

Model Administrative Procedure Code (1991)



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Introduction

In recent years the courts have developed an important body of procedural and evidentiary rules which reflect values that are appropriate for the style of administrative tribunals -- simplicity of procedure and accessibility, and the right to a fair but expeditious hearing. These rules are scattered throughout the reported cases; they are not conveniently accessible to most lawyers, members of administrative bodies and individuals who want to exercise their own rights. Moreover, these rules, which are generally presented as methods of applying the principles of fairness or natural justice, are the same throughout Canada, and so it would be valuable to present an overall view. On the invitation of the Fondation du Barreau du Québec, an unofficial codification of these rules was prepared in 1985. This codification has been used as a reference document by a number of administrative tribunals in Quebec, such as the Bureau de révision de l'évaluation foncière, the Commission de la fonction publique du Québec, and so on, and by a number of lawyers.

The "Model Administrative Procedure Code" attached hereto is an update and adaptation of the "Règles de procédure des tribunaux administratifs" published in 1985, at the same time as the specific regulations for each of the administrative tribunals in Quebec.

The update takes into account the decisions of the Supreme Court of Canada, the Federal Court and other superior courts in Canada as of April 1, 1991.

Ontario and Alberta administrative procedure legislation has also been taken into consideration, as has the American statute of 1946, the Revised Model State Administrative procedure Act, Appendix A, and recent Canadian documents.

Because of the great variety of powers exercised by a myriad of administrative bodies in Canada, the challenge in writing this working paper was to present rules that are general enough to be used by a large number of such bodies, but also precise enough to serve as rules of conduct by members of administrative tribunals, guides for lawyers and agents, and guarantees for individuals.

In terms of codifying what might be called "minimum" rules, a difficult choice had to be made, particularly in respect of the rules of evidence. Only those rules which are specific to the work of administrative tribunals were included. For example, no specific rules concerning the admissibility of childrens testimony were required for administrative tribunals, and so the draft model Act is silent on this particular question.

Similarly, the standard of "substantial" evidence, which is so important in American administrative law as a test and as a guarantee of the reasonableness of decisions, has not been adopted into Canadian administrative law, although judges may review erroneous findings of fact.

In other words, the working paper, which will of course be put to the test of criticism and comment, is an attempt to be general enough to be broadly applicable, but at the same time clear and precise enough to permit both decision-makers and individuals to be certain as to the scope of their rights and duties.

One criticism that may be made of Canadian administrative law is that it is not communicable, or not accessible, because its sources lie essentially in the case law and not in legislation. A model administrative procedure code could undoubtedly contribute to making Canadian administrative law more accessible to the people it claims to protect, and could be the next step in improving relations between government and the governed.

Yves Ouellette
Professor of Law
Université de Montréal

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CHAPTER I**Definition and objectives**

Sec 1 -- In this Act, "authority" means a person, an agency, a commission or a tribunal, acting under a statute or other provision of law, not including a court and a coroner, that, after an oral hearing, decides matters affecting right, interests or privileges.

Comments:

A -- This is a mode code designed to cover a great variety of independent bodies, both federal and provincial, including both regulatory agencies and adjudicative bodies, that is, "tribunals" and "commissions", to use the terminology in the Ratushney report; accordingly, the word used is "authority", which is also used in the *Alberta Administrative Procedure Act*.

B -- The text covers proceedings by authorities which make decisions after holding hearings; this is the standard used in the American *Revised Model State Administrative Procedure Act*.

C -- The text proposes only general and minimum rules which have already been formulated in the case law. It does not operate to change the common law, but simply to codify it in order to facilitate the work of lawyers, unrepresented parties and decision-makers.

Sec 2 -- The purpose of this code is to provide for fair, expeditious and simple proceedings and to ensure that decisions are of good quality.

Comments:

A -- It is wise to set out the objectives of the text in order to facilitate interpretation.

B -- The source of this provisions is the 1987 Ouellette report.

