

Publisher's Note

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

AUTHOR'S NOTE

I am delighted to share this first Author's Note as an editor of *Practice and Procedure Before Administrative Tribunals*. This Note also provides an opportunity to thank James Sprague for his 26 years of editorial service with this publication, initially in collaboration with Robert Macaulay, the founding editor, whose vision continues to animate this volume. I am grateful that James has agreed to work together with me for the balance of Releases for 2018.

Just as James Sprague and Robert Macaulay brought their experience to *Practice and Procedure Before Administrative Tribunals*, so I will build on that tradition shaped by my own experience, which includes roles as an advocate before tribunals and on judicial review, an adjudicator in both the health and education tribunal sectors, an Open Meeting Investigator and Integrity Commissioner for the City of Toronto, an advisor to several regulatory bodies, tribunals and public inquiries, and as a teacher and student of administrative law at the

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University of Toronto and Osgoode Hall Law School, York University over the past two decades. This experience has taught me to focus both on the important ideas underlying administrative law, as well as the lived experience of those who play key roles in its practice.

While I hope my perspective will add to the existing strengths of *Practice and Procedure Before Administrative Tribunals*, my aim is very much to continue the approach shared by James Sprague and Robert Macaulay. They conceived of this volume first and foremost as a useful and helpful resource for adjudicators, advocates and parties before administrative bodies. This volume has and will continue to present a blend of practical information, easy to find authority, engaging commentary, and analysis covering a broad range of issues arising in proceedings before administrative bodies.

My experience has also taught me to look at administrative law questions from different vantages. What does an adjudicator need to know about the standard of review or the degree of fairness required in a particular context? How can a synthesis of the relevant case law assist a lawyer appearing before a tribunal, or the parties if they are representing themselves? What aspects of administrative law will benefit policy-makers and decision-makers? These are the questions which guide the organization of this book and the material it covers.

Another strength of this volume has been its currency. With almost monthly Releases, *Practice and Procedure Before Administrative Tribunals* covers the latest case law from the Supreme Court of Canada, other appellate and notable administrative law decisions across Canada, as well as key statutory developments, law reform initiatives, and significant developments within the community of administrative agencies, boards and commissions. To enhance this responsiveness to legal issues in administrative law, in the coming months, new chapters will be added to the volume covering topics which include:

- First Nations, Indigenous Peoples & Tribunal Hearings;
- Active Adjudication; and
- Practice before Online Tribunals

Beyond these new chapters, the volume will continue to cover recent developments across all the existing chapters. 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.

British Columbia (Minister of Forests, Lands and Natural Resource Operations) v. Canadian Forest Products Ltd., 2018 CarswellBC 1162, 2018 BCSC 771 (B.C.S.C.): 1. Doctrine Of Abuse Of Process Prohibits Relitigation Where Technical Requirements Of *Res Judicata* Are Not Met But It Would None The Less Violate The Concept Of Finality And Undermine The Integrity Of The Administration Of Justice (12). 2. Abuse Of Process Does Not Prevent Challenging Decision Up Through The Designated Review Chain (12). 3. Summary Of *Res Judicata*: “Cause Of Action” And “Issue Estoppel” (12). 4. Mixed Question Of Fact And Law Involves The Application Of The Law To A Set Of Facts (28). 5. Propriety Of An Exercise Of Discretion To Proceed In The Circumstances With A Matter Notwithstanding The Doctrine Of Abuse Of Process Is A Question Of Fact Or Of Mixed Fact And Law (28). 6. *Dunsmuir* Exception Respecting Drawing Jurisdictional Lines Between Two Expert Agencies Refers To Expert Agencies Acting Under Different Statutory Regimes (28). 7. Collateral Attack Principle Prevents Attack On Validity Of Order Other Than Through Designated Review Route (29A).

Canada (Attorney General) v. Haydon, 2018 CarswellNat 2110, 2018 FCA 88 (Fed. C.A.): Permitting On-Going Agency Proceedings To Conclude Before Entertaining Judicial Review May Avoid Necessity For Judicial Intervention (28).

Canada (Human Rights Commission) v. Canada (Attorney General), 2018 CarswellNat 2838, 2018 SCC 31 (S.C.C.): 1. Meaning Of Reasonableness Review (28). 2. Conflicting Decisions Do Not Warrant Changing Reasonableness Review To Correctness Review (28). 3. For Question Of Central Importance To Legal System To Operate As Exception To *Dunsmuir* Reasonableness The Question Must Also Be Outside Of The Agency’s Expertise (28). 4. Determining Parameters Of Term In Grant Of Authority Is Not A “True” Question Of Jurisdiction (28). 5. Supreme Court Continues To Question Continuing Validity Of Role Of “True” Question Of Jurisdiction In Standard Of Review Analysis (28). 6. Use Of Contextual Analysis To Determine If *Dunsmuir* Presumption Of Reasonableness Review Is Rebutted Should Be Exceptional, Need Not Be Long And Detailed, And Should Be Based On Consideration Whether Determinative Factors Show A Clear Legislative Intent To Rebut Presumption (28). 7. The Fact That Legislature Does Not Provide For A Privative Clause Does

Not Rebut Presumption Of Reasonableness Review (28). 8. Fact That Other Agencies May Be Called Upon To Interpret A Statutory Provision Does Not In Itself Rebut Reasonableness Review Of An Agency's Interpretation Of That Provision When It Falls Within The Agency's Home Statute (28). 9. Illustration Of "Purpose Of Tribunal" In Standard Of Review Analysis (28).

