# BOOK REVIEWS

ADMINISTRATIVE LAW AND PRACTICE. By Robert F. Reid, Q.C. Toronto: Butterworth & Co. (Canada) Ltd.. 1971. Pp. xxix, 594. $42.50.

We owe a debt of gratitude to Mr. Reid for having undertaken this work. Members of the bench, bar, law schools and the vast array of administrative tribuals will alike profit by it. It may be that those affected by the operations of the tribunals may derive guidance from it, as Mr. Reid hopes.

The author who has the temerity to write a book on administrative law has some choices available to him. He can write a brief basic outline of the history and principles, as did Foulkes; he can do a more comprehensive and analytical piece of work within a medium compass as did Wade; he may attempt what is regarded as the definitive work on judicial review, as did de Smith; he may concentrate on the practice, procedure and jurisprudence relating to a particular tribunal or class of tribunals.

Mr. Reid has not done any of these, although in breadth of coverage and disclosure of detail, his book most closely approximates that of de Smith.

What is appropriate about the book is that as the first English-speaking Canadian textbook on administrative law, it identifies and organizes the jurisprudence on the subject of judicial review of administrative tribunals in Canada in a most comprehensive yet practical way. It is appropriate that the first such Canadian textbook should be written by a practioner for practitioners.

It does not cover the whole range of administrative law. As the author explains: "[T]his book is principally concerned with the attempts of our courts to control the procedures of our tribunals" (p. xii). This he regards as the central issue today. The work, therefore, confines itself to judicial attitudes towards the tribunals. It does not develop the history of inquiries into administrative law developments and procedures, such as the Donoughmore and Franks Committees, nor does it attempt to set out what should be the future course of law — this has been done by McRuer and the legislatures are already taking up the challenge. In my view the book does exactly what it should do — expose judicial attitudes in depth.

The following general comments might be made. In the first place, the author wisely refrains from attempting, as some might wish, to rationalize or simplify the effect of the jurisprudence. If one thing emerges from the various chapters as they unfold, it is the complete lack of consistency of the jurisprudence on almost all major points. This is a fact which students and practitioners alike must understand; to try to pin down the attitude of the courts is like nailing jelly to the wall.

Secondly, the book is a text on Canadian law. Where English jurisprudence is referred to it is merely a necessary backdrop. There is no reference whatever to American jurisprudence.

In the third place, historical and philosophical commentary and analysis is limited to the degree appropriate to a book which is essentially practical; one is, however, receptive to and stimulated by such incursions into these fields as the author permits himself. Indeed, one should read at the outset, before reading anything else, chapter 23 which is entitled "A Summing Up", in which the author tells us: "It is clear that administrative law in Canada today is in a sorry state. No proof of this is needed beyond the judgments themselves; every chapter of the foregoing reveals contradictions on virtually every issue, and general disorder in the law" (p. 461). Then follows some brief reference to historical developments, the role of the tribunals and the reason for that role; a reminder that the legislatures have tried but failed to maintain the tribunals as informal, speedy and expert bodies to make final decisions, and a clear warning that we may now be in for a period of opposite reaction in the form of over-judicialization of the tribunal mechanism. This is a preceptive comment which places the author somewhat at odds with the recommendations of the McRuer Commission and the Ontario and, perhaps, federal legislation as it may be emerging. But I think he is right in his statement that perhaps the legal profession is inclined to assume too readily that society generally would prefer judges and lawyers to have the most to say about how the tribunals should govern themselves and what should be their objectives, rather than the people most closely involved who are affected by the decisions and who know what the game is all about.

These are important issues which the book raises. Delegation of auththority and responsibility by legislatures is not likely to diminish and, as the author points out in his opening chapter, is indeed proliferating. The volume of work originating with administrative tribunals could, by over-judicialization, in the long run swamp the courts (as if they are not being swamped already). Eessentially, it is submitted (and this is amply demonstrated by Mr. Reid's book), that the principles which govern judicial review are basically the following:

(a) The rule of law, not only in the Diceyan sense but also as more modernly developed which postulates that the independent courts must see to it that rights and liabilities of individuals are decided in accordance with law and on sound and just principles.