Sec 3 -- An authority shall make rules of specific regulations procedure and evidence, which shall set out standards governing the following matters:

(a) the method of serving documents, notices of hearing and decisions;

(b) the holding of pre-hearing conference by telephoner otherwise;

(c) the procedure for preparing hearing lists;

(d) the preparation of the minutes of the hearing;

(e) the procedure which applies when a request is made by an intervenor for funding and the criteria to be considered in deciding whether to grant such a request and determining the amount granted;

(f) the format of and procedure for entering decisions;

(g) the procedure for reviewing decisions.

CHAPTER II**Procedure****Part I -- General Principle**

Sec 5 -- In the event that the Act and the regulations are silent, an authority is master of its own procedure, subject to the right of the parties to a fair hearing.

Source:

Hoffman-Laroche Limited v Delmar Chemicals Limited, [1985] 1 SCR 575;

Kane v Board of Governors of the University of British Columbia, [1980] 1 SCR 1105;

American Airlines v Competition Tribunal (1989), 89 NR 241 (FCA), affirmed by [1989] SCR 290.

Part 2 -- Representation

Sec 6 -- Anyone who is a party to a proceeding before an authority may choose to be represented or assisted by counsel or agent if, in the circumstances, failure to be so represented would amount to a denial of justice.

Comments:

A -- At common law, there is no general and absolute right to be represented by counsel before an administrative tribunal. Everything depends on the circumstances, such as the complexity of the issues and the proceedings, time considerations and costs.

R v Laroch (1982), 131 DLR, 152 CFR;

Hone v Maze Prison Board of Visitors, [1988] All ER 321 (H of L);

Sheik v Canada, [1990] 3 FC 231 (FCA);

Gochanour v Solicitor General of Alberta, [1990] 5WWR 178 (QB).

B -- Section 7 of the Canadian *Charter of Rights and Freedoms*, where it applies (as in prison discipline cases), may, depending on the circumstances, confer the right to be represented by counsel.

Howard v Stoney Mountain Institution, [1984] 2 FC 642;

Re Kaur and Minister of Employment and Immigration, [1990] 2 FC 299.

C -- Some provincial legislation or Law Society regulations impose more general and absolute rules respecting representation by counsel before a body which exercises quasi-judicial powers.

D -- A study submitted to the Lord Chancellor in the United Kingdom in July 1989 indicated that representation significantly increases an applicants chances of success before an administrative tribunal. The study also showed that before certain bodies, such as social benefits appeal boards, representation by non-lawyer experts had the most impact.

Hazel Genn and Yvette Genn, "The Effectiveness of Representation at Tribunals", Report to the Lord Chancellor, July 89.

Sec 7 -- Where a party is not represented by counsel or agent, an authority shall:

- (a) inform the person of his or her right to choose to be represented;
- (b) assist the person in bringing out the facts.

Comments:

The source of the rule set out in paragraph (b) is:

Hummel v Heckler, 736 F (2d) 91, 95 (1985);

Ouellette Report, 1987, p 276.

Part 3 --Public interest intervention

Sec 8 -- On oral or written request, an authority may grant status as an intervenor to any person, corporation or group of persons associated for the pursuit of a common interest, who have shown sufficient interest and are in a position to inform the authority or assist it in making a decision which will be in accordance with the objective of the Act or in the public interest.

Source:

A -- *Canada v Newfoundland Telephone*, [1987] 2 SCR 462;

B -- The public law, and not the private law, standard of locus standi should apply. *Stanford v Harris* (1990), 38 Admin LR 141 (Ont Div Ct).

Sec 9 -- An intervenors procedural rights, including the right to apply for funding, shall be determined by the specific regulations of each authority, or by an order of the authority.

Comments:

The wide variety among the bodies in question would make it dangerous to set out a complete list of intervenors procedural rights.

Some decisions have held that the scope of such rights will vary, depending on whether the Act provides that an oral hearing is mandatory or merely optional.

Seafarers International Union of Canada v CN, [1976] 2 FC 369.

