

The Impact of the *Charter* in Administrative Law: Reflections of a Practitioner

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I. THE WAY LAWYERS OPERATE.....	258
II. THE WAY TRIBUNALS OPERATE	260
III. OPEN HEARINGS.....	261
IV. DISCLOSURE STANDARDS.....	262
V. TRIBUNAL INDEPENDENCE.....	263
VI. SOME PARTING THOUGHTS	265

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Most lawyers who practice administrative law, if asked what impact the *Canadian Charter of Rights and Freedoms*¹ has had on their practice, would likely answer, “Not much.” They would tell you that in their day-to-day practice before tribunals the *Charter* is rarely relevant and rarely raised, and that when the *Charter* is a factor, it involves a lot of work in circumstances where the likely outcome is all but clear. If asked what impact the *Charter* has had on the development of administrative law principles, they would be hard pressed to identify much, if anything. Upon reflecting on this topic in preparation for this conference, I tend to agree with these observations.

Administrative law is a relatively new part of the legal landscape when compared to the centuries-old common law. When governments began to create boards and delegate decision-making powers to them, Courts saw a need to ensure that tribunals conducted their proceedings in a fair and proper manner, that they properly carried out the mandate granted to them, and that they did not step outside that mandate. Tribunals were not supposed to be like courts. They were there to discharge a public policy function as dictated by the government that created them and they were to do so in an informal and expedient manner.

In little more than twenty years (which interestingly coincides with the time during which the *Charter* has been in effect) the administrative law landscape has changed. There are more and more tribunals controlling and regulating more and more aspects of our lives. During this time, the *Charter* has been relevant to the development of substantive areas such as human rights, labour law, immigration law, competition law, professional regulation and more. These areas have been subject to challenges to legislation and to the way in which tribunals carry out their mandates under legislation.

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

But what about administrative law principles themselves? The principles of natural justice and procedural fairness, including the rule against bias, as applied to administrative proceedings have developed and continue to develop as the common law of administrative law. Since those safeguards already exist, is the *Charter* really relevant to obtaining a fair hearing in administrative law? Standards of judicial review have also developed as a matter of administrative law principle. Research certainly does not identify authorities that demonstrate that the *Charter* has been applied to change the administrative law landscape in any significant way.

In this short paper, I will bring you my practitioner's perspective on the impact of the *Charter* on administrative law practice. Other panellists will provide their unique perspectives, including those of the tribunal. My reflections on the impact of the *Charter* will involve comments on the way we practice administrative law and on some specific areas where I do see that the *Charter* has had some direct and indirect impact.

I. THE WAY LAWYERS OPERATE

Thankfully most administrative law cases do not involve *Charter* issues. "*Charter* issue?" is one of those questions on our check-list and the answer is usually "No."

Where there is a possibility of a *Charter* issue in an administrative law case, however, the lawyer's work grows exponentially. Each case involves many considerations additional to those that exist in the absence of a *Charter* argument. For example, *Practice and Procedure Before Administrative Tribunals*² contains more than fifty pages of text and annotations under the heading "Tribunals and the Charter of Rights". Virtually all of this space is devoted to the challenges you and your client will face in raising a *Charter* issue and obtaining a useful remedy.

We ask ourselves whether there is a *Charter* issue or possible *Charter* issue in the case. This involves knowing and reviewing the rights and freedoms set out in the *Charter* and being familiar with the *Charter* cases in the substantive area in question. We ask, is there something in the legislation that arguably violates the *Charter*? Is there something in the way in which the tribunal operates in terms of procedure or remedy that could possibly violate the *Charter*? If so, can an argument be made that

² R. Macaulay & J. Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Carswell, 1988).

the *Charter* applies to this particular situation? Is the tribunal part of the apparatus of government? Does it carry out government policies or programs?