(b) The importance of the question of jurisdiction and the striking down by the courts of decisions or procedure of tribunals which go beyond it; and the equally important question of fair play which is fundamental to most issues of judicial review; together with the recognition that discretion validly exercised by a tribunal is valid and binding and not to be supplanted by that of the courts.

(c) The principle (or lack of it) which leads courts to decide in effect whether or not to intervene in the decision or activity of a tribunal brought before it, and having made that decision to rationalize their way through to the result—in the process relating the factual situations to such magic

concepts as the duty to act judicially, natural justice and so forth, in the right way to enable the desired result to be achieved.

Tribunals must be made aware of the ground rules relating to jurisdiction and fair play; the courts must be kept free to set them right where failure works injustice and hardship, but Mr. Reid's warning against over-judicialization should be heeded.

It is particularly true of administrative law that whether one is preparing a law school syllabus or a textbook, the organization of the outline puts the author's peculiar stamp upon it and distinguishes it from others. Central to the author's dilemma is the perennial question to lead the student or the reader through the intricasies of administrative law by introducing him first to the substantive rights of persons affected by tribunal decisions, the breach of which gives ground for judicial review, or which are factors giving rise to judicial review; or whether to emphasize the remedies available in the course of applying which substantive rules are derived.

This book is organized into 23 chapters. The author chooses the substantive approach in developing the subject. The first 11 chapters are devoted to the factors which reviewing courts consider in cases brought before them; chapters 12 to 21 deal with remedies available and the factors governing their application by the courts; and the final chapters outline briefly recent and impending legislation designed to clarify and standardize the substantive and procedural rules. The final chapter is the summing up (chapter 23) which, as indicated earlier, ought to be read as a prelude to the rest.

A most important contribution is Part 2 which consists of a case citator, a table of cases and the index. Perhaps one of the most useful parts of the book is the case citatior which contains the cases that have formed the basis for the general treatment of the law contained in the main part of the book grouped in relation to the tribunal whose decision or procedure is under review. The citator is organized under subject headings such as — accountancy, assessment, Board of Grain Commissioners, broadcasting, Civil Service, conservation, fuel, harbours, highway improvement, hospitals, human rights, immigration, insurance, labour, public utility, railway, rent and rent control, school, taxation, veterinarians, to pick a number at random. Under each of the subject headings are grouped the decisions by courts relating to the federal tribunals and provincial tribunals. The case citator along with the table of cases which follows is, in my judgment, the best compilation of its kind to date and is a most useful source of information for student and practitioner alike.

The early chapters open up with the right to be heard and the nature of the hearing. It is clear that the author regards this (which many have thought to be the second rule of natural justice) as central to the rationale of administrative law. The principle is used as a vehicle to make some general comments on the administrative law background from Magna Carta to

the emergence of modern administrative law in the twentieth century and in Canada particularly after the Second World War. The development of administrative tribunals and the proliferation of judicial review cases is seen to go hand in hand with the intervention by governments in the affairs of citizens through regulation. "Tribunal" is used throughout to mean decision-making bodies that are outside the law court hierarchy. Then follow instances where the right to be heard has been recognized and the rationale for these judgments, after which are grouped the cases where a right to a hearing has not been recognized and the rationale of judgments refusing a hearing. All this is grouped in relation to various types of tribunals, including the Lieutenant-Governor-in-Council, Ministers of the Crown, labour relations tribunals, vocational tribunals, and immigration tribunals, which of course is not an exhaustive list. The text is developed under easily understood headings which greatly assist in the organization of the material, *e.g.*, where the statute expressly requires a hearing, where the statute appears to dispense with a hearing but one is inferred, where the statute confers a discretion to hold or dispense with a hearing and where the statute is silent. Chapter headings and sub-headings such as this are typical of all chapters.