It is probably preferable that matters such as the right to call witnesses, to cross-examine and to obtain disclosure of expert reports and financial documents be left to the discretion of the authority or set out in a specific regulation.

Re Manitoba League of Physically Handicapped Inc. and Taxicab Board (1988), 48 DLR (4th) 245 (Man QB);

Re BC Pollution Control Board (1967), 61 DLR 221 (BA); *Consumers Association of Canada v Canadian Transport Commission*, [1979] 2 FC 415;

Re CRTC and London Cable TV Ltd., [1976] 2 FC 621 (FCA);

Re Attorney-General for Manitoba and National Energy Board (1975), 48 CLR (3d) 73;

American Airlines v Competition Tribunal (1989), 89 NR 241 (FCA);

Sec 10 -- person who has been granted status as an intervenor may, at any time before the hearing commences, request intervenor funding, where the regulation so provides.

Sec 11 -- An authority has the power:

- (a) to decide the amount of funding to be granted;
- (b) to decide which applicants will provide the funding for intervenors;
- (c) to decide the conditions on which funding may be granted;
- (d) to decide any question of law or fact relating to an application for funding;
- (e) to grant additional funding, at the end of the hearing, if it believes, considering all the circumstances, the amount initially granted was inadequate.

Comments:

This text was inspired by Bill 174, Ontario, First Session, 34th Legislature, 1988: *An Act for the establishment and conduct of a Project to provide Funding to Intervenors in proceedings before a Joint Board under the Consolidated Hearings Act, 1981 and before the Ontario Energy Board and to provide for certain matters in relation to costs before those Boards.*

Part 4 -- Pre-hearing conference

Sec 12 -- An authority or one of its members may order the parties, orally, or in writing, to appear before a member, the secretary or counsel, at a specified time, date and place for the purpose of holding a pre-hearing conference.

Sec 13 -- The purpose of the pre-hearing conference is:

- (a) to define the issues to be argued at the hearing;
- (b) to assess the advisability of amending the pleadings for greater clarity or precision;
- (c) to encourage the parties to exchange documents before they are produced at the hearing;
- (d) to plan the manner in which the hearing will proceed and evidence will be produced;
- (e) to examine the possibility of admitting certain facts or accepting proof by affidavit;
- (f) to consider any other matter that may promote a simple and expeditious hearing;
- (g) to consider the possibility of reaching a settlement.

Sec 14 -- Facts admitted at a pre-hearing conference shall be set out in a statement signed by the parties or their counsel or agent and countersigned by the person who presided at the pre-hearing conference.

The statement shall be entered on the record and shall be considered as evidence of the facts admitted, for all legal purposes.

Source:

Re Emerson and Law Society of Upper Canada (1984), 5 DLR(4th) 294; 3/7

Re Kuun and University of New Brunswick (1985), 13 DLR (4th) 745 (NBCA).

Part 5 --Hearing

Sec 15 -- The parties and any person who is directly affected shall be given reasonable notice of the hearing.

Comments:

A -- A person may be directly affected by a proceeding although he or she is not already a party to it.

Examples: *Canadian Transit Co v Public Service Staff Relations Board* (1990), 39 Admin LR 142 (FCA);

Canadian Union of Public Employees v Canadian Broadcasting Corporation (1990), 38 OAC 231 (CA);

Jantran v Régie des permis d'auto du Québec, [1987] RJQ 2467 (SC).

B -- Generally speaking, it is not necessary for a regulatory agency to notify mere potential competitors.

Okanagan Helicopter and Erickson Air Crane Co (1975), 55 DLR (3d) 98 (FC).

Sec 16 (1) The notice shall include:

(a) a statement of the date, time and place of the hearing;

(b) a statement of the purpose of the hearing and, in a reasonably precise manner, of the issues involved.

(2) The notice may include a statement that if a party does not attend at the hearing, the authority may proceed in his or her absence.

Comments:

Section 15 and 16 are inspired by section 6 of the Ontario *Statutory Powers Procedure Act*.

