

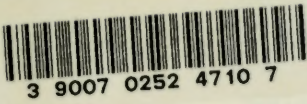


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ROYAL COMMISSION
INQUIRY INTO CIVIL RIGHTS,

REPORT NUMBER ONE

VOLUME 3

1968

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PART III

SAFEGUARDS AGAINST UNJUSTIFIED EXERCISE OF CERTAIN SPECIAL POWERS

Section 1

EXPROPRIATION PROCEDURE

INTRODUCTION

We have said that the mere existence of the power to expropriate property is in itself an encroachment on the rights of an individual in the sense that the security of his rights to property has been diminished.

There is general agreement that the existence and the exercise of this power in actual cases constitutes an invasion of civil rights in our current legal system. Notwithstanding this, the power conferred and exercised in proper cases and according to proper principles is necessary in the public interest. This was emphasized repeatedly in many submissions received by this Commission. The great weight of criticism was not directed against the principle of expropriation as an instrument of government, but against the promiscuous manner in which the power is conferred and the methods by which it may be, and often is, exercised.

Since expropriation is one of the necessary functions of modern government, our task is to recommend proper safeguards which will afford adequate and feasible protection for the rights of the individual, consistent with the demands of the public interest.

The subject may be conveniently dealt with under the following headings:

- (1) The Power to Expropriate;
- (2) Control of the Power to Expropriate;
- (3) Expropriation Proceedings;
- (4) Arbitration;
- (5) Tribunal to Fix Compensation;
- (6) Arbitration Procedure;
- (7) The Arbitration Hearing;
- (8) Appeals;
- (9) Abandonment or Disposal of Expropriated Land;
- (10) Expert Appraisers.

The basis of compensation for land expropriated and for damages suffered from injurious affection is a subject that has been referred to the Ontario Law Reform Commission by the Attorney General, under the provisions of the Ontario Law Reform Commission Act, and it has been dealt with by that body.¹ We shall not deal with the basis of compensation in this Report.

Throughout this Section, where we refer to the "owner", the word is used as it is comprehensively defined in the Expropriation Procedures Act.² It includes all those persons entitled to an interest in land, limited or otherwise.

In recent years the subject of expropriation has received critical examination by special committees and commissions formed for that purpose in other jurisdictions, both in North America and elsewhere. In Ontario a Select Committee of the Legislature on Land Expropriation reported in February of 1962. This report formed the foundation for the Expropriation Procedures Act, which came into force on January 1, 1964. We are obliged to examine the law of expropriation from a different point of view.

Our Terms of Reference are such that we conceive it our duty to examine the law of expropriation procedure particularly from the point of view of its impact on the rights of the individual owner of land.

¹See Report of the Ontario Law Reform Commission, Report on The Basis for Compensation on Expropriation (September, 1967).

²Ont. 1962-63, c. 43, s. 1 (f).

CHAPTER 65

The Power to Expropriate

THE power to expropriate, as commonly understood in Canada, is a statutory power to take land without the consent of the owner.¹ This is in brief the definition of expropriation in the Expropriation Procedures Act² and is the sense in which we shall refer to the power. In the United States it is called the power of "eminent domain", and in England it is called the power of "compulsory purchase". It has recently been suggested that this latter definition is inept "for it is not the *purchase* which is compulsory in the normal case, but the *sale*. . . ."³

In Ontario, as in other Canadian provinces, it is clear that the power of the Province or any body deriving its power from the Legislature to expropriate must be conferred in a statute enacted by the Legislature. This is in accord with our constitutional doctrine of the supremacy of Parliament. It is true that, even to the present day, there survives the prerogative right of the Sovereign "for the purpose of the defence of the realm in times of danger . . . to take any man's property".⁴ This prerogative cannot be exercised by the Crown in the right of the province. Under the British North America Act⁵ responsibility for defence resides with the Parliament of Canada, and the distribution of executive power follows that

¹When we use the term "land" we use it as defined in the Expropriation Procedures Act, Ont. 1962-63, c. 43, s. 1(e). It includes any interest in land.

²Ont. 1962-63, c. 43, s. 1(b)(e).

³Garner, *Compulsory Purchase Procedure*, 1 New Law Jour. 8, 8 (1965).

⁴*A.G. v. DeKeyser's Royal Hotel*, [1920] A.C. 508, 524.

⁵B.N.A. Act, s. 91, para. 7.

of legislative power.⁶ The prerogative can be supplanted by statute, as was shown in the judgment of the House of Lords in the *DeKeyser* case.⁷

CONSTITUTIONAL LIMITATIONS ON THE POWER

There are no constitutional limitations upon the powers of the legislatures of the Canadian provinces, acting within section 92 of the British North America Act, to create and confer the power of expropriation upon any body or person they see fit. All private property is potentially vulnerable to being taken against the will of the owner by some authority which has received the requisite legal power. There is no basic constitutional principle that obliges expropriating authorities to pay compensation, "just" or otherwise, upon the taking of property. The law was colourfully stated by Mr. Justice Riddell: "The prohibition 'thou shalt not steal' has no legal force upon the sovereign body. And there would be no necessity for compensation to be given. We have no such restriction upon the power of the legislature as is found in some States".⁸

This statement of the law may be contrasted with the law of the United States where the Fifth Amendment to the Constitution provides, *inter alia*, that private property shall not be taken for public use without "just compensation". The Fourteenth Amendment, with regard to the states, provides that ". . . Nor shall any state deprive any person of . . . property, without due process of law".

The Australian Constitution⁹ provides that the central government may expropriate property only upon "just terms". Such a limitation is not imposed on the legislatures of the states.

The Civil Code of the Province of Quebec¹⁰ provides that: "No one can be compelled to give up his property,

⁶*Bonanza Creek Gold Mining Co. Ltd. v. The King*, [1916] 1 A.C. 566.

⁷In his book, *The Law of Expropriation* (2nd ed., 1963) at 65, Mr. Justice Challies gives convincing reasons why this prerogative is also not open to the Dominion government to exercise.

⁸*Florence Mining Co. v. Cobalt Lake Mining Co.* (1908), 18 O.L.R. 275, 279, affirmed by the Privy Council in 1910. See (1918), 43 O.L.R. 474.

⁹See s. 51.

¹⁰Civil Code, Article 407 (Quebec 1931).

except for public utility and in consideration of a just indemnity previously paid". This expresses, in legal form, the basic principle governing expropriation in that province. However, it is not a constitutional limitation and is subject to alteration by the Legislature.¹¹

Although there are no constitutional restrictions on the power of the Legislature of Ontario to authorize the taking of land without compensation, it has been the invariable practice to provide for payment of compensation wherever expropriation has been authorized. The right of an owner whose property has been expropriated to be compensated for its taking is so basic that it should be secured in the Constitution.¹² The right to compensation has become what might be called a convention of our constitutional thinking.

Allied to this convention are three canons of interpretation of statutes which have been developed by the courts.

THE POWER TO EXPROPRIATE IS NOT TO BE READILY IMPLIED

"The right to take private property against the will of the owner is so serious an infringement of the rights of property that a strict construction will be placed upon it, and the authority must be found in no doubtful terms within the bounds of the statute—that is, upon a reasonable construction, either expressly or by necessary implication."¹³

The same principle was restated by Chief Justice Latchford: "The power of expropriation is . . . such an interference with the right of property that it should not readily be implied."¹⁴

STRICT COMPLIANCE WITH CONDITIONS PRECEDENT TO THE EXERCISE OF THE POWER

It has been restated from time to time that expropriation statutes will be construed to require the strict fulfilment of all conditions precedent to an expropriation. If the expropriating authority does not strictly comply with the pre-

¹¹Challies, *The Law of Expropriation* (2nd ed., 1963), 7.

¹²This will be discussed in Report Number 2.

¹³*Harding v. Township of Cardiff* (1881), 29 Gr. 308, 309 *per* Proudfoot, V.C.

¹⁴*Hydro-Electric Power Commission of Ontario v. County of Grey* (1924), 55 O.L.R. 339, 341.

expropriation formalities laid down in the governing statute, the owner not only retains title to the property in question but the right to recover damages for trespass if it has been entered without the owner's consent.¹⁵

A PRESUMPTION IN FAVOUR OF COMPENSATION

The third canon of interpretation of expropriation statutes is that there is a presumption against expropriation without compensation. This principle has been stated by the Judicial Committee of the Privy Council as follows:

“Under these circumstances their Lordships think that the construction ought to be in favour of the subject, in the sense that general or ambiguous words should not be used to take away legitimate and valuable rights from the subject without compensation, if they are reasonably capable of being construed so as to avoid such a result consistently with the general purpose of the transaction. . . .”¹⁶

THE EXPROPRIATION PROCEDURES ACT

The Expropriation Procedures Act applies “where land is expropriated or is injuriously affected by an expropriating authority in the exercise of its statutory powers”.¹⁷ “‘Expropriating authority’ means the Crown or any person empowered to acquire land by expropriation. . . .”¹⁸

All expropriations in this Province, except those coming under federal authority, are governed by this statute. Broadly speaking, it establishes expropriation procedures, including the assessment of compensation and appeals from awards to the Court of Appeal. For the source of statutory power to expropriate land one must look elsewhere than in the Expropriation Procedures Act.

BODIES AND PERSONS HAVING POWER TO EXPROPRIATE LAND

There are thirty-five Ontario statutes which confer powers of expropriation on bodies, persons or classes of persons. We

¹⁵For illustration see *James v. Hydro Electric Power Commission of Ontario*, [1953] O.R. 349, affirmed [1953] O.R. 728.

¹⁶*Minister of Railways v. Simmer etc. Mines Ltd.*, [1918] A.C. 591, 603.

¹⁷Ont. 1962-63, c. 43, s. 2 (1).

¹⁸*Ibid.*, s. 1 (c).

set out below in tabular form (Table A) the identity of those having powers of expropriation, the statutory source of the power, the purpose for which the power is conferred, if stated, and the approving body where approval is required, by some body other than the expropriating authority, before a decision to expropriate is effective.

Table A
EXISTING EXPROPRIATION POWERS

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Authorized Purpose</i>	<i>Approval, if Required</i>
An agricultural society	Agricultural Societies Act, s.21	For fairs and exhibitions	Subject to the approval of the Lieutenant Governor in Council
The Ontario Cancer Treatment and Research Foundation	Cancer Act, s.13	Any land and buildings that are deemed suitable for the purposes of the Foundation	Subject to the approval of the Lieutenant Governor in Council
Owner of a cemetery (who may or may not be a municipal corporation)	Cemeteries Act, s.40	Adjacent land for enlargement of cemetery	Subject to the opinion of municipal council, and on the certificate of Department of Public Health that in its opinion the proposed enlargement is for the public advantage and convenience and ought to be permitted, the owner should have power to expropriate for the stated purpose
A local municipality	Cemeteries Act, s.61	For establishment of a cemetery or expropriating an existing cemetery	With the approval of the Lieutenant Governor in Council
The Minister (which means the member of the executive council to whom the administration of this Act is assigned by the Lieutenant Governor in Council)	Commuter Services Act, 1965, s.4	For the establishment and operation, or either of them, of any commuter service that is or may be provided by agreement under s.3 of the Act	Subject to the approval of the Lieutenant Governor in Council. Comment: s. 2(2) provides that the Minister may delegate any of his powers under this Act to any one or more crown employees as defined in the Public Service Act, 1961-62

Table A—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Authorized Purpose</i>	<i>Approval, if Required</i>
A conservation authority	Conservation Authorities Act, s.17(c)	For the purposes of carrying out a scheme undertaken by the authority for the purposes of conservation, restoration and development of natural resources, other than gas, oil, coal and minerals, and the control of water in order to prevent floods and pollution or for any such purposes. See s.1(1)	A judge of the county or district court (Expropriation Procedures Act, s.1a, enacted by Ont. 1966, c.53, s.1)
Minister of Public Works	Game and Fish Act, 1961-62, s.6	For the purposes of management, perpetuation and rehabilitation of the wild life resources in Ontario	
Minister of Highways	Highway Improvement Act, s.7(1)	For the purposes of Part I or for making compensation in whole or in part to any person under this Part	
A county	Highway Improvement Act, s.66(1)	For the purpose of opening up, widening, improving, protecting from erosion altering or diverting a county road	
Minister of Economics and Development	Housing Development Act, s.7	For the purposes of a housing project under s.6	
A company incorporated pursuant to Part IV of the Lakes and Rivers Improvement Act	Lakes and Rivers Improvement Act, s.46	For the purpose of its undertaking (constructing a work to facilitate the floating of timber)	
The Government of Ontario	Lakes and Rivers Improvement Act, s.52	For the public service	Where the Lieutenant Governor in Council deems it expedient for the public service, he may dissolve a company formed under Part IV of the Act and declare its works to be public works upon payment to it of the then actual value of the works to be determined in accordance with The Public Works Act

Table A—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Authorized Purpose</i>	<i>Approval, if Required</i>
A person	Lakes and Rivers Improvement Act, ss.87-90, 96	For the completion, improvement or maintenance of a water privilege and works in connection therewith	On the authority of a county or district court judge if the judge deems the property to be taken necessary for the completion, improvement or maintenance of the water privilege and works in connection therewith, s.87 (2), and if he is of the opinion that the acquisition is in the public interest and is proper and just under all the circumstances of the case, s. 90
Municipal corporations	Municipal Act, s.333	For the purposes of the corporation	
Local municipalities	Municipal Act, s.338	For "deferred" widening, etc. of a highway	
All municipalities	Municipal Act, s.377, para. 63	For establishing and laying out public parks, squares, avenues, etc.	
Local municipalities	Municipal Act, s.379(1), para. 49	For selling or leasing the land expropriated for the purpose of sites for the establishment and carrying on of industrial operations and uses incidental thereto	
Municipality of Metropolitan Toronto	Municipality of Metropolitan Toronto Act, s.93	For establishing, laying out, opening up, widening, improving, etc., a metropolitan road	
Municipality of Metropolitan Toronto	Municipality of Metropolitan Toronto Act, s. 116	This section provides that the power of the Metropolitan Council to acquire land for the purposes of the Metropolitan Corporation includes the power to acquire land for the purposes of the Toronto Transit Commission	
The Metropolitan School Board	Municipality of Metropolitan Toronto Act, s. 145a	For the erection of a school for pupils from more than one public school division or high school district in Metropolitan Area	

Table A—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Authorized Purpose</i>	<i>Approval, if Required</i>
The Niagara Parks Commission	Niagara Parks Act, s. 6	No express purpose is stated. Presumably the expropriation would have to be for the purposes of the Commission which are set forth in s.3	Subject to the approval of the Lieutenant Governor in Council
A person	Ontario Energy Board Act, 1964, s.21	For the purpose of injecting gas into, storing gas in and removing gas from land in a gas storage area	Subject to authorization by the Ontario Energy Board
Any person who has leave to construct a transmission line, or a production line, distribution line or station	Ontario Energy Board Act, 1964, s.40	For the purpose of the line or station	Subject to the authorization of the Ontario Energy Board
The Ontario Northland Transportation Commission	Ontario Northland Transportation Commission Act, s.24	In respect of the railway and works	
The Ontario Northland Transportation Commission	Ontario Northland Transportation Commission Act, s.29(2)	For acquiring town sites	
Ontario Telephone Development Corporation	Ontario Telephone Development Corporation Act, s.4	No express purpose is stated in the subsection conferring the power. Presumably the power is for the Corporation's object, which is the improvement of telephone systems in Ontario	Subject to the consent of the Ontario Telephone Service Commission
Ontario Telephone Development Corporation	Ontario Telephone Development Corporation Act, s. 6	No express purpose is stated	

Table A—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Authorized Purpose</i>	<i>Approval, if Required</i>
Ontario Water Resources Commission	Ontario Water Resources Commission Act, s.19	For the Commission's purposes	
Any municipality	Ontario Water Resources Commission Act, s.32		Comment: s.31 of this Act enables the Commission to approve of the establishment of any sewage works, or the extension of or any change in any existing sewage works. s.32 requires the Commission to hold a public hearing before approving under s.31 of the extension of sewage works into another municipality or other municipalities or territory without municipal organization. s.32(3) provides that where the Commission has given approval under s.31 to an extension under ss.1, the municipality undertaking the extension may enter upon, take and use, such lands in such other municipality as may be necessary
A municipality	Planning Act, s.20 and s.23	For redevelopment	With the approval of the Minister of Municipal Affairs
Hydro-Electric Power Commission	Power Commission Act, s.24	The land and other objects to be expropriated must be capable of being used or made useful for generating, transforming, transmitting, distributing or selling power	On the authority of the Lieutenant Governor in Council
Hydro-Electric Power Commission	Power Commission Act, s.38	For office, service or other buildings	
A municipal corporation that has entered into a contract for the supply of power by the Commission	Power Commission Act, s.66	For the purpose of placing overhead or underground wires	
Hydro-Electric Power Commission	Power Control Act, s.5	For the generation, transformation, transmission, distribution or supply of power	

Table A—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Authorized Purpose</i>	<i>Approval, if Required</i>
A hospital or a corporation incorporated for the purpose of establishing a hospital	Public Hospitals Act, s.7	For any of its purposes	A judge of the county or district court. (Expropriation Procedures Act, s.1a, enacted by Ont. 1966, c.53, s.1)
A public library board	Public Libraries Act, 1966, s.16	For library and branch library purposes	
A board of parks management	Public Parks Act, s.15	For parks, avenues, boulevards and drives and approaches thereto or for purposes of the Board, including the supply of water for artificial lakes, fountains and other purposes	With the consent of all parties interested
A board of parks management	Public Parks Act, s.17	For acquiring land required for its purposes	
A local municipality	Public Utilities Act, s.2	For water works purposes or for protecting the water works or preserving the purity of the water supply	
A local municipality	Public Utilities Act, s.4	For the making and maintaining of the water works or for the opening up of new streets required for the same or for the protection of the works or for preserving the purity of the water supply or for taking up, removing, altering or repairing pipes, and for distributing water to the inhabitants of the municipality, or for the uses of the corporation or of the owners or occupants of the land through or near which pipes may pass	
All municipalities	Public Utilities Act, s.20	For its works or any extension thereof	

Table A—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Authorized Purpose</i>	<i>Approval, if Required</i>
A Public Utility Commission	Public Utilities Act, s.41	This section confers on public utility commissions, <i>inter alia</i> , the powers which are by the Act conferred on municipal corporations. See, therefore, the three immediately preceding expropriation powers	
A company incorporated for the purpose of supplying any public utility	Public Utilities Act, s.58	This section confers on such a company, <i>inter alia</i> , the powers which are by the Act conferred on municipal corporations	This power is not operative unless it is conferred on the company by its letters patent or supplementary letters patent and the municipality has passed a by-law with the assent of the municipal electors where such assent is required by the Municipal Franchises Act authorizing the company to exercise its powers. Also the powers of expropriation shall be exercised under and in accordance with the provisions of the Railways Act, R.S.O. 1950, c. 331. This latter Act involves the Ontario Municipal Board sanctioning the expropriation
An urban municipality	Public Utilities Act, s.62	For the purpose of supplying within the municipality any public utility	With the assent of electors entitled to vote on money by-laws
A public service commission of a municipality or a public utilities commission	Public Utilities Act, s.64		This section provides that the provisions of s.35 and ss. 38 to 48 apply <i>mutatis mutandis</i> to the commission. s.41 is therefore included. See reference to it above
Minister of Public Works	Public Works Act, s.13	For the public purposes of Ontario or the use or purposes of any Department of the Government thereof	
Minister of Public Works	Public Works Act, s.15	For acquiring a right-of-way between a place where any gravel, stone, earth, sand or water is taken and a public work	

Table A—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Authorized Purpose</i>	<i>Approval, if Required</i>
A Commission appointed by or under the authority of the Legislature	Public Works Act, s.48		Comment: This section provides in part that the like powers and duties, as are by this Act imposed or conferred upon the Minister, may be exercised and shall be performed by such commission in respect of matters entrusted to it, and in the application of this Act thereto, where the word "Minister" and the word "Department" occur, they mean such commission
Ontario Research Foundation	Research Foundation Act, 1944, s.11(c)	Any real property and any estate or interest therein deemed necessary for the Foundation's purposes	With the prior approval of the Lieutenant Governor in Council
The Board of Governors of the Ryerson Polytechnical Institute	Ryerson Polytechnical Institute Act, 1962-63, s.7(n)	Such land as the Board may deem necessary for the Institute	With the consent of a municipal corporation, if owner
The board of trustees, directors, commission or other governing body or authority of a sanatorium	The Sanatoria for Consumptives Act, s.22	For the purpose of the sanatorium	With the approval of the Lieutenant Governor in Council. Also, if the board of a sanatorium has been established by a municipal corporation, it shall not exercise any such power of expropriation without the consent first obtained of the council of such corporation
A public school board, separate school board, continuation school board, board of education, high school board or advisory committee appointed under Part III of the Secondary Schools and Boards of Education Act	Schools Administration Act, s.65	For a school site or for the enlargement of a school site	The exercise of this power is subject to the provisions of the Public Schools Act, s.10 and the Separate Schools Act, s.33, as to the selection of a site by a rural school board. These sections provide for some participation by the rate-payers of the school section, or supporters of the school, as the case may be, in the decision as to the site

Table A—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Authorized Purpose</i>	<i>Approval, if Required</i>
St. Clair Parkway Commission	St. Clair Parkway Commission Act, 1966, s.4	No purpose stated. The purposes of the Commission are set forth in s.3	With the approval of the Lieutenant Governor in Council
St. Lawrence Parks Commission	St. Lawrence Parks Commission Act, s.7	No purpose is stated. The purposes of the Commission are set forth in s.6	Subject to the approval of the Lieutenant Governor in Council
A continuation school board	Secondary Schools and Boards of Education Act, s.7	For a school site	See Schools Administration Act, s.65, <i>supra</i>
Ontario Stock Yards Board	Stock Yards Act, s.5	For its undertakings	Subject to the approval of the Lieutenant Governor in Council
A municipality	Telephone Act, s.28	For the purpose of establishing or carrying on a telephone system as a public utility	Comment: The exercise of this power is subject to ss. 35-86
A municipality that has established a municipal telephone system under this Act or a predecessor of the Act	Telephone Act, s.54	For the establishment or extension of a telephone system or to avoid duplication of systems or any part thereof	Subject to the consent of the Ontario Telephone Service Commission and the approval of the Ontario Municipal Board
All of the universities set forth in s.1(1) of the Act, being 15 universities	University Expropriation Powers Act, 1965, s.2	As they deem necessary for the purposes of the university or of any university or college federated or affiliated with the university	Subject to the consent of a municipality or metropolitan municipality, if it is the owner of the land involved or has an interest therein; and to the approval of a judge of the county or district court. (Expropriation Procedures Act, s.1a, enacted by Ont. 1966, c.53, s.1)
Minister of Lands and Forests	Wilderness Areas Act, s.4	For the purposes of the Act	

THE INCIDENCE OF THE POWER TO EXPROPRIATE

The above table shows that there are sixty separate statutory provisions which confer the power of expropriation. There are twenty-six different types of expropriating authorities, ranging from Ministers of the Crown down through provincial statutory bodies such as the Hydro-Electric Power

Commission and the Ontario Water Resources Commission, municipal bodies of various types, universities, conservation authorities and foundations, to private persons. The types of expropriating authorities consist of many separate bodies, such as agricultural societies, conservation authorities, municipalities, school boards, hospitals and public library boards. Table B set out below shows that there are over eight thousand expropriating authorities in Ontario.¹⁹ In addition, some authorities have powers of expropriation under more than one statute. For example, municipalities, of various types, derive such powers not only from the Municipal Act,²⁰ but also from the Cemeteries Act,²¹ the Planning Act,²² the Power Commission Act,²³ the Public Utilities Act,²⁴ and the Telephone Act.²⁵ The foregoing presents only an outline of the incidence of the powers of expropriation in Ontario.

¹⁹Note comment at foot of the Table as to total, p. 979 *infra*.

²⁰R.S.O. 1960, c. 249, ss. 333, 338, 377, 379.

²¹R.S.O. 1960, c. 47, s. 61.

²²R.S.O. 1960, c. 296, s. 20.

²³R.S.O. 1960, c. 300, s. 66.

²⁴R.S.O. 1960, c. 335, ss. 2, 4, 20, 41, 62.

²⁵R.S.O. 1960, c. 394, ss. 28, 54.

Table B

EXPROPRIATING AUTHORITIES IN ONTARIO

Column 1—Shows the expropriating authority.

Column 2—Shows the statute conferring the power of expropriation.

Column 3—Shows the total number of expropriating authorities of the type indicated.

Column 4—The figures listed in this column are a duplication of those previously listed in column 3 and are not included in the main total.

1 <i>Expropriating Authority</i>	2 <i>Statute</i>	3 <i>Number</i>	4 <i>Number</i>	5 <i>Comment</i>
An agricultural society	Agricultural Societies Act, s.21	241		
The Ontario Cancer Treatment and Research Foundation	Cancer Act, s.13	1		
The owner of a cemetery	Cemeteries Act, s.40	3238		Not including 375 municipally owned cemeteries

Table B—(Continued)

1 <i>Expropriating Authority</i>	2 <i>Statute</i>	3 <i>Number</i>	4 <i>Number</i>	5 <i>Comment</i>
A local municipality:				
Cities and Metropolitan Toronto		34		
Towns		143		
Separated Towns		6		
Villages		158		
Townships		571		
A Minister of the Crown to be designated	Commuter Services Act, 1965, s.4	1		
A Conservation authority	Conservation Authorities Act, s.17(c)	36		
Minister of Public Works	Game and Fish Act, 1961-62, s.6	1		
Minister of Highways	Highway Improvement Act, s.7(1)	1		
A county	Highway Improvement Act, s.66(1)	37		
Minister of Economics and Development	Housing Development Act, s.7	1		
Companies incorporated pursuant to Part IV of the Lakes and Rivers Improvement Act	Lakes and Rivers Improvement Act, s.46	7		
The Government of Ontario	Lakes and Rivers Improvement Act, s.52	1		
Persons with water privileges under ss. 89-90 of the Lakes and Rivers Improvement Act:	Lakes and Rivers Improvement Act, ss. 87-90, 96			
Private power developments		17		
Mill sites		375		
Municipal corporations:				
Local municipalities			918	
Counties			37	
Local Municipalities	Municipal Act, s.338		1	
All Municipalities	Municipal Act, s.377, para. 63		955	
The Municipality of Metropolitan Toronto	Municipality of Metropolitan Toronto Act, s.93		1	
The Municipality of Metropolitan Toronto	Municipality of Metropolitan Toronto Act, s.116		1	

Table B—(Continued)

1 <i>Expropriating Authority</i>	2 <i>Statute</i>	3 <i>Number</i>	4 <i>Number</i>	5 <i>Comment</i>
The Metropolitan School Board	Municipality of Metropolitan Toronto Act, s.145a	1		
The Niagara Parks Commission	Niagara Parks Act, s.6	1		
A person	Ontario Energy Board Act, 1964, s.21	2		Persons already authorized
Any person who has leave to construct a transmission line, or a production line, distribution line or station	Ontario Energy Board Act, 1964, s.40	5		Persons already authorized
The Ontario Northland Transportation Commission	Ontario Northland Transportation Commission Act, s.24	1		
The Ontario Northland Transportation Commission	Ontario Northland Transportation Commission Act, s.29(2)		1	
The Ontario Telephone Development Corporation	Ontario Telephone Development Corporation Act, s.4	1		
The Ontario Telephone Development Corporation	Ontario Telephone Development Corporation Act, s.6		1	
The Ontario Water Resources Commission	Ontario Water Resources Commission Act, s.19	1		
Any municipality	Ontario Water Resources Commission Act, s.26		955	
Any municipality	Planning Act, s.20 and s.23		955	
The Hydro-Electric Power Commission	Power Commission Act, s.24	1		
The Hydro-Electric Power Commission	Power Commission Act, s.38		1	
A municipal corporation that has entered into a contract for the supply of power by the Commission	Power Commission Act, s.66		1	
The Hydro-Electric Power Commission	Power Control Act, s.5		1	
A (public) hospital or a corporation incorporated for the purpose of establishing a hospital	Public Hospitals Act, s.7	220		
A public library board	Public Libraries Act, 1966, s.16	299		

Table B—(Continued)

1 <i>Expropriating Authority</i>	2 <i>Statute</i>	3 <i>Number</i>	4 <i>Number</i>	5 <i>Comment</i>
Boards of Park Management	Public Parks Act, s.15	115		
Boards of Park Management	Public Parks Act, s.17		115	
A local municipality	Public Utilities Act, s.2		918	
A local municipality	Public Utilities Act, s.4		918	
All municipalities	Public Utilities Act, s.20		955	
A public utilities commission	Public Utilities Act, s.41			See s.64 of the Public Utilities Act
A company incorporated for the purpose of supplying any public utility and having expropriation power conferred upon it in its letters patent	Public Utilities Act, s.58			(No information)
An urban municipality	Public Utilities Act, s.62			Includes all local municipalities except townships
A public service commission of a municipality or a public utilities commission:	Public Utilities Act, s.64			
Public Utilities				
Commissions:				
Hydro-electric commissions		354		
For water		354		
For gas		3		
Public Services				
Commissions:				
For telephones		57		
The Minister of Public Works	Public Works Act, s.13	1		
The Minister of Public Works	Public Works Act, s.15		1	
A Commission appointed by or under the authority of the Legislature	Public Works Act, s.48			Created by separate statutes (such as Water Resources Commission Act) which contain expropriating powers
The Board of Governors of the Ryerson Polytechnical Institute	The Ryerson Polytechnical Institute Act, 1962-63, s.7(n)	1		

Table B—(Continued)

1 Expropriating Authority	2 Statute	3 Number	4 Number	5 Comment
A board of trustees, directors, commission or governing body or authority of a sanatorium	The Sanatoria for Consumptives Act, s.22	12		
School boards which operate schools	Schools Administration Act, s.65			
Elementary School Boards:				
Public Boards of Education		53		
County School Areas		1		
Township School Areas		596		
Other—Urban		170		
—Rural		97		
Separate School Boards:				
Protestant		2		
Roman Catholic:				
Combined		204		
Other		321		
Secondary School Boards:				
Collegiate Institutes		197		
Continuation School Boards		9		
Boards of Education		51		
The St. Clair Parkway Commission	St. Clair Parkway Commission Act, 1966, s.4	1		
The St. Lawrence Parks Commission	St. Lawrence Parks Commission Act, s.7	1		
Ontario Stock Yards Board	Stock Yards Act, s.5	1		
A municipality	Telephone Act, s.28		955	
A municipality that has established a Municipal telephone system under this Act or a predecessor of the Act	Telephone Act, s.54		555	
All the universities set forth in s.1(1) of the Act	University Expropriation Powers Act, 1965, s.2	15		
Minister of Public Works	Wilderness Areas Act, s.4		1	
	TOTAL	8017*		

*The figures listed in column 4 are a duplication of those listed in column 3 and are not included in the main total.

A perusal of the foregoing table shows that the power to expropriate land has been conferred in Ontario with reckless and unnecessary liberality, without sufficient control over the exercise of the power. It cannot be too strongly emphasized that the Legislature should not confer the power of expropriation on any body or person unless it is clear that the power is inescapably necessary in the interest of good government and that adequate controls over its exercise are provided.

It is for the government of the day to decide, as a matter of policy, what the requirements of good government are, but the power of expropriation should not be included as a part of the policy unless the implementation of the policy would be frustrated without it.

Powers of expropriation constitute far too great an infringement on civil rights to be handed out as convenient tools. For example, it is difficult to see why a power of expropriation ever was conferred on the Liquor Control Board, which is in essence a body engaged merely in merchandising liquor.²⁶ This power was criticized in the Report of the Committee on the Organization of Government in Ontario in 1959,²⁷ but the section was not repealed until 1965.

We do not propose to assess the relative necessity of the various powers set out in Table A. There should be a complete review of each of the existing powers of expropriation with a view to determining the purpose and necessity of each one and the adequacy of statutory safeguards controlling their exercise.

GUIDELINES GOVERNING CONFERMENT OF THE POWER

The nature of the person or body on whom the power of expropriation is to be conferred should always be a matter for jealous attention. The less responsible to public opinion a particular body may be, the more reluctance should be shown in conferring the power of expropriation on it. Non-

²⁶Liquor Control Act, R.S.O. 1960, c. 217, s. 12, repealed by Ont. 1965, c. 59, s. 2.

²⁷See Report of the Committee on the Organization of Government in Ontario (1959), 17.

elected bodies, such as agricultural societies, conservation authorities, the Liquor Control Board, the Hydro-Electric Power Commission of Ontario, and universities, may be conscious of public opinion to some extent, but they are remote from control by public opinion in a political and democratic sense.

While the exercise of the powers of such bodies as the Hydro-Electric Power Commission and the Niagara Parks Commission is subject to the approval of the Lieutenant Governor in Council, they themselves formulate their own expropriation policies and the approval tends to be a matter of course. Where expropriation authorities are not responsible politically for their decisions, as ministers of the Crown and municipal councils are, the existence of their powers of expropriation is a much greater encroachment on civil rights than is the case where the powers are held by politically responsible authorities. This statement applies with even greater force to private bodies or persons who have expropriatory powers, such as those found in the Lakes and Rivers Improvement Act²⁸ and the Ontario Energy Board Act.²⁹

Where the power is conferred on any body, the identity of the person or body who may exercise the power should be clearly stated in the legislation. An expropriating authority should not have the power to delegate its powers to another person or body. In the Commuter Services Act,³⁰ the power of expropriation is conferred on "the Minister", but the Minister may delegate any of his powers under the Act to any one or more crown employees as defined in the Public Service Act.³¹ The Public Works Act³² provides that the like powers and duties as are by the Act imposed or conferred upon the Minister, including the powers of expropriation, may be exercised by a "commission appointed by or under the authority of the Legislature". Both of these provisions are contrary to the principles that we think should prevail.

²⁸R.S.O. 1960, c. 203, s. 46.

²⁹Ont. 1964, c. 74, ss. 21, 40.

³⁰Ont. 1965, c. 17, s. 4, as amended by Ont. 1966, c. 19, s. 1.

³¹Public Service Act, 1961-62, Ont. 1961-62, c. 121, s. 1(da), as enacted by Ont. 1962-63, c. 118, s. 1.

³²R.S.O. 1960, c. 338, s. 48.

THE MANNER IN WHICH THE POWER TO EXPROPRIATE IS EXPRESSED

The Public Works Act provides an example of a common formula used in expropriation legislation:

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

(a) the public purposes of Ontario; or

(b) the use or purposes of any department of the Government thereof."³³

Subject to what we shall have to say about expressing the purposes for which the power may be exercised, the language of this section appears to be satisfactory. It confers the power to purchase and acquire, quite apart from expropriation, and then the power to expropriate is clearly conferred. The latter is important. Where the Legislature has decided to encroach on civil rights by creating a power of expropriation, it should so state the decision as to make its intention readily recognizable. The direct and proper way to do this is to use the verb "expropriate" in the operative statutory provision. Obscure or less forthright language may fail to alert the legislators, or those who examine bills that come before the Legislature, to the extent of the power that is being conferred by the legislation.

The following are some examples of language used to confer power of expropriation without using the express term. The Cancer Treatment and Research Foundation "may acquire by purchase or lease or may enter upon, take and use without the consent of the owner thereof, any land. . . ."³⁴ In the Lakes and Rivers Improvement Act,³⁵ the operative words are ". . . take, acquire, hold and use. . . ." In the Planning Act,³⁶ the language is "acquire land", but to this is added "[t]he provisions of *The Municipal Act* apply to the acquisition of land under this Act"³⁷—a very obscure way of

³³*Ibid.*, s. 13.

³⁴Cancer Act, R.S.O. 1960, c. 45, s. 13(1).

³⁵R.S.O. 1960, c. 203, s. 87 (2).

³⁶R.S.O. 1960, c. 296, s. 20.

³⁷*Ibid.*, s. 23.

conferring the power of expropriation. The Public Utilities Act³⁸ provides that an urban municipal corporation “. . . may take possession of the works of the company and all property used in connection therewith. . . .” The Wilderness Areas Act³⁹ states: “Land may be acquired under *The Public Works Act* for the purposes of this Act.”

The Lakes and Rivers Improvement Act and the Public Utilities Act, when read as a whole, illustrate how the use of more or less innocuous words may cloak the drastic power of expropriation. One has to read these statutes as a whole to find the power to expropriate. A cloak of another sort is employed in the Planning Act and the Wilderness Areas Act. These statutes import the power of expropriation by reference to the Municipal Act and the Public Works Act, respectively. Legislation by reference has been condemned repeatedly by the courts. After quoting passages from Craies on Statute Law, and a nineteenth century English case, Mr. Justice LeBel said:

“I do not expect that quoting these old passages will do any good, but it would be wrong, I think, if I did not refer to them in view of this, my latest exasperating experience, with what the English cases call ‘Legislation by Reference’. This vexing legislative practice will continue to grow, I suppose, until an aroused public demands that our public statute law be codified.”⁴⁰

We re-emphasize that where it is intended to confer the power to expropriate land the language should be forthright and clear, and the power should immediately be recognizable without the examination of any other statute, and no language should be used which would have the effect of concealing the power from immediate recognition. Conversely, where the intention is not to confer a power to expropriate, the word “expropriate” should not be used, as it is in the Public Parks Act⁴¹ which provides that a board of park management, “. . . with the consent of all parties interested capable of consenting, may divert and expropriate any river. . . .”

³⁸R.S.O. 1960, c. 335, s. 62 (1).

³⁹R.S.O. 1960, c. 432, s. 4.

⁴⁰*Re Brown and the Corp. of Peterborough*, [1957] O.R. 224, 243.

⁴¹R.S.O. 1960, c. 329, s. 15.

The essence of a power of expropriation is that it be exercised without the consent of parties affected thereby. If the intention is not to confer compulsory power of acquisition of land, care should be taken to use language which makes this clear. The Agricultural Research Institute of Ontario Act provides that:

“13. Subject to the approval of the Minister, the Research Institute may . . . apply for, purchase or otherwise acquire, any patents, interest in patents, licences or other rights . . . to . . . assign or grant licences in respect of or otherwise turn to account the property rights or information so acquired. . . .”⁴²

Quite apart from the question of the constitutional validity of this provision, do the words “otherwise acquire” include compulsory acquisition? Although the rule of interpretation is that powers of expropriation are not lightly implied, the Legislature should be precise in expressing its intention when it confers the powers of acquisition of property on any body.

PURPOSES FOR WHICH THE POWER IS TO BE EXERCISED SHOULD BE STATED

Powers of expropriation do not exist at large. They must be related to some specific purpose or purposes. When the Legislature decides to confer on any body the power of expropriation, it should know, and state in clear and precise language, the purpose for which it is conferring the power. Such statement of purpose delineates a boundary within which the power must be exercised and is a safeguard against the abuse of the power.

Some statutes merely state that the expropriating authority may expropriate “for its purposes”.⁴³ This language may be appropriate where the purposes of the body on which the power is conferred are clearly defined. In the Niagara Parks Act,⁴⁴ the Ontario Telephone Development Corporation

⁴²Ont. 1961-62, c. 1, s. 13.

⁴³See Cancer Act, R.S.O. 1960, c. 45, s. 13(1); Municipal Act, R.S.O. 1960, c. 249, s. 333(1); Public Hospitals Act, R.S.O. 1960, c. 322, s. 7.

⁴⁴R.S.O. 1960, c. 262, s. 6.

Act,⁴⁵ and the St. Lawrence Parks Commission Act,⁴⁶ no purposes are set out for the exercise of the power of expropriation. It may be inferred that the powers are conferred solely for the purpose of the expropriating authority, but the matter is not one that should be left to inference. The Legislature should not only define, but bring its mind to bear on, the purposes for which the power may be exercised.

The Cancer Act⁴⁷ provides an illustration of language that ought not to be used when conferring a power of expropriation: “. . . the Foundation may . . . take and use without the consent of the owner thereof, any land and buildings that are deemed suitable for the purposes of the Foundation . . .”. The language does not make it clear whether the test for the exercise of the power is to be a subjective or an objective one. Has the Foundation power to decide (deem) that land is suitable for the “purposes” of the Foundation, or could a court decide (deem) that land was not suitable for the Foundation’s “purposes”? It is not required that a decision be made that the land is *necessary* for its purposes, nor what the purposes may be.⁴⁸ Such expressions as “for the public purposes of Ontario” or “the use or purposes of any department of the Government thereof” are unsatisfactory terms to be used in conferring a power of expropriation. The expression “for the public purposes of Ontario” has been criticized by Mr. Justice McLennan as being “of a broad and vague import”.⁴⁹

⁴⁵R.S.O. 1960, c. 280, ss. 4, 6.

⁴⁶R.S.O. 1960, c. 279, s. 7; formerly entitled Ontario-St. Lawrence Development Commission Act.

⁴⁷R.S.O. 1960, c. 45, s. 13.

⁴⁸For a full discussion of the subject of ingredients of a power, see Chapters 5, 6 and 7 *supra*.

⁴⁹*James v. Hydro Electric Power Commission*, [1953] O.R. 349, 355.

CHAPTER 66

Control of the Power to Expropriate

YOUR Commission has received submissions to the general effect that all expropriations should be subject to the approval of some "higher" body. Broadly speaking, these submissions may involve the concept that the individual or individuals, who may be affected by a proposed expropriation, should participate to some extent in the process which precedes a final decision to expropriate a particular piece of land. It has been suggested that in all cases, prior to the exercise of a power to expropriate, there should be a "trial of necessity", in which individuals affected should be allowed to participate. Such hearing might involve a proceeding wherein the expropriating authority is required to satisfy some superior authority that the expropriation is necessary to accomplish the purposes at hand, or to show that it is necessary to take the particular piece of land in question.

We shall discuss these proposals in due course, but before doing so it is necessary to examine the existing law insofar as it provides some form of approval by a person or body independent of the expropriating authority before there is an effective expropriation.

PRESENT LAW

Provisions Requiring Approval

Thirty-five of the sixty powers of expropriation may be exercised by the expropriating authority without the approval or consent of any other body. We cannot find that any coherent

legislative policy has been followed in deciding when wide powers of expropriation will be conferred without approval by some superior authority. Bodies which may expropriate without approval are of all types including a Minister of the Crown,¹ municipal councils,² appointed bodies³ and private persons⁴. Bodies requiring approval include Ministers of the Crown and elected bodies, such as municipal councils.⁵

When approval is required, no coherent pattern emerges governing the selection of the approving authority in relation to the nature of the expropriating authority. The approving bodies may be the Lieutenant Governor in Council, a Minister of the Crown, municipal councils, the Department of Health, a county or district court judge, municipal electors, the Department of Municipal Affairs, the Ontario Energy Board, the Ontario Telephone Service Commission or the Ontario Municipal Board.

Table C shows the nature and incidence of the present approval system. Expropriating authorities are divided into four basic types: private authorities, publicly appointed authorities, municipal authorities and Ministers of the Crown.

¹Game and Fish Act, Ont. 1961-62, c. 48, s. 6, as amended by Ont. 1967, c. 30, s. 1.

²Municipal Act, R.S.O. 1960, c. 249, s. 333.

³Ontario Northland Transportation Commission Act, R.S.O. 1960, c. 276, s. 17 (c).

⁴Lakes and Rivers Improvement Act, R.S.O. 1960, c. 203, s. 46.

⁵Commuter Services Act, Ont. 1965, c. 17, s. 4; Cemeteries Act, R.S.O. 1960, c. 47, s. 61.

Table C
APPROVAL AUTHORITIES

<i>Expropriating Authority</i>	<i>Approving Authority</i>	<i>Statute</i>
Private Expropriating Authorities		
Agricultural society	Lieutenant Governor in Council	Agricultural Societies Act, s. 21
Owner of cemetery	Municipal council	Cemeteries Act, s. 40
Any person	County or district court judge	Lakes and Rivers Improvement Act, ss. 87-90, 96

Table C—(Continued)

<i>Expropriating Authority</i>	<i>Approving Authority</i>	<i>Statute</i>
A person	Ontario Energy Board	Ontario Energy Board Act, 1964, s. 21
Any person who has been given leave to construct a pipe line, etc.	Ontario Energy Board	Ontario Energy Board Act, 1964, s. 40
Company supplying public utility	Ontario Municipal Board	Public Utilities Act, s. 58
Governing body of sanatorium	Lieutenant Governor in Council	Sanatoria for Consumptives Act, s. 22
University	County or district court judge	Expropriation Procedures Act, s. 1a
Hospital	County or district court judge	Expropriation Procedures Act, s. 1a

Publicly Appointed Expropriating Authorities

Ontario Cancer Treatment and Research Foundation	Lieutenant Governor in Council	Cancer Act, s. 13
Conservation authority	County or district court judge	Expropriation Procedures Act, s. 1a
Niagara Parks Commission	Lieutenant Governor in Council	Niagara Parks Act, s. 6
Ontario Telephone Development Corporation	Ontario Telephone Authority (Now known as the Ontario Telephone Development Corporation)	Ontario Telephone Development Corporation Act, s. 4
Hydro-Electric Power Commission	Lieutenant Governor in Council	Power Commission Act, s. 24
Ontario Research Foundation	Lieutenant Governor in Council	Research Foundation Act, 1944, c. 53, s. 11 (c)

Table C—(Continued)

<i>Expropriating Authority</i>	<i>Approving Authority</i>	<i>Statute</i>
Governing body of sanatorium (if appointed by municipality)	Lieutenant Governor in Council and the municipality	Sanatoria for Consumptives Act, s. 22
St. Clair Parkway Commission	Lieutenant Governor in Council	St. Clair Parkway Commission Act, 1966, s. 4
St. Lawrence Parks Commission	Lieutenant Governor in Council	St. Lawrence Parks Commission Act, s. 7
Ontario Stock Yards Board	Lieutenant Governor in Council	Stock Yards Act, s. 5

Municipal Expropriating Authorities

Municipality (owning cemetery)	Department of Public Health	Cemeteries Act, s. 40
Municipality	Lieutenant Governor in Council	Cemeteries Act, s. 61
Municipality	Minister of Municipal Affairs	Planning Act, s. 20 and s. 23
Urban municipality	Electors entitled to vote on money by-laws	Public Utilities Act, s. 62
Municipality	Ontario Telephone Service Commission	Telephone Act, s. 54
Municipality	Ontario Municipal Board	Telephone Act, s. 54

Minister of Crown Expropriating Authority

Minister (or Crown employee)	Lieutenant Governor in Council	Commuter Services Act, 1965, s. 4
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Grounds for Approval

In some cases the grounds on which the approval may be given are set out in the legislation. For example, under the Cemeteries Act,⁶ the owner of a cemetery cannot expropriate land for the enlargement of a cemetery unless, *inter alia*, the Department of Public Health "... certifies that in its opinion the proposed enlargement is for the public advantage and convenience and ought to be permitted . . ."; and, under the Lakes and Rivers Improvement Act,⁷ a person can expropriate land or other property only if a county or district court judge "... is of the opinion that . . . [the expropriation] . . . is in the public interest and is proper and just under all the circumstances of the case . . ." The amendment to the Expropriation Procedures Act⁸ in 1966 gives some indication of the standards to be met in seeking approval in those cases coming within it. The judge may make an order authorizing the expropriation where he is "satisfied that the expropriation of the land in whole or in part is reasonably necessary for the purpose of the applicant".

In the majority of provisions requiring approval the grounds for approval are not set out. Language such as "subject to the approval of the Lieutenant Governor in Council . . ." precedes the words conferring the power. No legislative guide is given as to the grounds on which the Lieutenant Governor in Council is to act in exercising the power of approval. We have already referred to powers of expropriation where the purposes for which land may be expropriated are not clearly set out as a limitation on the power. If such purposes are stated, as we recommend, they would furnish some guidance. Where no clear purpose is expressed and no grounds for approval are stated the power to approve is uncontrolled.

Owner's Right to a Hearing

Where there are approval provisions, in very few cases is the owner of the property given a right to be heard before a decision is made by the approving authority. The Ontario

⁶R.S.O. 1960, c. 47, s. 40.

⁷R.S.O. 1960, c. 203, s. 90.

⁸Ont. 1966, c. 53, s. 1 (5).

Energy Board Act,⁹ is a rare example of a statute which provides for a notice of an application for approval to be served. "The applicant shall serve notice of the application and notice of the hearing on such persons and in such manner as the Board directs."¹⁰

In the absence of an express provision requiring notice and a hearing, the general rule appears to be settled that notice and a hearing are not required before approval is given. In the *Copithorne* case,¹¹ the Supreme Court of Canada held that the requirements of natural justice do not afford the person affected by an expropriation a right to be heard before permission to expropriate is granted by the minister.

DEFECTS IN THE PRESENT LAW

The present law of Ontario is defective in two ways:

- (1) In many cases there is no proper control over the exercise of a power of expropriation; and
- (2) Generally, it does not provide for any system of inquiry giving persons who will be affected by an expropriation an opportunity to be heard.

CONTROL OF EXPROPRIATION BY APPROVAL

The decision to expropriate the property of an individual is an administrative decision of policy—a political decision in which the interests of the individual are sacrificed to the general interests of the community. The distinction between a judicial decision and an administrative decision of this kind is made very clear by Professor H. W. R. Wade in discussing the effect to be given to evidence obtained in a statutory inquiry:

" . . . [T]he evidence on matters of fact and the argument on matters of law should provide the judge with all he needs to consider. He ought, in theory, to act like a calculating machine, which will deliver the right solution if fed with the right data. A minister's decision on a planning scheme or a

⁹Ont. 1964, c. 74.

¹⁰*Ibid.*, s. 40(2); see also Expropriation Procedures Act, Ont. 1962-63, c. 43, s. 1a(3), as enacted by Ont. 1966, c. 53, s. 1.

¹¹*Calgary Power Limited v. Copithorne*, [1959] S.C.R. 24. See also *Hamer v. Etobicoke Board of Education*, [1967] 1 O.R. 268, affirmed [1967] 1 O.R. 595 (C.A.), *sub. nom. Meeson v. Etobicoke Board of Education*.

clearance scheme or a new town order is something quite different. The public inquiry cannot provide him with all that has to be considered, for there is the whole exterior world of political motive."¹²

The same point was made in concise language in the Gordon Committee Report on the Organization of Government in Ontario:¹³ "The courts . . . cannot be left to determine the routes that highways will follow", nor, we would add, to determine the necessity for land for educational purposes in Ontario.

It is useful to restate here what we said earlier when dealing with constitutional principles:

"The general principle underlying the control of the executive branch by the Legislature is therefore that every segment of the public service should be under the direction and control of a Minister who can be called to account by and in the Legislature. . . . The absence of the ultimate control by the Legislature, exercised through Ministers responsible for the exercise of subordinate legislative or administrative powers [the power to expropriate is essentially an administrative power] by such persons or bodies, is a relevant factor in determining whether such powers constitute an unjustified encroachment on the rights of individuals."¹⁴

We said earlier in this Section that the power of expropriation is such an infringement on civil rights that jealous and vigilant attention should always be given to the question of upon whom it should be conferred. The less responsible to public opinion a particular body may be, the more reluctantly should the power of expropriation be conferred on it. The same principle should dictate the choice of the approving authority. The Legislature should not confer the power of expropriation on an appointed body, and the power of approval on another appointed body. If an unjustified expropriation decision is made, it is wrong for the government of the day to shelter behind the fact that an appointed body made the decision. The decision is a policy decision for which the government should be held responsible.

¹²H. W. R. Wade, *Administrative Law* (1961), 173.

¹³Report of the Committee on the Organization of Government in Ontario (1959), 26.

¹⁴pp. 44-5 *supra*.

It is not within the constitutional concept of responsible government to confer powers on an appointed body which carry with them final and serious political responsibility for decisions made.

The 1966 amendment to the Expropriation Procedures Act¹⁵ is an example of legislation providing for evasion of responsibility in expropriation matters. A county or district court judge is required to authorize the exercise of the power of expropriation by conservation authorities, hospitals and universities. He must be satisfied that the expropriation of the land, in whole or in part, is reasonably necessary for the purpose of the applicant. This is bad in principle. The error in principle is compounded by the provision for an appeal to the Court of Appeal from the order of a county or district court judge. Neither county nor district court judges, nor the Court of Appeal, should be required to assume the responsibility of making policy decisions for the government. It is difficult to understand how a county or district court judge or the Court of Appeal could come to a meaningful decision on the requirements of a conservation authority, a hospital or a university. These are not matters for judicial decision.

In England all expropriation (compulsory purchase) decisions are subject to approval by a Minister of the Crown. In recognition of the basic constitutional principle of ministerial control this requirement is extended to many other matters that are not subject to approval in Ontario, e.g., planning permission.

We have concluded and recommend that, with the exception of certain expropriations by municipal authorities, the exercise of a power of expropriation by any person or a body other than a minister should be subject to the approval of a minister.

In accordance with this principle we recommend that the approving authority with regard to existing powers of expropriation be as set out in Table D. (Where the power is now exercised by a minister we have included him as an approving authority in the third column of the Table).

¹⁵Ont. 1962-63, c. 43, s. 1a, as enacted by Ont. 1966, c. 53, s. 1.

Table D
RECOMMENDED APPROVING AUTHORITIES

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Recommended Approving Authority</i>
An agricultural society	Agricultural Societies Act, s. 21	Minister of Agriculture
The Ontario Cancer Treatment and Research Foundation	Cancer Act, s. 13	Minister of Health
Owner of a cemetery (who may or may not be a municipal corporation)	Cemeteries Act, s. 40	Minister of Health
A local municipality	Cemeteries Act, s. 61	Minister of Health
The Minister (which means the member of the executive council to whom the administration of this Act is assigned by the Lieutenant Governor in Council)	Commuter Services Act, 1965, s. 4	The Minister referred to in Column 1
A conservation authority	Conservation Authorities Act, s. 17(c)	Minister of Energy and Resources Management
Minister of Lands and Forests	Game and Fish Act, 1961-62, s. 6	Minister of Lands and Forests
Minister of Highways	Highway Improvement Act, s. 7(1)	The municipal corporation expropriating
A county	Highway Improvement Act, s. 66(1)	Minister of Highways
Minister of Economics and Development	Housing Development Act, s. 7	Minister of Economics and Development
A company incorporated pursuant to Part IV of the Lakes and Rivers Improvement Act	Lakes and Rivers Improvement Act, s. 46	Minister of Lands and Forests
The Government of Ontario	Lakes and Rivers Improvement Act, s. 52	Minister of Lands and Forests

Table D—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Recommended Approving Authority</i>
A person	Lakes and Rivers Improvement Act, ss. 87-90, 96	Minister of Lands and Forests
Municipal corporations	Municipal Act, s. 333	The municipal corporation expropriating
Local municipalities	Municipal Act, s. 338	The municipal corporation expropriating
All municipalities	Municipal Act, s. 377, para. 63	The municipal corporation expropriating
Local municipalities	Municipal Act, s. 379(1), para 49	The municipal corporation expropriating
Municipality of Metropolitan Toronto	Municipality of Metropolitan Toronto Act, s. 93	Municipality of Metropolitan Toronto
Municipality of Metropolitan Toronto	Municipality of Metropolitan Toronto Act, s. 116	Municipality of Metropolitan Toronto
The Metropolitan School Board	The Municipality of Metropolitan Toronto Act, s. 145a	Minister of Education
The Niagara Parks Commission	The Niagara Parks Act, s. 6	Minister of Energy and Resources Management
A person	Ontario Energy Board Act, 1964, s. 21	Minister of Energy and Resources Management
Any person who has leave to construct a transmission line, or a production line, distribution line or station	Ontario Energy Board Act, 1964, s. 40	Minister of Energy and Resources Management
The Ontario Northland Transportation Commission	Ontario Northland Transportation Commission Act, s. 24	Minister of Transport
The Ontario Northland Transportation Commission	Ontario Northland Transportation Commission Act, s. 29(2)	Minister of Transport

Table D—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Recommended Approving Authority</i>
Ontario Telephone Development Corporation	Ontario Telephone Development Corporation Act, s. 4	Minister of Municipal Affairs
Ontario Telephone Development Corporation	Ontario Telephone Development Corporation Act, s. 6	Minister of Municipal Affairs
Ontario Water Resources Commission	Ontario Water Resources Commission Act, s. 19	Minister of Energy and Resources Management
Any municipality	The Ontario Water Resources Commission Act, s. 32	Minister of Municipal Affairs
A municipality	Planning Act, s. 20 and s. 23	Minister of Municipal Affairs
Hydro-Electric Power Commission	Power Commission Act, s. 24	Minister of Energy and Resources Management
Hydro-Electric Power Commission	Power Commission Act, s. 38	Minister of Energy and Resources Management
A municipal corporation that has entered into a contract for the supply of power by the Commission	The Power Commission Act, s. 66	The municipal corporation expropriating
Hydro-Electric Power Commission	Power Control Act, s. 5	Minister of Energy and Resources Management
A hospital or a corporation incorporated for the purpose of establishing a hospital	Public Hospitals Act, s. 7	Minister of Health
A public library board	Public Libraries Act, 1966, s. 16	Minister of Education
A board of park management	Public Parks Act, s. 15	(No authorization needed because power can be exercised only with the consent of all parties)

Table D—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Recommended Approving Authority</i>
A board of park management	Public Parks Act, s. 17	The relevant municipality
A local municipality	Public Utilities Act, s. 2	The municipal corporation expropriating
A local municipality	Public Utilities Act, s. 4	The municipal corporation expropriating
All municipalities	Public Utilities Act, s. 20	The municipal corporation expropriating
A public utility commission	Public Utilities Act, s. 41	The relevant municipality
A company incorporated for the purpose of supplying any public utility	Public Utilities Act, s. 58	The relevant municipality
An urban municipality	Public Utilities Act, s. 62	The municipal corporation expropriating
A public service commission of a municipality or a public utilities commission	Public Utilities Act, s. 64	The municipal corporation expropriating
The Minister of Public Works	Public Works Act, s. 13	Minister of Public Works
Minister of Public Works	Public Works Act, s. 15	Minister of Public Works
A commission appointed by or under the authority of the Legislature	Public Works Act, s. 48	Minister of Public Works
Ontario Research Foundation	Research Foundation Act, 1944, c. 53, s. 11(c)	The minister responsible for the administration of the Act
The Board of Governors of the Ryerson Polytechnical Institute	The Ryerson Polytechnical Institute Act, 1962-63, s. 7(n)	Minister of Education

Table D—(Continued)

<i>Expropriating Authority</i>	<i>Statute</i>	<i>Recommended Approving Authority</i>
The board of trustees, directors, commission or other governing body or authority of a sanatorium	Sanatoria for Consumptives Act, s. 22	Minister of Health
A public school board, separate school board, continuation school board, board of education, high school board or advisory committee appointed under Part III of the Secondary Schools and Boards of Education Act	Schools Administration Act, s. 65	Minister of Education
The St. Clair Parkway Commission	St. Clair Parkway Commission Act, s. 4	Minister of Energy and Resources Management
The St. Lawrence Parks Commission	St. Lawrence Parks Commission Act, s. 7	Minister of Energy and Resources Management
Ontario Stock Yards Board	Stock Yards Act, s. 5	Minister of Agriculture
Continuation School Board	Secondary Schools and Boards of Education Act, s. 7	Minister of Education
A municipality	Telephone Act, s. 28	The municipal corporation expropriating
A municipality that has established a municipal telephone system under this Act or a predecessor of the Act	Telephone Act, s. 54	The municipal corporation expropriating
All of the universities set forth in s. 1(1) of the Act, being 15 universities	University Expropriation Powers Act, 1965, s. 2	Minister of University Affairs
Minister of Public Works	Wilderness Areas Act, s. 4	Minister of Public Works

Although the Minister of Municipal Affairs is the Minister responsible for the administration of the Municipal Act and related statutes, this Commission believes that there are compelling reasons why the Minister should not be held responsible for the exercise of powers of expropriation by municipal bodies, except in certain areas. Generally speaking, municipalities are self-governing. Their councils are elected by qualified electors. (This is not entirely true of the Council of the Municipality of Metropolitan Toronto.) For this reason they should be held responsible to the public for their decisions. There are, however, some areas of municipal government that are subject to some form of provincial control, e.g., aspects of planning and financing. But the decision to expropriate in most areas has always been vested in municipalities. The inquiry procedure which we later recommend should apply to municipalities, and the final approval power should not be taken from them except where the power to expropriate land is exercised for a purpose other than the immediate purposes of the municipal body, such as the disposal of the land to private persons or bodies for their own purposes. We think that in such cases the exercise of the power of expropriation by municipal bodies should be subject to the approval of the Minister of Municipal Affairs.

Our recommendations give a wider power to municipalities than now exist in Great Britain. The statutory inquiry procedure there applies where compulsory purchase orders are made by local governments. Such orders must be confirmed by the Minister of Housing and Local Government before they become effective. This procedure has been in effect for several years¹⁶ and is largely influenced by geographical considerations and the necessity for close co-ordination between local governments and the central government. It may be that the same reasons for co-ordination will develop in Ontario as population becomes more dense, but we do not think that that time has come yet.

There are several bodies, such as the Ontario Northland Transportation Commission and the Niagara Parks Commission, which are now charged with the responsibility of adminis-

¹⁶See Report of Committee on Ministers' Powers, Cmd. 4060, 92.

tering particular statutes. It is important that a minister be responsible for authorizing expropriations by these appointed bodies, notwithstanding that the minister may not be directly responsible for administering the applicable statutes.

The Minister of Public Works in the name of Her Majesty is charged with the general power to expropriate "... for (a) the public purposes of Ontario; or (b) the use or purposes of any department of the Government thereof."¹⁷ It is advisable, in cases where an expropriation is being conducted under the authority of this Act for the benefit of some department, other than the Department of Public Works, that the minister of that department for whose benefit the expropriation is made be the approving body. This recommendation would be applicable to the power conferred under the Game and Fish Act,¹⁸ which provides: "Land may be acquired under *The Public Works Act* for the purposes of management, perpetuation and rehabilitation of the wildlife resources in Ontario." The Minister of Lands and Forests and not the Minister of Public Works should be the approving authority for expropriations under this section. This recommendation also applies to expropriations under the Wilderness Areas Act.¹⁹

As we have indicated, the Municipality of Metropolitan Toronto is different from other municipal bodies. The members of its council are not elected directly, but are elected to the councils or boards of control of its area municipalities, and through this route become members of the Metropolitan Council. The Chairman of the Council is appointed. In a sense its members are elected, and in another sense they are appointed. On balance, we think that this difference is not sufficient to make a distinction between powers of expropriation as exercised by the Municipality of Metropolitan Toronto and those exercised by other municipalities. They should not be subject to the approval of the Minister of Municipal Affairs.

School boards differ from other municipal bodies in one significant respect. Although they are elected, they may exer-

¹⁷Public Works Act, R.S.O. 1960, c. 338, s. 13.

¹⁸Ont. 1961-62, c. 48, s. 6.

¹⁹R.S.O. 1960, c. 432, s. 4.

cise powers of expropriation over the lands of persons other than their electors. One set of electors elects the public school boards and another elects the separate school boards. Notwithstanding this, either of these boards may expropriate the land of those for whom there is no elected representative on the board. In this sense the principle of responsibility of elected representatives does not apply as it does to municipal councils. The exercise of the power of a school board to expropriate land should be subject to the approval of the Minister of Education. The Minister is now required to approve of a multitude of matters affecting the local operation of schools that are of less consequence than the taking of land by the exercise of powers of expropriation.

AN INQUIRY SYSTEM

Right to a Hearing

Notwithstanding that the decision to expropriate, and what should be expropriated, must be a political decision, safeguards should be provided to control the way in which the decision is arrived at. Examples have been brought to the attention of the Commission of decisions by expropriating authorities which can accurately be described as either ill-conceived or arbitrary. In one case, complaint was made that the expropriating authority caused serious hardship by taking large portions of farm land against the protest of the owner, despite the apparent lack of necessity to do so to accomplish the scheme. The lack of necessity was demonstrated by the fact that the authority was prepared to abandon much of the land some months later. Other cases were drawn to our attention where owners, whose farms had been expropriated, were unnecessarily put to great inconvenience and financial hardship by expropriations that proved to be unnecessary. We are not obliged to pass judgment on the wisdom of the initial decision in any particular case; but where the expropriation authority itself reverses in part its initial decision, it condemns itself. In such cases, if the expropriation plan had been more thoroughly considered by the authority before it was implemented, much injustice would have been averted. We shall make procedural recommendations in due course which would mitigate in large measure such injustices.

Other submissions were made to the Commission by owners and others concerning arbitrary or unwise conduct or action which was largely based on incorrect appreciation of the essential facts. In one case it was alleged that the expropriating authority's map did not show essential details, such as a lake. Obviously, we are in no position to assess the soundness of these submissions. However, the very fact that they were made and that there does not exist in Ontario law a general right to contest an expropriation decision on the basis of its soundness, fairness, or necessity, shows that the civil rights of the landowner are insufficiently safeguarded in our expropriation procedure. There is a gap in the law that should be filled.

We have, therefore, come to the firm conclusion that an inquiry system patterned on that of Great Britain should be adopted in Ontario and made applicable to expropriation cases. We discussed the British inquiry system at some length in Chapter 13 of this Report.

Before approval of an expropriation is given, adequate notice by publication or otherwise of an intention to expropriate should be given and persons affected should have an opportunity to file objections with the expropriating authority within a reasonable period of time. If objections are filed which are not withdrawn an inquiry officer should be appointed to hold a hearing.

There has always been an understandable and deep-seated resentment on the part of the owners whose property has been expropriated that the action has been taken without their consent and without a hearing. The right to a hearing is fundamental justice.

In addition to reasons based on fundamental justice, a right to be heard will tend to produce expropriation decisions which will reflect more consideration for the rights of the owner and produce better plans, without sacrificing matters of vital public interest.

It has been suggested that hearings would delay projects and increase costs. If the economic interests of the Province would suffer to the extent that the Lieutenant Governor in Council might think it a proper case to proceed without a

inquiry, he should have power to grant leave to proceed without giving notice or holding an inquiry.

Whether inquiries would increase costs is very questionable. The hearings in many cases would reveal circumstances that would reduce costs and encourage fuller investigation, with better planning in the early stages of the project. In any case, to deny an individual a right to be heard on the ground of cost, when his property is to be taken from him by government action, is a frail excuse for the exercise of arbitrary power.

In the United Kingdom the inquiry procedure is an integral part of the expropriation procedure. The procedure has been well tried and has been found to be necessary, desirable and successful.

In cases where the expropriating authority and the approving authority are the same (generally so in provincial government and municipal expropriations), it may be argued that the inquiry procedure is a formality devoid of any real guarantee of administrative justice to the owner because the expropriating authority is asserting its right and at the same time acting as judge. This argument misses the main purpose of the inquiry-approval procedure. First, it is not suggested that the approving authority is to act as a judge in the traditional sense and decide applications according to law. Its decision will be, and must be, based on policy, but the purpose of the recommended procedure is to give owners affected by expropriation orders an opportunity to be heard. Professor Wade puts it this way: "It is as plain as can be that a ministerial decision of the kind that follows a public inquiry is not judicial at all, but administrative."²⁰ Second, with the hearing and approval, expropriation decisions should be better considered and they should be made with a better understanding of all the relevant facts. The language of Professor Wade expresses with great clarity views with which we respectfully agree:

"The value of the right to a hearing . . . is that it provides a safeguard against oversight. The real risk is not that the department will perversely disregard the evidence, but that it will be tempted to act before it has even discovered that there

²⁰H. W. R. Wade, *Administrative Law* (1961), 171.

is another side to the case. The right to a hearing is based on the sound principle that a better decision is likely to result if both sides of the case are first heard. It is not based on any idea that what is finally done need follow logically from what transpires at the hearing. Exactly the same applies to public inquiries, which are merely a statutory and formal method of giving effect to the same principle of justice which the judges developed by case-law. The more extreme legal criticisms, therefore, merely draw attention to what is inevitable, i.e. that we are dealing with decisions of policy, not decisions on law. But the public inquiry is not at all to be despised on that account, any more than the right to a hearing is to be despised in other cases. It is essential to fair administration, and there is no reason to maintain that it is valueless merely because it requires trust to be placed in the administrator. There is something much greater at stake than the right to blow off steam."²¹

The Inquiry Tribunal

In the United Kingdom, the inquiry tribunal consists of one person. In view of its functions, a larger body is unnecessary. The tribunal should be a body separate from the approving authority. It would not be practicable for the approving authority itself to hear all the interested parties. That would be an ideal procedure, but it is not a practical one. The inquiry officer's function should be to accord all necessary parties a fair hearing on the relevant issues (compensation and the necessity for the work are not relevant issues,) and make his findings of fact on the evidence. He should not act as a judge in the case in deciding the matter. He should make a written report on the facts to the approving authority.

In the United Kingdom the inquiry officers are called inspectors. They are selected from various quarters. Most of them are civil servants in the Ministry of Housing and Local Government; others are selected from other government departments, and some are appointed on an *ad hoc* basis from outside the government service. The factors which should bear on the proper selection of inspectors were fully considered by the Franks Committee.²² This Committee recommended that the inspectors for all inquiries be placed under the control of

²¹*Ibid.*, 175-76.

²²The Franks Report, 64-66, paras. 293-303.

the Lord Chancellor. This recommendation was not accepted by the government, probably because it was felt that the inspector should be a person familiar with the day-to-day work and policy of the confirming authority.²³

In this Province where we do not have a statutory inquiry tradition we are not encumbered by past practices and methods in instituting the proposed inquiry-approval procedure. We recommend, for the sake of independence, that the inquiry officers, permanent or *ad hoc*, should be appointed by the Attorney General. The Attorney General is the Minister responsible for the administration of justice in the Province. An inquiry should be conducted in a manner that inspires confidence which is so important in such proceedings. The officer should not be too closely identified with the approving authority.²⁴

Inquiry Procedure

We were impressed with the statutory inquiry procedures in the United Kingdom. These are not confined to expropriation (compulsory purchase) decisions, but extend to other governmental decisions, such as the granting or refusal of planning permission, clearance orders, and new town orders.²⁵ The procedures available would appear to afford a balance between the right of an individual, whose rights are in jeopardy to be heard, and the public interest.

In the case of compulsory purchases, an inquiry is held by an inquiry officer. Both the expropriating authority and persons affected are entitled to be heard. The inspector reports on the facts and submissions to the "confirming authority", i.e., the appropriate Minister. The report is considered and the Minister either confirms the compulsory purchase

²³For a fuller discussion of this recommendation, see H. W. R. Wade, *Administrative Law* (1961), 191.

²⁴The Franks Report, 65, para. 303.

²⁵See Acquisition of Land (Authorization Procedure) Act, 1946, 9 & 10 Geo. VI, c. 49, particularly the First Schedule thereto; Compulsory Purchase of Land Regulations, 1949 (S.I. 1949, No. 507); Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules, 1962 (S.I. 1962, No. 1424); Tribunals and Inquiries Act, 1958, 6 & 7 Eliz. II, c. 66, ss. 7A, 12; Tribunals and Inquiries Act, 1966, c. 43; Tribunals and Inquiries (Discretionary Inquiries) Order, 1967 (S.I. 1967, No. 451); and Compulsory Purchase by Ministers (Inquiries Procedure) Rules, 1967 (S.I. 1967, No. 720).

order, "with or without modifications", or refuses to confirm it. On confirmation the compulsory purchase order is final and binding, subject to being challenged in the courts on grounds of *ultra vires* or procedural deficiencies, within six weeks of publication of the notice of the confirmation.

Where the expropriation is at the instance of a minister, the same procedure with respect to the hearing is followed, but in such case the minister is himself the confirming authority.

The procedure in the United Kingdom should be a useful guide. It has been in effect for many years and has undergone some revision, reform and codification.²⁶ Detailed procedural rules should be formulated by the rule-making body we recommend in Chapter 14. We outline for consideration matters that should be included in the rules, modelled in large measure on the system followed in the United Kingdom, discussed in detail in Chapter 13.

PROCEDURE PRIOR TO HEARING

1. The expropriating authority should give notice by publication or otherwise of its intention to expropriate. The notice should indicate the land proposed to be expropriated, and a statement that affected persons have a right of a hearing.

2. If the person or persons affected desire to exercise their right to a hearing, they should so advise the approving authority within a stated time.

