

## Publisher's Note

2018 — Release 2

Previous release was 2018-1

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# Robert W. Macaulay and James L.H. Sprague Practice and Procedure Before Administrative Tribunals

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## AUTHOR'S NOTE

Over my working career I served with a number of agencies — either as an appointed member or as hired staff. In looking back I realized that despite several years experience with each of those agencies my focus was generally on the division or function of which I was part rather than the agency as a whole. As a consequence when I left each agency I had a great deal of information and understanding of the role and operation of the agency division on which I served. However, I think it fair to say that I had only a basic grasp of the operations of the other divisions of the agency.

Most agencies have different divisions or sectors — finance, legal, IT, human resources, investigations/prosecutions, executive/administration and so forth. Yet I suspect that many members of agencies have little understanding of the policies, approaches, and operation of sectors other than their own except to the extent that actual knowledge was necessary in order to perform their own functions. As a member of

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Ontario's Residential Tenancies Commission back in the early 80s for example, I knew that Commission policies were established by an executive committee — but had no idea how that committee developed its policies or even identified where policy was needed. Similarly, when I worked in the legal services unit of another agency I discovered that operations staff had little idea of the role of legal or how it operated. This significantly affected how and when advice was sought.

Staff members, particularly junior staff members, likely have little opportunity to obtain detailed understanding respecting sectors outside of their immediate responsibility. But I suggest that agency members should take advantage of their positions to gain a detailed knowledge of the operations of all of the sectors of the agencies on which they serve. Understanding the needs and operations of investigations and prosecutions, for example, may benefit the agency in crafting its orders, writing its reasons, or in maintaining its files. Similarly, understanding how the IT sector operates may enable agency members to better determine how that sector may be of greater assistance to them. Even where there may not be a direct benefit to one's duties as a member, gaining insight into how one's agency operates will contribute to one's ability to advantageously contribute to its evolution or understand why certain limitations exist. To this end it may be useful for Chairs of agencies to facilitate opportunities for members to better understand the functioning of their agency beyond the confines of the immediate sector.

The Update to this release includes notes respecting the following administrative law decisions and the point for which the case has been noted. Numbers in parenthesis indicate the chapter in the main text which contains the discussion to which the noted points are relevant.

*Association des juristes de justice c. Canada (Procureur général)*, 2017 CarswellNat 5989, 2017 SCC 55 (S.C.C.): 1. Reasons to be read as a whole (22). 2. Expertise cited as a reason for deference to labour arbitrator's interpretation of a collective agreement (28). 3. Not every intrusion upon private affairs engages the liberty rights of section 7 of the *Charter*.

*Belaire v. Ontario Aboriginal Housing Services Corp.*, 2017 CarswellOnt 7298, 2017 ONSC 2839 (Ont. Div. Ct.): 1. Ignoring clear words interpreting a provision rendered the resulting interpretation unreasonable (28). 2. Interpretation of statutory provision excluding agency's jurisdiction was a "true" question of jurisdiction (28).

*Boulerice v. Canada (Attorney General)*, 2017 CarswellNat 6051, 2017 FC 942 (Fed. Ct.): 1. Court is limited to determining the existence and scope of parliamentary privilege (17). 2. Source and determination of extent of parliamentary privilege (17). 3. Decisions of federal board of internal economy respecting political party's use of parliamentary resources for political purposes are not protected by parliamentary privilege (17). 4. Board of Internal Economy is a "federal board, commission or other tribunal" and subject to judicial review authority of the Federal Court of Canada (28).

*ENMAX Energy Corporation v. Balancing Pool*, 2017 CarswellAlta 2457, 2017 ABQB 718 (Alta. Q.B.): 1. Agency under statutory obligation to act on certain event is in breach of that duty when it unduly delays taking action pending resolution of separate on-going legal proceedings which directly impact on the existence of the obligation (5B). 2. In order to secure a mandatory injunction a party must demonstrate more than the existence of a serious issue to be determined. It must establish a strong *prima facie* case (28).

