

ADMINISTRATIVE TRIBUNALS AND THE CHARTER edited by Neil R. Finkelstein and Brian MacLeod Rogers (Toronto: Carswell, 1990)

Administrative Tribunals and the Charter is a collection of nine papers authored separately, which were prepared for a series of programs sponsored by the Law Society of Upper Canada in November, 1988 and May, 1989. The programs represented a cooperative effort between the Law Society of Upper Canada and the Barreau du Quebec. The papers, which are stated to be current to April, 1989, address a number of procedural and substantive issues relating to the *Charter* and its impact on administrative tribunals and administrative law.

The first five papers relate primarily to procedural and strategic issues when *Charter* arguments are to be raised. The four remaining papers deal with substantive issues affecting administrative tribunals, such as the relationship between *Charter* guarantees and the common law fairness doctrine. Each paper is designated as a chapter in the book. A table of cases is provided together with a rather limited subject index.

This publication follows the format of an earlier similar collection of papers, entitled "Charter Issues In Civil Cases" (see (1988) Alta. L. Rev. 320). Hopefully, this current publication represents the second in a series of volumes of papers by the Law Society of Upper Canada, as publication provides access to a valuable resource which might otherwise escape attention.

Chapter 1 is a paper on jurisdiction of administrative tribunals to consider *Charter* arguments, prepared by Larry Taman, Assistant Deputy Minister of Constitutional Law and Policy with the Ministry of the Attorney General of Ontario, with acknowledged assistance from members of his Department. The paper provides an insightful analysis of the desirability for, yet practical problems with, tribunals determining the constitutional validity of legislation. Although the review of jurisprudence is already somewhat dated through the passage of time in a rapidly developing area, the author provides interesting observations and suggestions on how jurisdiction of tribunals to rule on constitutionality of legislation might be limited to attain the advantages of the tribunal's review, yet avoid the perceived difficulties.

The second chapter by co-editor Neil Finkelstein addresses the factors to be considered in deciding whether to litigate a *Charter* issue before the administrative tribunal where it arises, or to seek a stay in order to litigate the issue in court. The discussion duplicates some of the observations in Chapter One on the issue, a problem which might be anticipated in this type of publication.

The third chapter is a paper prepared by Karl Delwaide of the Barreau du Quebec, on access to the courts and administrative tribunals. The paper attempts to define the right of a legislature to delegate to an administrative tribunal the exclusive jurisdiction to determine reparation for personal inquiries suffered, as a result of a tort, to the exclusion of remedies before the courts. Mr. Delwaide concludes that s. 7 of the *Charter* does not substantially alter the right of a legislature to provide for exclusive jurisdiction in an administrative tribunal, such as Worker's Compensation Board. The paper, although

advancing a credible theory, takes on the flavour of an argument in favour of the propositions made, and fails on occasion to include discussion of relevant judicial precedent. For instance, on the issue of whether denial of a tort action for damages arising out of personal injuries amounts to an infringement of "security of the person", reference is made to academic writing and a Law Commission working paper, but not to judicial decisions directly on point. However, the paper advances a creative and logically consistent argument, and is still of interest despite subsequent jurisprudence that may have significantly narrowed the application of ss. 7 and 15 of the *Charter* since the paper was produced.

Chapter 4, written by John D. Richard of Messrs. Lang, Michener, Lawrence and Shaw of Ottawa, deals with the judicial review jurisdiction of the Federal Court of Canada over federal administrative tribunals in the post-*Charter* area. The paper is a straight forward discussion of the nature and extent of federal court jurisdiction, with appropriate reference to statutory and case authority. The interesting issue of the jurisdiction of federal tribunals to hear *Charter* issues is once again canvassed, although in somewhat more detail. Matters of procedure, standing, constitutional notice provisions, stays of proceedings, and potential applicability of the *Canadian Bill of Rights* are also commented upon. In his conclusion, Mr. Richard notes that significant amendments to the *Federal Court Act* dealing with jurisdiction of the Federal Court of Appeal and Trial Division have been introduced, which would affect some of the discussion in the earlier parts of the paper.