3. If no persons notify the approving authority that they desire a hearing, then that body may authorize the proposed expropriation to proceed. If any affected person or persons notify the approving authority that they desire to be heard, then this body should appoint a date, time and place for the hearing and so notify interested parties.

4. Prior to the hearing, the expropriating authority should make available to interested parties plans, maps and documents which it intends to use at the hearing.

²⁶See, in particular, Tribunals and Inquiries Act, 1958, 6 & 7 Eliz. II, c. 66, ss. 7A, 12; Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules, 1962 (S.I. 1962, No. 1424); and Compulsory Purchase by Ministers (Inquiries Procedure) Rules, 1967 (S.I. 1967, No. 720).

PROCEDURE AT THE HEARING

1. The parties should be entitled to present their own cases, or to be represented by members of the legal profession or laymen.

2. Since the expropriating authority is seeking a change in the *status quo*, it should present its case first and have a right of reply following the case for the objectors. Cross-examination of witnesses should be allowed and all issues of admissibility of evidence should be decided by the inquiry officer. The ordinary rules of evidence should not apply; the main criterion for the admissibility of evidence should be its relevance. Hearsay evidence should be admitted, if, in the opinion of the inquiry officer, it may have probative value.

3. The merits of the expropriating authority's general policy should not be considered relevant. For example, any evidence as to whether the public work contemplated, e.g., a new road or school, was necessary from a policy point of view, should be inadmissible. The necessity of the work should be assumed and treated as being beyond comment. The soundness and fairness of taking the particular piece of land described in the proposed expropriation plan should be the main issue at the hearing. The public interest and the interests of the owner must be considered. Evidence and comment on this issue, and on related issues such as the feasibility of the modification of the expropriation plan, or alternative sites or routes, or the taking of a lesser estate or interest in the land, should be relevant. The scope of the hearing we recommend is more restricted than in the United Kingdom, where the merits of the proposed work may be examined.

4. The inquiry officer should have the right to inspect the site of the proposed expropriation, either in the presence of the parties or alone.

5. Following the presentation of the evidence, all parties to the proceeding should be entitled to present argument to the inquiry officer.

THE REPORT OF THE INQUIRY OFFICER

The report should contain a summary of the evidence and arguments advanced by the contending parties, the in-

quiry officer's findings of fact, and his opinion on the merits of the application with reasons therefor.

Since the officer is not to have a decisional role in the procedure, it is with some reluctance that we recommend that he express an opinion on the merits. This reluctance is overcome by the following considerations:

- (a) If the main points of evidence and argument are faithfully and accurately recorded in the report, the expression of the opinion will appear in a proper context and will not be given undue weight.
- (b) In many cases a properly reasoned opinion, expressed by the man who heard the presentations and visited the proposed site, would be useful to the approving authority. It would in some cases focus the findings of fact on relevant conclusions. The rule in the United Kingdom is:

"The appointed person shall after the close of the inquiry make a report in writing to the Minister which shall include the appointed person's finding of fact and his recommendations, if any, or his reason for not making any recommendations."²⁷

This rule substantially expresses our recommendation, except that we would substitute the word "opinion" for the word "recommendation". This emphasizes the passive role which the inquiry officer should play in the matter.

APPROVAL

After receipt of the report, the approving authority should consider it and decide to approve (with or without modification) or not to approve expropriation, giving written reasons for its decision. No modification should extend the expropriation to land which was not included in the original plan of expropriation, unless the parties affected consent. The approving authority should send a copy of the decision, and the reasons therefor, to the affected parties, together with the inquiry officer's report.

The foregoing, with accompanying details, should form basic procedural provisions to be complied with before a valid expropriation decision could be made.

²⁷Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules, 1962 (S.I. 1962, No. 1424), para. 9(1).

JUDICIAL REVIEW OF EXPROPRIATION PROCEEDINGS

Since the validity of an expropriation could be challenged for failure to comply with the procedural requirements we recommend, in the interests of the security of land titles, a time limitation within which expropriation proceedings may be challenged.

In the United Kingdom²⁸ any person aggrieved by a compulsory purchase order may challenge it by way of application to the High Court within six weeks of the date of publication of the notice of confirmation of the compulsory purchase order in question. Otherwise, the compulsory purchase order shall not be questioned by any legal proceedings whatsoever.²⁹

In Ontario any application to set aside the approving order should be made to the Appellate Division of the High Court of Justice for Ontario.³⁰ The form of the procedure should be as recommended in Chapter 22. The court should have power to sustain the expropriation order notwithstanding that there have been procedural errors. Mere technicalities ought not to be allowed to interfere with an otherwise valid expropriation.

²⁸Acquisition of Land (Authorization Procedure) Act, 1946, 9 & 10 Geo. VI, c. 49, para. 15 to Schedule I.

²⁹*Ibid.*, para. 16 to Schedule I.

³⁰The constitution of the court to hear such applications is discussed in Chapter 44 *supra*.

CHAPTER 67

Expropriation Proceedings

THE first step to implement a decision to expropriate is taken by filing a plan pursuant to section 4(1) of the Expropriation Procedures Act:

“4. (1) Notwithstanding any general or special Act, where an expropriating authority has exercised its statutory powers to expropriate land, it shall register without undue delay in the proper registry or land titles office a plan of the land signed by the expropriating authority and by an Ontario land surveyor, and thereupon, but not otherwise, the land vests in the expropriating authority.”¹

Subsections 2 to 5 of section 4 deal with the acquisition of land for temporary periods, or for limited estates or interests, the correction of errors in plans registered, presumptions concerning the signature on plans and the registration of certain plans by the Hydro-Electric Power Commission of Ontario.

Subject to what we have said in the previous chapter, there have been no submissions made to this Commission that the formal procedure to implement a decision to expropriate set out in section 4, coupled with notice to the owner of filing given under section 5, is an unfair or unsatisfactory method of effecting an expropriation.

The fact that the title to land is taken by the mere filing of a plan in the Registry Office was strongly criticized by Thorson, J., the President of the Exchequer Court of Canada,

¹Expropriation Procedures Act, Ont. 1962-63, c. 43, s. 4(1).

in *Grayson v. The Queen*. Referring to this power, the learned judge said:

“I have frequently called attention to these provisions of the law and stated that Canada has the most arbitrary system of expropriation of land in the whole of the civilized world. I am not aware of any other country in the civilized world that exercises its right of eminent domain in the arbitrary manner that Canada does. And, unfortunately, the example set by Canada has infected several of the Canadian provinces in which a similar system of expropriation has been adopted.”²

The force of this criticism has been somewhat mitigated in Ontario, but only somewhat, by the provisions of section 5 of the Expropriation Procedures Act³ providing for service of notice of expropriation.⁴ Since it is the registration of the plan that vests the land in the expropriating authority, there is a public record showing exactly what land has been taken and on what date it was taken. It is notice to any person searching the title to the land in question that the land belonged to the expropriating authority as of the date of the registration.

With the exception of expropriations by conservation authorities, public hospitals and universities, the compensation payable is fixed as of the date of the registration of the plan, unless there has been delay of more than sixty days after the registration of the plan in serving the notice of expropriation.⁵ In the case of conservation authorities, public hospitals and universities, the compensation payable is fixed as of the date of the application to the judge for an appointment for a hearing.⁶

There has been criticism of the provision that the expropriating authority shall register the plan “without undue delay”.⁷ No duty is imposed on the authority to register the plan within a specific period of time. No sanction or penalty is expressly provided for failure to register “without undue delay”, but compensation must be assessed as of the date of registration if notice is given within sixty days of the plan’s

²[1956-60] Ex. C.R. 331, 335.

³Ont. 1962-63, c. 43.

⁴See pp. 1013-17 *infra*.

⁵Ont. 1962-63, c. 43, ss. 5(2), 12.

⁶*Ibid.*, s. 1a(8), as enacted by Ont. 1966, c. 53, s. 1.

⁷*Ibid.*, s. 4(1).

registration. This may affect the ultimate compensation in two ways. On the one hand, rising market values or improvements to the land being expropriated would accrue to the financial detriment of the expropriating authority if it delayed registering the plan; on the other hand, as the law now is, it may not be in the interests of the expropriating authority to register the plan promptly. Announcement of a decision to expropriate may place a blight on land to be affected by the work and depreciate its market value. One case has come to our attention where appraisers had written property owners advising them that their land was likely to be expropriated, but no plan was registered. The result was that the property became frozen. Purchasers would not buy it with the prospect of expropriation.

Where the inquiry-approval procedure is made to apply, the owner should have the right to elect to have the compensation determined as of the date upon which the notice of hearing before the inquiry officer is served, or as of the date of the registration of the plan, or as of the date on which the notice of expropriation is served, or as of the date on which possession is given.

In those cases where leave is given to proceed without holding an inquiry, the owner should have the right to elect to have the compensation determined as of the date upon which leave is given, or as of the date of the registration of the plan, or as of the date on which notice of expropriation is served, or as of the date on which possession is given.

The expropriating authority should be obliged to register the plan within a stipulated period after the approval has been given or leave to proceed without an inquiry is given, on pain of either having the expropriation lapse or being liable to pay compensation by reason of the delay, or both. The period of six months from the date of approval provided in the 1966 amendment⁸ is much too long.

The phrase "where an expropriating authority has exercised its statutory powers to expropriate land",⁹ requires clarification. It seems clear that the phrase embraces the actual

⁸Expropriation Procedures Act, Ont. 1962-63, c. 43, s. 1a, as enacted by Ont. 1966, c. 53, s. 1, as applying only to conservation authorities, hospitals and universities.

⁹*Ibid.*, s. 4(1).

decision to exercise the powers of expropriation, but does the phrase include more? For example, under section 7 of the Highway Improvement Act¹⁰ where the Minister of Highways desires to expropriate land “. . . he shall register in the proper registry or land titles office a plan and description of the land . . . signed by himself. . .” He shall also, within sixty days after exercising the powers under section 7, give notice of the expropriation to the owner.¹¹ Is the Minister of Highways obliged to register the plan and give notice under both statutes? This would not appear to be the intention of the Expropriation Procedures Act. It is a matter which should be put beyond doubt.

If the inquiry-approval procedure is adopted, the plan which is required to be registered should have an endorsement signed by the approving authority or one of its officers, showing on its face the date of approval and compliance with the applicable law.

NOTICE OF EXPROPRIATION

Following registration of the plan, notice of expropriation must be served on the owner:

“5. (1) Where a plan has been registered under section 4 and no agreement as to compensation has been made with the owner, the expropriating authority may serve the owner, and shall serve the registered owner, within sixty days after the date of registration of the plan, with a notice of expropriation of his land (Form 1), but failure to serve the notice does not invalidate the expropriation.

(2) Where a plan has been registered under section 4 and a notice of expropriation has not been served in accordance with subsection 1, the registered owner may elect, by notice in writing served upon the expropriating authority,

(a) to have the compensation to which he is entitled assessed as of the date of the registration of the plan under section 4; or

(b) to have the compensation to which he is entitled assessed as of the date on which he was served with the notice of expropriation.”¹²

¹⁰R.S.O. 1960, c. 171, s. 7 (2).

¹¹*Ibid.*, s. 10(1)(a).

¹²Expropriation Procedures Act, Ont. 1962-63, c. 43, s. 5.

“Owner”, as defined,

“includes a mortgagee, lessee, tenant, occupant, execution creditor, a person entitled to a limited estate or interest in land, a committee of the estate of a mentally incompetent person or of a person incapable of managing his affairs, and a guardian, executor, administrator or trustee in whom land is vested.”¹³

“Registered owner”, as defined,

“means an owner of land whose interest in the land is defined and whose name is specified in an instrument in the proper registry, land titles or sheriff’s office, and includes a person shown as a tenant of land on the last revised assessment roll.”¹⁴

We set out in full on the next page Form 1 referred to in section 5(1).

While registration of the plan may be notice to anyone making a search of the title in the proper registry or land titles office, it is obviously not an effective way to furnish the owner with notice that his land has been taken. Under the existing law, it is possible for an owner to be unaware for sixty days following registration of a plan under section 4 of the Act that his land no longer belongs to him.

We have received submissions that the time allowed for service of the notice should be considerably shortened. Since the general rule is that compensation is assessed as of the date of the expropriation, an owner may suffer considerable financial loss through making repairs or improvements to his property within the sixty day period between the date of the expropriation and the date he receives the notice. This is clearly unjust. On the other hand, it might take many days for the expropriating authority to determine the names of and serve all of the persons who come within the definition of registered owner. They might include owners, tenants, mortgagees, mechanics’ lien claimants and execution creditors. The Ontario Select Committee on Land Expropriation in its Report¹⁵ came to the conclusion that sixty days would seem to be appropriate under most circumstances. It is difficult to

¹³*Ibid.*, s. 1(f).

¹⁴*Ibid.*, s. 1(g).

¹⁵Report of the Select Committee of the Legislature on Land Expropriation (Ontario, 1962), 16.

Form 1

THE EXPROPRIATION PROCEDURES ACT,
1962-63

(Section 5(1))

NOTICE OF EXPROPRIATION

To
(Registered Owner)

TAKE NOTICE:

1. That the did, on the
(Name of Authority)
day of, 19....., register as No.....
in the
(Proper Land Titles or Registry Office)

a plan of expropriation in accordance with *The Expropriation Procedures Act, 1962-63*, and that the land defined therein is vested in the for its use.
(Name of Authority)

2. Attached hereto is a copy of the relevant portion of the plan of expropriation of your land (*or a description thereof*).

3. That, under *The Expropriation Procedures Act, 1962-63*, the
(Name of Authority)

will be notifying you of the amount of compensation, if any, it is willing to pay for the land expropriated and for the damages resulting therefrom and that, if you are not satisfied with the offer, you are entitled to have the compensation determined by
(Name of Tribunal)

or..... upon your making
(Alternative Tribunal, if any)
application to it.

4. That for any further information respecting this matter you may communicate with
(Name of Authority, Officer or Agent)
at.....
(Address)

DATED at, this day of, 19.....
.....
(Name of Authority,
Officer or Agent)

see how the length of time for serving notice could be shortened. Searches have to be completed and notices served. If service is by publication, the publication must be once a week for three weeks in a newspaper.¹⁶

In view of the fact that a possibility of hardship to an owner arising from his having made repairs or improvements to his property between the date of the expropriation and the date of the service of notice exists, provision should be made for the recovery of the cost of such repairs or improvements in proper cases.

If the inquiry-approval procedure is adopted, the sixty-day period for giving notice might be shortened considerably. Under that procedure the expropriating authority would have much of the necessary information before the plan would be registered.

Under the recommended procedure, it would be unlikely that the owner would be completely ignorant of the fact that his land might be expropriated. Once he received notice that the expropriating authority was seeking approval of its plan to expropriate his land, he would know that expropriation was likely and, after he received notice of approval, he would know that it was imminent.

While it may be difficult to ascertain and serve all persons who may be "registered owners" within a period shorter than sixty days, there does not appear to be, in most cases, much difficulty in serving promptly the person who is most vitally interested in the expropriation, the owner-occupant of the land involved. This should be done first and the remaining services made thereafter.

FAILURE TO SERVE NOTICE

Submissions have been made criticizing the provision that "failure to serve the notice does not invalidate the expropriation".¹⁷

If there is legal authority for the expropriation, and all other conditions precedent for a valid expropriation have been met, there is no sound reason why the mere failure to serve the notice within sixty days should invalidate the pro-

¹⁶Expropriation Procedures Act, Ont. 1962-63, c. 43, s. 1(h).

¹⁷*Ibid.*, s. 5(1).

ceedings. The right to have the compensation assessed as of the date on which the registered owner is served with notice of expropriation would appear to ensure that in most cases the notice is served within the sixty days.¹⁸

It is possible, however, that the registered owner may never be served with the notice of expropriation. The right to elect to have compensation fixed as of the date on which possession is given, which we have recommended, would give relief in such cases.¹⁹

The notice in Form 1²⁰ serves an important purpose beyond merely giving information to the owner that his land has been expropriated. It informs him that he will be notified of the amount of compensation, if any, which the expropriating authority is willing to pay for the land; that he is entitled to have the compensation determined by arbitration upon his own application; and that he may obtain further information from the expropriating authority.

There should be two additions to the required notice:

- (1) It should state that the owner has the right to invoke the negotiation procedure set out in section 9a of the Expropriation Procedures Act,²¹ and that he must do so before proceeding to arbitration, unless the parties otherwise agree.
- (2) It should state that the owner may consult a solicitor to advise him as to his legal rights, and that the expropriating authority will pay the preliminary costs of the solicitor, fixed according to a prescribed tariff of costs.

NEGOTIATION PRIOR TO ARBITRATION

Following a valid expropriation and service of notice, two issues remain outstanding between the expropriating authority and the owner:

- (1) When possession of the premises is to be surrendered; and
- (2) The amount of compensation to be paid.

¹⁸*Ibid.*, ss. 5(2), 12.

¹⁹*Ibid.*, s. 5(2)(b).

²⁰See p. 1015 *supra*.

²¹Expropriation Procedures Act, Ont. 1962-63, c. 43, s. 9a, as enacted by Ont. 1965, c. 38, s. 2.

The latter may be determined either by negotiation and settlement or by an award of the arbitral tribunal having jurisdiction.

It is preferable that the matter be settled to the satisfaction of both parties rather than litigated, and the law, in so far as possible, should be designed to this end.

Up until the time the Expropriation Procedures Act²² came into force, it was possible for parties to enter into an arbitration hearing without an offer being made and without the parties communicating in any way with respect to the matter of compensation. This has been corrected by sections 8, 9²³ and 9a.²⁴

Section 8 reads as follows:

"8. (1) Where land has been expropriated from an owner and a plan has been registered under section 4 and no agreement as to compensation has been made with the owner, the expropriating authority shall, within six months after the date of registration of the plan and before taking possession of the land, serve upon the registered owner an offer in full payment of the compensation for all interests in the land, but failure to serve the offer does not invalidate the expropriation.

(2) The expropriating authority may, within the six-month period mentioned in subsection 1 and before taking possession of the land, upon giving at least two days' notice to the registered owner, apply to the judge for an order extending the time for serving the offer under subsection 1.

(3) If the offer required to be served under subsection 1 is not served within the time limited by subsection 1 or by an order of a judge under subsection 2, interest upon any compensation payable to the registered owner shall be calculated from the date of registration of the plan."²⁵

Two submissions were made to the Commission concerning this section:

(1) The saving provision that "failure to serve the offer does not invalidate the expropriation" should be eliminated.

(2) The six months' period is too long.

²²Ont. 1962-63, c. 43.

²³*Ibid.*, s. 9, as re-enacted by Ont. 1965, c. 38, s. 2.

²⁴*Ibid.*, s. 9a, as enacted by Ont. 1965, c. 38, s. 2.

²⁵*Ibid.*, s. 8.

As in the case of failure to serve the notice under section 5 (1),²⁶ there appears to be no sound reason why mere failure to serve the offer should have the effect of invalidating the expropriation. Subsection 3, in providing that if the offer is not served within the requisite time interest shall be calculated from the date of the registration of a plan, provides some sanction to ensure that offers are served within the required period.

The second submission has some merit. In difficult cases, particularly those involving a large number of properties, the six-month period, and perhaps even a longer period, may be necessary in order to have the required preparatory and appraisal work completed before offers are made. This possibility should not form a basis for a general rule. In many expropriations the expropriating authority takes only one property or a small number of properties. In the planning leading up to the decision to expropriate an appraisal of the land involved would necessarily be made in order to determine the cost of the project, since public moneys would be required. In such cases there is no reason why the offer should not be made much earlier. The sooner the offer of compensation is served on the owner, the sooner it is possible to have any dispute finally resolved. The benefits of section 9a,²⁷ which will be discussed later, cannot, under the present provisions, accrue to the owner until he has received an offer under section 8, or until the time for complying therewith has expired. It is, therefore, possible that an appointment for negotiation under section 9a may not be taken out until six months after the date of the registration of the plan, or a longer period of time if an order has been made under section 8 (2),²⁸ extending the time for serving the offer under section 8 (1).²⁹ Section 9a, enacted in 1965, was intended to promote, not delay, prompt settlement of all claims. In it, the principles of conciliation are adopted.³⁰

²⁶*Ibid.*, s. 5(1).

²⁷*Ibid.*, s. 9a, as enacted by Ont. 1965, c. 38, s. 2.

²⁸*Ibid.*, s. 8(2).

²⁹*Ibid.*, s. 8(1).

³⁰*Ibid.*, s. 9a, as enacted by Ont. 1965, c. 38, s. 2.

The section established a new procedure in this jurisdiction. It reads as follows:

"9a. (1) A board of negotiation shall be established consisting of two or more members appointed by the Lieutenant Governor in Council, one of whom may be designated as chairman.

(2) The cost of the board of negotiation shall be paid in the fiscal year 1965-66 out of the Consolidated Revenue Fund and thereafter out of moneys appropriated therefor by the Legislature.

(3) Any two of the members of the board of negotiation constitute a quorum and are sufficient to perform all functions of the board on behalf of the board.

(4) The board of negotiation may sit at any place in Ontario.

(5) In any case in which a notice of negotiation is served, the board of negotiation shall, upon reasonable notice to the expropriating authority and the owner, meet with them and, without prejudice to any subsequent proceedings, proceed in a summary and informal manner to negotiate a settlement of the compensation.

(6) Before or during the negotiation proceedings, the board of negotiation shall inspect the land that has been expropriated or injuriously affected.

(7) If the negotiation proceedings do not result in a settlement of the compensation, the expropriating authority or the owner may serve notice of arbitration upon the other of them, stating that it or he, as the case may be, requires the compensation to be determined by arbitration as though the negotiation proceedings had not taken place."³¹

The procedure is mandatory in all cases, except where the parties agree otherwise. The beneficial effect of the procedure is that it forces the parties to meet together to discuss any unresolved differences. Negotiations are conducted in an atmosphere of informality. Freedom of discussion is promoted, without prejudice to any subsequent proceedings. A party may appear before the board with or without a solicitor. Where agreement has not been reached, the board usually recommends a settlement figure. In practice, this figure includes, in addition to a sum for compensation for the land taken, a sum to cover the party's legitimate costs to the date of negotiation proceedings, e.g., solicitors' and appraisers' costs. We think this practice is as it should be.

³¹*Ibid.*, s. 9a, as enacted by Ont. 1965, c. 38, s. 2.

The board authorized by this section held its first meeting on August 12, 1965. At the time of writing it has held 625 meetings. The existing information indicates that sixty-nine per cent of the negotiations which it has conducted have resulted in settlements (or, at least, the cases involved were settled short of arbitration); nineteen per cent did not result in settlement; and twelve per cent have not yet resulted in either settlement or arbitration.

It seems inevitable that as more expropriations take place in the Province there will be a larger number of cases coming on for negotiation under section 9a. This will result in a delay in obtaining appointments for meetings and one of the primary purposes of the negotiation procedure will be defeated. This difficulty should be anticipated now by making provision for such additional personnel for the board as may be necessary.

We received submissions from members of the public, both before and after the board was established, endorsing the principle of compulsory negotiation prior to arbitration. There seemed to be a lack of knowledge that the board had been established. If the notice of expropriation is amended as we have suggested,³² the interested parties would have full knowledge of their rights and obligations.

EXCHANGE OF INFORMATION

It is generally recognized that full and fair disclosure is essential to the just disposition of adverse claims. Detailed procedure for production and pre-trial examinations of parties is prescribed in actions in the ordinary courts. The result is that a very large percentage of the actions that are commenced are settled by negotiation before trial. Another equally important result is that in those cases that are not settled the parties come to court with a knowledge of the case they have to meet. This saves the time of the court and promotes justice.

In expropriation cases where large sums of money are usually involved, there are no general provisions for production, discovery or exchange of valuers' appraisals. (The Ontario Municipal Board may make orders for discovery and

³²See p. 1017 *supra*.

production.)³³ The proceedings before the board of negotiation are stated to be without prejudice and in no sense can these proceedings be a substitute for production. Later in this chapter we discuss a form of production and discovery that should be available if either party desires to take advantage of it. Proper production and discovery would create a legal framework for the exchange between the parties of relevant material bearing upon compensation, which should be made available as a basis of negotiation as well as preparation for arbitration. In England the parties are required to exchange reports of appraisers and deposit them with the Registrar of the Lands Tribunal.³⁴

We were told that the usual practice in England is for expropriating authorities to be open and frank with the owners and to furnish them with all relevant information, such as schedules of comparable sales and valuations. It is undesirable that the adversary system, with whatever merits or shortcomings it may have, be applied without restriction between expropriating authorities and owners.

A case was brought to the attention of the Commission during the public hearings, illustrating the urgent need for full and fair disclosure and fair dealing on the part of expropriating authorities. A municipality expropriated farm land belonging to one who had come to Ontario from Europe and who was not familiar with the laws and procedures of the Province. The expropriating authority offered the owner \$900 for his land. The owner, who had little knowledge of his rights with respect to compensation, sought the assistance of the local county federation of agriculture. Upon its intervention the offer was raised to \$2,000, and finally \$5,000 was paid and accepted.

Your Commission requested an explanation from the municipality. According to the explanation, the initial offer appeared to have been based on ignorance or incompetence on the part of the expropriating authority or its agent. The authority did not conduct adequate inspection of the premises and compensable injury was not taken into consideration. It

³³Table E to Chapter 72, pp. 1066 ff. *infra*; Ontario Municipal Board Act, R.S.O. 1960, c. 274, ss. 37, 90; R.R.O. 1960, Reg. 466, s. 14, Forms 4, 5, 6, 7; see also *Re Pasquale and Twp. of Vaughan*, [1967] 1 O.R. 417.

³⁴Lands Tribunal Rules, 1963 (S.I. 1963, No. 483), Rule 42(4).

may be that the appraiser was merely incompetent. Whatever the reason, the municipality solemnly offered \$900 for a property for which it was willing to pay \$5,000. It is not an acceptable answer to say that the farmer could have obtained his ultimate rights on an arbitration. We emphasize that everything should be done to encourage settlement of compensation disputes by negotiation. For this to be possible, the utmost good faith on the part of expropriating authorities should at all times be demonstrated. An expropriating authority which enters into negotiations with an owner is not negotiating in good faith without first having made an honest attempt to decide for itself, on careful examination and appraisal, what is proper compensation for the loss inflicted. We shall discuss the role of the appraisal profession later in this Section. Undoubtedly, if the farmer involved in the case we mentioned had accepted the first offer an intolerable injustice would have been suffered.

Submissions were made to the effect that expropriating authorities and their agents, in some cases, have adopted an arrogant, rude, "take-it-or-leave-it" attitude towards owners. Whatever may be the proper mode of negotiation between two private parties, different principles should govern the course of negotiation between an expropriating authority and an owner. One is usually a public body with statutory powers to take away the property rights of the owner; the other is a private person who, through no fault or act of his own, has had his property taken. These facts dictate that the expropriating authority and its agents are in good conscience obliged to treat the owner with courtesy and fairness. This cannot be enforced entirely by legislation, but legislation which provides safeguards against abuse of power curbs arrogance.

POSSESSION BY THE EXPROPRIATING AUTHORITY

Unless otherwise agreed, the purchaser of real estate normally obtains the right to possession of the premises at the time that the title to the land passes to him. Where the land is expropriated, it is otherwise. Possession follows some time after the transfer of title.

The rights and liabilities of the parties with respect to possession are governed by the Expropriation Procedures Act:

"18. Where land has been expropriated and the compensation has not been agreed upon or determined, the expropriating authority, before taking possession of the land, shall offer to the registered owner a sum not less than 50 per cent of the amount to which he may be entitled as estimated by the expropriating authority, and, if the registered owner accepts that sum, it shall be paid and applied in partial payment of any compensation that may subsequently be agreed upon or determined.³⁵

19. (1) Where land that has been expropriated is vested in an expropriating authority and the expropriating authority has served the registered owner with a notice that it requires possession of the land on the date specified therein, the expropriating authority, if no application is made under subsection 3, is entitled to enter upon and take possession of the land on the date specified in the notice.

(2) The date for possession shall be at least ten days after the date of the serving of the notice of possession.

(3) A registered owner or an expropriating authority may, upon such notice as the judge directs, apply to a judge for an adjustment of the date for possession specified in the notice of possession, and the judge, if he considers that under all the circumstances the application should be granted, may fix the date for possession."³⁶

Before an expropriating authority can lawfully enter into possession of expropriated land, the following steps must be taken:

(1) The plan must be registered in the appropriate registry office.³⁷

(2) The registered owner must be served with an offer in full payment of compensation.³⁸

(3) The registered owner must be offered a sum not less than fifty per cent of the amount to which he may be entitled, as estimated by the expropriating authority.³⁹

³⁵Ont. 1962-63, c. 43, s. 18.

³⁶*Ibid.*, s. 19.

³⁷*Ibid.*, s. 4.

³⁸*Ibid.*, s. 8 (1) (2).

³⁹*Ibid.*, s. 18.

(4) If no application is made for an adjustment of the date for possession, ten days' notice requiring possession must be served on the registered owner.⁴⁰

(5) If an application is made for an adjustment of the date of possession, the expropriating authority cannot enter into possession before the date fixed for possession by the judge.⁴¹

It is possible under the law as it now stands for an expropriating authority to obtain possession within ten days of the registration of the plan, unless a judge has made an order to the contrary.

It is obvious that extreme hardship could result to an owner if he be not given sufficient notice of the time when the expropriating authority intends to enter into possession of his premises. The main hardships would be his inability to relocate in adequate alternative accommodation and the interference with any business conducted on the property involved. Examples of these hardships have been put before the Commission in detailed submissions. In one case, following an expropriation of an extensive area of land, the owners were given notice in an informal manner to give up possession in two years, but subsequently they were given notice to vacate in three months' time. This is an intolerable exercise of the powers conferred on an expropriating authority.

A converse abuse of the exercise of power was drawn to the attention of the Commission. Notice to surrender possession on a particular date was given to the owner, followed by a notice extending the time for possession. In one case the owner was put to great inconvenience and expense by being saddled with two farms and all of the attendant costs and expenses related thereto, by reason of the fact that the expropriating authority changed the date of possession to a later date. The expropriations referred to took place prior to the Expropriation Procedures Act and thus were not governed by it.

However, it has been suggested that the Expropriation Procedures Act does not entirely eliminate the possibility of

⁴⁰*Ibid.*, s. 19(1)(2).

⁴¹*Ibid.*, s. 19 (3).

abuses that may arise concerning possession of expropriated land:

- (1) It is not clear that the existing law obliges an expropriating authority to take possession of the land, with all the attendant consequences which flow from possession or occupancy, on the date specified in the notice, or that fixed by the judge where an adjustment has been made.
- (2) The expropriating authority may informally lead the owner to believe that it requires possession at a date earlier than that stated in the notice.
- (3) The expropriating authority may informally lead the owner to believe that possession will not be required at the time stated in the notice.

The expropriating authority should be required to take possession of the land, with all the attendant liabilities, on the date fixed for giving possession in the notice or by the judge, unless the parties otherwise agree.

The matters raised in items (2) and (3) are relevant circumstances which the judge may take into account in adjusting the date for possession under section 19 (3).

If a project which involves expropriation is carefully planned, as it should be, there is no reason in most cases why notice of possession could not be served upon the owner at the time of the expropriation, i.e., at the date of the registration of the plan. If this were the case, then a period longer than ten days for possession could and should be provided for in the legislation. We understand that now notices of possession are often served a considerable time after the registration of the plan under section 4. One probable explanation of this practice is that the expropriating authorities do their planning piecemeal and determine for themselves, sometime after the expropriation, when they will require possession of the land. If this be the case, then we think it fair that expropriating authorities, as part of their planning for the project involved, should determine, at the time of the expropriation, exactly when they will require possession. We realize the difficulties which face expropriating authorities concerning such matters

as the making of contracts for the demolition of existing buildings, and for the construction of new works or buildings. But we feel that the expropriating authority rather than the owner should assume the hardships and risks which might flow from having, or not having, as the case may be, possession of the land involved. The expropriating authority should be required to give a minimum of three months notice of possession under section 19 of the Act. We stress that this is the minimum period and it should be provided by legislation.

We recognize that in emergencies the public interest may require that the expropriating authority obtain possession in a shorter time than three months. These emergencies, if properly proven, would be relevant to the circumstances to be considered by the judge on an application for "an adjustment of the date" under section 19 (3).

The Ontario Select Committee of the Legislature on Land Expropriation, in its Report in 1962⁴² recommended that there be information in the notice of possession advising the owner of the "options available to him"—specifically, that he has a right to apply to the judge for an order extending the time and that the expropriating authority has a corresponding right to apply for a reduction of the time specified in the notice. This recommendation was not implemented. The Act as it now stands does not require any such information to be given in the notice. That this information be furnished to the owner is essential so that he may be fully apprised of his rights.

AMOUNT TO BE OFFERED

As we have said, the Act⁴³ requires the expropriating authority, before taking possession, to offer to the registered owner a sum not less than fifty per cent of the amount to which he may be entitled, as estimated by the expropriating authority. The offer and acceptance of the sum do not prejudice the rights of the parties in the ultimate determination of the amount of compensation.

⁴²Report of the Select Committee of the Legislature on Land Expropriation (Ontario, 1962), 19.

⁴³Ont. 1962-63, c. 43, s. 18.

We received submissions contending that the amount required to be offered should be increased. In practically all cases, when possession is given up, the owner must relocate in alternative premises. This relocation usually involves, as a minimum, a deposit at the time the contract to purchase the new premises is made, moving costs, solicitors' fees, and a down payment on the completion of the contract to purchase. In normal real estate transactions the funds to cover these costs, except for the deposit, are provided by the proceeds of the sale of the equity in the property that the purchaser has sold. In expropriation cases it might well be that the fifty per cent of the appraised value of the land taken would be exhausted in discharging the existing encumbrances on the property, with nothing left to invest in alternative property. In such cases, personal and financial hardships are imposed on the owner.

The Pennsylvania law⁴⁴ requires that expropriating authorities, before taking possession, must offer to pay to the owner "the amount of just compensation as estimated" by them. Payments made are without prejudice to the rights of either party "to proceed to a final determination of the just compensation and the payments heretofore made shall be considered only as payments *pro tanto* of the just compensation as finally determined".

We have been informed that one of the large expropriating authorities in the Province has made it a practice voluntarily to pay owners seventy per cent of the estimated value of the property, and sometimes more, depending on the existing encumbrances. The argument against obliging expropriating authorities to offer the full amount of compensation prior to their taking possession is that, if it should subsequently be found that overpayment has been made, the expropriating authority might have difficulty in recovering the difference. This may be a possibility in some cases, but the advantages of full payment to the owner prior to his giving up possession significantly outweigh the small risks that expropriating authorities would incur in the circumstances. The risk is one that should be borne by expropriat-

⁴⁴Eminent Domain Code, 1964, s. 407(a).

ing authorities. Owners of expropriated properties ought not to be required to provide insurance against this risk.

The Ontario Law Reform Commission has recommended that 85% of the estimated market value of the property expropriated should be paid to the owner before taking possession.⁴⁵ We think this is the minimum. We prefer the principle of the Pennsylvania law requiring that the full amount of compensation as estimated by the expropriating authority should be offered to the owner as a condition precedent to its obtaining possession.

⁴⁵Report of the Ontario Law Reform Commission, *The Basis for Compensation on Expropriation* (September, 1967), 70.

CHAPTER 68

Arbitration

THE RIGHT TO ARBITRATE

THE ultimate right to arbitrate is the fundamental factor which controls and gives meaning to the process of negotiation. The right, as expressed in the Expropriation Procedures Act, is:

“10. (1) Where the expropriating authority is a municipality as defined in *The Department of Municipal Affairs Act*, a claim for compensation, if not agreed upon by the authority and the owner and if not settled by negotiation proceedings, shall be determined by,

(a) the judge in which case the provisions of *The Municipal Arbitrations Act* as to procedure apply;

(b) the official arbitrator, in which case the provisions of *The Municipal Arbitrations Act* as to procedure apply; or

(c) the Board, in which case the provisions of *The Ontario Municipal Board Act* as to procedure apply,

as provided for in Part XVI of *The Municipal Act*.

(2) Where the expropriating authority has received its authority under section 21 or 41 of *The Ontario Energy Board Act, 1964* or a predecessor thereof, a claim for compensation, if not agreed upon by the authority and the owner and if not settled by negotiation proceedings, shall be determined under section 21 or 41, as the case may be, of that Act.

(3) Where the expropriating authority does not come within subsection 1 or 2 or where the municipality mentioned in subsection 1 is a local board of more than one municipality,

a claim for compensation, if not agreed upon by the authority and the owner and if not settled by negotiation proceedings, shall be determined by the Board and not otherwise, and *The Ontario Municipal Board Act*, except sections 94 and 95, applies so far as is practicable to every such claim."¹

Under sections 21 and 41 of the Ontario Energy Board Act,² provision is made for arbitration by an appointed board, with an appeal by way of a hearing *de novo* to the Ontario Municipal Board.³

Notwithstanding the statutory right to arbitrate, the parties may have a right to submit the issues of compensation to any type of private arbitration on which they agree and abide by the result.

The important factors in the process of arbitration are:

- (1) The nature of the arbitral tribunal; and
- (2) The procedure governing arbitration proceedings, both before and during the actual arbitration hearing.

THE ARBITRAL TRIBUNAL

The statutory provisions for arbitral tribunals in expropriation cases are incoherent and illogical. The types of tribunals empowered to hear applications to determine compensation are:

- (a) County or district court judges;
- (b) Official Arbitrators (who may or may not be county or district court judges);
- (c) The Ontario Municipal Board;
- (d) Boards of arbitration appointed by the Lieutenant Governor in Council under the Ontario Energy Board Act,⁴ or by the minister as defined in the Act.⁵

Where the expropriating authority is a municipality as defined in the Department of Municipal Affairs Act, the claim

¹Ont. 1962-63, c. 43, s. 10, as enacted by Ont. 1965, c. 38, s. 2.

²Ont. 1964, c. 74.

³For further discussion of this procedure, see pp. 1048-49 *infra*.

⁴Ont. 1964, c. 74, s. 21 and O. Reg 323/64.

⁵*Ibid.*, s. 41 (3).

for compensation shall be determined under the provisions of Part XVI of the Municipal Act.⁶ The relevant sections are:

“347. (1) Except in cases where there is an official arbitrator, the senior judge of the county or district court shall be sole arbitrator unless he under his hand requests a junior judge or the judge or junior judge of some other county or district to act for him, in which case the judge so designated shall be sole arbitrator.

(2) The provisions of *The Municipal Arbitrations Act* as to procedure and appeals apply to arbitrations held and awards made by the judge.

348. (1) Notwithstanding the other provisions of this Act or any other Act, the council may by by-law designate the Municipal Board as the sole arbitrator, in which case the Municipal Board has and may exercise all the powers and duties of an official arbitrator.

(2) Except as provided in subsection 3, *The Ontario Municipal Board Act* applies to proceedings taken before the Municipal Board under this section.

(3) The provisions of *The Municipal Arbitrations Act* with respect to appeals apply to awards made by the Municipal Board under this section.”

The office of Official Arbitrator is governed by the Municipal Arbitrations Act.⁷ The relevant sections are:

“1. (1) An official referee may be appointed by the Lieutenant Governor in Council for any municipality to which this Act applies and he shall be the ‘Official Arbitrator’ for the municipality for which he is appointed.

(2) The Official Arbitrator shall,

(a) be a judge of a county court or a barrister of at least ten years standing at the Bar of Ontario;

(b) have all the powers of an official referee under *The Judicature Act* and of an arbitrator under *The Municipal Act* or under *The Arbitrations Act*;

(c) be an officer of the Supreme Court;

(d) not act as solicitor or counsel for or against the corporation or for any other municipal corporation;

(e) have all the powers of a judge of the Supreme Court including those relating to the production of books and papers, the amendment of notices for compensation or damage and of all other notices and pro-

⁶R.S.O. 1960, c. 249, ss. 347, 348.

⁷R.S.O. 1960, c. 250.

ceedings, the rectification of errors or omissions, the time and place of taking examinations and views, the assistance of valuers, appraisers, engineers, surveyors or other experts, and as respects all matters incident to the hearing and determination of matters before him or proper for doing complete justice therein between the parties, including the power of awarding costs.

(3) Where there is an Official Arbitrator for a municipality to which this Act applies,

(a) all claims for compensation or damages for land expropriated or injuriously affected under *The Municipal Act*; and

(b) all claims and questions arising under any lease or contract to which the municipality is a party and which by by-law or the terms of the lease or contract are to be determined by arbitration,

against the municipality or against such municipality and an adjoining municipality shall be heard and determined by the Official Arbitrator.

(4) Where a claim is against a municipality and an adjoining municipality, each of which has an Official Arbitrator, neither municipality shall be deemed to have an Official Arbitrator.

12. (1) One-half of the fees and expenses of the Official Arbitrator is payable by each of the parties to the reference if only two parties are interested, and proportionately by all parties interested if a larger number than two are so interested; but the Official Arbitrator has power to award that any sum so paid or payable may be recoverable by any one or more of the parties from any other or others of them, and such fees and expenses are recoverable as any other costs of the arbitration.

(2) If the award is not taken up within thirty days after service upon the parties of the notice of filing thereof, the fees and expenses of the Official Arbitrator are recoverable by action from any one or more of the parties to the arbitration.

(3) Nothing herein prejudicially affects the right of the Official Arbitrator to recover his fees or expenses in any way in which they may now be recovered.

15. (1) This Act extends and applies to cities having a population of not less than 100,000, to The Municipality of Metropolitan Toronto, the County of York and to the Township of York, and to any municipality the council of which

by by-law declares that it is desirable that the municipality be brought within the provisions of this Act, and in such case this Act shall be read as though it had been expressly applied to such municipality by the terms thereof.

(2) The council of a municipality that has passed a by-law under subsection 1 may repeal it at any time after the expiration of six months from the passing of the by-law, and upon such repeal this Act ceases to apply or be in force in the municipality.”⁸

To summarize, the arbitral tribunal for a claim against a municipality for compensation for expropriation of land may be:

- (1) The Official Arbitrator;
- (2) The senior judge of the county or district court; or
- (3) The Ontario Municipal Board.

The Official Arbitrator. If the Municipal Arbitrations Act applies, or is by by-law made to apply, to the municipality involved, and an Official Arbitrator has been appointed under section 1(1),⁹ the Official Arbitrator may be a county court judge or a barrister of at least ten years standing. A municipality having an Official Arbitrator, by virtue of having passed a by-law under section 15 (1) of the Act, may in accordance with subsection 2 of that section by by-law dismiss its Official Arbitrator. If this were done then the municipality’s arbitrator would be a county or district court judge.¹⁰ Any municipality, by passing a by-law, may rid itself of either its Official Arbitrator or its sole arbitrator by appointing the Ontario Municipal Board as sole arbitrator.¹¹

The Senior Judge of a county or district court is “sole arbitrator” unless he requests a junior judge, or the judge or junior judge of some other county to act for him, if an Official Arbitrator has not been appointed under the Municipal Arbitrations Act, and no by-law has been passed under section 348 (1) of the Municipal Act.¹²

⁸*Ibid.*, s. 1, as amended by Ont. 1965, c. 78, s. 1; s. 12; s. 15, as amended by Ont. 1965, c. 78, s. 4.

⁹See pp. 1032-33 *supra*.

¹⁰Municipal Act, R.S.O. 1960, c. 249, s. 347(1).

¹¹*Ibid.*, s. 348 (1).

¹²*Ibid.*, s. 347.

The Ontario Municipal Board is the arbitrator if a by-law has been passed under section 348 (1).¹³

The law with respect to the selection of the arbitral tribunal exhibits a domination of history over clear and logical thinking. In many cases one is required to thread one's way through a legislative maze to determine with certainty which is the proper tribunal. In certain cases this task is quite difficult.

Expropriations by the Metropolitan Separate School Board provide an example. The Board has a geographical jurisdiction which is not coterminous with that of the Municipality of Metropolitan Toronto.¹⁴ It might be said that the proper tribunal to hear claims resulting from this Board's expropriations would be the Ontario Municipal Board under section 10(3) of the Expropriation Procedures Act.¹⁵ However, although it is clear that the Board is a "municipality" and a "local board" as defined in the Department of Municipal Affairs Act,¹⁶ can it be said that it is a "local board" of any municipality within section 10(3) of the Expropriation Procedures Act? The confusion does not end there.

Section 10(1) dictates that where the expropriating authority is a municipality as defined in the Department of Municipal Affairs Act, the identity of the arbitral tribunal is to be determined by reference to Part XVI of the Municipal Act. Does subsection 3 of section 10 come into operation at all? When one examines Part XVI of the Municipal Act, it appears to imply that if the land expropriated is within a municipal jurisdiction where there is an Official Arbitrator, the county or district court judge as sole arbitrator is excluded. The City of Toronto is within the geographical area of the Metropolitan Separate School Board. Does it follow that, if this board expropriates lands within the boundaries of the city, the claim for compensation will be heard by the city's Official Arbitrator (it has one); but that if the land is within Metropolitan Toronto, but in an area that does not have an

¹³*Ibid.*, s. 348.

¹⁴Metropolitan Separate School Board Act, 1953, Ont. 1953, c. 119, ss. 1(a)(c), 3, 8, 9, 10.

¹⁵Ont. 1962-63, c. 43, s. 10(3), as enacted by Ont. 1965, c. 39, s. 2.

¹⁶R.S.O. 1960, c. 98, ss. 1 (f) (d).

Official Arbitrator, the senior judge of the County Court of the County of York will be sole arbitrator?

The board of education for a city or town may expropriate land in a township for the purposes of a school site where the land adjoins a boundary between the city or town and the township.¹⁷ In cases where there are different arbitrators, under Part XVI of the Municipal Act, for the municipality in which the school board is situate and in the township where the expropriated land is situate, who would be the arbitrator to determine compensation, if this power were exercised?

A court asked to rule on these questions would furnish decisions which would be binding on the parties and serve as precedents for future cases. But the parties to an arbitration should not have to go to the Court of Appeal to find out what tribunal has jurisdiction to hear the case.

The examples cited demonstrate the confusing consequences that arise from the conferral of jurisdiction to arbitrate on several tribunals. The questions that arise in the course of arbitration proceedings are difficult enough, without any added uncertainty about the tribunal that has jurisdiction to act. We have assumed that section 10 of the Expropriation Procedures Act contains a comprehensive and mandatory code designating the tribunals authorized to determine compensation. If this is not correct, section 36 (2) of the Ontario Municipal Board Act¹⁸ increases the confusion. It reads as follows:

“36. (2) Notwithstanding anything in any general or special Act, where land or other property has been expropriated under the authority of any general or special Act all claims for compensation or damages by reason of such expropriation shall, where the expropriating body so elects by notice in writing, be heard and determined by the Board, and where such election is made sections 28, 30, 31, 32 and 36 of *The Public Works Act*, except as otherwise provided in the Act authorizing the expropriation, *mutatis mutandis* apply.”

We have assumed, and we think rightly, that section 10 of the Expropriation Procedures Act,¹⁹ by reason of section 2(1) thereof, prevails over section 36(2) of the Ontario Municipal

¹⁷Schools Administration Act, R.S.O. 1960, c. 361, s. 65(2).

¹⁸R.S.O. 1960, c. 274, s. 36(2).

¹⁹Ont. 1962-63, c. 43, s. 2(1), and s. 10, as re-enacted by Ont. 1965, c. 38, s. 2.

Board Act. However, legislation with regard to expropriation should be clear and unequivocal. The recent case of *Re Proud Homes Limited and Hamilton Board of Education*,²⁰ furnishes an example of litigation arising out of the legislation we have been discussing. The issue arose in an arbitration commenced before the Ontario Municipal Board. The question was whether the Board or the senior judge of the county court was the proper arbitral tribunal to fix compensation for land expropriated by the Hamilton Board of Education. After the arbitration had been commenced, a case was stated by the Ontario Municipal Board for the opinion of the Court of Appeal as to whether it had jurisdiction in the matter. The court held that the senior judge of the county court was the proper person to act as arbitrator. In the next chapter we make recommendations for legislative action to clear up this confusion.

FEES OF ARBITRATORS

The present law concerning arbitrators' fees has been criticized with justification. Under section 12 of the Municipal Arbitrations Act,²¹ the "fees and expenses" of the Official Arbitrator are payable by the respective parties to the arbitration as indicated in that section. No scale of fees and expenses is provided in the legislation.

Prior to 1956, the Official Arbitrator was entitled to be paid for his services while sitting on any arbitration at the rate of \$30 per day, or a proportionate part thereof where less than a whole day was taken, and \$10 where he convened the hearing but it was adjourned at the request of one of the parties.²² This section was repealed in 1956 for reasons that are not apparent.²³ The amount of fees payable to an Official Arbitrator now appears to be governed only by a "rule of thumb". An extract from the reasons for judgment of the Court of Appeal in *W. Harris & Co. Ltd. v. Municipality of Metropolitan Toronto*,²⁴ shows the scale of the fees the parties

²⁰[1966] 2 O. R. 378 (C.A.).

²¹R.S.O. 1960, c. 250.

²²Municipal Arbitrations Act, R.S.O. 1950, c. 244, s. 12.

²³*Ibid.*, s. 12, as repealed by Ont. 1956, c. 51, s. 3.

²⁴[1965] 2 O. R. 135.

were required to pay the arbitrator in that case (the Senior Judge of the County Court of the County of York) and to his clerk and reporter. "This hearing having extended over a period of approximately ten days, the arbitrator's fee was fixed at \$2,000.00 calculated at \$200.00 per diem, the clerk's fee at \$50.00 and the reporter's fee at \$500.00, in all \$2,550.00, of which the appellant's share would be \$1,275.00."²⁵

In *Canadian Memorial Chiropractic College v. Municipality of Metropolitan Toronto*,²⁶ the fee of the junior judge was \$7,500. In his account, this was expressed to be for preparing for the case prior to the hearing, hearing it (approximately fifty-six days) and preparing reasons. In addition, a clerk's fee of \$100 and a reporter's fee of \$127 ("re transcript of argument") were charged. The total account was \$7,727.00. This was required to be paid by the parties before the award was delivered.

When a claim is heard by the Ontario Municipal Board, no "fee or expense" is payable to the Board beyond fees directly relating to the proceedings before the Board, which are remitted by the Board to the Treasurer of Ontario.²⁷ The services of the members of the Board and its staff are, as in the case of the judges and staff of the regular courts, paid for out of public funds.

It is wrong that there should be a difference between the cost to the parties to arbitrations before a judge or an Official Arbitrator, and arbitrations before the Ontario Municipal Board. The accident of what legislation applies to a given case dictates what tribunal will be the arbitrator, and the same accident dictates the burden of costs imposed on the parties to the arbitration—a burden that is very substantial when small property owners' interests are involved.

No person should be obliged to pay a fee for services performed under statutory authority which are of a judicial character.

Elsewhere in this Report²⁸ we have dealt with the matter of judges' receiving remuneration in addition to their regular

²⁵*Ibid.*, 141.

²⁶[1967] 1 O. R. 244.

²⁷Ontario Municipal Board Act, R.S.O. 1960, c. 274, s. 98(2).

²⁸See Chapters 45, 46 *supra*.

salaries and allowances. We have indicated that such a practice is improper in principle and, in our view, illegal. Apart from the legal aspects discussed in Chapter 45, county or district court judges as sole arbitrators are not entitled to the fees and expenses provided for Official Arbitrators in section 12 (1) of the Municipal Arbitrations Act.²⁹

Section 347(2) of the Municipal Act provides that “the provisions of *The Municipal Arbitrations Act*, as to procedure and appeals, apply to arbitrations held and awards made by the judge”, i.e., when acting as sole arbitrator. This provision deals only with procedure and appeals. It does not confer substantive rights on county and district court judges to collect fees and expenses provided for Official Arbitrators by section 12 of the Municipal Arbitrations Act. The subject of fees and expenses cannot be said to be comprehended by the words “procedure and appeals”. Very much clearer language would be required to impose on a party to an arbitration an obligation to pay the fees to the presiding judge, even if the Legislature had power to pass such legislation.³⁰

In the two examples we cited the total fees and expenses included items for clerks and reporters. These would only be proper if they could be considered to be part of the “fees and expenses of the Official Arbitrator” within the meaning of section 12 (1) of the Municipal Arbitrations Act.

Obligations on parties to an arbitration to pay for the services of the staff of the arbitrator should not be imposed by obscure language.

In our opinion, the fees and expenses system, with regard to arbitrations arising out of expropriation proceedings, is indefensible and should be abolished.

INDEPENDENCE OF ARBITRATOR

As we have indicated, where a municipality has an Official Arbitrator it may dismiss him by merely repealing the by-law making the Municipal Arbitrations Act applicable to the municipality,³¹ or by passing a by-law making the Ontario

²⁹R.S.O. 1960, c. 250.

³⁰See Chapter 45 *supra*.

³¹Municipal Arbitrations Act, R.S.O. 1960, c. 250, s. 15(2).

Municipal Board the sole arbitrator for the municipality.³² Likewise, the sole arbitrator of a municipality can effectively be excluded from hearing claims against the municipality by the council passing by-laws under the Municipal Arbitrations Act,³³ or the Municipal Act.³⁴ Conversely, the municipality can, by repealing a by-law making the Municipal Board the arbitrator, dismiss the Board as its sole arbitrator.

It is wrong in principle that one of the parties to arbitration proceedings should have a right of election between arbitral tribunals, as conferred by the Municipal Arbitrations Act³⁵ and the Municipal Act³⁶; or, put differently, should have power in effect to dismiss the arbitrator from his or its present position as far as future cases are concerned. This is doubly wrong where the arbitrator is paid fees while presiding at arbitrations.

ARBITRAL FUNCTIONS OF THE ONTARIO MUNICIPAL BOARD

The functions and duties of the Ontario Municipal Board, hereinafter referred to in this chapter as "the Board", are further dealt with in Report Number 2. However, it is necessary to make some reference here to those functions as they relate to arbitration in expropriation proceedings.

The members of the Board are appointed by the Lieutenant Governor in Council and "shall hold office during pleasure".³⁷ The Board may be the arbitral tribunal in cases arising under the Expropriation Procedures Act,³⁸ which involve claims against municipalities as defined in the Department of Municipal Affairs Act, and also where claims are made against the provincial government.³⁹ We again emphasize that, as an important matter of principle, it is wrong for the deciding tribunal in cases where the issues are solely judicial, and they are solely judicial in compensation cases, not to be com-

³²Municipal Act, R.S.O. 1960, c. 249, s. 348(1).

³³R.S.O. 1960, c. 250, s. 15 (1).

³⁴R.S.O. 1960, c. 249, s. 348 (1).

³⁵R.S.O. 1960, c. 250, s. 15(1)(2).

³⁶R.S.O. 1960, c. 249, s. 348 (1).

³⁷Ontario Municipal Board Act, R.S.O. 1960, c. 274, s. 7.

³⁸Ont. 1962-63, c. 43, s. 10(1)(c), as re-enacted by Ont. 1965, c. 38, s. 2.

³⁹*Ibid.*, s. 10(3), as re-enacted by Ont. 1965, c. 38, s. 2.

pletely independent from both parties. When the Board hears claims against the provincial government, this principle is violated. In making this comment we wish to make it absolutely clear that we are not suggesting that any members of the Ontario Municipal Board have failed to act independently in cases involving the provincial government which fixes and pays their salaries. We have the highest respect for them and the manner in which they endeavour to discharge their diverse and difficult duties. This is not the point. The point is that the parties who are contesting claims with the provincial government may feel that the Board may be influenced in its decisions by its lack of independence from the government.

The Board exercises a very wide jurisdiction over many subjects in addition to that conferred on it under the Expropriation Procedures Act. The Act puts the members in a most difficult position in performing the duties imposed on them.

A passage from a judgment⁴⁰ of the Honourable Mr. Justice Kelly sets out with great clarity many of the difficulties that arise in clothing a board with powers, duties and responsibilities, some of which conflict with each other:

“It is clear, I think, that the Board has not applied the correct principles in determining the amount to be paid to the appellant by the authority. Normally, therefore, the matter would be remitted to [the] Board for reconsideration. In the case at bar, however, there appear to be cogent reasons militating against this course. Relevant legislation entrusts to the Board a number of different duties to be discharged by it in various capacities; the combined result is really an embarrassment to the Board and such as to make it extremely difficult for it to proceed objectively to determine the compensation to be payable to the appellant or to anyone in a position similar to that of appellant (*sic*). The Board, by virtue of certain sections now to be found in the *Planning Act* was required to pass upon the zoning and flood-control by-laws of the township before they became effective. The Board would also be required to review and pass upon any future by-law of the township to vary the zoning of appellant’s subject property and of the other properties owned by the appellant adjacent thereto. One of the questions to be determined in settling the amount of compensation is the probability, as of the date of expropriation, of the change in the zoning regulations to

⁴⁰*Valley Improvement Co. Ltd. v. Metropolitan Toronto and Region Conservation Authority*, [1961] O.R. 783.

permit appellant's contemplated uses. In another capacity the Board will be called upon to approve capital expenditures to be borne by the township as a result of its obligation to furnish funds to the Authority for its flood control and conservation works; thus the very amounts payable by the Conservation Authority as compensation to the appellant will fall in part to be borne by the township and will be the subject-matter of an application by the township to the Board for its approval *qua* capital borrowing. In these circumstances it simply does not have the appearance of justice that the Board be required as arbitrator to determine the compensation arising from the action of the Authority in expropriating appellant's lands. It is in no sense a criticism of the Board to state that the Legislature, in placing the Board in these various capacities, has demanded of it a standard of detachment beyond that reasonably to be expected of any tribunal. Consideration of these matters, coupled with the fact that the Board's decision is not grounded upon a conflict in the evidence as to value or upon the credibility of witnesses, impels me to the conclusion that this Court should determine the compensation to be awarded and I now turn directly to that issue."⁴¹

Any tribunal deciding a matter which is entirely judicial should decide it solely on the basis of the evidence put before it at the hearing. There are cases where, as shown by Mr. Justice Kelly, the Board cannot enter upon a hearing to fix compensation, freed from other considerations and responsibilities affecting the matter. For example, the powers of the Board under the Planning Act⁴² include decisions on matters relating to the approval of plans of subdivision. The ripeness of a plan of subdivision for approval by the Minister is a very important element in the fixing of compensation.⁴³

BOARDS OF ARBITRATION UNDER THE ONTARIO ENERGY BOARD ACT, 1964

Two different methods of arbitration to fix compensation are prescribed under the Act,⁴⁴ depending on the subject matter.

⁴¹*Ibid.*, 793-94.

⁴²R.S.O. 1960, c. 296, s. 28 (7), as amended by Ont. 1962-63, c. 105, s. 8 (1).

⁴³*The Board of Education for the Township of North York v. Village Developments Ltd.*, [1956] S.C.R. 539.

⁴⁴Ontario Energy Board Act, 1964, Ont. 1964, c. 71.

(1) Where the Ontario Energy Board makes an order authorizing a person to inject gas into or store gas or remove gas from a storage area, the person authorized by the order is required to make to the owner "fair, just and equitable compensation in respect of such gas or oil rights. . . ." ⁴⁵ The amount of compensation is "determined by a board of arbitration in a manner prescribed in the regulations". ⁴⁶ The relevant regulation provides that the arbitration board shall consist of not fewer than three and not more than five members, as the Lieutenant Governor in Council may from time to time determine. The members of the arbitration board are appointed by the Lieutenant Governor in Council. ⁴⁷

(2) Where the Ontario Energy Board has given any person leave to expropriate land for the purpose of constructing a pipeline or station, the compensation is determined by a board of arbitration of one or more persons appointed by the Minister. ⁴⁸

There is a right of appeal in both cases to the Ontario Municipal Board and from that Board to the Ontario Court of Appeal, with leave of the court upon any question of law or jurisdiction. The appeal to the Ontario Municipal Board is by way of a hearing *de novo*.

What appears to have been intended to be a "summary" procedure is a very complex one. The unfortunate owner is faced with two arbitrations on the merits, with full hearings with the same or other witnesses and an appeal on questions of law and jurisdiction to the Court of Appeal, and, under the Supreme Court Act, an appeal to the Supreme Court of Canada. A very formidable procedural weapon is placed in the hands of expropriating authorities when the owner may be subjected to such a series of appeals.

A case was put before this Commission in which a corporation was given the right to store gas in 1958 on lands owned by farmers in western Ontario. At the time of the hearing before this Commission (January, 1965) the owners of the lands had not yet received a final decision with respect

⁴⁵*Ibid.*, s. 21 (2) (a).

⁴⁶*Ibid.*, s. 21 (3).

⁴⁷O. Reg. 323/64, s. 3.

⁴⁸Ontario Energy Board Act, 1964, Ont. 1964, c. 74, s. 41(3).

to compensation. We are not considering the merits of this case, but it demonstrates the need for jealous vigilance in safeguarding the interests of those who may be subject to the powers of expropriation that may be conferred under the Act.

The arbitration boards provided for under the Act and its predecessor⁴⁹ have heard the following number of claims:

1961	—	5
1962	—	nil
1963	—	nil
1964	—	7
1965	—	2
1966	—	6
1967	—	2 (first six months)

There now appear to be four procedural stages in expropriations under the Ontario Energy Board Act, 1964:⁵⁰

- (1) The negotiation;
- (2) The arbitration by appointed arbitrators under sections 21 or 41;
- (3) The hearing *de novo* before the Ontario Municipal Board; and
- (4) The appeal on law or jurisdiction to the Ontario Court of Appeal.

This is a vexatious plethora of procedures. We recommend that the authority to fix compensation for expropriations of land or interests in land under the Ontario Energy Board Act should be vested in the Lands Tribunal recommended in the next chapter.

Where rights to store gas underground are given under the authority of the Ontario Energy Board Act, a completely different basis for compensation must be found than that which is applied where land is taken. The basis or formula should be defined after an investigation and report by the Ontario Energy Board, and applied by the Lands Tribunal.⁵¹

⁴⁹Ontario Energy Board Act, R.S.O. 1960, c. 271, ss. 14(3), 19(3).

⁵⁰Ont. 1964, c. 74.

⁵¹This recommendation differs from that contained in the Report of the Ontario Law Reform Commission, *The Basis for Compensation on Expropriation* (September, 1967), 63. At the time of its report, that Commission did not have before it the recommendation made in the next chapter for a Lands Tribunal.

CHAPTER 69

Tribunal to Fix Compensation

THE two main factors to be considered in establishing a tribunal to fix compensation are:

- (1) Its independence, both in fact and in law, from all the parties which may have matters before it for decision;
- (2) Its general competence and experience in making decisions concerning all relevant factors.

As we have emphasized, the assessment of compensation in expropriation cases is a purely judicial function. It requires a knowledge of the relevant law and its application to the proven facts and expert opinions adduced in evidence. There is no room in this decisional process for the introduction of governmental policy. This dictates that a properly established tribunal to hear compensation claims should have the same independence as a court of justice.

The involvement of governments at all levels in public projects which require the acquisition of land will continue to increase, and the number of applications to determine compensation will multiply. The character and competence of the tribunal to hear these cases must be designed not only to meet the present but the future needs of the Province.

For expropriations coming under the jurisdiction of the Federal Government, compensation is fixed by the Exchequer Court of Canada with a right of appeal to the Supreme Court of Canada.¹

¹Except those cases coming under the Railway Act, R.S.C. 1952, c. 234.

In England, since 1949, the Lands Tribunal, which has many of the attributes of a court, has had exclusive jurisdiction to determine disputed claims for compensation following compulsory purchases.²

The basic principle that the rights of the parties and the compensation to be paid should be decided by judges, can no longer be strictly adhered to in expropriation cases. This principle, which has prevailed in Ontario since Confederation, was departed from by the giving of some jurisdiction to the Ontario Municipal Board, and in some instances to an Official Arbitrator who is not a judge.

We recommend that a Lands Tribunal similar to the Lands Tribunal in England be established in Ontario with jurisdiction to fix compensation in all cases where the power of expropriation is exercised, and in those cases where statutory rights over land are exercised.

The tribunal should consist of at least seven members. The chairman and two vice-chairmen should be qualified lawyers. The chairman should have status and salary equal to those of a judge of the Supreme Court of Ontario, and the vice-chairmen should be paid salaries equal to those of county court judges. Lay members should be experienced and qualified appraisers. All members should have definite tenure of office. Provision should be made for the enlistment of qualified persons to act as *ad hoc* members of the tribunal.

Arbitrations should be heard by at least three members, one of whom should be a chairman or vice-chairman, except where the amount claimed is less than \$1,000. In such cases the arbitration might be conducted by one member. The salary of the members of the tribunal and its staff should be paid by the Province. The tribunal should sit, when required, in any place in Ontario.

There should be a right of appeal from the decisions of the tribunal to the Court of Appeal on all questions of law and fact, as is contemplated in the Expropriation Procedures Act.³

²Lands Tribunal Act, 1949, 12 & 13 Geo. VI, c. 42; see also 10 Halsbury, *Laws of England* (3rd ed.), 226.

³Ont. 1962-63, c. 43, s. 11.

In Ontario the diversity of tribunals exercising similar jurisdiction has made it difficult to achieve any uniformity of interlocutory and hearing procedures. If a single tribunal is created to hear expropriation cases, as we recommend, a uniform code of procedure could be laid down, regulating the successive steps in all arbitration proceedings.

A series of published reports of reasons for awards made by the tribunal should be made available by the government. These reports would tend to give uniformity to decisions in compensation matters and tend to facilitate negotiations for settlement.

CHAPTER 70

Arbitration Procedure

UNIFORM procedure is provided under the Expropriation Procedures Act for taking land, giving notice, taking possession and compulsory negotiation, but there is no uniformity of procedure for the conduct of arbitrations. Each type of tribunal—the judge, the Official Arbitrator, boards of arbitration under the Ontario Energy Board Act, 1964,¹ and the Ontario Municipal Board—follows its own procedures.

Table E to Chapter 72 demonstrates the diverse procedures followed by the three main types of arbitral tribunals in Ontario and the need for procedural reform.

Even with the boards of arbitration established under sections 21 and 41 of the Ontario Energy Board Act, 1964, the procedures are different. The board of arbitration established under section 21 is to proceed “in a manner prescribed in the Regulations”.² Ontario Regulation 323/64, passed under the Ontario Energy Board Act, provides that the board of arbitration shall proceed in a summary manner and that the rules of procedure of the Ontario Energy Board apply.³ These rules appear in Ontario Regulation 324/64. Basically, they provide for proceedings to be commenced by the filing of an application, setting out concisely the nature of the claim with certain prescribed details. This document serves much the same purpose as the statement of claim in a civil action. The respondent must file an “answer” which must “contain a clear and concise statement of the grounds upon which the application is opposed”.

¹Ont. 1964, c. 74.

²*Ibid.*, s. 21 (3).

³O. Reg. 323/64, s. 3 (5).

The Lieutenant Governor in Council, under section 41 (5), is empowered to make regulations governing the practice and procedure of the board of arbitration acting under section 41. Until such regulations are made, the practice and procedure of the Ontario Municipal Board apply to any arbitration under this section. To date, no regulations have been made. The practice and procedure of the Ontario Municipal Board, as set out in Regulation 466 of R.R.O. 1960, is similar to, but somewhat more elaborate than, that of the Ontario Energy Board, set out in Ontario Regulation 324/64.

As shown in Table E, the procedure before the judge sitting as sole arbitrator, and before the Official Arbitrator is governed by the Municipal Arbitrations Act.

It is accepted that there should be uniform procedure leading up to arbitrations in all expropriation cases in the Province. This principle of uniformity should be extended to arbitration procedure—that applicable to the pre-hearing stage and to the hearing itself.

If our recommendation that jurisdiction to fix compensation be conferred on a Lands Tribunal is adopted, uniform procedural rules should follow as a matter of course. Even if this recommendation is not adopted, it is still desirable that the practice before any existing tribunals should be standardized, if possible. There is no reason why an owner's procedural rights and liabilities should be different depending on the nature of the expropriating authority, or on the nature of the arbitral tribunal.

We do not think that rules of a comprehensive nature applying to other proceedings than those governing expropriation matters should be made applicable to such proceedings, as is the case of the rules of the Ontario Municipal Board⁴ and the Ontario Energy Board.⁵

In Report Number 2 we shall discuss the many and diverse duties and responsibilities of the Ontario Municipal Board. Many of these duties and responsibilities bear little, if any, resemblance or relation to each other; e.g., the approval of a debenture issue by a municipality and an arbitration to fix

⁴R.R.O. 1960, Reg. 466.

⁵O. Reg. 324/64.

compensation in an expropriation case. Rules should be made which are designed to bring about an effective resolution of the substantive issues involved in a particular type of case. General rules may be useful in serving a general purpose, but rules should be specially drawn governing arbitration proceedings in expropriation cases.

Certain specific aspects of procedure should be considered in formulating rules, whether they be provided in the Expropriation Procedures Act or be made by a rule-making body.

NOTICE OF ARBITRATION

Prior to the amendment to the Expropriation Procedures Act in 1965,⁶ there was express provision for the method of commencement of arbitration proceedings. The expropriating authority or the owner could serve notice of arbitration upon the other of them, stating that he or it required the compensation to be determined under the Act.⁷ Under this provision, the service of the notice of arbitration was the first formal step leading to the arbitration hearing. Section 9 was repealed in 1965 and a new section 9 substituted.⁸ This section does not contain any requirement for a notice of arbitration, or the service of any document. It concludes merely with the statement that "where the expropriating authority and the owner are in agreement on the matter [to avoid formal negotiation] they may have the compensation determined by arbitration under section 10". There should be a formal procedural step which gives rise to rights and imposes liabilities in arbitration proceedings. Under section 9a (7),⁹ a notice of arbitration may be served where negotiation proceedings do not result in a settlement. The same provision should obtain where the parties agree under section 9 to forego negotiation proceedings.

PLEADINGS

Table E to Chapter 72 shows the lack of uniformity concerning the service of documents in the nature of pleadings.

Pleadings in civil cases, originally intended to define and

⁶Ont. 1962-63, c. 43, ss. 9, 9a, 10, as re-enacted by Ont. 1965, c. 38, s. 2.

⁷*Ibid.*, s. 9, prior to its enactment in 1965.

⁸*Ibid.*, s. 9, as re-enacted by Ont. 1965, c. 38, s. 2.

⁹*Ibid.*, s. 9a, as enacted by Ont. 1965, c. 38, s. 2.

narrow the issues before the court and to give the opposite party notice of the case he had to meet, eventually developed into technical monstrosities used more for strategic purposes than for elucidating the truth. Long drawn out and expensive contests over the pleadings were engaged in. These bore no relation to the object of the litigation—a just decision on the merits of the matter in dispute.

In modern times pleading has been simplified, but it still has its technical aspects. The Rules of Practice and Procedure require that “pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved. . . .”¹⁰ This is a simple statement, but there is still much interpretative jurisprudence. Many interlocutory motions arise with reference to pleadings, and not infrequently causes of action are denied to a party because of faulty pleading. The process of detailed pleading is not suitable for compensation procedure in expropriation cases.

It should be sufficient in ordinary cases for the claimant to set out in his notice of arbitration, or in reply to a notice served by the expropriating authority, a simple statement of the nature of his claim. Usually this could be done very briefly and the documents might be drawn by a layman. In complicated cases involving such things as disruption of business, if the claim is not set out with sufficient particularity, the tribunal can order further particulars. In no case should the statement of the nature of the claim be used as a technical barrier so as to exclude legitimate elements in a claim for compensation. In proper cases the expropriating authority should be required, at the risk of costs, to admit or deny elements of compensation claimed.

The negotiation procedure established in 1965 should make it quite simple to prepare the necessary statements.

PRODUCTION AND DISCOVERY

The present practice with respect to the production of documents and discovery is far from uniform. A reference to Table E shows that the Ontario Municipal Board may make

¹⁰Rules of Practice and Procedure of the Supreme Court of Ontario, Rule 143.

orders for examinations and require documents to be produced and admitted. In proceedings to which the Municipal Arbitrations Act¹¹ applies, the Official Arbitrator is given all the powers of a judge of the Supreme Court, including those relating to the production of books and papers, and the time and place of taking examinations. No specific rights are given under these provisions, nor are the rights of production defined. We emphasize again that it is not desirable that the proceedings of the ordinary courts should be introduced into arbitration cases. Informality should prevail, but informality should not be allowed to destroy the effective determination of contested cases.