Frei v. Calgary (Police Service), 2018 CarswellAlta 464, 2018 ABCA 102 (Alta.C.A.): A Definition Stated To "Include" Specific Named Items Should Not Be Interpreted As Being Restricted Only To Those Named Items.

Groia v. Law Society of Upper Canada, 2018 CarswellOnt 8700, 2018 SCC 27 (S.C.C.): 1. Hearing Conduct Of Counsel (12). 2. Logical Inconsistency In Reasoning And Failure To Take Into Account Relevant Circumstances Rendered A Decision Unreasonable (28). 3. Law Society's Interpretation Of Rules Made Under Its Home Statute Subject To Reasonableness Standard Of Review (28). 4. A Question Of Central Importance To The Legal System As A Whole Must Also Be Outside Of An Agency's Expertise In Order To Constitute An Exception To The Default Reasonableness Standard Of Review Respecting Questions Of Law (28). 5. Outside Of The Delineated Exceptions To The Default Reasonableness Standard Respecting An Agency's Interpretation Of Its Own Statute Circumstances May Indicate That The Legislature Intended Correctness Review To Apply (28).

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 CarswellAlta 1044, 2018 SCC 26 (S.C.C.): 1. The Charter Applies Only To Actions Of Government And Not To Private Disputes (23). 2. Judicial Review Is Available Only Respecting State Action Which Is Of A Public Nature (28). 3. Incorporation By A Private Statute Does Not Operate So As To Make The Actions By The Incorporated Body The Actions Of State Authority (28). 4. The Fact That The Actions Of A Voluntary Association May Impact On A Wide Segment Of Society Is Not Sufficient To Make Those Actions Subject To Judicial Review (28). 5. It Is Not Open To A Party To Seek To Enforce Procedural Fairness Respecting A Decision Of A Voluntary Association In The Absence Of Some Civil Or Property Right Which The Party Seeks To Uphold (28). 6. Business Access To The Members Of A Religious Congregation Is Not A Property Right Enforceable Before The Courts (28). 7. "Justiciability" Deals With The Suitability

For A Court To Resolve A Matter (28). 8. The Determination Of Religious Dogma Is Not Justiciable (28).

K.W. v. Toronto Catholic District School Board, 2018 CarswellOnt 7724, 2018 ONSC 2794 (Ont. S.C.J.): 1. Cross-Examination Not Required Where It Is Not Needed To Adequately Present One's Case (12). 2. Correctness Standard Of Review Applied To Question Of Whether School Board Had Authority Under Its Statute To Make A Particular Policy (28).

Law Society of British Columbia v. Trinity Western University, 2018 CarswellBC 1510, 2018 CarswellBC 1511, 2018 SCC 32 (S.C.C.): 1. Law Societies' Statutory Mandates Extended Beyond Ensuring Skills Competence But To Broader Concept Of Protecting The Public Interest In Administration Of Justice (5). 2. Where Legislatively Authorized The Governing Body Of A Professional Organization Does Not Fetter Its Discretion In Adopt The Results Of A Referendum Of Its Membership In Decisions Respecting Regulation Of Organization (5B). 3. Breadth Of Meaning Of "Public Interest" In Accreditation Of Proposed Law Schools (8). 4. Elected, Representative Body Not Required To Give Formal Reasons For Its Decision (22). 5. In Absence Of A Legal Duty On Decision-Maker To Give Formal Reasons Reviewing Court May Look To Record To Determine If Decision-Maker Properly Carried Out A *Doré* Balancing Of *Charter* Rights And Statutory Duties (22). 6. Agency In Determination Of Fundamental Shared Values May Look To *Charter* And Human Rights Legislation Even Where Not Mandated To Directly Apply Those Sources (23). 7. Even Under A Reasonableness Review Of A Discretionary Decision An Agency Must Be Correct Respecting The Relevant Legal Principles (28). 8. Steps In The *Doré* Analysis Of *Charter* Validity Of Discretionary Administrative Decisions (28). 9. *Doré* Reasonableness Is The Same As *Oakes* Proportionality (28). 10. Why Deference Is Owed To An Agency's *Doré* Analysis (28). 11. Statutory Intent That Lawyers Be Self-Regulating Indicates That Deference Owed To Law Society's Determination Of The Meaning "Public Interest" In Its Enabling Statute (28).

