

REFORMING THE LEGAL FRAMEWORK FOR REGULATORY AND ADJUDICATIVE AGENCIES

**NOTES FOR REMARKS OF:
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As you have heard from Janet, the April 1998 Report of the Agency Reform Commission, entitled *Everyday Justice* contained a number of recommendations designed to allow agencies to resolve issues and disputes more quickly, while preserving fairness. The hearing process made up the largest single topic of the extensive consultation undertaken by the Commission, which began in September 1997. At that time, the Commission published a consultation paper and four background papers, and encouraged feedback and submissions. The Commission heard from or met with over 200 groups and individuals, including of course SOAR and many of your agencies.

One of the background papers was on “Hearing Process Reform”, and had been prepared by a joint Ministry of the Attorney General/Agency project team established and co-chaired by me and Cheryl Cottle, Director of Legal Services for the Financial Services Commission of Ontario. The project team included agency chairs and legal counsel, as well as counsel from my ministry’s Policy Branch and Crown Law Office, Civil. Our project team, with valuable input from an advisory committee that included senior representatives of the administrative law bar, the legal clinics, an experienced mediator, and a multiple agency user, identified 11 areas of possible hearing process reform to enable tribunals to resolve issues/disputes expeditiously, effectively and fairly. The background paper contained a discussion of each of these 11 areas. Many of the areas for improvement were well supported during the consultation phase, particularly screening cases to weed out those not properly before tribunals, and using mediation and pre-hearing conferences to resolve issues and disputes. Feedback to the Commission demonstrated that, because of the diversity of tribunals, the parties appearing before them, and the wide range of issues dealt with, a “cookie cutter” or “one-size-fits-all” approach to reform would not work.

During this initial phase of our work, we made it absolutely clear to the agencies and their stakeholders, that our advice to the commission was that none of the

agency reforms, whether they be to the legal or accountability frameworks for agencies, or in the areas of appointments, business improvements or sector coordination, should lower or appear to lower legal standards of fairness, independence and impartiality. I am pleased to say that our advice was taken, and is reflected in the commission's report.

The Commission concluded that changes were needed to the *SPPA* to give all agencies the full range of powers needed to resolve problems as quickly as possible, and that changes might also be needed in some of the acts governing individual agencies. It determined that agencies need a more consistent approach to solving problems and disputes, and that agencies need help utilizing the options available in current legislation combined with some legislative change. It stated categorically that any increase in tribunal powers must be accompanied by training for members and staff.

Before making its recommendations in that section of the report entitled "The Public Face of Agencies", the Guzzo Commission set out some principles guiding changes to the hearing process. Foremost among these was that, in the quest for earlier and more cost-effective dispute resolution, fairness and impartiality must be maintained. This mirrored the first plank of the Commission's vision of a regulatory/adjudicative agency sector in which "the cornerstones of impartiality and fairness are preserved and enhanced". The other principles enunciated by the Commission were:

- all options should be explored to solve problems and resolve disputes as early as possible (time frames for decisions should be part of performance goals), and at minimum cost to all parties;
- the processes which agencies develop should be responsive to the range of clients who appear before them, especially unrepresented parties;
- the use of both in-house and private sector alternative dispute resolution, such as mediation, should be fully explored;
- with some exceptions, hearings should be held by a single agency member rather than a panel;
- parties who are able to pay and who benefit from the system should pay their fair share;
- fees or costs must not hinder access to administrative justice.

Here are the Commission's recommendations:

- That the Ministry of the Attorney General work with agencies to help determine what tools they can and should consider using under the current legislation, and the procedures and rules they need to translate this into practice;
- That the Ministry of the Attorney General identify any gaps in the *Statutory Powers Procedure Act* and work with agencies and ministries to determine what strategic amendments are needed to fill those gaps, following appropriate consultations. Amendments should go forward by the winter 1998 session of the Legislature.
- That ministries review the statutes governing their agencies to determine whether amendments are required. The Ministry of the Attorney General will provide assistance, as needed.
- That the government establish a process to review any proposed amendments or new legislation governing individual agencies. This will ensure the statutes governing agencies in individual ministries stay consistent with the reforms recommended in this report.