There is only one issue in a compensation case: How much should the expropriating authority pay? There may be, however, different elements in this issue, depending on the nature of the property taken. With these elements this Commission is not concerned.¹²

Production

The procedure of the Lands Tribunal of England forms a useful precedent. It provides a practice that appears to have been satisfactory.

Rule 42 (4) of the Lands Tribunal Rules, 1963, requires the parties to furnish to each other, through the Registrar of the Tribunal, "a copy of each of the following documents relating to the evidence to be given by his expert witnesses . . .

(i) every plan and valuation of the land or hereditament which is the subject of the proceedings (including particulars and computations in support of such valuation) which it is proposed to put in evidence;

(ii) a statement of any prices, costs or other particulars and any plans relating to a property or properties other than the said land or hereditament which are proposed to be given in evidence in support of any such valuation, or a statement that no such prices, costs, particulars or plans will be relied upon."

Rule 42(6) provides:

"42. (6) If an application for leave to call more than one, or more than one additional, expert witness is made at the hearing

¹¹R.S.O. 1960, c. 250, s. 1 (2) (e), as amended by Ont. 1965, c. 78, s. 1.

¹²The basis of compensation has been dealt with by the Ontario Law Reform Commission. See Report of the Ontario Law Reform Commission, *The Basis for Compensation on Expropriation* (September, 1967).

and is granted by the Tribunal, or if at the hearing any party seeks to rely upon any plans, valuations or particulars which appear to the Tribunal not to have been sent to the registrar in accordance with the foregoing provisions of this Rule, the Tribunal shall, unless it is satisfied that no prejudice to any party will arise, adjourn the hearing on such terms as to costs or otherwise as it thinks fit.”

The Court of Appeal in England has held that, where paragraph 42(6) applies, the Lands Tribunal must adjourn the hearing in accordance with that paragraph; it may not exclude properly tendered material evidence.¹³

The Lands Tribunal Rules further provide:

“44. Any party to any proceedings shall furnish to the registrar on his request any document or other information which the Tribunal may require and which it is in his power to furnish and shall afford to all other parties to the proceedings an opportunity to inspect such documents (or copies of such documents) and to take copies thereof;

Provided that nothing in this Rule shall be deemed to require the furnishing of any information which it would be contrary to the public interest to disclose.

45. If it appears to the Tribunal that any party to proceedings before the Tribunal has failed to send a copy of any document required under these Rules to be sent to any other party or to the registrar, the Tribunal may direct that a copy of the document shall be sent as may be necessary and that the further hearing of the proceedings be adjourned, and may in any such case require the party at fault to pay any additional costs occasioned thereby.”

Our discussions with Sir William Fitzgerald, the Chairman of the Lands Tribunal, and H. P. Hobbs, a member of the Tribunal, revealed that the usual practice in England is for expropriating authorities to make frank disclosure of their valuations to owners at an early stage in the negotiations, and to advise the owner as to the exact amount of the offers made to other owners in the area affected by the work. Undoubtedly the Rules have promoted this practice. This is a practice of exchange of information not dissimilar to that followed in Ontario in many cases of disputed valuations for succession duty purposes where there is a free exchange of valuations,

¹³*Routh's Trustees v. Central Land Board*, 8 P. and C.R. 290.

if not in writing, at least, orally, between the Treasury Department and the estate representatives.

Regulations passed under the Ontario Municipal Board Act recognize that there are proper cases where production should be made.

We recommend:

(1) That the parties to expropriation proceedings should be required to produce to the parties adverse in interest copies of the following documents relating to the evidence to be given by expert witnesses:

(a) Plans and valuations of the land which is the subject of the proceedings, including particulars and computations in support of such valuations, which are to be submitted in evidence;

(b) A statement of any prices, costs or other particulars, and any plans relating to properties other than the land in question, which are proposed to be given in evidence, or a statement that no such prices, costs, particulars or plans will be relied on.

(2) Similar provisions to those contained in Rule 42 (6) of the Lands Tribunal Rules of England should be adopted;

(3) Any party to the proceeding should have a right to apply to the Registrar of the Tribunal for production and inspection of any documents (other than privileged communications) which the Registrar may deem properly producible and relevant to the issues involved in the arbitration. The Registrar should have power to fix the terms of production and the time and place of inspection. Privilege should not extend to appraisals and other material expressly directed by the rules to be produced.

Discovery

We do not think oral discovery is necessary in all cases. It could be vexatious and used to delay the final disposition of arbitrations. But there are cases where discovery may be essential to a proper hearing and would shorten the arbitration hearing. We think that the Registrar should have the

power now exercised by the Ontario Municipal Board¹⁴ to order examinations for discovery to be held in special cases, where an examination is shown to be necessary.

Although the negotiation procedure provided in the 1965 amendment to the Expropriation Procedures Act is carried on without prejudice, it should provide both parties with much of the information that would be forthcoming on an examination for discovery.

The recommendations we have made concerning production and discovery are designed to facilitate negotiation and voluntary settlements. They should assist in crystallizing issues before the arbitration takes place, thereby reducing the element of surprise. The penetrating statement of Mr. Justice Frankfurter in *Johnson v. U.S.*,¹⁵ that “[a] trial is not a game of blind man’s buff”, applies with great force to an arbitration to fix compensation for property taken without the owner’s consent. Any sporting theory of a trial in the ordinary courts of justice fails to appeal to an owner in an arbitration, when the resources of all tax-payers, including those of the owner himself, are used to gather the factual information and pay for the appraisals on which the expropriating authority relies. In fairness, the contending parties in an expropriation case ought not to be treated as ordinary private litigants.

INTERLOCUTORY APPLICATIONS

Interlocutory procedure in England is governed by the following rule of the Lands Tribunal:

“31. (1) Except where these Rules otherwise provide, any application for directions of an interlocutory nature in connection with any proceedings shall, unless otherwise ordered by the President, be made to the registrar.”

Under the regulations governing procedure before the Ontario Municipal Board,¹⁶ where any matter is not expressly provided for, the rules of practice under the Judicature Act—

¹⁴R.R.O. 1960, Reg. 466, s. 14.

¹⁵333 U.S. 46, 54 (1947).

¹⁶R.R.O. 1960, Reg. 466.

applicable to procedure in the ordinary courts—are to be followed as far as they are applicable, as determined by the Board.¹⁷ Interlocutory applications are dealt with by the Board.¹⁸

It is essential that interlocutory applications should be kept to a minimum in arbitration proceedings. These should be heard by a legally qualified member of the Lands Tribunal, or the Registrar of the Tribunal if he is legally qualified. We suggest that, unless the Chairman otherwise directs, the Registrar should deal with interlocutory matters.

¹⁷*Ibid.*, s. 2.

¹⁸*Ibid.*, s. 18.

CHAPTER 71

The Arbitration Hearing

IT is not our purpose to formulate detailed rules for the conduct of arbitrations. We only indicate some fundamental matters that should be clarified. Some basic rules are provided for hearings before the Ontario Municipal Board,¹ but they are inadequate for the orderly and uniform conduct of hearings and no rules are provided for other arbitrations.

WHO SHOULD BEGIN

We received a submission that the landowner should not be obliged to present his case first at the hearing. It was felt that this gave the expropriating authority a tactical advantage. In England the person claiming compensation shall begin, and the other parties are heard in the order that the tribunal may determine.²

In expropriation arbitrations conducted by the Exchequer Court of Canada the owner, notwithstanding that he may be the defendant in the proceedings, is required to lead his evidence first and has the right to reply to any evidence adduced by the expropriating authority.^{2a} We think this is the proper procedure to be followed, but it should not be implied that the order of the hearing places an onus of proof on the owner. This we shall deal with later.

¹R.R.O. 1960, Reg. 466, ss. 10-18.

²Lands Tribunal Rules, 1963 (S.I. 1963, No. 483), Rule 35(1).

^{2a}General Rules and Orders of the Exchequer Court of Canada, Rule 158.

TAKING A VIEW

There should be a rule empowering the tribunal to take a view of the expropriated property. This naturally flows from the nature of the issue in the proceeding. The board of negotiation under the Expropriation Procedures Act as amended in 1965,³ is required "to inspect the land that has been expropriated". It is equally important that the arbitral tribunal at least be empowered to do so, but its right of inspection should be wider than that provided in civil cases by Rule 265.^{3a} The tribunal should have a right to consider what it saw as relevant evidence adduced in the case. It should set out clearly in its reasons for its award what weight it gave to the view taken and why it gave weight to it.

EVIDENCE

We do not think there should be any special rules of evidence in expropriation cases. To attempt to formulate special rules might do more harm than good. Special issues frequently arise, such as the admissibility of evidence showing allegedly comparable sales, offers to purchase, listings, settlements and awards in other cases. We have not received any submission critical of the rulings on these matters by the existing tribunals of original jurisdiction or appellate tribunals. Considerable latitude should be permitted in the admission of evidence of this character, with concentration more on the weight of the evidence than on its admissibility.

ONUS OF PROOF

The language used in three Canadian cases⁴ indicates that the onus is on the owner to prove the value in expropriation arbitrations. This burden, in so far as it relates to the proof of market value, should not be placed on either party to these proceedings. Land that has been taken has a market

³Expropriation Procedures Act, Ont. 1962-63, c. 43, s. 9a(6), as enacted by Ont. 1965, c. 38, s. 2.

^{3a}Rules of Practice and Procedure of the Supreme Court of Ontario, Rule 265.

⁴*The King v. Kendall* (1912), 14 Ex. C. R. 71, 86; *The King v. W. D. Morris Realty Limited*, [1943] Ex. C. R. 140, 154-55; and *Re Duthoit and Province of Manitoba* (1966), 54 D.L.R. (2d) 259, 267.

value. Arbitration proceedings to determine market value are more in the nature of an investigation than a trial. However, the onus of proof of items of special value or consequential damage should be on the owner. This is in accordance with the generally accepted principle: he who has peculiar knowledge of, and affirms a particular set of facts, should bear the onus of proof of those facts.

NUMBER OF EXPERT WITNESSES

Paragraph 6 in Table E⁵ to Chapter 72 indicates that the law concerning the number of expert witnesses before arbitral tribunals is not clear. A real possibility of unfairness to owners exists if they are met at a hearing with a battery of experts produced by the expropriating authority.

In England the relevant Lands Tribunal Rule reads as follows:

“42. (1) This Rule applies to any proceedings before the Tribunal except an appeal from the decision of a local valuation court.

(2) Not more than one expert witness on either side shall be heard unless otherwise ordered:

Provided that, where the appeal or reference includes a claim for compensation in respect of minerals or disturbance of business, as well as in respect of land, one additional expert witness on either side on the value of the minerals or, as the case may be, on the damage suffered by reason of the disturbance may be heard.

(3) An application for leave to call more than one, or more than one additional, expert witness may be made to the registrar in accordance with the provisions of Rule 31 or may be made to the Tribunal at the hearing.”

A profession of surveyors has been developed in England. They are highly skilled in making valuations with a knowledge of all the elements that should be taken into account. That such witnesses would be available throughout Ontario when required is questionable. It may well be that it would be a hardship to restrict the parties to one expert in the first instance. Different elements in the valuation of a claim may

⁵See p. 1068 *infra*.

have to be considered, e.g., construction costs, business disturbance, planning, zoning and other aspects of land use control.

Until there are in Ontario a sufficient number of qualified appraisers, two experts should be permitted to give evidence without special leave.

STATED CASE

In certain cases the substantial issue may turn on a point of law, such as whether the loss of or interference with a particular right is compensable under the relevant legislation. For example, in *Re Thomson Lumber and Building Materials Ltd. et al and Minister of Highways*,⁶ the main issue was whether the deprivation of an owner's right of access to a highway was compensable under the Highway Improvement Act. If it is apparent early in the proceedings that a point of law will govern the result, much time and expense might be saved by stating a case for the opinion of an appellate court. Such a procedure is now provided by the Ontario Municipal Board Act.⁷ We recommend that the Expropriation Procedures Act should make provision for a stated case in all expropriation arbitrations.⁸

WRITTEN REASONS FOR DECISIONS⁹

The factors that have to be taken into consideration and the detailed submissions that are often made, together with the unrestricted right of appeal in compensation cases, make it imperative that reasons for decision should be fully expressed in writing. There is nothing in the statutes or regulations requiring arbitrators in expropriation cases to give reasons, apart from vague references in the Municipal Arbitrations Act.¹⁰ Where the official arbitrator proceeds partly on view and partly on special knowledge or skill possessed by

⁶[1964] 2 O.R. 175 (C.A.).

⁷R.S.O. 1960, c. 274, s. 93.

⁸Appeals by way of stated case are discussed in Chapters 34 and 51 *supra*.

⁹We discuss the subject of written reasons for decisions of tribunals in Chapter 14 *supra*.

¹⁰R.S.O. 1960, c. 250.

himself, he shall put in writing as part of his reasons a statement of such matter sufficiently full to allow the Court of Appeal to determine the weight that should be attached to it.¹¹ In addition, the arbitrator is required to file the award, the exhibits and "the reasons for his decision" in the office of the registrar of the Court of Appeal.¹²

There should be a specific requirement, either by a statute or by rules, that the tribunal should be required to give written reasons for its decisions in all cases. *Pro forma* reasons of the sort that are sometimes given by arbitral tribunals other than the Ontario Municipal Board ought not to be sufficient. Some arbitrators adopt a sort of formula designed to make the award impregnable in the Court of Appeal, rather than to inform the Court of Appeal and the parties what the process of reasoning was. On the other hand some arbitrators give no reasons at all. The parties are entitled to written reasons for an award which demonstrate the reasoning by which the award was arrived at.

SHORTHAND REPORTERS

The right of appeal in arbitration cases would not be meaningful unless the proceedings were properly reported by a fully qualified court reporter. This should be expressly provided for in the rules.

COSTS

The expenses incurred by an owner for solicitors' and valuers' fees are elements to be considered in determining the basis of compensation where land has been expropriated. This matter has been the subject of a reference to the Ontario Law Reform Commission and has been dealt with in its report.¹³

¹¹*Ibid.*, s. 4.

¹²*Ibid.*, s. 5.

¹³See Report of the Ontario Law Reform Commission, *The Basis for Compensation on Expropriation* (September, 1967).

CHAPTER 72

Appeals

THE rights of appeal and the practice on appeals are governed by the following provisions of the Expropriation Procedures Act:¹

“11. (1) The expropriating authority or the owner may appeal to the Court of Appeal from any determination or order of a judge, an official arbitrator or the Board under section 10.

(2) The practice and procedure as to the appeal and proceedings incidental thereto are the same *mutatis mutandis* as upon an appeal from the High Court, except that the appeal may be taken at any time within six weeks from the day the determination or order was sent by registered mail to the parties, and the determination or order shall be deemed to have been received on the second day following its mailing, and the period of any vacation of the Supreme Court shall not be reckoned in computing such six weeks.”

The right of appeal is one thing; the powers conferred on the Court of Appeal is quite a different thing. Without power in the Court of Appeal, the right to appeal is meaningless. The powers of the Court of Appeal are not clearly set out in the Act. The parties must look to sections 26 and 27 of the Judicature Act² for the powers of the court.

The words “may appeal from any determination . . .” would appear to confer a right of appeal on all questions of law or fact if the determination or order is that of a judge, an Official Arbitrator, or the Ontario Municipal Board “under

¹Ont. 1962-63, c. 43, s. 11.

²R.S.O. 1960, c. 197.

section 10". However, section 10³ provides that where the expropriating authority has received its powers under sections 21 and 41 of the Ontario Energy Board Act,⁴ 1964, the claim for compensation shall be determined under those sections. These sections, when read with section 95 of the Ontario Municipal Board Act,⁵ would restrict the right of appeal to the Court of Appeal to questions of law and jurisdiction, and only with leave of the court obtained within one month after the making of the order or decision sought to be appealed from, or within such time as the court may allow.

It is difficult to give a clear answer to the question: Does section 11 of the Expropriation Procedures Act apply to appeals from decisions of the Ontario Municipal Board when it derives jurisdiction under the Ontario Energy Board Act? If it does not and one is obliged to look to the Ontario Energy Board Act for the provisions respecting such appeals under that Act, appeals are restricted to questions of jurisdiction or questions of law and they lie only where leave to appeal is obtained from the Court of Appeal. It is clear from section 11 of the Expropriation Procedures Act that the appeals contemplated by that section are not restricted to any particular questions and do not require leave. There does not appear to be any logical reason why the right of appeal from decisions of the Ontario Municipal Board fixing compensation under the Ontario Energy Board Act should be more restricted than that from decisions fixing compensation in other cases.

The words used in section 11 (1) of the Expropriation Procedures Act are strange and unusual words to be employed where creating a right of appeal. The words are "may appeal". In creating a right of appeal the usual words are "an appeal lies".⁶

If it is intended by the language used in section 11 of the Expropriation Procedures Act—when read together with sections 26 and 27 of the Judicature Act—that the Court of

³Expropriation Procedures Act, Ont. 1962-63, c. 43, s. 10, as re-enacted by Ont. 1965, c. 38, s. 2.

⁴Ont. 1964, c. 74, ss. 21, 41.

⁵R.S.O. 1960, c. 274.

⁶Judicature Act, R.S.O. 1960, c. 197, s. 26(1); Ontario Energy Board Act, 1964, Ont. 1964, c. 74, ss. 21(4), 41(7); Ontario Municipal Board Act, R.S.O. 1960, c. 274, s. 95; County Courts Act, R.S.O. 1960, c. 76, s. 38.

Appeal should have all the powers of the arbitral tribunal, this should be clearly stated in the Act.

It cannot be said that there is a definite practice and procedure of the Court of Appeal in disposing of appeals from judgments of judges of the High Court. In practice the court views a verdict of a jury quite differently from the judgment of a trial judge sitting without a jury. If there is evidence to support the jury's verdict, the court supports it. On the other hand, the judgment of the trial judge is frequently set aside because the Court of Appeal takes a view of the evidence different from that of the trial judge. Which practice and procedure is the Court of Appeal required to follow under the provisions of section 11?

We recommend that the rights of the parties to appeal should be well defined. The appeal should lie on both questions of law and fact. The Court of Appeal should have power to give any judgment or make any orders that the arbitral tribunal could have made. We see no reason why the Court of Appeal should not be clothed with power to exercise the same power it exercises on an appeal from a judge of the High Court sitting without a jury. This may now be the law by reference to the Judicature Act, but it should be clearly set out in the Expropriation Procedures Act.

Section 11 is deficient in another respect. ". . . [T]he appeal may be taken at any time within six weeks from the day the determination or order was sent by registered mail to the parties, and the determination or order shall be deemed to have been received on the second day following its mailing, and the period of any vacation of the Supreme Court shall not be reckoned in computing such six weeks."⁷ The effective words are: "was sent by registered mail". The usual word used in such circumstances is "served". "Serve" is defined in the Act to mean "to serve personally or by registered letter addressed to the person to be served at his last known address, or, if that person is unknown or if his address is unknown, by publication once a week for three weeks in a newspaper having general circulation in the locality in which the land concerned is situate".⁸

⁷Expropriation Procedures Act, Ont. 1962-63, c. 43, s. 11 (2).

⁸*Ibid.*, s. 1 (h).

In using the word "sent" instead of the word "served", as defined in the Act, the statute makes provision for the extinguishment of rights of appeal by loose procedure, or even by a deliberate misuse of the procedure. The following questions or matters of vital importance arise:

- (1) On whom is placed the obligation "to send" the determination or order to the parties?
- (2) To what address must the determination or order be sent? To general delivery? To the address named in the claim, which may have been changed by reason of possession having been taken from the owner?
- (3) No provision is made for unusual circumstances; e.g., the owner may have died between the hearing and the delivery of the determination or order; there might be a post office strike delaying its delivery; it may have been mailed by accident to the wrong address; the owner might be sick and in hospital, unable to look after his personal affairs.

Many other unusual circumstances might arise, but no matter what the circumstances might be, the owner is "deemed" by the statute to have received the determination or order on the second day following its mailing, whether he has received it or not, and the time for appealing expires within six weeks of the day the determination or order "was sent". This is harsh and unconscionable legislation. It operates to the benefit of expropriating authorities and against the interest of unfortunate owners.

Under the Ontario Municipal Board Act, the Board is given power to extend the time within which anything is required to be done, "if the circumstances of the case in its opinion so require".⁹ The Rules of Practice and Procedure governing procedure in the Supreme Court and in the county courts provide for the extension of time within which anything may be required to be done in any proceedings.¹⁰ But these are impliedly excluded by the provisions of section

⁹R.S.O. 1960, c. 274, s. 89.

¹⁰Rules of Practice and Procedure of the Supreme Court of Ontario, Rule 178.

11 (2).¹¹ The Court of Appeal or a judge thereof could surely be trusted to exercise a discretion to extend the time for appealing under the provisions of section 11 in special circumstances. We recommend that power be given to a judge of the Court of Appeal to extend the time for appealing in proper cases.

¹¹In *Maher v. Sheridan*, [1966] 2 O.R. 284, the Court of Appeal held that the Rules of Practice and Procedure did not apply to an appeal under the Mining Act, R.S.O. 1960, c. 241.

Table E
EXISTING PROVISIONS RELATING TO PRACTICE AND PROCEDURE

<i>County or District Court Judge. (The sole arbitrator under the Municipal Act, s.347(1).) Expropriation Procedures Act, s.10(1)(a).</i>	<i>Official Arbitrator. Municipal Arbitrations Act, s.1(3) as enacted by 1965, c.78, s.1; Expropriation Procedures Act, s.10(1)(b).</i>	<i>Ontario Municipal Board. Expropriation Procedures Act, s.10(1)(c) and s.10(3).</i>
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COMMENCEMENT OF PROCEEDINGS

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| <p>1. Serve clerk of municipality and other interested persons with notice that matter is referred to the Official Arbitrator (the Judge), specifying nature of claim or question to be determined and the amount in controversy. Municipal Arbitrations Act, s.3.</p> | <p>See column 1.</p> | <p>Either party may serve the other with Notice of Application setting forth the nature of the application and the relief sought. R.R.O. 1960, Reg. 466, s.4, Form 1; made pursuant to the Ontario Municipal Board Act.</p> |
| <p>2. File such Notice with the Official Arbitrator (the Judge). Municipal Arbitrations Act, s.3.</p> | <p>See column 1.</p> | <p>The Notice of Application is then filed with the Board. Reg. 466, s.7.</p> |

INTERLOCUTORY PROCEEDINGS—PLEADINGS

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| <p>3. No pleadings, apart from notice referred to above.</p> | <p>See column 1.</p> | <p>Reg. 466, s.2 provides that where any matter is not expressly provided for by the rules in the Regulation, the Rules of Practice and Procedure under the Judicature Act shall be followed as far as they are applicable, as determined by the Board. Ss. 4-9 provide for documents in the nature of pleadings</p> |
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Table E—(Continued)

<i>County or District Court Judge. (The sole arbitrator under the Municipal Act, s.347(1).) Expropriation Procedures Act, s.10(1)(a).</i>	<i>Official Arbitrator. Municipal Arbitrations Act, s.1(3) as enacted by 1965, c.78, s.1; Expropriation Procedures Act, s.10(1)(b).</i>	<i>Ontario Municipal Board. Expropriation Procedures Act, s.10(1)(c) and s.10(3).</i>
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PRODUCTION AND DISCOVERY

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| 4. Questionable whether parties have right to production and discovery. The Municipal Arbitrations Act, s.1(2)(e) gives all the powers of a Supreme Court Judge including those relating to the production of books and papers, etc., the time and place of taking examinations, etc., to the Official Arbitrator. This may not apply to Judges and may not amount to conferring procedural rights on parties in the absence of properly enacted rules to that effect. | See column 1. | Under Reg. 466, s.14 the Board may make orders for production of documents, for inspection, for examinations for discovery, for the examination of witnesses who cannot attend the hearing by reason of sickness, etc. A party, prior to the hearings, may cause the other to admit any document that requires to be proved, to save expense. Similar provisions are found in the Ontario Municipal Board Act, ss. 37, 90. |
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The Power Commission Act, s.24(6) provides that where the Hydro-Electric Power Commission elects to have compensation determined by the Ontario Municipal Board, in addition to the powers conferred upon the Ontario Municipal Board by s.28 of the Public Works Act, and by the Ontario Municipal Board Act, the Ontario Municipal Board has the power, upon the application of the Commission or the owner, to direct the filing and serving of pleadings, and particulars thereof, and to direct discovery and production as in actions in the Supreme Court, and in accordance with the rules of practice in that behalf.

THE HEARING

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| 5. No stated rules regarding hearings, apart from s.1(2)(e) of the Municipal Arbitrations Act giving to the Official Arbitrator all the powers of a Supreme Court Judge. | See column 1. | Reg. 466, s.17 provides that at the hearing of an application, the party commencing the proceedings shall begin and, after the evidence in defence is given, has the right of reply. Parties have the right to have witnesses subpoenaed. Form 9. |
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Also, during the course of the hearing, it would appear, the Board may state a case in writing for the opinion of the Court of Appeal upon any question that, in the opinion of the Board, is a question of law. Ontario Municipal Board Act, s.93.

Table E—(Continued)

County or District Court Judge. (The sole arbitrator under the Municipal Act, s.347(1).) Expropriation Procedures Act, s.10(1)(a).	Official Arbitrator. Municipal Arbitrations Act, s.1(3) as enacted by 1965, c.78, s.1; Expropriation Procedures Act, s.10(1)(b).	Ontario Municipal Board. Expropriation Procedures Act, s.10(1)(c) and s.10(3).
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THE HEARING—(Continued)

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| 6. Questionable whether there is any restriction on the number of expert witnesses that may be called. | See column 1. | If, by virtue of the definitions of "action" in s.1(a) and "court" in s.1(b) of the Evidence Act, s.10 of that Act applies, then no more than three expert witnesses may be called without the leave of the Board. |
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THE AWARD

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| 7. The Municipal Arbitrations Act, s.4 provides that where the Official Arbitrator (the Judge) proceeds partly on view or upon special knowledge this shall be incorporated into his reasons for judgment. S.5 provides that the Official Arbitrator (the Judge) shall file his award, the exhibits, and his reasons in the office of the registrar of the Court of Appeal. This may be an indirect requirement that reasons be, in fact, given. (Further, see note in item 10, <i>infra</i> .) The Official Arbitrator (the Judge) must give notice of filing to the parties. S.5. The award is not to be made public until the Official Arbitrator's fees are paid. S. 6. | See column 1. | It appears, according to Reg. 466; s.25, that the Board's "award" would be in the form of an order, prepared by the applicant and approved by the respondent. See Form 10 of this Regulation. There is no requirement that reasons be given for the order. |
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COSTS

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| 8. The Official Arbitrator may determine the incidence and scale of costs. They shall be taxed by one of the taxing officers of the Supreme Court. Municipal Arbitrations Act, s.11. | See column 1. | Costs shall be in the discretion of the Board and may be fixed in any case at a sum certain or may be taxed. The Board may order by whom costs are to be taxed and under which scale. Ontario Municipal Board Act, s.96. See also column 1 as to costs under the Expropriation Procedures Act, s.13. The comments therein regarding s.11 of the Municipal |
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- The Expropriation Procedures Act, s.13 provides

Table E—(Continued)

County or District Court Judge. (The sole arbitrator under the Municipal Act, s.347(1).) Expropriation Procedures Act, s.10(1)(a).

Official Arbitrator. Municipal Arbitrations Act, s.1(3) as enacted by 1965, c.78, s.1; Expropriation Procedures Act, s.10(1)(b).

Ontario Municipal Board. Expropriation Procedures Act, s.10(1)(c) and s.10(3).

COSTS—(Continued)

for the awarding of costs in a manner different from s.11. S.11 of the Municipal Arbitrations Act is made applicable by the Expropriation Procedures Act, s.10(1)(a)(b). It is not clear whether it takes precedence over s.13 of the Expropriation Procedures Act, if there be any conflict between the two.

Arbitrations Act are probably equally applicable to s.96 of the Ontario Municipal Board Act.

FEES OF ARBITRAL TRIBUNAL

9. Fees of Official Arbitrator. Under the Municipal Arbitrations Act the award is not released until the fees of the arbitrator are paid. S.6. Fees are payable by the parties proportionately but may be awarded against any of the parties as costs of the arbitration. S.12.

See column 1, where it is suggested that a judge sitting as sole arbitrator may not be entitled to a fee.

S.99 of the Ontario Municipal Board Act provides for the payment, upon every application to the Board or every order thereof, of such fee as the Board may direct, regard being had to the time occupied by the Board and its officers and the expense occasioned to the Province in the matter.

Although the Municipal Act, s.347(2), provides that the Municipal Arbitrations Act as to procedure and appeals applies to arbitrations held and awards made by the judge, it is not clear that a judge is entitled to a fee unless the entitlement thereto is a matter of "procedure". (See pp. 1037-39 *supra*.)

APPEAL TO COURT OF APPEAL

10. The Expropriation Procedures Act, s.10(1)(a)(b) provides that the provisions of the Municipal Arbitrations Act "as

See column 1.

Appeals are clearly under s.11 of the Expropriation Procedures Act, since by s.10(3) of that Act ss. 94, 95 of the Ontario Municipal Board Act do not apply.

Table E—(Continued)

County or District Court Judge. (The sole arbitrator under the Municipal Act, s.347(1).) Expropriation Procedures Act, s.10(1)(a).	Official Arbitrator. Municipal Arbitrations Act, s.1(3) as enacted by 1965, c.78, s.1; Expropriation Procedures Act, s.10(1)(b).	Ontario Municipal Board. Expropriation Procedures Act, s.10(1)(c) and s.10(3).
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APPEAL TO COURT OF APPEAL—(Continued)

to procedure” apply where the tribunal is either (a) the judge or (b) the Official Arbitrator “as provided for in Part XVI of the Municipal Act”. This Part includes s.347(2) which says that the provisions of the Municipal Arbitrations Act “as to procedure and appeals” apply to arbitrations held and awards made by the judge. The appeal provisions of the Municipal Arbitrations Act, s.7, while similar to those in the Expropriation Procedures Act, s.11, are not exactly the same. The latter probably governs, giving the phrase “as to procedure” precedence over “as provided for in Part XVI of the Municipal Act”.

The Expropriation Procedures Act, s.11 provides, *inter alia*, that “the appeal may be taken at any time within six weeks from the day the determination or order was sent by registered mail to the parties . . .” This implies that the tribunal shall so send the determination or order. This is in conflict with s.5 of the Municipal Arbitrations Act (see item 7, *supra*) which appears to be applicable by the Expropriation Procedures Act, s.10(1)(a). Compliance with ss.5, 6 of the Municipal Arbitrations Act could well frustrate the right of appeal given by s.11 of the Expropriation Procedures Act.

However, in the case of a municipality which has designated the Ontario Municipal Board as sole arbitrator under the Municipal Act, s.348, see column 1.

Table E—(Continued)

County or District Court Judge. (The sole arbitrator under the Municipal Act, s.347(1).) Expropriation Procedures Act, s.10(1)(a).	Official Arbitrator. Municipal Arbitrations Act, s.1(3) as enacted by 1965 c.78, s.1; Expropriation Procedures Act, s.10(1)(b).	Ontario Municipal Board. Expropriation Procedures Act, s.10(1)(c) and s.10(3).
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APPEAL TO COURT OF APPEAL—(Continued)

Under the Expropriation Procedures Act, s.11, the appeal is to the Court of Appeal and the practice and procedure as to the appeal and proceedings incidental thereto are the same *mutatis mutandis* as upon an appeal from the High Court.

Under s.348 of the Municipal Act a municipality can designate the Ontario Municipal Board as the sole arbitrator, in which case the Board has all the powers and duties of an Official Arbitrator. It further provides that the Ontario Municipal Board Act applies to proceedings taken before the Municipal Board under this section except that the provisions of the Municipal Arbitrations Act as to appeals apply to awards made by the Municipal Board. This is adopted by the Expropriation Procedures Act, s.10(1)(c).

FURTHER APPEAL

11. For any further possible appeal to the Supreme Court of Canada resort should be had to the Supreme Court Act, R.S.C. 1952, c.259.

See column 1.

See column 1.

(Note that by Reg. 466, s.19 no trial or hearing shall take place or motion be heard during the long vacation or the Christmas vacation unless directed by the Board in case of urgency. This Regulation implies, see s. 18, that parties to proceedings before the Board may make interlocutory motions. There would appear to be no such right before the Judge or Official Arbitrator.)

CHAPTER 73

Abandonment or Disposal of Expropriated Land

ABANDONMENT

THE relevant section of the Expropriation Procedures Act reads:¹

“21. (1) Where, at any time before the date specified in the notice of possession served under section 19, the land or any part thereof is found to be unnecessary for the purposes of the expropriating authority or if it is found that a more limited estate or interest therein only is required, the expropriating authority may, by an instrument signed by it and registered in the proper registry or land titles office and served on the owner who was served with notice of expropriation, declare that the land or such part thereof is not required and is abandoned by the expropriating authority or that it is intended to retain only such limited estate or interest as is mentioned in the instrument, and thereupon,

(a) the land declared to be abandoned reverts in the owner from whom it was expropriated and those entitled to claim under him; or

(b) in the event of a limited estate or interest only being retained by the expropriating authority, the land so reverts subject to such limited estate or interest.

(2) Where part only of the land or all of it except a limited estate or interest therein is abandoned, the fact of such abandonment and the damage, if any, sustained in consequence of that which is abandoned having been expropriated and all the other circumstances of the case shall be taken into account

¹Ont. 1962-63, c. 43, s. 21.

in determining the compensation for the part or the limited estate or interest that is not abandoned.

(3) Where the whole of the land is abandoned, the owner from whom it was expropriated is entitled to compensation for all damages sustained and all costs incurred by him in consequence of the expropriation and abandonment, and the amount of the compensation, if not agreed upon by the parties, shall be determined under this Act and not otherwise."

In some cases, the right of abandonment, before the date specified in the notice of possession served under section 19, would benefit both the expropriating authority and the owner. In other cases, the owner might not wish to have the land which has been taken from him unilaterally revested in him at some time after he had good grounds for believing that he was no longer its owner. He may have purchased other property, assumed financial obligations or changed his way of life. Provision for compensation for all damages sustained and all costs incurred by owners in consequence of an expropriation and abandonment is not adequate where the whole or part of the land expropriated is abandoned. The owner should have a right to elect either to take the land back with a right of compensation for consequential damages, or to insist on the expropriating authority's retaining the land expropriated and paying full compensation therefor.

DISPOSAL OF LAND AFTER EXPROPRIATION

In our view an owner whose land has been taken by the exercise of statutory powers has a just claim to resume ownership of the land in certain circumstances if it is no longer required by the expropriating authority. This claim should be recognized in some form by legislation.

As early as 1845, when England passed its first comprehensive statute on compulsory purchase,² such rights were recognized and given some measure of protection by sections 127 to 131 of that Act. These provisions conferred a right of pre-emption on original owners, or, at least, those "then entitled to the lands (if any) from which the same were

²Lands Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 18.

originally severed"³ before superfluous lands could be sold by expropriating authorities. The Town and Country Planning Act,⁴ which deals with the disposal of land held for planning purposes, when read with statutes incorporated by reference requires, in some cases, the consent of the appropriate minister for the disposal of lands taken by compulsory purchase.

The expropriating authority holds its extraordinary powers of expropriation in trust to be exercised for the public benefit. This has been recognized in legislation and in particular in those provisions which specify the purposes for which expropriations may take place. If a contemplated expropriation is for a purpose not provided in the relevant legislation, then there is no power to proceed with it. This accords with the basic principle that a person's property rights should not be taken from him except for purposes specified by the Legislature. Subject to the right of abandonment, the legislation does not make the spirit of this principle fully applicable. Except in one or two cases, where land that has become vested in the expropriating authority is no longer needed for its purposes, there do not appear to be any statutory restrictions on an expropriating authority's right to do with the land what it wishes. It may sell it to whomever it sees fit and at any price. The absence of any restrictions is an unjustified encroachment on the rights of owners and tends towards expropriation of more land than is required in order that a speculative profit may be made.

The provisions in the Sanatoria for Consumptives Act⁵ and the Public Libraries Act,⁶ limiting the disposal of land which has been expropriated, are exceptions to the general rule.

The Sanatoria for Consumptives Act provides:

"24. No part of any property acquired or used for the purposes of a sanatorium shall be sold, leased, mortgaged or otherwise disposed of without the approval of the Lieutenant Governor in Council."⁷

³*Ibid.*, s. 128.

⁴1962, 10 & 11 Eliz. II, c. 38, s. 78.

⁵R.S.O. 1960, c. 359.

⁶R.S.O. 1960, c. 325. This Act was repealed and replaced by the Public Libraries Act, 1966, Ont. 1966, c. 128, s. 54.

⁷R.S.O. 1960, c. 359, s. 24.

This provision may apply to cases where the land has been acquired by other means than expropriation. It is not readily apparent what the policy of this section is or whose interests are being protected by it. No criteria to guide the decision of the Lieutenant Governor in Council are laid down.

Under the former Public Libraries Act, consent of the municipal council was required before land acquired by expropriation could be disposed of:

“31. (1) Subject to the restrictions and provisions hereinafter contained, the board has power to acquire by purchase, expropriation, lease or otherwise, all lands required for library and branch library purposes, and to erect, lease or otherwise procure the necessary buildings therefor, and hold, maintain and repair the same, and has power, with the consent of the municipal council, to sell, exchange or otherwise dispose of any lands or buildings that may no longer be required for such purposes.”⁸

Where title to land may be affected caution must be exercised in conferring new rights. There are many factors to be considered in giving to previous owners statutory rights concerning land which is no longer required by the expropriating authority. These factors must include:

- (1) The length of time which has elapsed since the expropriation;
- (2) The difficulty of locating the former owner or his heir, as the case may be; and
- (3) The enhancement of the value of the surplus land by reason of work performed by the expropriating authority.

We do not think that it is practical to confer actual property rights of a residual nature on former owners of expropriated land. Each case must be treated in the light of its particular facts. The practical solution would be to require the consent of the appropriate approving authority before any surplus land could be sold by an expropriating authority. In Table D⁹ the recommended approving authorities are set out. Before giving approval to a sale of expropriated land, the approving authority should be required to make inquiry into

⁸R.S.O. 1960, c. 325, s. 31(1). A similar provision is contained in the Public Libraries Act, 1966, Ont. 1966, c. 128, s. 16(1).

⁹See pp. 994 ff. *supra*.

the circumstances of the proposed sale and the position and desires of former owners, who should be given an opportunity, where practical, to purchase the land on equitable terms. Failure to follow legislative provisions of this sort should not affect the title to the land.

Several beneficial consequences should flow from such provisions. Taken with the inquiry-approval procedure which we recommend, it should operate to curb expropriations of more land than is necessary for the purposes of a proposed work. In addition, it should place upon the proper authority (in the same manner as the proposed inquiry-approval procedure) full responsibility for the decision concerning the future of the expropriated land, having regard to the just claims of former owners.

We recognize the problem respecting the price which the former owner should pay for superfluous lands. On the one hand, it could be said that the owner should have his land back for the amount of compensation paid to him for it regardless of its new market value, if any. If its market value is enhanced by the work executed on the non-superfluous expropriated land, the owner would have enjoyed this enhancement if the expropriation had not included the superfluous lands. Why should he have to pay for it when these lands are sold back to him? On the other hand, in some cases the land which turns out to be superfluous may have originally been necessary for the execution of the work involved and the work could not have been constructed without it. If, by reason of changed circumstances expropriated land becomes superfluous, why should the former owner be entitled to obtain it for less than its existing market value? There are no fixed answers to these questions. Justice depends on the circumstances in each case. Fixed rules cannot be laid down respecting the price at which superfluous lands should be sold. As each case arises, the approving authority, or the Minister or municipality (who are their own respective approving authorities), as the case may be, should consider all the relevant facts when consenting to a sale or selling expropriated land at a particular price. The owner should have a right to be heard and make his claim.

Certain existing provisions in Ontario expropriation legislation require consideration in the light of our recommendations.

Four of the most frequently used expropriation statutes may be taken as examples: the Highway Improvement Act,¹⁰ the Municipal Act,¹¹ the Power Commission Act,¹² and the Public Works Act.¹³ These provisions are not all worded in the same manner but they serve the same general purpose—to enable the expropriating authorities involved to expropriate more land than is necessary if they can acquire the larger areas of land at a more reasonable price than the part immediately required for their purposes. Section 333 (2) of the Municipal Act and section 25 of the Public Works Act specifically empower expropriating authorities to sell whatever land is not required or to sell whatever is deemed expedient. The Municipal Act¹⁴ enables municipalities to use any land acquired or taken in excess of land actually required for the opening, widening, extension or straightening of a highway in or towards making compensation by way of restitution to the owner of other land taken for or in connection with the work. These provisions may be used in contravention of fair principles of expropriation law. An authority could deliberately expropriate more land than was necessary for the proposed work with the sole purpose of selling the surplus land at a considerable profit realized through increased value by reason of the work involved. This would reduce the total cost of the project at the expense of the owner of the unnecessary land.

Apart from the deliberate taking of more land than is necessary for the purpose of selling the surplus land at a profit, there are cases where the power to take more land than is directly necessary may be to the advantage of both the owner and the expropriating authority. For example, some expropriations may leave the owner with a remnant of land which

¹⁰R.S.O. 1960, c. 172, s. 7 (4).

¹¹R.S.O. 1960, c. 249, s. 333 (2).

¹²R.S.O. 1960, c. 300, s. 24 (3), which incorporates the expropriation powers of the Public Works Act.

¹³R.S.O. 1960, c. 338, s. 25. There are several other expropriation statutes with provisions similar to those contained in the statutes just mentioned.

¹⁴R.S.O. 1960, c. 249, s. 334 (1).

would be of little or no value to him. In such cases the expropriating authority could be obliged to pay severance damages which, in addition to the compensation for the land taken, might be equal to the value of the owner's parcel.

In view of the foregoing, we recommend that expropriating authorities should not be empowered to expropriate more land than is necessary for the proposed work, except where this can be shown to be in the interests of the owner of the unnecessary land.

CHAPTER 74

Expert Appraisers

WE have referred to the importance of having reasonably qualified appraisers available to perform their services at various levels of expropriation proceedings, when required to advise expropriating authorities and owners and to give expert testimony before tribunals determining compensation. There is no area of litigation in which tribunals are as reliant on the evidence of potentially ill-qualified witnesses as they are in expropriation cases. The fact that appraisers play such an essential role in the process of fixing compensation should be recognized in a tangible way by the government. We suggest that the government should take steps to encourage and promote the education and training of appraisers whose services will be available to the public, as well as expropriating authorities. The need for well-qualified appraisers is a public need.

At the present time there are courses of instruction offered by some organizations and institutes in the Province which are concerned with the techniques of appraisal. While these courses no doubt are serving a useful purpose, wider courses of education should be available which go more deeply into the basis of land valuation, with instruction in related land law, economics, public finance, construction and engineering with a view to providing comprehensively trained appraisers.

In Ontario there are no comprehensive courses available of this nature. The University of Toronto School of Architecture provides a post-graduate course of instruction in town

and regional planning, but the course we envisage should be much more comprehensive and specialized than that.

The course provided by Queen's University for the Institute of Municipal Assessors of Ontario, with the financial assistance of the Department of Municipal Affairs, is an example of what has been accomplished in a similar field.

In England there are three professional bodies concerned with land valuation:

- (1) The Royal Institution of Chartered Surveyors,
- (2) The Chartered Auctioneers and Estate Agents Institute,
- (3) The Chartered Land Agents Society.

These three bodies came together and established the College of Estate Management, which is affiliated with London University. In addition, there is a course in land valuation given at Cambridge University. The course at the College of Estate Management includes land law, construction costs, town planning, and the economics of land valuation. The surveyor members of the Lands Tribunal are appointed by the Lord Chancellor from persons suggested by the Royal Institution of Chartered Surveyors.

We think that the number of expropriations in Ontario warrants the development of a well-trained and organized body of professional appraisers.

Summary of Recommendations
Contained in Section 1

Summary of Recommendations on Expropriation Procedure

1. The right of an owner, whose property has been expropriated, to be paid compensation should be secured in the Constitution.
2. The Legislature should not confer the power of expropriation on any body or person unless it is clear that the power is inescapably necessary in the interest of good government, and that there are adequate controls over its exercise.
3. There should be a complete review of all of the powers of expropriation with a view to determining the purpose and necessity of each one and the adequacy of statutory safeguards controlling their exercise.
4. The less responsible to public opinion the particular body may be, the more reluctance there should be in conferring a power of expropriation on it.
5. Where the power of expropriation is conferred on any body, the identity of the person or body who may exercise the power should be stated clearly in the legislation.
6. Where the Legislature has decided to encroach on civil rights by creating a new power of expropriation, it should do so in clear and unambiguous language that expresses the intention in readily recognizable form. The direct and proper way to do this is to use the verb "expropriate" in the operative statutory provision.
7. Where the Legislature has decided to confer on any body the powers of expropriation, it should know and state in clear and precise language the purpose for which it is conferring the power.

8. An approval system should be provided to control final decisions to expropriate.
9. Except in unusual circumstances, before final approval is given to the expropriation, persons affected by a proposed expropriation should be given an opportunity to be heard at a formal inquiry. In unusual circumstances, the Lieutenant Governor in Council should have power to permit the expropriating authority to proceed after proper approval without following the inquiry procedure.
10. The basic principle which should dictate the selection of the approving authority is that the approving authority should be in a position to accept clear political responsibility for the expropriation decision finally made.
11. Generally, the Minister who is charged with the administration of a statute should control and be responsible for and approve of expropriations made under that statute.
12. The recommended inquiry-approval procedure should apply to municipalities. A municipality should be its own approving authority, except where the power to expropriate land is exercised for a purpose other than the purposes of the municipal body—such as the disposal of the land expropriated to private persons or bodies for their own purposes. In such cases the exercise of the power of expropriation should be approved by the Minister of Municipal Affairs.
13. An expropriation under the Public Works Act for the benefit of a department, other than the Department of Public Works, should be subject to the approval of the minister of the relevant department and not the Minister of Public Works.
14. Expropriations by the Municipality of Metropolitan Toronto should be approved by that body in the same manner as expropriations by other municipalities, and not by the Minister of Municipal Affairs.
15. Expropriations by all school boards should be subject to the approval of the Minister of Education.

16. The inquiry officers in the recommended inquiry-approval procedure should be appointed by the Attorney General on a permanent or *ad hoc* basis.
17. The statutory inquiry procedure in the United Kingdom, which is followed prior to compulsory purchases, is a useful guide to be followed in establishing the procedure in Ontario.
18. The following are the essential steps which should be followed in the recommended inquiry-approval procedure:
 - (a) The expropriating authority should give adequate notice of its intention to expropriate to all persons affected.
 - (b) If the person or persons affected desire to exercise their right to a hearing, they should so advise the approving authority within a stated time.
 - (c) If no persons notify the approving authority that they desire a hearing, then that body may authorize the proposed expropriation to proceed. If any affected person or persons notify the approving authority that they desire to be heard, then it should appoint a date and time and place for an inquiry and so notify all interested parties. The Attorney General should appoint the inquiry officer.
 - (d) Prior to the hearing, the expropriating authority should deliver to all interested parties a notice indicating the grounds upon which it intends to rely at the hearing, together with a list of any documents (including maps and plans) which the authority intends to use at the hearing.
 - (e) The parties at the hearing should be entitled to present their own cases or to be represented by members of the legal profession or laymen.
 - (f) The expropriating authority should present its case first and have a right of reply following the case for the objectors. Cross-examination of witnesses should be allowed. The ordinary rules of evidence should not

apply. The main criterion for the admissibility of evidence should be its relevance. Hearsay evidence should be admitted if, in the opinion of the inquiry officer, it may have probative value.

(g) The merits of the expropriating authority's general policy should not be considered relevant, but alternative routes or sites should be relevant. The soundness, fairness and necessity of taking the particular piece of land described in the proposed expropriation plan, should be the main issue at the inquiry.

(h) The inquiry officer should have the right to inspect the site of the proposed expropriation, either in the presence of the parties or alone.

(i) Following the presentation of the evidence, all parties to the proceeding should be entitled to present argument to the inquiry officer.

19. The report of the inquiry officer should contain a summary of the evidence and arguments advanced by the contending parties, the inquiry officer's findings of fact, and his opinion on the merits of the application with reasons therefor.
20. After receipt of the report, the approving authority should consider it and decide to authorize (with or without modification), or not to authorize the proposed expropriation, giving written reasons for its decision. No modification should extend the expropriation to land which was not included in the original plan of expropriation, unless the parties affected consent.
21. A time limitation should be fixed within which expropriation proceedings may be challenged. The provision for the time limitation should contain safeguards concerning the rights of persons affected who have had no notice of the proceedings, and the rights of all parties where the expropriating authority has acted without statutory authority.
22. An application to set aside or quash an expropriation should be made to the Appellate Division of the High Court of Justice for Ontario which we recommend in Chapter 44.

23. Where the recommended inquiry-approval procedure is followed, the owner should have the right to elect whether the compensation should be fixed as of the date that the notice of the hearing before the inquiry officer is served, or as of the date of the registration of the plan, or the date that the notice of expropriation is served, or as of the date on which possession is given.¹
24. The expropriation plan should be registered within a stipulated period after approval has been given, or, where leave is granted to proceed without the inquiry procedure, within a stipulated period after leave is granted, on pain of having either the expropriation lapse or of being liable to pay compensation by reason of the delay, or both. The period of six months from the date of the order authorizing the expropriation provided for by section 1a(7) of the Expropriation Procedures Act² is much too long.
25. The phrase "where an expropriating authority has exercised its statutory powers to expropriate land", used in section 4(1) of the Expropriation Procedures Act, should be clarified.
26. Provision should be made for compensation in proper cases for repairs or improvements to expropriated property between the date of the expropriation and the date of the service of the notice under section 5(1) of the Act.
27. The owner-occupant of the expropriated land should be served with the notice of the expropriation under section 5(1) of the Expropriation Procedures Act within a time less than the sixty day period provided for in that section. This service could be made first and the remaining services made thereafter.
28. The notice of expropriation, Form 1, should be amended to include:
 - (a) A statement that the owner has the right to invoke the negotiation procedure set out in section 9a of the

¹For right to elect where inquiry-approval procedure is not followed, see p. 1012 *supra*.

²Ont. 1962-63, c. 43, s. 1a(7), as enacted by Ont. 1966, c. 53, s. 1.

Expropriation Procedures Act, and that he must do so before proceeding to arbitration unless the parties otherwise agree;

(b) A statement that the owner may consult a solicitor to advise him as to his legal rights, and that the expropriating authority will pay the preliminary costs of the solicitor fixed according to a prescribed tariff.

29. The offer of compensation under section 8 of the Expropriation Procedures Act in most cases should be made much earlier than six months after the date of registration of the plan.
30. Provision should be made for such additional personnel for the Board of Negotiation as may be necessary to satisfy future needs.
31. The expropriating authority should be required to take possession of the land, with all the attendant liabilities, on the date fixed for giving possession in the notice under section 19(1) of the Expropriation Procedures Act, or on a date fixed by the judge.
32. The expropriating authority, subject to "an adjustment of the date" under section 19(3), should be required to give a minimum of three months' notice of possession under section 19(1) of the Expropriation Procedures Act.
33. The notice of possession under section 19(1) of the Expropriation Procedures Act should contain a statement of the options available to the owner—specifically, that he has the right to apply to the judge for an order extending the time, and that the expropriating authority has a corresponding right to apply for a reduction of the time specified in the notice.
34. The full amount of compensation as estimated by the expropriating authority should be offered to the owner as a condition precedent to the obtaining of possession.
35. The payment of fees and expenses to the arbitrator by the parties to the arbitration in expropriation proceedings should be abolished.
36. A Lands Tribunal, similar to the Lands Tribunal in England, should be established with jurisdiction to determine

compensation in all cases where the power of expropriation is exercised, and in those cases where statutory powers to acquire rights over land are exercised.

37. The recommended Lands Tribunal should determine compensation for expropriations under the Ontario Energy Board Act, 1964.
38. Arbitrations should be heard by at least three members, one of whom should be a chairman or vice-chairman (who should be a qualified lawyer), except where the amount claimed is less than \$1,000.00, in which case the arbitration might be conducted by one member.
39. There should be a right of appeal from the decision of the proposed Lands Tribunal to the Court of Appeal on all questions of law and fact.
40. The government should make available a series of published reports of reasons for awards by the Lands Tribunal.
41. There should be uniformity of procedure to govern both the pre-hearing stage and the hearing stage of arbitration proceedings.
42. Specific rules should be drawn governing the procedure for the recommended Lands Tribunal.
43. The following aspects of procedure should be considered in formulating rules:
 - (a) The Expropriation Procedures Act should expressly provide that a notice of arbitration is to be served where the parties agree to forego negotiation proceedings.
 - (b) The claimant should set forth in his notice of arbitration, or in his reply to a notice served by the expropriating authority, a simple statement of the nature of his claim. The tribunal should be empowered in proper cases to order further particulars. In proper cases, the expropriating authority should be required, at the risk of costs, to admit or deny elements of compensation claimed.

- (c) The parties to expropriation proceedings should be required to produce to the parties adverse in interest, copies of the following documents relating to the evidence to be given by expert witnesses:
- (i) Plans and valuations of the land which is the subject of the proceedings, including particulars and computations in support of such valuations, which it is proposed to put in evidence;
 - (ii) A statement of any plans, prices, costs, or other particulars, relating to properties other than the land in question which are proposed to be given in evidence, or a statement that no such plans, prices, costs or particulars will be relied upon.
- (d) The adoption of provisions similar to those contained in Rule 42(6) of the Lands Tribunal Rules in England which enable the Tribunal to adjourn the hearing on such terms as to costs or otherwise as it thinks fit where plans, valuations or particulars, which appear to the Tribunal not to have been sent to the Registrar, are sought to be relied upon at the hearing.
- (e) Any party to the proceedings should have a right to apply to the Registrar of the Tribunal for an order for production and inspection of any documents (other than privileged communications) which the Registrar may deem properly producible and relevant to the issues involved in the arbitration.
- (f) The Registrar of the proposed Lands Tribunal should have the power to order examinations for discovery to be held in special cases where an examination is shown to be necessary.
- (g) Interlocutory applications in arbitration proceedings should be kept to a minimum and should be heard by a legally qualified member of the Lands Tribunal, or the Registrar of the Tribunal if he is legally qualified.
- (h) At the hearing the claimant should present his case first.

(i) The Tribunal should be empowered to take a view of the expropriated property and to consider what it saw as relevant evidence adduced in the case.

(j) There should be no onus of proof, in so far as it relates to the proof of market value, placed on either party to the arbitration proceedings. The onus of proof of items of special value or consequential damage should be on the owner.

(k) Until there is in Ontario a sufficient number of qualified appraisers, two experts should be permitted to give evidence without special leave.

44. The Expropriation Procedures Act should be amended to make provision for a stated case on a question of law to the Court of Appeal in all expropriation arbitrations.
45. The legislation should contain a specific requirement that written reasons for decisions be given in all cases.
46. The legislation should expressly provide for the proper reporting of proceedings by a fully qualified court reporter.
47. The rights of the parties to appeal from a decision of the Lands Tribunal should be well defined. The following should be expressly provided for in the Expropriation Procedures Act. The appeal should lie on both questions of law and fact. The Court of Appeal should have power to refer the matter back to the tribunal or to give any judgment or make any order that the arbitration tribunal could have made. The Court of Appeal should be clothed with power to exercise the same power that it exercises on any appeal from a judge of the High Court sitting without a jury.
48. A judge of the Court of Appeal should have power to extend the time for appealing in proper cases.
49. Where either the whole or part of an owner's land which has been expropriated is abandoned, the owner should have the right to elect whether he will take the land back

with the right of compensation for consequential damages, or insist on the expropriating authority's retaining the land expropriated and his being paid full compensation therefor.

50. The claim of an owner whose land has been expropriated to resume ownership of it in certain circumstances, if it is no longer required by the expropriating authority, should be recognized in some form by legislation.
51. The consent of the appropriate approving authority should be required before any surplus land is sold by an expropriating authority. Before giving approval to the sale of expropriated land, the approving authority should be required to make inquiry into the circumstances of the proposed sale, and the position and desires of the former owners who should be given an opportunity, where practical, to purchase the land on equitable terms.
52. Expropriating authorities should not be empowered to expropriate more land than is necessary for the proposed work, except where this can be shown to be in the interests of the owner of the unnecessary land.
53. The government should take steps to encourage and promote the education and training of appraisers whose services would be available to the public, as well as to expropriating authorities.

Section 2

LICENSING

INTRODUCTION

Consideration of the licensing laws of the Province may be usefully prefaced by a statement made by Mr. Justice Rand of the Supreme Court of Canada in *Roncarelli v. Duplessis*:

"The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with *complete impartiality and integrity*; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible (*sic*) with the *purposes envisaged by the statute*: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the 'discretion' of the Commission; but that means that decision is to be based upon a weighing of *considerations pertinent to the object of the administration*."¹

Generally, the relevant legislation prohibits the doing of the thing in question and creates an exemption from the prohibition in favour of those who have been granted licences. The Highway Traffic Act, for example, provides that: "No person . . . shall operate or drive a motor vehicle on a highway unless he holds an operator's licence issued to him under this section."² Licensing legislation usually makes it an offence punishable by a fine or imprisonment to engage in the prohibited conduct without a licence.³

No useful purpose would be served in cataloguing the many licensing powers now conferred by Ontario legislation. They range all the way from permission to carry lethal weapons to selling newspapers on the streets. The principles to be applied in licensing legislation may be most usefully discussed by an extensive consideration of licensing through by-laws passed under the authority of the Municipal Act.⁴ More

¹[1959] S.C.R. 121, 140. Italics added.

²R.S.O. 1960, c. 172, s. 13 (1).

³*Ibid.*, s. 13 (2).

⁴R.S.O. 1960, c. 249.

than sixty trades and occupations are required to be licensed by either municipal councils or boards of commissioners of police and in Metropolitan Toronto, by the Metropolitan Licensing Commission. The principles we discuss have equal application to licensing laws administered by bodies that are not governed by the Municipal Act. In considering these licensing powers we are concerned with laws of wide impact and practical interest throughout the Province.

THE DECISION TO LICENSE

We start with this basic premise. It is an infringement of the civil rights of an individual to prohibit him, without government approval, from engaging in a lawful activity. The questions with which we are concerned are whether a licensing requirement is an unjustified infringement on civil rights and whether proper safeguards are provided against abuse of licensing powers. These questions can only be dealt with in the context of the particular government policy sought to be implemented in whole, or in part, by the licensing scheme.

It is for the relevant legislative body to determine whether the public welfare sought to be advanced justifies prohibitory licensing legislation, with all the attendant restrictions flowing therefrom. It is not for this Commission to define formulae to guide governments, be they provincial or municipal, in determining what the relevant policy should be.

CHAPTER 75

Licensing Powers

THE FORM OF THE POWER TO LICENSE

AN appraisal of legislation conferring the power to license involves the consideration of:

- (a) The personal and public interests involved;
- (b) The facets of licensing, granting, renewing, refusing, cancelling and suspending licences;
- (c) The legislative definition of the purpose of any particular licensing requirements; and
- (d) The legislative definition of standards to govern licensing decisions.

THE PERSONAL AND PUBLIC INTERESTS INVOLVED

As a general principle that which is not prohibited is, in the eyes of the law, permitted. There is a personal and public interest that the law should not unnecessarily fetter the individual's basic right to engage in any lawful means of earning a livelihood that he sees fit and to develop whatever talents he may have to this end. This principle bears on both the basic legislative decision to license and on the standards which should be imposed to implement the licensing power.

It is not our function to consider competing economic values or principles. However, the interest of the individual and the public interest may suffer if licensing requirements are unnecessarily imposed or unreasonable standards are required in their implementation. Generally, there is still a

basic truth expressed in the judgment of Harrison, C. J. in *Regina v. Johnston*:

“The great law governing the conduct of man in serving his fellowmen is the law of competition. The less that law is interfered with the better for the general interest of society.”¹

This philosophy has received legislative recognition in the Municipal Act, which provides, subject to certain expressed exceptions, that “. . . a council shall not confer on any person the exclusive right of exercising within the municipality any trade or calling or business . . . unless authorized or required by this or any other Act so to do. . . .”²

The power to suspend or revoke a licence is more far-reaching than the power to license. It involves not only the right of the individual to engage in the activity of his choice, but it may affect a substantial investment in time and money in the building up of the licensed business, together with goodwill attached to it. When proceedings are commenced to revoke, or to some lesser extent, to suspend a licence, all this must be taken into account. It should likewise be considered in the framing of standards to be met for the procedure to be followed before a revocation or suspension order is made.

THE FACETS OF LICENSING

Licensing legislation involves more than conferring power to issue or refuse to issue licences. It involves matters logically related to the licensing scheme, including renewal, revocation and suspension of licences. These facets have sometimes, but not always, been recognized in licensing legislation in Ontario. For example, a typical provision in the Municipal Act enables by-laws to be passed for “licensing, regulating and governing [the activity in question] . . . and for revoking any such licence.”³

On the other hand, there are provisions in the Act which confer the power to license, regulate and govern, but do not

¹ (1876), 38 U.C.Q.B. 549, 552.

² R.S.O. 1960, c. 249, s. 248 (1).

³ *Ibid.* Licensing dry cleaners: s. 377, para. 24; boat livery keepers: s. 395, para. 3; salvage shops: s. 396, para. 1; tobacco stores: s. 400, para. 2; theatres, bowling alleys, etc.: s. 401, para. 6.

confer express power to revoke.⁴ It may be assumed that in these cases the power of revocation is intended and it may be implied from the language used. The determination of the intention of the Legislature should not be left to implication. The power to revoke a licence is such a significant and far-reaching power affecting personal rights that it should be expressly conferred. To confer this power expressly in some sections of a statute and to leave its existence to inference in other sections in the same statute, is not only confusing but provides a vexatious source of litigation.

It appears that the power to license is intended to carry with it the power to suspend for a particular period of time, since few of the licensing provisions in the Municipal Act expressly confer this power. The Public Accountancy Act⁵ gives the Public Accountants Council power to revoke a licence, but does not give power of suspension. In *Re Moses and Institute of Chartered Accountants*,⁶ it was held that a Supreme Court judge, on an appeal, had the power to suspend the licence but that the Public Accountants Council, the original tribunal, did not.

All powers which naturally relate to licensing, such as the power to revoke or suspend, should be stated expressly in the legislation so that those affected can be under no doubt as to their rights and potential liabilities.⁷

LEGISLATIVE DEFINITION OF THE PURPOSES OF LICENSING

In the statutes of Ontario there is a wide variation in the legislative definitions of the purposes of licensing schemes.

The British North America Act⁸ confers legislative power on the provinces with respect to "shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue

⁴*Ibid.* Lending libraries: s. 379 (1), para. 133; laundries: s. 386, para. 1; fruit dealers: s. 399 (1), para. 4; non-resident and transient photographers: s. 400, para. 4, as amended by Ont. 1961-62, c. 86, s. 44.

⁵R.S.O. 1960, c. 317, s. 19.

⁶[1965] 1 O.R. 155.

⁷Cooper, *State Administrative Law*, 499, refers to court decisions where the power to revoke or suspend licences has been implied; but he states the general rule to be ". . . ordinarily, the authority to revoke licences rests upon specific statutory authorization".

⁸B.N.A. Act, s. 92, para. 9.

for provincial, local, or municipal purposes.” The raising of revenue is only one of the many purposes of imposing licensing requirements. Licences are often required for the purpose of: facilitating the collection of revenue;⁹ enforcing minimum standards of competence;¹⁰ protecting the public health;¹¹ ensuring a minimum level of competence in certain trades serving the public, e.g., electricians;¹² protecting natural resources;¹³ regulating various aspects of the provincial economy, e.g., the schemes provided for by the Farm Products Marketing Act¹⁴ and the Milk Act;¹⁵ or a licence may be required for several combined purposes, e.g., collection of revenue, having a record of the names of persons enjoying a privilege, and public safety, e.g., the operation of motor vehicles on public highways.¹⁶

It is axiomatic that the scope of any legislative power should be limited to its purposes. To enforce legislation for a purpose not intended is an unjustified infringement on civil rights. This leads to the conclusion that the particular purposes or policy sought to be implemented by licensing legislation should be carefully determined and then expressed in the legislation with clarity. The importance of a clear legislative standard was demonstrated in *Brampton Jersey Enterprises Ltd. v. The Milk Control Board of Ontario*.¹⁷ In that case the Milk Control Board refused to grant a licence to carry on the business of a milk distributor in a particular area on the ground that the area was already “adequately served” by other distributors. The pertinent legislation provided that:

“12. (1) The Board may . . . (g) refuse to grant a licence where the applicant is not qualified by experience, financial responsibility and equipment to properly conduct the proposed business or for any other reason that the Board may deem sufficient.”¹⁸

⁹Retail Sales Tax Act, Ont. 1960-61, c. 91.

¹⁰Highway Traffic Act, R.S.O. 1960, c. 172.

¹¹Air Pollution Control Act, R.S.O. 1960, c. 12, superseded by the Air Pollution Control Act, 1967, Ont. 1967, c. 2, at the time of writing not proclaimed in force; Meat Inspection Act, Ont. 1962-63, c. 78.

¹²Municipal Act, R.S.O. 1960, c. 249, s. 401, para. 5.

¹³Game and Fish Act, Ont. 1961-62, c. 48, s. 38.

¹⁴R.S.O. 1960, c. 137.

¹⁵Ont. 1965, c. 72.

¹⁶Highway Traffic Act, R.S.O. 1960, c. 172, s. 13.

¹⁷[1956] O.R. 1. (C.A.).

¹⁸Milk Industry Act, Ont. 1954, c. 52, s. 12 (1) (g).

The Court of Appeal held that "the Board, being a creature of statute, must act within the ambit of the powers given to it by statute . . ." ¹⁹ and that "the reason given by the Board for its refusal to grant a licence [the area involved being already 'adequately served'] to the appellant is not . . . related to the object or purpose of the statute." ²⁰ The uncertain language of the applicable legislation ²¹ made an extended examination of the statute and relevant case law necessary before the proper scope of the licensing power could be determined. ²²

DEFINITION OF STANDARDS

"A prime source of justified dissatisfaction with the type of federal administrative action which I will shortly specify is the failure to develop standards sufficiently definite that decisions will be fairly predictable and that the reasons for them will be understood; this failure can and must be remedied." ²³

It is essential for the guidance of licensing agencies that the government policy be reflected in the legislative definition of the standards required to enable a person to obtain and retain a licence. While in most areas a rigid and exhaustive code cannot be laid down for the administration of the licensing policy and it is necessary to leave to the licensing tribunal the power to exercise a well-informed discretion, the scope of the policy should be made clear in the defined standards. The licensing legislation of Ontario leans much too heavily in favour of unfettered discretion.

The case law on municipal licensing illustrates the deficiencies of the enabling sections of the Municipal Act and the deficiencies of licensing by-laws passed thereunder. Most of the enabling sections of the Act simply employ the formula that by-laws may be passed "for licensing, regulating and governing" the particular trades or businesses, etc., mentioned.

¹⁹[1956] O.R. 1, 8.

²⁰*Ibid.*, 9.

²¹Particularly s. 12 (1) (g).

²²The probability of litigation, in the circumstances of applications of the type in the *Brampton* case, would be significantly reduced if s. 12 (1) (g) concluded with the word "business" and not with "or any other reason that the Board may deem sufficient".

²³Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 867 (1962).

The requirements to be satisfied to obtain a licence, or to retain a licence, appear either to be left to the body enacting the by-law—to be inserted in the by-law—or to be laid down in actual cases by the body administering it.

Standards in Municipal By-Laws

Some of the by-laws passed in Ontario providing for the licensing of taxicabs usefully illustrate how licensing powers may be implemented where no or insufficient standards are provided.

The taxicab by-law enacted by the Board of Commissioners of Police for the City of Ottawa²⁴ empowers the Board to revoke a licence “if the circumstances shall appear to it to warrant such action”. It would be difficult to frame a more subjective legislative ground for revoking a licence. There is nothing in the enabling section of the Municipal Act²⁵ expressly authorizing such a basis for revocation, nor, on the other hand, is there anything in it which would tend to indicate that the test is beyond the powers of the Board.

The Windsor taxicab by-law enables the Board of Commissioners of Police to revoke a licence “upon such grounds as the Commission may deem sufficient”.²⁶ The same language is used in the Sault Ste. Marie by-law.²⁷ The Hamilton by-law contains no provisions respecting the grounds for which a licence may be revoked. Its revocation section commences: “Upon the Board’s decision to suspend or revoke any licence which may be lawfully revoked. . . .”²⁸ This section implies that a power to revoke exists and that the grounds for revocation are at large.

The Fort William by-law²⁹ provides that a licence may “be refused, revoked, or cancelled by the Board in its dis-

²⁴By-Law No. 184 of the Board of Commissioners of Police for the City of Ottawa, s. 31 (2).

²⁵R.S.O. 1960, c. 249, s. 395, para. 1.

²⁶By-Law No. 91 of the Board of Commissioners of Police for the City of Windsor, s. 41 (b).

²⁷By-Law No. 18 of the Board of Commissioners of Police for the City of Sault Ste. Marie, s. 34 (b).

²⁸By-Law No. 4 of the Board of Commissioners of Police for the City of Hamilton, s. 13.

²⁹By-Law No. 20 of the Board of Commissioners of Police for the City of Fort William, s. 13.

cretion and it shall not be bound to give any reason for refusing, revoking, or cancelling any licence". While there is nothing in the enabling section of the Municipal Act³⁰ expressly authorizing this provision, it accords with section 247(4) of the Act which contains similar language. A like provision is in the London taxicab by-law.³¹

The Port Arthur taxicab by-law frankly states that "any licence issued pursuant to the provisions of this by-law may be revoked or cancelled at any time by the Board without cause assigned".³² The next sub-section of this by-law, by contrast, is objective in the extreme. Upon conviction for trivial offences carrying nothing more than a nominal fine, a taxicab operator shall—not may—lose his means of livelihood. It states:

"54. (2) Every licence issued to a person as driver of a taxicab shall be forthwith revoked upon the conviction of that person for any offence under the Criminal Code of Canada, the Liquor Control Act of Ontario or the Highway Traffic Act of Ontario, s. 111 (1) (a) or (b)."

This is discrimination against taxicab operators and an unjustified encroachment on their civil rights. Mr. Gellhorn's observation on similar licensing laws in the United States is fully warranted: "In practical terms . . . a blanket proscription of this sort seems more vindictively punitive than it does selectively preventive."³³

These examples demonstrate how far bodies exercising subordinate legislative power will depart from sound principles³⁴ when given the power to do so. The effective remedy does not lie in merely amending these arbitrary by-laws but in amending the provisions of the Municipal Act which gives the licensing tribunals power to be arbitrary. Proper guide lines are required.

The development of some of the relevant case law on municipal licensing illustrates the extent to which the rights

³⁰R.S.O. 1960, c. 249, s. 395, para. 1.

³¹By-Law No. 58 of the Board of Commissioners of Police of the City of London, s. 6.

³²By-Law No. 11 of the Board of Commissioners of Police of the City of Port Arthur, s. 54 (1).

³³Walter Gellhorn, *Individual Freedom and Governmental Restraints*, 128.

³⁴See Chapter 23 *supra*.

of the individual to earn his living have been circumscribed by the arbitrary power of licensing bodies. In *Re McGillivray & Hamilton*,³⁵ the municipality refused to renew or reissue a licence to the owner of a public garage. The applicant applied for an order of *mandamus* and, on the application, it was admitted that the applicant had “complied with the terms of the by-law as far as the application was concerned”. The respondent relied on section 271 (now section 247) of the Municipal Act, which read:

“271. (1) The power to license any trade, calling, business or occupation or the person carrying on or engaged in it shall include the power to prohibit the carrying on of or the engaging in it without a license.

