

ADMINISTRATIVE LAW PRIMER FOR TRIBUNAL MEMBERS AND STAFF

Presented by: Christine Arnold

BC Council of Administrative Tribunals
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Introduction

- Presented by: Christine Arnold
 - Registrar and CEO of the College of Veterinarians of British Columbia
 - BCCAT course author and instructor - **Foundations of Administrative Justice: Practice & Procedure for Staff**
 - Next offerings: November 8, 2024 (still time to register!) & April 25, 2025
 - Member – Property Assessment Appeal Board
 - Instructor: University of British Columbia - Sauder School of Business
 - Real estate licensing – BC Financial Services Authority
- You: new to administrative justice and administrative law
 - New member (decision-maker) or staff to administrative agency (e.g. tribunal, board, commission, professional regulator, etc.)

Roadmap

- What is administrative justice
- What is administrative law
- Procedural fairness
- Decision making
- Reviews and appeals
- Questions and discussion (10-15 minutes)

What is Administrative Justice?

System of decision-making by administrative agencies

- What is an administrative agency?
 - Government body that makes decisions
 - e.g. tribunals, boards, commissions, professional regulators
- Exists in parallel with court system
- Underlying public policy - includes:
 - More justice more nimbly for more people
 - Reserve courts (time, space, resources) for issues that require judicial intervention
- Governed by administrative law

What is Administrative Law?

Branch of public law

- Law of relationships with government, including between:
 - Public institutions and people
 - Public institutions
 - Branches of government
- Public law includes: constitutional law, criminal law, and administrative law
- Contrast to private law (e.g. contract law)

What is Administrative Law? (cont'd)

Applies to the exercise of public authority – e.g.:

- Government
 - E.g. decisions of the Minister of Immigration
- Administrative tribunals (by name or function)
 - E.g. Human Rights Tribunal (e.g. discrimination complaint)
 - E.g. Residential Tenancy Branch (e.g. wrongful eviction claim)
 - E.g. Property Assessment Appeal Board (e.g. property assessment dispute)
- Professional regulators
 - E.g. College of Physicians and Surgeons of British Columbia
 - Licensing decisions, complaints adjudication, discipline decisions

Source of Law and Jurisdiction

Common Law

- Administrative law is developed in the common law
- Common law = body of law created through decisions of courts
 - → *precedents*

Legislation

- Law created by government (legislative branch) = *statutes*
- Administrative agencies exist exclusively as *creatures of statute*
 - Created and eliminated by the legislature

Source of Law and Jurisdiction (cont'd)

Administrative agencies as creatures of statute

- No inherent jurisdiction or power → jurisdiction defined by statute (i.e. *enabling statute*)
 - Jurisdiction = scope of authority / scope of decision-making power
 - Enabling statutes – e.g.:
 - *Human Rights Code*, RSBC 1996, c 210 → Human Rights Tribunal
 - *Assessment Act*, RSBC 1996, c 20 → Property Assessment Appeal Board
 - *Veterinarians Act*, SBC 2010, c 15 → College of Veterinarians
 - Decisions must be within the administrative agency's jurisdiction
 - E.g. disciplinary decision of the College of Veterinarians must pertain to disciplining a veterinarian (not, for example, a dentist)

Source of Law and Jurisdiction (cont'd)

Administrative Tribunals Act, SBC 2004, c 45

- To apply to an administrative agency, must be incorporated by reference in an enabling statute
 - E.g. *Assessment Act*, s 43.1
 - E.g. *Residential Tenancy Act*, SBC 2002, c 78, s 5.1 (new in 2024)

Practice tip: prepare your own copy of the *ATA* with applicable provisions highlighted/tabbed

Source of Law and Jurisdiction (cont'd)

Administrative agency's own rules

- Often called Rules of (Practice and) Procedure
 - E.g. Property Assessment Appeal Board - Rules of Practice and Procedure
 - Topics include: appeal management procedures, adjournments, tariff of costs
 - E.g. Residential Tenancy Branch – Rules of Procedure
- Rules must not be inconsistent with enabling statute or *Administrative Tribunals Act* (to extent applicable to agency)
- Practice tip: know your agency's rules – many common questions or issues are addressed in the rules

Source of Law and Jurisdiction (cont'd)

Homework

- What is your administrative agency's enabling statute?
- Does it incorporate by reference provisions of the *Administrative Tribunals Act*? If yes, which provisions?
- Does your administrative agency have rules? What kinds of matters do they address?