Sec 17 -- The hearing shall be open to the public; however an authority may, of its own motion or at the request of a party, order that the hearing be held in camera, where the authority is of the opinion that

(a) it is so required in the interest of public security;

(b) a person's personal or financial privacy outweighs the benefits of a public hearing.

Source:

Section 9, Ontario *Statutory Powers Procedure Act*.

Pilzmaker v Law Society of Upper Canada (1990), 36 OAR 244 (Div Ct).

Comments:

1 -- This provision does not follow the common law rule that in the event that the Act is silent, an administrative tribunal may proceed in camera or in public. *St-Louis v Treasury Board*, [1983] FC 332. Under the common law, an authority has discretion to proceed in camera or in public.

2 -- This provision could not apply in this form in Quebec, because of section 23 of the *Charter of Human Rights and Freedoms* which sets out a slightly different rule.

3 -- Each authority should make guide-lines or rules regarding trade secrets or proprietary information.

Sec 18 -- An authority shall deal with all proceedings before it as informally and expeditiously as is justified by the circumstances and the right to a fair hearing.

Source:

Sec 68 (2), *Immigration Act*, c 1-2, enacted by c 28, 4th Supp.

Heckler v Day, 104 S Ct 2249 (1984).

Re Misha (1989), 52 DLR (4th) 477 (Sask CA).

Sec 19 -- An authority may adjourn a hearing, of its own motion or on request, on such terms as it may determine,

(a) in order to prevent a denial of justice;

(b) if it is satisfied that an adjournment would not unreasonably impede the proceedings.

Source:

Sec 69(6), *Immigration Act*

Han v MEI (1984), 52 NR 274 (FCA);

Green v MEI, [1984] 1 FC 441 (FCA);

Pruneau v Chartier, [1973] CS 736.

Sec 20 -- An authority shall grant to any party

(a) a reasonable opportunity to be heard, to submit evidence and to make representations;

(b) a reasonable opportunity to cross-examine witnesses, to the extent necessary to ensure a fair hearing.

Source:

Sec 4, Alberta *Administrative Procedures Act*

Sec 10, Ontario *Statutory Powers Procedure Act*

Lipkovits v CRTC, [1983] 2 FC 321;

Cashin v CBC, [1984] 2 FC 209 (FCA);

Re Forstar Management Inc and BC Securities Commission (1990), 71 DLR (4th) 317 (BCCA).

Comments:

Is it desirable to require that, where a party is unrepresented, the authority inform him or her of the right to cross-examine?

See *Swindle v Sullivan*, 914 F (2d) 222 (1990).

Sec 21A (1) The right to a fair hearing includes the right of a natural person who is a party to a proceeding to understand the language used at the hearing.

(2) An authority shall, taking into account all the circumstances, grant the assistance of a competent interpreter free of charge to a party or witness who does not understand or speak the language used at the hearing or who is deaf.

Source:

Sec 14 of the Canadian *Charter* and sec 36 of the Quebec *Charter*.

Section 14 of the Canadian *Charter* has been interpreted as not conferring an absolute right to interpreter in arbitration proceedings under the *Canada Labour Code*.

Roy v Hackett (1988), 45 DLR (4th) 415 (Ont CA).

See also: *Brar v Canada* (1989), 43 Admin LR (FC);

Ming v MEI, [1990] 2 FC 336 (CA);

Restaurant Diana v Régie des permis dalcool, JE 89-344 (SC).

CHAPTER III

Evidence

Sec 22 -- Decisions made by an authority shall be based on the evidence and according to the principle of transparency.

Source:

R v Deputy Industrial Injuries Commissioner, [1965] 1 QB 456;

Re Dale Corporation and Rent Review Commission (1983), 149 DLR (3d) 113 (NSCA);

Mahon v Air New Zealand, [1984] AC 808.

