MODEL CODE OF ADMINISTRATIVE PROCEDURE

For Saskatchewan Administrative Tribunals

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INTRODUCTION

Boards, commissions, and review panels have become an important part of the administration of justice in Saskatchewan. These "administrative tribunals" make decisions in a wide range of cases affecting Saskatchewan residents and businesses. Nearly fifty tribunals adjudicate disputes between citizens and government agencies.

This *Model Code* is designed to contribute to the fairness and efficiency of Saskatchewan tribunals. It provides a basic set of procedural rules that can be adopted by most tribunals, or used as a starting point for creating a procedural code adapted to specific needs.

The importance of procedure can hardly be over-emphasized. Proper procedural rules help ensure that decisions will be unbiased and assure all parties that they will have a full opportunity to be heard before a decision is made.

Saskatchewan tribunals usually act fairly, but it is difficult to ensure that uniformly high procedural standards are applied by all tribunals. Each tribunal has been created by legislation, but the legislation is uneven. In some cases, tribunals are governed by detailed procedural rules set out in the legislation. Others, particularly those created when administrative law was less developed than at present, are not. Oversight of tribunals has largely been left to the courts. Judicial review of tribunal decisions has laid down basic principles, called the "rules of natural justice", which all tribunals must adhere to, but it is not always easy for tribunals to identify procedures that will ensure that these principles are honoured in practice.

These problems are compounded by the differences between tribunals. Some, like Human Rights Tribunals, are presided over by professionals, and assisted by expert staff. Others are composed of lay persons with little background in the law. The level of formality also varies. Some tribunals are rarely attended by lawyers and have no formal rules to ensure procedural fairness. Others, like the Labour Relations Board, are hedged with procedural protections.

Many smaller boards and tribunals suffer from lack of clear guidance in procedural matters. This *Code* is designed to supply the needed guidance. It will be most useful for smaller tribunals rather than those with well-developed procedural rules. Adoption of the code will provide an authoritative and comprehensive source of procedural law.

For many smaller agencies, the greatest need is often education for non-professional, part-time board members. Both the Canadian Council of Tribunals and its provincial affiliate, the Saskatchewan Association of Administrative Tribunals, sponsor educational programs for members. The *Model Code* is not an alternative to education but can be a valuable educational tool.

Although designed with the needs of smaller tribunals in mind, the *Model Code* is a workable set of procedural guidelines that could be applied by almost any tribunal. There is, however, a significant exception. The *Model Code* is not intended to apply to disciplinary committees established under legislation regulating self-governing professions. The Law Reform Commission has published a *Handbook for Professional Association Disciplinary Proceedings* as a companion to the *Model Code*.

The principles of natural justice

Procedural rules come from two sources. First, each tribunal is established by a statute. This legislation may contain some procedural rules. The rules contained in the *Model Code* are intended to supplement, rather than replace, statutory rules. Second, the courts have developed "principles of natural justice" that apply to all tribunals. If, on judicial review of a decision of a tribunal, the court finds that the principles of natural justice have not been followed, the decision may be overturned.

Tribunals are sometimes called *quasi-judicial* decision makers. Like the courts, they have a duty to act fairly. The principles of natural justice have been developed over time to promote fairness. The principles have been summarized as follows:

> The first two principles of natural justice are that persons whose interests may be affected by a decision should firstly be given notice of the case to be met or the allegations against them and secondly, an opportunity to be heard. The third fundamental principle of natural justice is that the decision maker should be disinterested and impartial. The policy reasons behind all three aspects of the rules of natural justice is the same: Namely, not only must justice be done, but it must manifestly be seen to be done. It is a matter of important public policy that there be no lack of public confidence in the impartiality of adjudicative tribunals [James Casey, *The Regulation of Professions in Canada*].

The courts have applied these principles to a wide range of procedural issues, from notice requirements, to reception of evidence and cross-examination of witnesses. The Model Code is intended to reflect the principles of natural justice.

THE ANNOTATED MODEL CODE

1.0 Pre-Hearing Procedures

1.1 Acknowledgment of application and information

The tribunal should acknowledge receipt of an application in a timely fashion, and notify the applicant of

(1) the procedure for setting a hearing date if the date has not been set;

(2) any error in the application, and any additional information required by the tribunal;

(3) any other parties or intervenors that may be included in the application;

(4) the availability of ADR or mediation; and

(5) any other information the tribunal believes to be appropriate.

Comment:

Acknowledging the application

Effective communication contributes to fairness and efficiency. Communication between the tribunal and the parties who will appear before it starts when the application is made. It should begin by acknowledging receipt of the application. The acknowledgement is an opportunity to avoid future misunderstandings and delays by providing basic information about the procedures that will apply to the application.

Correcting errors in an application

If there is an error in an application, or required information has been omitted, the applicant should be notified as soon as practically possible. The tribunal should review all applications to identify errors and omissions. This

task might be assigned to the secretary or clerk of the tribunal, or to a designated tribunal member. However, it is important to keep in mind that this review should not amount to prejudgement. If there is any doubt about whether the tribunal should proceed with an application, it must be resolved at a hearing. In such a case, Rule 1.4 (*Hearing confined to jurisdictional issues*) may apply.

Form and content of the acknowledgement

The rules do not set out the content of the acknowledgement in detail. The legislation governing the tribunal may contain some special requirements. Otherwise, the tribunal should design a form of acknowledgement that fits its needs. For example, municipal Development Appeals Boards usually hold monthly meetings, and hear applications at the next scheduled meeting. In this case, the requirement in 1.1(1) can be met by giving notice of the hearing date. Other tribunals may schedule hearings differently. If the number of potential participants or complexity of issues requires consultation before a hearing date can be set, applicants should be made aware of the manner in which the hearing date will be set (see Rule 1.3).