(4) Subject to the provision of *The Theatres and Cinematographs Act*, the granting or refusing of a license to any person to carry on a particular trade, calling, business or occupation, or of revoking a license under any of the powers conferred upon a council or a board of commissioners of police by this Act, or any other Act, shall be in its discretion, and it shall not be bound to give any reason for refusing or revoking a license and its action shall not be open to question or review by any court.”^{35a}

Barlow, J., who heard the application in the first instance, said:

“Pursuant to s. 271 (4) the council considered the application for a licence for a garage, and in its discretion refused to grant the same. It is not shown that the respondent did not properly or honestly exercise its discretion. Unless it is so shown, in my opinion, *mandamus* will not lie . . .”³⁶

In affirming this decision, Robertson, C.J.O., said in the Court of Appeal: “It seems to me that it is impossible to argue that while the granting of a licence is in the discretion of the council, yet the council has no right to refuse to grant it.”³⁷ The result is that an applicant for a licence and, what is worse, the holder of a licence who has built up a business, such as a garage business, is dependent for his livelihood, or his continued livelihood, on the whims of a licensing body that may

³⁵[1947] O.W.N. 761, affirmed [1947] O.W.N. 905.

^{35a}Municipal Act, R.S.O. 1937, c. 266, s. 271(1)(4).

³⁶[1947] O.W.N. 761, 762.

³⁷*Re McGillivray & Hamilton*, [1947] O.W.N. 905, 907.

act as it wills, so long as it conceals everything that could indicate an improper motive. We shall return to consider section 247(4) of the Municipal Act in relation to procedure and appeals.

Legislative Standards to Guide Licensing Bodies

Where there are no standards laid down by the Legislature to guide licensing bodies, litigants are left to grope in a maze of uncertainty as to what their rights are and the courts are not in a position to give them much assistance. Judgments have held, in the absence of any legislative guidance, that a licence can be refused for lack of good character;³⁸ for an accumulation of several matters, each of them separately having "slight" relevance to the issues before the tribunal;³⁹ and where the contemplated land use of the licensee would violate an existing restrictive area by-law (where counsel argued that the licensee would face the zoning matter when he had to and that it was not relevant to his entitlement to a licence).⁴⁰

On the other hand, it has been held that a licence cannot be refused, in the absence of legislative guidance, to enforce a land use control policy not embodied in a restrictive area by-law duly passed and approved by the Ontario Municipal Board under the Planning Act.⁴¹ A licence cannot be refused if the licence fee imposed is prohibitive,⁴² or because the licensing tribunal is of the opinion that enough licences of the class in question have already been issued.⁴³

Objective and Subjective Standards

The grounds on which a licence can be refused or revoked may be expressed in the legislation with varying degrees of objectivity or subjectivity. The standards may be entirely objective as in the regulation providing that a person shall

³⁸*R. v. Yule*, [1962] O.R. 584.

³⁹*Re Dyke and McEachern and the Village of Port Credit*, [1950] O.W.N. 651.

⁴⁰*Re Tenenbaum et al and Toronto Board of Health*, [1955] O.R. 622.

⁴¹*Re Cities Service Oil Co. Ltd. and Kingston*, [1956] O.W.N. 804; (1956), 5 D.L.R. (2d) 126; *Wilcocks v. Township of Pickering*, [1961] O.R. 739; *Re Steven Polon Ltd. and Metropolitan Licensing Commission*, [1961] O.R. 810.

⁴²*Re McCormick et al and the Township of Toronto*, [1948] O.W.N. 425.

⁴³*Re Rosenberg and Toronto Board of Health*, [1939] O.W.N. 33; 1 D.L.R. 771; *Brampton Jersey Enterprises Ltd. v. Milk Control Board of Toronto*, [1956] O.R. 1 (C.A.).

lose his driver's licence when he has accumulated fifteen demerit points;⁴⁴ or they may be almost entirely subjective as in the Farm Products Marketing Act,⁴⁵ which enables the Farm Products Marketing Board to refuse a licence to produce tobacco "for any reason that the Board deems proper".⁴⁶ Other examples can be given which fall between these two extremes, e.g., under the Securities Act, 1966,⁴⁷ a person is entitled to be registered under the Act (to enable him to trade in a security or carry on some other form of activity regulated by the Act) if, in the opinion of the Director of the Ontario Securities Commission, he "is suitable for registration and the proposed registration is not objectionable".⁴⁸ His registration may be suspended or cancelled where, in the opinion of the Director, "such action is in the public interest".⁴⁹ Provisions such as this provoke the comment: "Sometimes telling the agency to do what is in the public interest is the practical equivalent of instructing it: 'Here is the problem. Deal with it'."⁵⁰

The subjective expression of licensing standards should be used only where absolutely necessary and not as a protection against interference by the courts.⁵¹ Ideally, legislation should establish licensing schemes wherein licences can be refused or revoked only on a basis of objective grounds clearly

⁴⁴O. Reg. 129/62, as amended by O. Reg. 339/63 and O. Reg. 139/64 made under the Highway Traffic Act, R.S.O. 1960, c. 172.

⁴⁵R.S.O. 1960, c. 137.

⁴⁶*Ibid.*, s. 18(2)(a), as enacted by Ont. 1962-63, c. 45, s. 11.

⁴⁷Ont. 1966, c. 142.

⁴⁸*Ibid.*, s. 7(1).

⁴⁹*Ibid.*, s. 8.

⁵⁰Davis, *Administrative Law Treatise*, s. 203. For other Ontario provisions enabling licences to be revoked if, in the opinion of the tribunal, such action "is in the public interest", see: Used Car Dealers Act, Ont. 1964, c. 121, s. 5; Collection Agencies Act, R.S.O. 1960, c. 58, s. 6(3a), as enacted by Ont. 1964, c. 7, s. 4(2); Real Estate and Business Brokers Act, R.S.O. 1960, c. 344, s. 7, as enacted by Ont. 1964, c. 9, s. 5; and Mortgage Brokers Registration Act, R.S.O. 1960, c. 243, s. 6, as enacted by Ont. 1964, c. 63, s. 4.

By-Law 68 passed by the Metropolitan Licensing Commission provides that a licence may not be issued if the applicant's character "may not be good, or that the carrying out of the trade, etc., may result in a breach of the law, or *may be in any way adverse to the public interest*" (ss. 6, 10, italics added); and further, that the licence may be revoked for any of the aforesaid "reasons" (s. 19), and that a licence may be suspended "for cause" until the next meeting of the Commission (s. 20).

⁵¹See Chapter 17 *supra*.

set out in the statute. However, if all licensing legislation were required to attain this ideal, much of its effective purpose would be frustrated. Nevertheless, legislation can tend toward such an ideal if, in conferring a discretion, it contains statements of objective factors that shall be taken into account in the exercise of the discretion. The Civil Aviation (Licensing) Act, 1960,⁵² of the United Kingdom provides a good illustration of how this can be done in an important licensing field. It provides that the Air Transport Licensing Board "may at their discretion . . . either refuse the application or grant the applicant an Air Service licence. . . .",⁵³ and that "in exercising their functions under this section the Board shall consider in particular. . . ." There follow clearly expressed policy considerations.⁵⁴ This legislation has not left the licensing tribunal to formulate the essential elements of the licensing policy. It has declared them and at the same time it has left with the tribunal the measure of discretion it requires. "Complete impartiality and integrity" of the administration of a licensing policy will be assisted and enhanced if the Legislature expresses as far as possible "the purposes envisaged by the statute" and the "considerations pertinent to the object of the administration".⁵⁵

We recommend that:

1. Where power to license is conferred, the purpose of the power and the grounds upon which it is to be exercised should be carefully determined and then expressed in the legislation with as much clarity and objectivity as possible.

2. If a large measure of discretion is intended to be vested in the licensing tribunal, safeguards surrounding the exercise of this discretion should be established as in the Civil Aviation (Licensing) Act, 1960, of the United Kingdom.⁵⁶

3. The Municipal Act⁵⁷ should be amended so as to require municipalities, when enacting by-laws thereunder, to

⁵²1960, 8 & 9 Eliz. II, c. 38.

⁵³*Ibid.*, s. 2 (1).

⁵⁴*Ibid.*, s. 2 (2).

⁵⁵See the judgment of Rand, J. in *Roncarelli v. Duplessi*, [1959] S.C.R. 121, 140.

⁵⁶1960, 8 & 9 Eliz. II, c. 38.

⁵⁷R.S.O. 1960, c. 249.

set standards to be inserted in the licensing by-laws indicating the matters or grounds on which a licence may be refused, revoked or suspended.

Similar Ontario legislation has given guidance to the authorized licensing authorities. Section 247 (5) of the Municipal Act provides that a licence shall not be refused "with respect of the carrying on of any business by reason only of the location of such business where such business was being carried on at such location at the time of the coming into force of the by-law requiring such licence". This provision, although a very limited one, is conspicuous as being one of the few specific legislative directions in the licensing field. However, notwithstanding its specific terms, its effect can be defeated by the provisions of section 247 (4) relieving the licensing tribunal of an obligation to give reasons.

LIMITATION ON THE NUMBER OF LICENCES TO BE ISSUED

Licensing authorities are empowered under the Municipal Act⁵⁸ to pass by-laws in certain cases limiting the number of licences of a particular class that may be issued.⁵⁹

The power to limit the number of licences that may be issued and to refuse a licence on the ground that the specified number has been granted, is a control over the relevant area of the economy with monopolistic attributes. Where the power to limit is conferred and exercised the licence takes on the characteristics of a franchise. The real purpose of limiting the number of licences to be issued should be to promote the welfare of the licensee in the public interest. This principle has received statutory acknowledgment in statutes other than the

⁵⁸*Ibid.*

⁵⁹Pursuant to the Municipal Act, the number of licences may be limited for the carrying on of the business of a public garage or automobile service station where gasoline is stored or kept for sale (s. 379(1), paras. 127, 128, 129); for the carrying on of the taxicab business (s. 395, para. 1); for the business of operating "victualling houses, ordinaries and houses where fruit, fish, oysters, clams or victuals are sold or to be eaten therein, and places for the lodging, reception, refreshment or entertainment of the public" (s. 399 (1), para. 5); and for the having in possession for hire or gain of any billiard, pool, or bagatelle table, including the limiting of the number of tables that may be licensed (s. 401, para. 1). And see s. 248 (2), which enables the council to limit the number of licences and the number of tables "to such number as the council may deem fit even if the number be limited to one".

Municipal Act,⁶⁰ such as the Public Commercial Vehicles Act,⁶¹ and the Farm Products Marketing Act.⁶² The power to limit the number of licences issued is a far-reaching one and should only be conferred when accompanied by adequate safeguards for the rights of the individual. Under the Municipal Act the power is to be exercised by the passage of a "by-law". The limitation, or an objective formula for determining the limitation, should be expressed in the by-law.

The Metropolitan Licensing Commission of Metropolitan Toronto in its licensing by-law⁶³ used this formula: "There shall not be issued by the Commission a greater number of taxicab owner licences than the number set by resolution of the Commission." The number of taxicab owner licences in the Metropolitan Toronto area was provided for in a formula fixed by a resolution of the Metropolitan Licensing Commission at one licence per thousand population of Metropolitan Toronto. This did not comply with the Municipal Act,⁶⁴ which states: "By-laws may be passed . . . for limiting the number of cabs . . . used for hire." The principle or the formula for determining the number should have been fixed in a by-law.⁶⁵

Quite apart from this interpretative point, subordinate or delegated legislative power of a monopolistic character, affecting the rights of the community as a whole, should not be exercised by a non-elected body. If the number of licences for taxicabs or restaurants or other facilities serving the public is to be limited in any community, the principle or the formula for fixing the number should be determined by legislation publicly debated and passed by the elected representatives of the people. This is an elementary safeguard for the rights of the individual. This principle is consistent with the general policy of section 247 (2) of the Municipal Act⁶⁶ which

⁶⁰R.S.O. 1960, c. 249, s. 399 (1) para. 5.

⁶¹R.S.O. 1960, c. 319.

⁶²R.S.O. 1960, c. 138, s. 18, as enacted by Ont. 1962-63, c. 45, s. 11, as amended by Ont. 1965, c. 39, s. 5(1)(2), and as further amended by Ont. 1966, c. 56, s. 2(1)(2).

⁶³By-Law No. 49, enacted on the 24th of July, 1963, Schedule 8, para. 48.

⁶⁴R.S.O. 1960, c. 249, s. 395, para. 1.

⁶⁵By-Law 49 has since been repealed and replaced by By-Law No. 68, requiring that the number of taxicab licences be fixed by by-law.

⁶⁶R.S.O. 1960, c. 249.

provides that it is the council and not a Board of Commissioners of Police, where such Board is the licensing body, which fixes the fee to be paid for a licence.

In making this recommendation we are not unmindful of the fact that before decisions of this nature can be made intelligently they must be based on accurate information and a substantial element of administrative expertise. If relevant information is required in order to determine the number of licences that should be issued for any trade or calling, an inquiry procedure could be provided, through which the information would be acquired, and the general public could have an opportunity to be heard. An analogous practice is followed under the Public Commercial Vehicles Act⁶⁷ in determining public necessity and convenience. Where it is intended to fix quotas for licences there should be no difficulty in holding a public hearing by a committee of the municipal council before a decision is made.

The Farm Products Marketing Act⁶⁸ provides another illustration of a delegation, and of a subdelegation, of legislative power to non-elected bodies, which when exercised produces monopolistic results. The Farm Products Marketing Board is empowered, *inter alia*, to make regulations providing for "the fixing and allotting to persons of tobacco acreages or other production quotas on such a basis as the Board deems proper".⁶⁹ This gives power to the Board to restrict a tobacco farm owner from growing tobacco on his own land beyond the stipulated acreage and to prohibit others from growing tobacco. The Act goes on to provide that the Farm Products Marketing Board may delegate this power to the local board. This has been done.⁷⁰

The Ontario Flue-Cured Tobacco Growers' Marketing Board has passed (May 6, 1963) what are called "General Regulations" pursuant to this subdelegation to implement the acreage allotment provisions of the Farm Products Marketing Act. The local board derives its legal power to limit a farmer

⁶⁷R.S.O. 1960, c. 319, s. 4, as amended by Ont. 1961-62, c. 114, s. 4.

⁶⁸R.S.O. 1960, c. 138, s. 18, as enacted by Ont. 1962-63, c. 45, s. 11, as amended by Ont. 1965, c. 39, s. 5(1)(2), and as further amended by Ont. 1966, c. 56, s. 2(1)(2).

⁶⁹*Ibid.*, s. 18(2)(b)(ii).

⁷⁰O. Regs. 107/63, 108/63 and 125/63.

in the use of his land from a regulation passed by the Farm Products Marketing Board—an appointed body. If such a power is needed in the public interest it is one of such consequence to the general public that it should only be exercised by the Legislature, or by the Lieutenant Governor in Council, a body directly accountable to the Legislature. Under the present law the cabinet is two levels away from the formulation and enforcement of a detailed policy of land use.⁷¹

THE TRANSFER OF LICENCES HAVING A MONOPOLY VALUE

Where the law restricts the number of licences which may be issued to those engaging in a particular trade or occupation, difficult questions arise concerning the right of an owner to transfer his licence to another person. Three main interests are involved:

(1) The interest of the licence holder in selling his property for whatever it will fetch in the market place. The law of supply and demand will give the licence a market value quite apart from any goodwill attached to the business carried on by the licensee;

(2) The interest of the qualified and deserving person who wishes to engage in the trade or occupation in question to do so on a fair and equitable basis without having to “buy a licence” from another licence holder;

(3) The interest of the public in having the benefit of free competition.

Apart from licences issued for the purpose of collecting revenue and maintaining records, the only justification for a licensing scheme is the promotion of the public interest in good service, safety, health, and in some cases, the economic welfare of the licensees. Generally speaking, there can be no justification for a scheme of licensing that creates a franchise with a marketable value for the licensee. It may be that this is a necessary consequence in some cases, but the public interest demands that adequate safeguards be provided against public and private exploitation.

⁷¹The operation of the Farm Products Marketing Board will be discussed in detail in Report Number 2.

Special representations were made to this Commission concerning the licensing procedure adopted in Metropolitan Toronto with respect to taxicab licences. The Licensing Commission maintains a list of applicants who are eligible to receive a licence in their turn when new licences are issued by reason of an increase in the population of Metropolitan Toronto.⁷² However, licensees are free, in effect, to transfer their licences to purchasers who may not be on the list, in accordance with the relevant by-law of the Commission.⁷³ A cab owner "may sell his cab and its equipment to any person and upon such sale the owner's license issued in respect of such cab shall be terminated. . . . [T]he Commission may in its discretion issue a new licence to the purchaser of such taxi-cab vehicle and equipment subject to the following conditions:

. . . (i.) That the new applicant qualifies under all other provisions of this By-law, and is a resident of Metropolitan Toronto."^{73a} Six other conditions follow. Under this system, when the Commission issues a licence to the purchaser, as in practice it does, the vendor realizes a monopoly value of his licence on the sale of the vehicle and equipment.⁷⁴ While the licence fee payable to the Commission for a new licence is only \$300, it was recently reported that a cab and licence were "sold", with the approval of the Commission for the sum of \$14,500.⁷⁵ Whether this figure is correct or not, the monopoly value of taxicab licences in Metropolitan Toronto is very high and in the last analysis it is the members of the public who use taxicabs who bear this cost.

In the years prior to 1963, the Licensing Commission followed the policy of requiring cab owners intending to sell their vehicles as cabs, to sell to the next eligible person on a list kept by the Commission, at a price determined by the Commission—which price did not take into account the monopoly value of the licence. However, it was decided, in 1963, to depart from this practice. In the brief filed with us by

⁷²By-Law No. 68 of the Metropolitan Licensing Commission, Schedule 8, s. 48A.

⁷³*Ibid.*, Schedule 8, s. 27.

^{73a}*Ibid.*, Schedule 8, s. 27(1)(2)(i).

⁷⁴Brief of the Metropolitan Licensing Commission, 7-8.

⁷⁵Toronto Star, June 15, 1967, p. 7.

the Metropolitan Licensing Commission, the reason for the change was explained in this way:

“... [E]xperience indicated that there was widespread flouting and circumvention of these regulations, which tended to bring the whole by-law into disrepute and contempt. Most of the revocations of cab owners' licences arose from attempts by this Commission to enforce the by-law in regard to illegal sales. Finally, the Commission in 1963 decided to bring matters into the open by permitting the sale of a taxicab at whatever price the parties agreed to. Section 27 of Schedule 8 of the by-law now permits the making of an Agreement for the sale of a taxicab upon an all-cash basis. If the Agreement is approved by the Commission the existing licence is terminated and a new licence is issued.

In the two years since this change was made it has been noted that the monopoly value of a cab owner's licence has increased from \$1,500.00 to \$5,000.00 or more, which would appear to indicate that cab ownership is a desirable asset and presumably a profitable business under the present regulations.

Recognition of the right to deal in the monopoly value of a licence in addition to being more realistic has made it possible for the Licensing Commission to insist upon higher standards in the industry in dealing with the public, especially as regards the mechanical condition of taxicabs and the regulations have been tightened in regard to the age of taxicab vehicles, and some of the monopoly value of the licence has been channelled back to the Licensing Commission, representing the public, in the form of increased licence and licence renewal fees.”⁷⁶

On our request, the Chairman of the Licensing Commission elaborated on this submission in a letter to this Commission:

“The type of transactions [under the transfer system existing until the change in 1963] that were used to effect a transfer of the ownership without a sale were varied but generally took the form of rental agreements, partnership agreements and management agreements, none of which came before the Commission. These were the methods used to circumvent the Commission's regulations as referred to in the submission to the Royal Commission. The Commission attempted to regulate management agreements by requiring affidavits to

⁷⁶Brief of the Metropolitan Licensing Commission, 7-8.

be taken by the owner of the licence and by prescribing the form of contract to be used by the manager and licensee. It was found that notwithstanding the form of contract for management, licences were in essence being sold. This is best illustrated in the reported case *Re Szabo and Metropolitan Toronto Licensing Commission*, [1963] 2 O.R. 426.⁷⁷

We recognize that in a large urban area such as the Municipality of Metropolitan Toronto, in a field such as the taxicab industry,⁷⁸ it may be difficult to police a licence-issuing and transfer policy, but we do not find the reasons given by the Commission convincing.

Any argument based upon cab ownership being a “desirable asset and presumably a profitable business under the present regulations”, is neither sound nor logical. It should not be the purpose of a licensing system to enhance the profitability of the business of a licensee beyond what is necessary to give good service to the public and a reasonable return to the licensee from his labours. The latter interest is guaranteed by the limitation on the number of licences that may be issued, and not by the right to make a profit on the sale of licences under the present government-created monopoly. It is hard to see any relationship between the right to deal in the monopoly value of a licence and the ability of the Commission to insist on higher standards in the industry.

If there was difficulty in preventing trafficking in licences prior to 1963 by reason of illicit transfers through “rental agreements, partnership agreements and management agreements”, the real cause for the difficulty must have been that the fares were so high that, taken with the limitation on the number of licences issued, the licences had a very high marketable value.

Finally, the argument that “some of the monopoly value of the licence has been channelled back to the Licensing Commission, representing the public, in the form of increased licence and licence renewal fees” is untenable. If this were true it would be an indirect tax on the users of taxicabs for the

⁷⁷Letter, June 13, 1967.

⁷⁸See the Report of the Advisory Committee on Taxicabs to the Board of Commissioners of Police of the City of Toronto, April 12, 1932, 30-32; and the Report of the Committee on Taxicabs to the Board of Commissioners of Police for the City of Toronto (1952), 13-16.

benefit of the public at large, which is not the purpose of the licensing scheme. But the thesis is not sound. The purchaser from a licensee pays the monopoly value to the licensee and it is he, not the vendor, who pays the increased licence fee to the Commission. The purchaser of the licence must recoup for himself, out of fares collected from users of taxicabs, not only the purchase price of the licence but the "increased licence fee". This policy of the Licensing Commission of Metropolitan Toronto appears to be in direct violation of the intent of its general licensing by-law:⁷⁹

"17. (1) No person shall enjoy a vested right in the continuance of a licence and upon the issue, renewal, transfer, cancellation or suspension thereof, the value of a licence shall be the property of the Metropolitan Licensing Commission.

(2) No licence shall be transferred except with the consent in writing of the Commission and the Commission shall not be bound to give such consent."

In practice, a cab owner may not transfer his licence; he may only sell his taxicab vehicle, equipment and the goodwill attached to the business. The licence is terminated and the Commission issues a new licence. It however treats "the value of a licence" as the property of the licence holder and not that of the Commission. The public interest demands that licensing laws should be written so as to make it clear that the monopoly value created by the limitation of numbers of licences cannot be turned to private advantage. A licensee should not be able to reap a benefit for himself by reason of the limitation of the number of licences. He has done nothing to create this wealth. It is the users of the taxicab, together with the limitation on licences that may be issued, that have created it.

If there is to be a limitation on the number of licences issued, the licensing tribunal should maintain a list of applicants for licences, available for public inspection. When the holder of a licence no longer wishes to use it, he should return it to the tribunal and a new licence should be issued to the person qualified and entitled to it whose application has been filed with the Commission for the longest period of time.

⁷⁹By-Law No. 68 of the Metropolitan Licensing Commission, s. 17.

STRUCTURE AND ORGANIZATION OF LICENSING TRIBUNALS

We use the term "licensing tribunal" to mean that body which administers licensing laws—the body that grants, refuses, renews, suspends or revokes licences, as distinct from the body that enacts licensing laws. In Chapter 10 we state that judicial power should appropriately be exercised by impartial bodies, independent of political control. In their decisions they should strive to be just in the same sense as justice is done in the courts. The exercise of administrative power should appropriately be subject to political control. The extent to which a licensing tribunal exercises strictly judicial power is governed entirely by the extent to which it is required to apply clearly established principles to the cases which come before it and to follow a fair procedure. The degree of its administrative power is measured by the amount of unfettered discretion it has after legal rules have been applied.

The classification of licensing tribunals affects not only the appropriate principles to govern their structure and organization, which we are now considering, but also those governing procedure, judicial review, and appeals which we discuss later.

Most licensing tribunals now exercise both judicial and administrative powers. Although we have recommended that, where possible, these should be separated, so that proper principles may be applied, in many cases they are so interwoven that this cannot be done. In such cases the principles of the exercise of judicial power independently of political control and the exercise of administrative power subject to political control, conflict. As we have said in Chapter 10, no new applicable principles can be devised and a practical solution must be adopted. The courses to be followed with respect to structure and organization, procedure, judicial review, and appeals all require special consideration.

So far as structure and organization of tribunals are concerned, we have come to the conclusion that where a licensing tribunal exercises some administrative powers the tribunal ought not to be established as an independent body in the true

sense. Provincial licensing bodies should continue to be appointed by the Lieutenant Governor in Council and hold office during pleasure and, where municipal licensing tribunals are appointed, they should continue to be appointed as they are now.⁸⁰

Although licensing tribunals that make policy should be under government control, they should act independently in the sense of being impartial in the administration of a declared policy. In this respect their proceedings should be conducted in substantially the same manner as those of judicial tribunals. They should not "appear in the role of prosecutors and judges in the same cause".⁸¹ The task of investigating complaints and making presentations to the tribunal should be performed by other public servants.

DELEGATION OF THE POWER TO ISSUE AND RENEW LICENCES

Power to issue licences may be properly delegated by a licensing tribunal to one or more of its qualified officials, with the duty to conduct the necessary investigations and apply the relevant legislative standards. Such a delegation is essential to any good licensing scheme where large numbers of licences are issued annually.⁸² The licensing tribunal should devote its time and attention solely to difficult and contested applications.

The power to issue a licence and the power to refuse to issue, or to revoke one, are different matters. Subject to the exception to which we shall immediately refer, no official should have the power to refuse, suspend or revoke a licence.

Under the Municipal Act,⁸³ a chief constable of a municipality, where a board of commissioners of police is the licensing tribunal, may suspend a licence in certain circumstances

⁸⁰See Chapters 45, 46 and 39 *supra* with respect to county and district court judges and magistrates acting as members of boards of commissioners of police and of licensing boards.

⁸¹Chapter 2, p. 49 *supra*.

⁸²In 1964 the total number of licences issued by the Metropolitan Licensing Commission of Metropolitan Toronto was 69,974: See Brief of the Metropolitan Licensing Commission, 1.

⁸³R.S.O. 1960, c. 249, s. 247 (7) (8).

for a time no longer than “the expiration of two weeks from the date of suspension or after the time of the next meeting of the board after the suspension, whichever occurs first”. This power is justified, provided that the applicable by-law sets out appropriate standards to govern the exercise of the power.

In all cases where the issuing official believes that an application should be refused, it should be referred to the tribunal to be dealt with in accordance with the procedure which we shall discuss later.

ENACTMENT OF LICENSING LAWS

In principle, basic licensing laws should be enacted by democratically elected bodies. In the provincial sphere this is not always possible. Detailed regulations concerning licensing schemes under such statutes as the Farm Products Marketing Act⁸⁴ and the Elevators and Lifts Act,⁸⁵ must necessarily be enacted by the Lieutenant Governor in Council—a body directly responsible to the Legislature. On the municipal level, licensing by-laws should be enacted by the respective councils and not by boards of commissioners of police or the Metropolitan Licensing Commission.

RECOMMENDATIONS

1. Licensing requirements should not be unnecessarily imposed nor should unreasonable standards be required in their implementation.
2. All powers which naturally relate to licensing, such as the power to revoke or suspend, should be stated expressly in the legislation conferring the power so that those affected by the exercise of the power may be under no doubt as to their rights and potential liabilities. Such powers should not be left to implication.
3. The particular purposes or policy sought to be implemented by licensing legislation should be first determined and then clearly expressed in the legislation.

⁸⁴R.S.O. 1960, c. 137.

⁸⁵R.S.O. 1960, c. 119.

4. If a large measure of discretion is intended to be vested in a licensing tribunal, safeguards surrounding the exercise of this discretion should be established as in the Civil Aviation (Licensing) Act, 1960, of the United Kingdom.
5. The Municipal Act should be amended so as to require municipalities, when enacting by-laws thereunder, to set standards to be inserted in the licensing by-laws indicating the matters or grounds on which a licence may be refused, revoked or suspended.
6. The power to limit the number of licenses issued should only be conferred when accompanied by adequate safeguards for the rights of the individual.
7. Subordinate legislative power in the licensing field conferring monopolistic privileges affecting the rights of the community as a whole, should be exercised by an elected body or, if this is not possible, by a body directly accountable to an elected body, such as the Lieutenant Governor in Council.
8. Where a limitation on the number of taxi-cab licences issued is provided, the licensing tribunal should maintain a list of applicants for licences available for public inspection. When the holder of a licence no longer wishes to use it, he should return it to the tribunal and a new licence should be issued to the person qualified and entitled to it whose application has been on file with the licensing tribunal for the longest period of time.
9. Where a licensing tribunal exercises some administrative powers the tribunal ought not to be established as an independent body in the true sense. Provincial licensing bodies should continue to be appointed by the Lieutenant Governor in Council and hold office during pleasure and, where municipal licensing tribunals are appointed, they should continue to be appointed as they are now.
10. The proceedings of licensing tribunals should be conducted in substantially the same manner as those of judicial tribunals. The task of investigating complaints

and making presentations to the tribunal should not be performed by members of the tribunal.

11. Power to issue licences may properly be delegated by a licensing tribunal to one or more of its qualified officials.
12. Subject to the Municipal Act,⁸⁶ no official should have the power to refuse, suspend or revoke a licence. In all cases where the issuing official believes that the application should be refused, the matter should be referred to the tribunal to be dealt with in accordance with the procedure recommended in this Section.
13. Basic licensing laws should be enacted by democratically elected bodies. In the provincial sphere, where detailed regulations are required these should be enacted by the Lieutenant Governor in Council.

⁸⁶R.S.O. 1960, c. 249, s. 247(7)(8).

CHAPTER 76

Safeguards on the Exercise of Licensing Powers

PROCEDURAL SAFEGUARDS

No Notice or Hearing Required Where Initial Decision is to Grant a Licence

IT is obvious that no hearing should be required where a licence is issued in the first instance. The important thing is the effective administration of the licensing law with as little inconvenience to the public as possible.¹

Notice of Grounds for Refusal to Grant a Licence and an Opportunity to be Heard

If, in the course of processing an application for a licence, the issuing officer considers that there are grounds for rejecting the application, the licensing tribunal should hold a hearing at which the applicant should be given the opportunity to fully present his case. Preceding the hearing, sufficient information should be given to the applicant to enable him

¹See Cooper, *State Administrative Law*, 150: "A distinction should be noted (although it is not often the subject of discussion in court opinions) between the granting and the denial of license applications. If the outcome of the case is the granting of the license, the applicant cares little whether he has been granted a hearing or not; it is the grant of the license that is important."

to meet the case against him. The hearing should comply with the provisions of the Statutory Powers Procedure Act recommended in Chapter 14.

Notice in Revocation Proceedings

Few municipal licensing by-laws in Ontario provide for notice prior to the revocation of a licence. By-law No. 91 of the Board of Commissioners of Police of the City of Windsor is an exception.² The Board may cancel or suspend a taxicab licence, "but such action shall be taken only after notice has been given to the person affected requiring him to appear before the Board at a time and place specified in such notice and to show cause why such a licence or permit should not be revoked or suspended. . . ."³ By-law No. 68 of the Metropolitan Licensing Commission, empowering the Commission to revoke licences, concludes: ". . . but before revoking any such license the holder thereof shall be given at least 7 days notice . . . and shall be permitted either by himself or by his representative to appear before the Commission to show cause why he believes such licence should not be revoked."⁴ Provision for notice of revocation or suspension proceedings should be in all licensing by-laws, unless there are very exceptional circumstances where public health or safety is involved.

The notice should set out briefly the grounds on which it is alleged that the licence should be revoked, and, where possible, a statement or summary of the evidence, if any, against the licence holder. The initial decision to initiate revocation or suspension proceedings is often based on information, material or documents contained in a report to the tribunal. Such evidence, if not given to the licensee with the notice, should be made available for his inspection prior to the hearing. This is the policy of the Metropolitan Licensing Commission. It makes reports upon which complaints are based available upon request. It was submitted that "the notice of hearing makes it clear that details of the allegations against the licensee are available to him in advance".⁵ This is

²By-law No. 91 of the Board of Commissioners of Police for the City of Windsor, s. 41(b).

³*Ibid.*

⁴By-law No. 68 of the Metropolitan Licensing Commission, s. 19(1).

⁵Brief of Metropolitan Toronto Taxicab Conference, Inc., 3.

essential for a licensee to make adequate preparation for the hearing. In the United States, provisions of this type are contained in the Revised Model State Administrative Procedure Act (discussed in Chapter 12). These require that the notice in revocation proceedings specify the "facts or conduct which warrant the intended action".⁶ The Federal Administrative Procedure Act⁷ (also discussed in Chapter 12) requires that in such proceedings "facts or conduct which may warrant such action [the withdrawal, suspension, revocation or annulment of any licence] shall have been called to the attention of the licensee".

Opportunity to Achieve Compliance

The provisions in the American Acts concerning notice prior to revocation proceedings contain requirements binding on the licensing agency which are peculiar to the licensing function and cover more than procedural rights. They confer also rights of a substantive nature. It is useful to set them out in full.

The Federal Administrative Procedure Act provides:

"9. (b) . . . Except in cases of willfulness or those in which public health, interest or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements . . .".⁸

The Revised Model State Administrative Procedure Act provides:

"14. (c) No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. . . ."⁹

⁶Revised Model State Administrative Procedure Act, s. 14 (c). See p. 175 *supra*.
⁷60 Stat. 237 (1946), 5 U.S.C.A. § 1001 *et seq.* (1946), s. 9(b). See p. 180 *supra*.

⁸*Ibid.*

⁹Both of these provisions are referred to in Chapter 12 *supra*.

The provisions of the Revised Model State Administrative Procedure Act have been adopted in several states of the union.¹⁰ The requirements that “the licensee shall have been given an opportunity to demonstrate or *achieve* compliance with all lawful requirements”¹¹ in the Federal Act, and that “the licensee was given an opportunity to show compliance with all lawful requirements for retention of the licence” in the Revised Model State Administrative Procedure Act, introduce an element of flexibility into the administration of licensing laws—an element that is not inconsistent with the basic purpose of licensing—and put a restraint on arbitrary action. They contain principles that should have statutory expression in Ontario, either in the licensing statutes or in the proposed Statutory Powers Procedure Act.¹²

Onus of Proof In Revocation Proceedings

By-law No. 91 of the Board of Commissioners of Police of the City of Windsor,¹³ and Metropolitan Toronto Licensing Commission By-law No. 68, to which we have referred, put the obligation on the licensee to “show cause” why the licence should not be suspended or revoked. It is wrong to place the burden on the licensee to show grounds why his licence should not be suspended or revoked, rather than placing this burden on those who allege that grounds for suspension or revocation exist. The injustice is compounded where the existing laws do not afford the licensee the right to know the case against him.

When a licence has been granted by a licensing tribunal it is fair to assume that, at that time, the person licensed is legally entitled to it. If it is alleged that he has become disentitled to it, then the onus of satisfying the tribunal, on the balance of probabilities, that this is the case, should be on those who so allege. The licensing tribunal should not revoke

¹⁰Cooper, *State Administrative Law*, 492, n. 39.

¹¹Italics added.

¹²For practical reasons for such a provision, see Cooper, *State Administrative Law*, 497.

¹³By-law No. 91 of the Board of Commissioners of Police of the City of Windsor, s. 41 (b).

or cancel a licence until this onus has been satisfied. Provision for appeals on the record, which we shall later recommend, should ensure compliance with this rule.

Provincial Procedural Legislation

Recent provincial licensing legislation has shown a commendable trend towards conferring procedural rights on those affected by licensing schemes. The Securities Act, 1966,¹⁴ contains a limited code of procedure. The Director shall not refuse to grant or refuse to renew registration "without giving the applicant an opportunity to be heard".¹⁵ He is obliged to give a registrant an opportunity to be heard before suspending or cancelling any registration, except where the granting of an opportunity to be heard would, in his opinion, be "prejudicial to the public interest", in which case the decision is subject to review by the Ontario Securities Commission.¹⁶ The Act provides rules to be applicable "at a hearing required or permitted under the Act to be held before the Commission or the Director. . ."¹⁷ These rules provide that "notice in writing of the time, place and purpose of the hearing shall be given to any person or company that, in the opinion of the Commission or the Director, is primarily affected by such hearing" in "addition to any other person or company to whom notice is required to be given";¹⁸ that "the person presiding shall receive such evidence as is submitted by a person or company to whom notice has been given . . . that is relevant to the hearing. . ."¹⁹; that "at the hearing or hearing and review by the Commission, all oral evidence received shall be taken down in writing and together with such documentary evidence and things as are received in evidence by the Commission shall form the record";²⁰ that written reasons for decisions adversely affecting "the right of a person or company to trade in securities" be issued on request;²¹ and that "a person

¹⁴Ont. 1966, c. 142.

¹⁵*Ibid.*, s. 7 (2).

¹⁶*Ibid.*, s. 8.

¹⁷*Ibid.*, s. 5.

¹⁸*Ibid.*, s. 5, Item 1.

¹⁹*Ibid.*, s. 5, Item 3.

²⁰*Ibid.*, s. 5, Item 4.

²¹*Ibid.*, s. 5, Item 5.

or company attending or submitting evidence at a hearing pursuant to item 1 may be represented by counsel".²²

There are many statutes conferring licensing powers on tribunals which contain few or no procedural safeguards for the rights of the licensee or the public. We refer particularly to the Municipal Act²³ which we are about to discuss and many of those statutes conferring licensing powers on self governing bodies with which we deal in Section 4 of this Part.

Municipal Procedural Legislation

In the wide municipal licensing field, the relevant procedural law is in a chaotic state. As we have indicated, most of the legislation authorizing licensing by-laws is passed under the Municipal Act, which uses the simple formula "by-laws may be passed . . . for licensing regulating and governing of [the business in question]" and "for revoking any such licence". The Act does not require that procedural provisions be contained in the by-laws authorized.

There is one procedural licensing provision in the Municipal Act. It is a negative one which takes away rights. Under section 247 (4) the applicant for a licence, or a licensee, is denied the right to have reasons for a refusal to grant a licence or for a revocation of one.

We have examined representative licensing by-laws submitted to us by eight of the larger municipalities in Ontario—Fort William, Port Arthur, Sault Ste. Marie, Windsor, Hamilton, Ottawa, Kingston and the Municipality of Metropolitan

²²*Ibid.*, s. 5, Item 7. See also the following recently enacted statutory provisions: Used Car Dealers Act, 1964, Ont. 1964, c. 121: opportunity to be heard before application for registration or renewal thereof is refused, s. 4 (3); opportunity to be heard before registration is suspended or cancelled, s. 5; the right, in certain circumstances, to have application or cancellation proceedings referred to an advisory board for hearing, s. 6 (2); the right to written reasons for decisions refusing to grant a registration or a renewal thereof or suspending or cancelling the same, s. 8. There are virtually identical provisions in: Collection Agencies Act, R.S.O. 1960, c. 58, ss. 6 (3), 6 (3a), 6a (2) and 6c, as enacted by Ont. 1964, c. 7, ss. 4 (2), 5; Real Estate and Business Brokers Act, R.S.O. 1960, c. 344, ss. 6 (2), 7 and 8 (2), as enacted by Ont. 1964, c. 99, s. 5; and Mortgage Brokers Registration Act, R.S.O. 1960, c. 244, ss. 5 (3), 6, 6a (2) and 6c, as enacted by Ont. 1964, c. 63, s. 4.

²³R.S.O. 1960, c. 249.

Toronto. A significant feature of many of these by-laws is the general absence of any reference to such procedural matters as:

- (1) Notice to the person affected prior to the refusal or revocation of a licence;
- (2) The right to a hearing;
- (3) The right to reasons.

These by-laws appear to be directed more toward administrative expedience and convenience than to the protection of the civil rights of individuals. The suspension and revocation provisions of the by-law passed by the Board of Commissioners of Police for the City of Hamilton, covering some twenty-two trades or businesses, are typical. They read:

"13. Upon the Board's decision to suspend or revoke any licence which may lawfully be revoked, the issuer of licences shall give written notice by ordinary prepaid mail addressed to the licensee at his most recent address on record with the issuer of licences, and no such suspension or revocation shall take effect until 48 hours after the mailing of such notice, exclusive of Sundays and holidays; and before the expiration of such period the licensee shall be responsible that the licence certificate and all licence plates and identification cards belonging to the Board are returned to the Board by delivery to the issuer of licences."²⁴

These provisions assume the validity of a decision to suspend or revoke a licence—but there is nothing in the by-law itself providing for any steps which should be taken to lead to a valid decision. No concern is shown for the protection of the rights of the licensee and his interests, which may be very substantial. The only concern is that the revocation should not take effect until such time as the licensee will probably have received notice of the decision. The fairness of the decision to revoke is not material, but the return of the plates and documentation respecting the licence is. It is unnecessary to emphasize that irreparable harm may be done to a licence holder by an unwarranted revocation of his licence. Under

²⁴By-law No. 4 of the Board of Commissioners of Police for the City of Hamilton, s. 13. Provisions identical with the foregoing can be found in By-Law 10467, s. 15 (concerned with some eleven trades and businesses) and By-Law 10468, s. 9 (concerned with certain construction trades and businesses) passed by the Council of the City of Hamilton.

existing law he can receive no compensation, except in the very unusual case where the licensing body has acted corruptly.

In referring to the by-laws submitted to us, we do not single out the respective municipal authorities for criticism but treat the by-laws as typical examples of those passed under the Municipal Act.

Statutory Powers Procedure Act

The minimum rules of procedure which we have recommended be enacted in the Statutory Powers Procedure Act²⁵ should apply to all proceedings by licensing tribunals except:

- (1) Where a licence is granted on an initial application;
- (2) Where for reasons of public safety, health or emergency, immediate action is required.

If the powers of licensing tribunals are conferred in accordance with the principles we have recommended in Chapter 75, the element of administrative discretion left to most licensing tribunals will not be large and will be controlled to a great extent by defined statutory purposes and standards.

We have therefore concluded that additional rules applicable to judicial tribunals made by the Statutory Powers Rules Committee can and should, for the most part, be applicable to proceedings by licensing tribunals. The additional rules proposed are:

- (1) Decisions should be based on a record;
- (2) No consultation after the hearing in the absence of affected parties;
- (3) The deciding members of the tribunal should be present at the hearing; and
- (4) All evidence should be taken down by a skilled reporter or otherwise recorded.

The extent to which these additional rules may be applied to a particular licensing tribunal will depend on the nature of its powers and should be a matter for the decision of the Statutory Powers Rules Committee.²⁶

²⁵See pp. 212 ff. *supra*.

²⁶See p. 219 *supra*.

JUDICIAL SAFEGUARDS

Judicial Review

An adequate and expeditious supervision of the decisions of licensing tribunals by the courts is an essential safeguard against arbitrary action. The subject of judicial review has been dealt with in Section 5 of Part I of this Report.

In accordance with the principles there set out, decisions of licensing tribunals subject only to the minimum rules of procedure enacted in the Statutory Powers Procedure Act would be subject to review on all grounds of *ultra vires* and for error of law on the face of the record. Decisions of licensing tribunals to which the additional rules for judicial tribunals are applied would be subject to review on these grounds and for lack of substantial evidence in the record.

Right of Appeal

The protection afforded by judicial review is a limited one. In cases where a wider review is desirable an appeal must be provided.²⁷

The need for a right of appeal from decisions of licensing bodies is widely recognized in the statutes of Ontario, e.g., the statutes relating to the self-governing professions and occupations dealt with in Section 4 of this Part, the Securities Act, 1966,²⁸ the Real Estate and Business Brokers Act,²⁹ and the Municipal Act.³⁰

There does not appear to be any consistent policy with regard to appeals nor any coherent system under which they are provided. Some statutes providing for rights of appeal make provision for appeal procedure, and some do not. No appropriate procedural provisions are contained in the Municipal Act where a right of appeal is given.³¹ Section 247 reads in part:

“(4) Subject to *The Theatres Act*, the granting or refusing of a licence to any person to carry on a particular trade, call-

²⁷*Re Szabo and Metropolitan Toronto Licensing Commission*, [1963] 2 O.R. 426, 427.

²⁸Ont. 1966, c. 142, s. 29.

²⁹R.S.O. 1960, c. 344, ss. 30-34, as amended by Ont. 1964, c. 99, s. 12.

³⁰R.S.O. 1960, c. 249, s. 247 (9) (10).

³¹*Ibid.*

ing, business or occupation, or of revoking a licence under any of the powers conferred upon a council or a board of commissioners of police by this or any other Act, is in its discretion, and it is not bound to give any reason for refusing or revoking a licence and its action is not open to question or review by any court.

(9) Notwithstanding subsection 4, the decision of a board of commissioners of police in refusing or revoking a licence is subject to an appeal therefrom to a judge of the Supreme Court whose decision is final.

(10) The practice and procedure on and in relation to an appeal made under subsection 9 shall be the same, as nearly as may be, as in the case of an appeal from a decision of the Master of the Supreme Court in an action or proceeding in the Supreme Court."

In the first place, this section does not create a right of appeal from licensing decisions of municipal councils. There should be such a right of appeal. In the second place, the procedural provisions are quite inappropriate for an appeal from a licensing body. McTague, J., dealt with this matter forcefully in *Re Silverberg and Board of Commissioners of Police for the City of Toronto*.³² He said:

"An analysis of subsec. 7 [now subsection 10] leads to the conclusion that it has been assumed that what takes place before the Master is analogous to what takes place before the Board of Police Commissioners. The assumption is erroneous. Matters before the Master involve *litem inter partes*. The rights of different litigants are submitted to the Master, and, on all of the material before him, the Master makes his order. The matter then comes before a Judge in Chambers before whom the appellant places all of the material which was before the Master, and the Judge, on a review of the same material as was before the Master, determines whether the Master proceeded upon a correct principle or upon a wrong one in making his order. The chief thing to be noted is that upon the appellant is placed the obligation of serving the parties (the Master is not served) and furnishing the appellate tribunal with what was before the Master. . . .

When one considers these fundamental differences between the functions of the Master and the functions of the Board of Police Commissioners, it becomes apparent that the lot of an appellant in getting before a Judge of the Supreme Court

³²[1937] O.R. 528.

the material upon which an appeal can be proceeded with is a most difficult one. . . .³³

. . . If a right of appeal in the true sense of the word is intended, this is a matter to which consideration should be given, as well as the matter of providing the applicant with some means by which he can satisfy the usual onus of getting before the appellate tribunal material on which an appeal can be decided properly.³⁴

Naturally, one is desirous of helping the appellant here. I should very much like to find a way by which he can get before me the necessary material on which to decide his appeal. The legislation does not give me power to relieve him of the duty of getting before the Court all the material necessary to decide the motion. . . .³⁵

The appellant here may have a very good case. But to allow an appeal, I should have to reach the conclusion that, on the evidence and other material before it, the Board of Police Commissioners exercised a wrong principle in arriving at the decision appealed from. This I am unable to do, because the evidence and material which were before the Board were not before me, and therefore, I cannot say that the Board was wrong. Consequently, I have no alternative but to dismiss the motion."³⁶

In this case the right of appeal was effectively frustrated by the absence of proper procedural requirements in the statute and the express provision that the Board was not bound to give reasons for its decision. Where a Board does not keep a record and does not give reasons, the party affected by its decision has little to put before an appellate court, particularly if the members of the Board make no comments during the hearing.³⁷ We agree with the comment of the Donoughmore Committee that "it is contrary to natural justice that the silence of the Minister or Ministerial Tribunal should deprive him [a disappointed party] of his opportunity" to contest the decision.³⁸

Appropriate rules governing appeals from licensing tribunals should be prepared.

³³*Ibid.*, 531.

³⁴*Ibid.*, 534.

³⁵*Ibid.*, 533.

³⁶*Ibid.*, 534.

³⁷See *Re Ross and Board of Commissioners of Police for the City of Toronto*, [1953] O.R. 556.

³⁸The Donoughmore Report, 80.

An inconsistency in the present law exists. Under section 247 (9) of the Municipal Act,³⁹ if an appeal is taken, the decision of a Supreme Court judge is final but if the decision is attacked by way of an application for judicial review, the decision of the Supreme Court judge hearing the application is subject to appeal to the Court of Appeal as of right. This discrepancy in the law will largely be corrected if the recommendations made in this Report that appeals from administrative tribunals and applications for judicial review be heard by the Appellate Division of the High Court of Justice for Ontario are adopted.

Where licensing tribunals are required to adhere to the rules of procedure which we have recommended, a system of appeals and appropriate procedure on appeals should be established. In such cases the tribunals would be required to have a record of their proceedings. Those tribunals to which the additional rules governing judicial tribunals are applicable would be required to base their decisions on the record. The system of appeals should provide:

(1) Decisions of tribunals required to base their decisions on the record should be subject to appeal to the Appellate Division of the High Court of Justice for Ontario. The appeal should lie on all grounds of *ultra vires* and on all questions of law or fact within the authority of the tribunal. Such appeals would be based on the record of the proceedings before the licensing tribunal. The Appellate Division should have power on the appeal to make such order as the licensing tribunal should have made, or to refer the matter back to the licensing tribunal for a re-hearing. Contempt proceedings to enforce the order of the Appellate Division would not in that case be necessary.⁴⁰

(2) Decisions of licensing tribunals that are not required to base their decisions on the record should be subject to appeal to an appropriate superior tribunal. (See Chapter 15). The appellate tribunal should have the same powers as the licensing tribunal and power to make such order as

³⁹R.S.O. 1960, c. 249.

⁴⁰See *Re Ross and Board of Commissioners of Police for the City of Toronto*, [1953] O.R. 947.

the licensing tribunal might make. In appropriate cases, a further appeal to the Appellate Division of the High Court of Justice on a matter of law should be provided.

An Appeal from an Order Suspending a Licence

The right of appeal given under subsection 9 of section 247 of the Municipal Act⁴¹ does not apply where the order of the licensing tribunal is an order of suspension. Where an order of suspension is limited to two weeks, as by section 247 (8), a right of appeal would not be of much value; but where the suspension may be for a longer period, or there are repeated suspensions, a right of appeal from decisions of licensing tribunals is a necessary safeguard.

RECOMMENDATIONS

1. No hearing should be required where a licence is issued (as distinct from being denied) in the first instance.
2. If the issuing officer considers that there are grounds for rejection, the licensing tribunal should hold a hearing and give the applicant the opportunity to fully present his case.
3. The applicant should be provided with sufficient information in order that he may meet the case against him and the hearing should comply with the provisions of the Statutory Powers Procedure Act which we have recommended.
4. Provision for notice of revocation or suspension proceedings should be in all licensing laws unless there are very exceptional circumstances when public health, safety or emergency are involved.
5. The notice should set out briefly the grounds on which it is alleged the licence should be revoked or suspended and, where possible, a summary of the evidence that it is proposed to submit to the tribunal.
6. Evidence, if not supplied to the licensee with the notice, should be made available for his inspection prior to the hearing.

⁴¹R.S.O. 1960, c. 249.

7. Provisions similar to those in the Revised Model State Administrative Procedure Act and the Federal Administrative Procedure Act of the United States, giving a licensee an opportunity to show compliance with all lawful requirements and thus avoid proceedings leading to suspension, revocation or annulment of a licence should be enacted in Ontario either in the licensing statutes or the Statutory Powers Procedure Act.
8. The onus should not be placed on the licensee to show cause why his licence should not be suspended or revoked.
9. The Statutory Powers Procedure Act should apply to most licensing proceedings to correct procedural deficiencies in the licensing laws, particularly with respect to:
 - (a) notice of hearing,
 - (b) notice of case to be met,
 - (c) right to counsel, and
 - (d) reasons for decision.
10. The minimum rules applicable to judicial tribunals should be applicable to the proceedings of all licensing tribunals except where a licence is granted on an initial application and where, for reasons of public safety, health or emergency, immediate action is required.
11. Additional rules governing judicial tribunals should apply to licensing tribunals where appropriate. The additional rules are:
 - (a) Decisions should be based on the record;
 - (b) No consultation after the hearing in the absence of affected parties;
 - (c) The deciding members of the tribunal should be present at the hearing;
 - (d) All evidence should be recorded.
12. The Statutory Powers Rules Committee should decide the extent to which the additional rules for judicial tribunals should apply to licensing tribunals.
13. Our recommendations concerning judicial review apply to review of licensing decisions.

14. In addition, there should be statutory rights of appeal from licensing decisions and procedural provisions with regard thereto.
15. Where a licensing tribunal is required to base its decision on the record before it, an appeal should lie to the Appellate Division of the High Court on all questions of *ultra vires* and on all questions of fact or law disclosed in the record.
16. On the appeal the court should have power to make the order that the licensing tribunal should have made or to refer the matter back to the licensing tribunal for a re-hearing.
17. Where a tribunal is not required to base its decision solely on the record before it, an appeal should lie to an appropriate superior tribunal.
18. On the appeal the appellate tribunal should have the same powers as the licensing tribunal and power to make such order as the licensing tribunal might make.
19. In appropriate cases an appeal should lie by way of stated case to the Appellate Division of the High Court of Justice on questions of law.
20. Rules of procedure governing appeals, except procedure in the courts, should be made by the Statutory Powers Rules Committee. Rules of procedure in the courts should be left to the Rules Committee constituted under the Judicature Act.⁴²
21. There should be a right of appeal from suspensions of licences.

⁴²R.S.O. 1960, c. 197, s. 111, as amended by Ont. 1961-62, c. 51, s. 3 enacting s. 111(1)(aa); by Ont. 1965, c. 51, s. 5(1)(2) enacting s. 111(1)(f) and s. 111(4a); and by Ont. 1965, c. 51, s. 5(3) amending s. 111(5).

Section 3

FAMILY BENEFITS ACT, 1966

INTRODUCTION

In Ontario, as in many other jurisdictions, the period since the Second World War has produced a significant increase in governmental assistance to those in need and to the disabled. We are not here concerned with the policies which have prompted this development; neither are we concerned with the political or humanitarian bases on which certain groups or classes have been selected for assistance while others have not. Our concern is with statutory rights and with the exercise of the power to determine the existence and extent of rights in individual cases.

Several powers exercised under the Family Benefits Act¹ fall within our Terms of Reference. The powers to determine the eligibility of an applicant for assistance, to fix the amount to be paid to an eligible applicant, to order and to make investigations of applicants for and recipients of assistance, and to order the suspension, cancellation or variation of payments, are all necessary powers, but they should be exercised according to the standards set out earlier in this Report. The existing legislation in Ontario will be measured against those standards with particular reference to the nature and scope of the powers, the persons on whom the powers are conferred, the procedure by which the powers are to be exercised, and the available appeals from the exercise of the powers. We are not concerned with the scales of benefits payable under the legislation or the adequacy of those scales.

The Legislation

Until the Family Benefits Act was passed in 1966, the payment of welfare assistance in Ontario was governed by a group of statutes, each of which dealt with a different classification of needy or disabled persons. The Acts were: the

¹Ont. 1966, c. 54.

Blind Persons' Allowances Act,² the Disabled Persons' Allowances Act,³ the General Welfare Assistance Act,⁴ the Mothers' Allowances Act,⁵ and the Old Age Assistance Act.⁶

The new legislation covers all areas covered by these Acts and all persons who may be entitled to welfare assistance. It is clear that administratively the new scheme is an improvement over the former. An individual who may qualify for assistance under more than one classification is now able to apply, by a single application under a single statute, for all the benefits to which he may be entitled.

The new Act has not only provided an improved administrative procedure, but it has provided important and much needed substantive changes in the area of welfare assistance, e.g., provision for an appeal from a decision of the Director, which did not lie under the "predecessor Acts".⁷

In enacting the Family Benefits Act, the Legislature did not repeal the predecessor Acts; rather, the new legislation has superseded the old, except in so far as section 14 (4) (5) is applicable:

"14. (4) Where a person is a recipient under a predecessor Act when this Act comes into force, he shall, if eligible therefor, be paid an allowance under this Act, and his eligibility therefor shall be determined in so far as is possible in accordance with the information contained in the application and other documents on file under the predecessor Act.

(5) Notwithstanding subsection 4, a recipient under a predecessor Act shall not be transferred under subsection 4 if to do so would result in a reduction of his allowance at the time of his transfer."

The reason for the continued existence of the predecessor Acts is clear and commendable, but it is anomalous to have on the statute books conflicting legislation dealing with the same subject matter. It would have been preferable to repeal

²R.S.O. 1960, c. 35.

³R.S.O. 1960, c. 107.

⁴R.S.O. 1960, c. 164.

⁵R.S.O. 1960, c. 247.

⁶R.S.O. 1960, c. 267.

⁷Ont. 1966, c. 54, s. 11. "Predecessor Acts" is the term used in s. 14 of the Family Benefits Act, 1966.

the predecessor Acts and to include in the new legislation provision for departure from the new scale of benefits in cases where a recipient under any of the repealed Acts would suffer a reduction in his allowance as a result of the change in legislation.

A more important difficulty with the solution adopted by the Legislature is that it is not clear whether a recipient of an allowance who falls within section 14 (5) of the new Act is to be treated as continuing under the predecessor Act for the sole purpose of continuing his allowance at the earlier amount, or for all purposes. If, for example, the Director were to make a decision to cancel or suspend or vary the allowance, would the recipient be able to use the machinery provided by section 11 of the new Act and request a hearing before the board of review, or would he be treated as being under the predecessor Act? (No provision for appeal or review was contained in any of the predecessor Acts.) It is also difficult to accept the view that an individual who takes the benefits of section 14 (5) of the new Act should have to accept the disadvantages of continuing under a predecessor Act. The right of appeal which is given by the new Act should be available to all recipients of welfare assistance, regardless of whether assistance is paid on the new or the old scale.

CHAPTER 77

Administrative Scheme of the Family Benefits Act

WHERE a person applies for assistance under the Family Benefits Act¹ an application is sent to the Director of the Family Benefits Branch of the Department of Public Welfare who determines, without a hearing, the applicant's eligibility to receive assistance and the amount of assistance to be paid and who directs that payment be made. The Director may vary, from time to time, the amount of assistance to be paid to a recipient and may cancel or suspend benefits.

The Director is assisted by field workers who may prepare and submit reports to him and who may assist applicants in the preparation of applications; and by a medical advisory board which reviews medical evidence submitted in support of an application and reports thereon to the Director.

Any decision, order or directive of the Director is reviewable by a board of review, at the request of the applicant or recipient affected.

Provision is made for regional administrators, but their duties and functions are nowhere set out.

The minister responsible for the administration of the Act is the Minister of Public Welfare.

¹Ont. 1966, c. 54.

ALLOWANCES AND BENEFITS

A distinction is drawn in the Act between an "allowance" and a "benefit", defined respectively as follows:

"1. (a) 'allowance' means an allowance provided on the basis of need under this Act and the regulations.

(d) 'benefit' means a benefit provided on the basis of need under this Act and the regulations, and includes an allowance."

In view of the last four words of section 1 (d), it might appear that one term, "benefit", would have been sufficient to cover both varieties of assistance. However, it is clear from section 7 (1) that the distinction has significance:

"7. (1) An allowance *shall* and other benefits *may* be provided in accordance with the regulations to any person in need who is resident in Ontario. . . ." [Italics added.]

Once eligibility under the Act and regulations has been determined, an allowance is a matter of entitlement, but the granting of a benefit is a matter for the discretion of the Director.

This raises a number of questions, one of which we consider at this stage: What is the substance of the allowance/benefit distinction? Or what, in concrete, practical terms, is a benefit? The difference is not made clear by the Act. The Act is worded in such a way as to obscure the distinction.

The Lieutenant Governor in Council is empowered to make regulations "designating benefits or classes of benefits",² but no section of the regulations³ clearly does so. Sections 17, 18 and 19 of the regulations come closest, providing respectively that "a beneficiary . . . is entitled without cost to receive medical services in accordance with *The Medical Services Insurance Act, 1965*, and the regulations thereunder", that "a beneficiary is entitled without cost to receive hospital services in accordance with *The Hospital Services Commission Act* and the regulations thereunder" and that "a beneficiary . . . may be entitled to dental services under any agreement in writing in force from time to time between the Crown in right of Ontario and the Royal College of Dental Surgeons of Ontario". It

²*Ibid.*, s. 13(j).

³O. Reg. 102/67.

appears, therefore, that benefits, strictly so-called, are free medical, hospital and dental services. Form 2 in the regulations, "Application for a Benefit", makes it clear that benefits comprise free medical and hospital services.

The substance of the distinction between allowances and benefits thus eventually becomes clear. Since an allowance is something that a person is entitled to as a legal right, and a benefit is something that may be granted in the discretion of the Director, it is important that the different forms of assistance for which an applicant may be eligible be clearly set out and defined, and preferably in the Act itself. From a discussion with departmental officials, it would appear that this confusion arises out of an agreement between the government and the Royal College of Dental Surgeons with respect to professional services rendered to family groups. Since this is the case, the confusion may not have much practical importance. Nevertheless, "benefit" is not clearly defined in the Act and the obscurity is deepened by including "allowance" within the definition of "benefit".

The overlapping definition results in "benefit" being used ambiguously in many sections of the Act and regulations. In a statute dealing with assistance to disabled and needy members of society, clarity is essential. We are not concerned with the minutiae of drafting in the statute and regulations, but we are concerned where language used may obscure the rights of the individual and his understanding of them. Although, in practice, these differences may now have little significance, the legal rights should be clearly defined.

NATURE AND SCOPE OF POWERS CONFERRED

Broadly speaking, powers of investigation are conferred on field workers and powers of decision on the Director and the Board of Review.

Powers of Investigation

By section 13 (r) of the Act, the Lieutenant Governor in Council has power to make regulations,

"... providing for the making of investigations for the purposes of this Act of applicants for or recipients or beneficiaries of benefits".

This power has been exercised primarily in section 14 (3) of the regulations.⁴ The main powers of investigation are:

- “14. (3) A field worker shall,
- (a) at the request of the Director,
 - (i) verify any statements in an application for an allowance,
 - (ii) where any child of an applicant or recipient is receiving or may receive a benefit, review the circumstances under which the child is being cared for, and
 - (iii) review the capacity of the applicant or recipient to manage an allowance;
 - (b) at such times as the Director directs, prepare and submit a report on any circumstances of an applicant or recipient that might affect his eligibility for the amount of or continuance of a benefit or any other matter relating thereto; . . .”

These powers clearly fall within the first of the two main types of powers of investigation discussed in Chapter 28,⁵ i.e., an investigation where the investigating body or person acts only on the direction of a superior governmental body. No field worker (a field worker is defined, by section 1 (h) of the Act as “a person employed as such by the Department of Public Welfare or any other employee of the Department whom the Minister designates as such”) has the power to act on his own motion in conducting an investigation. But, no limit is placed on the power of the Director to set an investigation in motion; no conditions precedent are set out. In Chapter 28, the following recommendations were made:

“2. Where powers of investigation are conferred, these should be subject to conditions precedent which must be satisfied before an investigation can be validly commenced.

5. If it is considered that a condition precedent in objective form would seriously frustrate the implementation of the policy of the statute, the person who is to form the unreviewable opinion, i.e., who is to be ‘satisfied’, should be in a responsible position in the government hierarchy.”⁶

⁴O. Reg. 102/67, s. 14(3).

⁵See pp. 388 ff. *supra*.

⁶See p. 390 *supra*.

These powers are clearly not in conformity with these recommendations; the Director, who is not a politically responsible official within the meaning of the recommendations, may set an investigation in motion without first satisfying any conditions precedent, whether subjective or objective. The question is whether, in the light of the policy of the Act, any limitations on the power should be imposed.

A distinction must be drawn between the power to order an investigation to verify statements made in an application for assistance, and other powers of investigation. No limitations should be placed on the Director's power of investigation to determine the eligibility of an applicant. He should be free to check the veracity of any material statements made in an application for assistance. Restrictive regulations on the power would tend to delay assistance. It is different with respect to other powers set out in section 14 (3) of the regulations. It is not unreasonable to require that before ordering an investigation to determine whether a recipient of assistance continues to be qualified for assistance, the Director should have reasonable grounds for believing that circumstances exist which warrant an investigation bearing on the continued payment of assistance. Those members of the public who are exposed to these powers of investigation should have their right to be free from unwarranted invasions of their privacy clearly established in the Act.

The scope of the powers conferred by section 14 (3) of the regulations is satisfactorily defined. In Chapter 31 powers of entry to premises are discussed as incidental to powers of investigation. Section 14 (3) of the regulations confers no express power of entry, but it is clear that the power is necessarily incidental where the circumstances under which a child is being cared for are involved.⁷ The principles recommended in Chapter 31⁸ as to entry are applicable here.

Under section 16 (3) of the regulations, the Medical Advisory Board is required to investigate the eligibility of an applicant or recipient who makes a claim based on physical impairment, and in so doing the Board is empowered to obtain any evidence (in addition to the medical evidence submitted

⁷O. Reg. 102/67, s. 14(3)(a)(ii).

⁸See pp. 410 ff. *supra*.

by the applicant) which is necessary to make a complete report to the Director. No conditions precedent are set out (unless one is implied by the requirement that such additional evidence be "necessary to make a complete report"). We do not think that there should be any.

By section 8 (1) of the Act, it is provided:

"8. (1) In cases presenting special circumstances and in which investigation shows the advisability of an allowance being provided to an applicant who is not eligible for an allowance, the Lieutenant Governor in Council may direct that an allowance be provided to the applicant."

The purpose of the subsection is clear and commendable; it is proper that there should be a discretionary power to grant assistance to an individual who may not come within the prescribed categories, but the machinery of investigation here is unclear. At whose instance is the investigation conducted? Into what matters is the investigation to go, other than those which may have been set out in an application under the Act? By whom is the investigation to be conducted? Is the presenting of "special circumstances" a condition precedent to the ordering of an investigation, or to the exercise of the discretion to grant an extraordinary allowance? If the former, who is to decide when special circumstances exist and what, if any, criteria are to be adopted? It is recognized that in dealing with the kind of situation which section 8 (1) is designed to cover, a degree of vagueness may be inevitable and perhaps even desirable. However, matters such as those we have mentioned, pertaining to the investigatory powers, should be resolved with as much precision as possible.

Powers of Decision

With the exception of the discretionary power which is conferred on the Lieutenant Governor in Council to grant assistance to an applicant who is not strictly eligible, all decisions at first instance under the Act are made by the Director. These powers of decision may conveniently be dealt with under three heads:

- (1) Eligibility for and amount of assistance;
- (2) Variation, suspension and cancellation of assistance;
- (3) Miscellaneous powers of decision.

ELIGIBILITY FOR AND AMOUNT OF ASSISTANCE

By section 3 of the Act,

- “3. (1) The Director shall,
- (a) receive applications for benefits; and
 - (b) determine the eligibility of each applicant to receive a benefit and, where the applicant is eligible, determine the amount of the allowance or other benefit. . . .”

Since the grounds of eligibility and scales of payments are fully set out in the Act and regulations, these powers are clearly judicial in nature. Certainly with respect to the granting of and the amount of an allowance, no element of discretion or of policy determination is present. The decisions involve no more than an examination of the facts to determine whether an applicant satisfies the prescribed conditions.

As we have pointed out, the granting of a benefit, as distinct from an allowance, would appear to be a matter of discretion. This element of discretion has, however, largely been eliminated by the regulations. The recipient of a pension under the Old Age Pensions Act (Canada)⁹ who meets other detailed criteria, “may be provided without cost” with medical and hospital services.¹⁰ Here the discretionary element is apparently present, but by sections 17 and 18 of the regulations it is provided that, in addition to those persons eligible under section 2 (1) of the regulations, a beneficiary *is entitled* without cost to receive medical and hospital services. In view of this confusion between discretion and entitlement, it is difficult to determine exactly what is involved in the power to decide that an applicant should receive a benefit. As we have said, in practice these regulations appear to be interpreted to reduce the element of discretion to those cases coming within the agreement with the Royal College of Dental Surgeons with respect to dental services rendered to family groups. What is done in practice is to attempt to apply the terms of the agreement to each particular case. We think, however, that there is no apparent reason why the grounds for eligibility for a benefit should not be fully set out so that the benefit could always be a matter of entitlement. It is important that the

⁹R.S.C. 1952, c. 199.

¹⁰O. Reg. 102/67, s. 2.

Director's power should be clearly judicial, as in the case of allowances, so that his decisions would be subject to judicial review.

VARIATION, SUSPENSION AND CANCELLATION OF ASSISTANCE

Under section 3 (1) (b) of the Act, the Director is given power to vary, from time to time, the amount of assistance to be paid to a recipient. This power must clearly be read in connection with section 8 of the regulations (setting out the basis on which allowances are computed) and with the detailed scales of payments in the regulations. Again, this is a judicial power, involving a consideration of a recipient's circumstances to see if any change in them warrants a variation in the amount of his allowance.

Section 7 (3) of the Act provides:

"7. (3) Any benefit may be suspended or cancelled if the recipient fails to comply with any requirement of this Act or of the regulations."¹¹

The cancellation or suspension of assistance to a disabled or needy person is a serious matter indeed. The grounds upon which such action can be taken should be set out with clarity. If criteria for eligibility are put on one side as raising wholly different considerations from those raised by section 7 (3), and if those matters are left out of account for which, by the regulations, the power of suspension or cancellation has been expressly provided, what are the "requirements" which must be complied with? They appear to be few in number. Section 5 provides that an allowance is not subject to alienation or transfer by the recipient; this, no doubt, implies a requirement that a recipient not alienate or transfer his allowance. Section 12 provides in part:

"12. (1) No person shall knowingly obtain or receive a benefit that he is not entitled to obtain or receive under this Act and the regulations.

(2) No person shall knowingly aid or abet another person

¹¹In this section there is the confusion mentioned earlier, resulting from the overlapping definitions of "allowance" and "benefit". Clearly, "benefit" is used here as including "allowance", but "recipient", used to describe the person in receipt of the benefit, is defined by section 1(k) of the Act as "a person to whom an *allowance* is provided". A person who receives a benefit is a beneficiary (s. 1(c)).

to obtain or receive a benefit that such other person is not entitled to obtain or receive under this Act and the regulations.”

Section 12 (3) provides penal sanctions (fine and imprisonment) for contraventions of section 12 (1) (2), and it may therefore be questioned whether such contraventions should also be punished by suspension or cancellation of any assistance for which the culprit would otherwise be eligible. Even assuming, however, that such additional sanction is appropriate, these are the only “requirements” specifically set out in the Act giving power of suspension or cancellation under section 7 (3). No similar “requirement” is found in the regulations, unless one includes such things as the direction that applications should be made in the prescribed forms, etc.¹²

Under section 13 (n) of the Act the Lieutenant Governor in Council has power to make regulations “providing for the suspension, cancellation, reinstatement and transfer of allowances and other benefits”. The power has been exercised. Section 12 of the regulations provides:

“12. (1) The Director . . . may cancel or suspend a benefit where,

(a) the . . . recipient or spouse of the . . . recipient is unwilling to accept employment, and, in the opinion of the Director, suitable employment is available; or

(b) the . . . recipient is absent from Ontario.

(2) The Director, having regard to a beneficiary’s budgetary requirements and his income, may . . . suspend an allowance where a beneficiary is,

(a) a patient in a general hospital or a convalescent hospital; or

(b) serving a term of imprisonment.

(3) The Director may recover from a recipient any sum improperly paid under this or any predecessor Act as a result of non-disclosure of facts, misrepresentation or any other cause by reducing or suspending the allowance or by such means as the Director considers appropriate.”

It is clear that the powers conferred by this section are judicial; given the existence of the prescribed facts, the Director may act. The major problems raised by the section involve

¹²O. Reg. 102/67, s. 13(1)(4).

the procedure to be followed, which will be discussed later. There is one point, however, which should be raised at this stage: in section 12(1)(a) of the regulations, the availability of suitable employment is a matter for the opinion of the Director. Here again, there should be an indication of what factors are to be considered as relevant. No doubt consideration should be given, for example, to the educational background and training of the individual concerned, his physical condition and his domestic situation. It is not suggested that arbitrary decisions are being or will be made under section 12(1)(a), but the decision to cancel or suspend welfare payments is a serious one which should only be made after a full consideration of all the relevant factors. In this respect the language of section 12(2) is to be preferred since it makes clear that the allowance of a recipient who is hospitalized or imprisoned may only be suspended after a consideration of his "budgetary requirements and income". The scope of the power to alter assistance should, wherever possible, be sharply delineated by a clear statement of the factors to be considered in the exercise of the power.