Sec 23 -- In the event that the Act and the regulations are silent, an authority

(a) is master of its own evidence, subject to the right of the parties to a fair hearing;

(b) is not bound by technical rules of evidence;

(c) may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

Source:

Miller v Minister of Housing, [1968] 1 WLR 992 (CA);

Canada v Mills (1985), 60 NR 4 (BCA);

Richardson v Perales, 91 5 Ct 1420 (1971);

Immigration Act, s 68(3).

Sec 24 -- An authority may not receive evidence outside a hearing or without the knowledge of the parties.

Source:

R v City of Westminster Assessment Committee, [1941] 1 KB 53;

R v Schiff (1971), 13 DLR (2d) 304 (Ont CA);

Sarco Canada v Anti-Dumping Tribunal (1978), 22 NR 225 (FCA);

Re Brunswick International and Anti-Dumping Tribunal (1980), 108 DLR 216 (FCA);

La Guilde des employés de Super Carnaval v Tribunal du travail, 11986] RJQ 1556 (Que CA);

CP Ltd v BC Forest Products (1981), 34 NR 209 (FCA);

Re BC Government Employees Union and Public Service Commission (1979), 96 DLR (3d) 86 (SCBC);

Kane v Board of Governors of the University of British Columbia, [1980] 1 SCR 1105;

Spence v Prince Albert Police Commission (1987), 25 Admin LR 90 (Sask CA).

Sec 25 -- An authority may take judicial notice

(a) of facts that are publicly known and that may be judicially noticed by a Court of Law;

(b) of generally recognized facts and any information and opinion that is within its specialized knowledge, subject to section 26.

Source:

Sec 68(4), *Immigration Act*

Cite de Ste-Foy v Société immobilière Enic Inc, [1967] SCR 121;

Dome Petroleum v Grekul (1984), 5 DLR (4th) 262 (Alta QB);

Air Canada v Mirabel, [1989] RJQ 1164 (Que CA).

Sec 26 -- Before an authority takes notice of any fact, information, opinion, policy or unwritten rule other than what may be judicially noticed, it shall notify the parties of its intention and afford them a reasonable opportunity to make representations with respect thereto.

Source:

Sec 68(5) of the *Immigration Act*

Gonzalez v MEI, [1981] 2 FC 781 (FCA);

Kalair v MEI(1985), 10 Admin LR 107 (FCA);

CUM v Properties Gun ter-Kaussen, [1987] RJQ 2641.

Sec 27 -- Hearsay may be admitted in evidence if there are reasonable guarantees of the credibility of the evidence, upon such terms as ensure that the parties are afforded a fair hearing.

Source:

TA Miller v Minister of Housing, [1986] 1 WLR 992;

Restaurants et Motels Inter-cit- Inc v Vassart, [198?] CS 1052;

Canada v Mills (1985), 60 NR 4 (FCA).

Sec 28 -- A certified copy of the report of a commission or board of inquiry established by the government under the provision of any Act is admissible in evidence.

Source:

Re City of Toronto and Canadian Union of Public Employees, local 79(1982), 133 DLR (3d) 94 (Ont CA).

CHAPTER IV

Deliberation and reasons for decisions

Sec 29 -- An authority shall act fairly at all stages of the proceedings, including its deliberations. **Source:**

Re Emerson and Law Society of Upper Canada (1984), 5 DLR (4th) 294 (Ont HCJ);

Tremblay v Commission des affaires sociales, [1989] RJQ 2053 (Que CA, on appeal);

IWA v Consolidated Bathurst Packaging, [1990] 1 SCR 282.

Sec 30 -- Where an authority is required by law to give reasons for its decision, the decision shall include

(a) a statement of the findings of fact made from the evidence adduced;

(b) a statement of the rules of law and the interpretation thereof, or of the policy used.

Comments:

A -- An authority may be required by the Act and, in some cases, by virtue of the principles of procedural fairness or of section 7 of the Canadian *Charter*, to give reasons for its decisions.

B -- Unlike American law, Canadian common law does seem to require that authorities make express findings as to witnesses lack of credibility, where credibility is an issue.