Most of the information required by the Rule can be incorporated into a standard form. For example, the requirement that the applicant be informed of other potential parties can usually be met by telling the applicant who is entitled to notice of hearing under the legislation governing the tribunal. Note in addition that under Rule 1.5.4, if a person applies for status as a party or intervenor, notice of the application must be given to other participants.

Some tribunals may find it useful to provide all applicants with an information packet outlining the tribunal's function and procedure.

Alternative Dispute Resolution

If alternative dispute resolution, such as mediation, is available, the acknowledgement is an opportunity to make information about it available.

1.2 Identification of participants

1. The tribunal shall grant party status to

(1) all named parties;

(2) all persons who have participated in earlier proceedings;

(3) all persons whom the tribunal knows or reasonably believes are entitled by statute to standing as parties in the proceedings;

(4) all other persons who will be directly affected by the proceedings, and in consequence entitled to party status;

(5) any other person who the tribunal is authorized by statute to add as a party.

2. The tribunal may grant intervenor status, on such terms as the tribunal shall specify, to

(1) any person who qualifies as an intervenor under statute or other provision of law;

(2) any person who is affected by the proceedings or who represents the public interest, and who, in the tribunal's opinion, can contribute to the proceedings.

3. The tribunal may grant status as a party or intervenor prior to the hearing, but any person who has not been granted status may appear at the hearing and make application for status at that time.

4. When a tribunal has received an application, timely notice that the application has been received shall be given to all persons who may be granted party status under Rule 1.2.1,

and any other person the tribunal, in its discretion, determines should be given notice.

5. Any person who applies for, or is given, status as a party or intervenor is entitled to the acknowledgement and information set out in Rule 1.1.

6. The tribunal may appoint one or more of its members to determine who shall receive the notices required in Rules 1.2 and 1.3, and to grant, prior to the hearing, status as a party or intervenor under Rules 1.3.3.

Comment:

Who is a party?

It is important to identify all persons entitled to participate in a hearing. Here, a distinction must be made between two classes of participants. "Parties" are entitled to participate fully in the hearing, in the same manner as the applicant. "Intervenors" are permitted to participate only to the extent allowed by the tribunal.

Persons entitled to participate as *parties* fall into two classes:

(1) Anyone entitled to receive notice of hearing is a party. For example, *The Planning and Development Act* requires Development Appeals Boards to notify the owners of "adjacent property or property within a radius of 75 metres from the property in respect of which the appeal is made."

(2) The rules of natural justice require that any person who may be "directly affected" by a tribunal decision must be given an opportunity to participate as party. This is an evolving area of the law, that is sometimes difficult to apply in practice. Nevertheless, it is an important matter for the tribunal to consider. A decision can be overturned by the courts on the ground that a person with a direct interest has not been given an opportunity to be heard.

If it is clear that direct, unavoidable loss (financial or otherwise), may result from the tribunal's decision, party status must be granted. A tribunal should not refuse party status to anyone with a plausible claim to it, but there are

limits. The courts have held that an interest simply as a member of the public is not sufficient for party status. This is obviously a difficult area of the law. There are no easy answers. Here are the observations of the Federal Court of Appeal on this topic in a recent decision:

> It is clear to me that mere interest in the eventual outcome of a proceeding before a tribunal, whether financial or otherwise, is not in itself sufficient to give an individual a right to participate therein. The demands of natural justice and procedural fairness certainly do not require so much and in any event it would be impossible in practice to go that far. In my judgement, to be among the interested parties that a tribunal ought to involve in a proceeding before it to satisfy the requirements of the *audi alteram partem* [fair hearing] principle, an individual must be directly and necessarily affected by the decision to be made. His interest must not be indirect or contingent, as it is when the decision may reach him only through an intermediate conduit alien to the preoccupation of the tribunal, such as a contractual relationship with one of the parties immediately involved (*Canadian Transit Co. v. Public Service Staff Relations Board (Can.)* (1989), 39 Admin. L.R. 140).

Notifying parties

Another important question is how the tribunal should contact possible parties. Potential parties may come forward on their own. But the tribunal must also make a reasonable effort to identify and contact potential parties. The courts have held that failure to do so may deprive potential parties of the right to be heard. Some tribunals are required by statute to advertise hearings. All tribunals should determine whether advertisement and other methods of identifying and informing potential parties are appropriate.(See also comment on Rule 1.3.)

Intervenors

Persons who are not "directly affected" by a tribunal decision do not have a right to participate in hearings. But tribunals, like the courts, may permit anyone who may make a contribution to the proceedings to participate. Appropriate intervenors include organizations representing the public interest, and persons with special knowledge about the issues. The Rule recognizes this practice, but leaves it to the tribunal to determine the extent of participation. Intervenors might, for example, be invited to make a submission, but not to introduce evidence or examine witnesses.

1.3 Setting the hearing date and notice of hearing

1. Except as provided in Rule 1.3.2, or as otherwise required by statute, the tribunal shall hold a hearing within a reasonable time after receipt of an application.

2. Notwithstanding any provision to the contrary, a hearing may be postponed if the tribunal believes it is in the interests of justice to do so.

3. Notice of hearing must be given to

(1) all parties and intervenors,

(2) all persons who have applied for party or intervenor status whose status has not been determined, and

(3) any other persons known to the tribunal who are directly affected by the proceedings and who have not been notified that the application has been made.

4. Notice of hearing must be reasonable, or as otherwise required by statute.

Comment:

Setting the hearing date

In most cases, the governing statute requires a hearing within a specified time after receipt of an application. In all other cases, the Rule requires that the hearing be held within a reasonable time.

