

Publisher's Note

2017 — Release 11

Previous release was 2017-10

From Your Library:

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

AUTHOR'S NOTE

Alongside of the abstract principles respecting the ability of the citizen to challenge a decision of a state agent runs a very practical question — can the ordinary citizen even afford to mount such a challenge or is he or she economically obliged to simply put up and shut up.

The economic reality of access to justice has been in the press and the courts recently. I had the pleasure to read Tom Hickman's short but interesting piece "*Public Law's Disgrace: Part 2 The Cost of Access To Justice As a Constitutional Issue* (which is available on-line (free!) here: <https://ukconstitutionallaw.org/2017/10/26/tom-hickman-public-laws-disgrace-part-2/>). In this piece Mr. Hickman briefly canvasses the negative effect of the legal principle respecting costs as applied in judicial review. Mr. Hickman writes:

... that the rule that a claimant must pay the costs of the defendant (and potentially other parties too) if their claim is lost represents the most pressing issue in public law, no less important that a formal restriction on the standing of claimants, since its operation in the

THOMSON REUTERS CANADA®

Customer Support

1-416-609-3800 (Toronto & International)

1-800-387-5164 (Toll Free Canada & U.S.)

Fax 1-416-298-5082 (Toronto)

Fax 1-877-750-9041 (Toll Free Canada Only)

Email CustomerSupport.LegalTaxCanada@TR.com

This publisher's note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

context of judicial review means that the vast majority of the population are effectively barred from making an application for judicial review.

As noted by Mr. Hickman the monetary cost of judicial proceedings has been in the courts recently as well with the U.K. Supreme Court's decision in *R. v Lord Chancellor*, [2017] UKSC 51 (U.K.S.C.) (regime of fees applicable in employment claims a violation of the common law right of access to justice) and decisions over in Canada such as *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2017 CarswellBC 2497, 2017 BCCA 324, 5 C.P.C. (8th) 1 (B.C.C.A.) (upholding the legal requirement for a party to pay for jury and jury process in civil trials).

Mr. Hickman's article explores a number of possible solutions to costs operating as a practical barrier to judicial review (none of which appear particularly successful). In an age where salaries not only of judges and lawyers but court support are significant, as well as the ordinary costs of maintaining the physical plant cost) it is not surprising that access to justice can also be a question of access to cash. On the issue of costs in judicial review perhaps the only feasible answer is one modelled on Ontario's *Statutory Powers Procedure Act* and B.C.'s *Administrative Tribunals Act* which empower agencies to award costs but basically only in cases where a party's conduct has been "unreasonable, frivolous or vexatious or a party has acted in bad faith" (Ont) or "improper, vexatious, frivolous or abusive" (B.C.). If such an approach were adopted by the courts it would might operate as a control on vexatious or frivolous claims by the local crank but permit those with at least arguable and honest concerns with state action a greater ability to defend their interests and even perhaps in some cases the interest of the public generally. This, of course, would leave a significant cost to be ultimately borne by the taxpayer. Nor would it address the question of the significant personal costs which can be involved in pursuing a judicial review application.

Obviously, this is an issue which may demand greater study and consideration respecting the validity of the concern and the possible solution. I suggest, for example, that in considering the issue of costs on access to justice that one should also consider the effect of the current *Dunsmuir* presumption of deference to state decision-making. It strikes me that if one considers that access to justice is being impaired as a result of the operation of the costs principle in judicial review one should also consider what the citizen is getting in return for assuming that costs liability. It may be arguable that a citizen harmed by state

action must be prepared not only to assume the risk of significant personal costs but must do so in a system which favors the state and will uphold state decision which can be viewed as being at simply legally and factually plausible (except in the few circumstances respecting a very limited number of questions of law). Issues such as this raise the question as to whether judicial review serves its constitutional purpose in the modern world.

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.