If the *Charter* does apply, how, procedurally, does one mount the *Charter* challenge in this particular case? Can the challenge be brought before the tribunal? Does the tribunal have jurisdiction over the subject matter and the remedy? Will it be necessary to start a separate proceeding in court? Is injunctive relief required and available? What remedy is available and who can provide that remedy? These questions and many others have been canvassed in much detail in a number of lengthy court decisions over the last twenty years; and, while it may appear at first blush that the principles to be applied have been reasonably articulated, applying them to the facts of any particular case can be a challenge, and predicting the outcome to a client can be difficult.

As part of the analysis, counsel must also explore whether the client can afford the cost of undertaking a *Charter* challenge. Just getting to the point of raising the issue can be time-consuming and expensive. Many clients cannot afford to pursue this kind of challenge.

Once a decision is made to embark on a *Charter* challenge, legislation requires that notices be served on Attorneys General. Sometimes (this was especially so in the early years of the *Charter*) it is quite difficult to convince a tribunal to even consider a *Charter* question because tribunals are reluctant to be forced to enter unfamiliar territory. If the tribunal will hear your case, there may be delays while the tribunal seeks advice and while all proper parties are notified and given an opportunity to appear and make argument.

In many cases, the uncertainty of the outcome, coupled with the time and cost of proceeding, means the *Charter* challenge is not pursued, and we fall back on traditional, more familiar, administrative law arguments to make our client's case.

II. THE WAY TRIBUNALS OPERATE

While other presenters will be discussing the impact of the *Charter* on the conduct of tribunal business in more detail, I will touch on this topic briefly. Tribunals are creatures of statute and therefore creatures of government. Powers are delegated to them through legislation, and they have a specific mandate to carry out. They are “experts” in their fields. They are not constitutional experts.

In our paper entitled *The March Toward Judicialization: Administrative Tribunals at the Cross-Roads*, we wrote:

“When faced with a *Charter* issue, a tribunal is forced into the realm of the judicial. Of necessity, the tribunal must ask and answer a number of questions that will require it to engage in legal analysis. If the challenge is to the constituting legislation, the tribunal must first decide whether it has the jurisdiction to determine whether the legislative provision is constitutional. If the *Charter* issue involves the application of the *Charter* to the particular case, the tribunal must review and apply the law with respect to the particular section of the *Charter* in question. If there are Section 1 issues, the tribunal will be required to hear evidence of justification. When it comes to fashioning a remedy, the tribunal again must have regard to the principles developed by the courts. When acting in this fashion, the tribunal is acting very much like a court.

As well, if a tribunal has been faced with a *Charter* issue, it will be subjected to closer scrutiny from the courts than is the case with respect to most other issues. Indeed, when dealing with *Charter* issues, tribunals are expected to act in the same fashion as a court. The standard of review is correctness. Hence the *Charter* is yet another factor in the trend toward judicialization of tribunals.”³

³ A.M. Wallace & P. Casey, “The March Toward Judicialization: Administrative Tribunals at the Cross-Roads” (Canadian Bar Association Annual Administrative Law Conference, November 1999).

III. OPEN HEARINGS

For anyone practicing administrative law in pre-*Charter* days, it was not unusual; indeed it was the norm, that most administrative tribunal proceedings were held in camera. The parties arrived at the appointed time and place and were escorted into a closed room where the hearing took place without spectators and without the press. Often those entering were asked to identify themselves, and those not directly involved in the proceeding were asked to leave. This is one area where the *Charter* has had significant impact on administrative hearings.

With the passage of the *Charter*, in addition to the common law tradition of openness of court proceedings, Section 2(b) now provides additional strength to arguments for openness of proceedings because it grants everyone the fundamental:

“(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

The Supreme Court of Canada determined that while the principle of openness of courts is deeply embedded in the common law tradition, it is inextricably tied to the rights guaranteed by Section 2(b) of the *Charter*.⁴ The Supreme Court has strongly upheld the openness requirement for courts with few narrow exceptions.⁵

These same principles have been applied to administrative tribunals. An oft-cited case in this regard is *Pacific Press v. Canada (Minister of Employment & Immigration)*,⁶ where the court considered whether and to what extent inquiries held under the *Immigration Act*⁷ should be open to the public. The court concluded that it was not unreasonable to extend the principle of public accessibility to quasi-judicial proceedings and decision-makers such as immigration adjudicators. The rationale for this is that statutory decision makers exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the administration of justice, the legitimacy of such tribunals' authority thereby requiring that confidence in their

⁴ See for example *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, (1996), 110 C.C.C. (3d) 193 (S.C.C.).