All participants are entitled to expect that proceedings will not drag on for an unnecessarily long time. Requirements setting time limits ensure timely decisions. However, they may cause problems in some cases. For example, it may be desirable to postpone the hearing to allow mediation, or to permit the parties to gather evidence.

The importance of notice of hearing

Notice of hearing ensures that the parties' right to be heard is protected. The courts have said that "probably no principle is more fundamental to administrative law than [the]… rule of natural justice that parties be given adequate notice and opportunity to be heard" (*Canadian Transit Co. v. Public Service Staff Relations Board (Can.)* (1989), 39 Admin . L.R. 140). Failure to give adequate notice is grounds for overturning a decision. In *Wiswell v. Winnipeg*, [1965] S.C.R. 512, the Supreme Court of Canada stated that inadequate notice is "more than an administrative irregularity", and will render a decision "void."

Adequate notice has two essentials:

(1) It must include an accurate description of the nature and scope of the hearing. The parties must be told enough to allow them to prepare their cases. Thus they must be told what is at issue, and exactly what occurrences the hearing is about.

(2) It must be given far enough in advance of the hearing to allow the parties to prepare their cases.

Both the time of notice and its content may be stipulated by the governing statute. Such requirements should be regarded as minimum requirements. In all cases, the tribunal must ensure that notice meets the two tests referred to above, which may require more than the statute demands.

Method of notice

Any statutory requirement concerning the way in which notice is to be given must be rigorously followed. Otherwise, what is important is to ensure that known parties actually receive notice, and that reasonable steps have been taken to ensure that potential participants are aware of the application.

Registered mail is a more appropriate means of ensuring that notice reaches known parties than ordinary mail.

Choosing an appropriate method of notice may be particularly difficult when there is a large group of potential parties. Personal service may be impractical. Thus, for example, the courts have held that advertisement in a newspaper is adequate notice when all rate-payers in a municipality were potential parties (*Conception Bay South (Town) v. Nfld.,* 6 Admin. L.R. 287, Nfld. S.C.).

1.4 Hearing confined to jurisdictional issues

When a tribunal is of the opinion that it may lack jurisdiction to hear an application, or that the application contains some other fundamental defect, and the applicant does not consent to withdrawal of the application, the tribunal may direct that the question of jurisdiction or other defect be heard and determined prior to a hearing of the application on its merits.

Comment:

A tribunal may be required to hold a hearing even if it is convinced that it has no authority to make the requested decision. This is because tribunals must rule on questions of jurisdiction, and must hear submissions from the parties before deciding.

Many tribunals advise applicants of presumed lack of jurisdiction, and suggest withdrawal of the application. In many cases, this is entirely satisfactory. For example, an applicant to a Development Appeals Board may seek relaxation of a zoning bylaw, unaware that *The Planning and Development Act* allows the board to do so only if a building permit has been refused by the municipality. Few applicants would insist on proceeding after the problem has been explained.

But in some cases, the jurisdictional issues may be difficult. For example, the jurisdiction of the Meewasin Valley Authority Appeal Board to hear applications brought by property owners affected by proposed developments has been litigated in the Court of Appeal on at least three occasions. In such cases, the tribunal has no option but to hear the application, giving the parties an opportunity to be heard on the question of jurisdiction.

It may be appropriate to proceed with an ordinary hearing that deals with both jurisdiction and other issues. However, it may be more convenient to hold an initial hearing to discuss jurisdiction. Only if the Tribunal rules that it has jurisdiction will it be necessary to reconvene to hear evidence on the other issues. Rule 1.4 authorizes this method of proceeding.

1.5 Other pre-hearing matters

1. A tribunal may direct, on consent of the parties, that a pre-hearing conference be held.

2. A tribunal may, on consent of the parties, divert an application to mediation or other alternative dispute resolution (ADR) mechanism.

3. A tribunal may direct any informal enquiry or investigation or otherwise gather information relating to an application in order to determine whether to conduct a hearing, or for consideration at a hearing.

4. When two or more cases pending before a tribunal involve the same or similar questions of fact or law, the tribunal may, on consent of the parties, order that the proceedings be combined in whole or in part.

5. When more than one tribunal has jurisdiction over the same or a similar matter, a joint hearing may be conducted on consent of the parties and the tribunals.

Comment:

In recent years, administrative tribunals in Canada have adopted some innovative approaches to dispute resolution. Many of these could be used by Saskatchewan tribunals.

Investigation

Courts make decisions only on the basis of evidence presented by the parties. Some tribunals are authorized to take a more proactive approach, and conduct investigations on their own.

The courts have held that tribunals may conduct investigations on their own initiative, so long as the results are disclosed to the parties. However, care must be taken to make sure that the parties have full information about any

investigations undertaken at the tribunal's direction. It is almost never good practice for board member to make his or her own private inquiries.

Pre-hearing conferences

Pre-hearing conferences are a way to narrow issues and encourage early resolution of disputes. Pre-hearing conferences make no binding decisions (unless they are consented to by all the parties). Thus they are flexible, and need not follow a rigid format. In practice, the tribunal might designate one of its members to meet with the parties or their representatives. The conference is an opportunity to identify the important issues, agree on facts, and disclose evidence that will be presented.

Mediation

The value of mediation and other methods of alternative dispute resolution are now recognized, but have not been much used by Saskatchewan tribunals other than the Human Rights Commission.

In mediation, an independent third party will guide the parties through a discussion and, ideally, to an agreement that is acceptable to all. A mediator can help parties gain a better understanding of the issues and help identify solutions. A mediated settlement can be more creative, and is often more acceptable to the parties, than a decision dictated by the letter of the law. It can be less expensive, less time-consuming, and less traumatic for everyone involved.