Chapters 2 and 3 also deal with the nature of the hearing and reconsideration and rehearing. Chapter 4, however, instead of moving on to the remaining rule of natural justice follows with classification of function, which of course is central to the whole question of judicial review. The chapter opens with a sentence from Mr. Justice Pennel, in the Supreme Court of Ontario: "the test to distinguish between an administrative act and a *quasi*-judicial act is almost as elusive as the Scarlet Pimpernel."[1] This is characteristic of the author's emphasis through-out the book on another great characteristic of administrative law, namely, its lack of consistency, lack of precision, lack of predictability, and lack of logic. It may be of some comfort to students who find themselves confused to read in a textbook that the law itself is "in a sorry state" and to find such phrases as "general disorder in the law" (p. 461), "this branch of the subject is marked by confusion, and is more confused than it ought to be" (p. 12), and so on, for chapter after chapter.

We find, for example, a grouping of decisions under functions classified as administrative, functions classed as judicial or quasi-judicial, elements in the classification of the function — a particularly interesting list, and the consequences of classifying the function. Chapter 5 follows with the finality of tribunal action which under such headings as "intrinsic finality", "privative clauses" and "collateral issues" lay out the jurisprudence dealing with the attempts of the legislatures to prevent judicial review.

We then return to natural justice with a very useful and analytical chapter on bias (Chapter 7). Chapter 8 deals with defects in the appointment and

[1] Voyager Explorations Ltd. v. Ontario Securities Commission, [1970] 1 Ont. 237, at 242.

constitution of the tribunal and failure to comply with the statute or rules. Chapter 9, in something less than twenty pages, disposes of delegated legislation and sub-delegation of powers, subjects which are not as fully developed as the chapter heading might warrant and which appears to me to follow somewhat illogically in this place. The general thrust, as might be expected, is in relation to the doctrine of ultra vires.

A somewhat unusual and useful chapter on appearances by tribunals in court follows (chapter 10), after which, in chapter 11, we find the scope and nature of judicial review. This is a janus-like chapter falling, as it does, bewteen what I have called the substantive parts of the book and the remedies. It is a chapter, like chapter 23, that might well be read before plunging into the main body of the text. It points up the two general sources of review — the administration and the courts; it is sometimes useful to remember that there are times when decisions of tribunals may be reviewed by a Minister of the Crown, and, indeed, by Cabinet. In this chapter we find discussion of the rule that no appeal exists except when granted by a statute. The main methods of obtaining judicial review, *e.g.*, through appeal or prerogative writs, are described, as well as through ancillary proceedings; the grounds for invalidation of a tribunal's decision are discussed in relation to each of these methods. This chapter also introduces us to administrative and quasi-judicial discretions which, as all students will recall, are supervised by the courts to ensure that their exercise is to be "according to the rules of reason and justice, not according to private opinion . . . according to law, and not humour, . . . not arbitrary, vague and fanciful, but legal and regular" — this language from *Sharpe v. Wakefield*[2] being described as virtually the charter for such matters. The ability of the reviewing court to substitute its own opinion for that of the tribuanl is discussed as are review proceedings on questions of law and evidence.

The chapters which follow deal individually with remedies, chapter 12 being general comments with succeeding chapters devoted individually to certiorari and prohibition, what constitutes the record, habeas corpus, mandamus, quo warranto, declarations of right, injunctions, damages, statutory appeal and review.

Thus, the basic organization. The author treats the subjects matter succinctly. By far the major part of the text consists of explaining how the courts have treated various situations. The style is basically that of the encyclopedic works with copious examples of tribunal's decisions treated similarly or disparately under the prevailing rule discussed. Case citations are confined to the footnotes leaving the text uncluttered. Where analysis and comment is found it is short, to the point and clear.