⁵ See as well *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

⁶ (1991), 127 N.R. 325 (F.C.A.).

⁷ R.S.C. 1985, c. I-2.

integrity and understanding of their operations be maintained. This can be effected only if their proceedings are open to the public.

These principles have been applied by the courts in various administrative tribunal contexts including, for example, police discipline proceedings where statutory provisions requiring in camera hearings have been struck down.⁸

The importance of this development cannot be overlooked. Today many tribunals actively ensure that their hearings are open to the public and that due notice is provided of the time and place of those hearings. Press regularly appear and demand access to proceedings and the right to publish those proceedings. In camera hearings and publication bans are challenged. Numerous provincial and federal statutes have been amended to require that, absent special circumstances, the tribunals' proceedings are required to be open to the public. This has resulted in more press coverage of the activities of tribunals and thereby more public scrutiny of the conduct and decisions of tribunals. There is no question that in this area the *Charter* has had a significant impact on the practice of administrative law.

IV. DISCLOSURE STANDARDS

When the Supreme Court of Canada decided *R. v. Stinchcombe*⁹ in 1991, it is doubtful the members of the Court were thinking of administrative proceedings. The Court was concerned with the full disclosure of the entire case against an accused in criminal proceedings. The Court determined, in that context, that the *Charter* requires full, complete, timely and ongoing disclosure of all case materials collected against an accused.

This case is an example of a situation where the *Charter* has had an indirect impact on the development of administrative law. In administrative proceedings, the rules of natural justice and procedural fairness have long required a certain level of disclosure. Since the decision in *Stinchcombe*, however, there has been a growing trend toward developing disclosure standards in administrative proceedings much like those

⁸ *Southam Inc. v. Canada (Attorney General)* (1997), 154 D.L.R. (4th) 370 (Ont. Gen. Div.); *Canadian Broadcasting Corp. v. Summerside (City)* (1999), 170 D.L.R. (4th) 731 (P.E.I.S.C.).

⁹ [1991] 3 S.C.R. 326 [hereinafter *Stinchcombe*].

outlined in *Stinchcombe*. *Stinchcombe*-like disclosure standards have been applied in a number of different areas of administrative law including professional discipline proceedings, human rights cases and immigration cases. Without actually applying the *Charter* to the case, courts have applied the criminal *Charter* standards of disclosure in *Stinchcombe* to administrative proceedings on the basis that these principles accord with general administrative law principles of natural justice and procedural fairness.

The rationale for imposing an extensive disclosure requirement is that the decision of the tribunal might terminate or restrict a person's rights or seriously impact on their rights. Given this rationale, we can expect that over time more onerous disclosure standards will be applied in other kinds administrative proceedings.

V. TRIBUNAL INDEPENDENCE

Since the passage of the *Charter*, there have been several court decisions dealing with the independence of the judiciary. This is another example where the developments in another area, in this case judicial independence, have had an impact on administrative law.

Section 11(d) of the *Charter* sets out the right of every person charged with an offence to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. In *Valente v. The Queen*,¹⁰ the Supreme Court of Canada confirmed the requirements of judicial independence for purposes of Section 11(d). The court held that the independence protected by Section 11(d) is independence of the judiciary from other branches of government and bodies which can exercise pressure on the judiciary through power conferred on them by the state. The Court confirmed the three components of judicial independence: security of tenure, financial security and administrative control.

The Supreme Court of Canada applied these principles of independence to administrative tribunals in *Canadian Pacific v. Matsqui Indian Band*,¹¹ finding in that case that tribunal members appointed by band chief and council who were asked to adjudicate disputes pitting the interests of the band against outside interests did not have the required degree of

¹⁰ [1985] 2 S.C.R. 673 [hereinafter *Valente*].