MISCELLANEOUS POWERS OF DECISION

By section 2 (4) of the regulations:

"2. (4) A child who in the opinion of the Director is impaired as a direct result of the natural mother having used the drug known as thalidomide shall be deemed to be a person in need and shall be eligible for financial aid in such amounts as the Director may determine."

Two points should be made: first, that the cause of the impairment is a matter upon which the Director is to form an opinion. But the question may be one about which the Director may not, in all cases, be qualified to form an opinion. Clearly, this is a matter upon which the Director should have the assistance of a report from the medical advisory board, but section 16 of the regulations, dealing with the composition and functions of the medical advisory board, does not list this as one of the areas in which the board is to act. Such decisions should be required to be made on the basis of the best advice available as to the existence of the prescribed factual situation and should not be left solely to the Director's

opinion. Second, there is no indication of the scale upon which the amount of "financial aid" is to be calculated. Here it is the child rather than his parents who may be eligible for assistance. If the amount to be paid is solely within the discretion of the Director, this should be made clear. If, on the other hand, the amount is not purely discretionary, there should be a clear indication of the factors to be considered in calculating it.

By section 5 of the regulations, the eligibility of an applicant for, or recipient of, an allowance may be affected:

"5. (1) Where an applicant or recipient . . . or the spouse or a dependant child of the applicant or recipient has an interest or estate in real property, other than real property used by the applicant or recipient as his own dwelling place, the applicant or recipient . . . is not eligible for an allowance unless such arrangement or disposition of the estate or interest is made as is deemed to be advantageous for the care of the applicant's or recipient's family."

Section 5 (2) is to the same effect with respect to an interest or estate in real property held by a foster child. The purpose of section 5 cannot be criticized, but the language should be clarified. Who is it that must "deem" the arrangement or disposition to be "advantageous"? It is reasonable to assume that it is intended that the decision should be the Director's, since it is he who, under section 3(1)(b) of the Act, is to determine eligibility. Again, no criteria are set out which are to be applied in making the decision.

Further examples of matters upon which the Director is to form an opinion, without any indication of the factors to be considered relevant, are found in sections 5(1)(2), 6, 9(1)(b)(v), and 9(8)(b) of the regulations. It is stressed that when power is given to determine matters such as eligibility for and amounts of assistance, and suspension or cancellation of assistance, the grounds upon which the decisions are to be made should be set out with as much precision as possible.

CHAPTER 78

Structure and Procedures of Tribunals Under the Family Benefits Act

STRUCTURE AND ORGANIZATION OF TRIBUNALS

POWERS of decision are conferred by the statute on

- (1) The Director, and
- (2) The Board of Review.

The Director

The Director makes all decisions on questions of eligibility and the amount of allowances and benefits. He has power to suspend, cancel or vary them and to decide certain miscellaneous matters. He initiates and directs investigations leading up to decisions.

In 1966, the last year in which allowances were paid under the predecessor Acts, approximately 62,000 persons were receiving assistance. It is apparent that the Director cannot personally put his mind to the making of all decisions with respect to the granting or termination of all allowances and benefits. In practice most of the decisions must be made by members of his office staff.

The provisions of the Interpretation Act¹ are relied on as authority for the delegation of the powers of the Director.

“27. (m) words directing or empowering a public officer or functionary to do an act or thing, or otherwise applying to

¹R.S.O. 1960, c. 191, s. 27 (m)(o).

him by his name of office, include his successors in office and his lawful deputy;

(o) words authorizing the appointment of a public officer or functionary or the appointment of a person to administer an Act include the power of appointing a deputy to perform and have all the powers and authority of such public officer or functionary or person to be exercised in such manner and upon such occasions as are specified in the instrument appointing him or such limited powers and authority as the instrument prescribes."

We think that it is an unjustified extension of these general provisions to treat them as conferring power on the Director to authorize his staff to grant or refuse allowances or benefits. The power to make such important decisions should not be left to implication.

Considerations of accessibility, expedition, informality and economy justify a departure from the principle that judicial powers such as those conferred on the Director should not be exercised by persons appointed by a minister, or combined with investigatory powers, as long as there is provision for review by an independent body.²

Other than proper provision for the delegation of the powers of the Director to which we have just referred, no change should be made in the mode of making initial decisions.

The Board of Review

Section 11 of the Act provides for the constitution and powers of the Board of Review:

"11. (1) The Minister shall appoint a board of review, consisting of such number of members as are prescribed by the regulations, and shall designate one of the members as chairman.

(2) Any applicant or recipient may request a hearing and review by the board of review of a decision, order or directive of the Director affecting the applicant or recipient, as the case may be.

(3) Where a hearing and review are requested, the board of review shall hold a hearing and may by its order direct the

²See pp. 124 ff. *supra*.

Director to make such decision as the Director is authorized to make under this Act and as the board of review deems proper, and thereupon the Director shall act accordingly.

(4) The order of the board of review is final, but a further application for a benefit may be made by the applicant upon new or other evidence or where it is clear that material circumstances have changed.”

By the regulations the number of members of the Board of Review is fixed at three, with two members constituting a quorum.³

As of January 1, 1968, a Board of Review had not been appointed. Since April 1, 1967, the date on which the Act came into force, applications for review have apparently been handled by the Director and his staff on a basis that has no legal foundation. The right of appeal to a Board of Review is frustrated until a Board of Review is appointed.

The members of the Board of Review are appointed by the Minister and have no tenure of office. This is inconsistent with the principles set out in Chapter 10 of this Report. The members of any board of review such as this should be appointed by the Lieutenant Governor in Council, and should be given a tenure of office of sufficient duration to give them independence with respect to any particular matter for decision coming before them.

For reasons that we shall discuss later when dealing with procedure, we cannot see how a Board of Review constituted under the present statute can function according to sound legal principles and with adequate procedural safeguards to the rights of the individual.

PROCEDURE

Decisions of the Director

Since the decisions of the Director fall under two heads—original decisions concerning the eligibility of the applicant, and decisions to cancel, suspend or vary assistance—the procedural requirements are different.

³O. Reg. 102/67, s. 15(1).

ORIGINAL DECISIONS CONCERNING THE ELIGIBILITY OF APPLICANTS

In arriving at the original decision, the purpose of the statute—to meet emergency—must prevail. In the making of a decision to grant assistance in the first instance, the Director might be impeded in arriving at the decision by procedural requirements. He should be free to ascertain “need” quickly and then apply the defined grounds of eligibility. The scales of payment are clearly set out for allowances, and if an applicant is eligible he is entitled to them.

Where assistance is not granted, the procedural safeguards we have recommended in Chapter 14⁴ should apply. There should be a hearing.

DECISION TO CANCEL, SUSPEND OR VARY ASSISTANCE

A decision to cancel or suspend assistance is different from the original decision. The Director “may” decide to take such action.⁵ Every recipient of assistance is in danger of being deprived by the Director’s decision of the the allowance or benefits enjoyed under the Act. In a very real sense a case may be made against him. He should, therefore, be given a proper opportunity to meet that case and to adduce any evidence which might influence the Director in the decision. The power to cancel welfare assistance is serious and should not be exercised without meticulous attention to those procedural safeguards whose adoption we have recommended, including, particularly, that he should be afforded a hearing.⁶

THE NATURE OF THE HEARING

It is difficult to determine the kind of hearing that will adequately safeguard the rights of an applicant without sacrificing expedition, informality and economy.

Where it appears that the initial application will not be granted in whole or in part the applicant should be notified of the intended decision. Reasons should be given. Before a final decision is made the applicant should have an opportunity to make written or oral submissions.

⁴See pp. 206 ff. *supra*.

⁵O. Reg. 102/67, s. 2.

⁶Chapter 14, p. 206 *supra*.

The advantages of proceeding by way of written submissions are that informality, expedition and economy are not sacrificed. The advantages of oral submissions are many, including benefits that come from personal contact. These submissions should be made to regional administrators.

The difficulties that arise with respect to initial applications also arise with respect to the cancellation, suspension or variation of an allowance or benefit. We have concluded that notice of intended action should be given to a person receiving an allowance or benefit before any alteration is made in it. The recipient should have the same rights to make submissions as are accorded to an applicant in the first instance.

The Board of Review

It is clear at least that any applicant for or recipient of assistance may, as of right, have a hearing before the Board for the Review of any decision, order or directive of the Director. The procedure followed at such hearing should conform to our recommendations as to procedure for judicial tribunals set out in Chapter 14. The only provision for procedure in the regulations is that a request for review shall be mailed to the Chairman of the Board of Review.⁷

No provision is made in the Act or in the regulations for the place at which hearings are to be held. It is therefore assumed that the Board will sit only in Toronto. The fact that an individual is faced with a journey to Toronto, with its consequent costs in time, trouble and money, may deter him from seeking a review of the Director's decision. This is wrong.

The Board should be required to take speedy action, in that the delay between a request for a hearing and the hearing should be minimal. The hearing should be convenient and inexpensive for the individual concerned. There should, ideally, be a single board hearing all appeals from the Director so as to promote uniformity and consistency of administration of the Act and regulations. We do not think it would be possible to devise a scheme for one board of review with all these characteristics. If the present scheme of the Act is

⁷O. Reg. 102/67, s. 15(2).

followed, the right of appeal will be largely lost because the Board of Review will be incapable of handling the volume of cases.

Officials of the Department of Welfare have informed us that requests for reconsideration of decisions number hundreds weekly.

AN ITINERANT BOARD OF REVIEW

An itinerant Board of Review does not appear to be a practical solution. It would not be practical for a single board to travel throughout the whole Province hearing appeals promptly wherever it was required. Delays in hearing individual requests where prompt action is essential would frustrate the purposes of the Act. The only virtue that an itinerant Board of Review would have would be a hearing in the locality in which the complaint arises, and the provision of a single tribunal for hearing all complaints.

REGIONAL BOARDS OF REVIEW

In our discussion with the Departmental officials, it was indicated that it was the intention of the Department to set up regional boards of review with a central Board of Review in Toronto. This has not been done by the regulations, but we find it difficult to see how it could be done within the present legislation. The Minister is given the power to appoint a Board of Review consisting of such number of members as is prescribed by the regulations. It may be that it was the intention that a very large Board of Review would be set up that would sit in divisions, but the provisions of the Interpretation Act would appear to prevent such a scheme from operating under the present Act:

“27. (e) Where an act or thing is required to be done by more than two persons a majority of them may do it.”⁸

If regional boards of review are to be set up, they should be independent of political control.

Whatever the composition of the review tribunal may be, the procedure at hearings should conform to the standards set

⁸Interpretation Act, R.S.O. 1960, c. 191, s. 27(e).

out in Chapter 14. The Rules Committee recommended in that chapter should formulate rules governing applications for review.

APPEALS TO THE COURTS

In providing for an appeal to a Board of Review from decisions, orders and directives of the Director, the Act has provided:

“11. (4) The order of the board of review is final. . . .”

Earlier in this Report⁹ we endorsed this principle:

“An appeal from a judicial tribunal should be taken to the ordinary courts unless exceptional circumstances render this impractical.”

This principle applies to decisions of the Board of Review. When exercising its powers under the Act and regulations, the question arises: Are the circumstances surrounding family benefits so exceptional that one who has been denied a right of assistance by the Board of Review should not be allowed to have the matter finally determined in the courts? Rights of appeal to the courts are now allowed in much less important cases. Whether a widow or orphaned children should be allowed the benefits provided under the Act, not only involves very substantial sums of money, but very real social consequences. Any argument based on the contention that there would be a plethora of appeals is unsound and self-defeating. If the Act is well administered, there should be very few appeals. However, we think the right of appeal should be restricted to questions of law alone and should be to the Appellate Division of the High Court of Justice, recommended in this Report.

RECOMMENDATIONS

1. The terms “allowances” and “benefits” used in the Family Benefits Act should be clearly defined and the legal rights thereto clarified in the Act.
2. The Act should provide that before the Director should have power to order an investigation to determine

⁹Chapter 15, p. 234 *supra*.

whether the recipient of assistance continues to be qualified for assistance, he should have reasonable grounds for believing that circumstances exist which warrant an investigation bearing on the continued payment of assistance.

3. Section 8(1) of the Act providing for payment of an allowance in special circumstances should be clarified by providing a procedure by which it may become operative.
4. The Director should be given statutory power to delegate his powers of decision.
5. A decision to refuse assistance should not be made without giving the applicant an opportunity to be heard.
6. A decision to cancel or suspend assistance should not be made without first informing the recipient of the alleged grounds for cancellation or suspension and giving him an opportunity to be heard.
7. Provision should be made for both written and oral submissions.
8. On an initial application the Director should have power to make an interim order for payment of assistance pending a final decision.
9. Proper boards of review should be appointed by the Lieutenant Governor in Council with tenure of office.
10. Provision should be made for local or regional boards of review.
11. There should be a right of appeal from the decision of the boards of review on questions of law alone to the Appellate Division of the High Court of Justice for Ontario.

Section 4

SELF-GOVERNING PROFESSIONS AND OCCUPATIONS

INTRODUCTION

In Ontario there are twenty-two self-governing professions and occupations which have been given statutory power to license, govern and control those persons engaged in them.

The power-conferring statutes are: the Architects Act,¹ the Chiropody Act,² the Dentistry Act,³ the Dental Technicians Act,⁴ the Drugless Practitioners Act (covering physiotherapists, chiropractors, masseurs, naturopaths and osteopaths),⁵ the Embalmers and Funeral Directors Act,⁶ the Law Society Act,⁷ the Medical Act,⁸ the Nurses Act,⁹ the Ophthalmic Dispensers Act,¹⁰ the Optometry Act,¹¹ the Pharmacy Act,¹² the Professional Engineers Act,¹³ the Psychologists Registration Act,¹⁴ the Public Accountancy Act,¹⁵ the Radiological Technicians Act,¹⁶ the Surveyors Act,¹⁷ and the Veterinarians Act.¹⁸

The callings covered by these statutes include those which have been known traditionally as professions, requiring many years of education and training before one is qualified to practise, as well as occupations where the educational standards are not high, but the emphasis is on technical skill.

¹R.S.O. 1960, c. 20.

²R.S.O. 1960, c. 57.

³R.S.O. 1960, c. 91.

⁴R.S.O. 1960, c. 90.

⁵R.S.O. 1960, c. 114.

⁶R.S.O. 1960, c. 120.

⁷R.S.O. 1960, c. 207 (including the Barristers Act, R.S.O. 1960, c. 30, and the Solicitors Act, R.S.O. 1960, c. 378).

⁸R.S.O. 1960, c. 234.

⁹Ont. 1961-62, c. 90.

¹⁰Ont. 1960-61, c. 72.

¹¹Ont. 1961-62, c. 101.

¹²R.S.O. 1960, c. 295.

¹³R.S.O. 1960, c. 309.

¹⁴R.S.O. 1960, c. 316.

¹⁵R.S.O. 1960, c. 317.

¹⁶Ont. 1962-63, c. 122.

¹⁷R.S.O. 1960, c. 389.

¹⁸R.S.O. 1960, c. 416.

Those callings which are customarily thought of as professions cannot be precisely defined. They all have some features in common, but all these features will not be found in any single profession, and many of them are not found in occupations which are not normally classed as professions. These are the significant characteristics: the calling is one which depends for its effective pursuit on confidence of two kinds—the personal confidence of the patient or client in the technical competence of the practitioner, and the confidence of the public at large in the integrity and ethical conduct of the profession as a whole; it requires a high standard of technical skill and achievement; it provides a service to members of the public; practitioners are usually employed under a contract for service rather than under a contract of service, i.e., they operate as independent practitioners and are not subject to detailed control by those whom they serve; the calling is one in which more than mere technical competence is required for the service of patients or clients and for the protection of the public, i.e., standards of ethical conduct must prevail; confidence is reposed in the practitioner, requiring that he does not exploit the intimate details of his patient's or client's life and affairs which are divulged to him. No doubt many other characteristics of professions could be added.

It is relevant first to consider why the powers of self-government are conferred on the enumerated bodies, and second, to consider whether the powers of self-government are necessary or desirable.

CHAPTER 79

The Power of Self-Government

THE granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest. The power is not conferred to give or reinforce a professional or occupational status. The relevant question is not, "do the practitioners of this occupation desire the power of self-government?", but "is self-government necessary for the protection of the public?" No right of self-government should be claimed merely because the term "profession" has been attached to the occupation. The power of self-government should not be extended beyond the present limitations, unless it is clearly established that the public interest demands it.

In a statement published in 1966 of the functions, procedure and disciplinary jurisdiction of the General Medical Council of England, the purpose of the power of self-government is well stated in words that should apply to every self-governing body: "The general duty of the Council is to protect the public, in particular by supervising and improving medical education. . . . The Council is not an association or union for protecting professional interests. . . ."

It is not easy to see why powers of self-government, with all the possible monopolistic attributes, have been extended to some of the bodies covered by the enumerated statutes.¹ This Commission is not so much concerned with whether all those callings and occupations ought to have delegated legislative and judicial powers, as it is with the question as to what

¹See p. 1160 *supra*.

sort of delegated legislative and judicial powers the respective bodies should enjoy and what controls and safeguards should be imposed on the exercise of those powers.

The power of self-government is essentially the power to decide who shall be permitted to earn his living by the pursuit of a particular calling. As pointed out by Professor Gellhorn, the basic civil right involved in professional self-government is "the right to make a living"² in the calling of one's choice. Since the power must be exercised only for the protection of the public, the real question is by whom and in what manner should it be exercised. It can be strongly argued, and to some extent it has been recognized in Ontario, that a power which so circumscribes the freedom of the individual to earn his livelihood by any lawful means, should not be exercised except under government control.

The right to control admission to a profession or occupation, and to issue licences authorizing persons to engage in the practice of a profession or occupation, confers a power to control the number who may be admitted to it, as well as to ensure competence of its members. The power to set educational standards and prescribe training includes the power to exclude persons even though they may qualify to meet reasonable standards. Excessively high standards may produce specialists but leave a vacuum with respect to areas of a profession where the services of a specialist are not required.

These facts give foundation to the argument that the government of professional bodies is a matter for the State. This principle has been accepted in the United States, where the usual practice has been to establish professional boards of governors under the control of the state government. These bodies have traditionally been composed of an admixture of government appointees and representatives of the professions concerned. In some cases a situation approaching that prevailing in Canada has been reached where the governing body of a profession, although retaining its continued subjection to state control, has over a period of time become entirely composed of representatives of the profession.³

²Walter Gellhorn, *Individual Freedom and Governmental Restraints*.

³*Ibid.*, 115-16.

The arguments for State control are much stronger where the bodies involved are not professions in the traditional sense, but those whose members are more in the nature of trained technicians.

There are three distinct areas in the exercise of the powers of self-government conferred on a profession or occupation: administration, policy and discipline. With mere administration we have little concern. It involves domestic details of the powers of self-government. The legislative powers to make public policy, and the judicial powers of discipline, do concern this Commission.

There are six methods in which a measure of control is exercised by the government over the self-governing bodies, but there does not appear to be any rational or logical basis for the different manner in which controls involved are applied.

(1) The board or council is appointed by the Lieutenant Governor in Council as in the Chiropody Act⁴ and the Dental Technicians Act.⁵

(2) Detailed rules for admission procedure are laid down in the governing Act, as in the Public Accountancy Act⁶ and the Psychologists Registration Act.⁷

(3) Regulations are made by the Lieutenant Governor in Council governing the admission procedure, as in the Nurses Act.⁸

(4) The bodies are given power to make their own rules and by-laws governing admission and procedure, subject to the approval of the Lieutenant Governor in Council, as under the Chiropody Act.⁹

(5) The bodies are given power to pass by-laws or make rules, subject to the power of the Lieutenant Governor in Council to revoke them as under the Dentistry Act.¹⁰

⁴R.S.O. 1960, c. 57, s. 2(1).

⁵R.S.O. 1960, c. 90, s. 2(1).

⁶R.S.O. 1960, c. 317, s. 15, as amended by Ont. 1961-62, c. 113, s. 6.

⁷R.S.O. 1960, c. 316, s. 6, as amended by Ont. 1965, c. 105, s. 1; and s. 7, as amended by Ont. 1962-63, c. 112, s. 1.

⁸Ont. 1961-62, c. 90, s. 6.

⁹R.S.O. 1960, c. 57, s. 3.

¹⁰R.S.O. 1960, c. 91, s. 11.

(6) A Minister is required to be a member of the council or governing body, as under the Medical Act,¹¹ the Law Society Act,¹² and the Dentistry Act.¹³

The constitution of the General Medical Council of Great Britain provides an interesting precedent. The council consists of forty-four members; eight are nominated by Her Majesty; twenty-eight are chosen by universities and relevant professional bodies, and eight are elected. This legislation is designed to give the council a broad base of authority so that the public interest will be protected, while at the same time the profession will have ample opportunity to be heard as to the way in which the public interest is to be protected.¹⁴

Appendix A to this Section¹⁵ shows the extent to which there is government control over the self-governing bodies, and the way in which the controlling body of each is elected or appointed. Appendix B to this Section¹⁶ shows the extent to which there is government control over the rule making powers of the respective self-governing bodies.

The effectiveness of the control exercised by these methods is very questionable. How far there should be more effective government control will be discussed later. Unquestionably there are some self-governing bodies that require closer government control than others.

Broadly speaking, the power of self-government may be subdivided under two headings:

- (a) The power to license; and
- (b) The power to regulate the conduct of the licensee, which includes the power to withdraw the licence.

Under the first heading fall such matters as setting educational standards, standards of technical competence, ethical and character requirements, and the admission procedures.

¹¹R.S.O. 1960, c. 234.

¹²R.S.O. 1960, c. 207.

¹³R.S.O. 1960, c. 91. The Minister of Health is a member of the medical council; the Minister of Education and Minister of Health are *ex officio* members of the Board of Directors of the Royal College of Dental Surgeons, and the Attorney General is a bencher of The Law Society of Upper Canada.

¹⁴Medical Act, 1956, 4 & 5 Eliz. II, c. 76.

¹⁵See p. 1212 *infra*.

¹⁶See pp. 1213 ff. *infra*.

Under the second, fall such matters as setting and maintaining standards of both competence and conduct, and supervising members and taking disciplinary action against any member who falls below the prevailing standards. These will be the subject of discussion in some detail.

The traditional justification for giving powers of self-regulation to any body is that the members of the body are best qualified to ensure that proper standards of competence and ethics are set and maintained. There is a clear public interest in the creation and observance of such standards. This public interest may have been well served by the respective bodies which have brought to their task an awareness of their responsibility to the public they serve, but there is a real risk that the power may be exercised in the interests of the profession or occupation rather than in that of the public. This risk requires adequate safeguards to ensure that injury to the public interest does not arise.

We recommend that the principle applied in creating the British Medical Council be adopted in Ontario. Lay members should be appointed by the Lieutenant Governor in Council to the governing bodies of all self-governing professions and occupations.

CHAPTER 80

Rule-Making Power

THERE is no consistency throughout the several Acts under review with respect to rule-making power. This power may be divided into two branches:

- (1) Power to make rules respecting policy matters, e.g., admission requirements and discipline; and
- (2) Power to make rules with respect to administration of the affairs of the self-governing body.

With the latter the public has little concern, but the former is something in which the public has a very great interest.

A review of some of the relevant acts emphasizes the confusion and inconsistencies that exist.

Under the Dentistry Act,¹ no power is provided to make regulations. However, the Board of Directors of The Royal College of Dental Surgeons of Ontario may pass by-laws. It is clear from the matters covered in the by-laws that these are intended to serve the same purpose as regulations. Non-administrative matters (e.g., the prescribing of admission standards which the Board is empowered to do)² should be dealt with in statutory regulations.

Although the Board is authorized,³ subject to the approval of the Lieutenant Governor in Council, to pass *by-laws* providing for the establishment, development and regulation of an ancillary body (dental hygienists), such provision has in fact been made by *regulation*.⁴ Not only does the Board have

¹R.S.O. 1960, c. 91.

²*Ibid.*, s. 4, as amended by Ont. 1966, c. 38, s. 5.

³*Ibid.*, s. 12.

⁴R.R.O. 1960, Reg. 74.

the anomalous power to govern the practitioners of a separate occupation, but the power has been exercised by making regulations for which there is no statutory authority. This power is discussed further in what follows.

The rules relating to registration requirements are called "Regulations" by the College, but are not to be found in the Ontario Regulations and are clearly not regulations *stricto sensu*. At the very least, the Dentistry Act⁵ and the activities of the College manifest a confusing use of terminology.

The Drugless Practitioners Act deals with drugless practitioners in general. It provides that the Lieutenant Governor in Council may make regulations classifying drugless practitioners (under such headings, presumably, as chiropractors, masseurs, etc.) and prescribing the systems of treatment that may be followed by practitioners of different classes.⁶ It is confusing that power to make regulations on *exactly* the same matters is conferred on the Board of Regents.⁷ The situation becomes even more puzzling when it is observed that the Board of Directors of a particular classification, once appointed, has all the powers which the Board of Regents would have if the Board of Directors had not been appointed, and the Board of Regents ceases to act with respect to that classification of drugless practitioners.⁸

Thus, the result is that the Lieutenant Governor in Council, by section 4, may prescribe the system of treatment to be followed by a given classification,⁹ while the Board of Directors of that classification, by sections 5 and 6(e), may exercise the same power and, notionally at least, prescribe conflicting systems of treatment.

The conflict may be more apparent than real, since all regulations made under section 6 require the approval of the Lieutenant Governor in Council; nevertheless, the confusion should be eliminated.

The Law Society Act¹⁰ authorizes the Benchers of the Law Society of Upper Canada to make "regulations", but that term

⁵R.S.O. 1960, c. 91.

⁶Drugless Practitioners Act, R.S.O. 1960, c. 114, s. 4.

⁷*Ibid.*, s. 6(e).

⁸*Ibid.*, s. 5.

⁹*Ibid.*, s. 4.

¹⁰R.S.O. 1960, c. 207, s. 42.

is treated as synonymous with "rules". No "regulations" have appeared in the *Ontario Gazette*. The rules and regulations made by the Benchers require no governmental approval, notwithstanding that the Act contains many more detailed provisions regarding the powers of the governing body than do the other Acts under review. The rules relating to admission to practice and to discipline should be contained in statutory regulations.

The "rules" of the Law Society have not been published in such a manner as to be readily available, either to the public or even to the members of the profession. Rules of a self-governing body ought always to be readily available to anyone interested in seeing them. They are part of the law in force in the Province.

In the Medical Act¹¹, as in the Law Society Act,¹² the words "rules", "regulations" and "by-laws" seem to be used interchangeably.

The Professional Engineers Act contains no provision for the making of regulations, but the Council of the Association of Professional Engineers of the Province of Ontario is empowered to pass "by-laws" which deal with, *inter alia*, such matters as admission to practice and discipline. These require the approval of the Lieutenant Governor in Council and of a majority of the members of the Association.¹³ These "by-laws" in fact appear labelled as "Regulations" in the Revised Regulations of Ontario, and have been amended in subsequent issues of the Ontario Regulations.^{13a}

The Optometry Act, 1961-62,¹⁴ may be regarded as a proper model for the organization of rule-making powers. These powers are dealt with in two separate sections: by section 7,¹⁵ the Board of Directors of the College of Optometrists of Ontario may pass by-laws on purely administrative matters involving the management of the affairs of the College (e.g., management of property and meetings of the Board). For these

¹¹R.S.O. 1960, c. 234.

¹²R.S.O. 1960, c. 207.

¹³R.S.O. 1960, c. 309, ss. 4, 5.

^{13a}R.R.O. 1960, Reg. 496.

¹⁴Ont. 1961-62, c. 101.

¹⁵*Ibid.*, s. 7.

by-laws, no approval is required except passage by the College at a general meeting. By section 16,¹⁶ the Board may make regulations respecting policy matters (e.g., admission requirements, discipline). These require the approval of the Lieutenant Governor in Council and are published in the Ontario Regulations.

This is the proper division of rule-making powers. In each case control over the exercise of the power is placed in the appropriate hands.

SUMMARY

A comparison of the various provisions with respect to the power to make regulations conferred on the relevant bodies reveals the following points:

- (a) There is considerable confusion of terminology. As we have indicated, the terms "regulations", "by-laws" and "rules" seem to be used interchangeably (e.g., the Dentistry,¹⁷ Law Society,¹⁸ Medical,¹⁹ and Professional Engineers Acts²⁰). A uniform terminology should be adopted and employed. The term "regulations" should be reserved for those rules which materially affect the public, and should be matters of public record published in the *Ontario Gazette*.
- (b) The approval by the Lieutenant Governor in Council is generally required. The only clear exceptions are in the Law Society²¹ and Medical Acts.²² The Public Accountancy Act²³ does not require approval of regulations, but the Lieutenant Governor in Council may annul any regulations made by the Council. A partial exception to the general rule is found in the Architects Act,²⁴ which requires approval by the Lieutenant Governor in Council for some regulations but not for others. In other cases (the Surveyors²⁵ and Veterinarians Acts²⁶), there is no provision for the

¹⁶*Ibid.*, s. 16.

¹⁷R.S.O. 1960, c. 91.

¹⁸R.S.O. 1960, c. 207.

¹⁹R.S.O. 1960, c. 234.

²⁰R.S.O. 1960, c. 309.

²¹R.S.O. 1960, c. 207.

²²R.S.O. 1960, c. 234.

²³R.S.O. 1960, c. 317.

²⁴R.S.O. 1960, c. 20.

²⁵R.S.O. 1960, c. 239.

²⁶R.S.O. 1960, c. 415.

making of regulations but only of by-laws, which deal with such matters as admission to practice and discipline. These do not require the approval of the Lieutenant Governor in Council.

In yet other cases (the Dentistry Act²⁷ and the Professional Engineers Act²⁸), the governing body may not make regulations but only by-laws dealing with, *inter alia*, admission and discipline, but these do require the approval of the Lieutenant Governor in Council.

(c) No consistent distinction is drawn between those rules which should be contained in by-laws, and those rules which should be contained in regulations.

It is recommended that by-laws should deal only with matters of administration and domestic affairs, e.g., management of property, meetings of council, etc., while rules dealing with policy or adjudication, e.g., admission standards, discipline, etc., should be contained in regulations, as defined in paragraph (a) of this Summary. All regulations should be approved by the Lieutenant Governor in Council.

²⁷R.S.O. 1960, c. 91.

²⁸R.S.O. 1960, c. 309.

CHAPTER 81

Admission

WE have made it clear that the power to admit a licensee is not conferred to protect the economic welfare of the profession or occupation. Those professions or occupations which have been granted self-governing status are charged with a responsibility not only to see that persons licensed are qualified, but that all qualified applicants are licensed. The public has a genuine and very real interest in knowing that the members of the self-governing bodies are properly trained and have good ethical standards. The technical nature of the services performed by the members of such bodies makes it very difficult for the layman to assess the competence of the practitioner and gauge the value of the services he has received. The public must be able to rely on the judgment of those who are empowered to decide that persons licensed to practise a profession or engage in a self-governing occupation are qualified. That being so, the responsible and experienced members of a profession or occupation on whom the power of self-government is conferred should be in the best position to set the standards to be met and the qualifications of anyone who aspires to enter the profession or occupation. But it must be recognized that each of the self-governing bodies has been given a statutory monopoly through its licensing powers. What has to be guarded against is the use of the power to license for purposes other than establishing and preserving standards of character, competence and skill.

Two questions arise:

- (a) May qualified persons be excluded from entering self-governing bodies?
- (b) May the licensing power be used for purposes of limiting the number of persons permitted to become members of the self-governing bodies?

The historical precedent of the medieval guilds, as described by Professor Gellhorn, illustrates the kind of thing that causes concern.

“The medieval guilds, whether of merchants or of craftsmen, seem originally to have been concerned with the reputations of their members. Artisans and tradesmen knew that observance of commonly accepted standards would enhance the reputation of all. At the outset the guilds readily accepted new members, seeking only to assure that all would measure up to the prescribed norms of reliability. Before the middle of the fourteenth century, however, there was thinly disguised evidence of an aim to restrict competition by restricting membership, and a century later the disguises were frankly discarded. . . . Competition between one guildsman and another all but disappeared. Each guild, in pursuit of monopoly for its members, exercised virtually complete governmental powers of a legislative, judicial, and financial character.”¹

Under the former rules of the Law Society of Upper Canada, those applying to become members from outside the Province were required, in addition to passing the prescribed examinations, to pay a fee of \$1,500 as a condition precedent to being called to the Bar, while a candidate who received his training in Ontario paid a fee of \$100. This form of discrimination has now been corrected, but it did exist for many years. Under the regulations passed under the Pharmacy Act, applicants for registration who have qualified outside Ontario shall not be registered in Ontario in numbers exceeding one per cent of the total registered membership of Pharmaceutical Chemists in Ontario in the same year. These restrictions serve to alert the public that the power of self-government has real monopolistic attributes.

¹Gellhorn, *Individual Freedom and Governmental Restraints*, 113.

QUALIFICATIONS

Qualifications for entry to self-governing bodies may be divided into two classes:

- (a) Educational qualifications, and
- (b) Non-educational qualifications.

Educational Qualifications

In fixing educational standards, two classes of candidates must be considered—those who have received their training in the Province of Ontario, and those who have received their training outside the Province. Qualifications which must be met by all applicants for admission to practise have been established for each of the self-governing bodies. In some cases, e.g., the Chiropody Act, the Optometry Act and the Embalmers and Funeral Directors Act, the required educational requirements are set out in some detail in statutory regulations in question;² while in others, e.g., the Law Society Act,³ there is merely a provision empowering the governing body of the profession to prescribe educational standards for admission.

We do not criticize the wisdom of the practice of conferring in some cases on certain bodies the power to fix educational standards for admission, and in others of establishing in the controlling Act or by regulation passed thereunder, such standards. In some cases, the educational training of members of a profession extends over many years and puts the members of the profession in the best position to decide what should be the intellectual attainments for practitioners in their respective professions. In other cases, self-government has been granted to those whose occupations do not require high standards of academic training but training of a more technical nature. Such standards for admission can be set conveniently either by the governing Act or the regulations passed thereunder.

In any case, there should be adequate safeguards against standards of admission being employed as regulatory devices to limit the number of those entering the profession or occupa-

²See R.R.O. 1960, Reg. 53, s. 12 (Chiropody); O. Reg. 166/63, s. 1 (Optometry); and R.R.O. 1960, Reg. 129, ss. 2, 4 (Embalmers).

³R.S.O. 1960, c. 207.

tion. The risk that this may be done is greater in those professions or occupations where the vigilance of universities is not likely to alert the government or the public to the adoption of unrealistic standards. Since the risk of misuse of the power to set educational standards exists, there should be some form of control.

Non-Educational Qualifications

Many of the self-governing bodies require other qualifications from their entrants which may have no clear relevance to their training, ability or technical competence.

(i) *Age*

Approximately half of the governing statutes in Ontario specify no minimum age for applicants for admission. Of the occupations which do call for a minimum age, all but two set the age at twenty-one.⁴ There can be no objection to a reasonable age qualification.

(ii) *Good Moral Character*

Good moral character is a requirement common to the professional or occupational statutes and its relevance cannot be disputed. It is, however, a relative term. What the term should mean as applied to one profession or occupation may be quite different from the meaning the term should bear as applied to another. One measures moral character by a higher standard where the emphasis is on skilled advice or the management of trust funds. The requirement of good moral character is to the ethical aspect of a profession what the educational standards are to competence. To state the requirement is one thing, but to apply it is another. Moral weaknesses are seldom apparent and they often only become manifest when the individual is exposed to the problems arising in the profession or occupation involved. It is extremely difficult, if not impossible, to detect future moral risks. Notwithstanding the difficulties of application, it is nevertheless necessary to have standards of good moral character where bodies are given the power of self-government. The determination of

⁴Embalmers and Funeral Directors Act, and Regulations governing Dental Hygienists, require that a licensee be not less than twenty years of age.

moral instability, like the determination of other standards, is essentially a judicial decision and an applicant should only be refused admission on this ground after being afforded a hearing. The right of appeal will be discussed later.

(iii) *Citizenship*

When the Legislature confers on any professional or occupational body the power of self-government, there is a delegation of legislative and judicial power which is an exercise of the sovereign authority of the State. There is strong argument in favour of the contention that legislative and judicial power should only be exercised by persons who would ordinarily be entitled to vote and be candidates in a provincial election.

Few of the self-governing bodies have any requirement respecting citizenship. The Architects Act⁵ requires, as a condition precedent to membership in the Association, that the applicant be domiciled in Ontario, a British subject, or one who has taken the oath of allegiance and declared his intention of becoming a British subject. Under the regulations passed under the Dentistry Act⁶ controlling membership in the ancillary body "Dental Hygienists", no person shall be registered as a dental hygienist unless she is a Canadian citizen or a British subject, or furnishes proof to the satisfaction of the Board of Directors of the Royal College of Dental Surgeons of Ontario that she intends to make application for Canadian citizenship within a reasonable time.⁷ The Barristers Act⁸ and the Solicitors Act⁹ require that candidates for admission be British subjects. In certain cases (e.g., the Pharmacy Act, the Professional Engineers Act, and the Chiropody Act), applicants are asked to state their nationality or citizenship.¹⁰

We do not think that citizenship should be a condition precedent to membership in any of the self-governing professions or occupations. Such a provision would in many cases

⁵R.S.O. 1960, c. 20, s. 7.

⁶R.S.O. 1960, c. 91, s. 12.

⁷O. Reg. 332/65, s. 7.

⁸R.S.O. 1960, c. 30, s. 2.

⁹R.S.O. 1960, c. 378, s. 3.

¹⁰See R.R.O. 1960, Reg. 480, Form 1 (Pharmacists); R.R.O. 1960, Reg. 496, Form 2 (Professional Engineers); and R.R.O. 1960, Reg. 53, Form 3 (Chiropodists).

deny to members of the public the services of highly skilled professional men and women during the period that must expire before citizenship can be acquired. The requirement that barristers and solicitors be British subjects is justified, as barristers and solicitors are officers of the court. On the other hand, we think that all statutes conferring powers of self-government should contain provisions that only British subjects may hold office in the respective bodies or exercise the powers of self-government. It is inconsistent with the exercise of delegated legislative power and judicial power that the power may be exercised by persons who would not ordinarily be qualified to vote or sit as members of the Legislature which delegates the power.¹¹

ADMISSION OF APPLICANTS WHO RECEIVED TRAINING OUTSIDE ONTARIO

Two questions arise with respect to educational requirements to be met by applicants from outside the Province:

- (1) Are there relevant local provincial conditions? and
- (2) What is the relevant coverage of the applicant's training?

In many cases local provincial conditions are irrelevant. For example, a study of engineering or pharmacy involves substantially the same content wherever it may be undertaken. But the extent of the study is another matter. This general statement does not apply to the study of the law which may involve a strong local element. The Ontario law may be quite different from the law where the applicant received his training.

The main problem in applying educational standards for applicants from outside the Province is the coverage which may involve not only what the candidate has studied, but his qualifications as compared with those of persons trained within the Province. This problem has two slightly different aspects as it involves applicants who have been trained outside Ontario but within Canada, and applicants who have been trained outside Canada.

¹¹Appendix C to this Section is an analysis of the admission requirements of the self-governing bodies. See pp. 1218A ff, *infra*.

The essential questions raised by each concern the educational standards of applicants as related to the standards of those trained in Ontario. The non-educational requirements discussed above should create no problem. Such requirements as age and good moral character are constant, no matter where the individual applicant comes from. The non-educational requirement of citizenship has been discussed.

Even in those fields of study where there is no significant difference in the subject matter from one province, country or continent to another, there may still be a serious question in the case of any particular applicant as to whether his training satisfies the requirements established by the profession in this Province. Here, as in all questions of admission to practice, the overriding consideration must be the protection of the public by the maintenance of high standards.

Admission standards should not be set as an encouragement or discouragement of the immigration into Ontario of persons who have particular skills or qualifications. Questions of immigration are entirely separate from the exercise of the powers conferred on self-governing bodies. The only relevant question, apart from non-educational requirements, to be asked of any applicant for admission, no matter what his place of origin and no matter where he took his training, is whether he has met the required educational standards established in the Province. This question can only be answered by comparing the applicant's training with the established standards. Such an inquiry admits of only one of two possible conclusions: either the standards have been attained by the applicant, or they have not. In the former case, the applicant should be admitted as a member of the self-governing body. In the latter case, the governing body in question may, instead of refusing the application, decide that the requirements have been substantially met, but not entirely. In such a case the candidate may be classed as conditionally admissible. That is, he may be admitted if he satisfies the outstanding requirements. This is the course followed now in proper cases in some of the professions; for instance, under the Transfer Regulations of the Admissions Committee of The Law Society of Upper Canada, a barrister and solicitor who has practised for a continuous period of not less than three years, in another

Canadian common law jurisdiction, immediately preceding application, may be admitted to practise in Ontario, provided he:

- (a) Presents a certificate of good standing from the province of whose bar he is a member, and
- (b) Passes the prescribed examination on the statutes and practice and procedure of Ontario.

The regulations under the Pharmacy Act provide that an applicant for admission from outside Ontario must have academic qualifications at least equivalent to the degree of Bachelor of Science in Pharmacy at the University of Toronto, and if he does not possess such qualifications he may be required to pass such of the examinations leading to that degree at the University of Toronto as shall be stipulated by the Council of the Ontario College of Pharmacy.

The process of measuring an applicant's qualifications against the established standards is essentially a judicial matter. Self-governing bodies should be required to hold a hearing in all cases before an application is rejected. At such hearing the applicant should be given the opportunity of presenting evidence of the details of the course of study he has pursued and making representations to the admitting authority. A right of appeal from a decision refusing admission will be discussed later.

Reciprocal Arrangements for Admission

The principle on which reciprocal arrangements are made for admission to the relevant professions or occupations should be: Are the training and qualifications required for admission in the other jurisdictions equivalent to those in Ontario? The test should be whether the standards for admission to practice in Ontario are met, not whether Ontario licensees are admissible in the other jurisdiction.

The Surveyors Act¹² contains the sort of provision that is founded on a principle clearly designed to protect the profession.

"24. The board has power to grant exemption from the whole or part of the term of apprenticeship and from the whole or

¹²R.S.O. 1960, c. 389.

parts of the intermediate and final examinations in the case of a person who has attained the age of twenty-one years and has practised as a surveyor in any of Her Majesty's realms other than the Province of Ontario, and has satisfied the board that the qualifications for practising required in such realm are similar to those required in Ontario and has produced to the board his certificate or diploma; provided that the same or similar privileges are granted in such realm to Ontario land surveyors."¹³

This provision is limited to those who might come from "Her Majesty's realms", and further limited to those realms that extend similar privileges to Ontario surveyors.

It is recommended that there should be no legislative recognition of a power to exclude qualified applicants for admission who come from outside the Province on any principle dependent on reciprocal arrangements.

Admission Procedure

The safeguards outlined in Chapter 14 of this Report with respect to an appropriate procedure for tribunals in Ontario, and our recommendations set out therein, apply with force to procedure regarding the admission of members to self-governing bodies and the control of the privileges of membership. Suitable procedure for admission differs in many respects from that appropriate to the exercise of the power to erase from the register, although both are judicial decisions.

The procedure on admittance presents no problem, unless the matter of rejection of an applicant for admission is raised. Clear and simple rules with respect to proof and qualifications should be set out, either in rules or the governing statutes. A decision to reject an applicant ought not to be made without a hearing, and written reasons by the admitting tribunal should be given in all such cases. Under the Medical Act of Great Britain, there is a right of appeal by way of stated case to the Privy Council against a refusal to register.¹⁴

We recommend that a right of appeal should lie to the Appellate Division of the High Court of Justice for Ontario wherever an application to be admitted to a self-governing body has been rejected.

¹³*Ibid.*, s. 24.

¹⁴1956, 4 & 5 Eliz. II, c. 76, ss. 24, 26.

CHAPTER 82

Discipline

DISCIPLINARY POWERS

THE obligation to maintain high standards of competence and ethical conduct is not discharged once an applicant has been admitted to practice. There is the continuing obligation to see that practising members of the body provide proper service to the public. The service provided will only be valuable so long as it is a combination of a high degree of technical competence and a vigilant observance of the ethical requirements of practice.

Traditionally, the self-governing bodies have policed their own ranks, and clearly they have a proper interest in doing so. Almost all the problems which arise in relation to this question concern the machinery of discipline to be employed.

The most obvious feature of the power of a self-governing body to discipline its members is that it is clearly a judicial power within the meaning we have given to that term, i.e., it consists of the independent and impartial application of pre-determined rules and standards; no element of policy should be present in the exercise of this power. It is a power whose exercise may have the most far-reaching effects upon the individual who is disciplined. The sanction imposed upon one who has been found guilty of professional misconduct may be anything from a reprimand to expulsion from the profession. Where conviction may result in what has aptly and justifiably been termed "economic death", it is vital that procedural safeguards to ensure fairness be clearly established and rigorously observed.

The last proposition would appear too obvious to need to be stated, but nevertheless an examination of the statutes conferring powers of self-government shows a bewildering array of inconsistencies and omissions in the provisions made for disciplinary procedure. Many of the statutes fall far short of the essential procedural requirements for judicial tribunals set out in Chapter 14 of this Report.¹

There does not appear to be any rational explanation for the inconsistencies in these statutes, except that each statute appears to have been drawn without reference to any required code of procedure and without an awareness of the necessity of surrounding such judicial powers with the procedural safeguards necessary to promote justice.

Procedural defects are not the only grounds for criticism. The provision of a set of rules is not in itself sufficient. That such wide judicial powers as those conferred on the self-governing bodies should be placed in private hands may be expedient, but it is anomalous. Disciplinary powers are penal powers. When these powers are conferred on private individuals who take no oath of office, and for whom in most cases the government has no responsibility for appointment, a private court is created. Such powers remind one of the private justice of feudal times, when the Lord of the Manor had the right to hold the court for his tenants. The private disciplinary justice meted out by the self-governing bodies is, in a very real sense, an anachronism the survival of which can only be justified if all the interests concerned are better protected by this method than they could be by any other. The first matter to bear in mind is the reason that the power of self-government is granted to any body. Many occupational bodies require regulation in the public interest, but this is often done by setting up a licensing scheme with different methods of control, e.g., real estate brokers, investment dealers, and used car dealers. It is not suggested that such a licensing scheme would be appropriate for all self-governing bodies, but before new powers of self-government are conferred it should

¹In Appendix D to this Section we have set out an analysis of the grounds for disciplinary action as contained in the relevant legislation. See pp. 1219 ff. *infra*.

be clearly demonstrated that a licensing scheme would not be appropriate.

There are three groups with an interest in the efficacy and fairness of disciplinary proceedings of self-governing bodies. They are:

- (1) The public, whose benefit and protection are the primary objectives of the whole process;
- (2) Members of the self-governing body, who are or may be subjected to discipline; and
- (3) The profession or occupation itself, which has a general interest in ensuring the maintenance of high standards of professional or occupational conduct.

In general, questions of professional or occupational misconduct, incompetence and unethical practices are matters which the leading members of a profession or occupation should be best able to judge. However, the ability born of experience to decide what is and what is not professional or occupational misconduct, is not necessarily the same thing as the ability to occupy satisfactorily the seat of justice. There is in the present situation a very real danger that the protection of public, professional and occupational interests will cause the other interests involved to be disregarded.

The practitioner against whom disciplinary proceedings are directed has a very real interest in the fairness of the proceedings. Basic concepts of penal justice, such as the presumption of innocence, have just as much place in such proceedings as in the courts of law. Unless the interests and rights of the accused are protected under the present system, or unless the present system can be modified by the introduction of safeguards for those interests and rights, the argument is very strong that the right to dispense private professional penal justice should be withdrawn and all disciplinary matters be decided by the courts of law.

A perusal of the relevant statutes indicates that the powers of self-government appear to have been extended to bodies where the technical competence of their members could well have been controlled by licensing, without extending to them the monopolistic attributes of self-government.

There are defects other than procedural ones which cause concern and criticism of the present system. Some of these defects are inherent in a system which places extensive judicial powers in the hands of persons who have little or no judicial experience; others spring from a lack of definition of both the ends to be achieved by disciplinary proceedings, and the means of arriving at those ends. These defects and recommendations for their removal will be considered.

COMPOSITION OF THE DISCIPLINARY TRIBUNAL

In some of the professional statutes, or in the regulations or by-laws made under them, provision is made for disciplinary powers to be exercised by a discipline committee (e.g., the Pharmacy Act). In others, (e.g., the Chiroprody Act, the Drugless Practitioners Act, the Professional Engineers Act), the powers are exercised by the governing body itself. The Medical Act and the Dentistry Act provide for limited powers which may be exercised by a discipline committee. In the event that the discipline committee decides that the case calls for a penalty which it does not have jurisdiction to impose, the committee reports to the council and council may act on the report of the discipline committee, or may require that it be furnished with a transcript of the evidence taken, or may refer the matter back to the committee to take additional evidence. In those cases where the penalty to be imposed is beyond the jurisdiction of the discipline committee, there is no provision that a copy of the report to council be furnished to the accused member or that he have a hearing before the council. This we think is an unjust procedure and inconsistent with the recommendations contained in Chapter 14.

In certain cases, a discipline committee makes a decision and there is a right of appeal, as under the Medical Act to the Council, and under the Dentistry Act to the Board, without provision that members of the discipline committee—who were members of the Council or Board, as the case might be—should not sit as members of the body hearing the appeal. This we shall discuss later.

The lack of judicial experience of the governing bodies gives rise to concern. There can be no doubt that frequent exposure to judicial process is essential for the creation of a

familiarity with the procedure and an awareness of its purposes. Many of the members of the governing bodies must necessarily have little or no experience of adjudication and judicial procedure. The cases requiring discipline are infrequent and the membership of the tribunal changes from time to time. We have been advised that the disciplinary powers of the Ontario Board of Examiners in Psychology have never been exercised since they were first provided in 1960. It is difficult to see how a practitioner against whom a complaint is laid can confidently expect such a body to be sufficiently familiar with procedural requirements to ensure a completely fair hearing for him.

The factor of judicial and procedural inexperience goes deeper than mere unfamiliarity with the process of adjudication. Notwithstanding that the Ontario College of Physicians and Surgeons heard seven separate charges of unethical conduct against members of the College in the six months preceding its half-yearly report published in June, 1966, grave procedural errors were found by the Court of Appeal to have been made in *Re Glassman and the Council of the College of Physicians and Surgeons*.² The errors were not mere technical or formal lapses. In *Mehr v. Law Society of Upper Canada*,³ the Supreme Court of Canada found that the demands of fundamental fairness and natural justice were not met by the discipline committee of The Law Society.

It has been suggested that the problem of disciplinary procedure should be solved by providing a Professions Disciplinary Tribunal which would be composed of representatives of all self-governing bodies and which would hear all disciplinary cases of such bodies. Such a tribunal would enjoy certain advantages, chief among which would be:

- (a) That by experience in the technique of adjudication it would acquire a familiarity with the judicial process which would be conducive to the establishment of a uniform and fair procedure in all cases; and
- (b) That since such a body would be independent of any one profession, it would not be vulnerable to the charge of

²[1966] 2 O.R. 81 (C.A.).

³[1955] S.C.R. 344.

“looking after its own”; at present, no matter how fair-minded and conscientious a disciplinary body may be, a disgruntled member of the public may do serious damage to the reputation of a profession as a whole by quite unfounded complaints that its members “stick together”.

On the other hand, such an independent tribunal could not bring to any individual case that knowledge of the practice and standards of the particular profession or occupation which is the main justification for the present system. However, such a tribunal could receive expert evidence on what constitutes professional misconduct in the particular profession of which the accused is a member.

Although the independent tribunal has some advantages, we do not recommend it. We think that the public interest will be better served by the present system, as applied to truly professional bodies, if further safeguards are provided. This was the view taken by the members of the Ontario Court of Appeal in the *Glassman* case. Schroeder, J. A. said:

“On a charge imputing misconduct to a medical practitioner in the pursuit of his profession the members of the Council are the best possible judges to determine the issues involved.”⁴

Laskin, J. A. said:

“I do not doubt the advisability of having allegations of professional misconduct initially passed upon by the professional body statutorily authorized to enforce ethical standards upon licensed members.”⁵

While these principles apply to truly professional bodies whose members have had many years of education and specialized training, it is not so clear that the public interest demands that the monopolistic powers of self-government in licensing be conferred on bodies whose members are trained technicians engaged largely in quasi-commercial activities.

In any case, the governing bodies of the designated professions and occupations cannot be left to formulate their own rules of procedure and to conduct their hearings in their own way without considerable effective supervision.

⁴[1966] 2 O.R. 81, 100.

⁵*Ibid.*, 101.

Two matters are raised in the *Glassman* case which require the attention of this Commission:

1. The members of the disciplinary committee sat as members of the Council, hearing an appeal from a decision of the discipline committee in which they had participated.
2. Counsel, who appeared to present the case against the accused, conferred with the Council during its deliberations upon the subject matter of the appeal.

On the first point, the court did not decide whether the members of the discipline committee were legally disqualified from sitting on the appeal, but merely stated the opinion that it would be better if they did not do so.⁶ There should be a statutory rule prohibiting members of an inferior tribunal from sitting on appeals from decisions in which they have participated. No one who has exercised judicial powers should participate in hearing an appeal from his own decision.

On the second point, the Court of Appeal, with some apparent misgivings, followed an earlier decision⁷ and held that the decision of the Council was not invalidated because of the presence of counsel for the Council during the deliberations on the case. The court, however, drew attention to the the British Medical Act,⁸ which makes provision for the appointment of a legal assessor. We have recommended that the rules governing judicial tribunals (as we have emphasized, a disciplinary committee of a self-governing body is a judicial tribunal) should provide explicitly that, where the tribunal seeks legal advice, the nature of the advice should be made known to the parties in order that they may make submissions as to the law, and in no case should the members of the tribunal seek advice from or consult with counsel for either side in the absence of the other side.⁹

The provisions of the British Medical Act,¹⁰ and the rules passed thereunder, established minimum standards of caution that should apply to all disciplinary bodies. The

⁶*Ibid.*, 97.

⁷*R. v. Public Accountants Council, Ex parte Stroller*, [1960] O.R. 631.

⁸1956, 4 & 5 Eliz. II, c. 76.

⁹Chapter 14, p. 220 *supra*.

¹⁰1956, 4 & 5 Eliz. II, c. 76, s. 24.

legal assessor, for which provision is made, must be a barrister or solicitor of ten years standing. In all proceedings before the disciplinary committee, he must be present. His function is quite distinct from that of "counsel for the prosecution". He is an adviser to the committee on questions of law only, and in addition he has a duty to inform the committee forthwith of any irregularity in the conduct of proceedings which comes to his knowledge. The advice to the committee must be tendered in the presence of every party appearing at the hearing. If a question is referred to the assessor after a committee has begun its deliberations, and the committee considers that it would be prejudicial to the discharge of its duties for the advice to be tendered in the presence of the parties or their representatives, the advice may be tendered in their absence. Where this action is taken, the assessor must as soon as possible personally inform the parties of the question put to him by the committee and his advice thereon. His advice must subsequently be put in writing and a copy of it given to the parties. Copies of written advice must be available on application to every party to the proceedings who does not appear thereat.¹¹

We consider that the principle of a legal assessor adopted in Great Britain is sound, but we would go further. We think he should be appointed to sit as a member of the committee and that he should not be counsel or solicitor to the governing body of the relevant profession or occupation. We do not think that the provisions of the regulations under the Architects Act¹² and the Dentistry Act,¹³ giving power to the board to call in a solicitor or counsel for assistance and advice, and in the Medical Act,¹⁴ providing that "the College shall provide the discipline committee with . . . the services of counsel. . . ." are satisfactory. They do not provide the elementary safeguards of an open hearing, where those who might be affected by the decision may have an opportunity to present full argument. An opportunity to present full argument in-

¹¹*Ibid.*, s. 37, and rules passed thereunder; see 26 Halsbury, *Laws of England* (3rd ed.), 60, paras. 117, 118.

¹²R.S.O. 1960, c. 20.

¹³R.S.O. 1960, c. 91, s. 25 (8).

¹⁴R.S.O. 1960, c. 234, s. 34, as amended by Ont. 1962-63, c. 80, s. 1.

cludes an opportunity to know what legal arguments are presented against a party and to meet them.

The extent to which the legal assessor should participate in the decision is a matter for debate. In California, the legally qualified member is chairman, while in Great Britain the assessor is merely an adviser. The trial of cases before a disciplinary body is much more serious than many trials conducted in the regular courts. Matters of law and fact are often difficult to distinguish. Having this in mind, we think that there should be a well-qualified lawyer on each disciplinary body, to whom arguments of law may be addressed and whose advice on law will be reflected in the written reasons of the committee. Such a provision in the governing statutes would preserve the advantages provided by the procedure laid down in the British Medical Act, without following the somewhat cumbersome procedure of furnishing the parties with copies of legal opinions.

PROFESSIONAL MISCONDUCT

Some controlling statutes (e.g., the Surveyors Act¹⁵) refer to "professional misconduct" as a ground for taking disciplinary action against a practitioner; others, (e.g., the Veterinarians Act,¹⁶ and the Professional Engineers Act¹⁷) refer to "unprofessional conduct". The difference between the two terms does not appear to be very great and it is probable that the professions treat them as synonymous. Nevertheless, since it is desirable that the standards of professional behaviour be defined with as much precision as possible, it would be preferable to use a single term throughout the professional statutes. Of the two, "professional misconduct" would appear to be the more appropriate. "Unprofessional conduct" is a much wider term and it could mean "conduct unbecoming to a professional man", which might involve conduct that had nothing to do with professional standards. Professions have an interest in seeing that their members conduct their lives according to certain accepted standards. In the Surveyors Act,¹⁸

¹⁵R.S.O. 1960, c. 389, s. 36(1).

¹⁶R.S.O. 1960, c. 416, s. 14(1).

¹⁷R.S.O. 1960, c. 309, s. 28 (1).

¹⁸R.S.O. 1960, c. 389, s. 36 (1).

as an alternative to professional misconduct, the term "conduct apt to bring the profession into disrepute" is used. The protection of the corporate image of a profession or occupation is a secondary consideration in matters of discipline. The main emphasis should be on the protection of the public; for that purpose it is misbehaviour in the conduct of professional matters which is important.

Each of the self-governing bodies should circulate to its members a code of ethics or a statement of what constitutes professional misconduct. If a person is to be punished for activity which has been prohibited, he should have available the means of knowing what activity is prohibited. In other words, each member of the self-governing bodies should know, or should have the means of knowing, what is regarded as improper conduct, in so far as the powers of discipline may be exercised. In some cases, e.g., the optometrists, the public accountants, the veterinarians, codes of professional ethics have been drawn up and are contained in the by-laws. In others, e.g., the professional engineers, the code of ethics has been incorporated into the statutory regulations. In still others, e.g., the pharmacists, the psychologists and the various branches of the drugless practitioners, unprofessional conduct is stipulated as a ground for disciplinary action, but is nowhere defined. It may be impossible to stipulate in advance all the varieties and shades of activity which will be regarded as professional misconduct, and a general clause providing for discipline for "professional misconduct" will always be necessary so as to allow the profession to take account of unforeseen types of misbehaviour. The presence of such a general provision does not make it any less desirable that each body exercising disciplinary powers of self-government should have a code of ethics.

An unusual provision relative to disciplinary action is contained in the Pharmacy Act. Not only does it provide the basis for disciplining pharmacists, but also a basis for disciplining medical practitioners, dentists and veterinarians. The Act reads:

"51. (3) Where it appears to the Minister that a legally qualified medical practitioner, dentist, veterinary surgeon or pharmaceutical chemist has sold or prescribed an excessive, unrea-

sonable or improper amount of any drug referred to in Schedule D or has failed to make a complete report under subsection 1, the Minister may report such matter to the disciplinary body of The College of Physicians and Surgeons of Ontario, The Royal College of Dental Surgeons of Ontario, The Ontario Veterinary Association or The Ontario College of Pharmacy, as the case may be.”¹⁹

One may search the statutes governing the relevant professions but will find no reference to this provision or this ground for discipline. The law for each body should be clearly set out in the statutes or regulations governing that body. This is particularly true with respect to disciplinary matters.

We recommend that each of the self-governing bodies draw up an itemized list of activities which have been classified as professional misconduct. As new activities are classified by the exercise of power under that residuary “professional misconduct” clause, such classification, whether it has been made by a ruling or by a decision in an actual case, should be circulated to the profession.

All standards of conduct should be drafted for the main purpose of protecting the public and not the profession itself. The regulations passed under the Act respecting Ophthalmic Dispensers²⁰ provide an example of what ought not to be done. The Act gives the Board of Ophthalmic Dispensers, subject to the approval of the Lieutenant Governor in Council, power to make regulations “defining unprofessional conduct for the purposes of this Act”.²¹ The relative regulation passed reads as follows:

- “5. For the purposes of the Act, unprofessional conduct means,
- (a) the procuring of registration by misrepresentation or fraud;
 - (b) being mentally or physically incapable of practising as an ophthalmic dispenser and so certified by a duly qualified medical practitioner; or
 - (c) being so given over to the use of alcohol or drugs as to be incapable of practising as an ophthalmic dispenser.”²²

¹⁹R.S.O. 1960, c. 295, s. 51(3).

²⁰Ont. 1960-61, c. 72.

²¹*Ibid.*, s. 22 (d).

²²O. Reg. 376/61, s. 5.

This is a limiting and comprehensive definition of unprofessional conduct for the purpose of the Act. One who procures registration by fraud is guilty of unprofessional conduct, but one who perpetrates fraud in the practice of his profession is not. It is inhuman to define by statute mental illness as unprofessional conduct. In addition, the certificate of only one medical practitioner should not be sufficient to give a basis for disqualification. We think that the rules of the Law Society of Upper Canada lay down the proper test in such cases. "Where a member has been declared, certified or found to be mentally incompetent or mentally ill pursuant to the relevant statutes in that behalf, the benchers may, by resolution, suspend him from practice."²³

In the regulations governing chiropractors,²⁴ the provisions with regard to discipline are directed almost entirely to the protection of the interests of those engaged in the calling.²⁵

²³Reg. 81(1).

²⁴R.R.O. 1960, Reg. 53, s. 8.

²⁵See Appendix D to this Section, pp. 1219 ff. *infra*.

CHAPTER 83

Procedure Before Disciplinary Bodies

SOME of the procedural deficiencies in the relevant legislation applying to the respective self-governing bodies demand particular attention.

NOTICE OF HEARING

Several of the Acts—the Architects, Embalmers, Nurses, Optometry, Pharmacy, Professional Engineers, Psychologists Registration, Public Accountancy, Radiological Technicians and Veterinarians Acts—contain no provision as to the time which must elapse between the sending out of a notice of hearing and the date of the hearing. This deficiency is aggravated by the absence in all but two of the Acts—the Architects Act and the Law Society Act—of any provision for an adjournment of the hearing. Where notice to the member complained of is provided for, the time most frequently given is ten days before the hearing. It is recommended that an interval of at least ten days be required in all the statutes, coupled with an express power in the disciplinary body to adjourn the hearing from time to time.

SERVICE OF NOTICE

Where there is any provision for service, as a general rule the formula adopted is “service by registered mail to the member’s last address on the professional register.” This is

not altogether satisfactory. The regulations made under the Dental Technicians Act¹ require personal service of the notice of hearing, while the Law Society Act calls for personal service *or* service by registered mail *or* publication of the notice of hearing in a newspaper in the city, town or county where the member resides or practices. Uniformity of practice is desirable. It is recommended that there be a requirement for the notice to be served personally upon the member complained of, or, if personal service cannot be effected, service by registered mail addressed to the member at the address last shown on the register should be sufficient.

FAILURE TO ATTEND HEARING

The rule most frequently found is that the hearing may proceed in the member's absence if, after receiving notice of the hearing, he neglects to attend. This is satisfactory. However, under the Dentistry and Surveyors Acts, not only may the hearing proceed in the absence of the member complained of, but, once having failed to attend the original hearing, the member is not entitled to notice of any further hearings or proceedings.

Under the Professional Engineers Act, sanctions cannot be imposed until after the disciplinary body has heard evidence under oath on behalf of the accused. This would suggest that if the member complained of does not appear at the hearing, the hands of the disciplinary body are tied and they cannot proceed to impose a sanction upon him. We think it reasonable that the disciplinary body be empowered to proceed in the absence of the member who has received proper notice of the hearing. Provision should be made for service of a copy of the decision and reasons therefor on a member disciplined, whether he attends or not.

RIGHT TO COUNSEL

In only half of the professional statutes is the right to counsel recognized. In the Dentistry (with respect to dental hygienists), Drugless Practitioners (general), Embalmers,

¹ R.R.O. 1960, Reg. 72, s. 20(2).

Nurses, Optometry, Pharmacy, Professional Engineers, Psychologists Registration and Veterinarians Acts, no provision is made entitling the member complained of to be represented by counsel at the disciplinary hearing. This right should be recognized in all the statutes. There is justification for the provision in certain of the Acts—Chiropody, and Drugless Practitioners—that the member may be represented either by counsel or an agent.

SANCTIONS AVAILABLE

Only the Dentistry, Law Society, Medical, Optometry, Professional Engineers and Surveyors Acts provide the power to impose a lesser sanction than suspension of the right to practise. In each of these statutes, the power to impose a reprimand is also provided. Under the Dentistry Act, a fine may be imposed. In all other cases, except the Public Accountancy Act, the only sanctions available to the disciplinary body are suspension and cancellation of the right to practise. In the Public Accountancy Act, the only sanction available is cancellation of the right to practise. This is unsatisfactory. Unless the disciplinary body has power to impose a lesser penalty than suspension of the right to practice, it is likely that one of two undesirable results will follow. Either the professional body will refuse to take disciplinary action against practitioners who have committed minor offences, which will be a dereliction of the duty owed to the public to maintain high professional standards; or the professional body will take action in all cases and thus produce a situation in which the sanctions imposed may be out of all proportion to the offence committed, which may be grossly unfair to the individual practitioner involved.

We recommend that all disciplinary bodies have a full range of sanctions made available to them, ranging from reprimand to revocation of the right to practise, except the right to impose fines as is given under the Dentistry Act. We do not think any self-governing body exercising judicial powers should have power to impose fines, especially when the fines are paid to the treasury of the body.

COSTS

Except in a few instances, no provisions are found in the statutes of the self-governing bodies concerning the payment of costs of disciplinary hearings. In those cases where the subject is referred to, it is not dealt with in any uniform manner. Under the Dental Technicians Act, costs up to \$100 may be awarded against a member who is found guilty at a disciplinary hearing. Under the Dentistry Act, costs may be awarded against a member where the board directs the certificate of licence of the member to be suspended or cancelled. ". . . [A]fter taxation of such costs by the taxing officer of the Supreme Court at Toronto, execution may issue out of the Supreme Court for the recovery thereof in like manner as upon a judgment in an action in that court."² "The costs to be taxed and allowed against a member, including the costs of appeal, if any, shall as far as practicable be the same or the like costs as in an action in the Supreme Court, and the taxing officer may also allow such fees and disbursements for work done or proceedings taken before notice of complaint as he deems just."³

Under the Medical Act, the costs of the disciplinary hearing may include the costs of reporting and transcribing the evidence. The scale of costs is not set out in the statute. Like the Dentistry Act, provision is made that an execution may issue out of the Supreme Court upon the taxing officer's certificate. The two last-mentioned statutes are the only ones that provide for a judgment for costs having all the effect of a judgment rendered in the Supreme Court.

The Medical Act⁴ provides that if the member wishes to appeal he must pay for a transcript of the hearing, and if he does not do so his appeal is deemed to have been abandoned. If, on the other hand, the council or two members of the council appeal from the decision of the disciplinary body, no charge is made for the transcript. The anomalous result is that the member who has been subjected to disciplinary proceedings by the Council of the College of Physicians and

²Dentistry Act, R.S.O. 1960, c. 91, s. 25(20).

³*Ibid.*, s. 25(21).

⁴R.S.O. 1960, c. 234, s. 39(1), as re-enacted by Ont. 1966, c. 85, s. 5(1); and s. 41, as re-enacted by Ont. 1966, c. 85, s. 7.

Surgeons may be required to pay twice for the costs of reporting and transcribing the evidence at the hearing, and his failure to do so may mean the taking away of all his rights of appeal. Provisions substantially similar to those in the Medical Act are to be found in the Pharmacy Act.⁵

The power to award costs is in the nature of a judgment. We think it should only be exercised by judges. It is not a power that should be conferred on lay bodies of the nature we are discussing. The cost of exercising disciplinary powers is an incident of self-government which should be borne by the body as a whole. In no case should a lay body have power to make an order for costs enforceable as a judgment of the Supreme Court. All such powers as to costs should be repealed.

On the other hand, each body should have power if necessary to make an award from its funds to reimburse a member of the body for costs incurred through unwarranted disciplinary action taken against him. Such power is now conferred under the Dentistry Act,⁶ but it is limited to cases where a complaint is found to be frivolous or vexatious.

PUBLIC HEARINGS

The matter of whether hearings with respect to admission or discipline should be in public has given us much concern. We recommended⁷ that the hearing held by self-governing professional bodies, "involving professional capacity or reputation", be an exception to the rule that hearings of a tribunal should be in public.

Only three statutes conferring power on self-governing bodies (the Ophthalmic Dispensers Act, the Optometry Act and the Radiological Technicians Act) require public hearings. The Franks Committee was of the opinion that "if the adjudicating bodies, whether courts or tribunals, are to inspire that confidence in the administration of justice which is a condition of civil liberty they should, in general, sit in public".⁸ The proceedings of the disciplinary committee of

⁵R.S.O. 1960, c. 295, s. 29(7), as re-enacted by Ont. 1966, c. 115, s. 6(2).

⁶R.S.O. 1960, c. 91, s. 25(19).

⁷Chapter 14, p. 214 *supra*.

⁸The Franks Committee Report, Cmnd. 218, para. 77.

the General Medical Council of the United Kingdom must be held in public, except where in the interests of justice or for any other special reason, it appears to the committee that the public should be excluded from any proceedings or any part thereof. In such case the committee may direct that the public should be so excluded, but such direction will not apply to the announcement of any decision of the committee.⁹ This provision must be read in conjunction with a procedure in the nature of a preliminary inquiry which is not held in public. This inquiry is held for the purpose of deciding whether a case has been made out which would warrant a hearing before the full committee. The purpose of these inquiries is to sift out frivolous and vexatious complaints.

After careful consideration we have come to the conclusion that the rule set out in Chapter 14 is the correct one to be applied to those self-governing bodies whose members have been required to spend many years acquiring an education to fit them especially to become members of a profession. The fact that a member of a profession such as the medical profession is charged and tried publicly before a discipline committee is sufficient to destroy his professional career, no matter what the outcome of the trial may be. No one who has built up a professional practice can ever be anonymous to his patients or clients. We think that such cases are very different from a trial of civil or criminal cases where a public trial is a safeguard to the accused. However, as we said in Chapter 14, the person against whom a charge is made should in all cases have the right to a public hearing if he so requests.

EVIDENCE

In only one of the statutes we have been discussing is there any reference to the kind of evidence that is admissible at a disciplinary hearing. The Medical Act of Ontario provides:

“38. (1) Any person who would be a competent and compellable witness at the trial of a civil action in Ontario is a competent and compellable witness at a hearing of the discipline committee, and the evidence adduced thereat shall be gov-

⁹General Medical Council Disciplinary Committee (Procedure) Rules, 1958, Rule 42(2)(3).

erned by *The Evidence Act* and the rules of evidence in civil proceedings in Ontario, except that,

(a) where any evidence is tendered that would not be admissible as such at the trial of a civil action in Ontario, the committee may receive such evidence if it is satisfied that its duty of making due inquiry into the case before it makes its reception desirable; and

(b) any letter, statement, prescription, certificate, record or other document purporting to be signed by a registered medical practitioner and any account for professional services that is on an account form bearing his name is *prima facie* evidence that the document was signed or, in the case of an account, was authorized by him, and is *prima facie* evidence of the statements contained in the document or account.”¹⁰

It is difficult to know what subclause (a) means. It would appear to be an exception that makes the main provision meaningless.

In view of the consequences that may flow from disciplinary action, we think that the rules of evidence applicable in civil cases should apply to disciplinary hearings. On the other hand, the rule set out in Chapter 14¹¹—a tribunal should have a discretion to ascertain relevant facts by such standards of proof commonly relied on by reasonable and prudent men in the conduct of their own affairs—should apply to a hearing with respect to admission to the profession. Proof of educational qualifications and experience abroad should be facilitated.