Summary: Administrative Justice

Summary:

- System in which government delegates decision-making to administrative agencies
- Governed by administrative law
- Administrative law made up of common law and statutes
 - Statutes: look to enabling statutes, application of *Administrative Tribunals Act*, and agency's own rules

Next: PROCEDURAL FAIRNESS = fundamental organizing principle of administrative justice

→ Procedural Fairness

Procedural Fairness

= Fundamental principle of administrative justice

Four Basic Components:

- Right to know case and to reply (a.k.a. right to notice and to be heard)
- Right to decision from unbiased/impartial decision-maker
- Adjudicator (panel) who hears matter must decide matter
- Right to reasons

Exactly how these rights are given effect depends on various factors, including the severity of the consequences, the rules of procedure of the administrative agency, and practical/logistical realities → exists on a spectrum and balanced against other rights and interests.

= “*it depends...*”

Procedural Fairness (cont'd)

Right to know case and reply - how might the potential elements be carried out? *It depends...*

Some elements:

- Right to notice → Timing? Format?
- Right to disclosure → Timing? Format? Balancing interests (efficiency, confidentiality)?
- Right to hearing → Written? Oral? In person? By telephone? Videoconference?
- Right to participate → Not an absolute right. What if language barrier? What if health concern?
- Right to counsel → Not absolute right. What if cannot afford? What if lawyer of choice is busy?
 - Consider: Mental Health Review Board (deals with loss of liberty) vs other types of issues
- Right to adjournments → Not absolute right. How many? Under what circumstances? What if prejudicial to other parties?
- Right to cross-examine → Not absolute or infinite right.

Procedural Fairness (cont'd)

Right to unbiased/impartial decision-maker

- Reasonable apprehension of bias
 - Test: “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would [that person] think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.” (*Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 60)
- What to do if reasonable apprehension of bias is discovered or raised?
 - Disclosure (good practice to err on side of disclosure)
 - Parties can waive
 - Parties given opportunity to make submissions
 - Decision maker to decide

Procedural Fairness (cont'd)

Adjudicator who hears matter must decide matter

- If panel, entire panel must render decision
- Each adjudicator must make independent decision free of external interference or influence
- There may be circumstances where a new panel must be constituted and a new hearing held

Procedural Fairness (cont'd)

Right to reasons

- Explanation for the decision that is coherent, logical, and that accounts for relevant facts, context, and applicable laws, regulations, and policy
- “Write for the unsuccessful party”
- No absolute right to written reasons (unless legislated or in agency’s rules)

→ Decision Making

Decision Making

Primary components of decision making:

- Issue(s)
 - What needs to be determined?
- Facts
 - Finding of facts from the evidence
 - admitting evidence
 - considering and weighing evidence
 - if inquisitorial agency, any other evidence that should be requested?
- Analysis
 - Applying applicable legal framework to the facts
- Conclusion
 - Decision supported by reasons

Decision Making (cont'd)

Issue(s):

- Must be clear on issues before the administrative agency
- To extent necessary, must narrow issues to those within jurisdiction of administrative agency or available to be decided at present point in proceedings → look to enabling statute, applicable provisions (if any) of *Administrative Tribunals Act*, and agency's rules of procedure
- Do not proceed to any further steps until issues to be decided are determined

Decision Making (cont'd)

Evidence - admitting evidence:

- Administrative agencies have much broader discretion in admitting and considering evidence compared to courts
 - Can act on any material or information that is probative (= quality or function of proving or demonstrating something) → threshold is very low
 - E.g. may consider *hearsay evidence* (= statement that is made out of court and relied on for the truth of its content)
 - Exception: enabling statute says otherwise
- All information assessed on intersecting spectrums of relevancy & reliability
 - Unreliable and irrelevant; reliable, but irrelevant; unreliable, but relevant; reliable and relevant
 - Unreliable, but relevant is where most judgment must be exercised

Decision Making (cont'd)

Evidence (cont'd) – admitting evidence (what to consider):

- Relevance and reliability (particularly relevant, but unreliable)
- Balance of harm and good (net value)
- Efficiency vs probative value
 - Necessary?
 - Duplicative?
- Undermine fairness? Can unfairness be overcome?
- Will parties feel heard? (recall right to be heard)

Decision Making (cont'd)

Evidence (cont'd) – considering and weighing evidence:

- Guard against biases, especially with live witness testimony
 - E.g. cultural differences in what is considered respectful demeanour
- Guard against main character syndrome – you are not necessarily a relevant or only reference point
 - Consider myriad other experiences (with discrimination, authority, privilege, etc.), perspectives, personalities, trauma, intellectual and cognitive abilities, etc.
- Look for internal consistency → Does it make sense in a vacuum? Did it hold up in cross-examination?
- Look for external consistency → Relative to other evidence
- Nexus to truth of the matter: first-hand account vs multiple degrees of hearsay

Decision Making (cont'd)

Evidence (cont'd) – considering and weighing evidence:

- Not all evidence is created equal - must decide how much weight to put on each piece of evidence
- Is there better quality evidence available?
 - Is there any other evidence available on the issue?
- What position does the other party take on the evidence?
- Can adverse inference be drawn from opposing party declining to enter contradictory evidence on same issue?
 - Exercise caution around burden of proof and where opposing party could not be reasonably expected to have or enter contrary evidence (e.g. difficult to prove absence of something)
- If inquisitorial agency: consider requesting evidence

Decision Making (cont'd)

Making findings of fact:

- Must make findings of fact from the evidence
- Fine to articulate/explain that there was conflicting evidence, elements of unreliability, etc., but must ultimately make firm and conclusive findings of fact on which to base decision
- → “I find that...”
 - Avoid “I believe...”, “I think...”, “it seems...”