2251723 Ontario Inc. (VMEDIA) v. Rogers Media Inc., 2017 CarswellNat 4405, 2017 FCA 186 (Fed. C.A.): 1. Agency Must Explain Departure From Past Positions If Decision Is To Be Upheld As Reasonable (6). 2. In Determining The Reasonableness Of An Agency's Decision Is A Reviewing Court Restricted To Considering The Agency's Explanation Or Can The Court Consider Any Explanation That Is Supportable On The Facts (22).

ANCR v. Shaw Communications Inc., 2017 CarswellMan 447, 2017 MBCA 92 (Man. C.A.): Inherent Authority Of Superior Court To Come To Aid Of Inferior Body (12).

Bessette v. British Columbia (Attorney General), 2017 CarswellBC 1871, 2017 BCCA 264 (B.C.C.A.): 1. Reviewing Court Has Discretion To Hear Application For Judicial Review (28). 2. Reasonable To Refuse Premature Judicial Review In Absence Of Any Special Circumstances Warranting Immediate Intervention (28).

Boeing Canada Operations Ltd v. Winnipeg (City) Assessor, 2017 CarswellMan 401, 2017 MBCA 83, 23 Admin. L.R. (6th) 87 (Man. C.A.): 1. Tenant Who Was Responsible For Taxes Imposed On Property Owner Was Not Entitled To Notice Of Owner's Failure To Provide Information To Tax Authorities Which Resulted In Tax Penalty For Which Tenant Was Ultimately Responsible (12). 2. Same Standard Of Review On Appeals And Judicial Reviews (27C). 3. Rights Of Appeal Which Are Not Available Respecting An Issue Are Not Alternative Remedies To Judicial Review (28). 4. Appellate Standard Of Review On Appeal From Judicial Review Decision (28). 5. Decision That An Interpretation Is Correct Also Means That That Interpretation

Is Reasonable (28). 6. Correctness Standard Of Review Respecting Questions Of Procedural Fairness (28).

Cairns v. PEIHRC and Eastern School District, 2017 CarswellPEI 56, 2017 PECA 16 (P.E.I.C.A.): 1. Fairness Does Not Require That Irrelevant Issues Be Pursued Or Determined (9). 2. Delay Must Result In Significant Prejudice To A Person In Order To Establish Undue Delay (12). 3. Role Of Appellate Court On Appeal From Judicial Review Decision (28). 4. Reasonableness Standard Of Review Does Not Require That Reviewing Court Agree With Decision Under Review. It Only Requires That Decision Under Review Is Reasonable In Light Of Facts And Law (28). 5. Deference Accorded Decisions Of P.E.I. Human Rights Commission In Light Of That Body's Expertise In Human Rights Law (28). 6. P.E.I. Human Rights Commission Is An Independent Decision-Maker Which Is Not Afraid To Make Findings Against The Interest Of The Government (39).

Canada (Attorney General) v. Fontaine, 2017 CarswellOnt 15406, 2017 SCC 47 (S.C.C.): Clear And Precise Language Required To Remove Inherent Jurisdiction Of Superior Courts (12).

Canada (Transport) v. Canadian Union of Public Employees, 2017 CarswellNat 3743, 2017 FCA 164 (Fed. C.A.): Federal Court Of Appeal Suggests Agency's Failure To Give Any Reasons Will Not Necessarily Result In Decision Being Found Unreasonable If Reasons Can Be Discerned From The Record (22).

Essar Steel Algoma Inc. v. Jindal Steel And Power Limited, 2017 CarswellNat 3766, 2017 FCA 166 (Fed. C.A.): Deference Warranted By Highly Specialized Nature Of The Agency (28).

National Gallery of Canada v. Lafleur de la Capitale Inc., 2017 CarswellOnt 13616, 2017 ONCA 688 (Ont. C.A.): In Order To Permit Meaningful Appellate Review Reasons Must Allow Parties And Appellate Court To Discern Why Conclusions On Key Issues Were Made (22).