Mediation is of course only appropriate where the tribunal has some discretion in regard to the decision it can make. More detailed discussion of mediation is beyond the scope of this handbook. A tribunal interested in adopting a mediation program should seek expert advice to assist in designing an appropriate program. The Dispute Resolution Office, Saskatchewan Justice, is available as a resource.

Consolidation of hearings

Consolidation of hearings with related subject matter may be a useful tool. The Rule allows two types of consolidation:

(1) Several applications before the tribunal may involve the same facts. For example, a survey error may have put all the houses on a block in

contravention of a zoning by-law. The Development Appeals Board might suggest that all applications for relaxation of the by-law be heard together.

(2) A fact situation may give rise to applications before two tribunals. For example, a proposed development in the City of Saskatoon might lead to appeals to both the Meewasin Valley Authority Appeals Board and the municipal Development Appeals Board. In such a case, the parties might agree to a joint hearing before the two tribunals. Each tribunal would then make its decision, according to law it administers.

2.1 Adoption of procedural rules

1. A tribunal has, subject to the rules of natural justice and the statute governing the tribunal, the power to control its own proceedings.

2. A tribunal may adopt rules of procedure of general application in addition to or in substitution for the rules contained in this code, subject to statute, and the rules of natural justice.

3. Notwithstanding that it has adopted procedures of general application, a tribunal may adopt particular procedures for a given case, or vary existing procedures for a given case.

Comment:

Some tribunals are authorized to make rules governing their own procedure by the statutes establishing the tribunals. Most smaller boards do not have a statutory authority to adopt procedural rules. But they nevertheless may do so, within the limits set by the rules of natural justice and the statutes governing them. This Rule explicitly authorizes adoption of additional rules. Examples of additional rules are rules governing pre-hearing disclosure of evidence by the parties, and rules governing adjournments.

This *Model Code* is a basic set of procedural rules. Tribunals that choose to follow it may find it useful to adopt additional, more specific rules.

Neither the *Model Code* nor other procedural rules adopted by a tribunal should be a strait jacket. Proceedings before tribunals should be flexible. For that reason, the Rule allows a tribunal to adopt or modify rules to meet the special circumstances of specific cases.

2.2 Quorum

Unless otherwise provided by statute, a tribunal may hold a hearing before a quorum of members of the tribunal as defined in *The Interpretation Act, 1995*, and when one or more tribunal members cannot complete the hearing, the hearing may be completed by the remaining members so long as a quorum remains.

Comment:

Most tribunals hear applications before the full board of tribunal members. It is important that a proper quorum of board members is present at the hearing. *The Interpretation Act, 1995* provides the basic rules for determining what constitutes a quorum:

18(2) Where a board is established by or pursuant to an enactment:

(a) if the number of members of the board is a fixed number, at least one-half of the number of members is a quorum at a meeting of the board;

(b) if the number of members of the board is not a fixed number, at least one-half of the number of members in office is a quorum at a meeting of the board;

(c) if the number of members of the board is expressed as a range between a minimum and a maximum, at least one-half of the number of members in office is a quorum, but only if at least the minimum number of members is in office;

(d) an act or thing done by a majority of members of the board present at a meeting of the board, if the members present are a quorum, is deemed to have been done by the board;

(e) a vacancy in the membership of the board does not invalidate the constitution of the board or impair the right of the members to act, if the number of members in office is not less than a quorum.

(3) In subsection (2), "board" means a board, commission or other body, whether incorporated or not, consisting of three or more members.

Larger tribunals such as the Labour Relations Board may hold hearings before panels constituted with less than the full number of board members. The tribunals that may find a panel system useful are usually those authorized to do so by statute, and are also those that require least guidance from a *Model Code*.

2.3 The form of the hearing and access to proceedings

1. Unless otherwise provided by statute, hearings shall be open to the public and advertised in a reasonable manner.

2. Except as provided in Rule 2.3.3, parties and intervenors are entitled to made written or oral submissions at the hearing, and to be present throughout the hearing.

3. A tribunal may, on consent of the parties and intervenors, hold written, electronic, oral or mixed hearings, but in such cases, access of the parties and intervenors to all submissions, replies, and evidence during the course of the hearing must be ensured, and if the tribunal is required to hold a public hearing, public access to such materials must be made available prior to release of the tribunal's written decision and reasons.

Comment:

Most Saskatchewan tribunals hold hearings open to the public. At a hearing, oral and written submissions may be presented, and witnesses heard. This Rule is concerned with two matters: Public access, and adoption of alternative forms of hearing such as electronic hearings and exchange of written submissions.

Public hearings

Hearings open to the public are required by statute in many cases. When a public hearing is required by statute, the requirement is mandatory. A decision made at a hearing not open to the public may be overturned by the courts.

When the governing statute does not require a public hearing, the courts have held that the tribunal may exclude the public (see for example *Millward v. Canada (Public Service Commission)* (1974), 49 D.L.R. (3d) 295 (FCTD)). Nevertheless, public expectations increasingly demand transparency. Thus, as a matter of good practice, public hearings should be preferred. The Rule adopts this approach.

Tribunals not required by statute to hold public hearings may wish to consider adopting a different rule, but should do so only after careful consideration of its purposes. The Alberta Law Reform Institute has suggested an alternative to the open hearing rule that might be considered:

> A hearing should be open to the public, except where any of the following factors outweigh the desirability of holding the hearing in public:
>
> - matters involving public security would be disclosed
> - there is a possibility of danger to life, liberty or security of a person
> - intimate financial or personal matters would be disclosed.

Oral hearing

The courts have quite clearly stated that the rules of natural justice require at the very least that the parties have "the right to bring evidence, and the right to make argument." Usually, an "oral hearing" is held by a tribunal. It is attended by all the parties. Submissions are read or circulated at the hearing, and witnesses heard.