Chapter 5, presented by R.G.L. Fairweather, Chairman of the Immigration and Refugee Board, discusses the impact of the *Charter* on the operation of the Board. After referring to the problem of whether the Board is a "court of competent jurisdiction" within s. 24(1) of the *Charter*, and briefly discussing the merits of raising *Charter* arguments at the Board level, the paper addresses the issue of how s. 15 of the *Charter* has been used to challenge the criteria used to define admissibility for family class members. The balancing of a claimant's right to privacy through the channel of an "in camera hearing", against the writer's right to freedom of expression, is also examined. Finally, Mr. Fairweather makes the case in favour of allowing the Board to intervene directly in *Charter* cases before the courts, when the outcome may affect agency process.

Chapter 6 is a paper on the effect of the *Charter* on the requirements for independence and impartiality of administrative tribunals, presented by William Atkinson of the Barreau du Quebec. After acknowledging that the judicially prescribed requirement for an independent tribunal in s. 11(d) of the *Charter* will have little direct application on administrative tribunals, the paper explores the extent to which courts may require impartiality and independence through the notion of principles of fundamental justice protected by s. 7 of the *Charter*. Specific issues addressed include tenure of appointment of tribunal members, multiple functions in the adjudicative process, appointments of non-lawyers, consultation of sitting members with other colleagues or employees of the tribunal, and the impact of the presence of a judicial appeal on the need for a hearing before an independent tribunal.

In Chapter 7, Mary Eberts of Messrs. Tory, Tory, DesLauriers and Birmingham of Toronto, examines the potential effect of s. 7 of the *Charter* on investigations preceding adjudicatory proceedings. Ms. Eberts chooses the example of unreasonable delay guaranteed in the penal context by s. 11(b) of the *Charter*, and reviews attempts to attain similar protection against delay in the administrative context through s. 7 of the *Charter* and common law natural justice. The review and analysis of precedent, and the suggestion of why s. 7 ought to be applied to human rights commission procedures, presents an interesting hypothesis.

In Chapter 8, James Shields and Ian Vallance of the Law Society of Upper Canada, present a rather disjointed discussion of three topics: the evolution of the fairness doctrine in administrative law, the limitations on the role of Board counsel in Board hearings and in appeal or judicial review of Board decisions, and the effect of s. 11 of the *Charter* on the development of the fairness doctrine. The failure to mention the application of s. 7 of the *Charter* and its potential impact on the development of procedural fairness, appears to be a significant omission in the paper.

Chapter 9 is a substantial paper by co-editor Brian Rogers addressing *Charter* limits on administrative investigative powers. The theme is advanced that in applying *Charter* protection to persons subject to investigative process, courts ought to avoid heavy reliance on labelling impugned conduct as "administrative" or "criminal". Rather, the conduct should be examined in the context of the particular statutory scheme.

Five broad areas of administrative investigation are examined in light of specific *Charter* protection. The application of ss. 9 and 10(b) of the *Charter* to powers of administrative officials to compel oral answers is discussed. The issue is raised of whether s. 7 contains a privilege against self-incrimination which offers protection where a subpoena has been issued requiring testimony under oath, and whether corporations may rely on such a privilege. Despite the majority of precedent to the contrary at the time the paper was written, Rogers correctly anticipates that compulsory production of documents ought to be considered a seizure, and that s. 8 provides a vehicle for the court to undertake balancing of privacy interests against government need. The section on inspections and searches is an insightful analysis of the manner in which s. 8 ought to be applied in the administrative context, and the approach suggested in the paper appears to be consistent with the reasoning of the Supreme Court of Canada in the recently decided *Thomson Newspapers* and *McKinlay Transport* cases. Reference is also made to relevant U.S. jurisprudence. The application of s. 8 to administrative seizures is analyzed, with the suggestion that specific consideration ought to be given to the proportionality of the government objective involved relative to the intrusiveness of the actual seizures permitted under the legislation. The paper is a welcome addition to the relatively insubstantial body of academic writing in the area.

In conclusion *Administrative Tribunals and the Charter* contains valuable discussions of the potential impact and applicability of the *Charter* in the administrative law context, from both a procedural and substantive perspective. Academics, students and practitioners

alike will find this publication to be a helpful resource, containing insightful analysis of legal theory and practical problems arising from the application of the *Charter* in the administrative area.

Robert Maybank
Constitutional Law Section
Department of the
Attorney General of
Alberta.