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. 9, September 2024

AUTHOR'S NOTE

In *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22, 2024 CarswellOnt 9199, 2024 CarswellOnt 9200 (S.C.C.), the Supreme Court confirmed the application of the *Charter* to public school workplaces. This finding involved an application of the two-branch framework in *Eldridge v. British Columbia (Attorney General)*, 1997 CarswellBC 1939, 1997 CarswellBC 1940, [1997] 3 S.C.R. 624 (S.C.C.), to determine the application of s. 32 of the *Charter* which focus on (1) its very nature or (2) the degree of governmental control exercised over it, the entity is akin to a government. Where the entity is found to be "government", the *Charter* applies to all its actions.

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

The Court concluded all actions carried on by Ontario public school boards are subject to Charter scrutiny, including the principal's actions, in which he acted in his official capacity as an agent of the board, a statutory delegate. This led Rowe J., writing for the majority, to examine the role of administrative tribunals in adjudicating *Charter* questions for the first time since the Supreme Court's 2010 *Conway* decision.

> [85] When the *Charter* was proclaimed in 1982, its relationship with administrative tribunals was, in Abella J.'s formulation, a "tabula rasa" (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 3). I rely on *Conway* for the proposition that administrative tribunals — and therefore, the arbitrator in this particular instance — are competent to and tasked with the work of adjudicating *Charter* questions where they arise.
>
> [86] It was determined in *Conway* that there was no need to bifurcate proceedings where a *Charter* question arose (para. 22). Further, the principles governing remedial jurisdiction apply in both arenas: there was not a *Charter* for the courts and another for administrative tribunals (para. 20, citing *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 70, per McLachlin J., dissenting).
>
> ...
>
> [89] The principles governing remedial jurisdiction under the *Charter* apply to both courts and administrative tribunals. Tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction (i.e., where the essential factual character of the matter falls within the tribunal's specialized statutory jurisdiction). In exercising their statutory discretion, tribunals must comply with the *Charter* (*Conway*, at paras. 20-21 and 78-81).
>
> [90] This is, in part, an access to justice issue. There are practical advantages and a constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available (*Conway*, at para. 79). *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes, meaning that claimants do not need to have separate recourse to the courts for their *Charter* rights to be vindicated (*Conway*, at para. 103).
>
> [91] Where a *Charter* right applies, an administrative decision-maker should perform an analysis that is consistent with the relevant *Charter* provision. Administrative tribunals are empowered — and, for the effective administration of justice, called upon — to conduct an analysis consistent with the *Charter* where a claimant's constitutional rights apply (*Conway*, at paras. 78-81; *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409, at para. 52). It was therefore incumbent on the arbitrator to proactively address the s. 8 issue that manifested itself on the facts of the grievance. It is insufficient to revert to a separate "well developed arbitral common law" privacy right framework, or to another framework, as the arbitrator did in this instance

(*A.F.*, at para. 13). As I have explained, the *Charter* and relevant s. 8 jurisprudence were legal constraints that applied to the arbitrator's decision (*Vavilov*, at para. 101). In other words, the arbitrator was required to decide the grievance consistent with the requirements of s. 8. This would properly entail drawing on both the relevant body of arbitral decisions and the s. 8 jurisprudence.

On this basis, the Supreme Court held the arbitrator erred by not exercising her jurisdiction over the s. 8 *Charter* issues raised. This case serves as an important affirmation by the Supreme Court as to the scope of the *Charter* jurisdiction of tribunals, and a reminder that where *Charter* issues emerge, they must be addressed by a decision-maker with jurisdiction to do so.

This Release also includes a variety of updates on other important new administrative law decisions:

In *Bellegarde v. Carry the Kettle First Nation*, 2024 FC 699, 2024 CarswellNat 1649 (F.C.), the Federal Court heard a dispute involving elected councillors to the Carry the Kettle First Nation [CTKFN] Council. The Court granted the application of the impugned councillors, invalidating their purported removal by the Council (on the basis of a lack of quorum among other problems) and finding that the Tribunal that is required to be established pursuant to paragraph 12(7)(i) of the governing *Election Act* to provide a recommendation to a Council to remove an elected official from office was improperly constituted. The effect of this decision also was to render the election of two new councillors in a by-election void *ab initio*.

In *M.I. v. Administrator, Ontario Works Region of Peel*, 2024 ONSC 1975, 2024 CarswellOnt 4328 (Ont. Div. Ct.), the Administrator of Ontario Works cancelled the applicant's benefits and assessed an overpayment of over $95,000 for payments she received from January 1, 2015 to July 31, 2021. The applicant is a mother of three children who testified she left her abusive husband in 2004. The administrator found that the applicant had failed to provide information and was "not living as a single person." The applicant appealed to the Tribunal which upheld the Administrator's decision and rejected the applicant's evidence that she had been honest with the administrator about her marital situation. The Ontario Divisional Court found that the Tribunal breached the applicant's procedural fairness rights when it issued a decision with a single paragraph of substantive reasons that repeated the identical paragraph provided in response to an earlier reconsideration decision.

In *Liberal Party of Canada v. The Complainants*, 2024 BCSC 814, 2024 CarswellBC 1372 (B.C. S.C.), the B.C. Supreme Court considered whether a federal political party constituted an "organization" within the meaning of the BC Information and Privacy Commission's governing legislation so as to give the Commission jurisdiction over a privacy dispute. The Court put the concern in the following terms, at para. 2: "These proceedings concern the collection and use of the personal information of Canada's citizens by Canada's federal political parties ("FPPs"). The rapid advancement of technological tools allowing for the harvesting of private information for the purpose of profiling and micro-targeting voters has created risks of misuse of personal information that could result in the erosion of trust in our political system." The judicial review arose over an Order from the Commission determining that, the *British Columbia's*

Personal Information Protection Act, S.B.C. 2003, c. 63 [PIPA] is constitutionally applicable to the collection, use and disclosure of personal information in British Columbia by FPPs registered under the *Canada Elections Act*, S.C. 2000, c. 9. The Court found that the Order was not premature, and that on judicial review, the Order was reasonable and had violated the duty of fairness owed to the political parties. Finally, the Court also rejected the political parties' argument that provincial jurisdiction over them was precluded on federalism grounds.

In *Rockcliffe Park Residents Association v. City of Ottawa*, 2024 ONSC 2690, 2024 CarswellOnt 7248 (Ont. Div. Ct.), the Court considered a motion from the respondent city to strike affidavits filed by the applicant resident association in a judicial review of a decision (or decisions) in relation to a heritage permit. The Court concluded that some of the evidence tendered in three of the affidavits was inadmissible and should be struck.

In *Innu Nation Inc. v. Canada (Crown-Indigenous Relations)*, 2024 CF 896, 2024 FC 896, 2024 CarswellNat 2288, 2024 CarswellNat 2289 (F.C.), the Federal Court found an application for judicial review of a decision of the Minister of Crown-Indigenous Relations to enter into a Memorandum of Understanding on Advancing Reconciliation with the Nunatukavut Community Council to be non-justiciable, as it neither created legal benefits or prejudice to the parties. The applicant had argued that the MOU adversely impacted the Innu's Section 35 Constitutional rights and the decision of the Minister to enter into the MOU was reviewable by the Court.

L.S.