An oral hearing allows the parties to respond immediately to the submissions made by others, and to question witnesses called by others. A "hearing" that involves only the exchange of written submissions, for example, may meet the minimum requirements of the right to be heard in some cases, but has generally been regarded as less satisfactory.

The courts have said that the "hearing" does not necessarily have to be "oral." (Jones & de Villars, *Principles of Administrative Law* (2d) at 230, 241). However, they have preferred oral hearings when "reputation, livelihood, or matters of serious import" are at issue (*Pett v. Greyhound Racing Assoc.* (1968), 2 W.L.R. 1471 (Eng. C.A.)), and under the *Charter of Rights,* when "life and liberty" are at issue (*Singh v. Minister of Employment and Immigration* (1985), 12 Admin. L.R. 137 (S.C.C.)).

The Rule makes oral hearings the normal procedure unless the participants consent to another format.

Other forms of hearing

There is growing interest in the use of electronic communications (such as tele-conferencing, fax, and email) to conduct hearings at which all of the participants are not physically present. These innovations make an interactive exchange possible. They are thus more acceptable than an exchange of written submissions, and may be satisfactory substitutes for a conventional oral hearing.

These approaches can be used at present by any tribunal if all the parties consent. The Rule facilitates electronic and written hearings by expressly permitting them, but leaves it to tribunals to devise procedures that will be appropriate for their needs.

The most difficult problem in designing alternatives is to ensure that parties and intervenors can participate in a full, meaningful manner, and that the process remains open to public scrutiny.

2.4 The role of participants

1. The Chair, or other member designated by the tribunal members present at a hearing, shall preside over the hearing.

2. Parties must be given a fair opportunity to present a case at a hearing, and to know and respond to the case they are to meet, including any representations of other participants.

3. A party has the right to self-representation, or to be represented by legal counsel or other advocate.

4. The participation rights of intervenors are at the discretion of the tribunal.

5. The tribunal may order the exchange of documents between parties or intervenors, the filing or exchange of witness statements, or experts' reports and qualifications, the exchange of medical examinations, and the provision of particulars.

6. Rule 2.4 is subject to the provisions of any statute or regulation governing procedure before the tribunal.

Comment:

Saskatchewan tribunals conduct hearings with varying degrees of formality. Proceedings before a Human Rights Tribunal, for example, are relatively court-like. On the other hand, informality is the hall mark of many tribunals, particularly smaller agencies such as Development Appeals Boards.

A tribunal is not a court, and fairness can be ensured without adopting the strict adversarial regime typical of the courts. To do so would in fact impede the efficiency of tribunals like Development Appeals Boards, without adding much to the protection of the rights of participants.

Role of the chair and tribunal members

Some member of the tribunal should have responsibility for controlling the hearing. This will usually be the chairperson of the tribunal, but another tribunal member may be designated to chair a hearing. The hearing chair calls upon the parties to present evidence and witnesses. He or she may also rule on minor procedural matters, and maintains order.

Questions from participants to the tribunal should be directed through the chair. The hearing chair should not allow any party or counsel (including its own legal advisor) to take control of the proceedings. Thus a new hearing was ordered in a case in which counsel "generally speaking acted as spokesman" for the tribunal (*Venzel v. Association of Architects* (1990), 41 A.C. 50 (Ont. Div. Ct.)).

There are no hard-and-fast rules applying to the way in which a hearing is to be conducted. But it is the usual practice to begin by allowing the applicant to present evidence and call witnesses. After this, parties opposed to the application present evidence and witnesses. All parties should be given an opportunity to summarize their contentions, and to make and respond to any arguments about points of law and procedure as they arise.

It is important to remember that the tribunal is required to be impartial, like a judge in a court of law. The chair and other tribunal members may question parties and witnesses, but should not appear to advocate for any party. The courts will overturn a decision if the tribunal does not remain impartial, or even appears to be biased against a party. For example, in *Brett v. Board of Directors of Physiotherapy* (1991), 77 D.L.R. (4th) 421 (Ont.C.A.), a decision was overturned because a board left the impression that "the member was being tried by counsel to the Board".

Role of parties and participants

Natural justice requires that parties have the right to be heard. This goal can usually only be achieved by permitting the parties to present evidence and arguments, and respond to the evidence and arguments presented by others. Thus the courts have held that "when an oral hearing is held… generally the right to call witnesses and to cross-examine them is part of the procedure protected by natural justice" (Jones & de Villars, *Principles of Administrative Law* (2d) at 260).

Legal counsel

Parties may be represented by legal counsel. The courts have held that there is always a right to counsel in any case where "reputation, livelihood, or matters of serious import" are at issue (*Pett v. Greyhound Racing Assoc.* (1968), 2 W.L.R. 1471 (Eng. C.A.)). In other cases, there is perhaps no absolute right to counsel. But when a full hearing is conducted, the courts have been quick to criticize if counsel for a party is not allowed to participate. The Rule thus gives parties the right to be represented by counsel.

Disclosure

Rule 2.4.5 is intended to ensure full disclosure of evidence. A fair hearing is possible only if the parties know the case to be made against them. Thus, when a tribunal had access to a report not made available to one of the parties, the tribunal's decision was over-turned (*Errington v. Minister of Health*, [1935] 1 K.B. 249 (Eng. C.A.)). While some exceptions to the full disclosure requirement have been recognized by the courts, it would be dangerous to proceed without full disclosure unless legal advice has been obtained.

Most problems can be avoided if relevant documents and reports are circulated by the parties to all participants prior to the hearing, and submitted in evidence at the hearing. If the tribunal itself obtains information or advice, it should be shared with all participants (See Rule 2.5.3).

