

Society of Ontario Adjudicators and Regulators

Principles of Administrative Justice: A Proposal

Introduction

SOAR (the Society of Ontario Adjudicators and Regulators) proposes that Ontario's first principles of administrative justice be reviewed and codified.

SOAR offers the following principles, formulated by its Working Committee on First Principles, as a basis for discussion.

SOAR's Working Committee on First Principles

Chair - Brian Goodman*

Harry Arthurs Professor
Osgoode Hall Law School

Peter Hoy Consultant
Ministry of Citizenship

Mary McCormick Vice Chair
Assessment Review Board

Ivana Petricone Director
Rexdale Community Legal Clinic

Margot Priest Chair
Ontario Telephone Service Commission

Herb Sohn Chair
Child and Family Services Review Board

Tom Wright Information and Privacy Commissioner

*Rent Review Hearings Board Chair

(Reporting Letter)

*Office of the Chair
Rent Review Hearings Board*

March 6, 1995

*Mr. S.R. Ellis
President
Ontario Society of Adjudicators and Regulators*

Dear Ron:

RE: Principles of Administrative Justice in Ontario's Adjudicative System

I am writing to you in my capacity as chair of the SOAR Working Committee on First Principles of Administrative Justice.

On behalf of the committee, I am pleased to submit for the consideration of the SOAR Board of Governors principles, including commentaries, of administrative justice in Ontario's adjudicative system.

This project was first proposed at a meeting of the Circle of Chairs on December 8, 1993. Terms of Reference for the committee as well as its membership were approved by the SOAR Board of Governors on March 10, 1994. The committee was to develop a long-term vision of administrative justice in Ontario. The vision would describe the fundamental characteristics and the governing principles of the administrative justice regime to which, in SOAR's opinion, the Province of Ontario ought to aspire.

I presented a status report on the committee's work, as well as copies of our "work in progress" at the October 1994 meeting of the SOAR Board. In November 1994, copies of our then draft were circulated for comment by the Circle of Chairs, following a presentation by me. Members of the committee also hosted a workshop on November 25 as part of last year's successful Conference of Ontario's Boards and Agencies. The workshop provided the committee with an opportunity to present the draft to a wider audience, and to receive feedback.

It is fair to say that the reaction to both the project and the November 1994 draft has been overwhelmingly positive. The relatively few, but important, suggestions for improving the draft have been considered by the committee, and changes have been made to both the preamble and to the fourth principle and commentary as a consequence.

The committee is now satisfied with the document, and commends it to the SOAR Board for its review and approval. We propose that the SOAR Board consider pursuing a broader consultation strategy that would include key stakeholders such as government, and administrative justice practitioners and academics. SOAR may wish to consider hosting a meeting or series of meetings at which the committee can assist you in this regard.

I would like to thank you, Mr. President, for your personal support for this seminal undertaking, which the committee sees as a cornerstone for SOAR's diverse and important activities. Please extend my appreciation as well to the current and former SOAR Board members who contributed to the success of this project.

I am proud of what we have accomplished, and consider myself truly fortunate to have chaired a committee with such outstanding and committed membership.

Yours very truly,

Brian P. Goodman

Chair

SOAR's Working Committee
on First Principles

Report to the SOAR Board of Governors

March 6, 1995

Report of the SOAR Working Committee on First Principles of Administrative Justice

Preamble

The following principles of administrative justice have been developed by the SOAR Working Committee on First Principles.

The principles relate to all Ontario agencies that exercise powers to determine legal rights or obligations. We have referred to these as administrative justice agencies. The

principles focus on the adjudicative process, by which is meant any non-court process in which legal rights or obligations are determined.

It is the Committee's view that Ontario's administrative justice agencies and their adjudicators and staff ought to be governed by these principles. The public, including the "customers" of administrative justice agencies and their representatives, who it is hoped will ultimately benefit from the application of these principles, should support and respect them.

*The principles are organized in two sections: the first dealing with the adjudicative process and the second having application to adjudicators and staff. Each of the principles is followed by a **commentary**, which is intended to explain terms and concepts used in the statements of the principle, as well as indicating some methods of compliance.*

The Adjudicative Process

Administrative justice requires that the adjudicative process be accessible.