Decision Making (cont'd)

Analysis:

- Law
 - What is the law that applies to the issues before the administrative agency?
 - Look to:
 - Common law
 - Statute and legal framework that flows from applicable statute(s)
 - Other statutes or binding legal documents
 - Bylaws
 - Standards
 - Policy
 - Rules
 - Is there a legal test that a party must meet?
 - What decisions and orders are available to you to make?
 - Limited by jurisdiction of administrative agency → look to enabling statute
- Apply law to facts to reach conclusion on the issues

Decision Making (cont'd)

Decision and providing reasons

- Providing reasons is one of the basic requirements of procedural fairness → all interested parties should be able to understand how you reached conclusion, even if they don't agree with the conclusion
 - Articulate reasoning that led to conclusion
- Explanation for the decision that is coherent, logical, and that accounts for relevant facts, context, and applicable laws, regulations, and policy
- “Write for the unsuccessful party”
- No absolute right to written reasons (unless legislated or in agency's rules)
 - Decision writing is a skill (BCCAT course plug: Decision Writing Workshop)

→ Reviews and Appeals

Reviews and Appeals

What happens if a party disagrees with an administrative decision?

- Potential options:
 - Internal review or appeal
 - Review by or appeal before another, independent administrative agency
 - Statutory right of appeal (to court)
 - Judicial review (JR) (to court)
- Caution: developing area of law
- Standard of review: important concept, but not explored today

Reviews and Appeals (cont'd)

Internal review or appeal

- Administrative agency's legislative framework may contemplate a mechanism for internal review or appeal
 - E.g. College of Veterinarians → a review lies with the council (governing board) of the College in respect of the College's decision to deny or cancel a practice facility's (e.g. veterinary clinic) accreditation
- Legislative framework sets out interim state and possible outcomes
 - Review or appeal may or may not result in a stay of proceedings
 - Possible outcomes may include return to original decision-maker to reconsider (with or without direction) and/or substitution of decision or new decision entirely (depending on *standard of review*)

Reviews and Appeals (cont'd)

Review by or appeal before another, independent administrative agency

- Administrative agency's legislative framework may contemplate review by or appeal before a separate administrative agency
 - E.g. Health Professions Review Board
 - jurisdiction to review certain kinds of decisions (e.g. registration) of the professional regulators included under the *Health Professions Act*, RSBC 1996, c 183
- Legislative framework sets out interim state and possible outcomes
 - Review or appeal may or may not result in a stay of proceedings
 - Possible outcomes may include return to original decision-maker to reconsider (with or without direction) and/or substitution of decision or new decision entirely (depending on standard of review)

Reviews and Appeals (cont'd)

Statutory right of appeal

- Administrative agency's legislative framework may contemplate an appeal to the court
- May be limited right of appeal
 - E.g. limited to questions of law (may be by way of *stated case* (refer question of law to the court)) or a type of issue or decision

Reviews and Appeals (cont'd)

Judicial Review (JR)

- Application to a superior court (e.g. Supreme Court of British Columbia) to review administrative decision
- General principles:
 - Constitutional right → Administrative agencies are always subject to the superior court's inherent jurisdiction to review their actions and decisions for compliance with the constitutional capacities of the government
 - flows from the judicature provisions of the *Constitution Act, 1867* (ss 96-101)
 - → essentially every decision of an administrative agency is subject to JR
 - SCC has so far declined to opine definitively on enforceability of *privative clauses*
 - Expected to exhaust other avenues of review or appeal before seeking JR
 - otherwise, may be dismissed for *prematurity*
 - Statutory limited rights of appeal do not preclude right to seek JR on other issues (*Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8)

Reviews and Appeals (cont'd)

Staff: important role in respect of review or appeal

- Procedurally substantive:
 - Staff often influence or make procedural decisions that may be raised in a review or appeal
 - e.g. initial assessment of claim (for compliance with deadlines, prescribed forms, etc.), delivery of notices, distribution of documents, etc.
- Administrative:
 - A review is generally a *review on the record* → reviewer makes determination based on the records and documents that arose in the underlying proceedings and were available to the original decision-maker
 - → good record-keeping and document management are critical
 - Role:
 - record keeping and document management during original decision-making process
 - record and document production for appeal or review

→ Conclusion

Questions?
Thoughts?

THANK YOU!

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