As you have heard, the Government accepted all of the Commission's 31 recommendations, including of course the four on hearings process reform. At the beginning of May of this year, I assumed, at the request of the Deputy Attorney General, a new position as Executive Lead, Agency Reform Project, reporting directly to the Deputy. This was a landmark for both the administrative justice sector and the ministry (not to mention me!), being the first time in the history of the ministry that an executive level position was created focusing on the ministry's role vis-a-vis the regulatory and adjudicative agencies across government. I decided that we should have a small project staff, and continue to draw on the extensive expertise resident in the agency sector in particular, and elsewhere in government, as well as beyond, in stakeholders such as the administrative law bar. I also determined that the make-up of our own project team should reflect the successful partnership arrangement that we have forged and nurtured with SOAR

and the agencies in moving forward on agency reform. At the end of May, Kathleen Beall was appointed manager of the project. Kathleen is on secondment to the ministry's Policy Branch from the Ministry of Labour legal branch. She has a wealth of experience in the area, having been tribunal counsel, appeared before tribunals and the Courts on behalf of tribunals, drafted relevant legislation, and worked with Management Board on earlier agency reform initiatives. I also recruited Ayumi Bailly as senior policy analyst for the project. Ayumi, who is a member of the SOAR Board of Directors and a founding member of the Council of Government of Ontario Dispute Resolvers and the Circle of Registrars, hails from the Pay Equity Hearings Tribunal and Board of Inquiry, and has served as a tribunal registrar and senior administrator. Ayumi joined the team in July. Rounding off the team is my ebullient and resourceful administrative assistant, Desiree Glasgow, who knows more people in the ministry than anyone I know. We, and I in particular, consider myself extremely fortunate to be supported by such committed and capable team members. Both Kathleen and Ayumi are participating in COBA (Ayumi was on the organizing committee), and I hope you will have chance to meet them.

How did we proceed? We prepared a project plan which spelled out the steps, accountabilities and time frames for achieving our objectives of both legislative and non-legislative reforms. During the late spring and early summer we developed a consultation paper, based on the Commission's report, setting out our proposed directions for amending the *SPPA*. I also established two *ad hoc* advisory groups, one of agency representatives and the other of stakeholders, with representation from the same groups that had participated on our advisory committee in June 1997. We sent the paper to the members of both groups in advance of meeting with them twice in August. Our paper was subsequently revised, to reflect the helpful feedback that we received. Copies of the paper were shared with the agency/ministry working group and the agency redesign forum, and their input was sought. We also organized a roundtable session to review our proposals, to which we invited key umbrella organizations, such as SOAR, the College of Physicians and Surgeons, the Ontario Municipal Association and the Ontario Hospital Association, whose members would be affected by amendments to the *SPPA*. Our subsequent submission, based on the paper, was endorsed by the Red Tape Commission and by Cabinet, and legislative counsel has drafted proposed amendments which we expect will be introduced shortly in the Legislature. Before tuning to the directions for amendment, I wanted to briefly share with you how we proceeded on the non-legislative front.

The Commission had found that, while the *SPPA* provides many agencies with powers, not all agencies had established rules and procedures to use these tools, such as pre-hearing conferences. It suggested that agencies may need help to use all the tools currently available. Some of you will recall the sample rules prepared in 1995 by a SOAR committee chaired by my Deputy Minister, Andromache Karakatsanis, when she was Chair of the Circle of Chairs and Chair of the Liquor License Board. This was an excellent early initiative of SOAR, which we drew on.

This past spring I proposed to your president, Murray Chitra, that we establish a joint MAG/SOAR Committee to develop a compendium of model tribunal rules, and that he name the members from the agency sector. Murray enthusiastically accommodated my request, and assembled a first-rate team of agency sector representatives, led by Bob Owen, SOAR vice-president and vice-chair of both the Ontario Municipal Board and the Assessment Review Board. Bob was asked to co-chair the committee, with Kathleen Beall, whom I appointed, and who incidentally had earlier served on the SOAR sample rules committee. Ayumi, Management Board legal staff, and MAG policy counsel also serve on the committee. This excellent group of individuals developed a special team chemistry, and worked tirelessly, on a volunteer basis. They have produced a document which expertly sets out a menu of possible rules and criteria to help tribunals decide when it might consider a particular rule as opposed to another. Of course, it will be for each tribunal, in consultation with its members, staff and stakeholders, to determine the right rule for that tribunal. The committee also developed an exciting training seminar on how to use the compendium, which it will be delivering this afternoon, and which I commend to you. Further training sessions will take place early next year. When the amendments to the *SPPA* are passed, the committee will have ready revisions to the compendium to cover model rules for the exercise of the additional powers.

I want to take this opportunity to both thank Murray for his continuing cooperation and the members of our joint committee for their outstanding contribution. Earlier this month, Kathleen presented the document to the joint working group, and received accolades from all quarters. One tribunal Chair, who had courageously confessed to the fact that his tribunal had not yet passed rules, immediately

established a tribunal rules committee to review the document and propose suitable rules.