Commentary:

The adjudicative process must be accessible to those for whom it is intended. Physical barriers or impediments should be minimized with accommodation being made for persons with different abilities and persons who speak languages other than French or English. Offices or information sources should be located in the communities where those for whom the process is intended live. Participation in the process itself should be facilitated with hearings being held in the communities at times convenient to the users. As a rule, people should not have to travel unreasonable distances in order to participate in the adjudicative process.

The process should be culturally sensitive. Information about the process should be readily available. People must also know that the process exists and that they can use it. It should be relatively simple to initiate the process and persons should not be excluded because of lack of ability to pay. Competent, professional assistance should be available to parties who require it. Different techniques should be used to make the process more convenient and available to the users; these can include greater use of teleconferencing or video conferencing, paper hearings or hearings that allow the use of recorded evidence and submissions rather than written documents.

Administrative justice requires that the adjudicative process be understandable and transparent.

Commentary:

An understandable adjudicative process is readily comprehensible to the people who use it. There is a contact person, with a name and phone number, who is available to describe the process and procedures. Persons using the process can learn about the consequences of their actions or decisions relating to the process; for example, they can find out about costs, potential suspension of benefits, and the consequences of negative findings by the decision maker, as well as the advantages of pursuing the administrative process. Persons using the process can readily find out the status of the file, including when a decision is likely to be issued. Plain language is used throughout the process, with limited use of specialized jargon or highly technical terms. Information about the process is available in brochures, practice notes, rules of procedure, policy statements or guidelines, in the publication of reasons or case summaries, and in statements by the adjudicator during a hearing. Annual reports are informative and educative. The reports and information about the process are available in public locations, such as libraries or government offices, and on electronic bulletin boards.

The adjudicative process should be transparent: the decision maker and the rationale for the decision can be identified. As a general rule, hearings and procedures are open to the public. The reasons for decision should clearly show the basis and logic of the decision. The decision can not be influenced by information to which the parties did not have access and an opportunity to challenge or refute.

Administrative justice requires that the adjudicative process be lawful, fair, expeditious, efficient and affordable.

Commentary:

The adjudicative process must follow the law, including all relevant statute and common law. Proceedings must be in accordance with the principles of fundamental justice. Fairness requires that the process be transparent and that persons and parties be accorded their rights without discrimination or favouritism.

The adjudicative process must avoid delays without sacrificing fairness and a just resolution. Persons using the adjudicative process in the administrative justice system should be confident of receiving service and a decision in as timely a manner as possible.

Persons should not be barred from initiating or completing the adjudicative process due to limited financial resources. From the public perspective, the adjudicative process must be efficient and effective.

Administrative justice requires that the adjudicative process provide an opportunity to resolve issues without a formal hearing and be as informal and non-confrontational as the law and subject reasonably permit.

Commentary:

Encouraging and facilitating the informal resolution of as many issues as possible, including settlement of all issues, can produce the best result for the parties. Even if all issues are not resolved informally, adjudication is more efficient and less costly when the parties are able to reduce the number of issues to be adjudicated. This can lessen the costs to the parties and public and ease the load on adjudicators. Procedures of the adjudicative body should be designed to encourage and facilitate cooperation and consensual arrangements among parties, including settlement. Such procedures may be contained in a case management mechanism that provides an appropriate settlement/issue definition stage or access to mediation. The adjudicative body can play an active role in facilitating the resolution of issues, while continuing to respect the need for an independent adjudicative process. Particularly in the case of settlements, the adjudicative body must be sensitive to any potential imbalance of power that may exist between the parties. A settlement of all issues may require that later approval be given by adjudicators because the law requires this, or for the sake of consistency or recognition of public interest.

The administrative justice system complements the court system of justice; however, administrative justice procedures need not be court-like. The rules of natural justice, the Statutory Powers Procedure Act, and the adjudicator's enabling legislation impose procedural requirements. The subject matter and the evidentiary requirements of the adjudication will further shape the procedure. Adjudicators should require or assist the parties to agree on or better define the issues in dispute and the differences between the parties. They should encourage use of agreed statements of fact and pre-filing of written evidence. They should consider the atmosphere of the hearing room and general comfort, and minimize use of legal or technical language. They should control excessive adversarial techniques of lawyers or agents, e.g. unnecessarily aggressive cross-examination.

Administrative justice requires that persons who are unrepresented by counsel or an agent not be unduly disadvantaged in the adjudicative process.