The table of contents is most useful, consisting of chapter headings, main headings and sub-headings, most of which assist the student or prac-

[2] [1891] A.C. 173, at 179.

titioner in locating the subject matter quickly in the text under its basic subject chapter and most of which are sufficiently descriptive to disclose the rule or idea treated in the text. Similarly, the index is well done. Multiple indexing of subjects appears to be followed. For example, a quick check under "damages against tribunals" which has 14 situations listed under it, is also indexed separately under each of those 14 headings elsewhere in the pages.

Several specific comments might be made about some of the chapters which seemed to me to be particularly interesting.

The relationship of certiorari and prohibtion to declaratory actions and injunctions is a point that puzzles students. Lord Denning, both from the bench and as an author, sees the declaratory action as ultimately taking over the field from the prerogative writs. On the other hand, the declaratory action has been apparently used sparingly in Canada, notwithstanding that it is not constrained by the technical rules applicable to the writs, *e.g.*, it may successfully be used to attack an administrative order whereas certiorari could not. As the author points out, Canadian courts have been somewhat conservative in considering requests for declarations alone and proceedings of this nature remain relatively rare. On the other hand, he implies that they are too frequently coupled with other causes of action and perhaps are subordinated in the judicial mind as a result. Suffice it to say that the declaratory action is a remedy which, in the absence of developing legislation on judicial review, ought more frequently to be tried on the courts in place of the prerogative writs or orders.

It is interesting to have a chapter on the power of a tribunal to reconsider or rehear a matter that has already been before it. This of course must depend upon the powers set out in the statute as otherwise, once having made a decision, the tribunal would no doubt be held to be functus. But it is useful to have set out, as the book does, the circumstances in which the cases show that tribunals have, indeed, exercised such a power. Whether a tribunal can correct a slip or error, which the author considers may exist even in the absence of express statutory authorization, or whether in certain circumstances it would be held to be functus, would appear to be in fact dependent upon the view of the matter taken by the individual judge. But this is typical of administrative law. In this context, the book deals with the effect of finality clauses on an express power to reconsider, the effect of delay on the exercise of a power, and the question whether the tribunal may embark upon a rehearing without notice, or is obliged to embark on it when properly called upon to do so. These are matters which, it is evident, depend upon the construction of the statute.

The chapter on damages is worthy of special mention. Can a person who has been subjected to an order of a tribunal which turns out in the result to be invalid claim damages successfully as a result of the making of the order? Usually under the provincial laws for the protection of public of-

ficers protection is given to tribunal members in the absence of dishonest motive, malice, collusion or fraud, or the like. While in *McGillivray and Kimber* [3] it was held that failure to comply with statutory requirements was actionable notwithstanding the absence of malice (a case where malice was present), the author concludes that, on the basis of the jurisprudence, the general trend is in the direction of requiring proof of fraud, collusion or malice before damages will be awarded. Typically, however, the book lists those cases in which damages have been awarded against tribunals based upon unlawful decisions.

Chapter 10 deals with appearances by tribunals in court in proceedings between others in which its own actions are being questioned, or otherwise to defend its own conduct. It appears to be generally accepted, on the basis of the jurisprudence, that where the jurisdiction of the body constituted to discharge judicial functions is questioned in a superior court, it may defend its jurisdiction, and in the event of an adverse judgement take an appeal therefrom (*Dominion Fire Brick Case*). [4] The author concludes that, unless a statute confers the right, it is more likely a convenience and that the usefulness of having the benefit of the tribunal's appearance would appear to be the governing factor. The problem is, however, tackled head on, although the jurisprudence on the matter is sparse, the practice of allowing tribunals to appear being reasonably well accepted.

