

Administrative Law

PRINCIPLES AND ADVOCACY

Fourth Edition

Liz Nastasi, Deborah Pressman & John Swaigen





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Administrative Law: Principles and Advocacy

FOURTH EDITION

Liz Nastasi
Deborah Pressman
John Swaigen


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To my family, Shane, Alex, Bella, and Alanna.

—Liz Nastasi

To my girls, Natalie, Emmy, and Leni.

—Deborah Pressman

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Preface to the Fourth Edition

Administrative law affects everyone. In our society, interaction between the government and citizens is inevitable. When renovating your home, you may need to apply for a building permit (municipal). A family member may have their driver's licence suspended due to a medical condition (provincial). A friend may have requested your help after a denial of EI or CPP benefits (federal).

Administrative law is the body of rules and principles that regulate how the government departments and agencies that administer and enforce our laws, as well as other government-like bodies created or given powers by statute, must behave when carrying out their functions. It ensures that government actions are authorized and that laws are administered in a fair and reasonable manner.

As a legal representative, you will be expected to have sufficient understanding of administrative law so that, wherever possible, you can be aware of your client's options and risks and—most importantly—you can know how to advise and represent your client before various administrative decision-makers, including at adjudicative proceedings.

In the four years that have passed since the third edition of this text was published, there have been a significant number of developments in the administrative law field. These include several important legislative and structural changes.

Case law has found that the open court principle applies to administrative tribunals in Ontario. In the 2018 case of *Toronto Star v AG Ontario*, the Ontario Superior Court of Justice declared provisions of Ontario's *Freedom of Information and Protection of Privacy Act* that delay or block public access to tribunal records to be invalid. The court gave the province one year to revise the Act and make its tribunal system more open and accessible to journalists and the public.

Since the previous edition, there have been significant structural changes and tribunal reform. One such change was the creation of a new cluster named Tribunals Ontario that combines Social Justice Tribunals Ontario, Environment and Land Tribunals Ontario, and Safety, Licensing Appeals and Standards Tribunals Ontario that became effective January 1, 2019.

This fourth edition also examines other major developments, such as the rise of active adjudication and innovative dispute resolution processes that allow tribunals to incorporate more mediations and even online processes.

The purpose of this book is to provide you with a fundamental and practical understanding of the key legal issues that arise in administrative law and advocacy before government departments, administrative agencies, and tribunals.

This edition is a revision of and an update to the previous one. The text is divided into three parts. Part I, Principles and Theory, provides an overview of and builds an extensive foundation on the legal sources within which administrative decision-making takes place. This part describes how laws and rules are created and interpreted. It examines how and

why agencies are established, how they function, and how they affect the traditional division of powers. It also explains the relevance of the *Canadian Charter of Rights and Freedoms*, human rights codes, other quasi-constitutional laws, and the significance of procedural fairness.

Part II, Advocacy, applies the knowledge acquired in Part I. This part describes the fundamentals of effective advocacy. It outlines the basic steps that should be followed in most situations and provides a detailed discussion of the procedures involved in preparing for and participating in hearings before tribunals.

Part III, Challenging Administrative Decision-Making and Enforcing Orders, deals with issues that arise after the proceeding and explains how you can challenge decisions and enforce orders.

In addition, Appendix A, Selected Administrative Agencies: Their Mandates, Powers, and Procedures, provides an in-depth overview of specific federal and provincial agencies. Appendix B, Interpreting Statutes, Regulations, and By-Laws, and Appendix C, Research Tools and Procedures, are valuable and helpful resources.

We hope that this edition makes it easier for you to learn about administrative law. Throughout the text, new learning aids and tools such as tables and flow charts have been added to provide visual explanations and examples. In addition, chapter summaries, key terms, review questions, and exercises are included at the end of each chapter to help you apply new knowledge.

Acknowledgments

Finally, we want to say a few words of acknowledgment. Writing a book is not an easy process. For us, the encouragement we received from our fantastic colleagues, good friends, and supportive families made this book a reality. This text would not be possible without the hard work of many other people. We want to acknowledge the authors of the previous edition, John Swaigen and Jasteena Dhillon, and the entire team at Emond Publishing that helped with this text: Vicki Austin, developmental editor; Anna Killen, production editor; Kelli Howey, copy editor; Emma Johnson, proofreader; Kelly Dickson, director, development and production; and, of course, Lindsay Sutherland, publisher, higher education.

We also want to acknowledge all the people working in administrative law environments and contributing to administrative justice. They guard access to justice, help solve real problems, make hard decisions, and treat people fairly. It matters.

Liz Nastasi
Deborah Pressman
November 2019

A Note to Instructors

For instructors who have adopted this book for course use, supplemental teaching resources are available, including a test bank and PowerPoint presentations. For more information, visit the accompanying website for this book at www.emond.ca/AL4 or contact your Emond Publishing representative.