Pimicikamak et al v. Her Majesty the Queen in Right of Manitoba et al, 2018 CarswellMan 166, 2018 MBCA 49 (Man. C.A.): 1. Reasonableness Is Appropriate Standard Of Review Respecting Crown's Determination Of The Adequacy Of Aboriginal Consultation (28). 2. Limited Circumstances When New Evidence Can Be Admitted On Judicial Review (28). 3. Deference To Be Shown

To A Judicial Review Judge's Assessment As To Whether Facts In A Particular Case Warrant The Admission Of New Evidence While Correctness To Be Applied To Judge's Determination Of Legal Principles Respecting Admission Of New Evidence (28).

Toronto Star v. AG Ontario, 2018 CarswellOnt 6712, 2018 ONSC 2586 (Ont. S.C.J.): 1. Principle Of Open Courts Is A Democratic Right Covered By Section 2(B) Of The *Charter* (16). 2. Open Court Principle Includes Access To Exhibits And The Right To Copy Such Exhibits (16). 3. Adjudicative Agencies Must Comply With The Open Courts Principle (16). 4. Only Adjudicative Agencies, And Documents Relating To An Adjudicative Record, Are Subject To The Open Court Principle (16). 5. Restrictions On Right Of Access To Adjudicative Proceedings Must Be Justified Under The *Dagenais/Mentuck* Test By Person Seeking The Restriction (16). 6. Insofar As The Substantive Restrictions In Ontario's *Freedom Of Information And Protection Of Privacy Act* On Access To Personal Information Contained In The Adjudicative Records Of Adjudicative Agencies They Are In Breach Of Section 2(B) Of The *Charter* And Cannot Be Justified Under Section 1 Of The *Charter* (16). 7. Statutory Process In Ontario's *Freedom Of Information And Protection Of Privacy Act* To Determine Whether Personal Information Contained In Adjudicative Records Should Be Released Found To Be A Justifiable Intrusion On Right Of Public Access Under Open Court Principle (16). 8. Media Has Standing To Bring Constitutional Challenge To Statute Which Restricted Right Of Public Access To Adjudicative Records (16).

Trinity Western University v. Law Society of Upper Canada, 2018 CarswellOnt 9570, 2018 CarswellOnt 9571, 2018 SCC 33 (S.C.C.): 1. Law Societies' Statutory Mandates Extended Beyond Ensuring Skills Competence But To Broader Concept Of Protecting The Public Interest In Administration Of Justice (5). 2. Breadth Of Meaning Of "Public Interest" In Accreditation Of Proposed Law Schools (8).

West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal), 2018 CarswellBC 1234, 2018 SCC 22 (S.C.C.): 1. An Agency's Exercise Of Its Discretion To Make A Regulation Which Is Inconsistent With The Enabling Statute Or Outside Of The Scope Of Its Statutory Mandate Will Be Unreasonable (28). 2. Reasonableness Is Appropriate Standard Of Review Respecting Determination Of *Vires* Of Agency's Subordinate Legislation (28).

Zirger v. The Normal Farm Practices and Protection Board, 2018 CarswellOnt 5357, 2018 ONSC 2236 (Ont. Div. Ct.): 1. Earlier Refusal To Entertain Application For Judicial Review Does Not Impact Upon Party's Right To Exercise Statutory Appeal Rights (27C). 2. Judicial Review Is Not The Same As An Appeal. Purpose Of Judicial Review Is To Ensure That Government Action Is Consistent With Established Norms (28). 3. Other Than In Exceptional Circumstances A Court Will Not Intervene Through Judicial Review With On-Going Agency Proceedings (28). 4. Fact That Interim Agency Order May Be Jurisdictional Or Have Been Made Contrary To Fairness Do Not Constitute Exceptional Circumstances Warranting Premature Judicial Review (28).

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

Alberta's Administrative Procedure and Jurisdiction Act:

Section 11: Lack Of Jurisdiction: *Webber Academy Foundation v. Alberta (Human Rights Commission)*, 2018 CarswellAlta 1050, 2018 ABCA 207 (Alta C.A.).

British Columbia's Administrative Tribunals Act:

Section 17: Withdrawal Or Settlement Of Application: *Andruski v. Strata Plan LMS3199 (No. 3)*, 2018 CarswellBC 1377, 2018 BCHRT 124 (British Columbia Human Rights Tribunal).

Section 34: Power To Compel Witnesses And Order Disclosure: *Noyes v. The Waldorf Hotel and others*, 2018 CarswellBC 1222, 2018 BCHRT 109 (British Columbia Human Rights Tribunal).

Section 58: Standard Of Review If Tribunal's Enabling Act Has Privative Clause: *PHS Community Services Society v. Swait*, 2018 CarswellBC 1268, 2018 BCSC 824 (B.C.S.C.).

Ontario's Statutory Powers Procedure Act:

Section 20: Record Of Proceeding: *Collins v. McCarthy*, 2018 CarswellOnt 8990, 2018 ONSC 3525 (Ont. Div. Ct.).

Section 21: Adjournments: *Spence v. Ontario College of Teachers*,
2018 CarswellOnt 8609, 2018 ONSC 3335 (Ont. Div. Ct.).