2.5 Evidence

1. A tribunal may admit any evidence that it considers relevant to the issues before it if it would not be unfair to a party to admit the evidence, and the tribunal is not bound by the formal rules of evidence.

2. Notwithstanding Rule 2.5.1, a tribunal shall not admit evidence that is privileged.

3. A tribunal, or any member of a tribunal, may consult with other members of the tribunal, with staff of the agency or with any other person having technical or special knowledge, if when

such consultation occurs at any stage in the proceedings, including the drafting of the decision, any new facts, evidence, or legal issues arise which are likely to affect the decision of the tribunal, the participants are apprised of the information, and given an opportunity to make submissions.

Comment:

Tribunals are not bound by the formal rules of evidence that apply in courts of law. A tribunal may receive all relevant evidence, even if it would not be admissible in a court of law. In particular, exclusionary rules of evidence such as the hearsay rule, and the technical rules governing admission of documents into evidence, do not ordinarily apply. The courts have held that

> the technical rules of evidence… form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined [*R. v. Deputy Industrial Injuries Commission; Ex parte Moore*, [1965] 1 Q.B. 456].

Because informal rules of evidence are applied by tribunals, much that could be presented in court only through testimony of witnesses can be received through the submissions of the parties.

The Saskatchewan Human Rights Code states that a Human Rights Tribunal:

> 30(2) … may receive and accept any evidence and information on oath, affidavit or otherwise that in its discretion it considers appropriate, whether admissible as evidence in a court of law or not…

This is simply a statement of the general rule applying to all tribunals.

The only exception to this rule is a prohibition on reception of privileged information. Few communications are privileged in law. For example, statements made by a client to his or her lawyer are privileged. A few other examples of privilege have been created by statute. This is not the place to discuss the law of privilege. If a claim to privilege is made by a witness or party, the tribunal should obtain legal advice.

Although not bound by strict rules of evidence, a tribunal should exercise some care in regard to the evidence it receives. The tribunal decision must be based on relevant evidence. Relevant evidence is evidence that bears on the issues before the tribunal. A tribunal should not waste its time hearing irrelevant evidence, and may refuse to do so.

Rule 2.5.3 is intended to avoid a possible misunderstanding. Tribunals may consult with staff or experts. Even a tribunal such as a Development Appeals Board with no staff of its own may seek technical information from the municipal planning department. This is acceptable, but only if done properly. The courts have held that tribunals are entitled to consult, but only if the information they obtain is disclosed to the parties (*Errington v. Minister of Health*, [1935] 1 K.B. 249 (Eng. C.A.)).

This rule also applies when tribunal members view a site or conduct personal investigations. Again, such practices are acceptable only with the knowledge of the parties (see *Teneycke v. Matsqui Institution* (1990), 33 F.T.R. 181 (F.C.T.D.)).

2.6 Witnesses

1. If a tribunal believes the testimony of a witness would contribute materially to resolution of the issues before it, or is otherwise required in the interests of fairness, the tribunal may permit the parties to call and examine witnesses, cross-examine witnesses called by other parties, or submit witness statements in writing.

2. Members of a tribunal may ask any questions of witnesses and participants and their representatives which are reasonably necessary to disclose fully and fairly all matters relevant to the issues in the proceeding.

3. A tribunal may require that a witness give testimony under oath or affirmation, but unless the tribunal so directs, no oath or affirmation shall be required.

4. A tribunal may require a witness statement or other written evidence to be by affidavit, or in such other form as the tribunal may direct.

Comment:

The type of evidence, and the way it is received differs considerably from tribunal to tribunal. For example, in a hearing before a Development Appeals Board, the board usually relies on submissions made by the applicant and the municipal agency that refused the applicant's request for a building permit. Other witnesses are rarely required. A Human Rights Tribunal, on the other hand, usually hears testimony from a number of witnesses, who are examined and cross-examined by legal counsel.

Handling witnesses does not present problems for tribunals that routinely receive evidence in this way, but members of small boards are often uncertain whether parties should be allowed to call witnesses, whether witnesses should be cross-examined, whether the board should question witnesses, and whether evidence should be given under oath. This Rule addresses these issues.

Some tribunals place an emphasis on informality. They attempt to avoid the adversarial atmosphere of the court room. Rule 2.6.1 recognizes this by giving the tribunal more discretion about reception of evidence than a court of law. Thus, for example, the Rule does not require witnesses to give evidence under oath.

Note that the Rule does not make cross-examination an automatic right. This requires some explanation. In a court of law, a witness is questioned first by the party who calls the witness. The other parties then have the right to test the witness by cross-examination. A tribunal should allow cross-examination in most cases, but there are exceptions. If, for example, a witness testifies simply to provide general background information, cross-examination may not be necessary. If cross-examination is not required in such a case, the witness' information can be submitted in a written report, and attendance at the hearing will not be necessary.

The courts have stopped short of requiring cross-examination in all cases, but they have insisted that cross-examination be permitted in any case in which

fairness demands it. Thus, for example, the Alberta Court of Appeal held that a tribunal was acting properly when it received the report of an expert in evidence who was unable to attend. However, it did so only because the parties were permitted to address points raised by the report, and had done so by filing reports of other experts (*Strathcona (County) v. MacNab Enterprises Ltd.*, [1971] 3 W.W.R. 461).

2.7 Record of hearing

1. A tribunal shall compile a record of any proceeding in which a hearing is held.

2. In addition to any material required by statute, the record shall include

(1) the document by which the proceeding was commenced;

(2) all notices and acknowledgements;

(3) any order or other written decisions made in the course of proceedings;

(4) documentary evidence referred to in the decision, any transcript of oral evidence or any video or audio recording made by the agency; and

(5) the decision or order of the tribunal, and the written reasons for the decision.