Commentary:

Persons who act for themselves should not be prejudiced in their access to or utilization of the adjudicative process. Adjudicators should be alert to those disadvantages that may be minimized by maintaining control of the process. Clear and simple procedures and opening remarks by adjudicators at hearings as well as avoidance or explanation of legal or technical language will assist in this regard.

Administrative justice requires that decisions in the adjudicative process be consistent.

Commentary:

The consideration in the adjudicative process of like fact situations should over time, lead to like results. Consequently, techniques must be found to enable adjudicators to be both consistent in their decision making and responsive to the facts of the individual case. Adjudicators should explain departures from earlier decisions or policies. Techniques to enhance consistency can include training, dissemination of reasons for decisions or consolidated practice notes, development of policy statements, use of generic proceedings, rule-making proceedings and development of a data base of decisions indexed by key words. While it is important for a tribunal to have procedures that promote consistency, these should not constrain independent decision-making.

Adjudicators and Staff

Administrative justice requires that all persons be treated with courtesy, dignity and respect and with the utmost regard for the principles of equality and fundamental justice.

Commentary:

Adjudicators and staff who deal with the public should be sensitive to the diversity of client needs and concerns. Services should be provided in a manner that is helpful, respectful and responsive to client needs in the adjudicative process. The selection process for both adjudicators and staff should stress these attributes and orientations. Appropriate training, support and information should be provided to adjudicators and staff who deal with the public. Adjudicators should act and decide fairly, in good faith and without bias, based on all the evidence before them and relevant law. They should respect not only the requirements of human rights laws, but their spirit and intent. Adjudicators and staff should nurture an environment that is free from discrimination.

Administrative justice requires that adjudicators and staff be competent, objective, impartial, accountable and have no conflict of interest.

Commentary:

The selection process for adjudicators and staff should be open and fair. It should foster appointments of high quality that recognize the importance of appropriate experience and expertise. Adjudicators and staff assisting them should receive orientation and continuing training and professional development so that they are knowledgeable and capable of performing their duties and responsibilities at a competent level. Adjudicators and staff should have a clear understanding of their duties, responsibilities and accountabilities. There should be job descriptions, service standards, conflict of interest guidelines and a code of conduct for adjudicators and a public complaints procedure in place.

In the case of a tribunal, there should be a memorandum of understanding outlining the responsibilities, accountabilities and operating relationships of the tribunal, Chair, Minister, Deputy Minister and Ministry. Adjudicators and staff assisting them should demonstrate the receptiveness of an open mind, avoiding bias or the appearance of bias. There should be a performance management system in place which does not constrain but recognizes the importance of independent decision-making. This system should include objective-setting and performance evaluation, at least annually. Superior performance should be recognized and appropriately rewarded; suitable action should be taken where performance does not meet objectives or is unsatisfactory.

Administrative justice requires that adjudicators be independent in their decision-making, and that adjudicators and staff be free from improper influence and interference.

Commentary:

Independence is the ability to make decisions free from external pressures and without fear of personal consequences, including reprisals. Decisions must be based on facts, evidence, expertise, and properly delegated discretion. Independence allows for sufficient freedom to structure the process, consistent with the legislation, fairness and natural justice and to deal with the matter placed before the adjudicator. Adequate funding as well as the control and management of resources are integral to the independence of the decision-making process. Independence is not the opposite of accountability, but should instead be recognized as a necessary feature and precondition for accountability.

A person who comes before the tribunal must feel confident that the person to whom he or she presents the case will be the one making the decision. Acceptance of the value and integrity of the system depends upon the existence of public confidence. The adjudicator is the intermediary between the state (which recognizes, allocates and enforces rights, duties and benefits) and the individual. The respect that is accorded to this exercise of the power of the state is based to a large degree on adherence to accepted values, including fairness and freedom from improper influence. The further advantages of independence are that individuals and society are more likely to accept the decisions; predictability is enhanced since unseen influences and pressures do not affect the decisions.

Administrative justice is advanced by adjudicators and staff identifying problems and solutions respecting the governing legislation, process or structure.

Commentary:

Adjudicators and staff are uniquely placed to observe the potential for improvements in legislation and its implementation. They deal directly with the public in numbers of cases about issues in dispute. Consequently, staff and adjudicators should be encouraged to share their observations and recommendations in order that a position be developed. In

the case of a tribunal, that position should be drawn by the Chair to the attention of the appropriate authorities for their consideration.

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