The chapter on bias, as is mentioned above, is a useful one. Indeed, I consider it one of the most important chapters in the book, containing as it does the most incisive analysis of the subject in Canada that I have seen. Students are, of course, familiar with the three kinds of disqualifying bias — bias on the subject matter; pecuniary interest, however slight; and personal bias. Underlying this is the equally important principle that not only ought actual bias to disqualify but the appearance of bias, even though it may not exist in fact, must be placed on the same footing. In *Dimes v. Grand Junction Canal,* [5] the House of Lords made this abundantly clear in relation to the participation of the Lord Chief Justice of England where they clearly thought that bias did not in fact exist but could have appeared to exist, and in their judgment stated the importance of making an example to be heeded by the tribunals.

Yet, as the author points out, courts in conducting judicial review have not only been inconsistent in handling this principle but have in many cases departed from it in Canada. This is partly due to the built-in bias created by the statutes setting up certain tribunals, partly by public acceptance of bias as inherent in particular tribunals, and partly due to reluctance to apply the basic rule firmly. It is, of course, a fact that the procedures, purposes and

[3] 52 Sup. Ct. 146 (1915).

[4] Lab. Rel. Bd. of Saskatchewan v. Dominion Fire & Clay Products, [1947] 3 D.L.R. 1 (High Ct.) (per Kerwin, J.).

[5] Dimes v. Grand Junction Canal, 3 H.L.C. 759 (1852).

composition of tribunals are infinitely varied. Some tribunals have the objective of achieving a particular result or implementing a statute; some, including professional and labour tribunals, are composed of members some of which are competitors of the "accused" or represent a particular interest group. These situations are created by the statutes. Moreover, it is a commonplace that regulatory bodies in time tend to take on the colour of those whom they regulate and where such a body is required to act quasi-judicially, a built-in bias may occur. Some tribunals have functions which in effect ally them with the "prosecution".

The author points out that where a tribunal is a "three-cornered tribunal is required to adjudicate, the courts have applied the basic rule of bunal is required to adjudicate, the courts have applied the basic rule to disqualifying bias. Two-cornered tribunals, *i.e.*, those in which the contest becomes essentially one between a party and the tribunal have been treated differently because in fact they are different (these are, for example, the licencing tribunals; and disciplinary tribunals where the governing body initiates an accusation and tries it before a tribunal of its own members). In such situations, an attempt to apply the principle that there must be no appearance of bias is clearly futile and the trap lies in the courts attempting to say, on the one hand, that the basic rule applies but then denies the appearance of bias in a case where it clearly exists. In effect, the courts are driven to requiring bias to be proved in fact and overlooking, while at the same time criticizing, the appearance of bias.

These are important matters which the author has admirably brought into focus. Members of the bar and the public frequently reflect disenchantment with the operations of tribunals based on their experience. While the appearance of bias may be only one factor, it is clearly of fundamental importance that it be dealt with firmly by both courts and legislatures.

This book was written as a product of a struggle by Mr. Reid, over many years, to focus attention in the Canadian Bar Association and elsewhere on the erratic performance of the courts of judicial review and the need for concern over fundamental inconsistencies with principle in the performance of the tribunals. The book was brought to publication coincidentally with the development of the new Federal Court Act [6] which now provides, by statute, judicial review of all decisions or orders of federal tribunals including "those of an administrative nature not required by law to be made on a judicial or quasi-judicial basis" (section 28) while at the same time conferring original exclusive jurisdiction to issue an injunction or writs of certiorari, prohibition, mandamus or quo warranto, or to grant declaratory relief against any federal board, commission or other tribunal (section 18).

At the same time, the new Ontario legislation governing procedure and judicial review of statute proposals was well on its way and is now about to

[6] Can. Stat. 1970-71 c. 1.

come into force. It is to be hoped that other provinces will follow suit and that the new legislation will have the result of correcting many anomolies. It can, however, only provide the vehicle and state the basic principles upon which review is to be based. The correction of defects still remains with the courts in particular cases. There can be little doubt that the research, co-ordination and analysis of the existing jurisprudence by Mr. Reid will add much to the process.

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