I now return to our directions for amending the *SPPA*. There are some general principles which guided our approach to the revisions, and which are strategically targeted to ensure the availability of the full range of powers required by tribunals to provide fair, efficient and cost-effective resolution of disputes.

- The focus is on amendments that **enable** tribunals, rather than requiring them all to act in the same way;
- This approach takes account of the fact that **one size does not fit all** because of the diversity of the agency sector;
- A resolution of a dispute or issue **by the parties themselves** is, in most cases, to be preferred over a decision imposed by a third party;
- **Faster**, more **cost-effective** issue/dispute resolution that remains **fair** is in the best interests of everyone, including the parties;
- Any shift along the continuum of power from parties towards tribunals must be accompanied by appropriate **checks and balances**;
- Fees, costs and cost-recovery should never be allowed to impede **access** to administrative justice;
- The **rule-making** function under s.25.1 of the *SPPA* remains a critical component of the exercise of powers under the Act its enabling philosophy;
- The *SPPA* has an **educational** function for tribunals and their clients and their representatives, as well as a rights/powers conferring one;
- The *SPPA* applies to a wide range of **decision-makers beyond the Ontario government agencies**, for example the Director of Titles, municipal licensing bodies and disciplinary bodies of regulated professions.

Here are the proposed directions for statutory reform:

Interpretation: An interpretation provision will be added to provide that the Act and any rule made by it under s.25.1, shall be liberally construed to secure the just, most cost-effective determination of every proceeding on its merits.

New Powers: Tribunals will be given some additional powers to enable them to resolve issues/disputes faster and more cost-effectively, while maintaining fairness of process. The exercise of these rules is accompanied by appropriate checks and balances such as the need for a tribunal rule and notice to affected parties to ensure that the interests of stakeholders is recognized and that important rights of parties are not compromised. The Agency Reform Commission, the Ministry of the Attorney General and the Red Tape Commission have confirmed that widespread support exists for the following changes:

- *screening*: empowers tribunals to weed out applications/appeals that are not properly before the tribunal because, for example, they are frivolous or vexatious, or in the wrong forum. Tribunal administrative staff will be able to turn back matters that are technically defective, for example where required documentation is incomplete;
- *streaming and alternative dispute resolution*: empowers tribunals to set guidelines for procedural steps, for example pre-hearing conferences or expedited hearings, to be followed for different types of proceedings, and to direct parties to alternative dispute resolution, such as mediation;
- *control of process*: clarifies that tribunals have power to determine their own procedures and practices, provides that substantial compliance with requirements respecting content of forms and notices is sufficient, and requires tribunals to make rules and guidelines publicly available;
- *time frames*: requires tribunals to establish guidelines setting out the usual time frame for completing proceedings and for completing the procedural steps within those proceedings;
- *form of hearings*: empowers tribunals to hold written hearing for procedural matters and , unless there is good reason for not holding a written hearing, for substantive matters;
- *panel size*: empowers chair to assign a panel of one, unless conflicts with requirement of another statute. Even in such cases, chair can assign panel of less than the specified number or single member on consent of parties;
- *costs*: empowers tribunals to order a party to pay all or part of another party's costs where the tribunal finds that the conduct of a party has been unreasonable, frivolous or vexatious or made in bad faith. The tribunal rule would have to

include the circumstances in which costs may be ordered and the amount of the costs or the manner in which the amount of costs is to be determined.

The proposed amendments also contain so-called *grandparent* clauses, where appropriate, to allow tribunals to continue to exercise powers in accordance with the provisions of another Act that were in force when the amendments become law.

Before concluding, I wish to say a few words about the relationship between the accountability framework and tribunal performance plans, on the one hand, and the full tool box of powers given to tribunals under the legislation to allow tribunals to resolve issues and disputes at the earliest opportunity, while preserving fairness. Tribunals will be expected by both stakeholders and responsible Ministers to make use of all appropriate tools in serving clients. Tribunal chairs, who will be required to set tribunal performance standards and report publicly on results, can expect to be asked why the tribunal did not take advantage of the full range of powers available to it, including why the tribunal has not passed rules to allow for the exercise of powers that would enable the tribunal to resolve matters more expeditiously.

In closing I wish to again express my gratitude and pleasure for the close working relationship that we have developed with SOAR and the Ontario administrative justice community. This partnership is based on trust, mutual respect, and the recognition that no one party acting alone can effectively implement the thoughtful recommendations of the Agency Reform Commission. We must work together to ensure that those who come before the regulatory and adjudicative agencies, recently referred to by Chief Justice McMurtry as the guardians of that justice most commonly sought, are served fairly, effectively and courteously.