

Dialogue between Courts and Tribunals

Essays in Administrative Law and Justice

2001-2007

*Edited by Laverne A. Jacobs
& Justice Anne L. Mactavish*

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CIAJ CANADIAN INSTITUTE
FOR THE ADMINISTRATION
OF JUSTICE

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Les Éditions Thémis

Bibliothèque et Archives nationales du Québec and Library and Archives Canada cataloguing in publication

Main entry under title:

Dialogue between courts and tribunals : essays in administrative law and justice, 2001-2007

Papers presented at the annual round table conferences organized by the Canadian Institute for the Administration of Justice, 2001-2007.

Includes bibliographical references.

ISBN 978-2-89400-237-7

1. Administrative law - Canada. 2. Administrative courts - Canada. 3. Administrative agencies - Canada. I. Jacobs, Laverne A. II. Mactavish, Anne L. III. Canadian Institute for the Administration of Justice.

KE5015.Z85D52 2007

342.71'06

C2007-941320-X

Composition : Donna Ventress

On peut se procurer le présent ouvrage à

Éditions Thémis

Faculté de droit, Université de Montréal
CP 6128, succ. Centre-ville
Montréal (Québec) H3C 3J7
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Bibliothèque et Archives Canada

Bibliothèque nationale du Québec

ISBN 978-2-89400-237-7

Printed in Canada

Foreword

The signal achievement of the series of Roundtables on Administrative Law, held nationally and in the regions under the aegis of the Canadian Institute for the Administration of Justice, has been to provide a forum where senior tribunal members, judges, practising lawyers and academics have had frank discussions about issues of law and public administration in an informal atmosphere, free from the constraints imposed by litigation. Participants have benefited from hearing others' perspectives on the topics under discussion and have thus come to better appreciate the tasks and challenges faced by the different actors in the administrative justice system.

The success of the Roundtables is in large part attributable to the background papers prepared for each topic as a springboard for the ensuing discussion. Typically, the papers summarized the current state of the law, teased out its theoretical assumptions and implications, pointed to its weaknesses, and made suggestions for reform. The papers have been of a uniformly high quality and, in their own right, represent a significant contribution to an understanding of important aspects of contemporary administrative law in Canada. Their titles indicate the wide range of topics covered, and the differing perspectives from which they are approached.

The publication of this volume gives these excellent papers the wider readership which they richly deserve. All interested in administrative justice in Canada are indebted to the authors and editors (not mutually exclusive categories!) for this timely, stimulating, and informative collection. Congratulations to all concerned.

It is invidious in a Foreword to single out particular contributors. However, I am sure that no-one will feel slighted if I identify Laverne Jacobs as meriting an especially warm thank-you and congratulations. While a graduate student, Laverne wrote, or co-wrote with Tom Kuttner, the first three Roundtable papers, which form the first three chapters in this book. These papers set the standard. While recovering from illness and preparing for classes at her new academic home, the Faculty of Law

at the University of Windsor, she has also co-edited this volume with Anne Mactavish.

Justice John M. Evans
Federal Court of Appeal
Ottawa, Ontario
August 21, 2007

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Introduction

The administrative justice system has come to occupy a central role in delivering justice in Canada. Relied upon by the everyday citizen, decision-making by administrative actors is often the first and sometimes the only engagement with the justice system that Canadians may encounter.

Since the birth of the administrative state at the turn of the 20th century, the reach of administrative actors (ranging from government officials to tribunals, boards, agencies commissions etc. and at times including mixtures of private and public actors), has developed to such an extent that it is now commonplace to acknowledge that they deal with questions of law and justice affecting almost every aspect of daily life. Beyond this quantitative aspect, the impact of administrative decision-making on rights, obligations, interests and privileges has also taken on a qualitative significance of a different sort in the past decade. It is not just the type of rights, obligations, interests and privileges that are affected but the ways in which they are affected that attract attention. Fundamental questions about the quality of administrative justice relating to matters such as sufficient independence and impartiality, access to appropriate decision-making fora and decision-making expertise have proliferated. At the same time, practical questions regarding issues such as backlog, the availability of alternative dispute resolution services and consistency pose constant challenges for the administrative justice system.

The issues raised by the continuing evolution of the administrative state are therefore not only legal but also exceedingly practical. *Dialogue between Courts and Tribunals: Essays in Administrative Law and Justice (2001–2007)* is a collection of essays that address with vigour and insight both the theoretical questions of administrative law and the practical questions of providing efficient and effective administrative decision-making processes.

The Canadian Institute for the Administration of Justice (CIAJ) is a non-profit organization dedicated to improving the quality of justice for Canadians through education and research. The membership of the CIAJ is drawn from various institutions involved in the administration of

justice, including the courts, administrative tribunals, academia, court administration and law enforcement. This diverse membership allows for an interdisciplinary approach to the work of the organization.

Acting as an umbrella organization, the CIAJ brings together individuals and groups concerned with issues relating to the administration of justice, allowing members to learn from each other, and to share experiences and best practices. As a part of this approach, commencing in 2001, the CIAJ has convened a series of Roundtable discussions. Each year, a Roundtable was held nationally in Ottawa and then, as funding permitted, in three regions of the country. These Roundtables have been attended by members of the judiciary and of administrative tribunals, as well as by legal practitioners and academics involved in administrative law. The project provided a unique forum in which members of the judiciary and tribunal members could discuss common issues of administrative law and justice outside of the context of judicial review of a particular case.

Roundtable discussions have focused on a variety of topics, including tribunal expertise and independence, alternative dispute resolution, exclusive and concurrent jurisdictional issues, policy-making and how best to achieve consistency in decision-making. Each year, the starting point for these discussions has been a paper or papers prepared by some of Canada's foremost scholars in administrative law. Not only have these papers provided the focus for stimulating discussions on topical issues—they are also fine works of research and scholarship in their own right. In order to make these papers available to a wider audience, they have now been prepared for publication and are presented in this book in the order in which they were delivered.

Each paper in the collection explores an aspect of administrative justice with distinctive insight and perspective. Some propose empirical analyses of administrative justice issues (Bryden & Black, Jacobs) some focus on a close scrutiny of how tribunals function (Houle & Sossin, Whitaker, Gottheil & Uhlmann); yet others focus on judicial review but on some of the most vexing questions of administrative law such as standard of review, jurisdiction and tribunal standing (Jones, Chatterjee, Jacobs & Kuttner); and others still engage with the deeper theoretical tenets of administrative law and justice such as independence and expertise (Jacobs, Jacobs & Kuttner). All the papers in *Dialogue between Courts and Tribunals* focus on the administrative justice system in its efforts to be efficient and fair.

The authors have worked hard to revise their contributions, submitting them to a peer review process in the finest tradition of scholarship. The research and editing of this book has been made possible through the generous financial support of the Law Foundation of British Columbia. The staff members of the Canadian Institute for the Administration of Justice and of Les Éditions Thémis have provided invaluable assistance and technical skills. We acknowledge hard work of all the contributors to this project and thank them for their dedication: the authors, the peer reviewers, The Law Foundation of British Columbia, the CIAJ and its staff, Les Éditions Thémis, Ms. Emilia Nyitrai, Mrs. Donna Ventress, Ms. Kirryn Hashmi and Mr. Jason Steele for their editorial assistance, and especially Ms. Christine Robertson, Executive Director of the CIAJ for her unfailing commitment and enthusiasm to the Roundtables over the years and to this publication.

We are also particularly grateful to David Mullan, who prepared wrap up comments each year at the close of each Roundtable and in the same vein has written the concluding chapter of this work, and to Justice John Evans for all his support and counsel throughout this entire project.

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