STANDARD OF PROOF

We think it unwise to attempt to define by statute the standard of proof on which a disciplinary body may act. The provisions of section 38 of the Medical Act appear to have created some confusion with respect to the standard of proof applicable in disciplinary matters in the medical profession, as distinct from other self-governing bodies.

In *Re Glassman and Council of the College of Physicians and Surgeons*, Schroeder, J. A. held that by virtue of this section, “. . . the burden of proof cast upon the college is to

¹⁰R.S.O. 1960, c. 234, s. 38(1), as re-enacted by Ont. 1962-63, c. 80, s. 2, as amended by Ont. 1966, c. 85, s. 4.

¹¹See p. 216 *supra*.

establish the guilt charged against a practitioner by a fair and reasonable preponderance of credible testimony, the tribunal of fact being entitled to act upon a balance of probabilities. To say that the college must prove its case does not imply that it must demonstrate its case."¹²

In *Hynes v. Swartz*,¹³ Masten, J. A., in dealing with a case under the Architects Act, said: "Considering the penal nature of the proceeding, I am of the opinion that the appellant is entitled to the benefit of any doubt which may arise upon the evidence." The learned judge then went on to apply this principle and held that there was not sufficient proof of an intentional delinquency, but held the member to be negligent and reduced the penalty from suspension to a reprimand.

The risk of attempting to define standards of proof in statutory language is demonstrated by reference to certain judgments. In *Rex v. Summers*,¹⁴ Lord Goddard, in referring to the expression "beyond a reasonable doubt" as applied to a criminal case, said:

"I have never yet heard any court give a real definition of what is a 'reasonable doubt', and it would be very much better if that expression was not used. Whenever a court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity. . . . The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt, and that it is their duty to regard the evidence and see if it satisfies them so that they can feel sure, when they give their verdict, that it is a right one."

In *Regina v. Hepworth and Fearnley*,¹⁵ Lord Goddard explained the above passage and pointed out again the difficulty of laying down a formula to define the term "reasonable doubt".

In *Smith v. Smith*,¹⁶ the matter of standards of proof in civil actions was discussed at some length. The discussion was provoked by the conflict in judicial decisions concerning the standard of proof required in a divorce case. Locke, J. rejected

¹²[1966] 2 O.R. 81, 92.

¹³[1938] O.R. 77, 79.

¹⁴[1952] 1 All E.R. 1059, 1060.

¹⁵[1955] 2 Q.B. 600.

¹⁶[1952] 2 S.C.R. 312.

the argument that the standard should be proof "beyond a reasonable doubt", and concluded: "The nature of the proof required is, in my opinion, the same as it is in other civil actions. If the court is not 'satisfied' in any civil action of the plaintiff's right to recover, the action should fail".¹⁷ This statement was subject to the comment that no question affecting the legitimacy of offspring arose.

Two things are to be noted: the language used by the learned judge is very close to the standard as defined by Lord Goddard for criminal cases. The standard "satisfied" is used in each case. Words are often poor vehicles for the communication of ideas. In addition, the learned judge quite clearly indicates that there is a higher standard of proof required where the legitimacy of offspring is in question.

Rand, J. and Cartwright, J. clearly stated principles that should apply to the cases with which we are concerned. Rand, J. said:

"There is not, in civil cases, as in criminal prosecutions, a precise formula for such standard; proof 'beyond a reasonable doubt', itself, in fact, an admonition and a warning of the serious nature of the proceeding which society is undertaking, has no prescribed civil counterpart; and we are not called upon to attempt any such formulation."¹⁸

Cartwright, J. quoted a passage from an illuminating judgment of Sir Owen Dixon, Chief Justice of Australia, in which he said in part:

"... Except upon criminal issues to be proved by prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. . . ." ¹⁹

On a disciplinary charge there may be a wide variation in the standard of proof that may be required, dependent on the elements of the case, the nature of the charge and the results that may flow from a finding of guilt. This is recognized throughout the civil law. The standard of proof to

¹⁷*Ibid.*, 330.

¹⁸*Ibid.*, 331.

¹⁹*Ibid.*, 332.

establish negligence or to justify an apportionment of negligence, is very different from the standard required to establish illegitimacy.

In disciplinary cases it is sufficient to say that where a finding of guilt warrants disqualification from the practice of a profession, the standard of proof should be very high and convincing, while a standard to be applied where there is a finding of incompetence in one of the self-governing occupations is quite a different matter. No definite rule should be laid down. The question always should be: Is the proof sufficient to satisfy reasonable men, exercising prudence and caution in the particular circumstances of each case, that the decision to exercise disciplinary powers is a just decision?

RIGHT OF APPEAL FROM DECISION ON A DISCIPLINARY HEARING

No provision for appeal is found in the Chiropractic Act, the Dental Technicians Act, the Dentistry Act and the regulations concerning dental hygienists, the Drugless Practitioners Act (either under the general regulations or in any of the regulations appertaining to any of the specific classifications of drugless practitioners), or in the Law Society Act. Where appeals are provided there is no uniformity, either in the practice to be adopted with respect to the appeal or in the selection of the forum to which the appeal should go.

EFFECT OF SUSPENSION OR CANCELLATION OF RIGHT TO PRACTISE PENDING APPEAL

Most of the Acts are silent on the right to practice pending an appeal and there is no uniformity of practice where the point is covered. Under the Architects Act, the Professional Engineers Act and Veterinarians Act, the member may practice pending the disposition of his appeal, or until the time for appeal has passed; but under the Surveyors Act, the member whose right to practise has been suspended or cancelled, cannot continue to practice pending the disposition of his appeal, except where an order has been made by a judge of the Supreme Court permitting him to practice. An anomalous position is found under the Dentistry Act, which has no

express provision on this point; but if the discipline committee favours suspension for a period longer than twelve months and so reports to the Board, the licence of the member may be suspended by the discipline committee pending the Board's suspension. In other words, a sanction may be effective before it is ultimately imposed. Under the Medical Act, suspension or cancellation of a licence is not effective until the appeal has been disposed of, or until the time for appeal is passed, *unless* the penalty was imposed for incompetence. This provision combines the protection of the interests of the public with fairness to the members concerned.

We recommend that a similar provision be incorporated in all the Acts respecting self-governing bodies.

APPLICATION OF STATUTORY POWERS PROCEDURE ACT

Appendix E to this Section²⁰ is a chart showing a comprehensive analysis of the present disciplinary procedure set out in the respective statutes and regulations relating to self-governing bodies.

The statutory disciplinary powers of self-governing bodies afford a classic example of the urgent need of a Statutory Powers Procedure Act establishing minimum rules for all tribunals and a rules committee to formulate additional minimum rules of procedure applying to judicial tribunals.²¹

When such an Act is passed and appropriate rules applying to disciplinary tribunals are promulgated most of the criticisms we have raised with respect to the disciplinary powers of self-governing bodies will be met.

²⁰See p. 1228 *infra*.

²¹See Chapter 14, pp. 212 ff. *supra*.

CHAPTER 84

Control of Ancillary Occupations

DENTAL TECHNICIANS ACT AND RADIOLOGICAL TECHNICIANS ACT

THESE Acts¹ require special reference. Regulations passed under them must be submitted to the Royal College of Dental Surgeons and the Council of the College of Physicians and Surgeons respectively, thirty days before being submitted to the Lieutenant Governor in Council for approval. Any submissions on the part of these bodies must accompany the submission of the regulations to the Lieutenant Governor in Council. The object of these provisions is to give the Royal College of Dental Surgeons and the Council of the College of Physicians and Surgeons a sort of supervisory power over the two self-governing bodies.

While it may be very desirable that this be done in order to maintain the standards that the supervising body may require, it gives to the supervising body an opportunity to protect its competitive interest as opposed to the interests of the members of the public. We think that the public interest would be better protected by the adoption of the principles followed under the British Medical Act where the public is given representation on the governing body.²

¹R.S.O. 1960, c. 90; Ont. 1962-63, c. 122, respectively.

²See p. 1166 *supra*.

DENTAL HYGIENISTS AND REGISTERED NURSING ASSISTANTS

By section 12(a) of the Dentistry Act³ power is given to the Board of Directors of the Royal College of Dental Surgeons of Ontario to provide for "the establishment, development, regulation and control of an ancillary body known as dental hygienists".

By section 6(j) of the Nurses Act,⁴ the Council of the College of Nurses of Ontario is given power, subject to the approval of the Lieutenant Governor in Council, to make regulations "prescribing the fees for examinations, registration and renewal of registration of . . . nursing assistants". By section 6(k) the Council may make regulations "governing the disciplinary powers of the Council or a committee of the Council with respect to . . . registered nursing assistants, including the power to suspend or cancel their registration".

The powers provided by these Acts have been exercised⁵ and in neither case are the regulations satisfactory.

In any event, the situations created with respect to dental hygienists and nursing assistants are quite anomalous and entirely unjustifiable. These are not cases of delegation of power to self-governing bodies to control their own affairs but rather of delegation of legislative and judicial powers to regulate and control the affairs of others who have no part in making the rules by which they are governed.

We recommend that these powers be abrogated. One would have thought that the normal, commercial powers of hiring and dismissing which dentists and hospitals have would provide sufficient "quality control". If, however, some form of regulation is required, then we think that these are clearly cases for provincial licensing boards. We can see no justification for the present situations which are thoroughly undemocratic.

³R.S.O. 1960, c. 91.

⁴Ont. 1961-62, c. 90.

⁵See R.R.O. 1960, Reg. 74 (Dentistry); O. Reg. 342/62, ss. 8, 9, 12, 13, 19 and 20 (Nurses).

CHAPTER 85

Miscellaneous Provisions

DISPOSITION OF FINES IMPOSED FOR BREACHES OF SELF-GOVERNING STATUTES

ALL the statutes we have been considering provide for penalties that may be imposed by the court for offences under the respective Acts, e.g., practising medicine without being registered under the Act. Under eleven of the relevant statutes it is provided that the fines recovered as a result of prosecutions under the Act are to be paid to the governing body of the profession or occupation concerned.¹

The self-governing statutes, being public acts, are passed for the benefit of the public. It is difficult to see on what principle the fines imposed for breaches of these statutes should not be paid into the public treasury. The public provides the courts and all the facilities for the prosecution of the offences. It may be that these bodies engage their own counsel and for their own purposes conduct private prosecutions. This may be permissible, but it is a practice that ought not to be encouraged in any case, and it is particularly undesirable that it should be encouraged by statutory provisions that the fines imposed by the court should go to the private body. In no case should a private prosecutor have a monetary interest in the result of a prosecution. Such provision takes from the

¹Dental Technicians, Dentistry, Medical, Ophthalmic Dispensers, Optometry, Pharmacy, Professional Engineers, Psychologists Registration, Radiological Technicians, Surveyors, and Veterinarians Acts, contain this provision. No such provision appears in the Architects Act, the Barristers Act, the Chiropody Act, the Drugless Practitioners Act, the Embalmers and Funeral Directors Act, the Nurses Act, the Public Accountancy Act or the Solicitors Act.

administration of the criminal law that element of impartiality that is essential to respect for its administration. It is most difficult to see why fines, for example, imposed for breaches of the Barristers or the Solicitors or the Public Accountancy Acts should be payable to the public treasury, while fines, for example, imposed for breaches of the Medical Act or the Dentistry Act or the Surveyors Act should be payable to the respective bodies.

For reasons that we have already expressed with respect to the power to impose fines, we recommend that in all cases fines for breaches of the self-governing statutes should be paid into the public treasury.

LIMITATION PERIODS FOR BRINGING ACTIONS

Limitation periods for bringing actions are set out in six of the enumerated statutes.

The Dentistry Act—six months.²

The Embalmers and Funeral Directors Act—three months.³

The Medical Act—one year.⁴

The Pharmacy Act—six months.⁵

The Radiological Technicians Act—twelve months.⁶

The Veterinarians Act—six months.⁷

The language used in defining the period of limitation is not the same throughout the relevant statutes. In the Dentistry Act, the section reads:

“29. A duly registered member of the College is not liable to an action for negligence or malpractice by reason of professional services requested or rendered unless the action is commenced within six months from the date when the matter complained of terminated.”⁸

In the Embalmers and Funeral Directors Act, the period of limitation commences to run from “the date when in the

²R.S.O. 1960, c. 91, s. 29.

³R.S.O. 1960, c. 120, s. 21.

⁴R.S.O. 1960, c. 234, s. 43.

⁵R.S.O. 1960, c. 295, s. 57.

⁶Ont. 1962-63, c. 122, s. 13.

⁷R.S.O. 1960, c. 416, s. 18.

⁸R.S.O. 1960, c. 91, s. 29.

matter complained of, such professional services terminated".⁹ A similar provision is found in the Medical Act and the Radiological Technicians Act.¹⁰ In the Pharmacy Act, the limitation period commences to run "from the date the professional services were rendered".¹¹ Under the Veterinarians Act, the action must be commenced "within six months after the matter complained of terminated".¹² It is hard to find any principle on which these limitation periods are based.

Fixing the limitation period is not legislation for the protection of the public, but legislation for the protection of the members of the relevant profession or occupation. The only principle on which a limitation period can be supported is that the party in whose favour it operates requires protection against stale claims made after evidence may have disappeared. We can see no reason why a claim against an embalmer should be barred in three months, nor why a claim against a dentist or pharmacist or veterinarian should be barred in six months.

In defining when the limitation period should commence to run, clear language should be used. Great hardship may result where the party who has suffered from malpractice may be unable to bring an action within the defined period. The general subject of limitation of actions is one that should receive attention as it may affect all rights of action. However, for the purposes of considering the provisions of the Acts dealt with in this Section, we recommend:

- (1) No limitation period should be less than twelve months;
- (2) The court should have power to extend the time for bringing an action either before or after the period has expired, where it is satisfied that an extension of time will advance the cause of justice;
- (3) Uniform language should be used so that the commencement of the limitation period will be defined and remain the same in all cases.¹³

⁹R.S.O. 1960, c. 120, s. 21.

¹⁰Ont. 1962-63, c. 122, s. 13.

¹¹R.S.O. 1960, c. 295, s. 57.

¹²R.S.O. 1960, c. 416, s. 18.

¹³The broad subject of statutory limitation on causes of action is now being considered by the Ontario Law Reform Commission.

SUMMARY OF RECOMMENDATIONS

1. The provisions of a Statutory Powers Procedure Act, recommended in Chapter 14, should apply to the exercise of all judicial powers conferred under the respective Acts relating to self-governing professions and occupations.
2. The principles of the British Medical Act, 1956, should be followed by making provision for the appointment of lay members to each of the governing bodies of the self-governing professions and occupations.
3. The power of self-government should not be extended beyond the present limitations, unless it is clearly established that the public interest demands it and that the public interest could not be adequately safeguarded by other means.
4. Citizenship should not be a condition precedent to admission to any self-governing body.
5. Only British subjects should be qualified to hold office in any self-governing body.
6. Members of a disciplinary body should be prohibited from sitting on an appeal from decisions in which they have participated.
7. Each disciplinary body should have as a member a lawyer of ten years standing who should be appointed by the Lieutenant Governor in Council. (This recommendation is not applicable to the Law Society of Upper Canada.)
8. The term "professional misconduct" should be the term used in all statutes to describe conduct of a nature to warrant disciplinary action.
9. Each self-governing body should prepare a code of ethics, laying down standards of conduct designed primarily for the protection of the public. This code should be available to the public and circulated to members of the body to which it applies.
10. Where disciplinary proceedings have been instituted against a member, he should have at least ten days notice of a hearing. The notice of the hearing should be served personally. If personal service cannot be effected, service

- by registered mail, addressed to the member at the last address shown on the register should be permitted.
11. The disciplinary body should have power to proceed with the hearing where the member involved has been duly notified but has not attended.
 12. Disciplinary hearings should not be held in public unless the member involved so requests.
 13. The rules of evidence applicable to civil cases should apply to disciplinary hearings.
 14. On a hearing concerning admission, the tribunal should have discretion to ascertain relevant facts by such standards of proof as are commonly relied on by reasonable and prudent men in the conduct of their own affairs. No defined standards of proof applicable to all cases should be laid down.
 15. A member against whom disciplinary action has been taken should have a statutory right to be represented either by counsel or an agent.
 16. Disciplinary bodies should have a right to impose a full range of sanctions, from reprimand to revocation of licence to practice.
 17. No disciplinary body should have the right to impose fines.
 18. In no case should the fines imposed by a court for breaches of the relevant statutes be payable to the self-governing bodies. All fines should be payable to the Province.
 19. The disciplinary bodies should not have power to award costs against a member of the body. In no case should a mandatory award by a disciplinary body be enforceable by an execution issued out of a court of the Province.
 20. Self-governing bodies should have power to reimburse a member for costs incurred through unwarranted disciplinary action against him.
 21. A member who has been the subject of disciplinary action should not be suspended from continuing to practice pending an appeal, unless the charge is for incompetence.

22. The self-governing bodies should be required to hold a formal hearing before an application for registration is rejected.
23. There should be a right of appeal from all disciplinary decisions, and decisions refusing admission. The appeal should be to the Appellate Division of the High Court of Justice, in accordance with recommendations made in Chapter 44.
24. Uniform terminology should be adopted with respect to regulations, rules and by-laws.
25. All matters relating to admission and discipline should be dealt with by regulations made by the Lieutenant Governor in Council.
26. By-laws relating to administrative and domestic affairs of a self-governing body should be made by the body.
27. No self-governing body should have statutory control over others who are not members of the body. If employees of members of a self-governing body are required in the public interest to be controlled, this should be done by some form of licensing and not by the conferring of legislative and judicial powers exercisable over them.
28. A Model Act should be drawn which should form the basis of all self-governing Acts so that there might be some uniformity in the delegation of the relevant and judicial powers.
29. No limitation period should be for less than twelve months.
30. The court should have power to grant leave in proper cases to bring an action, notwithstanding that the limitation period has expired.
31. Uniform language should be used in defining a limitation period.

APPENDIX A

Composition of Governing Body

1. Wholly Elected

1. ARCHITECTS (s.9).
2. OPTOMETRY (s.4, By-laws s.11).
3. VETERINARIANS (s.4).

2. Wholly Appointed

1. CHIROPODY (s.2—by Lt. Gov. in Council—also designates chairman, v-chairman and sec-treas.).
2. DENTAL TECHNICIANS (s.2—Governing Bd. apptd. by Lt. Gov. in Council—Bd. elects chairman, v-chairman, sec-treas.—immediate past chairman is ex officio member of Bd. for one year).
3. DRUGLESS PRACTITIONERS (s.2—Bd. of Regents apptd. by Lt. Gov. in Council—also designates chairman, v-chairman, sec-treas.; s.3 Bd. of Directors for classification of D.P.s—apptd. by Lt. Gov. in Council—also designates chairman, v-chairman, sec-treas.).
4. EMBALMERS AND FUNERAL DIRECTORS (s.2—5 man Bd. of Admin. apptd. by Lt. Gov. in Council—at least 3 to be licensed fun. directors—Lt. Gov. in Council appts. chairman, v-chairman—Bd. members elect sec-treas.).
5. OPHTHALMIC DISPENSERS (s.2—5 man Bd. apptd. by Lt. Gov. in Council. *BUT* s.3: *Lt. Gov. in Council may provide for election of members of Bd. by profession—when Bd. elected, s.2 repealed—no mention in Act or Regs. of this having been done—has NOT yet been done*).
6. PSYCHOLOGIST REG. (s.2—5 registered psychologists, at least 2 of whom “shall not be principally engaged as members of the teaching staff of a university”).
7. RADIOLOGICAL TECHNICIANS (s.2—seven members apptd. by Lt. Gov. in Council—4 on recommendation of Bd. of Dirs. of Ont. Soc. of R.T.s, 2 by section of radiology, O.M.A., 1 non-radiologist by Bd. of Dirs., O.M.A. from secretariat of O.M.A.).

3. Other

1. DENTISTRY (s.4 as *am.*—elected members of college from electoral districts—*Min. of Ed.* and *Min. of Hlth.*, ex officio—*one by and from faculty of each body granting dentistry degrees in Ont.*).
2. LAW SOCIETIES (s. 5 as *am.*—elected benchers plus ex-treasurers, life-benchers and *Min. of Justice and Sol.-Gen.* (Dom.) and *Att-Gen. Ont.* ex officio.).
3. MEDICAL (s.3—12 elected members of profess.—*one from each medical faculty in Ont.*—*Min. of Health*, ex officio—all members of Council must be legally qualified medical practitioners in Ont.).
4. NURSES (s.3 as *am.*—*Min. of Health* or his rep. ex officio—members *elected by R.N.s.* of Ont.—members *apptd.* by R.N. Assoc. of Ont.).
5. PHARMACY (s.4 as *am.*—elected members, *Dean of Fac. of Pharm., U. of T.* ex officio).
6. PROFESSIONAL ENGINEERS (s.8—elected members plus *one member from each of the five branches of the profess. apptd.* by *Lt. Gov. in Council*).
7. PUBLIC ACCOUNTANCY (s.3—12 apptd. by Council of Int. of C.As. of Ont.—3 elected).
8. SURVEYORS (s.6—*Min. of Lands and Forests* or his appointee, Surveyor-General of Ont., President, V.-Pres. and 6 elected members).

APPENDIX B

Rule-Making Power

	<i>A.</i> <i>Power to make Regulations</i>	<i>B.</i> <i>Approval Required</i>	<i>C.</i> <i>Permissible Subject Matter</i>	<i>D.</i> <i>Regulations Made</i>	<i>E.</i> <i>Special Provisions</i>
1. ARCHITECTS	Yes—s.12—Regs. made by Bd.	No approval required for regs. made under s.12(1)—see next column— <i>BUIT</i> regs. made under s.12(3) require approval of Lt. Gov. in Council.	a) s.12(1): Administrative matters (e.g., fixing membership fees) <i>AND</i> prescribing qualifications for admission, prescribing for discipline, and control for discipline and control of members. b) s.12(3): Discipline—investigation of complaints, punishment for misconduct.	R.R.O. 1960, Reg. 29, as am. O.Reg. 312/63: Discipline, procedure set out—notice, hearing, right to counsel, etc.—publication in press of cancellation, suspension.	Regs. (both under s.12(1) and s.12(3)) to be circulated to every member of Ass'n. (ss. 12(2) (4))
2. CHIROPODY	Yes—s.3—Regs. made by Bd.	Approval of Lt. Gov. in Council required—s.3.	Administrative matters <i>AND</i> prescribing qualifications for admission, approval of colleges, etc., discipline and control, investigation of complaints, punishment for misconduct.	R.R.O. 1960, Reg. 53—covers all headings set out in s.3 of Act.	
3. DENTAL TECHNICIANS	Yes—s.3—Regs. made by Bd.	Approval of Lt. Gov. in Council required. (See col. E).	Administrative matters <i>AND</i> prescribing qualifications for admission, discipline and control of members, investigation of complaints, punishment for misconduct <i>AND</i> awarding of costs against member, defining misconduct.	O. Reg. 283/63—covers all matters set out in s.3 of Act.	s.3(2) Regs. to be submitted to Royal Coll. of Dental Surgeons of Ont. before being submitted to Lt. Gov. in Council for approval—submissions re. regs. from College to be presented to Lt. Gov. in Council when regs. presented for approval.

Appendix B—(Continued)

	A. Power to Make Regulations	B. Approval Required	C. Permissible Subject Matter	D. Regulations Made	E. Special Provisions
4. DENTISTRY	No—Only power to make "by-laws".				
5. DRUGLESS PRACTITIONERS: GENERAL	Yes—s.6—Bd. of Regents makes regs. for unclassified D.Ps. When separate classification made (see col. E) Bd. of Directors of that classification has same reg.-making powers.	Approval of Lt. Gov. in Council required—s.6.	Admin. matters AND prescribing qualifications for admission, prescribing discipline and control of D.Ps., prescribing systems of treatment, investigation of complaints, punishment for misconduct.	R.R.O. 1960, Reg. 121—covers all matters set out in s.6 of Act. Also R.R.O. 1960, Reg. 120 sets out classifications of D.Ps.—chiropractors, masseurs, physiotherapists.	s.4. Lt. Gov. in Council may make regs. creating classifications of D.Ps. BUT power given to Bd. of Regents by s.6(e).
5a. DRUGLESS PRACTITIONERS: CHIROPRACTORS	See above—Drugless Practitioners: General.	See above	See above	R.R.O. 1960, Reg. 119, as am. O. Reg. 336/61 and O. Reg. 143/65—covers all matters set out in s.6 of the Act.	See above
5b. DRUGLESS PRACTITIONERS: MASSEURS	See above—Drugless Practitioners: General	See above	See above	R.R.O. 1960, Reg. 122, as am. O. Reg. 49/63—covers all matters set out in s.6 of the Act.	See above
5c. DRUGLESS PRACTITIONERS: OSTEOPATHS	See above—Drugless Practitioners: General	See above	See above	R.R.O. 1960, Reg. 123—covers all matters set out in s.6 of the Act.	See above
5d. DRUGLESS PRACTITIONERS: PHYSIOTHERAPISTS	See above—Drugless Practitioners: General	See above	See above	O. Reg. 377/61—covers all matters set out in s.6 of the Act.	See above

6. EMBALMERS AND FUNERAL DIRECTORS	Yes—s.23—Bd. makes regulations.	Approval of Lt. Gov. in Council required—s.23.	Admin. matters AND prescribing requirements for admission to approved school, providing system of apprenticeship, authorizing change of requirements to admit those trained outside Ont., revocation, etc. of licences and procedure therefor and prescribing grounds therefor.	R.R.O. 1960, Reg. 129, as am O.Reg. 153/61, O.Reg. 247/62, O.Reg. 71/63. Covers all matters set out in s.23 of the Act.
7. LAW SOCIETY	Yes—ss.24, 43, 50, 54(3).	No approval required.	Elections, admission of students, barristers, solicitors, conduct and discipline, investigation of breach of rules, promotion of county law libraries, publishing of law reports.	No statutory regs. Rules of Soc. deal with all matters mentioned in col. C. and other matters with respect to which benchers authorized to make rules.
8. MEDICAL	Yes—ss.9, 14(1), 23(1), 24, 30, 62(1), 63.	No approval required for exercise of any rule-making power except that provided by s.63 (re prohibition, regulation and control of use of word "clinic") these require approval of Lt. Gov. in Council.	Admin. matter AND re educational qualifications of students, examinations, specialist classifications and qualifications, control of use of word "clinic".	No statutory regs.
9. NURSES	Yes—s.6—Council makes regs.	Approval of Lt. Gov. required—s.6.	Admin. matters AND prescribing requirements for approval of schools of nursing, requirements for admission to schools of nursing, disciplinary powers of Council or of committee.	O.Reg. 342/62, 132/63, 211/63, 208/64—cover all matters set out in s.6 of the Act.

Appendix B—(Continued)

	A. Power to Make Regulations	B. Approval Required	C. Permissible Subject Matter	D. Regulations Made	E. Special Provisions
10. OPHTHALMIC DISPENSERS	Yes—s.22—regs. made by Bd.	Approval of Lt. Gov. in Council required—s.22.	Requirements for admission to school of oph. dispensing, courses of instruction, examinations, registration, cancellation of registration, definition of unprofessional conduct plus certain admin. matters.	O.Reg. 376/61—covers registration and renewal fees, definition of unprofessional conduct, discipline procedure, remuneration of Bd., examination content.	
11. OPTOMETRY	Yes—s.16. Bd. makes regs.	Approval of Lt. Gov. in Council required—s.16.	Admission requirements for College, examinations, registration, suspension and cancellation of registration, government and discipline of members, defining unprofessional conduct, prescribing fees.	O.Reg. 166/63—covers all matters set out in s.16 of Act.	
12. PHARMACY	Yes—s.24. Regs made by Council. Also ss.28, 28a. (See col. E.)	Approval of Lt. Gov. in Council required for all regs. made under ss.24, 28, 28a.	Qualifications of apprentices, conditions of apprenticeship, qualifications for registration, designation of institutions at which studies may be undertaken, examinations, fees (s.24). s.28: Records to be kept by pharmacies. s.28a: standards for pharmacies.	R.R.O. 1960, Regs. 480, 481. O. Regs. 304/61, 234/63, 187/66. Cover all matters set out in ss.24, 28, 28a of Act.	s.52: Regs. made by Lt. Gov. re dispensing of drugs referred to in Schedules, re designations of poisons, etc.
13. PROFESSIONAL ENGINEERS	No reg. making power.				

14. PSYCHOLOGISTS REGISTRATION	Yes—s.5—Bd. makes regs.	Approval of Lt. Gov. in Council required.	Admin. matters <i>AND</i> holding of examinations, re suspension or cancellation of registration and causes and procedure therefor.	R.R.O. 1960, Reg. 501, O. Reg. 89/62. Covering matters set out in s.5 of Act.
15. PUBLIC ACCOUNTANCY	Yes—s.15(3), s.32(1). Council makes regs.	s.15(3) (see col. C), makes no mention of approval—merely that such reg. needs votes of two-thirds of council members present and voting. <i>BUT</i> by s.32(1), seems regs. made under s.15(3) included do <i>NOT</i> need approval <i>BUT</i> Lt. Gov. in Council may annul any reg.—s.32(3).	s.15(3): terms and conditions on which non-Ont. applicant may be exempted from one or more of usual admission requirements. s.32(1): anything required or authorized by Act and such further provisions as seem to Council necessary or desirable for purposes of Act.	s.32(2) Council on receipt of prescribed changes to supply copy of any regs. made or forms prescribed to any person applying therefor.
16. RADIOLOGICAL TECHNICIANS	Yes—s.14—Bd. makes regs.	Approval of Lt. Gov. in Council required. (<i>See col. E.</i>)	Requirements for admission to training courses, content of courses, examinations, registration, suspension and cancellation of registration defining unprofessional conduct, fees.	O. Reg. 185/64—covers all matters set out in s.14 of Act.
17. SURVEYORS	No power to make regs.—by-laws only (s.8) but cover such matters as admission and discipline.			s.14(2)—Regs. to be submitted to Council of College of Physicians and Surgeons 30 days before submission to Lt. Gov. in Council for approval—submissions of Council of College of Phys. & Surg. to be submitted to Lt. Gov. in Council with the application for approval of the regs.
18. VETERINARIANS	No power to make regs.—by-laws only (s.8) but re such matters as admission and discipline.			

	3. HEARING REQUIRED	4. APPEAL FROM REFUSAL TO ADMIT
1. ARCHITECT	No provision	No provision
2. CHIROPODIST	No provision	No provision
3. DENTAL TECHNICIAN	No provision	No provision
4. DENTIST	No provision	No provision
a. DENTIST (Dental Hygiene)	No provision	No provision
5. DRUGS PRACTITIONER (General)	No provision	No provision
a. DRUGS PRACTITIONER (Chiropractic)	No provision	No provision
b. DRUGS PRACTITIONER (Masseurs)	No provision	No provision

Admission Requirements: Ontario Applicants

	1. EDUCATIONAL			2. NON-EDUCATIONAL				3. HEARING REQUIRED	4. APPEAL FROM REFUSAL TO ADMIT
	a. Where set out	b. Requirements	c. Apprenticeship	a. Good Moral Character	b. Age	c. Citizenship	d. Other		
1. ARCHITECTS	Act contains statement "has passed prescribed exam of the registration Bd." No details of exam	Architecture course U. of Toronto or equivalent. Prescribed examination of Registration Bd. or exemption therefrom	NO	Required	Not less than 21	Must be Br. Subj. or have taken oath of allegiance and declared intention of becoming Br. Subj.	a) Domiciled in Ontario b) No corporate membership	No provision	No provision
2. CHIROPODY	Regulations	Grade 13 in 9 papers including physics, chem. bot., zoology; 4-yr. course in chiropody at "approved" school. Examination conducted by Bd. (details provided)	Must have completed at least 3 months clinical experience in chiropody under supervision of registered chiropodist	Required	At least 21	No provision BUT on application form as candidate for examination, required to state whether Br. Subj.	Examination fee of \$100; registration fee of \$5.00	No provision	No provision
3. DENTAL TECHNICIANS	Regs.—No details of content of exam set by Board	Grade 12 Ont. or equivalent; examination set by Board.	Must have served in Ontario as dental technician in employment of dentist or dental tech. for at least 4 years	No requirement	21	No requirement	Examination fee of \$75; registration fee of \$75	No provision	No provision
4. DENTISTRY	By-laws of College	Ontario Grade 12; 2 yrs. of Arts and Science in recognised University including English, chem. physics, botany; 4 yrs. in Fac. of Dent. U. of T. or its equivalent; examination set by Board	NO	Board must be satisfied applicant a "person of integrity and good moral character"	21	Must be Canadian citizen or satisfy Board of his intention to become Canadian citizen	Exam. fee of \$100. Regn. fee of \$100. Board may accept exams of Fac. of Dent. U. of T. i.e., U. of T. grads not required to sit exam set by Board	No provision	No provision
4a. DENTISTRY (Dental Hygienists)	Regs.	Grade 13 in 9 papers (required subjects set out) for admission to two-year course of study (curriculum set out)—exam by Board	NO	Must have "character" to become and act as dental hygienist	20	Must be Canadian citizen, or Br. Subj. or prove to satisfaction of Bd., intention to apply for Canadian citizenship within reasonable time of becoming eligible to do so	Must be female; must possess aptitude, capacity and character to become and act as dental hygienist	No provision	No provision
5. DRUGLESS PRACTITIONERS: (General)	Regs.	4 yr. course at approved school or college (curriculum set out); exam set by Board (subjects set out). Standards to be attained in exam set out	NO	Character references required	21	No requirement	Regn. fee of \$75. Exam fee of \$10 per paper written up to maximum of \$50	No provision	No provision
5a. DRUGLESS PRACTITIONERS: (Chiropractors)	Regs.	Ont. Secondary School graduation or equivalent; 4 yr. course in training school in Ontario or U.S.A. (curriculum set out); exam set by Board (subjects set out)	NO	Required	21	No requirement	Regn. fee: \$40. Exam fee: \$10 per paper up to max. of \$50	No provision	No provision
5b. DRUGLESS PRACTITIONERS: (Masseurs)	Regs.	Ont. Intermediate Cert. (grades 9 & 10); Graduation from school for masseurs (curriculum set out); exam set by Board (subject set out)	NO	Required	No requirement	No requirement	Exam fee: \$20. Regn. fee: \$15	No provision	No provision

	HEARING REQUIRED	4. APPEAL FROM REFUSAL TO ADMIT
DRUGL PRACTI (Osteopa	provision	No provision
DRUGL PRACTI Physiote	provision	No provision
EMBAL AND FE DIRECT	may, after a refuse to ert. of quali- n, licence or for any rea- or which if d, it could be d	No provision
LAW SC	provision	No provision
MEDIC	provision	No provision
NURSE	provision	S.11(Act) provides appeal to judge of Supreme Court, if council "refuses or neglects to register a person"—Judge may direct council to grant registration
DPHTH DISPEN	provision	If application for registration refused by registrar, Board may direct neces- sary entry be made in register
OPTOM	provision	No provision

	1. EDUCATIONAL			2. NON-EDUCATIONAL				3. HEARING REQUIRED	4. APPEAL FROM REFUSAL TO ADMIT
	a. Where set out	b. Requirements	c. Apprenticeship	a. Good Moral Character	b. Age	c. Citizenship	d. Other		
5c. DRUGLESS PRACTITIONERS: (Osteopaths)	Regs.	Ont. secondary school graduation or equivalent; 2 yrs. college or university inc. physics, chem. (organic & inorganic) Biology, English; 4 yr. course in osteopathy school or coll. (curriculum set out); exam set by Board (subs. given)	NO	Required	21	No requirement BUT application form for regn. —required to state whether Br. subj.	Exam fee: \$10 per paper up to max. of \$50. Regn. fee: \$40	No provision	No provision
5d. DRUGLESS PRACTITIONERS: (Physiotherapists)	Regs.	Grade 13 in 9 papers; graduation from physio. school or college (curriculum set out); 1000 hrs. clinical experience; exam set by Board (subjects set out)	Require 1000 hrs. clinical experience and training under supervision of physiotherapist in hospital approved under Pub. Hospitals Act	Required	21	No requirement	Exam fee: \$45. Regn. fee: \$25	No provision	No provision
6. EMBALMERS AND FUNERAL DIRECTORS	Act and Regs.	Ontario Secondary School graduation or equivalent; graduation from approved school (curriculum set out); apprenticeship; exam set by Board	2 yr. apprenticeship	Required	20	No requirement		Board may, after a hearing refuse to grant cert. of qualification, licence or permit for any reason for which if granted, it could be revoked	No provision
7. LAW SOCIETY	Rules	Grade 13; 2 yrs. college or university; graduation from approved law course at approved university in Canada; articulated clerkship; Bar Admission Course	1 yr. articulated clerkship	Required	No requirement	No requirement in Act or in Rules BUT see Barristers Act, R.S.O. 1960, c.30, s.2 (barrister must be Br. subj.), and Solicitors Act, R.S.O. 1960, c.378, s.13(1)—must take oath of allegiance		No provision	No provision
8. MEDICAL	Rules & Regs.	2 yrs. university pre-med; graduation from approved Faculty of Medicine in Canadian University; 1 year internship; exam set by M.C.C.	1 yr. internship at approved hospital in Canada or at U. S. hospital fully affiliated to university	Require letter of good character	No requirement	Require proof of landed immigrant status or of Canadian citizenship		No provision	No provision
9. NURSES	Regs.	Course at school of nursing (at least two year course, curriculum set out), High School graduation requirements for admission to School set out; exam set by Council	NO	No requirement	No requirement	No requirement	Exam fee: \$5 per paper. Must submit doctor's report certifying applicant in good health before admitted to School of Nursing	No provision	S.11(Act) provides appeal to judge of Supreme Court, if council "refuses or neglects to register a person"—Judge may direct council to grant registration
10. OPHTHALMIC DISPENSERS	Act and Regs.	Course of study at approved course of ophthalmic dispensing (home study courses available); exam set by Board	Practical training for 1 yr. in Canada with an ophthalmic dispenser or optometrist	Required	21	No requirement	Exam fee: \$50	No provision	If application for registration refused by registrar, Board may direct necessary entry be made in register
11. OPTOMETRY	Act and Regs.	Ontario Grade 13 or equivalent (subjects prescribed); course of instruction at College of optometry or equivalent (subjects set out); exam set by Board	NO	Required	21	No requirement	Registration fee: \$50	No provision	No provision

	3. HEARING REQUIRED	4. APPEAL FROM REFUSAL TO ADMIT
PHARMA	No provision	If application for registration refused by registrar, Council may direct necessary entry be made in register
PROFESSOR ENGINEER	No provision	If council refuses to register applicant, he may apply to judge of Supreme Court who, upon due cause shown, may direct council to grant registration
PSYCHO	Board may <i>after a hearing</i> refuse to register person on grounds which would justify suspension or revocation of registration if granted	If Board refuses or neglects to register applicant, he may apply to judge of Supreme Court, who upon due cause shown may direct Board to make registration
PUBLIC ACCOUNTANT	No provision	Refusal to grant licence must be communicated in writing. Right of appeal within 3 months to judge of Supreme Court, who, upon due cause shown, may direct council to grant licence
RADIOLOGICAL TECHNICIAN	No provision	No provision
SURVEYOR in	No provision	Appeal to Council from Secretary-Treasurer's refusal to register
VETERINARIAN	On question whether applicant is fit and proper person, must give applicant opportunity to appear before Council before deciding he is not	No provision

Admission Requirements: Ontario Applicants—(Continued)

	1. EDUCATIONAL			2. NON-EDUCATIONAL				3. HEARING REQUIRED	4. APPEAL FROM REFUSAL TO ADMIT
	a. Where set out	b. Requirements	c. Apprenticeship	a. Good Moral Character	b. Age	c. Citizenship	d. Other		
12. PHARMACY	Act and Regs.	B. Sc. in Pharmacy, U. of Toronto or other prescribed university; Apprenticeship	12 months apprenticeship (at least 6 months of which to be spent after obtaining B.Sc., Pharmacy); must have standing in subjects required for admission to B.Sc. Pharm. (U. of Toronto)	No requirement (see requirements for non Ontario Applicants)	Apprentice must be at least 15	No requirement		No provision	If application for registration refused by registrar, Council may direct necessary entry be made in register
13. PROFESSIONAL ENGINEERS	Act and Regs.	At least 5 yrs. experience in engineering work. If applicant is graduate in branch of prof. eng. from recognized University, years spent at university (up to 4) count towards the required 5; exam set by Council	Same as must have at least one year's experience	Required	21	No requirement BUT application form for membership in association requires statement of citizenship	Must be resident in Ontario	No provision	If council refuses to register applicant, he may apply to judge of Supreme Court who, upon due cause shown, may direct council to grant registration
14. PSYCHOLOGISTS	Act	Doctoral degree from educational institution approved by Board AND one year's acceptable experience, plus exam set by Board	One year of "experience" acceptable to the Board	No express requirement BUT see col. 3	No requirement	No requirement	Exam fee: \$100	Board may after a hearing refuse to register person on grounds which would justify suspension or revocation of registration if granted	If Board refuses or neglects to register applicant, he may apply to judge of Supreme Court, who upon due cause shown may direct Board to make registration
15. PUBLIC ACCOUNTANCY	Act	Must be member of qualifying body (Inst. C.A. Ont.) BUT no details of how membership obtained; OR member of Cert. Gen. A's of Ont. who has taken course of instruction and passed exam and had 3 years experience	NO	Required	No requirement	No requirement		No provision	Refusal to grant licence must be communicated in writing. Right of appeal within 3 months to judge of Supreme Court, who, upon due cause shown, may direct council to grant licence
16. RADIOLOGICAL TECHNICIANS	Act and Regs.	Ontario Secondary School graduation (inc. math & science or agricultural science); course of training for radiological technicians (syllabus set out); exam set by Board	NO	No requirement	No requirement	No requirement	Exam fee: \$20 Regn. fee: \$12	No provision	No provision
17. SURVEYORS	Act and By-laws	Intermediate exam (set by Board, subjects set out)—to take exam must have educational requirements for admission to civil engineering course at an Ontario University; final exam set by Board (subjects set out)	At least 2 years actual survey work as student to practising surveyor under a written instrument duly executed before 2 witnesses	Must produce satisfactory evidence of probity and sobriety	21	No requirement BUT must take oath of allegiance and oath of office	Must enter into bond to Crown in sum of \$1000	No provision	Appeal to Council from Secretary, Treasurer's refusal to register
18. VETERINARIANS	Act	Degree in Veterinary Science from Ontario Vet. College or U. of Toronto College or approved College or University; for persons other than grads of O.V.C., may be exam set by Council	NO	Registration may be refused if council decides after a hearing, that applicant not a fit and proper person to practise	No requirement	No requirement		On question whether applicant is fit and proper person, must give applicant opportunity to appear before Council before deciding he is not	No provision

APPENDIX D

Grounds for Disciplinary Action

Act	Grounds Set Out	Details	Details Circulated to Profession	Rulings Given on Professional Conduct	Rulings Circulated to Profession
1. ARCHITECTS	Regs. of Registration Bd.	<p>“<i>Professional Practice</i>” (Reg. 48): Prohibitions against (a) setting fees not in accordance with Schedule of Minimum Professional Charges, (b) improper designation of partnerships, (c) practising under name which might imply to public that non-member of Association is a member, (d) enabling unauthorized practice to occur, (e) engaging in anything in practice which would conflict with professional duties to client, (f) permitting contractors etc. to perform services without paying reasonable charge therefor.</p> <p>“<i>Professional Competence</i>” (Reg. 49): shall perform services with “reasonable skill and judgment”; member considered competent when drawings etc. prepared by him provide required information on which complete and accurate tender of cost of building may be made and from which the building may be erected and completed structurally sound and when he is capable of ensuring that building erected per drawings and specifications.</p> <p>“<i>Professional Conduct</i>” (Reg. 50): Prohibitions against (a) acceptance of remuneration from work other than professional fees; no discounts, commissions, (b) use in work of own materials, inventions etc. without written agreement from client, (c) “unethical” means of obtaining work, injuring other architects, (d) improper advertising (detailed), (e) reduction of fees to obtain or retain work, (f) raising other architects for clients, (g) attempts to evade or violate provisions of Act or Regs.</p> <p><i>M.B.</i> According to Act (s.15) disciplinary hearings held re charges of “misconduct or incompetence”.</p>	Regs. furnished to every member of profession—required by Act, s.12(4).	No provision	No provision

Appendix D—(Continued)

Act	Grounds Set Out	Details	Details Circulated to Profession	Rulings Given on Professional Conduct	Rulings Circulated to Profession
2. CHIROPODY	Regs: R.R.O. 1960, Reg. 53, ss.8, 9, 10	<p>s.8: Prohibitions against chiroprapist (a) holding himself out as chiroprapist in "misleading, unethical or unprofessional" manner, (b) improper advertising, (c) improper designation, (d) guaranteeing cures, (e) practice in employment of or in association with commercial business or in such manner as is likely to appear to public to be in employment of or association with commercial business.</p> <p>s.9(1): Sanctions may be imposed where member found guilty of "misconduct" or any violation of Act or Regs.; ignorance, incompetence.</p> <p>s.10(2): Investigation of complaint that member guilty of misconduct or of having displayed such ignorance or incompetence "as to render it desirable in the public interest that his registration be cancelled or suspended".</p>	No provision	No provision	No provision
3. DENTAL TECHNICIANS	Regs: 0. Reg. 283/63, ss.8, 9	<p>s.8: Prohibitions against (a) improper advertising, including advertising of prices, time or speed of service, (b) use, in work, of materials other than those specified by prescribing dentist or physician, (c) "directly or indirectly advertise expressly or by implication, that he (i) gives consultations (ii) gives free service (iii) grants premiums (iv) grants rebates, discounts or reductions, or (v) promises the return or refunding of money paid for services rendered by him as a dental technician", (d) carrying on business otherwise than in accordance with Act and Dentistry Act. Dental technician who violates any of above provisions is guilty of misconduct.</p> <p>s.9: Sanctions may be imposed where member found guilty of "misconduct" or incompetence.</p>	No provision	No provision	No provision
4. DENTISTRY	Act, ss.1, 24 By-laws: No. 12	<p>s.24, (as amended): Sanctions may be imposed where (a) member has been convicted of indictable offence in Canada or elsewhere, the conviction remaining unreversed. No disciplinary action where conviction for political offence committed outside commonwealth or for offence which, although indictable, ought not, from its nature or from circumstances in which committed, to justify disciplinary action, (b) member found guilty of any "infamous, disgraceful or improper conduct in a professional respect".</p> <p>s.1(ca) (as amended): defines "infamous, disgraceful or improper conduct in a professional respect".</p>	<p>No provision for circulation— By-laws to be published for 2 consecutive weeks in Ontario Gazette—do not take effect until published</p>	No provision	No provision

By-Law No. 12 ("For the regulation of the profession of dentistry"): Prohibitions against (a) Professional misconduct or conduct unbecoming a Licentiate of Dental Surgery, (b) improper advertising (inc. signs, press, telephone directory), (c) performance of dental work in public places or "movable contrivances", (d) practice in such a way as to be unable to give "full force and effect to his training, experience and judgment" (including (i) practice in employ of corporations or non-dentists, (ii) permitting of unauthorized practice, (iii) simultaneous practice of dentistry and dental technician's work, (iv) employment of unregistered dental hygienist or of more than one dental hygienist at any one time, (v) permitting dental hygienist to do unauthorized work or to do authorized work without control and supervision), fraud or malpractice or obtaining money by false pretences in connection with his practice, (f) improper holding out as specialist.
ALSO, College may exercise disciplinary power under s.51, *Pharmacy Act*, for sale or prescription of excessive unreasonable or improper amounts of drugs.

<p>4a. DENTISTRY (re Dental Hygienists)</p>	<p>Regs: R.R.O. 1960, Reg. 74, ss.25, 26</p>	<p>s.25: Prohibition against dental hygienist advertising that she is registered as dental hygienist or is engaged or about to become engaged in practice as dental hygienist. s.26: Sanctions may be imposed where dental hygienist guilty of (a) incompetence, (b) improper or dishonourable conduct re dental practice of her employer, (c) failure to comply with Act or By-law. <i>ALSO</i> where she has been convicted of crime that affects her fitness to practise.</p>	<p>No requirement re these by-laws that they be published in Ont. Gazette.</p> <p>No provision</p> <p>No provision</p>
<p>5. DRUGLESS PRACTITIONERS (General)</p>	<p>Regs: R.R.O. 1960, Reg. 121, ss. 29-33</p>	<p>s.29: Sanctions may be imposed for incompetence, misconduct, breach of Reg. s.30: Prohibition against advertising as drugless practitioner unless so registered. s.31: Prohibition against use of incorrect designations. s.32: Prohibition against improper advertising (permissible matter set out). s.33: Practitioner using advertisements containing misstatements, misrepresentations, distortions as to cures or as to his qualifications or attainments deemed guilty of misconduct.</p>	<p>No provision</p> <p>No provision</p> <p>No provision</p>

Appendix D—(Continued)

Act	Grounds Set Out	Details	Details Circulated to Profession	Rulings Given on Professional Conduct	Rulings Circulated to Profession
5a. DRUGLESS PRACTITIONERS (Chiropractors)	Regs: R.R.O. 1960, Reg. 119, s.8	Sanctions may be imposed if member found guilty of misconduct, or to have been ignorant or incompetent. No further details given.	No provision	No provision	No provision
5b. DRUGLESS PRACTITIONERS (Masseurs)	Regs: R.R.O. 1960, Reg. 122, s.8	Same as Chiropractors.	No provision	No provision	No provision
5c. DRUGLESS PRACTITIONERS (Osteopaths)	Regs: R.R.O. 1960, Reg. 123, s.8	Same as Chiropractors.	No provision	No provision	No provision
5d. DRUGLESS PRACTITIONERS (Physio- therapists)	Regs: 0. Reg. 377/61, ss.11, 14	Sanctions may be imposed if member found guilty of misconduct, ignorance, incompetence. Regulations governing designations to be used by physiotherapist, including prohibition against description of qualifications in such way as to suggest improperly the qualities or effectiveness of his services.	No provision	No provision	No provision
6. EMBALMERS AND FUNERAL DIRECTORS	Regs: R.R.O. 1960, Reg. 129 as am. 0. Reg. 153/61, 0. Reg. 247/62.	s.27: Sanctions may be imposed where it is shown, at a hearing, to the satisfaction of the Bd. that member (a) has procured registration by fraud or misrepresentation, (b) has been convicted of any offence for conduct which demonstrates that it is not in the public interest for him to act as embalmer or funeral director, (c) has demonstrated by one or more negligent acts or omissions that he is incompetent to act as embalmer or funeral director, (d) has made or promised payment or reward for purposes of extending his services or of procuring patronage, (e) has contravened Act, or Pre-arranged Funeral Services Act, 1961-62 or Regs. under either Act. ALSO registration may be suspended or revoked if member is physically or mentally incapable of acting as embalmer or funeral director or is so given over to use of alcohol or drugs as to be incapable of acting as embalmer or funeral director. s.28: Prohibitions against advertising (<i>inter alia</i> against inclusion of reference to prices or conditions of sale in advertising).	No provision	No provision	No provision

Yes, see previous column.

Rule 83—Professional Conduct Committee may, subject to the approval of Convocation, make rulings on matters of professional conduct. Three members of committee shall also be members of Discipline Committee.

No provision for circulation BUT rulings have been compiled and circulated and new rulings are published in Ont. Reports which are sent to all members.

Yes, see previous column.

s.44: Sanctions may be imposed where barrister, solicitor, or student-at-law found guilty of professional misconduct or of conduct unbecoming a barrister, solicitor or student-at-law. No further details in Act or Rules BUT compilation of rulings on professional conduct, ethics has been circulated to all members.

Act, s.33, as amended, Ont. 1962-63, c.80, s.1. ALSO "WARNING NOTICE" issued by Council of College.

s.33: Member is guilty of professional misconduct if (a) has been convicted in Can. of indictable offence or elsewhere of an offence which, if committed in Can. would be an indictable offence, (b) his rights and privileges under Narcotic Control Act (Dom.) or Food & Drug Act (Dom.) have been restricted or withdrawn, (c) has been guilty in opinion of discipline committee or Council of misconduct in professional respect or of conduct unbecoming a medical practitioner.

N.B. where member convicted of criminal offence committed in connection with practice of his profession, member deemed guilty of professional misconduct, name erased from register forthwith. Warning Notice comments upon, gives details, illustrations of professional misconduct. Deals with such matters as (a) improper use of prescription pads, (b) charging of excessive fees, (c) principles governing proper professional charges, (d) sales of doctors' accounts, (e) rebates from optical companies etc., (f) fee-splitting, (g) financial arrangements between part-time consultants and medical groups, clinics etc. (h) newspaper announcements, (i) specialty designations (j) professional cards, (k) telephone directory listings, (l) participation in T.V. radio and press programmes, (m) disciplinary action by hospitals, (n) keeping of records under Narcotic Control Act, Food and Drug Act.

Also reference in Warning Notice to Code of Ethics of Can. Med. Assn. (approved and adopted by College)—copies obtainable without charge from Registrar.

N.B. Under *Pharmacy Act*, s.51(4), sale or prescription of excessive, unreasonable or improper amounts of drugs may be grounds for taking disciplinary action by College.

No provision

No provision BUT Warning Notice provides that "Inquiries should be addressed to Registrar".

No provision BUT are circulated in annual "Warning Notice" issued by Council.

Appendix D—(Continued)

Act	Grounds Set Out	Details	Details Circulated to Profession	Rulings Given on Professional Conduct	Rulings Circulated to Profession
9. NURSES	Regs: O. Reg. 342/62, s.20	Sanctions may be imposed where member (a) procured registration by misrepresentation or fraud, (b) has been guilty of malpractice, (c) has been convicted of any offence which demonstrates that it is not in the public interest for her to continue to practise as a registered nurse or a registered nursing assistant, (d) is incapable of practising because of mental or physical illness or use of alcohol or drugs, (e) has demonstrated by one or more negligent acts or omissions that she is incompetent to practise.	No provision	No provision	No provision
10. OPHTHALMIC DISPENSERS	Act, s.15 Regs: O. Reg. 248/65, s.8	<i>Act, s.15</i> : Sanctions may be imposed where member found guilty of unprofessional conduct, incompetency, fraud or misrepresentation in connection with practice. <i>Regs. s.8</i> : Defines unprofessional conduct: "For the purposes of the Act, unprofessional conduct means": (a) negligence or improper conduct in a professional respect, (b) being mentally or physically incapable of practising, (c) being so given over to use of alcohol or drugs as to be incapable of practising, or (d) being convicted of a crime that affects member's fitness to practise.	No provision	No provision	No provision
11. OPTOMETRY	Regs: O. Reg. 166/63, s.9 Act s.11	<i>Act, s.11</i> : Sanctions may be imposed where member guilty of unprofessional conduct (as defined in regs.), incompetency or misrepresentation re practice of optometry. <i>Regs., s.9</i> : defines unprofessional conduct—member guilty of unprofessional conduct who, re practice of optometry (a) uses improper descriptions or designations, (b) assists unauthorized practice, (c) shares fees with anyone other than a patient or the member's employer, (d) advertises improperly. <i>ALSO</i> in By-laws (circulated to members) Code of Ethics set out (s.XI) and provided by By-laws, s.X, that complaint that member guilty of any violation of Act or Regs. or of the Code of Ethics shall be referred to Disc. Comm.	No provision. Code of Ethics contained in By-laws circulated under s.7(3), Act.	No provision <i>BU</i> by By-laws committee responsible for making recommendations to Bd. re standards of professional conduct.	No provision

12. PHARMACY	Act, s.29, as amended. Act, s.51	s.29: Sanctions may be imposed (a) if member convicted of an offence against any Act of Dom. Parliament or of the legislature of any province of Can. relating to the sale of drugs, poisons, medicines or alcoholic liquors, or (b) if member declared mentally incompetent under Mental Incompetency Act or has been certified or found to be mentally ill under Mental Hospitals Act; or (c) if member found guilty of negligence, incompetency or improper conduct in a professional respect. s.57: Where it appears to Minister that pharmaceutical chemist has sold or prescribed an excessive, unreasonable or improper amount of a scheduled drug, may report to disciplinary body of College who may take disciplinary action.	No provision	No provision	No provision
13. PROFESSIONAL ENGINEERS	Act, s.28 Regs, R.R.O. 1960, Reg. 496, s.46 & Sch.	Act s.28: Sanctions may be imposed where member found guilty of unprofessional conduct, gross negligence, incompetence, continued breach of bylaws of Ass'n. OR where member convicted of a "serious criminal offence" by a court of competent jurisdiction. Reg., s.46: Defines "gross negligence", "unprofessional conduct", "incompetence", "serious criminal offence": (a) Gross negligence means any act or omission in the carrying out of work of a prof. engineer that shows a reckless or deliberate disregard of or indifference to the rights or safety of others, (b) Unprofessional conduct means infamous, disgraceful or improper conduct in a professional respect and includes a violation of the Code of Ethics set out in Sch., (c) Incompetence means lack of adequate knowledge of, or continued neglect or failure to exercise, the ordinary skills of a prof. engineer, (d) Serious criminal offence means (i) any act committed in Can. that is punishable on indictment under the Crim. Code and (ii) any act that, if committed in Can. would be punishable on indictment under the Crim. Code BUT does NOT include any political offence committed outside Can. OR any offence that does not affect the fitness of a professional engineer to practise his profession. Schedule: Sets out Code of Professional Ethics dealing with such matters as duty to public, duty to employer, duty to other prof. engineers, duty to himself.	No provision	No provision	No provision
14. PSYCHOLOGISTS REGISTRATION	Regs, R.R.O. 1960, Reg. 501, s.10	Sanctions may be imposed where member (a) has procured registration by misrepresentation or fraud, (b) has been guilty of malpractice, (c) is mentally or physically incapable of practising psychology, (d) has been convicted of an offence under the Act or of any criminal offence that demonstrates that it is not in the public interest for him to continue to practise, (e) has been guilty of any professional misconduct or of conduct unbecoming a psychologist.	No provision	No provision	No provision

Appendix D—(Continued)

Act	Grounds Set Out	Details	Details Circulated to Profession	Rulings Given on Professional Conduct	Rulings Circulated to Profession
15. PUBLIC ACCOUNTANCY	Act, s.19(1)	s.19(1): Sanctions may be imposed if member (a) has been convicted of a criminal offence, (b) becomes of unsound mind, (c) has been adjudged bankrupt or has made arrangement with his creditors, (d) has been found on inquiry to be guilty of a conduct disgraceful to him in his capacity as a public accountant. <i>CODE OF ETHICS</i> adopted: prohibitions against <i>inter alia</i> (a) enabling unauthorized practice, (b) conflict of interest, (c) improper designation of practice or partnership, (d) improper advertising, (e) improper touting for business, (f) receiving fees without knowledge and consent of client, (g) attempting to obtain professional advancement by payment of bonuses, commissions or compensation to non-members.	No provision <i>BUIT</i> booklet containing Code of Ethics prepared and circulated.	No provision	No provision
16. RADIOLOGICAL TECHNICIANS	Act, s.10(1) Regs: O. Reg. 185/64, s.10	<i>Act, s.10(1)</i> : Sanctions may be imposed if member found guilty of (a) unprofessional conduct as defined by Regs., (b) incompetence, (c) fraud or misrepresentation re his practice. <i>Regs., s.10</i> : "Unprofessional conduct" means (a) use of radiation, negligent or hazardous manner as is likely to cause bodily harm to a patient or other person, or (b) such infamous, disgraceful or improper conduct as to render it desirable in the public interest that member's registration be revoked or suspended.	No provision	No provision	No provision
17. SURVEYORS	Act, s.36(1) <i>By-laws</i> 24, 25	<i>Act, s.36(1)</i> : Sanctions may be imposed where member found guilty of (a) gross negligence, (b) corruption in the execution of the duties of his office, (c) professional misconduct, (d) conduct apt to bring the profession into disrepute <i>OR</i> where member convicted in Can. or elsewhere of an indictable offence, other than a political offence committed out of Her Majesty's dominions.	No provision <i>BUIT</i> By-laws to be ratified by Ass'n at general meeting.	No provision	No provision

By-law 24 (Regs. respecting professional conduct): Deals with *inter alia* (a) receiving compensation from more than one source in same matter, (b) confidentiality of information re client's affairs, (c) conflicts of interest, (d) derogatory statements re other members, (e) raiding clients of other members, (f) improper advertising, (g) payment of commissions to secure business, (h) making unsolicited surveys with view to speculative sale of work, (i) knowingly making false plans or statements, (j) fraudulent or exorbitant charges for services, (k) enabling unauthorized practice, (l) competitive bidding for work, (m) organization of partnerships.

By-law 25: Prohibition against charging less than minimum fee set out in scale of professional charges.

ALSO Code of Ethics adopted dealing with most of points contained in *By-law 24*.

Act, s.14(1)
By-laws 62-64 &
 Appendix
 (Code of Ethics)

18.
 VETERINARIANS

No provision
 BU/T By-laws
 need approval
 of general
 meeting.

No provision

No provision

Act, s.14(1): Sanctions may be imposed where member found guilty of (a) unprofessional conduct, (b) gross neg., (c) incompetence or where member convicted by court of competent jurisdiction of criminal offence designated in by-laws.

By-law 62: Unprofessional conduct is any act or omission which, in the opinion of Council, amounts to an unjustifiable breach of duty to the public, a client, a patient or any other member of the profession.

By-law 63: Gross negligence or incompetence is any act or omission which, in the opinion of Council, is wholly inconsistent with the exercise of a reasonable degree of care and skill, having regard to all the circumstances.

By-law 64: Conviction of offence under Crim. Code deemed unprofessional conduct *UNLESS*, in the opinion of Council, offence had no relation to member's fitness to practise as veterinarian.

CODE OF ETHICS deals *inter alia* with: (a) General Department (Expect "conduct characterizing the personal behaviour of a gentleman"), (b) Professional Department, inc. provisions dealing with belittling fellow members, obedience, without *obvious* fault to regulations and laws governing members' acts, *visc*), consultations, (c) Advertising, (d) Emergency service, (e) Assisting unauthorized practice.

ALSO: disciplinary powers conferred by *Pharmacy Act*, s.51 for sale or prescription of excessive, unreasonable or improper amounts of scheduled drugs.

Self-Governing Bodies: Comparative Analysis of Procedure in Discipline

	1. Architects	2. Chiropody	3. Dental Technician	4. Dentistry	4A. Dentistry (Re Dental Hygienists)	5. Drugless Practitioners (General)	5A. Drugless Practitioners (Chiropractors)	5B. Drugless Practitioners (Masseurs)	5C. Drugless Practitioners (Osteopaths)	5D. Drugless Practitioners (Physiotherapists)	6. Embalmers and Funeral Directors	7. Law Society	8. Medical
Procedure Set Out	Regs.	Regs.	Regs.	Act	Regs.	Regs.	Regs.	Regs.	Regs.	Regs.	Act	Act & Rules	Act
A. Time of Notice	No time specified. Notice required. Hearing not less than 14, not more than 21 days from receipt of complaint.	At least 10 days between sending notice and hearing.	Personal service at least 10 days before date fixed for hearing.	At least 10 days of meeting of discipline committee to be given to accused.	No provision.	No time specified—registered mail to address under which accused registered, stating time and place of meeting of Board.	At least 10 clear days between date of sending notice (registered mail) and date of hearing.	At least 10 clear days between date of sending notice (registered mail) and date of hearing.	At least 10 clear days between date of sending notice (registered mail) and date of hearing.	At least 10 clear days between date of sending notice (registered mail) and date of hearing.	No time specified.	Not less than 7 days before hearing—personal service OR registered mail OR ad in newspaper where accused resides or practices.	At least 2 weeks before hearing—registered mail to address last known to registrar.
B. Contents of Notice	Notice of meeting, copy of complaint; accused may submit evidence, call witnesses, examine opposing witnesses—consequences of non-attendance.	Details of alleged misconduct, nature of evidence in support of complaint, date, time, place of hearing.	Time and place of hearing, written statement of misconduct alleged, copy of any complaint in writing.	Statement of matter under inquiry.	No provision.	No provision.	Details of alleged misconduct, nature of supporting evidence, date, time, place of hearing.	Details of alleged misconduct, nature of supporting evidence, date, time, place of hearing.	Details of alleged misconduct, nature of supporting evidence, date, time, place of hearing.	Details of alleged misconduct, nature of supporting evidence, date, time, place of hearing.	Statement of complaint or charge.	Notification of formal complaint, time and place of hearing.	Copy of charges made or statement of subject matter of inquiry, time, place of hearing.
C. Place of Hearing	No provision.	No provision.	No provision.	All hearings in Toronto.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
D. Public/Private Hearing	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
E. Accused's Failure to Attend	Bd. may, in his absence, suspend or cancel his membership.	Hearing may proceed but may be made in his absence.	Bd. may proceed in accused's absence.	Committee may proceed in his absence and accused not entitled to notice of future proceedings.	No provision.	No provision. (No express statement that accused entitled to attend.)	Hearing may proceed, decision may be made in his absence.	Hearing may proceed, decision may be made in his absence.	Hearing may proceed, decision may be made in his absence.	Hearing may proceed, decision may be made in his absence.	No provision.	Discipline Committee may proceed in accused's absence.	Discipline Committee may proceed in accused's absence without further notice to accused.
F. Accused's Right to Counsel	Has right to counsel.	May be represented by counsel or agent.	Has right to counsel.	Has right to counsel.	No provision.	No provision.	May be represented by counsel or agent.	May be represented by counsel or agent.	May be represented by counsel or agent.	May be represented by counsel or agent.	No provision.	Right provided.	Right provided.
G. Adjournments	Hearing may be adjourned from time to time.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	Committee may from time to time adjourn any investigation.	No provision.
H. Subpoena	Yes—Bd. has powers of commissioner under Public Inquiries Act.	No provision.	No provision.	Obtainable by Committee and any party on praecipe from Supreme Court.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	Yes—Board has powers of commissioner under Public Inquiries Act.	Committee or Treasurer may issue summons with force of subpoena.	College and accused, without leave or order, may obtain subpoena from Supreme Court.
I. Accused's Right to call witnesses.	Right provided.	Right provided.	No provision—merely "to attend and answer the complaint."	Has right to "adduce evidence".	No provision.	No provision.	Right provided.	Right provided.	Right provided.	Right provided.	Has right to present evidence.	Has right to "adduce evidence".	Right to call evidence.
J. Evidence on Oath	Yes—Bd. has powers of commissioner under Public Inquiries Act.	No provision.	No provision.	Yes—Chairman or any member of Committee may administer oath.	No provision.	No provision.	No provision.	No provision.	Yes.	No provision.	Yes—Board has powers of Commissioner under Public Inquiries Act.	Yes—Committee has power to examine witnesses under oath.	Yes—oath administered by chairman or other member of committee.
K. Right to cross-examine	Right provided.	Right provided.	No provision.	Right provided.	No provision.	No provision.	Right provided.	Right provided.	No provision.	Right provided.	No provision.	No provision.	Right provided.
L. Counsel for Witnesses	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
M. Privilege in Defamation	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
N. Official Notice	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
O. Stenographic or Electronic Recording	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	Evid. Act and Rules of ev. apply BUT may admit legally inadmissible ev.
P. Standard of Proof	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
Q. Stenographic or Electronic Recording	No provision.	No provision.	No provision.	No express provision BUT reference to transcript of ev. in s. 25 (21), 25a(22), 27(2).	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	Hearing shall be stenographically recorded.	No provision.	Evidence to be reduced to writing, taken down in shorthand or mechanically recorded.
R. Record Compiled	No provision.	No provision.	No provision.	No express provision—oblique reference in s. 27(2).	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No express provision BUT committee prepares report for Convocation.	Yes—copy of proceedings, ev., reports, orders, papers, on which committee acted.
S. Written decisions with reasons	No provision.	No provision.	No provision.	No express provision BUT committee required to make report to Board.	No provision.	No provision.	No provision.	No provision.	No provision.	Written decision—accused notified—no provision re reasons.	No express provision BUT time for appeal runs from receipt of written notice of decision.	No express provision BUT copy of committee's report sent to accused.	No express provision but clear this is done.