3. A tribunal shall make the record available for inspection by any interested person, participant, or party.

Comment:

A record of the proceedings before a tribunal will be required if the tribunal's decision is appealed. The record required for this purpose should include copies of applications and notices, submissions, and documents referred to in the decision. It will not ordinarily include a transcript of the proceedings. Few tribunals are

equipped to prepare transcripts (but statute may require otherwise, for example, *The Saskatchewan Human Rights Code* requires Human Rights Tribunals to keep a record of oral testimony).

The record-keeping requirement is set out in some detail in the statutes governing many tribunals. For example, *The Meewasin Valley Authority Act* provides that:

> Unless otherwise ordered by the appeal board, all maps, plans, drawings and written material, or copies thereof, filed with or transmitted to the appeal board… are to be retained by the appeal board as part of its permanent records, but, pending the hearing of the appeal, the appeal board shall make all such material available for inspection to any interested person or participating party.

The Rule is intended to provide a minimum set of record-keeping requirements for tribunals that do not have adequate statutory guidance in this regard.

3.0 The Decision

Introduction

Saskatchewan courts have held that even in the absence of a statutory requirement, tribunals are generally required to render written decisions. Fairness also requires that decisions be delivered in a timely fashion.

Although the law does not require tribunals to give reasons for their decisions in all cases, most tribunals now accept that the participants are entitled to reasons. The trend in the courts is to encourage tribunals to include reasons in their written decisions.

3.1 Decision and reasons in writing

1. The final decision of a tribunal must be rendered in writing, and include reasons for the decision.

2. When a tribunal has rendered its decision, it shall notify the participants of the decision, and make available to them copies of the written decision and reasons.

3. Except as otherwise provide by statute or regulations, the written decisions and reasons rendered by a tribunal shall be available for public inspection.

Comment:

All Saskatchewan tribunals are required to render decisions in writing. A few are also required by required by statute to give reasons for their decisions. In the past, the courts did not believe that reasons were necessary, but some recent Canadian decisions suggest that this attitude is changing. Failure to give reasons may contribute to a finding that the proceeding was unfair (e.g. *Rainbow v. Central Okanagan School District No. 23* (1990), 45 Admin. L.R. 273).

Thus giving reasons for decisions is good practice. The Rule adopts this approach.

3.2 Timely decisions

A tribunal shall render its decision in a timely fashion, and not later than the time required, if any, by statute or regulations.

Comment:

Both fairness and efficiency require that decisions should be made as quickly as practically possible. It is difficult, of course, to set out absolute time limits. However, most Saskatchewan tribunals are required to make decisions within time frames set out in statute. In addition, participants have recourse to the courts to compel a tribunal to render a decision. Rule 3.2 does no more than state these obligations.

3.3 Decision by Majority

1. Except as otherwise required by statute, a decision of the majority of the members of a tribunal participating in a hearing is a decision of the tribunal.

2. When a tribunal member who dissents from the decision of the majority so requests, the reasons for the dissent shall be included in the reasons for decision rendered by the tribunal.

Comment:

Some smaller tribunals have been uncertain whether decisions must be concurred in by a simple majority or require unanimity. Rule 3.3.1 provides guidance by stating the majority rule principle.

However, the legislation governing some tribunals has a special rule. In these cases, the legislation rather than the *Model Code* governs.

Some tribunals are uncertain whether dissenting opinions should be included in reasons for decision when all members of the tribunal do not agree. Most often, the problem has arisen because a board member wishes to record his or her dissent. It is good practice to allow a tribunal member to record a dissent. The Rule recognizes the right to dissent.

3.4 Correction of errors

A tribunal may correct clerical or typographical errors or errors of calculation in a decision of the tribunal within a reasonable time after the decision has been rendered.

Comment:

Tribunals have the right to correct clerical errors in their decisions. In a few cases, this authority is made explicit by statute. This Rule confirms the authority of all tribunals to correct errors.

3.5 Interim orders

1. Tribunals are authorized to make interim orders at any time during a hearing.

2. No interim order shall be made without giving participants an opportunity to be heard in regard to the subject matter of the order.

3. A tribunal may

(1) impose conditions on the grant of an interim order; and

(2) vary the interim order by the final order.

Comment:

An interim order is an order of the tribunal made before the final decision. For example, a Development Appeals Board might allow an applicant to do certain work to prevent damage to a building before making a final ruling on whether to approve a building permit. The courts have held that all tribunals may make interim orders to preserve the *status quo* until a decision is made. Authority to make interim orders is within the inherent jurisdiction of tribunals. The Rule reflects the requirements imposed by the courts on interim orders.

1. Pre-Hearing Procedures

1.1 Acknowledgment of application and information

The tribunal should acknowledge receipt of an application in a timely fashion, and notify the applicant of

(1) the procedure for setting a hearing date if the date has not been set;

(2) any error in the application, and any additional information required by the tribunal;

(3) any other parties or intervenors that may be included in the application;

(4) the availability of ADR or mediation; and

(5) any information the tribunal believes to be appropriate

1.2 Identification and notification of participants

1. The tribunal shall grant party status to

(1) all named parties;

(2) all persons who have participated in earlier proceedings;

(3) all persons whom the tribunal knows or reasonably believes are entitled by statute to standing as parties in the proceedings;

(4) all other persons who will be directly affected by the proceedings, and in consequence entitled to party status;

(5) any other person who the tribunal is authorized by statute to add as a party.

2. The tribunal may grant intervenor status, on such terms as the tribunal shall specify, to

(1) any person who qualifies as an intervenor under statute or other provision of law;

(2) any person who is affected by the proceedings or who represents the public interest, and who, in the tribunal's opinion, can contribute to the proceedings.

3. The tribunal may grant status as a party or intervenor prior to the hearing, but any person who has not been granted status may appear at the hearing and make application for status at that time.