Re NSP Investment Ltd and Joint Board under Consolidated Hearings Act (1990), 67 DLR (4th) (Ont Div Ct);

Cf Herr v Sullivan, 912 F (2d) 178 (1990).

C -- The standard or quality of the reasons may not be the same for all decision-making processes, and may differ according to the nature of the decision and the terms of the relevant legislation.

Re Poyser and Mills Arbitration (1964), 2 QB 467

Save Britains Heritage v Secretary of State for the Environment (1991), 2 All ER 10 (H of L).

CHAPTER V

Independence and Impartiality

Sec 31 (1) An authority or its members shall perform its functions personally, and shall do so in a wholly impartial manner and with an independent mind.

(2) Unless otherwise expressly provided by the Act, an authority is not bound by any government policy or ministerial directive.

Source:

Innisfill Township v Vespra Township, [1981] 2 SCR 145;

Alkali Lake Indians and West Coast Transmission (1984), 8 DLR 611 (BA);

Minott v Stoney Mountain Penitentiary, [1982] 1 FC 322;

Re Dale Corporation and Rent Review Commission (1983), 149 DLR (3d) 11?;

Matthews v Board of Directors of Physiotherapy (1991), 44 Admin LR 147 (Ont Div Ct).

Comments:

A -- This provision sets out the distinction between independence in decision-making and institutional independence or structural impartiality.

B -- The courts have held that the mere fact that a manual of directives is used is not necessarily improper, if the directives do not operate to pre-determine the case.

Re Green (1979), 94 DLR (3d) 641 (Ont CA);

Heckler v Campbell, 103 5 Ct 1952 (1983).

C -- The Act may of course require the authority to comply with guidelines.

See section 6 of the *Department of the Environment Act*, RSC 1985, c E-12.

CHAPTER VI

Review of the decision

Sec 32 -- Unless the Act expressly so authorizes, an authority may not review, reconsider or set aside a decision or an order except as provided by sections 33 and 34.

Canada v Nabiye, [1989] 3 FC 424 (CA);

Chandler v Alberta Association of Architects, [1989] 2 SCR 643; (1990), 62 DLR (4th) 577.

Sec 33 -- An authority may, within a reasonable time, on its own motion or on request, review its decision in order to correct any clerical error or in expressing the clear intention of the authority.

Grillas v Minister of Manpower and Immigration, [1972];

Chandler; *supra*.

Sec 34 -- An authority may, within a reasonable time, on its own motion or on request, review or set aside its decision or order where

- (a) the decision or order was obtained as a result of fraud or misrepresentation;
- (b) it appears to the authority that its decision or order was made without regard to the right of the parties to a fair hearing;
- (c) the authority has a continuing jurisdiction in the matter.

Source:

R v Home Secretary, [1978] WLR 700;

Gill v Canada, [1987] 2 FC 425 (FCA);

R v Kensington and Chelsea Rent Tribunal, [1974] 1 WLR 1486 (QBD);

Grillas, *supra*

Toth v MEI, [1989] 1 FC 535 (CA);

Scott v National Parole Board, [1988] 1 FC 473;

Longia v Canada, [1990] 3 FC 288 (CA), 44 Admin LR 264.

Comments:

A -- In-house review is a faster, simpler and more economical procedure than appeal or judicial review. It should be encouraged.

B -- The courts have held that in-house review may co-exist with the right of appeal.

Re Alberta Power and Alberta Public Utilities Board (1990), 66 DLR (4th) 286 (CA).

C -- Clearly, reconsideration should be exercised in a reasonable manner.

LRB of Saskatchewan c. The Queen (1956), SCR 82, 87.

Repeated applications for review or unreasonable delay would create turmoil, not orderly regulation.

Sec 35-- An authority that reviews its own decision shall ensure that all parties are afforded a fair hearing.

CHAPTER VII

Final provisions

Sec 36 -- Nothing in this Code relieves an authority from complying with any requirements imposed upon it by any other rule of law.

Source:

Sec 8, *Alberta Administrative Procedures Act*.