APPENDIX E

Studies: Comparative Analysis of Procedure in Disciplinary Matters

	6. Embalmers and Funeral Directors	7. Law Society	8. Medical	9. Nurses	10. Ophthalmic Dispensers	11. Optometry	12. Pharmacy	13. Professional Engineers	14. Psychologists Registration	15. Public Accountancy	16. Radiological Technicians	17. Surveyors	18. Veterinarians
	Act	Act & Rules	Act	Act, Regs.	Act, Regs.	Act, By-Laws	Act	Act	Act Regs.	Act	Act	Act, By-laws	Act.
10 clear (ten notice 1 mail) of hearing.	No time specified.	Not less than 7 days before hearing—personal service OR registered mail OR ad in newspaper where accused resides or practices.	At least 2 weeks before hearing—registered mail to address last known to registrar.	No provision.	Hearing not to take place before at least 10 clear days after notice of hearing given. Registered Mail.	No time specified.	No provision.	No provision.	No provision.	a) Where licence to be revoked for conviction, insanity, bankruptcy, one month notice. b) No time specified for notice of misconduct hearing.	No provision.	At least ten days notice of hearing.	No time specified.
alleged act, nature of charge, date, etc of	Statement of complaint or charge.	Notification of formal complaint, time and place of hearing.	Copy of charges made or statement of subject matter of inquiry, time, place of hearing.	No provision.	Details of charge, nature of supporting evidence, advice that accused entitled to appear at hearing, present evidence, date, time and place of hearing.	Statement of alleged violation.	No provision.	Accused to be furnished with copy of complaint, notice summoning him to appear before council.	No provision.	Written notice of proposed inquiry, time, and place of hearing, subject matter of hearing.	Written notice stating complaint or charge.	Statement of subject matter of hearing.	Copy of complaint sent to accused—summoned to appear before council.
ion.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	All hearings in Toronto unless otherwise directed.	No provision.
ion.	No provision.	No provision.	No provision.	No provision.	Public hearing.	Public Hearing.	No provision.	No provision.	No provision.	No provision.	Public Hearing.	No provision.	No provision.
may decision made in e.	No provision.	Discipline Committee may proceed in accused's absence.	Discipline Committee may proceed in accused's absence without further notice to accused.	No provision.	Hearing may proceed, finding may be made in his absence.	No provision.	No provision.	No provision but cannot impose disciplinary sanction until after hearing under oath on behalf of accused.	No provision.	No provision.	No provision.	Discipline Committee may proceed in his absence. Accused not entitled to notice of future proceedings.	No provision.
represented for agent.	No provision.	Right provided.	Right provided.	No provision; may have counsel on appeal.	May be represented by counsel or agent.	No provision.	No provision.	No provision.	No provision.	Right provided.	Right provided.	Right provided.	No provision.
ion.	No provision.	Committee may from time to time adjourn any investigation.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
ion.	Yes—Board has powers of commission under Public Inquiries Act.	Committee or Treasurer may issue summons with force of subpoena.	College and accused, without leave or order, may obtain subpoena from Supreme Court.	No provision.	No provision.	Yes—President of Board has powers of commissioner under Public Inquiries Act.	Council and accused may, without leave or order, obtain subpoena from Supreme Court.	Yes—Powers of commissioner under Public Inquiries Act.	No provision.	No provision.	Yes—powers of commissioner under Public Inquiries Act.	Yes—issued under hand of President, Vice-President or 2 members of council.	Yes—powers of commissioner under Public Inquiries Act.
vided.	Has right to present evidence.	Has right to "adduce evidence".	Right to call evidence.	No provision.	May present evidence.	May present evidence.	May "call evidence".	May "submit evidence".	No provision.	No provision.	May present "such evidence as he desires".	Has right to "adduce evidence".	May "submit evidence".
ion.	Yes—Board has powers of Commission under Public Inquiries Act.	Yes—Committee has power to examine witnesses under oath.	Yes—oath administered by chairman or other member of committee.	Express provision that unsworn or written statements may be used.	No provision.	Yes—powers of commissioner under Public Inquiries Act.	Yes—oath may be administered by presiding officer of council or discipline committee.	Yes—powers of commissioner under Public Inquiries Act.	No provision.	No provision.	Yes—power of commissioner under Public Inquiries Act.	Yes—chairman or any member of Committee may administer oath.	Yes—powers of commissioner under Public Inquiries Act.
vided.	No provision.	No provision.	Right provided.	No provision.	Right provided.	No provision.	"Full" right to cross-examine.	No provision.	No provision.	No provision.	No provision.	"Full" right to cross-examine.	No provision.
ion.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
ion.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
ion.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
ion.	No provision.	No provision.	Evid. Act and Rules of ev. apply BUT may admit legally inadmissible ev.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
ion.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
shall be officially	No provision.	Evidence to be reduced to writing, taken down in shorthand or mechanically recorded.	No express provision but accused may obtain transcript for appeal.	No provision.	Proceedings to be recorded in shorthand or otherwise.	No provision.	No express provision but clear from ss. 29(7), 29a(3) that proceedings recorded.	All evidence to be taken in writing by qualified stenographer.	No provision.	No provision.	No provision.	No provision.	Evidence to be taken by duly sworn shorthand reporter.
ion.	No provision.	No express provision BUT committee prepares report for Convocation.	Yes—copy of proceedings, ev., reports, orders, papers, on which committee acted.	No provision.	No provision.	No provision.	No express provision but clear from s.29(7) that record compiled.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
decision— notified— ion re	No express provision BUT time for appeal runs from receipt of written notice of decision.	No express provision BUT copy of committee's report sent to accused.	No express provision but clear this is done.	No provision.	Copy of order made to be served on accused—no mention of reasons.	No provision.	No express provision—decision written (s.29(7)) but nothing re reasons.	No provision.	No provision; s.9(1) suggests written decision; nothing re reasons.	Written notice of decision to be served—no mention of reasons.	No express provision BUT copy of order to be served on council. Nothing re reasons.	No provision—Discipline Committee reports to council which makes decision.	No provision.
on, on of	Suspension or cancellation of	Reprimand (by Committee)	Reprimand, suspension	Suspension.	Suspension up to	Suspension.	Suspension.	Suspension, cancellation of	Suspension, cancellation of	Revocation of licence.	Suspension, revocation of	Reprimand, suspension.	Suspension, cancellation of

	No provision.	No provision.	Evid. Act, s. 29(1) of ev. apply BUT may admit legally inadmissible ev.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
shall be mechanically	No provision.	No provision.	No provision.	No provision.	Proceedings to be recorded in shorthand or otherwise.	No provision.	No express provision but clear from ss. 29(7), 29(3) that proceedings recorded.	All evidence to be taken in writing by qualified stenographer.	No provision.	No provision.	No provision.	No provision.	Evidence to be taken by duly sworn shorthand reporter.
	No provision.	No express provision BUT committee prepares report for Convocation.	Yes—copy of proceedings, ev., reports, orders, papers, on which committee acted.	No provision.	No provision.	No provision.	No express provision but clear from s.29(7) that record compiled.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
decision—confirmed in re	No express provision BUT time for appeal runs from receipt of written notice of decision.	No express provision BUT copy of committee's report sent to accused.	No express provision but clear this is done.	No provision.	Copy of order made to be served on accused—no mention of reasons.	No provision.	No express provision—decision written (s.29(7)) but nothing re reasons.	No provision.	No express provision; s.9(1) suggests written decision; nothing re reasons.	Written notice of decision to be served—no mention of reasons.	No express provision BUT copy of order to be served on an accused. Nothing re reasons.	No provision—Discipline Committee reports to council which makes decision.	No provision.
of	Suspension or cancellation of licence or permit, revocation of certificate of qualification.	Reprimand (by Committee) suspension, disbarment, striking from rolls.	Reprimand, suspension, transfer of registration to special register, censure; Disc. Committee may impose limited fractions.	Suspension, cancellation of registration.	Suspension up to 6 months, revocation of certificate of registration.	Suspension, revocation of registration. Discipline Committee may reprimand.	Suspension, cancellation of registration. Under s.51 (see below) may also reprimand.	Suspension, cancellation of membership, reprimand.	Suspension, cancellation of certificate of registration.	Revocation of licence.	Suspension, revocation of registration.	Reprimand, suspension, expulsion.	Suspension, cancellation of registration.
n.	No provision.	May be awarded against accused found guilty.	Accused found guilty may be ordered to pay costs including cost of reporting and transcribing evidence.	No provision.	No provision.	No provision.	Accused, if found guilty, may be ordered to pay costs of hearing, including costs of reporting and transcribing evidence. Taxed on Supreme Ct. scale.	No provision.	No provision.	No provision.	No provision.	If complaint found frivolous or vexatious council may pay costs to accused.	No provision.
n.	Appeal, within 30 days after receipt of written notice of decision, to judge of Supreme Court.	No provision.	a) From final decision of Disc. Comm.: appeal to Council or to judge of Sup. Ct. Further appeal to C.A. b) From decision of Council: Appeal to judge of Supreme Court. Further appeal to C.A.	Appeal, within 3 months of date of notice of decision served, to judge of Supreme Court.	Appeal within 2 weeks after service of copy of order—to judge of county or district court where accused practices—trial de novo.	Appeal by way of originating notice to judge of Supreme Court. No time specified. Also Board may at any time review finding or order.	Appeal by motion within 1 month to C.A. Under s.51 Pharmacy Act (see below) appeal to C.A. must be within 15 days.	Appeal to C.A. within 15 days.	Appeal to judge of Supreme Court within 3 months of day on which notice of decision served.	Appeal to judge of Supreme Court within 3 months of service of notice of decision.	Right to appeal, within 2 weeks of service of notice of decision, to judge of county or district court where accused practices; trial de novo. Also Board may review order.	a) Appeal to judge of Supreme Court by notice after date of order of suspension or cancellation. b) Further appeal to C.A. within 15 days of judge's decision.	Appeal to C.A. within 15 days after date of order of suspension or cancellation.
a.	No provision.	No provision.	Obtainable—must pay cost—otherwise appeal abandoned.	No provision.	No provision.	No provision.	Available to accused upon application and payment of cost.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
a.	No provision.	No provision.	Not effective until time for appeal past or appeal disposed of, unless penalty imposed for incompetence.	No provision.	No provision.	No provision.	No express provision BUT s.29(1)(c)—certificate to be surrendered to registrar forthwith.	May practice pending disposition of appeal.	No provision.	No provision.	No provision.	Cannot practice pending appeal from suspension or expulsion unless judge of Supreme Court so order.	May continue to practice pending disposition of appeal.
	Certificate of qualification may be re-issued if Board satisfied applicant fit person.	No provision.	Application for reinstatement considered by discipline committee which reports to council; same procedure as in misconduct hearing. Right of appeal.	No provision.	No express provision BUT Board may review decision at any time, make further order.	No express provision BUT Board may review order and make further order.	Provision for application to council for reinstatement.	No provision.	No provision.	No provision.	No express provision BUT Board may review order at any time, make such further orders as it deems proper.	Provision for reinstatement of expelled member.	Council may restore registration upon such terms and conditions as it thinks proper.
	Qualified privilege Public Auth. Protection Act.	No provision.	No action against College officer or member of council re anything done in good faith under Act.	Complete immunity, not limited to acts done in good faith.	No provision.	No provision.	No action in respect of anything done in good faith under the Act.	No action for anything done under Act.	No provision.	No action based on council's revocation of licence—not limited to good faith.	No action against Board or any member for anything done under Act or Regs.	No provision.	No provision.
	No provision.	No provision.	No provision.	1) College may publish decision of disciplinary inquiry and any information used in the inquiry.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
may factor		1) If Treas., Sec., Deputy Sec., chairman or vice-chairman of discipline committee have reasonable cause to believe that member has been or may be guilty of misconduct re property in his possession, Judge of Supreme Court may order property not to be dealt without leave. 2) Convocation or Committee may appoint solicitor to investigate and conduct cases.	1) Discipline Committee has services of counsel and reporter— 2) Other disciplinary powers are conferred by provisions of s.51, Pharmacy Act. Powers thus conferred not mentioned in Medical Act.				1) Provision for witnesses fees 2) Additional, and in some respect different disciplinary powers conferred by s.51 on report from Minister re sale or prescription of excessive or improper amounts of certain drugs.					1) Discipline Committee may employ such legal or other assistance as it may deem necessary. 2) Council may act on report of Discipline Committee and make such order as it may deem just.	

P. Standard of Proof	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
Q. Stenographic or Electronic Recording	No provision.	No provision.	No provision.	No express provision <i>BUT</i> reference to transcript of ex. in ss. 25 (21), 25a(22), 27(2).	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	Hearing shall be stenographically recorded.	No provision.	Evidence to be reduced to writing, taken down in shorthand or mechanically recorded.
R. Record Compiled	No provision.	No provision.	No provision.	No express provision—oblique reference in s. 27(2).	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No express provision <i>BUT</i> committee prepares report for Convocation.
S. Written decisions with reasons	No provision.	No provision.	No provision.	No express provision <i>BUT</i> committee required to make report to Board.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	Written decision—accused notified—no provision re reasons.	No express provision <i>BUT</i> time for appeal runs from receipt of written notice of decision.	No express provision <i>BUT</i> copy of committee report sent to accused.
T. Sanctions Available	Suspension or cancellation of membership.	Suspension or cancellation of registration.	Suspension or cancellation of registration.	Suspension of licence, reprimand, fine, cancellation of licence. (Committee may impose limited sanctions.)	Suspension, revocation of registration.	Suspension, cancellation of certificate of registration.	Suspension, cancellation of registration.	Suspension, cancellation of registration.	Suspension, cancellation of registration.	Suspension, cancellation of registration.	Suspension, cancellation of registration.	Suspension or cancellation of licence or permit, revocation of certificate of qualification.	Reprimand (by Committee) suspension, disbarment, striking from rolls.
U. Costs	No provision. (On appeal C.A. may make order re costs of appeal.)	No provision.	Where accused found guilty Board may recover from him costs up to \$100.00.	Accused found guilty may be ordered to pay costs of the inquiry—taxed on Supreme Court scale.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	May be awarded against accused found guilty.
V. Right of Appeal	To C.A. within 15 days of order of suspension or cancellation.	No provision.	No provision.	Any member aggrieved by Committee decision may appeal to Board within 30 days. Further appeal to C.A. within 30 days of Board's decision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	Appeal, within 30 days after receipt of written notice of decision, to judge of Supreme Court.	No provision.
W. Availability of Transcript	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
X. Suspension, Cancellation effective pending appeal	May continue to practice pending appeal.	No provision.	No provision.	Where committee favours suspension longer than 12 months and so reports to Board, may suspend licence pending decision of Board.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
Y. Reinstatement	In "proper case" may be restored to membership, subject to terms and conditions set out by Board.	No provision.	No provision.	Discipline Committee hears applications for reinstatement, reports to Board.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	Certificate of qualification may be re-issued if Board satisfied applicant fit person.	No provision.
Z. Immunity of Tribunal	No action against Board for anything done under Act, regs., or by-laws; not limited to discipline or to acts done in good faith.	No provision.	No provision.	No action against Board or committee for anything done in good faith under Act re want of form or irregularity in proceedings.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	Qualified privilege Public Auth. Protection Act.	No provision.
AA. Publication of Findings.	Board may cause notice of suspension or cancellation of membership to be published in press with reason therefor.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.	No provision.
BB. Other	Board may call in a solicitor or a counsel for assistance and advice.	Board may appoint inspector to investigate complaint made against chiropract.	Board may employ "such legal and other assistance" as it deems necessary for the purpose of the investigation or hearing.	1) Committee may employ legal or other assistance. 2) Witness fees allowed on Supreme Court scale. 3) Costs may be awarded to accused if complaint frivolous or vexatious. 4) Other disciplinary powers are conferred by provisions of s. 51, Pharmacy Act, of which no mention here.			1) <i>Board not even required to hold hearing—merely "due inquiry"</i> . 2) Board may appoint inspector to investigate complaints.	Board may appoint inspector for investigation of complaints.	Board may appoint inspector for investigation of complaints.	Board may appoint inspector (not member of Board) to investigate complaints.	1) Board may appoint inspector to investigate complaints. 2) Majority of Board must be present. 3) If votes equal, complaint dismissed.		1) If Treas., Sec., Deputy Sec., chairman or vice-chairman of discipline committee have reasonable cause to believe that member has been or may be guilty of misconduct re property in his possession, Judge of Supreme Court may order property not to be dealt without leave. 2) Convocation or Committee may appoint solicitor to investigate and conduct cases.

Section 5

**ADMISSION TO AND DETENTION IN
MENTAL HOSPITALS AND ADMINISTRATION
OF ESTATES OF PATIENTS**

INTRODUCTION

The detention of persons on the ground that they are mentally ill must be considered under three distinct headings:

1. Admission and Detention Pursuant to Provincial Law;
2. Admission and Detention Pursuant to Federal Law;
3. Administration of the Estates of Patients while they are detained.

Although detention pursuant to Federal Law may appear to be somewhat beyond the Terms of Reference of this Commission, it will be apparent as we deal with the subject that there are related areas which are within the jurisdiction of the Province.

The administration of the estates of patients in mental hospitals involves to some extent consideration of the administration of the estates of the mentally incapable who are not patients in any hospital, and the functions of the office of the Public Trustee in its broader aspects.

CHAPTER 86

Detention of the Mentally Ill

ADMISSION AND DETENTION PURSUANT TO PROVINCIAL LAW

AT the time of writing, the law in Ontario governing psychiatric facilities and hospitalization of the mentally ill is contained in several statutes and the applicable common law. More than twenty institutions commonly designated as "Ontario Hospital . . ." or "Ontario Hospital School . . ." are regulated by the Mental Hospitals Act.¹

Four psychiatric facilities derive their power from the Community Psychiatric Hospitals Act.² The only institution being governed by the Psychiatric Hospitals Act³ is the Toronto Psychiatric Hospital, soon to be closed. The new Clarke Institute of Psychiatry was authorized by the Ontario Mental Health Foundation Act.⁴ Two institutions are licensed under the Private Sanitaria Act.⁵ Other private psychiatric facilities are governed by regulations under the Private Hospitals Act.⁶

¹R.S.O. 1960, c. 236. See also Public Hospitals Act, R.S.O. 1960, c. 322, ss. 65-70.

²Ont. 1960-61, c. 91.

³R.S.O. 1960, c. 315.

⁴Ont. 1960-61, c. 67.

⁵R.S.O. 1960, c. 307.

⁶R.S.O. 1960, c. 305. See R.R.O. 1960, Reg. 494, s. 23.

Under the Mental Health Act, 1967,⁷ not yet proclaimed, all those institutions coming within the designation "psychiatric facility" are to be designated by regulation.

We shall only deal with the Mental Health Act, 1967, which revised and re-enacted much of the previous legislation. This revision eliminated many of the objectionable features of previous legislation and provided for improved methods of review to safeguard the interests of patients.

HOSPITALIZATION

The Act provides for a scheme of admission on an informal basis and on an involuntary basis, designed to meet the interests of the individual cases.

"7. Any person who is believed to be in need of the observation, care and treatment provided in a psychiatric facility may be admitted thereto as an informal patient upon the recommendation of a physician."⁸

"8. (1) Any person who,

(a) suffers from mental disorder of a nature or degree so as to require hospitalization in the interests of his own safety or the safety of others; and

(b) is not suitable for admission as an informal patient,

may be admitted as an involuntary patient to a psychiatric facility upon application therefor in the prescribed form signed by a physician."⁹

Notwithstanding these provisions:

"6. Admission to a psychiatric facility may be refused where the immediate needs of the case of the proposed patient are such that hospitalization is not urgent or necessary."¹⁰

This section does not place on any one individual or official the responsibility of making a decision with regard to the immediate needs, the urgency or necessity with respect to the case. In its present form the decision may be made by a lay clerk in the office of the psychiatric facility.

⁷Ont. 1967, c. 51, s. 1(k).

⁸*Ibid.*, s. 7.

⁹*Ibid.*, s. 8(1).

¹⁰*Ibid.*, s. 6.

Other than this we have no criticism to make of the admission procedure. However, the powers conferred on police officers, to detain and confine for the purpose of medical examination, do not sufficiently safeguard the rights of the individual.

“10. Where a constable or other peace officer observes a person,

- (a) apparently suffering from mental disorder; and
- (b) acting in a manner that in a normal person would be disorderly,

the officer may, if he *is satisfied* that,

- (c) the person should be examined in the interests of his own safety or the safety of others; and
- (d) the circumstances are such that to proceed under section 9 would be dangerous,

take the person to an appropriate place where he may be detained for medical examination.”¹¹

These powers are much wider than the power of arrest given to police officers in other cases. The condition precedent to the exercise of the power should not be a subjective one, “if he is satisfied”, but it should be an objective condition, “if he has reasonable grounds to believe”, or “if he believes on reasonable grounds”. We can see no reason why such broad power to interfere with the liberty of the subject should be conferred in the terms expressed in this section.

The period of detention of an involuntary patient may be extended upon completion of a certificate of renewal in the prescribed form by the attending physician after personal examination.¹² Periods of extension are set out in the Act:

“13. (2) The attending physician shall not complete a certificate of renewal unless the patient,

- (a) suffers from mental disorder of a nature or degree so as to require further hospitalization in the interests of his own safety or the safety of others; and

- (b) is not suitable to be continued as an informal patient.

. . . ”¹³

¹¹*Ibid.*, s. 10. Italics added.

¹²*Ibid.*, s. 13(1).

¹³*Ibid.*, s. 13(2).

We point out that this places a very heavy onus on the physician who signs the certificate. Unlike the certificate of admission, which is based on a subjective condition precedent, an opinion,¹⁴ the condition precedent to the giving of a certificate of renewal authorizing detention of the patient is based on objective conditions precedent. In its present form the physician could be called upon in court to satisfy the court in all cases that the conditions precedent to the issue of the certificate of renewal in fact existed. We think the attending physician, in issuing a certificate, is entitled to further protection. We would suggest that he be entitled to issue a certificate "where he has reasonable grounds to believe", or "where he is of the opinion based on reasonable grounds".

The provisions of section 17 with respect to the communication of information regarding patients are too wide:

"17. Notwithstanding this or any other Act or any regulation made under any other Act, the senior physician may report all or any part of the information compiled by the psychiatric facility to *any person* where, in the opinion of the senior physician, it is in the best interests of the person who is the subject of an order made under section 14 or 15."¹⁵

We recognize that there are cases where it is in the interests of the patient that facts obtained by the attending physician should be communicated to other people, but we think this is much too broad an authorization. "To any person", and the words "in the opinion of the senior physician", leave the individual's rights without any safeguards except the wisdom of the senior physician. We think the right given under this section should be limited to "persons lawfully entitled thereto".

The Act provides for the appointment of boards of review. While we have no doubt that it is the intention to appoint boards of review, the Act does not make this a statutory obligation.

"27. (1) The Lieutenant Governor in Council may appoint a review board for any one or more psychiatric facilities."¹⁶

¹⁴*Ibid.*, s. 8(2)(3).

¹⁵*Ibid.*, s. 17. Italics added.

¹⁶*Ibid.*, s. 27(1).

It is not clear why the usual phraseology used in such cases was departed from in this statute. The usual formula is:

“There shall be a board . . . which shall consist of . . . members. The members of the board shall be appointed by the Lieutenant Governor in Council,”

We think the rights to cross-examine witnesses before the Board of Review are too limited.

“29. (3) The patient or his representative may call witnesses and make submissions and, with the permission of the chairman, may cross-examine witnesses.”¹⁷

We realize that in cases that may come before the board of review, an unlimited right to cross-examine witnesses would frustrate the purposes of the Act, but there would appear to be no reason why counsel appearing for a patient should not have the same right to cross-examine witnesses as at any other hearing. Other than this, the discretion should rest with the chairman of the board.

THE RIGHT TO VOTE

By virtue of the Elections Act,¹⁸ “a patient in a mental hospital” is not entitled to be entered on the voters’ list, nor may he vote. Under the Canada Elections Act,¹⁹ every person who is restrained of his liberty of movement, or deprived of the management of his property, by reason of mental disease, is deprived of the right to vote. The term “mental hospital” in the provincial Act is not defined and is not the term used to define an “institution” under the Mental Health Act. The term used in the Mental Health Act²⁰ is “psychiatric facility”. A comparison of the provisions of the provincial and federal Acts shows that some persons prohibited from voting in a national election may vote in a provincial election. Can it be said that those who are voluntary patients, or who, under the Mental Health Act will be informal patients, are “restrained of their liberty of movement”? The confinement to a hospital or the restraint on liberty because of illness are

¹⁷*Ibid.*, s. 29(3).

¹⁸R.S.O. 1960, c. 118, s. 16.

¹⁹Can. 1960, c. 39, s. 14.

²⁰Ont. 1967, c. 51.

not the proper tests to apply to the right to vote. The test should be the extent of the mental illness, which would be subject to certification or the order of the court in proper cases.

CRIMINAL LAW AND MENTAL DISORDER

It is not within the Terms of Reference of this Commission to consider the criminal law, except as to the bearing it has on the provincial law. There are three sections of the Criminal Code that deal with remand for mental examination.²¹

Section 710(5) refers to summary offences and is, by virtue of the Summary Convictions Act,²² applicable to provincial offences. Under section 710(5) of the Criminal Code the court may at any time during a trial remand the accused for observation for not more than thirty days, upon the evidence of one duly qualified medical practitioner. This power is substantially the same as that provided under sections 451(c)(1) and 524(1)(a).

The relevant provisions of the Mental Health Act, 1967, are:

"14. (1) Where a judge or magistrate has reason to believe that a person who appears before him charged with or convicted of an offence suffers from mental disorder, the judge or magistrate may order the person to attend a psychiatric facility for examination.

(2) Where an examination is made under this section, the senior physician shall report in writing to the judge or magistrate as to the mental condition of the person.

(3) If the senior physician reports that the person examined needs treatment, the judge or magistrate may order the person to attend a psychiatric facility for treatment.²³

15. (1) Where a judge or magistrate has reason to believe that a person in custody who appears before him charged with an offence suffers from mental disorder, the judge or magistrate may, by order, remand that person for admission as a patient to a psychiatric facility for a period of not more than two months.

²¹Crim. Code, ss. 451(c)(1), 524(1)(a), 710(5).

²²R.S.O. 1960, c. 387, s. 3, as amended by Ont. 1964, c. 113, s. 1.

²³Ont. 1967, c. 51, s. 14.

(2) Before the expiration of the time mentioned in such order, the senior physician shall report in writing to the judge or magistrate as to the mental condition of the person.²⁴

16. A judge or magistrate shall not make an order under section 14 or 15 until he ascertains from the senior physician of a psychiatric facility that the services of the psychiatric facility are available to the person to be named in the order."²⁵

These sections were designed to facilitate the early examination of persons charged with or convicted of crime. The intention is commendable. However, the procedure provided by the section is quite foreign to the administration of the criminal law. Provision is made for the senior physician to report in writing to the judge or magistrate. This language is taken from the Mental Hospitals Act²⁶ and the Psychiatric Hospitals Act.²⁷ Criminal trials cannot be properly conducted through correspondence with the judge or magistrate. It is essential to the good administration of justice that trials be conducted in public, and orders of the court be based on evidence submitted in public. The right to cross-examine should not be denied the accused persons through the process of written reports to the judge or magistrate. The legislation should provide that the report of the senior physician should be received in evidence, unless the accused objects. If he objects, the physician should be required to appear and give evidence. Courts are not set up to make orders in criminal cases based on "written reports to the judge". It is a constitutional question as to whether the Province can enact laws relative to the form in which evidence is to be received in a criminal case. In any case, the legislation could apply to all proper cases involving provincial offences.

DELEGATION OF LEGISLATIVE POWER

The Mental Health Act,²⁸ 1967, is an outstanding example of undermining all the safeguards which have been set up to protect the rights of the individual against the delegation by

²⁴*Ibid.*, s. 15.

²⁵*Ibid.*, s. 16.

²⁶R.S.O. 1960, c. 236, s. 38.

²⁷R.S.O. 1960, c. 315, s. 3, as enacted by Ont. 1966, c. 123, s. 2.

²⁸Ont. 1967, c. 51.

the Legislature of legislative power. "Psychiatric facility" is the key word of the statute. It means a facility for the observation, care and treatment of persons suffering from mental disorder, and designated as such by the regulations. It is the designation of an institution as a psychiatric facility by regulation that confers the powers provided under the Act, and likewise confers on the patients the safeguards provided by the Act. The safeguards of review, etc., are contained in Part II of the Act, but the Lieutenant Governor in Council may by regulation exempt any psychiatric facility or class thereof from the application of Parts II and III of the Act.²⁹

In the result, the Lieutenant Governor in Council is given the power by passing regulations to render the whole Act, or at least a substantial part of it, meaningless; and even the Minister may exempt a psychiatric facility from the application of certain provisions of the regulations.³⁰ The latter power extends to the exemption of institutions from the prescribed qualifications for the staff.

Where the liberty of the subject and his property rights are the subject of legislation, it should not be within the power of the Lieutenant Governor in Council to make exemptions from the legislative scheme applicable to institutions that come within the statute. In fact, it is difficult to know what useful purpose the Act would serve if a psychiatric facility were exempt from the application of Parts II and III.

²⁹*Ibid.*, s. 61(1)(c)(m). Part III deals with the administration of estates. Just how the assets of patients in psychiatric facilities—which are not exempt from Part II and are exempt from Part III—are to be administered is far from clear.

³⁰*Ibid.*, s. 61(2).

CHAPTER 87

Administration of Estates of the Mentally Ill

FOR centuries the property of mentally incompetent persons has been subject to the supervision of the courts in proper cases. In Ontario, there are two major legislative schemes. The one, of general application, may be invoked by an application to the courts for the appointment of a committee of the estate of the mentally incompetent person; the other arises by statute, because a person is a patient in a mental hospital. The latter requires a consideration of the provisions of the Mental Health Act, 1967,¹ and the Public Trustee Act.² Notwithstanding that under the Public Trustee Act, the Public Trustee administers estates of others than patients undergoing psychiatric treatment, it is convenient to deal with these statutes together.

PATIENTS IN PSYCHIATRIC FACILITIES

Under the Mental Health Act, 1967, the Public Trustee becomes the statutory committee of a patient who is certified by a physician to be incompetent to manage his estate.³ This provision acknowledges that there are cases where the patient may require treatment but may still be capable of managing his estate. Under the provisions of the Mental Hospitals Act,⁴

¹Ont. 1967, c. 51.

²R.S.O. 1960, c. 334.

³Ont. 1967, c. 51, s. 32.

⁴R.S.O. 1960, c. 236, s. 80, to be repealed by the Mental Health Act, 1967, when declared.

the transfer of the estate of an involuntary patient to the Public Trustee was automatic and immediate on the patient's admission to a mental hospital.

Experience has shown that of those confined to mental hospitals, nineteen per cent enter as voluntary patients. This figure has been increasing since the provisions for informal admission were introduced. Of all patients admitted, seventy-five per cent are released within six months, and eighty-five per cent within a year. Hasty disposal of assets of a patient may cause him irreparable loss, while on the other hand prompt action may be necessary to preserve or liquidate wasting assets. In our view there should be provision for such interim management of the estate as may be necessary, and the decisions with respect to interim management ought not to be solely in the hands of the Public Trustee. Consideration should be given to the prospects of recovery, the nature of the estate, and all the surrounding circumstances. An estate consisting only of the home of the patient is very different from one consisting of speculative securities. Some provision should be made for a guardian of the interests of the patient, such as there now is for the interests of infants. The procedure and rules to be followed could well be worked out by the Statutory Powers Rules Committee recommended in this Report.

EFFECT OF TRUSTEESHIP

Under the Mental Health Act, 1967:

"48. Every gift, grant, alienation, conveyance or transfer of property made by a person who is or becomes a patient shall be deemed to be fraudulent and void as against the Public Trustee if the same was not made for full and valuable consideration actually paid or sufficiently secured to such person or if the purchaser or transferee had notice of his mental condition."⁵

This section is most difficult to construe, but on any construction it appears to be harsh and an unjustified encroachment on civil rights. It would appear that every transfer of property by a person who later becomes a patient in a mental

⁵Ont. 1967, c. 51, s. 48, formerly s. 95 of the Mental Hospitals Act, R.S.O. 1960, c. 236.

hospital is, as against the Public Trustee, fraudulent and void if one or the other of two conditions exists:

1. If there has not been full and valuable consideration given or secured; or
2. The purchaser or transferee had notice of the patient's mental condition.

Notwithstanding that full consideration was given, if the purchaser had notice of the mental condition of the transferor, whatever that means, the whole transaction is void as against the Public Trustee.

The section is drastic and in its terms unwarranted for the following reasons:

- (1) There is no time limit. Any transaction during the lifetime of the patient may be called in question after he becomes a patient in a mental hospital.
- (2) The words "notice as to mental condition" are vague and meaningless. There is no definition of "mental condition". A provision which could have such far-reaching effect on property rights should be set out in precise and unambiguous language. Mental condition should be defined and it should be clear that it is incapacity at the time of the transfer that would invalidate the transfer.
- (3) If our construction is the correct one, all gifts made by a patient during his lifetime prior to his admission to a hospital would be void, irrespective of his mental condition at the time of the gift.
- (4) A purchaser who has given full consideration may lose his property if it is shown in an action that he had "notice" of the transferor's mental condition, whatever those indefinite words might mean.

This is not a law of general application. It applies only to those who become patients in psychiatric facilities. It is not limited to those patients who have been certified to be incompetent to manage their estates, and it applies "as against the Public Trustee", even where he may not be managing the particular patient's estate.

On the other hand, it does not apply where the transferor has been the subject of an application to the court for a

declaration of mental incompetency, but has not become a patient in a psychiatric facility. We do not think that there should be one law for those who have dealt with or received gifts from persons who have later become patients in a mental hospital, and another for those who had like transactions with persons who later have been declared by the courts to be mentally incompetent, without being admitted to a mental hospital. It may be that the section is intended to protect the interests of patients in hospitals, but if such a law is necessary it should be one of general application. It is not clear that it is necessary, and it is not clear that it is in the interests of the patients. In the light of the taxation laws, it may be that gifts and transfers of property made before hospitalization would be quite beneficial to a patient.

The validity of gifts or other transactions should be left to be determined by the courts. This is not a matter that should automatically be determined when a person suffering from mental incapacity becomes a patient in a psychiatric facility.

ADMINISTRATION OF ESTATES BY THE PUBLIC TRUSTEE

The Public Trustee does not administer estates according to any known law of trusts. He charges for his services, but generally speaking he does not pass his accounts unless he is required to do so. He makes a fixed charge. The charge is made as follows: two per cent on capital disbursements, two per cent on capital receipts, and one per cent on bank accounts. The Public Trustee advised us that his charge is really based upon the structure of the estate, the length of time it is under administration, the difficulty of administration, and the needs of the patient. He said he could not lay down "a cut and dried rule". We are told that if the estate can afford to pay, the rule is to charge fees for ordinary estates according to the practice of the Surrogate Court. In fact, the Public Trustee does not really "administer" the estates coming under his charge.

Under the Public Trustee Act, the Lieutenant Governor in Council may make regulations "fixing the rate of interest

to be allowed upon money in the hands of the Public Trustee and fixing the amount of interest to be charged upon advances made on behalf of any estate and the custody and control of securities held by him for investments".⁶

Acting under the power conferred under the Act, the Lieutenant Governor in Council has fixed the rate of interest to be paid on money in the hands of the Public Trustee generally at the rate of four per cent per annum on the minimum quarterly balance of \$500 or over. Where money in the hands of the Public Trustee is money of Crown estates, the rate is two per cent per annum, and where money is held under the Child Welfare Act or under Indian trusts, or is held uninvested under the Cemeteries Act, the rate is one per cent per annum, notwithstanding that the balance is less than \$500.⁷

In practice, an estate is dealt with in two ways, depending to some extent on the nature of the estate. It may be held by the Public Trustee in specie, e.g., government bonds; or it may be liquidated, e.g., common stocks and real property. If it is held in specie, the income is credited to the account of the patient. If it is liquidated, the proceeds form part of a pooled fund and are invested for the account of the Public Trustee. The patient is allowed four per cent interest on the amount of his estate that has been paid into the pooled fund. A profit is made on the difference between the income received on the pooled fund and the four per cent interest allowed to the patient. This profit is paid into an "administration fund", carried as a surplus account of the Public Trustee and not for patients. Out of the administration fund, \$200,000 has been set aside as an insurance fund, from which any claims for maladministration might be paid.

In addition to the profit made on investment of estate funds, the Public Trustee has a substantial income from charges made against the estates of patients. The Public Trustee is not only authorized but directed by the Act to make the charges prescribed by the regulations for his services against every estate that comes into his hands. All fees, charges, and expenses that would be allowed to a private trustee are allowed

⁶R.S.O. 1960, c. 334, s. 14 (f).

⁷O. Reg. 59/65, s. 5(3).

to the Public Trustee.⁸ In so far as patients in mental hospitals are concerned, in cases of hardship or poverty he may forego his charges.⁹

The annual report for the Public Trustee for the fiscal year ended March 31, 1967 shows:

TOTAL ASSETS UNDER ADMINISTRATION:	
Estates, trusts and committeeships	\$73,636,909.27
Administration fund	6,287,168.66
	<u>\$79,924,077.93</u>
Interest earned on investments and bank accounts	\$2,188,450.44
Less: Interest allowed	1,097,692.15
NET INTEREST EARNED FOR YEAR—	
Schedule 2	<u>\$1,090,758.29</u>

The statement of earnings for the year was as follows:

**THE PUBLIC TRUSTEE OF THE
PROVINCE OF ONTARIO
STATEMENT OF EARNINGS**

Year Ended March 31, 1967

FEES:

CROWN ESTATES:

Compensation	\$ 182,754.67	
Special services	6,512.66	
Commission on rental collections	966.15	\$ 190,233.48

PATIENT'S ESTATES:

Compensation	373,226.22	
Special services	12,313.13	
Commission on rental collections	11,704.61	397,243.96

SPECIAL TRUSTS:

Compensation	10,255.32	
Special services	566.30	
Commissions on rental collections	201.65	11,023.27

⁸R.S.O. 1960, c. 334, s. 8(2). Mental Health Act, 1967, Ont. 1967, c. 51, s. 51.

⁹Mental Health Act, 1967, Ont. 1967, c. 51, s. 51.

CHARITIES:			
Compensation		32,111.43	
CEMETERY TRUSTS:			
Compensation		4,650.93	
COMPANY TRUSTS:			
Compensation		5,754.58	\$ 641,017.65
OTHER:			
Interest on bank accounts	4,218.21		
Net interest earned —investment fund account— schedule 4	1,090,758.29	1,094,976.50	
Less Debit balances written-off		988.03	1,093,988.47
GROSS EARNINGS:			1,735,006.12
OPERATING EXPENSES:			
Schedule 3			1,095,271.36
NET EARNINGS FOR YEAR:			
Schedule 1			\$ 639,734.76

These statements show that on the investment of funds belonging to estates which came into the hands of the Public Trustee, and the investment of the administration fund which was built up out of profits derived from the investment of estate funds, the profit for the year was \$1,090,758.29, over and above the four per cent interest allowed to estates. The administration fees earned amounted to \$641,017.65. The total profit was \$1,735,006.12. The net earnings for the year, after operating expenses were deducted, amounted to \$639,734.76. This sum was transferred to the administration fund, which at the close of the year showed a balance of \$5,660,174.94. Since the first of April, 1964, this surplus account—misnamed administration fund—has been increased by \$2,025,252.66.

It is hard to see what justification there is for a trustee charging the usual administration fees payable to trustees, unless he administers the estate as other trustees are required to administer estates. In the case of about half the estates that

come into his hands, there is no real administration, but a mere pooling of estates to produce a profit for the Public Trustee on the investment of the pooled fund. Where a private trustee administers an estate and appropriates part of the income from investments to his own use, he is required to account by law to the owner of the estate, and he loses his right of compensation. Under this legislation, the legal rights of the unfortunate owners of estates are set aside and the law authorizes a process of administration quite foreign to the traditional law of trusts. This is an unjustified encroachment on the civil rights of the unfortunate people who are compelled to have their estates administered in this way.

The feeble excuse given for this system was that if it were not followed, the office would be run at a loss, and that in some cases of hardship the estates are administered without charge. We cannot see that this is an excuse. If welfare services are necessary in the administration of small estates, the burden of the cost should not fall on other unfortunate mental patients. It should be borne by the public at large.

The whole scheme and philosophy of the administration of estates by the Public Trustee should be completely revised and put on the same basis as administration by private trustees. If the office cannot be operated profitably on a just basis, the Province should bear the loss. In any case, the office of Public Trustee ought not to be operated on an unjust basis that provides a very large surplus which rightfully should belong to the estates administered.

POWERS OF INVESTIGATION

The Public Trustee is clothed with extraordinarily wide powers of investigation.

“5. The Public Trustee shall discharge the duties imposed upon him by *The Crown Administration of Estates Act*, *The Charities Accounting Act* and any other Act of the Legislature or by the Lieutenant Governor in Council, and he shall also make inquiries from time to time as to property that has escheated, or become forfeited for any cause to the Crown, or in which the Crown in the right of Ontario may be interested, and every person when required by the Public

Trustee shall furnish him with such information as he requires, and in default of so doing is guilty of an offence and on summary conviction is liable to a fine of not more than \$100, which fine shall be paid over to the Public Trustee."¹⁰

No government servant should have such broad powers. The scope of the power of investigation is unlimited, and there is no limitation on the use to which the information may be put. There would not appear to be any reason why the powers of a Commissioner under the Public Inquiries Act would not be sufficient. We recommend that the words, "and every person when required by the Public Trustee", and those following, be deleted from the Act, and appropriate words limiting his powers of investigation be substituted.

A GUARDIAN OF THE INTERESTS OF OWNERS OF ESTATES

A guardian should be appointed to act on behalf of those estates being administered by the Public Trustee, and should examine all the charges made and require accounts to be passed in proper cases. He should appear on behalf of the estates on the passing of accounts. Likewise, where the Public Trustee has the discretion to forego claims for compensation in cases of poverty or hardship, the guardian should have the duty to bring all the relevant circumstances to the attention of the Public Trustee, showing the instance of poverty and hardship that may exist.

We do not wish it to be inferred from anything we have said that any reflection on the holder of the office of Public Trustee or any of his staff is intended. They are devoted public servants working in a system prescribed for them by law, and it is their duty to carry out the law as it is.

AN ANNUAL REPORT

In view of the nature of the office and the large sums of money that are handled in it, the Public Trustee should make an annual report which should be tabled in the Legislature. The report should contain a reasonable statement of the financial affairs of the office. The report now made to the

¹⁰Public Trustee Act, R.S.O. 1960, c. 334, s. 5.

Attorney General should be amplified so that it may be readily understood by those who read it. It is not sufficient that a confidential report be made to the Attorney General. All those who may have an interest in the estates in the hands of the Public Trustee are entitled to know how the office is administered.

PERSONAL LIABILITY OF THE PUBLIC TRUSTEE

The Public Trustee is personally liable only where there is wilful misconduct in the management of an estate. The relevant section reads:

“50. The Public Trustee is liable to render an account as to the manner in which he has managed the property of the patient in the same way and subject to the same responsibility as any trustee, guardian or committee duly appointed for a similar purpose may be called upon to account, and is entitled from time to time to bring in and pass his accounts and tax costs in like manner as a trustee *but is personally liable only for wilful misconduct.*”¹¹

The italicized portion of this section is difficult to construe and it is hard to know why it is there. The Public Trustee Act provides that the Lieutenant Governor may appoint a person “to be a Public Trustee”, and it goes on to provide: “The Public Trustee is a corporation sole under that name with perpetual succession and an official seal, who may sue and be sued in his corporate name.”¹² One or two deputies may be appointed to act in the absence of the Public Trustee, but the protection given in the above quoted section of the Mental Health Act, 1967, does not extend to the deputies.

If the protection is intended only to be extended to the person who is appointed Public Trustee—as distinct from “the Public Trustee”, the corporation—it would have been much simpler to have allowed the law to take its course and to provide that the Public Trustee shall be indemnified out of the Assurance Fund for all claims against him. To take away rights of action at common law is quite unjustified. In our discussion with Mr. Thompson, the present Public Trustee,

¹¹Mental Health Act, 1967, Ont. 1967, c. 51, s. 50, formerly s. 97 of the Mental Hospitals Act, R.S.O. 1960, c. 236. Italics added.

¹²R.S.O. 1960, c. 334, s. 1.

he said that he did not know why the provision giving protection was in the statute, but nevertheless it was re-enacted in 1967.

The Public Trustee should have no more protection than private trustees have. This should be particularly true with respect to the estates of patients in psychiatric facilities.

In addition to other forms of statutory protection given to the Public Trustee, the Act provides: "Nothing in this Act makes it the duty of the Public Trustee to institute proceedings on behalf of a patient or to intervene in respect of his estate or any part thereof or to take charge of any of his property."¹³ The essence of this provision is that the Act imposes on the Public Trustee the privileges of a trustee and the right to remuneration, but absolves him of the ordinary obligations and duties of a trustee. He is given wide powers over the property of others, including patients in psychiatric facilities, but he is absolved from any duty to exercise them. He is given power to take charge of patient's property, but no duty to do so. He may leave it for "moth and rust to corrupt". He may take charge of the patient's accounts receivable or promissory notes, but he is under no duty to collect them. He may let statutory periods of limitation go by with impunity, so long as he does not do so wilfully, and it is now arguable that section 55 absolves him even from that liability. We can see no defence for this legislation. We repeat that legislation which imposes on patients in a psychiatric facility, and others, statutory trusteeship of their property, should meticulously provide that all the ordinary obligations and duties of a trusteeship follow as a matter of course.

LIMITATION OF ACTIONS

The limitation section of the Mental Health Act, 1967, applies not only to protect all those doing any act in pursuance of the Act, but doing any act in "intended pursuance" of the Act. This includes the Public Trustee. The section reads:

"58. All actions, prosecutions or other proceedings against any person or psychiatric facility for anything done or omitted to be done in pursuance or intended pursuance of this Act

¹³Mental Health Act, 1967, Ont. 1967, c. 51, s. 55, formerly s. 102 of the Mental Hospitals Act, R.S.O. 1960, c. 236.

or the regulations shall be commenced within six months after the act or omission complained of occurred and not afterwards.”¹⁴

We shall deal with this section first, in so far as it protects the Public Trustee. The legislation is unique in that it imposes a limitation period, within which actions for breach of trust may be brought. No other statutory limitation period applies to breaches of trust. In the second place, the period is extraordinarily short. In the third place, the limitation runs against a patient who is confined in a psychiatric facility and has no opportunity to assert his rights because the right to assert his rights is vested in the Public Trustee. In the fourth place, even if he had a means of asserting his rights, he would have no means of knowing of the maladministration of his estate until after the six-month period had gone by. Passing accounts with respect to anything that took place more than six months prior to the submission of the account, would be largely a meaningless gesture. The simple process of a six-month delay in the preparation of accounts for passing would conceal maladministration and as a result deprive patients of sources of information on which to found an action for any maladministration. When a patient dies, his personal representatives, in most cases, would have no means of knowing of the maladministration until the limitation period had expired.

The purpose of limitation legislation is to relieve against stale claims that might be conjured up after the evidence relative to a transaction may have disappeared. The purpose of this limitation period is to protect authorities who have themselves the special knowledge of the relevant transactions. It is foreign to true limitation legislation.

So far, we have dealt with the section in its application to the administration of estates. The section extends to protect “any person or psychiatric facility for anything done or intended to be done or omitted to be done in pursuance or intended pursuance of the Act or the regulations”. It is hard to deal with this section in restrained language.

Patients are not able to consult solicitors or to bring actions, yet the limitation period runs against them notwith-

¹⁴*Ibid.*, s. 58.

standing that they are by law under incapacity to protect their rights. We can see no just reason why the sick should be penalized with respect to their legal rights to bring an action in the courts. We recommend that the section be repealed.

MENTAL INCOMPETENCY PROCEEDINGS

The estates of mentally incompetent persons who have not become patients in a mental hospital may be administered under the supervision of the court. Likewise, on proper application the estates of those who have become patients in a mental hospital may be so administered.

It may be that the procedure for the administration of estates under the supervision of the courts might be simplified, but it does provide real safeguards for the interests of the incompetent.

In 1964 the procedure was somewhat simplified with a view to reducing the burden of costs, particularly on smaller estates.¹⁵ It is too soon to judge what beneficial results have flowed from the change of procedure. Before the change, the applications to the court under the Mental Incompetency Act were comparatively few, averaging about seventy-five per year. Where applications were made, the estates were usually substantial, and often those of aged people.

It would appear that there is a deficiency in our system. There should be some informal and inexpensive procedure provided for the administration of small estates.

In practice, families often devise their own way of handling the estates of relatives who may have become incompetent, and particularly those of aged parents. A power of attorney is often taken, authorizing a member of the family to do banking and to pay necessary bills. Such a power of attorney may be invalid at common law if the donor becomes incompetent.¹⁶

Under the Mental Health Act, 1967: "Upon the Public Trustee becoming committee of the estate of a person under this Act or by an order made under this Act, every power of

¹⁵An Act to amend The Mental Incompetency Act, Ont. 1963-64, c. 60.

¹⁶See *Drew v. Nunn* (1879), 4 Q.B.D. 661; *Yonge v. Toynbee*, [1910] 1 K.B. 215; but see to the contrary, *Kerr v. Town of Petrolia* (1921-22), 51 O.L.R. 74.

attorney of such person is void."¹⁷ This statute renders all powers of attorney void, irrespective of whether they are irrevocable or not. No protection is given to those who have dealt with the donee of the power in good faith and without notice that the donor has been certified as incompetent under section 32 (3), or where the Public Trustee has taken charge of the estate under section 32 (4), or where the Public Trustee has been appointed as trustee under section 32 (5). It may be that the transactions carried out by the donee of the power have been for the benefit of the patient. Nevertheless, they are void because the donee's authority to act for the donor has been rendered void by the statute. This is unjust.

The section is a negative approach and does nothing to solve a very real problem. A form of power of attorney should be authorized by statute which would in proper circumstances enable the donee to continue to act for a person who has become incompetent. Simple machinery could be devised, whereby on consent of the parties likely to be interested in the estate of one who has become incompetent, a person could be authorized to act as attorney for the incompetent without setting up the elaborate machinery of a legal committee. It is not the function of this Commission to work out a procedure in detail, but steps should be taken to give legal authority to a useful practice that is now carried on on a very wide scale, but with questionable legality.

RECOMMENDATIONS

1. There should be an objective condition precedent to the power of a peace officer to detain a person on the ground of mental disorder. Section 10 (b) of the Mental Health Act, 1967, should be amended by substituting the words, "if he believes on reasonable grounds" for the words "if he is satisfied".
2. The attending physician should have the power to issue a renewable certificate for the detention of an involuntary patient "where he has reasonable grounds to believe that the patient suffers from mental disorder of a nature or degree so as to require further hospitalization in the

¹⁷Ont. 1967, c. 51, s. 44.

interests of his own safety or the safety of others; and is not suitable to be continued as an informal patient". Section 13 (2) should be amended accordingly.

3. The senior physician mentioned in section 17 of the Mental Health Act, 1967, should have power to communicate information compiled by the psychiatric facility only to persons entitled by law to the information. Section 17 should be amended accordingly.
4. A qualified barrister appearing as counsel for a patient before the board of review should be permitted to cross-examine witnesses as of right.
5. The Election Act¹⁸ should be amended to clarify the right of voluntary patients to vote.
6. Provision should be made for a scheme of interim management of the estates of patients whose hospitalization may be of short duration.
7. An office of guardian of those suffering from mental disorder should be created to facilitate management of small estates, and to be a watch dog of the interests of the mentally incompetent.
8. The validity of gifts, conveyances or transfers of property should be left to the courts. In any case the provisions of section 48 of the Mental Health Act, 1967, should be amended to limit its application to transactions after the donor or transferor has become incompetent.
9. Estates coming into the hands of the Public Trustee should be administered on the same legal basis as estates are administered by private trustees.
10. The powers of the Public Trustee to conduct investigations and acquire information should be limited to those of a commissioner appointed under the Public Inquiries Act.¹⁹
11. The Public Trustee should be required to keep confidential any information obtained by him. Such information should not be conveyed to anyone except those legally entitled thereto.

¹⁸R.S.O. 1960, c. 118.

¹⁹Discussed in Part I, Section 4 *supra*.

12. Section 55 of the Mental Health Act, 1967, should be repealed.
13. Section 58 of the Mental Health Act, 1967, should be repealed.
14. A simple and inexpensive method of administering small estates should be devised so that family arrangements could be carried out with the approval of the guardian of the mentally incompetent, and in appropriate cases with the approval of the county or district court judge.
15. A form of power of attorney should be recognized by statute which would authorize the attorney—with the approval of the guardian of the mentally incompetent, or, in proper cases, the county or district court judge—to continue to act as attorney for the donor after he has become incompetent, so that small and limited transactions such as the banking and paying of small bills may be carried out by the attorney.
16. If the foregoing recommendation is adopted, section 44 of the Mental Health Act, 1967, should be amended. In any case, it should not apply to irrevocable powers of attorney.
17. The Public Trustee should make an annual report which should be tabled in the Legislature.

Consolidated Summary
of Recommendations

Part I

VOLUME 1

THE EXERCISE AND CONTROL OF STATUTORY POWERS IN THE ADMINISTRATIVE PROCESS

Statutory Powers: Administrative and Judicial Powers of Decision

PRINCIPLES THAT SHOULD GOVERN THE NATURE AND SCOPE OF STATUTORY POWERS OF DECISION

1. Where a statute confers a power of decision, rules or standards to govern the exercise of the power capable of judicial application should be stated in the statute. (p. 101)
2. Where rules or standards for judicial application cannot be stated and an administrative power to decide on grounds of policy is necessary and unavoidable for carrying out the policy of the statute, the administrative power should be no wider in scope than is in fact necessary. (p. 95)
3. Where an administrative power is conferred, wherever possible objective factors or purposes to be taken into account in reaching the decision should be expressed in the statute. (p. 102)
4. Where a statute makes provision for the removal of a right or a status enjoyed by an individual under the statute for reasons not related to the general policy of

the statute but personal to the person affected (i.e., that the right or status is to be taken away by reason of the person's conduct, character or competency), rules or standards should be stated. (p. 102)

5. If it appears, when a statute is first enacted, that administrative power is necessary and unavoidable because it is not possible to confer a judicial power on a tribunal, the statute should be reviewed periodically and rules or standards enacted as experience in the operation of the statute may warrant. (p. 102)
6. No power to take immediate action should be conferred in such terms that its existence is dependent solely on subjective conditions precedent. There should always be at least an objective requirement that reasonable and probable grounds exist to justify the action. (p. 101)

PRINCIPLES THAT SHOULD GOVERN THE STRUCTURE AND ORGANIZATION OF TRIBUNALS

7. Judicial and administrative powers should be separated and conferred on different tribunals where possible. (p. 121)

Judicial Tribunals

8. Judicial powers should normally be entrusted to the appropriate ordinary courts of law (whether superior or inferior). (p. 122)
9. Where effective governmental action requires that judicial powers be conferred on special tribunals, the tribunals should be independent of political control and constituted to operate in such a manner as to render them impartial. (pp. 122-23)
10. A special judicial tribunal should not be a minister or subject to his control. (p. 123)
11. Members of a tribunal should not be appointed by the minister of the department which will be affected by its decisions but by the Attorney General or Lieutenant Governor in Council. (p. 123)

12. Members should hold office for life or a fixed term of duration sufficient to ensure independence. (p. 123)
13. Members should be removable only by the Lieutenant Governor in Council for cause. (p. 123)
14. Bias or interest should disqualify members. (p. 123)
15. Powers of investigation should not be combined with judicial powers of decision. (p. 123)
16. Generally, one or more members should have legal training. (p. 123)
17. Where a hierarchy of judicial tribunals is necessary, generally the rules ensuring independence and impartiality should apply to each tribunal within the hierarchy, but considerations of expediency, informality and expense may justify a departure from the principle that powers of investigation should not be combined with powers of decision with respect to initial or secondary tribunals within the hierarchy if at a later stage the decision comes before a properly constituted tribunal. (p. 125)

Administrative Tribunals

18. Statutory powers to make administrative decisions (i.e., policy decisions) should be conferred either on ministers or on persons subject to the control and direction of ministers. (p. 126)
19. Where an administrative power is conferred on a minister, if possible the minister should himself make or approve all decisions in the exercise of the power. (p. 127)
20. Where decisions are less important and principles of policy relatively well defined, power should be given to the minister to delegate decisions to subordinates. (p. 129)
21. Where an administrative decision is to be made after a hearing, ideally the minister should personally hear the individuals affected and consider their representations. (p. 127)

22. Where there should be a hearing and the minister cannot personally conduct it, the hearing may be conducted by a hearing officer and the results of the inquiry should be reported to the minister before he makes a decision. (p. 129)
23. Where the power of decision is delegated by the minister to a subordinate and a hearing is necessary, the deciding officer should be the hearing officer. (p. 129)
24. A power of decision delegated to one official to be made after an inquiry by another should be conferred only where necessity requires it. (p. 129)
25. The inquiry system with hearing officers to conduct hearings before administrative decisions are made should be introduced. (p. 129)
26. An exception may be made to the principle of conferring policy decisions on ministers where the matters to be decided require specialized technical knowledge and full and detailed inquiries into a case, e.g., the Ontario Highway Transport Board. In those cases, the principles and considerations to govern the decisions should, where possible, be expressed in the statute unless well understood. The decision should be subject to the approval of a minister, or there should be a right of appeal to a minister or a committee of the Lieutenant Governor in Council. (p. 130)

Tribunals Exercising Both Judicial and Administrative Powers, which for Practical Governmental Purposes, Cannot be Separated

27. The general principles governing structure and organization of tribunals, i.e., independence of judicial tribunals and political supervision of administrative tribunals cannot be applied. Departure therefrom should be governed and limited by the necessities giving rise to the establishment of the tribunal. (p. 131)

Certain Classes of Tribunals or Specific Tribunals Whose Functions Might be Classified as Judicial or as Administrative but to Which the Principles Governing Tribunals to Exercise These Powers cannot be Generally Applicable

28. Where emergency action is required for the protection of public health and safety power may properly be conferred on an inspector or official to take action based on an inspection or a view. The power should be conditioned on the existence of reasonable and probable grounds that the requisite facts exist. (pp. 131-32)
29. Where the only question for determination is the application of a technical or scientific standard prescribed by statute and the most certain way of ensuring compliance is by scientific or technical tests made by trained experts, powers of decision may be conferred on an expert in these cases. (p. 132)
30. Where the decision is not a finding of fact but the formation of an expert opinion, the power to decide can be conferred directly on an expert or panel of experts. (p. 132)

PROCEDURAL REQUIREMENTS FOR A VALID DECISION IN THE EXERCISE OF A STATUTORY POWER

31. A Statutory Powers Procedure Act should be enacted to establish:
 - (a) Minimum rules of procedure applicable to all tribunals exercising a statutory power of decision, whether judicial or administrative, unless the power is exercised for emergency purposes, the scientific determination of standards, in circumstances in which the rules would frustrate the object of the statute conferring the power, or the application of the rules is excluded by statute.
 - (b) A Statutory Powers Rules Committee with power to make appropriate additional detailed rules for each tribunal, having regard to the nature and purpose of the powers exercised by it. (pp. 212-13)

32. If a system of inquiries by hearing officers, to be conducted before administrative decisions may be made is adopted in Ontario, there should be some additional provisions adapting the minimum procedure to inquiries. (p. 213)

Minimum Rules of Procedure

33. Notice of a hearing and an opportunity to attend and be heard should be given to all parties who will be affected by a decision. If notice has been given, the tribunal should have the discretion to proceed if the party does not attend. (p. 213)
34. Reasonable notice of the case to be met should be given to parties whose rights may be specifically affected. (p. 213)
35. Reasonable adjournments requested in good faith should be permitted. (p. 213)
36. Summonses for the attendance of witnesses and production of documents should be issuable by the tribunal. (p. 214)
37. Hearings should be in public except where,
(a) public security is involved;
(b) intimate financial or personal circumstances may have to be disclosed;
(c) professional capacity and reputation are under examination before self-governing bodies. (p. 214)
38. Orders of a tribunal should be enforced through committal procedures only on application to the High Court of Justice for Ontario. (p. 214)
39. Tribunals should have power to administer oaths with a discretion to accept unsworn evidence. (p. 215)
40. The parties whose rights are involved should be entitled to counsel except in exceptional circumstances. Unless the tribunal is in the nature of a court parties should be permitted to be represented by agents. (p. 215)

41. Counsel for witnesses should be permitted to appear, but should have no right to take part in the proceedings except to advise the witness and take objections under the relevant law. Where the public is excluded, such counsel should be excluded except when his client is giving evidence. (p. 216)
42. The parties should be entitled to examine their own witnesses and to cross-examine opposing witnesses where necessary for the full disclosure of the facts. (p. 216)
43. Tribunals should have the discretion to ascertain relevant facts by such standards of proof as are commonly relied on by reasonable and prudent men in the conduct of their affairs. In other respects the rules of evidence, e.g., privilege, should apply. (p. 216)
44. Official notice may be taken of generally recognized technical or scientific facts or opinions within the tribunal's specialized knowledge. The parties should be advised before, or during the hearing, of matters officially noticed in order that they might contest them. (p. 217)
45. The decision should be in writing if required and the parties notified thereof and of their rights of appeal. (p. 217)
46. A decision of a tribunal should be enforceable in the name of the tribunal in the same manner as an order of an ordinary court. (p. 217)
47. Reasons for the decision should be given in writing if required. The reasons should specify the findings of fact and conclusions of law based thereon. (p. 218)
48. A record should be compiled consisting of:
 - (a) the notice of the hearing,
 - (b) any intermediate rulings or orders made in the course of the proceedings,
 - (c) documentary evidence received or considered,
 - (d) a transcript of oral evidence or notes of the tribunal where evidence is not reported,
 - (e) the decision and reasons. (p. 218)
49. A right of appeal should be provided. (p. 218)

50. The law of qualified privilege in defamation is adequate to protect parties and tribunals in proceedings in the exercise of statutory powers and should not be extended to give absolute privilege. (p. 218)

Additional Minimum Rules for Judicial Tribunals Only

51. The Statutory Powers Rules Committee should have power to make rules applicable to judicial tribunals with relation to the matters set out in paragraphs 52-55, and to specify the tribunals to which they apply. (p. 219)
52. Findings of fact by a judicial tribunal should be based exclusively on evidence before it at the hearing and on matters officially noticed and disclosed to the parties. (p. 219)
53. Members of a judicial tribunal should not consult with one party or his counsel in the absence of the other party or his counsel, or where the decision involves a claim for a benefit, with interested departmental officials in the absence of the claimant or his counsel. A tribunal may in proper cases seek legal advice from an independent adviser. Such advice should be made known to the parties in order that they might make submissions as to the law. (p. 220)
54. Those members of a judicial tribunal making the decision should attend the hearing and hear and consider the evidence. All those hearing and considering the evidence should participate in the decision. (p. 220)
55. All evidence before a judicial tribunal should be recorded if possible. Where this is not practical adequate notes should be kept. (p. 220)

Detailed Rules for All Tribunals

56. Detailed rules for tribunals or classes of tribunals should be made by the Statutory Powers Rules Committee in consultation with the department concerned. (pp. 220-21)
57. All rules additional to those in the statute should be published and available to the public. (p. 221)

Constitution of the Statutory Powers Rules Committee

58. The permanent members should be:
- (a) The Chief Justice of Ontario and the Chief Justice of the High Court of Justice, or their nominees.
 - (b) The Chief Judge of the County and District Courts for Ontario, or his nominee.
 - (c) The Chairman of the Ontario Law Reform Commission, or his nominee.
 - (d) One or more representatives of the Attorney General's Department nominated by the Attorney General.
 - (e) A representative of the Law Society of Upper Canada, nominated by the Law Society of Upper Canada.
 - (f) A professor of administrative law of one of the law schools of Ontario and two lay members appointed by the Lieutenant Governor in Council. (p. 221)
59. Two *ad hoc* members should be appointed by the minister of the department involved where special rules are being developed for a tribunal exercising powers affecting the department. (p. 221)
60. The Committee should have a permanent secretary who should perform substantially the same duties as the secretary of the Council on Tribunals in the United Kingdom including the investigation of complaints regarding procedure. (p. 221)

Effect to be Given to Rules

61. Subject to recommendation 62, the courts should have power to set aside a decision based on the purported exercise of any statutory power to which the rules apply if there is a failure to follow them, unless in the opinion of the court, notwithstanding that the rules have not been followed, there has been no real or substantial miscarriage of justice. In such case the court should have power to validate a decision. (p. 222)

62. Informal settlements may be arrived at by agreement or consent without following the rules, or a party may otherwise waive his rights under the rules. (p. 222)

Declaratory Rulings

63. Power to make declaratory rulings anticipating action should not be conferred on statutory tribunals. (pp. 222-23)

Publication of Decisions

64. Important decisions of statutory tribunals and the reasons for them should be published so as to be available to members of the public. (p. 223)

PRINCIPLES APPLICABLE TO APPEALS FROM DECISIONS BY STATUTORY TRIBUNALS

65. An appeal should be provided from the decision of every judicial tribunal, except where an appeal would defeat the purpose of the statute. (p. 233)
66. Appeals from judicial tribunals should be taken to the ordinary courts unless circumstances render this impractical. (p. 234)
67. Where circumstances require that the appeal from a judicial tribunal should not be taken to the ordinary courts, the appeal tribunal should be established with the appropriate characteristics of a judicial tribunal to ensure independence and impartiality. An appeal should not lie from a judicial tribunal to the Lieutenant Governor in Council or to a minister. (p. 234)
68. No appeal should lie from an administrative decision made by a minister, except in appropriate cases to the Lieutenant Governor in Council. (p. 234)
69. No appeal should lie from an administrative decision to the courts. (p. 234)
70. Administrative decisions made by persons other than a minister should be subject to appeal, preferably to a minister or to senior administrative officers close to the minister. (p. 234)

71. Decisions of tribunals which issue certificates of convenience or necessity or fix rates or tolls should be subject to appeal on questions of law or *ultra vires* to a court, and on the merits of the certificate or quantitative rates and tolls to a minister or to a committee of the Lieutenant Governor in Council. (p. 234)
72. Where officials are empowered to take emergency action based on inspections or views, there should be a summary form of appeal to senior officials for a further inspection. (p. 235)
73. Where a tribunal consists of expert personnel who apply statutory, technical or scientific standards by objective tests, provision should be made for an appeal by way of a second test by different experts. (p. 235)

JUDICIAL REVIEW OF THE EXERCISE OF STATUTORY POWERS OF DECISION

Statutory Restrictions on Judicial Review

74. All clauses restricting judicial review ought to be repealed and none should be enacted unless it can be demonstrated that most exceptional circumstances demand it. (p. 277)
75. Subjective ingredients ought not to be included in a statutory power unless they are necessary to carry out the scheme of the statute. In no case should they be included merely as a device to exclude judicial review. (p. 275)

Principles of Substantive Law for Judicial Review

76. Judicial review in Ontario should be based on two principles:
 - (a) Retention of the doctrine of *ultra vires* providing for full review by the courts of decisions of all tribunals, whether judicial or administrative, to determine whether the decision is within the powers conferred on them;

- (b) Extension of the power of the courts in certain cases to review decisions within the powers of tribunals, to safeguard against errors of law on the face of the record or findings of fact unsupported by evidence. (p. 304).
77. The courts should be empowered to quash decisions of judicial tribunals made within their powers and required, by rules made under the Statutory Powers Procedure Act, to be based on a record, for error of law on the face of the record or for lack of such relevant evidence as a reasoning mind might accept to support the conclusions of the tribunal. (p. 310)
78. The courts should be empowered to quash decisions of administrative tribunals for an error of law on the face of the record or appearing in the reasons given by a tribunal for its decision. (p. 313)
79. Decisions of administrative tribunals on questions of fact or opinion within their power should not be subject to review by the courts. (p. 314)
80. Decisions of tribunals authorized to take immediate action to meet emergencies should not be subject to review except to ascertain if reasonable or probable grounds existed to justify the action where this is required by the statute conferring the power. (p. 314)
81. The court on judicial review should have a discretion to refuse to quash a decision of a tribunal where it appears that no substantial wrong or injustice has been caused by the decision. In such a case where a defect in the proceedings before a tribunal would render a discretion *ultra vires* the court should have discretion to validate the decision. (p. 315)
82. The grounds for judicial review based on the doctrine of *ultra vires* should not be codified by legislation and the law should be left free to develop refinements where appropriate. (p. 315)

83. Legislation should be enacted to extend judicial review over decisions in accordance with these recommendations. (p. 315)

The Procedural Law of Judicial Review

84. It is urgent that the procedure for judicial review be simplified and stripped of its vexatious technicalities. (p. 319) The changes that are required relate both to the procedure to be followed and the court to conduct the review. (p. 325)

APPLICATIONS FOR JUDICIAL REVIEW

85. Statutory provision should be made for a single procedure by way of summary application for review of the refusal to exercise, or of the proposed or purported exercise of, a statutory power under which any relief may be granted that would be available under any of the present remedies of *mandamus*, prohibition, *certiorari*, action for declaration or injunction. (p. 326)
86. Specific remedies in each individual statute conferring powers should not be enacted. If any variations in the general procedure should be required in specific statutes conferring powers they should receive special consideration. (p. 326)
87. Provision should be made pending review, for an interim stay of action in relation to a proposed or purported exercise of power where the protection of the interests of the individual affected requires it. The tribunal or the reviewing court should have power to grant the stay. (p. 327)
88. The time within which a purported exercise of statutory power is subject to review should be limited. The time limit should vary depending on the nature of the statutory power. Provision should be made for extension of the limitation period by the reviewing court before or after it has expired where it is established that there are *prima facie* grounds for review, and that no prejudice by reason of the delay will result to any party affected by reason of the extension of time. (p. 327)

89. Proceedings for review should be available either before the tribunal has commenced to exercise the power or during the course of its exercise or after it has been exercised. (p. 327)
90. An application for judicial review should be commenced by originating notice under the general Rules of Practice and Procedure of the Supreme Court of Ontario. Actions for a declaration or injunction should not be made the appropriate remedy in all cases. (p. 328)
91. Provision should be made for the production of documents where necessary and examinations for discovery by leave of the reviewing court. Interlocutory proceedings should be reduced to a minimum and unnecessary proceedings penalized in costs. (p. 328)
92. The evidence in review for error of law on the face of the record, or absence of substantial evidence, should be confined to the record, and in all other cases, should include the record where available, and other evidence relevant to the issue of *ultra vires*. (p. 328)
93. The reviewing court should continue to have the same discretionary power as is now exercised to refuse relief, other than the power to refuse relief on the ground that there is another equally convenient, effective and beneficial remedy. (pp. 328-29)
94. Relief should be refused where the grounds for attack on the exercise of a statutory power are merely technical in their nature and no substantial injustice or prejudice to a party has occurred. (p. 329)
95. Rules of court should be made governing persons to be served with the proceedings. (p. 329)
96. Provision should be made that tribunals exercising statutory powers should be suable entities for the purpose of judicial review. (p. 329)

97. The Attorney General should be served with notice of all proceedings for judicial review, even though he may not be a party thereto. (p. 329)
98. The standing of a person to apply for review should be governed by the present principles. (p. 329)
99. The right of judicial review should be available notwithstanding that a right of appeal may exist. (p. 329)
100. The proposed procedure should be available in aid of applications for writs of *habeas corpus* in the same way that proceedings for an order in the nature of *certiorari* are now available. (p. 329)
101. Wherever an action for a declaration or an injunction is brought for relief that could be obtained on summary application, the offending party should be penalized in costs. (p. 329)

THE COURT TO CONDUCT JUDICIAL REVIEW

102. The application should be heard by the Appellate Division of the High Court of Justice for Ontario and by at least three judges thereof. (p. 330; p. 665)
103. The decision should be subject to appeal only with leave granted by the Court of Appeal. (p. 330)
104. Where an action is brought for a declaration or for consequential relief in which the validity of the exercise of a statutory power is in issue, a judge of the Supreme Court should have power, either on his own initiative or on the application of any of the parties, to direct that a summary application be made to the Appellate Division of the High Court for a determination of the validity of the exercise of the power. When the validity is determined, the matter could be referred back to the trial court if necessary. (p. 330)

Statutory Powers: Subordinate Legislative Powers

LIMITATIONS ON THE SCOPE

105. Subordinate legislative powers with subjective limitations should not be conferred except in emergency legislation. (p. 343)
106. Power should not be given under any statute to amend other statutes, or regulations passed thereunder, by regulation except to meet the most exceptional circumstances as in the Emergency Measures Act. (p. 345)
107. Powers of definition of or amendment of the parent Act should not be conferred unless they are required for urgent and immediate action. (p. 348)
108. The penalty for breach of prohibitory regulations should be fixed or at least limited by the statute authorizing the regulations. (p. 350)
109. The authority to sub-delegate power to make regulations should not be conferred, except in relation to the exercise of emergency powers. (p. 351)
110. Where charges or levies are authorized, the amount should be fixed in the statute. Provisions for exemptions or relief by regulation are undesirable, but where unavoidable, any exemptions or relief given should be reported specially to the Legislature. (p. 353)
111. Where power to charge fees to be fixed by regulation is conferred, the purpose for which the fees are to be charged should be clearly expressed. (p. 353)
112. The power to enact retrospective provisions should not be delegated to any body but any such provisions should be enacted only by the Legislature. (p. 354)
113. Statutory provisions shifting the onus of proof ought not to apply to offences created by subordinate legislation. (p. 354)

114. No practice should be adopted in Ontario of limiting review by the courts of the validity of regulations. One method employed in Ontario is to confer subordinate legislative power with subjective limitations or considerations. Except in emergency legislation, subordinate legislative power should be subject to expressed objective limitations. (p. 354)
115. Judicial tribunals, or administrative tribunals with power of decision on policy grounds, should not be established by regulations. (p. 355)

PERSONS ON WHOM SUBORDINATE LEGISLATIVE POWER MAY BE PROPERLY CONFERRED

116. Political control of subordinate legislative power should be maintained by conferring the power on ministers, either singly or collectively, who are responsible to the Legislature, or on persons subject to the supervision and control of ministers. (p. 356)
117. Subordinate legislative power should not be conferred on persons or bodies independent of the control of ministers. If the members of the body are intended to be representative of interested persons, they should not be given the power to make regulations but should be an advisory board to a minister. (pp. 357-58)
118. Subordinate legislative power free from political control should not be conferred on apparently independent persons or bodies as a subterfuge, or to relieve the political authorities from embarrassing duties. (p. 360)
119. If effective administration requires that subordinate legislative power be conferred directly on an independent person or body, regulations made in the exercise of the power should be subject to disallowance by the Lieutenant Governor in Council or a minister. (p. 360)
120. Uniform language should be used to confer subordinate legislative power where possible. (p. 359)

PROCEDURE THAT SHOULD GOVERN THE EXERCISE OF SUBORDINATE LEGISLATIVE POWER

121. Advance publication of proposed regulations and formal consultation with, or hearings of interested parties, before regulations are made should not be a requirement in Ontario. (p. 364)
122. Where it is desired that consultation should be mandatory, provisions should be made for an advisory board representative of the interests of the persons or classes who may be affected, with which the minister recommending, approving or making the regulations is required to consult before so doing. In other cases it may be sufficient to provide merely for an advisory board available to the minister. (p. 364)
123. No change should be made in the law of Ontario concerning the manner of publication of regulations or its effect. (p. 365)
124. The Regulations Act should be extended to apply as far as possible to all regulations, rules or by-laws that make laws affecting the public, except municipal by-laws and to include all rules made in the exercise of sub-delegated power. (p. 366)
125. Regulations should not be required to be laid before the Legislature. (pp. 367-68)

REVIEW OF SUBORDINATE LEGISLATION BY THE LEGISLATURE

126. A committee of the Legislative Assembly, consisting of seven members with a quorum of three, should be established to scrutinize subordinate legislation. (p. 376)
127. Provision should be made in the Regulations Act requiring all regulations filed with the Registrar of Regulations to be permanently referred to the Committee. (p. 377)
128. The terms of reference for the Committee should exclude from review any consideration of the policy of

the parent Act or of the merits of the regulations. (p. 377)

129. The following guiding principles should be laid down for the Committee in its examination of the regulations:

(a) They should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute.