4. When a tribunal has received an application, timely notice of that the application has been received shall be given to all persons who may be granted party status under Rule 1.2.1, and any other person the tribunal, in its discretion, determines should be given notice.

5. Any person who applies for, or is given, status as a party or intervenor is entitled to the acknowledgement and information set out in Rule 1.1.

6. The tribunal may appoint one or more of its members to determine who shall receive the notices required in Rules 1.2 and 1.3, and to grant, prior to the hearing, status as a party or intervenor under Rule 1.3.3.

1.3 Setting the hearing date and notice of hearing

1. Except as provided in Rule 1.3.2, or as otherwise required by statute, the tribunal shall hold a hearing within a reasonable time after receipt of an application.

2. Notwithstanding any provision to the contrary, a hearing may be postponed if the tribunal believes it is in the interests of justice to do so.

3. Notice of hearing must be given to

(1) all parties and intervenors,

(2) all persons who have applied for party or intervenor status whose status has not been determined, and

(3) any other persons known to the tribunal who are directly affected by the proceedings and who have not been notified that the application has been made.

4. Notice of hearing must be reasonable, or as otherwise required by statute.

1.4 Hearing confined to jurisdictional issues

When a tribunal is of the opinion that it may lack jurisdiction to hear an application, or that the application contains some other fundamental defect, and the applicant does not consent to withdrawal of the application the tribunal may direct that the question of jurisdiction or other defect be heard and determined prior to a hearing of the application on its merits.

1.5 Other pre-hearing matters

1. A tribunal may direct, on consent of the parties, that a pre-hearing be held.

2. A tribunal may, on consent of the parties, divert an application to mediation or other alternative dispute resolution (ADR) mechanism.

3. A tribunal may direct any informal enquiry or investigation or otherwise gather information relating to an application in order to determine whether to conduct a hearing, or for consideration at a hearing.

4. When two or more cases pending before a tribunal involve the same or similar questions of fact or law, the tribunal may, on consent of the parties, order that the proceedings be combined in whole or in part.

5. When more than one tribunal has jurisdiction over the same or a similar matter, a joint hearing may be conducted on consent of the parties and the tribunals.

2. The Hearing

2.1 Adoption of procedural rules

1. A tribunal has, subject to the rules of natural justice and the statute governing the tribunal, the power to control its own proceedings.

2. A tribunal may adopt rules of procedure of general application in addition to or in substitution for the rules contained in this code, subject to statute, and the rules of natural justice.

3. Notwithstanding that it has adopted procedures of general application, a tribunal may adopt particular procedures for a given case, or vary existing procedures for a given case.

2.2 Quorum

Unless otherwise provided by statute, a tribunal may hold a hearing before a quorum of members of the tribunal as defined in The Interpretation Act, 1995, and when one or more tribunal members cannot complete the hearing, the hearing may be completed by the remaining members so long as a quorum remains.

2.3 The form of the hearing and access to proceedings

1. Unless otherwise provided by statute, hearings shall be open to the public and advertised in a reasonable manner.

2. Except as provided in Rule 2.3.3, parties and intervenors are entitled to made written or oral submissions at the hearing, and to be present throughout the hearing.

3. A tribunal may, on consent of the parties and intervenors, hold written, electronic, oral or mixed hearings, but in such cases, access of the parties and intervenors to all submissions, replies, and evidence during the course of the hearing must be ensured, and if the tribunal is required to hold a public hearing, public access to such materials must be made available prior to release of the tribunal's written decision and reasons.

2.4 The role of participants

1. The Chair, or other member designated by the tribunal members present at a hearing, shall preside over the hearing.

2. Parties must be given a fair opportunity to present a case at a hearing, and to know and respond to the case they are to meet, including any representations of other participants that are relevant to an issue in that case.

3. A party has the right to self-representation, or to be represented by legal counsel or other advocate.

4. The participation rights of intervenors are at the discretion of the tribunal.

5. The tribunal may order the exchange of document between parties or intervenors, the filing or exchange of witness statements, or experts' reports and qualifications, the exchange of medical examinations, and the provision of particulars.

6. Rule 2.4 is subject to the provisions of any statute or regulation governing procedure before the tribunal.

2.5 Evidence

1. A tribunal may admit any evidence that it considers relevant to the issues before it if it would not be unfair to a party to admit the evidence, and the tribunal is not bound by the formal rules of evidence.

2. Notwithstanding Rule 2.5.1, a tribunal shall not admit evidence that is privileged.

3. A tribunal, or any member of a tribunal, may consult with other members of the tribunal, with staff of the agency or with any other person having technical or special knowledge, if when such consultation occurs at any stage in the proceedings, including the drafting of the decision, any new facts, evidence, or legal issues arise which are likely to affect the decision of the tribunal, the participants are apprised of the information, and given an opportunity to make submissions.

2.6 Witnesses

1. If a tribunal believes the testimony of a witness would contribute materially to resolution of the issues before it, or is otherwise required in the interests of fairness, the tribunal may permit the parties to call and examine witnesses, cross-examine witnesses called by other parties, or submit witness statements in writing.

2. Members of a tribunal may *ask* any questions of witnesses and participants and their representatives which are reasonably necessary to disclose fully and fairly all matters relevant to the issues in the proceeding.

3. A tribunal may require that a witness give testimony under oath or affirmation, but unless the tribunal so directs, no oath or affirmation shall be required.

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(4) documentary evidence referred to in the decision, any transcript of oral evidence or any video or audio recording made by the agency; and

(5) the decision or order of the tribunal, and the written reasons for the decision.

3. A tribunal shall make the record material available for inspection to any interested person or participating party.

3. The Decision

3.1 Decision and reasons in writing

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