Pearson v. Canada (Attorney General), 2017 CarswellNat 4521, 2017 FCA 191 (Fed. C.A.): DND And Treasury Board Directives Were Mere Policies That Could Not Create Rights (6).

Prudential Steel ULC v. Borusan Mannesmann Boru Sanayi ve Ticaret A.S., 2017 CarswellNat 4135, 2017 FCA 173 (Fed. C.A.): 1. Court Had No Jurisdiction To Review Agency Opinion In Reasons That Had No Impact On The Decision Under Review But Which Might Be Relevant In Other Future Proceedings (22). 2. Federal Court Of Appeal Only Has Such Jurisdiction As Granted To It By Statute (28). 3. Federal Court Of Appeal May Receive Judicial Review Authority From Statutory Sources Other Than Section 28 Of The *Federal Courts Act* (28).

Tran v. Canada (Public Safety and Emergency Preparedness), 2017 CarswellNat 5569, 2017 SCC 50, (S.C.C.): 1. Exception To Presumption Against Retroactivity Respecting Public Protection Legislation Applies Only To Legislation Which Is Aimed At Protecting Public From Specific Conduct Rather Than Legislation That Aimed At Protecting The Public Generally (12). 2. Supreme Court Of Canada Affirms Traditional Principle Respecting Premature Application For Judicial Review (28). 3. Untenable Interpretation Of Legislation Cannot Be Seen As Being Either Correct Or Reasonable (28). 4. Supreme Court Of Canada Affirms Two Traditional Principles Respecting Statutory Interpretation.

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 45: Tribunal Without Jurisdiction Over Canadian Charter Of Rights And Freedoms Issues: *Barker v. Molson Coors Breweries and another*, 2017 CarswellBC 2728, 2017 BCHRT 208 (British Columbia Human Rights Tribunal).

Section 58: Standard Of Review With Privative Clause: *Goik v. Workers' Compensation Appeal Tribunal*, 2017 CarswellBC 2705, 2017 BCSC 1756 (B.C.S.C.); *British Columbia Nurses' Union v. Health Sciences Association of British Columbia*, 2017 CarswellBC 2707, 2017 BCSC 1758 (B.C.S.C.).

Section 59: Standard Of Review Without Privative Clause: *McCreath v. Victoria Taxi (1987) Ltd.*, 2017 CarswellBC 2740, 2017 BCCA 342 (B.C.C.A.).

Ontario's Statutory Powers Procedure Act:

Section 13: Contempt Proceedings: *LIUNA, Local 1059 v. EAN Construction*, 2017 CarswellOnt 15598 (Ontario Labour Relations Board).

J.L.H.S.

ProView Access and Westlaw Federated Search

Did you know that this title is available through your web browser on **Thomson Reuters ProView™**, or can be downloaded to your desktop, laptop or tablet giving you the freedom and flexibility to work wherever and whenever you want, with or without an Internet connection? Access to this title on the ProView platform is included with your print subscription.

With this title and its Publisher's Note now available on ProView, you will also notice that only one version of the Publisher's Note will be included with your print release going forward. We trust you will find these changes and enhancements beneficial as our products continue to evolve to meet your research and workflow implementation needs. Also, a reminder that an electronic version of all of the most recent Publisher's Notes for each publication is available at <http://www.carswell.com/products/elooseleafs-publishers-notes/>.

PLUS we're delighted to announce that effective late April 2017, researchers with a **WestlawNext® Canada** subscription can do a single search in WestlawNext Canada, which also simultaneously searches the supplemented titles that are currently on ProView.

This collection of content will now be called eLooseleafs on ProView (formerly the eReference Library on ProView). Relevant eLooseleaf titles will be displayed in the WestlawNext Canada results list and search results can be accessed by linking directly from the list of search results in WestlawNext Canada to ProView. Subscriptions to the individual titles will be required in order to access the content on ProView.

This new Federated search will streamline your research and help you to easily access relevant, authoritative content across platforms.