HEARINGS

BEFORE

ADMINISTRATIVE TRIBUNALS

FOURTH EDITION

by
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INTRODUCTION

A new edition of a book is always an opportunity to update the work and make it more relevant. That is certainly the case with this fourth edition of *Hearings Before Administrative Tribunals*. The new fourth edition updates the material to 2010 with all of the developments and twists and turns in administrative law that have taken place therein. This edition is also broader in scope having been expanded to cover Charter jurisdiction and judicial review.

New to the work is chapter 23 which deals with the authority of administrative agencies to grant remedies under either section 24 of the Charter of Rights or section 52 of the Constitution. In the last years the courts have undergone a radical sea change respecting the authority of administrative agencies to grant Charter remedies. From the earliest days of outright opposition to such an idea the current judicial position is a complete reversal that assumes a default position that agencies have the authority to act under sections 24 or 52 unless it is clear that the legislature did not intend that they do so. Chapter 23 discusses this new responsibility of administrative decision-makers.

In addition, while previous editions of *Hearings* have focused on the practice of administrative law at the level of the administrative decision-maker, the fourth edition expands its perspective to include in chapter 28 the current law of the review of administrative decision-making by the courts. This new chapter includes discussions respecting prematurely seeking judicial review, judicial stays of ongoing administrative proceedings, and the most current philosophy of judicial deference to administrative decision-making.

Administrative law is one of the three faces of public law (the other two being constitutional law and criminal law). In it are found the principles respecting the exercise of civil state power by the administration. The three paramount principles in administrative law are likely: 1. An administrative decision-maker has only the power validly given to it by a competent authority; 2. All grants of statutory powers of decision that impact upon a person's interests must be exercised in accordance with a flexible set of fairness principles the specific content of which are determined by the particular circumstances of each case; and 3. Persons who are affected by an invalid or improper exercise of administrative power cannot be completely barred from seeking redress through the courts. Each

of these principles is canvassed in this fourth edition of *Hearings Before Administrative Tribunals.*

The text of *Hearings Before Administrative Tribunals* is excerpted from the much larger and more comprehensive five volume *Practice and Procedures Before Administrative Tribunals* by Robert W. Macaulay and James L.H. Sprague. That work, with its unique perspective on practice at the agency level, rather than looking at process from the review perspective of the courts, first appeared as a one volume service in 1988 and was the result of the insight and hard work of Robert W. Macaulay. Sadly, Robert Macaulay did not live to see this fourth edition of the paperback *Hearings* as he died on August 17, 2010. This edition is dedicated to his memory. It, and its five volume source work, stand as testimonial to the perspective which Mr. Macaulay brought to academic writing in this area. That of administrative decision-making as being a valid and independent form of action by agencies of the executive the goal of which is the delivery of state programs in a practical and efficient manner which is, at the same time, respectful of the democratic legislative will and fair to the particular interests of those affected.

James L.H. Sprague
October 2010

9.4(b) Legislative Direction

Subject to the Constitution, to the extent that Parliament has set out procedure in legislation an agency is bound by that procedure. It cannot impose procedures which conflict with that legislative direction unless the legislation gives it the authority to do so. This is because a power to make subordinate legislation (i.e. regulations or rules) cannot be used to oust the expressed will of a Legislature, nor can a non-legislative discretionary power be used to oust legislative provisions. (See for example *Opron Inc. v. Emco Ltd.* (1980), 112 D.L.R. (3d) 288, 29 N.B.R. (2d) 422 (C.A.) where the Court held that regulations made under an Act cannot "amend, alter, enlarge or limit the substantive terms of the Act." and *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunication Commission)* (1977), 81 D.L.R. (3d) 609 (S.C.C.) where the Supreme Court of Canada stated at p. 629 D.L.R. that: "I have no doubt that if regulations are in force which relate to the licensing function they would have to be followed even if there were policy statements that were at odds with the regulations. The regulations would prevail against any policy statements."[32.19A]) Nor can the courts use the principles of natural justice and fairness to over-ride that legislation direction (again subject to the Constitution) as natural justice and fairness, being mere inferences drawn by the courts from the silence of the Legislature, cannot over-ride and express statement of legislative intent.[32.20] Equally, the failure to comply with a legislative procedural direction can render the agency's final decision invalid. This will depend on whether the legislative provision amounts to a discretionary power (in which case the procedure is in the discretion of the agency to carry out or not as the agency feels may be appropriate), or whether the legislative direction is an imperative duty laid upon the agency. If it is a duty the consequences of failure to comply with the direction will depend on whether it is mandatory or directory.[32.21]

Legislative direction may be found in a number of different sources.