*Islington Rangers Soccer League et al v. Toronto Soccer Association et al*, 2017 CarswellOnt 16967, 2017 ONSC 6229 (Ont. S.C.J.): 1. Judicial review authority in section 2(1) para 1 of the *Judicial Review Procedure Act* is not limited to bodies exercising statutory powers (28). 2. Disciplinary decisions of Toronto soccer association subject to judicial review (28).

*Kay Kay Corporation v. Condominium Corporation No. 072 4807*, 2017 CarswellAlta 1876, 2017 ABCA 335, 59 Alta. L.R. (6th) 5 (Alta. C.A.): 1. Meaning of "judicial notice" (12). 2. The situation at hand may affect whether something can be judicially noticed as a fact (12). 3. Operation of principle of judicial notice is a question of law (12).

*Kozak v. Lacombe (County)*, 2017 CarswellAlta 2020, 2017 ABCA 351, 58 Alta. L.R. (6th) 263 (Alta. C.A.): Legislature found to have directed standard of review (28).

*N.R.G. v. G.R.G.*, 2017 CarswellBC 3242, 2017 BCCA 407 (B.C.C.A.): Repeated exposure to continuing applications in same matter may result in decision-maker developing an impermissible point of view (12).

*R. v. Durham Regional Crime Stoppers Inc.*, 2017 CarswellOnt 15063, 2017 SCC 45 (S.C.C.): 1. Ability to claim informer privilege to be determined *in camera* (16). 2. Privilege cannot be claimed where it would operate to defeat the very purpose for which it exists (17).

*Sparks v. Nova Scotia (Assistance Appeal Board)*, 2017 CarswellNS 800, 2017 NSCA 82 (N.S.C.A.): 1. Reasonableness deals with both process and result (28). 2. Interpretation of statute that was unreasonable and unjust fell outside the range of possible, acceptable outcomes (28). 3. Agency's expertise and experience indicated deference (28).

*Stadler v. Director, St Boniface*, 2017 CarswellMan 510, 2017 MBCA 108 (Man. C.A.): 1. Where agency has authority to determine questions of law it has authority to apply *Charter* in matters properly before it unless legislature removes that authority (23). 2. Authority of agency which is a court of competent jurisdiction to grant a particular remedy under section 24(1) of *Charter* to be determined in light of mandate, structure and function of agency (23).

*Thelwell v. Canada (Attorney General)*, 2017 CarswellNat 5461, 2017 FC 872 (Fed. Ct.): Doré balancing of *Charter* interests with goals of statutory mandate requires consideration of particular circumstances in the case (28).

*Toronto Real Estate Board v. Commissioner of Competition*, 2017 CarswellNat 6861, 2017 FCA 236 (Fed. C.A.): 1. Burden of proof — he who asserts must prove (17). 2. Legislative direction ousted *Dunsmuir* presumption of deference respecting questions of law (28). 3. Interpretation of a standard form contract is a question of law (28).

Also noted in this Update are the following decisions dealing with aspects of B.C.'s *Administrative Tribunals Act* (chapter 38A); and Ontario's *Statutory Powers Procedure Act* (chapter 38).

### **British Columbia's Administrative Tribunals Act:**

**Section 57: Time Limit For Judicial Review:** *Denton v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 CarswellBC 3235, 2017 BCCA 403 (B.C.C.A.).

**Section 59: Standard Of Review Without Privative Clause:** *British Columbia Human Rights Tribunal v. Schrenk*, 2017 CarswellBC 3506, 2017 SCC 62 (S.C.C.); *Murphy v. Vancouver Island Health Authority*, 2017 CarswellBC 3431, 2017 BCSC 2255 (B.C.S.C.).

**Ontario's Statutory Powers Procedure Act:**

**Section 4: Waiver:** *Ponniah v. Ontario (Superintendent Financial Services)*, 2017 CarswellOnt 19581, 2017 ONFST 20 (Ont. Financial Services Tribunal).

**Section 5.1: Written Hearings:** *Houston v. 530675 Ontario*, 2017 CarswellOnt 19399, 2017 ONSC 6419 (Ont. Div. Ct.).

**Section 17.1: Costs:** *16-004565 v. Aviva Insurance Company*, 2017 CarswellOnt 19219 (Ont. Licence Appeal Tribunal).

J.L.H.S.

