Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. *Distribution List*
☐
☐
☐
☐

PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS

Lorne Sossin

Founding Authors Robert W. Macaulay and James L.H. Sprague

Release No. 1, January 2026

AUTHOR'S NOTE

As we turn the page to 2026, it is a time both to look forward and to look back.

One of the milestones we will mark this year is the 25th anniversary of the Supreme Court's decision in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, 2001 CarswellBC 1877, 2001 CarswellBC 1878, REJB 2001-25683, 34 Admin. L.R. (3d) 1, 93 B.C.L.R. (3d) 1, 204 D.L.R. (4th) 33, [2001] 10 W.W.R. 1, (sub nom. Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.)) 155 B.C.A.C. 193, 274 N.R. 116, [2001] 2 S.C.R. 781, (*sub nom.* Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.)) 254 W.A.C. 193, [2001] S.C.J. No. 17 (S.C.C.). In *Ocean Port*, McLachlin C.J., writing for the Court, confirmed that a government agency with a statutory mandate both to make policy, investigate allegations and adjudicate disputes does not by reason of this multiplicity of functions breach the independence component of the duty of fairness.

Thomson Reuters®

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
E-mail CustomerSupport.LegalTaxCanada@TR.com

In the course of her reasons, the Chief Justice took the occasion to set out where administrative justice fell within Canada's constitutional architecture. In the most often quoted passage of the judgment, she distinguished administrative tribunals from courts and the concept of judicial independence elaborated in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, explaining,

> 24 Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

The Chief Justice confirmed that "judicial independence" has no application to administrative justice, and further that administrative justice was part of the executive and not the judicial branch of government, stating:

> 33 The Constitution is an organic instrument, and must be interpreted flexibly to reflect changing circumstances: *Attorney-General for Ontario v. Attorney-General for Canada,* [1947] A.C. 127 (P.C.). Indeed, in the *Provincial Court Judges* Reference, Lamer C.J. relied on this principle to extend the tradition of independent superior courts (derived from the constitution of the United Kingdom) to all courts, stating that "our Constitution has evolved over time" (para. 106). However, I can find no basis upon which to extend the constitutional guarantee of judicial independence that animated the *Provincial Court Judges* Reference to the Liquor Appeal Board. The Board is not a court, nor does it approach the constitutional role of the courts. It is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function. Licences are granted on condition of compliance with the Act, and can be suspended for non-compliance. The exercise of power here at issue falls squarely within the executive power of the provincial government.

While some were critical of *Ocean Port* for failing to bring administrative justice, or at least some parts of it (tribunals adjudicating rights, for example) within the judicial fold, this decision opened up the arguably more interesting question of what legal protections and guard rails existed at common law, or through statutory interpretation, that would be customized to and for administrative justice. This discussion remains ongoing. Hopefully, the anniversary of Ocean Port will give rise to helpful reflections on how far that discus-

sion has come, and how far it still has to go.

This release features developments in several areas of administrative law.

In *Botbyl v. Heartland Farm Mutual Inc.,* 2025 ONSC 3349, 2025 CarswellOnt 12194 (Ont. Div. Ct.), the Ontario Divisional Court considered an appeal from a reconsideration decision of the License Appeal Tribunal (LAT), which overturned an adjudicator's decision granting relief from forfeiture of their insurance policy under s. 129 of the *Insurance Act* R.S.O. 1990, c. I.8. The Divisional Court allowed the appeal, set aside the reconsideration decision and restored the underlying adjudicator's decision. The questions before the Court included whether the LAT could be considered a "court" for purposes of granting relief from forfeiture under the Act. The Divisional Court relied on the principle that the SABS is consumer protection legislation, and therefore must be interpreted in a manner consistent with its objective to reduce economic dislocation and hardship for victims of motor vehicle accidents, including the more expansive reading of LAT's jurisdiction.

In *Universal Ostrich Farms Inc. v. Canada (Food Inspection Agency),* 2025 CAF 147, 2025 FCA 147, 2025 CarswellNat 3327, 2025 CarswellNat 4160 (F.C.A.), leave to appeal refused 2025 CarswellNat 4639, 2025 CarswellNat 4640 (S.C.C.), the Federal Court of Appeal dismissed an appeal from the judgment of the Federal Court in *Universal Ostrich Farms Inc. v. Canada (Canadian Food Inspection Agency)*, 2025 FC 878, 2025 CarswellNat 1793 (F.C.), affirmed 2025 CAF 147, 2025 FCA 147, 2025 CarswellNat 3327, 2025 CarswellNat 4160 (F.C.A.) leave to appeal refused 2025 CarswellNat 4639, 2025 CarswellNat 4640 (S.C.C.), which in turn dismissed an application for judicial review of two related decisions of the Canadian Food Inspection Agency (CFIA) relating to the fate of ostriches on a farm where testing confirmed the presence of H5N1, a "highly pathogenic avian influenza". The decisions were made under section 48 of the *Health of Animals Act,* S.C. 1990, c. 21, and in accordance with the CFIA's Stamping-Out Policy, including its Highly Pathogenic Avian Influenza 2022 Event Response Plan. The decisions would lead to the death of over 400 ostriches. In reaching its decision, the court noted its "considerable sympathy" for the owners of the ostrich farm but highlighted that, at para. 6 "it is not the role of this Court to set, vary, or grant exemptions from governmental policy. Rather, our sole role is to determine whether the decisions at issue in this appeal were reasonable in accordance with the deferential standard of review set out in the case law of the Supreme Court of Canada, this Court, and other Canadian courts." The Court found both the decisions and CFIA's adoption of the Stamping-Out Policy to have been reasonable.

In *Westjet v. Lareau,* 2025 CAF 149, 2025 FCA 149, 2025 CarswellNat 3390, 2025 CarswellNat 3391 (F.C.A.), the Federal Court of Appeal dismissed an appeal from a decision of the Canadian Transportation Agency the *Air Passenger Protection Regulations,* S.O.R./2019-150. Under the Regulations, a carrier owes its passengers compensation only for inconvenience caused by a disruption within its control (the "within control" category). According to the Regulations, a carrier owes them no compensation in the case of a disruption within its control but required for safety purposes (the safety category), or where a disruption is due to situations outside its control (the "outside control" category).

The agency's decision set out that disruptions within the "safety" category should be limited to events that "cannot be foreseen nor prevented or, in other

words, that cannot be prevented by a prudent and diligent carrier." It held that a disruption resulting from a crew shortage should not be considered to fall within the safety category unless the carrier demonstrates that the disruption could not have been reasonably prevented, or was unavoidable, despite proper planning and did not result from the carrier's own actions or inactions.

The Federal Court of Appeal rejected the appeal of the agency's decision within the context of the framework for statutory interpretation.

In *Dargatz Mink Ranch Ltd. v. British Columbia (Ministry of Agriculture and Food),* 2025 BCCA 272, 2025 CarswellBC 2260, 3 B.C.L.R. (7th) 213, 5 C.C.L.T. (5th) 186 (B.C. C.A.), the B.C. Court of Appeal dismissed an appeal from a decision finding no reasonable prospect of success in a claim alleging misfeasance in public office and a constructive taking in regulatory changes which rendered mink farming illegal. In doing so, the Court reiterated the significant changes to the review of delegated legislation occasioned by the Supreme Court's decision in *Auer v. Auer*.

L.S.