Firstly, there are the quasi-constitutional statutes which some jurisdictions have adopted and which operate within those jurisdictions as paramount controls on the power of government, including agency, action. Three jurisdictions have adopted such statutes: federal agencies are bound by *The Canadian Bill of Rights*; Alberta agencies are bound by the *Alberta Bill of Rights*; and Quebec agencies are bound by the Quebec *Charter of Human Rights and Freedoms*.[32.22] Because these are statutes passed by the federal Parliament or the provincial legislatures

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32.19A See also *Fairhaven Billiards Inc. v. Saskatchewan (Liquor & Gaming Authority)* (1999), 17 Admin. L.R. (3d) 167 (Sask. C.A.) (Agency cannot administer statute in a way that is contrary to the Act).

32.20 *Innisfil (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145, 123 D.L.R. (3d) 530. For other cases to this effect see the discussion in chapter 12.2(c) "Hearings Must Be Fair".

32.21 See the discussion later in this text in c. 12.3(c)(x).

32.22 All of which are set out later in this text under the Legislation tab.

actually come into effect until April 1, 1998). That Act contains a few, very general procedural provisions respecting either administrative and adjudicative decision-making.[32.28] as well as a more extensive procedural code applicable to the Administrative Tribunal of Quebec, the general administrative appeal agency of that province.

The federal department of Justice was considering a very extensive procedural statute for listed federal agencies but that initiative remains merely at the proposal stage and appears to be moribund at the time of writing.[32.29]

Aside from the statutes of general application, legislative direction can also be found in specific statutes respecting either particular agencies or particular subjects. See, for example, Ontario's Regulated Health Professions Act, 1991, S.O. 1991, c. 18[32.30] which contains procedural directions respecting the various regulated health bodies or the Commercial Appeals Commission Act, R.S.B.C. 1996, c. 5 which contains a number of procedural provisions respecting the operation of the Commercial Appeals Commission.

Lastly, agencies can perform functions under both federal and provincial statutes.[32.30A] When that happens the agency must, as one would expect, apply the legislative directions of the jurisdiction whose functions it is performing.[32.30B]

9.4(c) Legitimate Expectations

The operation of the principle of legitimate expectations is discussed in some detail later in this text in c. 40 and I would refer the reader to that chapter. In summary, where a decision-maker has promised an individual that a specific procedure will be followed before a decision is reached, or the decision-maker's conduct is such that would reasonably create such a belief, the courts will uphold that individual's right to that procedure even if the law would not otherwise recognize it. Legitimate expectations only operates to grant procedural, never substantive, rights and there must be some promise or conduct which a reasonable person would reasonably expect that a specific procedure was to be followed.

Legitimate expectations is really an aspect of "fairness", which I will discuss next. However, it applies where the law, including the principles of natural and justice and fairness would ordinarily not recognize the particular procedure claimed.

As an aspect of natural justice and fairness, legitimate expectations is subject to the same restrictions that apply to all aspects of that principle. It can only

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32.28 See ss. 2 to 8 of the Act which is set out later in this text under the Legislation tab.

32.29 The most current version of the proposal is set out in c. 38.2.

32.30 Which can also be found under the Legislation tab later in this text.

32.30.A The interested reader may wish to check out James M. Mabbutt's informative and short article, *It Takes Two to Tango: How to Get an Administrative Agency to Exercise Both Federal and Provincial Authority*, in (1997), 2 *Administrative Agency Practice* 121.

32.30.B *Canada Post Corp. v. Workers' Compensation Board (Sask.)* (1998), 174 Sask. R. 284 (Q.B.).