(b) They should be in strict accord with the statute conferring power, particularly concerning personal liberties.

(c) They should be expressed in precise and unambiguous language.

(d) They should not have retrospective effect unless clearly authorized by statute.

(e) They should not exclude the jurisdiction of the courts.

(f) They should not impose a fine, imprisonment or other penalty.

(g) They should not shift the onus of proof of innocence onto a person accused of an offence.

(h) They should not impose anything in the way of a tax (as distinct from fixing the amount of a licence fee, or the like).

(i) They should not make any unusual or unexpected use of delegated power.

(j) General powers should not be exercised to establish a judicial tribunal or administrative tribunal. (p. 378)

130. The Committee should be assisted by counsel other than the Legislative Counsel or Registrar of Regulations. (p. 378)

131. The Committee should have the power to sit during recess. (p. 378)

132. The Committee should have power to ask for explanations, written or oral, from the department concerned, and should do so in any event before making an adverse report. (pp. 378-79)
133. The Committee should not have power to make changes in regulations. (p. 379)
134. The rules of the Legislative Assembly should be amended to provide specifically for the reception of the report by the Committee and its approval or disapproval. (p. 379)
135. The rules of the Legislative Assembly should be amended to provide, subject to appropriate safeguards and time limits to prevent abuse, some specific procedure under which a private member can initiate a debate on the merits of any particular regulation. (p. 379)

SUPERVISION BY THE COURTS OF SUBORDINATE LEGISLATIVE POWER

136. Relief in relation to the validity or operation of regulations that can be obtained in proceedings by way of *mandamus*, *certiorari*, prohibition or actions for injunction or declaratory judgments should be available in the single summary application to the Appellate Division of the High Court recommended in recommendations 85 and following. (pp. 380-81)
137. Where the validity of regulations comes into question in proceedings for their enforcement or to give effect to rights purportedly conferred by them, the court before which the matter arises, should have power on its own initiative or on application of one of the parties to direct a summary application be made to the Appellate Division of the High Court to determine the question. (p. 381)

Statutory Powers: Powers of Investigation

CONDITIONS PRECEDENT TO THE EXERCISE OF A POWER OF INVESTIGATION

138. Arbitrary powers of investigation ought not to be conferred in any statute. (p. 390)
139. Where powers of investigation are conferred, they should be subject to conditions precedent which must be satisfied before an investigation can be validly commenced. (p. 390)
140. Conditions precedent should be expressed with precision. (p. 390)
141. Wherever possible conditions precedent should be drawn in objective form. (p. 390)
142. If the implementation of the policy of the statute demands that a subjective condition precedent be conferred, the person who is to form the unreviewable opinion, should be in a responsible position in the government hierarchy, preferably the Lieutenant Governor in Council or the appropriate minister. (pp. 390-91)

THE SCOPE OF INVESTIGATORY POWERS

143. Each provision conferring a power of investigation should contain language prescribing the purpose and permissible scope of the investigation. (p. 399)
144. The prescribed scope for any given power of investigation should be no broader than is necessary to accomplish the purposes of the Act in question. (p. 399)
145. The provision defining the scope of an investigation should be stated in precise language. (p. 399)
146. Where possible, the scope of an investigation should be stated in the objective rather than the subjective form. (p. 399)

147. Where it is considered that the scope of an investigation should be expressed in the subjective form, the person who decides the scope should be in a politically responsible position. (p. 400)
148. Where the scope of an investigation is expressed in the subjective form, it should be defined by the person who initiates the investigation. (p. 400)
149. The power to determine the scope of an investigation should not be subject to delegation. (p. 400)

SUMMONSES TO WITNESSES AND PRODUCTION

150. Powers of investigation should not be conferred by regulation. (p. 408)
151. Where a person or body has the power to summons persons to attend to give evidence or furnish information, the form of the summons should be prescribed by legislation or regulation giving sufficient information to acquaint the witness with the general nature of the proceedings. (p. 408)
152. A person summoned as a witness should be entitled to a witness fee. (p. 408)
153. Demands for information should be in writing and should indicate the general nature of the inquiry involved and the nature of the documents and information required. (p. 409)
154. Persons from whom documents are taken should be given a statutory right to the return of the documents within a reasonable time. (p. 409)
155. Provision should be made for the admission as *prima facie* evidence of properly certified copies of documents obtained under a statute and returned to the owner. (p. 409)

POWER OF SEARCH AND SEIZURE

156. Legislation which is intended to give power to enter, search and seize property should so state in clear and unambiguous language. (p. 422)

157. Unless the purpose of the statute would be frustrated, judicial authority should be a condition precedent to the exercise of the power of entry and search. (p. 422)
158. Judicial authority should always be a condition precedent to the right of entry and search of a private dwelling. (p. 422)
159. Where a statute is penal as opposed to regulatory, strict rules with regard to search and seizure should be followed. (p. 422)
160. Where judicial authority to search and seize is required, guidelines should be laid down to direct the judicial authority. (p. 423)
161. An applicant for judicial authority to search and seize should be required to show:
 - (a) some facts to justify the exercise of the power;
 - (b) the place to be searched; and
 - (c) some reason to believe that the relevant material may be found in the place to be searched. (p. 423)
162. Every statute authorizing a right of search should provide that the search be exercised during the day, unless otherwise ordered by judicial authority. (p. 423)
163. Every statute requiring judicial approval or authority to enter and search should incorporate the provisions of section 14 of the Summary Convictions Act. The power to seize property should be conditioned on there being reasonable grounds for believing that the property is something in respect of which an offence against the statute in question has been, or is suspected to have been committed, or that it will afford evidence as to the commission of an offence. (p. 423)
164. Where it is necessary for documents to be examined away from their usual locations, statutory provision should be made that certified copies be admitted as *prima facie* evidence in any prosecution or matter arising under the relevant statute. (p. 423)

165. No power should be given to any tribunal to investigate where it "deems it expedient" or to any person to seize property where "he deems it expedient". (p. 423)

POWER TO STOP AND DETAIN

166. Discretionary powers to stop and detain should be abolished, except in cases involving public safety or public health. In all other cases they should be conditioned on reasonable grounds for belief that the statute in question is being violated. (p. 425)
167. Where the rights of stoppage and detention are given, the detention should not be "at the risk of the owner". (p. 425)

POWER TO SEARCH THE PERSON

168. Power to search the person ought not to be conferred under provincial law. (p. 426)

POWER TO REQUIRE WITNESSES TO TESTIFY

169. In no case should subpoenas be issued out of a court for the attendance of witnesses before tribunals that are not courts. (p. 430)
170. All notices to attend or summonses to witnesses to attend and give evidence before tribunals should be issued by the tribunals. (p. 438)
171. Where it is not intended that a proposed witness is to be liable to committal for non-attendance, the tribunal should be empowered to issue documents, for convenience called Notices to Attend, containing basic information such as the date, time and place for attendance, and the nature of the hearing. Where non-attendance is an offence for which the witness may be prosecuted, this should be clearly stated in the notice. (p. 430)
172. Where it is intended that the proposed witness should be liable to committal for failure to attend, the tribunal itself should be empowered to issue a document called "Summons to Witness" containing all necessary infor-

mation, such as the date, time and place of the hearing, and the fact that failure to obey would render the proposed witness liable to committal to prison on an application to the Supreme Court of Ontario. (pp. 430-31)

173. Investigating bodies should not have power to commit witnesses for disobedience of a summons. (p. 431)
174. No statute should state that the disobedience of a subpoena "shall be deemed a contempt of court". (p. 431)
175. The law of Ontario should be clarified to provide that all evidential privileges should be recognized by investigating tribunals. (p. 440)
176. Legislation governing investigations should contain a provision similar to section 25(4) of the Coroners Act which reads as follows:

"25. (4) A witness shall be deemed to have objected to answer any question upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown, or of any person, and the answer so given shall not be used or be receivable in evidence against him in any trial or other proceeding against him thereafter taking place, other than a prosecution for perjury in giving such evidence." (p. 440)
177. No statute providing for an investigation should impair any of the evidential privileges. (p. 440)
178. Provisions excluding the general law of privilege such as those in the former Securities Act, the Succession Duty Act, the Election Act and formerly in the Liquor Licence Act, wherever they appear, should be repealed. (p. 441)
179. Provisions of all statutes conferring power on tribunals other than courts to commit for contempt should be repealed. (p. 446)
180. The Public Inquiries Act should provide that the powers of compulsion now exercised by tribunals other than courts may be exercised only by the Supreme Court

on a summary application made on behalf of the tribunal or of anyone with a special interest in the matter under inquiry. (p. 446)

PROCEDURAL RIGHTS OF THOSE AFFECTED BY THE EXERCISE OF INVESTIGATING POWERS

181. A considerable discretion should rest with the persons conducting inquiries, but there should be some rules made by the Statutory Powers Rules Committee for the guidance of those concerned with inquiries. It should be clear that what is stated in the rules is not all-inclusive. (p. 451) (Some recommendations as to matters to be incorporated in the rules are set out in recommendations 182-184.)
182. Unless it would frustrate the purposes of the statute, any person substantially and directly interested in the subject matter of an inquiry should have:
 - (a) an opportunity to be heard on any relevant matter; and
 - (b) a right to cross-examine witnesses in respect of relevant matters. (p. 451)
183. Any person against whom allegations of misconduct have been made should have the right to be examined by his own counsel before he is examined by the Commission counsel. (p. 452)
184. Unless restrained by statute, an investigating officer should have a discretion:
 - (a) to hold an inquiry in private if in the circumstances it would be unjust to hold it in public; and
 - (b) to grant an adjournment to any person affected, enabling him to prepare a reply. (p. 452)

APPEALS FROM OR REVIEW OF DECISIONS OF INVESTIGATING OFFICERS

185. The right of appeal by way of stated case should remain in the Public Inquiries Act. (p. 457)

186. The powers of the appellate court should be more clearly defined. (p. 457)
187. Section 5(3) of the Public Inquiries Act should be amended to permit the commissioner to proceed with an inquiry with respect to matters that are not in issue in a stated case. (p. 457)

USE OF INFORMATION AND EVIDENCE OBTAINED ON STATUTORY INQUIRY

188. There should be a statutory prohibition on the communication of information obtained in a statutory investigation beyond the purposes of the relevant statute and the administration of justice. (p. 462)

THE PUBLIC INQUIRIES ACT

189. The Public Inquiries Act should be re-drafted, having regard to the recommendations made in Section 4 of Part I of this Report with respect to safeguards that should apply to all investigations. (p. 465)
190. The only formula that should be used in conferring powers of investigation similar to those exercised by a commissioner under the Public Inquiries Act should be—"the provisions of the Public Inquiries Act should apply (Parts I or II, if divided into two parts) to investigations under this Act"—or words to that effect. (p. 465)
191. This formula should be substituted for all other formulae defining powers of investigation, e.g., "powers that may be conferred upon a commissioner appointed under the Public Inquiries Act" (Department of Education Act); "in the same manner as a court of record in civil cases" (Labour Relations Act); "as is vested in any court in civil cases" (Mining Act); "In like manner as the Supreme Court may in civil cases" (Registry Act); "as is vested in the Supreme Court for the trial of actions" (Securities Act, 1966); "like powers as the Supreme Court" (Workmen's Compensation Act). (p. 465)

192. A section similar to section 13 of the Inquiries Act of Canada, but in more precise language, should be included in the Act. (p. 465)
193. Where the Public Inquiries Act is to apply to the exercise of a statutory power it should be so stated in the relevant statute. (p. 465)

CORONERS

194. A survey should be made to determine how many coroners are required in Ontario and in what areas they should be located. (p. 496)
195. All coroners should be appointed coroners for Ontario but resident in a particular area. When a coroner ceases to reside in the area to which he is appointed he should cease to be a coroner. (p. 496)
196. Political considerations ought not to enter into the appointment of coroners. (p. 496)
197. The duties of the Supervising Coroner should be expressly defined by statute and all coroners should be subject to his control. (p. 496)
198. If chief coroners are appointed for cities of 100,000 population and over, they should be subject to the control of the Supervising Coroner. (p. 496)
199. The purpose of a coroner's investigation should be defined either in the statute or by regulations. (p. 496)
200. Regulations should be formulated, placing limitations on the nature of the information that a coroner is permitted to give out prior to an inquest. (p. 497)
201. Inquests should normally be conducted by a coroner, but the Crown Attorney or anyone who claims to be affected by an inquest should have a right to apply to the Attorney General for an order appointing a magistrate or a commissioner or commissioners to conduct the inquest in place of the coroner. (p. 497)

202. The education and training of coroners should be intensified. (p. 497)
203. The statute or regulations should define the purpose of an inquest and the duties of the coroner and the jury. (p. 497)
204. Regulations should provide that persons who, in the opinion of the presiding officer, are substantially and directly interested, should have full right to appear by counsel and to call, examine and cross-examine witnesses, with discretion in the presiding officer to limit these rights where it appears they are vexatiously exercised or beyond what is reasonably necessary. (p. 497)
205. Inquests should be held in public, except where national security may be involved. (p. 497)
206. Coroners should be restrained from entering into public debate respecting matters that have been the subject of an inquest. But a coroner should not be restricted from advocating changes in the law. (p. 497)
207. A coroner should not have power to make orders affecting the liberty of the subject or impose penalties. (p. 497)
208. The recommendation which we have made with respect to the enforcement of orders issued in the conduct of public inquiries by application to the Supreme Court, should be adopted for coroners' inquests. (p. 497)

Part II

VOLUME 2

ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE IN THE PROVINCE

PROVINCIAL COURTS OTHER THAN THE SUPREME COURT OF ONTARIO

Justices of the Peace

209. The whole system pertaining to the office of justice of the peace should be reorganized. (p. 524)
210. An establishment of justices of the peace should be set up for each magisterial jurisdiction. (p. 524)
211. The appointment of all present justices of the peace in Ontario should be cancelled. Those qualified for the office should be reappointed. No more justices of the peace should be appointed in any case than are required to fill the necessary establishment. (p. 524)
212. Men and women should be appointed to the office without discrimination and qualification should be the only criterion for appointment. (p. 525)
213. All appointments should be to a magisterial jurisdiction, but a justice of the peace might be given duties beyond the magisterial jurisdiction. (p. 525)
214. The senior magistrate should have supervisory power over the justices of the peace of his jurisdiction. (p. 525)
215. Where a justice of the peace dies, or is absent from or unable to perform his duties for more than thirty days, the senior magistrate of the jurisdiction should be required to report the facts to the Attorney General. (p. 525)

216. All justices of the peace should be paid a salary based on the demands on their time as shown by a review of the duties they perform. (p. 525)
217. All justices of the peace should be required to take a prescribed course of training for the office and to attend prescribed refresher courses. (p. 525)
218. The justices of the peace should be allowed a meaningful share of the judicial work in each jurisdiction so as to relieve the magistrates of those duties which appropriately can be performed by well-trained justices of the peace. (p. 525)

Magistrates' Courts

219. All magistrates should be appointed to serve on a full-time basis. (p. 543)
220. All magistrates, except the Chief Magistrate for Ontario, should receive the same salary. (p. 543)
221. The office of deputy magistrate should be abolished. (p. 544)
222. For administrative purposes one magistrate in an area should be designated the senior magistrate. (p. 544)
223. The salaries of magistrates should be equal to those of county court judges. (p. 544)
224. Only those with qualifications sufficient to command such salaries should be appointed to be magistrates. (p. 544)
225. All magistrates should be qualified lawyers. (p. 544)
226. All magistrates should be provided with adequate staff. (p. 544)
227. All cases in the magistrates' courts should be prosecuted by qualified lawyers. (p. 544)
228. The practice of assessing costs in magistrates' courts should be abolished. (p. 544)
229. Where a magistrate has levied a fine in a jurisdiction of which the accused is not a resident, and default in payment of the fine has been made, the magistrate

should be empowered to issue a warrant of committal which upon being backed by a justice of the peace wherever the defaulter is found would authorize the governor of the gaol in that jurisdiction to receive him. (p. 544)

230. Adequate and proper accommodation should be provided for all magistrates' courts, separate and apart from the accommodation provided for the administration of police forces. (p. 544)
231. Provision should be made for an advisory judicial council on the appointment of magistrates, consisting of the Chief Justice of Ontario, the Chief Justice of the High Court, the Chief Judge of the County and District Courts, and the Treasurer of the Law Society of Upper Canada or his nominee. This council would advise the Attorney General on the appointment of magistrates. (p. 544)
232. The advisory judicial council should be authorized to receive complaints concerning the conduct of magistrates in the performance of their duties, and to make recommendations where warranted that an investigation be conducted, under the provisions of the Magistrates Act, to determine whether the magistrate involved should be removed from office. (p. 544)
233. Magistrates should not be permitted to accept extra-judicial employment for remuneration. (p. 544)

Juvenile and Family Courts

234. As far as it is within the legislative competence of the province, rules of procedure should be formulated for the guidance of juvenile and family court judges by a Rules Committee appointed for that purpose by the Lieutenant Governor in Council. The Committee should be composed of representatives of the juvenile and family court judges, social workers, the legal profession, the Attorney General, and the public. (p. 569)

235. The Province should assume the entire responsibility, financial and otherwise, for the administration of the juvenile and family courts. (p. 569)
236. The Province should be divided into juvenile and family court areas, irrespective of municipal boundaries, having regard for the convenience of the public only. (p. 569)
237. A full-time juvenile and family court judge should be appointed for each area. (p. 569)
238. Proper detention facilities should be provided for each juvenile and family court area. (p. 569)
239. A special training course should be established in at least one university to train students in all branches of the relevant law and social sciences to qualify them for appointment as juvenile and family court judges, after five years' service as probation officers in juvenile and family courts. (p. 570)
240. If sufficient qualified graduates are available, such qualifications should be a statutory requirement for the appointment of a juvenile and family court judge. (p. 570)
241. Juvenile and family court judges should be appointed to that office and that office alone. (p. 570)
242. There should be a central authority to organize, coordinate and supervise the staffing and administration of juvenile and family courts throughout the province so that they may operate as efficiently as possible and as conveniently as possible on a full-time basis. (p. 570)
243. The jurisdiction of magistrates should not be conferred on juvenile and family court judges. (p. 570)
244. The Attorney General, by his direction, should not be able to confer jurisdiction on juvenile and family court judges to try indictable offences with the election of the accused, or to hold preliminary hearings. (p. 570)

245. The procedural rules should not be the same for the trial of juveniles as for the determination of responsibility for maintenance, or the paternity of children. (p. 570)
246. There should not be power to send a child to an industrial training school for breach of a city by-law or a provincial statute. (p. 570)
247. The term "juvenile delinquent" should be abolished as far as it applies to provincial offences. (p. 570)
248. The limitation of \$20 per week maximum that a father may be ordered by a magistrate or juvenile court judge to pay for the maintenance of a child, should be removed. (p. 570)
249. A standard of salaries for juvenile and family court judges equal to those of magistrates should be established and maintained. (p. 570)

County and District Courts

250. The involuntary jurisdiction of the county and district courts should be raised to \$10,000 in personal injury cases, with the right to apply to a Supreme Court judge for an order transferring an action to the Supreme Court where it is made to appear that, by reason of the complexities of the law or facts, the action is one that should be tried in the Supreme Court. (p. 619)
251. As far as possible, without imposing restrictions on the right of the accused to be tried at the first court of competent jurisdiction, all jury trials of persons charged with the more serious indictable offences should be conducted in the Supreme Court. (p. 619)
252. The Province of Ontario should be divided into areas consisting of groupings of contiguous counties for the purpose of setting alternate dates for the sittings of the assizes and the General Sessions of the Peace within the respective areas. (p. 619)
253. Administrative arrangements should be made to alternate the jury sittings of the Supreme Court and the General Sessions of the Peace so that there would be a

minimum of delay between committal for trial and the actual trial of an accused. (p. 619)

254. Subject to recommendation 251, where an accused has been committed for trial, the trial should be proceeded with at the next sittings of an assize court or the General Sessions of the Peace in the area where the trial can most conveniently be held. (p. 619)
255. The administration of justice, particularly in criminal cases, should be reorganized so that the trial of cases will be prompt and expeditious. (p. 619)
256. An efficient, uniform, province-wide system should be set up to record the work of the courts in civil and criminal cases, showing:

In criminal cases

- (a) The date of arrest, or summons;
- (b) If in custody;
- (c) If on bail;
- (d) The date of committal for trial;
- (e) The election;
- (f) Bills preferred before the grand jury;
- (g) True bills found;
- (h) Date of arraignment and plea;
- (i) When the case is tried and the verdict;
- (j) Sentence.

In civil cases

- (a) Jury cases entered for trial;
 - (b) Non-jury cases entered for trial;
 - (c) Jury trials held;
 - (d) Non-jury trials. (p. 620)
257. Monthly reports should be made to the Attorney General showing the progress of the work of all courts. The form of the report should make it imperative to set out the number of civil and criminal cases that have been awaiting trial for one, two, three, four, or five months, etc., as the case may be. (p. 620)

258. The records and reports should be open for inspection by members of the press and public at all reasonable times. (p. 620)

The Division Courts

259. No change should be made concerning the informality of proceedings in the division courts. (p. 644)
260. The Province should assume the financial and administrative responsibility for the operation of the division courts and they should be completely reorganized. (p. 644)
261. In all counties the division courts should be combined into one court, and for administrative purposes the division court should be brought under the county court system. (p. 644)
262. The offices of the division court ought not to be operated in connection with any other employment. (p. 644)
263. In less populous areas the county court clerk should perform the duties of the division court clerk. In the more densely populated areas there should be a deputy or assistant county court clerk, or a division court clerk attached to the county court clerk's office, to perform the duties of the division court clerk. (p. 644)
264. The bailiff's duties should be performed by the sheriff of the county and his staff. (p. 645)
265. Payment of officers on the fee system should be abolished. (p. 645)
266. All division court officers should be government servants paid on a salary. (p. 645)
267. The division court jury fee should be abolished. (p. 645)
268. Jury trials in the division court should be abolished. (p. 645)
269. The practice of appointing practicing members of the bar to be *ad hoc* judges of the division court should be discontinued. (p. 645)

270. Full-time division court judges should be appointed in York County to relieve county court judges of most of the division court work, and in other populous areas full-time division court judges should be appointed to try division court cases in contiguous counties. In less populated areas the county court judge should continue to be the division court judge. (p. 645)
271. The following powers of committal to jail for contempt should be abolished:
- (a) Committal for wilful default under an order of a judge to pay a judgment debt;
 - (b) Committal where it appears to the judge that the judgment debtor obtained credit from the judgment creditor, or incurred the debt or liability under false pretences, or by means of fraud or breach of trust;
 - (c) Committal where it appears to the judge that the judgment debtor "has made or caused to be made any gift delivery or transfer of property or has removed or concealed any property with intent to defraud his creditors. . . ." (p. 645)
272. Power to commit for failure to obey a summons or to be sworn, or for disturbing the process of the court, should remain. (p. 645)
273. The confusion in the Division Courts Act relating to execution should be resolved by devising a simple procedure whereby a judgment creditor can obtain a single writ of execution against the lands, goods and chattels of the judgment debtor, which writ may be filed with and executed by the sheriff of any county or district in Ontario. (pp. 645-46)
274. The Division Courts Act, section 116, which provides that unless the judgment creditor consents to an extension of time, "the issue of execution shall not be postponed for more than 50 days from the service of the summons", should be repealed. (p. 646)

275. Provision should be made for service of documents by registered post in proper cases, or through local service officers on payment of a service fee by the sheriff. (p. 646)
276. The tariff of fees and disbursements to be paid by litigants should be laid down by regulation. (p. 646)

THE SUPREME COURT OF ONTARIO

Trial Courts: High Court of Justice for Ontario

277. The trial case load of the High Court of Justice for Ontario should be redistributed in accordance with the recommendations made with respect to the jurisdiction of the county and district courts. (p. 652)
278. No change should be made in the circuit system of trial hearings of the High Court. (pp. 652-53)
279. The appellate functions of the High Court and the exercise of its powers of judicial review should be reorganized in accordance with recommendations 287 to 297. (p. 651)

Appellate Courts

280. A comprehensive reorganization of the appellate jurisdiction of the courts should be undertaken. (p. 669)
281. The reorganization should be undertaken not only with a view to the immediate and urgent necessities of the present, but particularly to meet the needs of the future as the population and economy of the Province grow. (p. 669)
282. All appeals to the highest court of appeal in the Province should be heard by at least five judges. (p. 669)
283. Rights of appeal should be enlarged rather than curtailed, and the method of appeal should be simplified. (p. 669)
284. There should not be any addition to the number of judges of the Court of Appeal, but there should be a court to exercise an appellate jurisdiction inferior to that of the Court of Appeal. (p. 669)

285. The primary objective should be to reduce the expense and delay in getting a decision by more than one judge in the matter under review. (p. 669)
286. No alteration should be made in appeals that lie to the county and district court judges, except where the decision of the tribunal vitally affects rights, or substantial amounts of money are involved. In such cases an appeal should lie to the Supreme Court of Ontario. (p. 669)
287. With the exception of appeals that should lie to the county and district court judges, and of some minor interlocutory appeals from the Master of the Supreme Court, all applications to the Supreme Court in the nature of appeals and judicial review should be heard by a court of at least three judges at the initial hearing. (p. 670)
288. An Appellate Division of the High Court of Justice for Ontario should be constituted on the model of the English system, but with an extended jurisdiction. (p. 670)
289. The Appellate Division of the High Court of Justice should be required to sit with a quorum of an uneven number, not fewer than three and not more than five judges. (p. 670)
290. The Appellate Division of the High Court should be presided over by the Chief Justice of the High Court for Ontario. (p. 670)
291. The Chief Justice of the High Court should assign members to the court from time to time, having regard for their experience and expertise particularly with regard to administrative law. (p. 670)
292. The jurisdiction of the Appellate Division of the High Court and the Court of Appeal should be defined by statute on definite principles. (p. 670)
293. The procedure on appeals should be left to the Rules Committee as presently constituted under the Judicature Act. (p. 670)

294. If the Attorney General wishes an advisory committee with which to consult prior to his recommending legislation which would define the jurisdiction of the courts, such a committee should be constituted on an *ad hoc* basis and without legislative power. (p. 670)
295. The Appellate Division of the High Court of Justice should hear:
- (a) All applications for judicial review in the first instance;
 - (b) All appeals by way of stated case, including those from administrative tribunals;
 - (c) All appeals from administrative tribunals, including self-governing bodies, except from the Lands Tribunal;
 - (d) All appeals from judgments of judges of the county and district courts and surrogate courts exercising a compulsory jurisdiction, as *persona designata* and in their capacity as judges of the court, but not including matters heard while exercising the optional jurisdiction of the Supreme Court;
 - (e) All division court appeals;
 - (f) All appeals from the Master of the Supreme Court, except decisions in minor interlocutory matters;
 - (g) All *habeas corpus* matters now conferred on the Court of Appeal under the Habeas Corpus Act, section 8, with further appeal to the Court of Appeal as of right by the person remanded into custody. (pp. 670-71)
296. Procedure on appeal to the Appellate Division of the High Court should be by way of a summary notice of motion, except where the appeal is from a judge at trial. (p. 671)
297. There should not be monthly lists for the Appellate Division of the High Court, but a running list to which cases can be added from day to day. (p. 671)

298. Appeals should lie to the Court of Appeal from decisions of the Appellate Division of the High Court of Justice, with leave of the Court of Appeal. (p. 671)
- (As to appeals in summary conviction matters involving the construction of the B.N.A. Act, or any other statute see recommendation 345.)
299. Appeals should lie to the Court of Appeal from:
- (a) All final judgments of judges of the High Court of Justice;
 - (b) All final judgments of the surrogate courts and county and district courts where the judgment is one that would be within the alternative jurisdiction of the Supreme Court;
 - (c) The Lands Tribunal;
 - (d) Judgments of the Appellate Division of the High Court, with leave of the Court of Appeal, where in the opinion of the Court of Appeal important questions of law are involved and in *habeas corpus* matters. (p. 671)

EXTRA-JUDICIAL EMPLOYMENT OF JUDICIAL PERSONNEL

300. As far as possible the regular judicial duties of judges should not be interfered with by their appointment to extra-judicial duties. (p. 721)
301. A judge of the Court of Appeal, the High Court of Justice, or a county or district court, should not be asked to perform extra-judicial duties without first getting the approval of the Chief Justice of Ontario, the Chief Justice of the High Court, or the Chief Judge of the County and District Courts respectively. (p. 721)
302. Where judges are asked to perform extra-judicial duties, the provisions of the Judges Act should be strictly observed. No judge should be paid or permitted to receive remuneration other than the statutory salary and allowances provided for judges. (p. 721)

303. The Extra-Judicial Services Act, the County Judges Act and the Surrogate Courts Act should be amended to conform to the provisions of the Judges Act. (p. 722)

THE MACHINERY OF JUSTICE AND THE INDIVIDUAL

Power of Arrest

304. In no case should power to create offences for which a person may be arrested without a warrant be delegated to the Lieutenant Governor in Council, a minister or any other body. (p. 741)
305. Powers to arrest without a warrant under the Highway Traffic Act should be restricted to those cases where there is a failure on the part of a driver of a motor vehicle to identify himself and the owner of the vehicle, without reasonable cause being shown, and where the driver has no legal right to have the motor vehicle on the highway. (p. 741)
306. There should be no power to arrest without a warrant under the Liquor Control Act, except where a peace officer finds a person committing an offence and that person refuses to give his name and address, or where there are reasonable grounds to believe that the person will not be found at the address given, or in the case of drunkenness, where it is necessary to protect the person from injury or injuring others. (p. 741)
307. A system should be devised whereby persons resident outside of Ontario should have the opportunity to pay money to a peace officer as security for their attendance in court, this sum to be applied to any fine that may be levied when the case comes before the court. This procedure should apply only to offences under the Highway Traffic Act, the Liquor Control Act and the Game and Fish Act. In such cases a precise statement should be sent to the accused to show how the money has been applied. (p. 742)

308. Warrants should not be issued for offences under the provincial law, except where it can be shown that the accused is in hiding or cannot be found. (p. 742)
309. Where a warrant is applied for, the information should clearly state the grounds on which it is believed that a summons will not be effective. (p. 742)
310. A warrant should never be issued, unless it is shown that a summons would not likely be effective. (p. 742)

Bail Procedure

BEFORE ARRAIGNMENT

Arrest for Provincial Offences

311. Police officers should be authorized by legislation in proper form to release arrested persons upon service upon them of a notice to appear in answer to the charge for which they have been arrested. (p. 750)
312. Arrested persons should be released on their own recognizance, where bail is thought necessary, unless it can be clearly demonstrated that injury to the accused person or other persons will likely follow. (p. 750)
313. Sureties and the deposit of money as security for the appearance of the accused should only be required in exceptional cases. (p. 750)
314. Arrested persons should be permitted to pledge their own real property as security, or real property in which they have an interest, without legalistic technicalities being observed. (p. 750)
315. It should be made an offence to fail to appear in response to a notice to appear, or pursuant to a recognizance. (p. 750)

Arrest for Offences Under Criminal Code

316. A complete reorganization of the disposition of justices of the peace and the allocation of duties should be undertaken so that there will be a minimum of delay in securing bail pending arraignment. (p. 750)

317. Legalistic technicality in the approval of property bail should be abandoned. Hundreds should not be made to suffer because of the risk of an occasional fraud. (p. 750)
318. Representations should be made to the Federal Government to adopt the procedure we recommend in Chapter 48 for release by police officers of those charged with minor offences, upon service of a notice to appear for trial. (pp. 750-51)
319. Failure to appear pursuant to a notice, as recommended in the preceding recommendation, should be included as an offence under section 125 of the Criminal Code. (p. 751)

ON ARRAIGNMENT

320. More careful consideration should be given in fixing bail on arraignment and its amount than is now given to it. (p. 754)

ON COMMITTAL

321. Where there is little likelihood that the accused will not appear to stand his trial, the requirements of bail should be kept to a minimum. (p. 754)

ON APPEAL FROM CONVICTION

322. A system should be established under which every appeal from a conviction on indictment should be investigated by the Attorney General to determine whether the convicted person ought not to be admitted to bail pending the hearing of the appeal. (p. 754)
323. The Summary Convictions Act should be amended to permit an appeal from all convictions for offences under Ontario statutes, upon the mere serving and filing of a notice of appeal without any sureties for payment of monetary sums or costs. (p. 754)
324. In those cases where imprisonment is imposed for a provincial offence, without the option of a fine, provision should be made for release on bail without sureties pending the hearing of an appeal unless the need for sureties has been clearly demonstrated. No bond for security for costs should be required. (p. 754)

325. Simple and expeditious rules of procedure for appeal from conviction for provincial offences should be devised so that an appeal will not fail by reason of some procedural defect in the proceedings taken. (p. 754)

Publication of Proceedings Before Trial

326. There should be no further restriction provided by law on the reporting of proceedings at preliminary inquiries. (p. 769)
327. Where an application is made by an accused person for a change of venue on the ground that the accused cannot get a fair trial in the locality where the charge is laid, the Attorney General ought not to oppose the application if it is based on reasonable grounds. (p. 769)
328. The Attorney General should act promptly to prosecute for breaches of the law respecting contempt of court, and not leave the initiation of prosecutions to the individuals affected or to the court. (p. 769)
329. Departmental rules should be laid down for the guidance of police officers and others in authority, restraining them from giving interviews for publication that may tend to interfere with the course of justice. (p. 769)
330. A self-governing council should be established in Ontario to control and discipline the press and other news media with respect to the publication of news and comment that may tend to prejudice the fair trial of an accused should a charge later be laid, unless it is shown that the publication is in the public interest. (p. 769)

The Grand Jury

331. If the Supreme Court is given power to review the sufficiency of the evidence on a committal for trial on *certiorari* the grand jury system should be abolished. (p. 782)
332. Provision should be made that another body, or an official, should perform the functions of the grand jury of inspecting public or semi-public institutions. (p. 781)

333. The sheriff should be made responsible for performing the functions of the grand jury with respect to general gaol delivery. (p. 781)
334. Regardless of whether or not the grand jury is abolished, the Supreme Court should be given wider powers to review on *certiorari* the sufficiency of the evidence to support a committal for trial. (p. 782)

Appeals From Convictions For Offences Against the Provincial Law

335. The Summary Convictions Act should be amended to give effect to recommendations 336 to 343, inclusive. (p. 793)
336. A person convicted of a provincial offence should be permitted to appeal by way of stated case, without giving security for the penalty imposed or for the fees and costs incurred or which may be incurred in the appeal. (p. 793)
337. The liability of an unsuccessful appellant to pay costs to the Crown on an appeal by way of stated case should be abolished. (p. 793)
338. A person convicted of a provincial offence should be permitted to appeal to the county or district court without giving security for the penalty imposed, the costs incurred or the costs of the appeal. (p. 793)
339. Simple rules of procedure for an appeal from a conviction for a provincial offence should be established which should be procedural only and should not go to the jurisdiction of the appeal court. (p. 793)
340. The appeal court should have jurisdiction to extend the time for appealing. (p. 793)
341. The appeal court should have a discretion to allow an amendment of the proceedings, as long as there would be no substantial prejudice to the parties involved. The appeal court should not have power to amend the charge so as to substitute another offence for the offence charged. (p. 793)

342. The liability of an unsuccessful appellant to pay the costs of the Crown on an appeal should be abolished. (p. 793)
343. The appeal should be on the record, with power in the court to hear further and other evidence where it considers that it is in the interest of justice in the case to do so. The right to call further evidence on the appeal should not be restricted to those cases where it must be demonstrated to the satisfaction of the court that the evidence sought to be produced was unknown and not available at the trial. (p. 793)
344. The right of appeal by the Crown by way of stated case, or to the county or district court from an acquittal for a provincial offence, should be abolished except in cases involving the construction of the B.N.A. Act or any other statute. (pp. 793-94)
345. The Attorney General should have the right to appeal directly to the Court of Appeal, upon obtaining the leave of that court, on a question of law involving the construction of the B.N.A. Act or any other statute where the accused has been acquitted of a provincial offence by a magistrate, justice of the peace, a county or district court judge, or by the order of a Supreme Court judge upon a stated case. (p. 794)
346. On appeals under the preceding recommendation, the accused should not be required to pay the costs of the appeal in any case and in granting leave the Court of Appeal should have the power to impose terms upon the Attorney General to pay the costs of the respondent. (p. 794)

Court Reporting

347. The court reporting system should be brought completely under the control of the Attorney General. (p. 811)
348. There should be a Director of court reporters for the Province. (p. 811)

349. A planned system of educating and training court reporters should be established under the direction of the Director who should set standards of qualifications. (p. 811)
350. Candidates for appointment should be required to pass examinations and to meet fixed standards. (p. 811)
351. Where there is evidence that a court reporter is not maintaining proper standards of work, he should be required to sit for re-examination. (p. 811)
352. Adequate remuneration should be provided for all court reporters. (p. 811)
353. A hierarchy of court reporters should be established, with opportunities for advancement and promotion from one category to another. (p. 811)
354. One of the functions of the Director of court reporters should be to assist in the development of good court reporters by providing refresher courses and educational assistance. (p. 812)
355. Provision should be made that, upon adequate cause being shown, court reporters may be disciplined, or in proper cases their services terminated. (p. 812)
356. A code of ethics should be prescribed so that reporters may know what standards are required of them. (p. 812)
357. Provisions should be made for the relief of court reporters who, by reason of the pressure of court sittings, may be unreasonably delayed in getting out transcripts that have been ordered. (p. 812)
358. Transcripts for criminal proceedings should have precedence. (p. 812)
359. The giving and receipt of premiums or inducements to give precedence in the preparation of transcripts should be expressly prohibited. (p. 812)
360. A special statute should be passed making proper provision for court reporters, as has been done in New Brunswick and Nova Scotia. (p. 812)

Privileged Communications

361. No changes should be made in the law concerning privileged communications. (p. 832)
362. Section 143 of the Highway Traffic Act should be repealed. (p. 832)
363. Any compulsion to make statements imposed on those involved in highway traffic accidents should go no further than to require them to report the accident and give the names of persons involved and known witnesses, together with a statement of injury sustained, if any. (p. 832)
364. All other statements concerning the accident should be on a voluntary basis, open to inspection and admissible in any proceedings according to the relevant laws of evidence. (p. 832)
365. The names of witnesses and statements made by them should likewise be open to inspection, and there should be no special statutory restraint on their admissibility in evidence in any proceedings. (p. 832)

Reimbursement of Innocent Persons Suffering Wrongful Convictions

366. Statutory authority should be conferred on the Lieutenant Governor in Council to make *ex gratia* payments of compensation on the recommendation of an *ad hoc* tribunal consisting of judges of the Supreme Court of Ontario appointed from time to time to consider cases where it is claimed that a person has been imprisoned and that his innocence can be clearly established. (p. 844)

Compensation for Victims of Crime

367. Persons who sustain injury or property damage while engaged in assisting peace officers in arresting any person or in preserving the peace, should be given a legal right to be compensated by the Province. (p. 854)

368. Persons who sustain injury or property damage while exercising their legal rights to effect an arrest or preserve the peace should be given a legal right to compensation by the Province. (p. 854)
369. Such rights to compensation should extend to dependants. (p. 854)
370. Where the right to compensation or the amount of compensation cannot be settled by negotiation, the claimant should have a right of action in the courts against the Province. (p. 854)

Compensation for Jurors and Witnesses

371. All witnesses other than qualified experts should be paid at the rate of at least \$15 per day, with proper travelling and accommodation allowances. (p. 863)
372. There ought to be a statutory obligation on statutory tribunals to pay witness fees for all witnesses summonsed at the instance of a tribunal. (p. 863)
373. Where witnesses are summonsed at the instance of a party to a cause before a tribunal, they should be entitled to be paid witness fees by the party requiring them to be summonsed. (p. 863)
374. Where costs are awarded against an opposite party, the tribunal hearing the matter should have power to disallow, as part of the costs, fees for witnesses unnecessarily called. (p. 863)
375. The scale of witness fees should be the same for all courts and tribunals. (p. 864)
376. The provincial government should assume the entire responsibility for jury fees and allowances. (p. 864)
377. Jury fees should be raised to provide adequate compensation for wage-earners requested to render jury service. (p. 864)

378. Juries for the trial of civil cases, other than those arising out of defamation, should be abolished. (p. 864)

FUTURE FINANCIAL RESPONSIBILITY FOR THE MACHINERY OF JUSTICE IN THE PROVINCE

379. The Province of Ontario should assume the entire financial responsibility for the machinery of justice, including the provision and maintenance of all necessary facilities and the appointment and remuneration of all persons necessary to administer justice, with the exception of the members of municipal police forces and those officials appointed by the Federal Government. (p. 927)
380. No person convicted for an offence should be required to subsidize the expense of his trial by having costs thereof levied against him. (p. 927)
381. All fines imposed as penalties for the contravention of any statute (except the fines that are payable to the Federal Government) should be wholly paid over to the Province of Ontario. (p. 928)
382. No person, acting either as informer or prosecutor or in any other capacity, should be entitled to any share or proportion of any fine levied. (p. 928)
383. The practice of municipal solicitors, by-law enforcement officers and others acting as prosecuting attorneys upon trials for violations of municipal by-laws, or upon private prosecutions, should be revised, and all prosecutions should be conducted by crown attorneys or under their supervision. It may not be practical for crown attorneys to attend at all trials for minor offences, but they should have supervision over all prosecutions. (p. 928)
384. The Province should, by agreement, make financial adjustments with those municipalities that have provided suitable facilities for the administration of justice. (p. 928)

385. The Province should enter into whatever financial arrangement may prove practicable with the Government of Canada, whereby the Government of Canada would pay to the Province a proportion of the costs to the Province of administering the laws of Canada in the provincial courts, in cases where fines or penalties imposed are paid to the Government of Canada. (p. 928)

THE ROLE OF THE ATTORNEY GENERAL IN GOVERNMENT

Crown Attorneys

386. Crown attorneys should not be permitted to collect fees. They should all be paid a definite salary. (p. 955)
387. The salaries of crown attorneys should be increased, relative to the authority and responsibility of the office. (p. 955)
388. The Province should be divided into districts with a Senior Crown Attorney appointed for each district who would be responsible, under the Senior Crown Attorney for the Province, to the Director of Public Prosecutions. (p. 955)

Supervisory Responsibility for Legislation

389. The preparation of all legislation should be supervised by a legislative branch of the Attorney General's Department. (p. 955)
390. Strict procedure should be adopted for the preparation of legislative bills. While the departmental minister should be responsible for the social policy of all bills, it should be clearly recognized that the Attorney General is constitutionally responsible for the legal policy of all bills. (p. 955)
391. When a department proposes new legislation, a memorandum embodying the principles of legislation should be submitted for approval to the Cabinet so that the government's policy may be determined before the drafting begins. (p. 955)

392. When government policy has been determined, the preparation of the draft bill should be undertaken by the legislative branch, under the control and supervision of the Attorney General. The drafting of the bill should be undertaken as early as possible. It should be carried on by the draftsman assigned by the legislative branch of the Attorney General in consultation with the administrative officials and the legal officer of the department concerned. Instructions on specific questions as to the social policy of the statute should come from the officers of the department concerned, subject to the control and direction of the minister; but the Attorney General should control and direct the general legal policy to be applied in the preparation of the draft bill. (p. 956)

Reorganization of Legal Services

393. The legal services of the government should be reorganized so that all legal services come under the direction of the Attorney General. (p. 956)
394. Legal officers in departments should have training in the Attorney General's Department. (p. 956)

Attorney General Act

395. There should be an Attorney General Act expressly defining the functions and role of the Attorney General in government and requiring him to submit an annual report to the Legislature. (p. 956)
396. Statutory provision should be made that the Attorney General must be a member of the Bar of Ontario. (p. 956)

Part III

VOLUME 3

SAFEGUARDS AGAINST UNJUSTIFIED EXERCISE OF CERTAIN SPECIAL POWERS

EXPROPRIATION PROCEDURE

Powers of Expropriation

397. The right of an owner whose property has been expropriated, to be paid compensation, should be secured in the Constitution. (p. 1083)
398. The Legislature should not confer the power of expropriation on any body or person unless it is clear that the power is inescapably necessary in the interest of good government, and that there are adequate controls over its exercise. (p. 1083)
399. There should be a complete review of all of the powers of expropriation with a view to determining the purpose and necessity of each one and the adequacy of statutory safeguards controlling their exercise. (p. 1083)
400. The less responsible to public opinion the particular body may be, the more reluctance there should be in conferring a power of expropriation on it. (p. 1083)
401. Where the power of expropriation is conferred on any body, the identity of the person or body who may exercise the power should be stated clearly in the legislation. (p. 1083)
402. Where the Legislature has decided to encroach on civil rights by creating a new power of expropriation, it should do so in clear and unambiguous language that expresses the intention in readily recognizable form.

The direct and proper way to do this is to use the verb "expropriate" in the operative statutory provision. (p. 1083)

403. Where the Legislature has decided to confer on any body the powers of expropriation, it should know and state in clear and precise language the purpose for which it is conferring the power. (p. 1083)

Control of Powers of Expropriation

404. An approval system should be provided to control final decisions to expropriate. (p. 1084)
405. Except in unusual circumstances before final approval is given to the expropriation, persons affected by a proposed expropriation should be given an opportunity to be heard at a formal inquiry. In unusual circumstances, the Lieutenant Governor in Council should have power to permit the expropriating authority to proceed after proper approval without following the inquiry procedure. (p. 1084)
406. The basic principle which should dictate the selection of the approving authority is that the approving authority should be in a position to accept clear political responsibility for the expropriation decision finally made. (p. 1084)
407. Generally, the Minister who is charged with the administration of a statute should control and be responsible for and approve of expropriations made under that statute. (p. 1084)
408. The recommended inquiry-approval procedure should apply to municipalities. A municipality should be its own approving authority, except where the power to expropriate land is exercised for a purpose other than the purposes of the municipal body—such as the disposal of the land expropriated to private persons or bodies for their own purposes. In such cases the exercise of the power of expropriation should be approved by the Minister of Municipal Affairs. (p. 1084)

409. An expropriation under the Public Works Act for the benefit of a department, other than the Department of Public Works, should be subject to the approval of the minister of the relevant department and not the Minister of Public Works. (p. 1084)
410. Expropriations by the Municipality of Metropolitan Toronto should be approved by that body in the same manner as expropriations by other municipalities, and not by the Minister of Municipal Affairs. (p. 1084)
411. Expropriations by all school boards should be subject to the approval of the Minister of Education. (p. 1084)
412. The inquiry officers in the recommended inquiry-approval procedure should be appointed by the Attorney General on a permanent or *ad hoc* basis. (p. 1085)
413. The statutory inquiry procedure in the United Kingdom, which is followed prior to compulsory purchases, is a useful guide to be followed in establishing the procedure in Ontario. (p. 1085)

Procedure for Inquiry and Approval

414. The expropriating authority should give adequate notice of its intention to expropriate to all persons affected. (p. 1085)
415. If the person or persons affected desire to exercise their right to a hearing, they should so advise the approving authority within a stated time. (p. 1085)
416. If no persons notify the approving authority that they desire a hearing, then that body may authorize the proposed expropriation to proceed. If any affected person or persons notify the approving authority that they desire to be heard, then it should appoint a date, time and place for an inquiry and so notify all interested parties. The Attorney General should appoint the inquiry officer. (p. 1085)
417. Prior to the hearing, the expropriating authority should deliver to all interested parties a notice indicating the grounds upon which it intends to rely at the hearing, together with a list of any documents (including maps

- and plans) which the authority intends to use at the hearing. (p. 1085)
418. The parties at the hearing should be entitled to present their own cases or to be represented by members of the legal profession or laymen. (p. 1085)
 419. The expropriating authority should present its case first and have a right of reply following the case for the objectors. Cross-examination of witnesses should be allowed. The ordinary rules of evidence should not apply. The main criterion for the admissibility of evidence should be its relevance. Hearsay evidence should be admitted if, in the opinion of the inquiry officer, it may have probative value. (pp. 1085-86)
 420. The merits of the expropriating authority's general policy should not be considered relevant, but alternative routes or sites should be relevant. The soundness, fairness and necessity of taking the particular piece of land described in the proposed expropriation plan, should be the main issue at the inquiry. (p. 1086)
 421. The inquiry officer should have the right to inspect the site of the proposed expropriation, either in the presence of the parties or alone. (p. 1086)
 422. Following the presentation of the evidence, all parties to the proceeding should be entitled to present argument to the inquiry officer. (p. 1086)
 423. The report of the inquiry officer should contain a summary of the evidence and arguments advanced by the contending parties, the inquiry officer's findings of fact, and his opinion on the merits of the application with reasons therefor. (p. 1086)
 424. After receipt of the report, the approving authority should consider it and decide to authorize (with or without modification), or not to authorize the proposed expropriation, giving written reasons for its decision. No modification should extend the expropriation to land which was not included in the original plan of expropriation, unless the parties affected consent. (p. 1086)

425. A time limitation should be fixed within which expropriation proceedings may be challenged. The provision for the time limitation should contain safeguards concerning the rights of persons affected who have had no notice of the proceedings, and the rights of all parties where the expropriating authority has acted without statutory authority. (p. 1086)
426. An application to set aside or quash an expropriation should be made to the Appellate Division of the High Court of Justice for Ontario which we recommend in Chapter 44. (p. 1086)
427. Where the recommended inquiry approval procedure is followed, the owner should have the right to elect whether the compensation should be fixed as of the date that the notice of the hearing before the inquiry officer is served, or as of the date of the registration of the plan, or the date that the notice of expropriation is served, or as of the date on which possession is given. (p. 1087)
428. The expropriation plan should be registered within a stipulated period after approval has been given, or, where leave is granted to proceed without the inquiry procedure, within a stipulated period after leave is granted, on pain of having either the expropriation lapse or of being liable to pay compensation by reason of the delay, or both. The period of six months from the date of the order authorizing the expropriation provided for by section 1a (7) of the Expropriation Procedures Act is much too long. (p. 1087)
429. The phrase "where an expropriating authority has exercised its statutory powers to expropriate land", used in section 4(1) of the Expropriation Procedures Act, should be clarified. (p. 1087)
430. Provision should be made for compensation in proper cases for repairs or improvements to expropriated property between the date of the expropriation and the date of the service of the notice under section 5(1) of the Act. (p. 1087)

431. The owner-occupant of the expropriated land should be served with the notice of the expropriation under section 5 (1) of the Expropriation Procedures Act within a time less than the sixty day period provided for in that section. This service could be made first and the remaining services made thereafter. (p. 1087)
432. The notice of expropriation, Form 1, should be amended to include:
 - (a) A statement that the owner has the right to invoke the negotiation procedure set out in section 9a of the Expropriation Procedures Act, and that he must do so before proceeding to arbitration unless the parties otherwise agree;
 - (b) A statement that the owner may consult a solicitor to advise him as to his legal rights, and that the expropriating authority will pay the preliminary costs of the solicitor fixed according to a prescribed tariff. (pp. 1087-88)
433. The offer of compensation under section 8 of the Expropriation Procedures Act in most cases should be made much earlier than six months after the date of registration of the plan. (p. 1088)
434. Provision should be made for such additional personnel for the Board of Negotiation as may be necessary to satisfy future needs. (p. 1088)
435. The expropriating authority should be required to take possession of the land, with all the attendant liabilities, on the date fixed for giving possession in the notice under section 19 (1) of the Expropriation Procedures Act, or on a date fixed by the judge. (p. 1088)
436. The expropriating authority, subject to "an adjustment of the date" under section 19 (3), should be required to give a minimum of three months' notice of possession under section 19 (1) of the Expropriation Procedures Act. (p. 1088)

437. The notice of possession under section 19(1) of the Expropriation Procedures Act should contain a statement of the options available to the owner—specifically, that he has the right to apply to the judge for an order extending the time, and that the expropriating authority has a corresponding right to apply for a reduction of the time specified in the notice. (p. 1088)
438. The full amount of compensation as estimated by the expropriating authority should be offered to the owner as a condition precedent to the obtaining of possession. (p. 1088)
439. The payment of fees and expenses to the arbitrator by the parties to the arbitration in expropriation proceedings should be abolished. (p. 1088)

A Lands Tribunal

440. A Lands Tribunal, similar to the Lands Tribunal in England, should be established with jurisdiction to determine compensation in all cases where the power of expropriation is exercised, and in those cases where statutory powers to acquire rights over land are exercised. (pp. 1088-89)
441. The recommended Lands Tribunal should determine compensation for expropriations under the Ontario Energy Board Act, 1964. (p. 1089)
442. Arbitrations should be heard by at least three members, one of whom should be a chairman or vice-chairman (who should be a qualified lawyer), except where the amount claimed is less than \$1,000.00, in which case the arbitration might be conducted by one member. (p. 1089)
443. There should be a right of appeal from the decision of the proposed Lands Tribunal to the Court of Appeal on all questions of law and fact. (p. 1089)
444. The government should make available a series of published reports of reasons for awards by the Lands Tribunal. (p. 1089)

445. There should be uniformity of procedure to govern both the pre-hearing stage and the hearing stage of arbitration proceedings. (p. 1089)
446. Specific rules should be drawn governing the procedure for the recommended Lands Tribunal. (p. 1089)

Arbitration Procedure

447. The Expropriation Procedures Act should expressly provide that a notice of arbitration is to be served where the parties agree to forego negotiation proceedings. (p. 1089)
448. The claimant should set forth in his notice of arbitration, or in his reply to a notice served by the expropriating authority, a simple statement of the nature of his claim. The tribunal should be empowered in proper cases to order further particulars. In proper cases, the expropriating authority should be required, at the risk of costs, to admit or deny elements of compensation claimed. (p. 1089)
449. The parties to expropriation proceedings should be required to produce to the parties adverse in interest, copies of the following documents relating to the evidence to be given by expert witnesses:
- (a) Plans and valuations of the land which is the subject of the proceedings, including particulars and computations in support of such valuations, which it is proposed to put in evidence;
 - (b) A statement of any plans, prices, costs, or other particulars, relating to properties other than the land in question which are proposed to be given in evidence, or a statement that no such plans, prices, costs or particulars will be relied upon. (p. 1090)
450. The adoption of provisions similar to those contained in Rule 42 (6) of the Lands Tribunal Rules in England which enable the Tribunal to adjourn the hearing on such terms as to costs or otherwise as it thinks fit where plans, valuations or particulars, which appear to the Tribunal not to have been sent to the Registrar, are sought to be relied upon at the hearing. (p. 1090)

451. Any party to the proceedings should have a right to apply to the Registrar of the Tribunal for an order for production and inspection of any documents (other than privileged communications) which the Registrar may deem properly producible and relevant to the issues involved in the arbitration. (p. 1090)
452. The Registrar of the proposed Lands Tribunal should have the power to order examinations for discovery to be held in special cases where an examination is shown to be necessary. (p. 1090)
453. Interlocutory applications in arbitration proceedings should be kept to a minimum and should be heard by a legally qualified member of the Lands Tribunal, or the Registrar of the Tribunal if he is legally qualified. (p. 1090)
454. At the hearing the claimant should present his case first. (p. 1090)
455. The Tribunal should be empowered to take a view of the expropriated property and to consider what it sees as relevant evidence adduced in the case. (p. 1091)
456. There should be no onus of proof, in so far as it relates to the proof of market value, placed on either party to the arbitration proceedings. The onus of proof of items of special value or consequential damage should be on the owner. (p. 1091)
457. Until there is in Ontario a sufficient number of qualified appraisers, two experts should be permitted to give evidence without special leave. (p. 1091)
458. The Expropriation Procedures Act should be amended to make provision for a stated case on a question of law to the Court of Appeal in all expropriation arbitrations. (p. 1091)
459. The legislation should contain a specific requirement that written reasons for decisions be given in all cases. (p. 1091)

460. The legislation should expressly provide for the proper reporting of proceedings by a fully qualified court reporter. (p. 1091)
461. The rights of the parties to appeal from a decision of the Lands Tribunal should be well defined. The following should be expressly provided for in the Expropriation Procedures Act. The appeal should lie on both questions of law and fact. The Court of Appeal should have power to refer the matter back to the tribunal or to give any judgment or make any order that the arbitration tribunal could have made. The Court of Appeal should be clothed with power to exercise the same power that it exercises on any appeal from a judge of the High Court sitting without a jury. (p. 1091)
462. A judge of the Court of Appeal should have power to extend the time for appealing in proper cases. (p. 1091)

General

463. Where either the whole or part of an owner's land which has been expropriated is abandoned, the owner should have the right to elect whether he will take the land back with the right of compensation for consequential damages, or insist on the expropriating authority's retaining the land expropriated and his being paid full compensation therefor. (pp. 1091-92)
464. The claim of an owner whose land has been expropriated to resume ownership of it in certain circumstances, if it is no longer required by the expropriating authority, should be recognized in some form by legislation. (p. 1092)
465. The consent of the appropriate approving authority should be required before any surplus land is sold by an expropriating authority. Before giving approval to the sale of expropriated land, the approving authority should be required to make inquiry into the circumstances of the proposed sale, and the position and desires of the former owners who should be given an opportunity, where practical, to purchase the land on equitable terms. (p. 1092)

466. Expropriating authorities should not be empowered to expropriate more land than is necessary for the proposed work, except where this can be shown to be in the interests of the owner of the unnecessary land. (p. 1092)
467. The government should take steps to encourage and promote the education and training of appraisers whose services would be available to the public, as well as to expropriating authorities. (p. 1092)

LICENSING POWERS

Licensing Legislation

468. Basic licensing laws should be enacted by democratically elected bodies. In the provincial sphere, where detailed regulations are required these should be enacted by the Lieutenant Governor in Council. (p. 1119)
469. Licensing requirements should not be unnecessarily imposed nor should unreasonable standards be required in their implementation. (p. 1117)
470. All powers which naturally relate to licensing, such as the power to revoke or suspend, should be stated expressly in the legislation conferring the power so that those affected by the exercise of the power may be under no doubt as to their rights and potential liabilities. Such powers should not be left to implication. (p. 1117)
471. The particular purposes or policy sought to be implemented by licensing legislation should be first determined and then clearly expressed in the legislation. (p. 1117)
472. If a large measure of discretion is intended to be vested in a licensing tribunal, safeguards surrounding the exercise of this discretion should be established as in the Civil Aviation (Licensing) Act, 1960, of the United Kingdom. (p. 1118)
473. The power to limit the number of licences issued should only be conferred when accompanied by adequate safeguards for the rights of the individual. (p. 1118)

474. The Municipal Act should be amended so as to require municipalities, when enacting by-laws thereunder, to set standards to be inserted in licensing by-laws, indicating the matters or grounds on which a licence may be refused, revoked or suspended. (p. 1118)
475. Subordinate legislative power in the licensing field conferring monopolistic privileges affecting the rights of the community as a whole, should be exercised by an elected body or, if this is not possible, by a body directly accountable to an elected body, such as the Lieutenant Governor in Council. (p. 1118)
476. Where a limitation on the number of taxi-cab licences issued is provided, the licensing tribunal should maintain a list of applicants for licences available for public inspection. When the holder of a licence no longer wishes to use it, he should return it to the tribunal and a new licence should be issued to the person qualified and entitled to it whose application has been on file with the licensing tribunal for the longest period of time. (p. 1118)

Licensing Tribunals

477. Where a licensing tribunal exercises some administrative powers the tribunal ought not to be established as an independent body in the true sense. Provincial licensing bodies should continue to be appointed by the Lieutenant Governor in Council and hold office during pleasure and, where municipal licensing tribunals are appointed, they should continue to be appointed as they are now. (p. 1118)
478. The proceedings of licensing tribunals should be conducted in substantially the same manner as those of judicial tribunals. The task of investigating complaints and making presentations to the tribunal should not be performed by members of the tribunal. (pp. 1118-19)
479. Power to issue licences may be properly delegated by a licensing tribunal to one or more of its qualified officials. (p. 1119)

480. Subject to the Municipal Act, no official should have the power to refuse, suspend or revoke a licence. In all cases where the issuing official believes that the application should be refused, the matter should be referred to the tribunal to be dealt with in accordance with the procedure recommended in this Section. (p. 1119)

Hearings

481. No hearing should be required where a licence is issued (as distinct from being denied) in the first instance. (p. 1132)
482. If the issuing officer considers that there are grounds for rejection, the licensing tribunal should hold a hearing and give the applicant the opportunity to fully present his case. (p. 1132)
483. The applicant should be provided with sufficient information in order that he may meet the case against him and the hearing should comply with the provisions of the Statutory Powers Procedure Act which we have recommended. (p. 1132)

Notice of Intention to Revoke

484. Provision for notice of intention to revoke or suspend proceedings should be in all licensing by-laws, unless there are very exceptional circumstances when public health, safety or emergency are involved. (p. 1132)
485. The notice should set out briefly the grounds on which it is alleged the licence should be revoked or suspended and, where possible, a summary of the evidence that it is proposed to submit to the tribunal. (p. 1132)
486. Evidence, if not supplied to the licensee with the notice, should be made available for his inspection prior to the hearing. (p. 1132)
487. Provisions similar to those in the Revised Model State Administrative Procedure Act and the Federal Administrative Procedure Act of the United States, giving a licensee an opportunity to show compliance with all

lawful requirements and thus avoid proceedings leading to suspension, revocation or annulment of a licence should be enacted in Ontario either in the licensing statutes or the Statutory Powers Procedure Act. (p. 1133)

488. The onus should not be placed on the licensee to show cause why his licence should not be suspended or revoked. (p. 1133)

Procedural Safeguards

489. The Statutory Powers Procedure Act should apply to most licensing proceedings to correct procedural deficiencies in the licensing laws, particularly with respect to:

- (a) notice of hearing,
- (b) notice of case to be met,
- (c) right to counsel, and
- (d) reasons for decision. (p. 1133)

490. The minimum rules applicable to judicial tribunals should be applicable to the proceedings of all licensing tribunals except where a licence is granted on an initial application and where, for reasons of public safety, health or emergency, immediate action is required. (p. 1133)

491. Additional rules governing judicial tribunals should apply to licensing tribunals where appropriate. The additional rules are:

- (a) Decisions should be based on the record;
- (b) No consultation after the hearing in the absence of affected parties;
- (c) The deciding members of the tribunal should be present at the hearing;
- (d) All evidence should be recorded. (p. 1133)

492. The Statutory Powers Rules Committee should decide the extent to which the additional rules for judicial tribunals should apply to licensing tribunals. (p. 1133)

493. Our recommendations concerning judicial review apply to review of licensing decisions. (p. 1133)

Appeals

494. In addition, there should be statutory rights of appeal from licensing decisions and procedural provisions with regard thereto. (p. 1134)
495. Where a licensing tribunal is required to base its decision on the record before it, an appeal should lie to the Appellate Division of the High Court of Justice on all questions of *ultra vires* and on all questions of fact or law disclosed in the record. (p. 1134)
496. On the appeal the court should have power to make the order that the licensing tribunal should have made or to refer the matter back to the licensing tribunal for a re-hearing. (p. 1134)
497. Where a tribunal is not required to base its decision solely on the record before it, an appeal should lie to an appropriate superior tribunal. (p. 1134)
498. On the appeal the appellate tribunal should have the same powers as the licensing tribunal and power to make such order as the licensing tribunal might make. (p. 1134)
499. In appropriate cases an appeal should lie by way of stated case to the Appellate Division of the High Court of Justice on questions of law. (p. 1134)
500. Rules of procedure governing appeals, except procedure in the courts, should be made by the Statutory Powers Rules Committee. Rules of procedure in the courts should be left to the Rules Committee constituted under the Judicature Act. (p. 1134)
501. There should be a right of appeal from suspension of licences. (p. 1134)

FAMILY BENEFITS ACT, 1966

502. The terms "allowances" and "benefits" used in the Family Benefits Act should be clearly defined and the legal rights thereto clarified in the Act. (p. 1156)
503. The Act should provide that before the Director should have power to order an investigation to determine whether the recipient of assistance continues to be qualified for assistance, he should have reasonable grounds for believing that circumstances exist which warrant an investigation bearing on the continued payment of assistance. (pp. 1156-57)
504. Section 8(1) of the Act providing for payment of an allowance in special circumstances should be clarified by providing a procedure by which it may become operative. (p. 1157)
505. The Director should be given statutory power to delegate his powers of decision. (p. 1157)
506. A decision to refuse assistance should not be made without giving the applicant an opportunity to be heard. (p. 1157)
507. A decision to cancel or suspend assistance should not be made without first informing the recipient of the alleged grounds for cancellation or suspension and giving him an opportunity to be heard. (p. 1157)
508. Provision should be made for both written and oral submissions. (p. 1157)
509. Proper boards of review should be appointed by the Lieutenant Governor in Council with tenure of office. (p. 1157)
510. Provision should be made for local or regional boards of review. (p. 1157)
511. There should be a right of appeal from the decision of the boards of review on questions of law alone to the Appellate Division of the High Court of Justice for Ontario. (p. 1157)

SELF-GOVERNING PROFESSIONS AND OCCUPATIONS

General

512. The provisions of a Statutory Powers Procedure Act, recommended in Chapter 14, should apply to the exercise of all judicial powers conferred under the respective Acts relating to self-governing professions and occupations. (p. 1209)
513. The principles of the British Medical Act, 1956, should be followed by making provision for the appointment of lay members to each of the governing bodies of the self-governing professions and occupations. (p. 1209)
514. The power of self-government should not be extended beyond the present limitations, unless it is clearly established that the public interest demands it and that the public interest could not be adequately safeguarded by other means. (p. 1209)
515. Citizenship should not be a condition precedent to admission to any self-governing body. (p. 1209)
516. Only British subjects should be qualified to hold office in any self-governing body. (p. 1209)

Discipline

517. Members of a disciplinary body should be prohibited from sitting on an appeal from decisions in which they have participated. (p. 1209)
518. Each disciplinary body should have as a member a lawyer of ten years standing who should be appointed by the Lieutenant Governor in Council. (This recommendation is not applicable to the Law Society of Upper Canada). (p. 1209)
519. The term "professional misconduct" should be the term used in all statutes to describe conduct of a nature to warrant disciplinary action. (p. 1209)
520. Each self-governing body should prepare a code of ethics, laying down standards of conduct designed

primarily for the protection of the public. This code should be available to the public and circulated to members of the body to which it applies. (p. 1209)

521. Where disciplinary proceedings have been instituted against a member, he should have at least ten days notice of a hearing. The notice of the hearing should be served personally. If personal service cannot be effected, service by registered mail, addressed to the member at the last address shown on the register should be permitted. (pp. 1209-10)
522. The disciplinary body should have power to proceed with the hearing where the member involved has been duly notified but has not attended. (p. 1210)
523. Disciplinary hearings should not be held in public unless the member involved so requests (p. 1210)
524. The rules of evidence applicable to civil cases should apply to disciplinary hearings. (p. 1210)
525. On a hearing concerning admission, the tribunal should have discretion to ascertain relevant facts by such standards of proof as are commonly relied on by reasonable and prudent men in the conduct of their own affairs. No defined standards of proof applicable to all cases should be laid down. (p. 1210)
526. A member against whom disciplinary action has been taken should have a statutory right to be represented either by counsel or an agent. (p. 1210)
527. Disciplinary bodies should have a right to impose a full range of sanctions, from reprimand to revocation of licence to practice. (p. 1210)
528. No disciplinary body should have the right to impose fines. (p. 1210)
529. In no case should the fines imposed by a court for breaches of the relevant statutes be payable to the self-governing bodies. All fines should be payable to the Province. (p. 1210)

530. The disciplinary bodies should not have power to award costs against a member of the body. In no case should an award by a disciplinary body be enforceable by an execution issued out of a court of the Province. (p. 1210)
531. Self-governing bodies should have power to reimburse a member for costs incurred through unwarranted disciplinary action against him. (p. 1210)
532. A member who has been the subject of disciplinary action should not be suspended from continuing to practice pending an appeal, unless the charge is for incompetence. (p. 1210)

Licensing

533. The self-governing bodies should be required to hold a formal hearing before an application for registration is rejected. (p. 1211)
534. There should be a right of appeal from all disciplinary decisions, and decisions refusing admission. The appeal should be to the Appellate Division of the High Court of Justice, in accordance with recommendations made in Chapter 44. (p. 1211)
535. Uniform terminology should be adopted with respect to regulations, rules and by-laws. (p. 1211)

Rules

536. All matters relating to admission and discipline should be dealt with by regulations made by the Lieutenant Governor in Council. (p. 1211)
537. By-laws relating to administrative and domestic affairs of a self-governing body should be made by the body. (p. 1211)

Control Over Other Bodies

538. No self-governing body should have statutory control over others who are not members of the body. If employees of members of a self-governing body are

required in the public interest to be controlled, this should be done by some form of licensing and not by the conferring of legislative and judicial powers exercisable over them. (p. 1211)

A Model Act

539. A Model Act should be drawn which should form the basis of all self-governing Acts so that there might be some uniformity in them. (p. 1211)

Limitation Period

540. No limitation period should be for less than twelve months. (p. 1211)

541. The court should have power to grant leave in proper cases to bring an action, notwithstanding that the limitation period has expired. (p. 1211)

542. Uniform language should be used in defining a limitation period. (p. 1211)

THE MENTALLY ILL: THEIR DETENTION AND ADMINISTRATION OF THEIR ESTATES

Detention

543. There should be an objective condition precedent to the power of a peace officer to detain a person on the ground of mental disorder. Section 10 (b) of the Mental Health Act, 1967, should be amended by substituting the words, "if he believes on reasonable grounds" for the words "if he is satisfied". (p. 1252)

544. The attending physician should have the power to issue a renewable certificate for the detention of an involuntary patient "where he has reasonable grounds to believe that the patient suffers from mental disorder of a nature or degree so as to require further hospitalization in the interests of his own safety or the safety of others; and is not suitable to be continued as an informal patient". Section 13 (2) should be amended accordingly. (pp. 1252-53)

545. The senior physician mentioned in section 17 of the Mental Health Act, 1967, should have power to communicate information compiled by the psychiatric facility only to persons entitled by law to the information. Section 17 should be amended accordingly. (p. 1253)
546. A qualified barrister appearing as counsel for a patient before the board of review should be permitted to cross-examine witnesses as of right. (p. 1253)

Right to Vote

547. The Election Act should be amended to clarify the right of voluntary patients to vote. (p. 1253)

Administration of Estates

548. Provision should be made for a scheme of interim management of the estates of patients whose hospitalization may be of short duration. (p. 1253)
549. An office of guardian of those suffering from mental disorder should be created to facilitate management of small estates, and to be a watch dog of the interests of the mentally incompetent. (p. 1253)
550. The validity of gifts, conveyances or transfers of property should be left to the courts. In any case the provisions of section 48 of the Mental Health Act, 1967, should be amended to limit its application to transactions after the donor or transferor has become incompetent. (p. 1253)
551. Estates coming into the hands of the Public Trustee should be administered on the same legal basis as estates are administered by private trustees. (p. 1253)
552. The powers of the Public Trustee to conduct investigations and acquire information should be limited to those of a commissioner appointed under the Public Inquiries Act. (p. 1253)
553. The Public Trustee should be required to keep confidential any information obtained by him. Such information should not be conveyed to anyone except those legally entitled thereto. (p. 1253)

554. Section 55 of the Mental Health Act, 1967, should be repealed. (p. 1254)
555. Section 58 of the Mental Health Act, 1967, should be repealed. (p. 1254)
556. A simple and inexpensive method of administering small estates should be devised so that family arrangements could be carried out with the approval of the guardian of the mentally incompetent, and in appropriate cases with the approval of the county or district court judge. (p. 1254)
557. A form of power of attorney should be recognized by statute which would authorize the attorney—with the approval of the guardian of the mentally incompetent, or, in proper cases, the county or district court judge—to continue to act as attorney for the donor after he has become incompetent, so that small and limited transactions such as the banking and paying of small bills may be carried out by the attorney. (p. 1254)
558. If the foregoing recommendation is adopted, section 44 of the Mental Health Act, 1967, should be amended. In any case, it should not apply to irrevocable powers of attorney. (p. 1254)
559. The Public Trustee should make an annual report which should be tabled in the Legislature. (p. 1254)

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