¹¹ (1995), 122 D.L.R. (4th) 129 [hereinafter *Matsqui*].

independence under the *Valente* tests because the requirements of financial security (there was none) and security of tenure (appointments were *ad hoc*) were not met.

This trend continued in *Hewat v. Ontario*¹² and *Dewar v. Ontario*.¹³ On grounds of fiscal restraint, the executive arbitrarily terminated fixed term appointments of the Vice Chairs of the Ontario Labour Relations Board before their terms were up. The Ontario Court of Appeal found that the rescission of the appointments was beyond the power of the executive branch of government, the key factor being security of tenure.

In both *Matsqui* and *Hewat*, the courts disposed of the issues of independence without reference to the *Charter*, but rather, it appears, on the basis of the degree of independence required expressly or by implication by the statute creating the administrative tribunal. While these cases do not involve a direct application of the *Charter*, they are another example of the use of principles developed in *Charter* cases in other areas as part of the development of administrative law.

Most recently, the Supreme Court of Canada has again dealt with the question of tribunal independence in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor control and Licensing Branch)*.¹⁴ McLachlin, C.J., delivering the judgment of the Court, stated that while superior and provincial courts are constitutionally required to possess objective guarantees of individual and institutional independence from the executive, administrative tribunals lack this constitutional distinction from the executive. The court recognizes that tribunals are created for the specific purpose of implementing government policy. Therefore, the composition and structure of tribunals is a subject for the legislator. While the court does recognize that tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Also, where the intention of the legislature is clear, there is no room to import common law doctrines of independence.

For our purposes here, I will conclude by observing that the debate on tribunal independence is likely far from over and the *Charter* will likely continue to have some influence, whether direct or indirect. As more and more sophisticated tribunals are delegated with greater authority over

¹² (1998) 37 O.R. (3d) 161 (C.A.) [hereinafter *Hewat*].

¹³ (1998), 37 O.R. (3d) 170 (C.A.).

¹⁴ [2001] 2 S.C.R. 781.

different aspects of people's lives, challenges to the independence of these tribunals will continue, and the general statements made by the Supreme Court of Canada will no doubt be refined, explained, distinguished and discussed. When will the *Charter* apply directly to a tribunal? What attributes of legislation will signal that tribunal independence was intended in a particular case? Will it be necessary to determine which specific attributes of independence were intended?

VI. SOME PARTING THOUGHTS

While I have mentioned a few points here where one might observe that the *Charter* has had direct or indirect impact on the practice of administrative law, I quare whether the *Charter* is contributing in more subtle ways to trends we are seeing in administrative law. In other words, is *Charter* "thinking" influencing the practice of administrative law? I raise a few points to ponder in this regard.

While the cases have been disposed of on the basis of general administrative law principles, has *Charter* thinking influenced the courts in the decisions involving tribunal impartiality such as *2747-3154 Quebec Inc. v. Quebec (Régie des permis d'alcool)*?¹⁵

Charter cases by definition deal with rights. While rights have always had a part to play in administrative law, there has always been a recognition that administrative tribunals are created to carry out a public policy objective. Quare whether *Charter* thinking is resulting in a more rights-based approach to administrative law arguments.

Unless there is a legislative requirement, tribunals ordinarily have not been required to create a *verbatim* record of their proceedings. The traditional record does not include a transcript of the proceedings. If a *Charter* issue is raised, however, the tribunal must be correct in its decision, thereby making the transcript of the proceedings relevant to the issue on review. We also observe there has been a general trend in recent years toward courts wanting to review transcripts of administrative hearings, and quare whether the existence of the *Charter* issue has contributed to that trend.

¹⁵ [1996] 3 S.C.R. 919.

Are the developments in cases like *Baker v. Canada (Minister of Citizenship and Immigration)*,¹⁶ influenced by the reality that we now live in a *Charter* society?

While these are all points we can discuss and debate, the reality for the ordinary practitioner of administrative law remains the same. In the day-to-day practice of administrative law, the *Charter* has little, if any, direct impact.

¹⁶ [1999] 2 S.C.R. 817.