Preface to the Third Edition

In 1951, when Robert Reid, later Justice Reid of Ontario's Divisional Court, was asked to teach administrative law at Osgoode Hall Law School, he discovered that there were no Canadian textbooks on the subject to assist him. Administrative law did not even exist as a heading in Canadian legal encyclopedias. In his foreword to a text on Canadian administrative tribunals, Justice Reid tells how he tried with limited success to scrounge advice and notes that would help him put together a course on administrative law.

Today, 65 years later, there are numerous texts on administrative law. There are practical guides for lawyers, tribunal members, and even expert witnesses. There are scholarly treatises. There are texts on specific issues such as bias, administrative investigations, and delegated legislation. But to my knowledge, until I wrote this book, there was still not one text designed specifically for students in institutions of higher learning (other than law faculties). University and college teachers generally used texts written for other purposes, supplemented by photocopies of materials they had collected. There was, and still is, very little that addresses both theory and practice—and that does so in plain language.

This book attempts to fill this gap. It is designed primarily for students who are studying to be paralegals, community legal workers, or law clerks, and for students who will work for government departments, regulatory agencies, or tribunals. It describes the underlying principles of administrative law and the variety of applications of those principles in a way that engages students and facilitates learning. It also contains practical advice on dealing effectively with departments, agencies, and tribunals.

The structure of this edition largely reflects that of the second, which was revised to reflect the competencies for paralegals identified by the Law Society of Upper Canada, and the Law Society's syllabus for community college courses for paralegals when the Law Society began to regulate paralegals in 2006.

With the help of Jasteena Dhillon, an experienced professor of administrative law, the text has been revised and expanded to improve its pedagogical features, such as the review questions, exercises, fact scenarios, and cases to consider at the end of each chapter.

This edition also reflects the substantial body of Supreme Court administrative law, Charter, and human rights decisions that have been made since the second edition was published, including decisions that have: clarified the standard of review of tribunal decisions (*Alberta (Information and Privacy Commissioner)*); clarified the scope of procedural fairness (*Newfoundland and Labrador Nurses' Union*); clarified the relationship between administrative law and the Charter (*Doré and Harkat*); changed the criteria for granting public interest standing in Charter cases (*Downtown East Side*); addressed the ability of tribunals to decide constitutional questions (*Conway*); affirmed the availability of damages as a remedy for violations of the Charter (*Ward*); reconfirmed the test for validity of delegated legislation (*Katz Group Canada Inc*); addressed the application of section 11 of the Charter to administrative proceedings (*Guindon*); interpreted section 15 of the Charter (*Law and Withler*); and clarified the jurisdiction of bodies other than human rights tribunals to hear human rights arguments (*Figliola*).

The text has also been revised to address some subjects for the first time or in greater depth, such as the *functus officio* doctrine, legitimate expectations (*Mavi*), tribunal governance and “clustering” (Ontario’s *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*), delegated legislation, public interest standing, the duty to consult First Nations under section 35 of the Constitution, whether the Charter imposes positive obligations on government, and the mandate and procedures of the Immigration and Refugee Board.

Like the first two editions, this text deals with both theory and practice. It addresses issues ranging from the very concrete and specific—for example, how to conduct research or lead evidence—to more abstract questions of principles, ethics, and courtesy. It suggests ways that representatives might carry out these responsibilities fairly, effectively, and efficiently. It also explains the responsibilities of representatives to their clients and to the regulators and tribunals before which they appear, as well as the obligations of these agencies to parties and their representatives.

The premise of this book is that all administrative departments and agencies are subject to certain common fundamental premises, yet no two government agencies are alike. The fact that each agency has been designed to meet a particular need makes it a challenge to determine in any specific case how the principles of administrative law apply to that agency.

Given this variety in administrative bodies and tribunals and their procedures, a “one size fits all” approach to describing and prescribing appropriate behaviour for advocates and government agents will fit no one perfectly. I hope, however, that the book’s double approach to the practice and theory of administrative law will fit most well enough.

Acknowledgments

Jasteena Dhillon is responsible for the improved pedagogical features (review questions, exercises, fact scenarios, and key cases) in this edition.

My thanks to Andy Anstett, Michael Bossin, and Gary Yee, who reviewed my descriptions of the regulatory agencies and tribunals with which they are or have been involved, and provided me with comments and insights into the workings of those entities.

I also want to reiterate my thanks to several chairs, vice-chairs, and members of tribunals, tribunal staff members, staff and members of regulatory agencies, tribunal counsel, and administrative law instructors who provided helpful advice and comments on drafts of the first and second editions: Andy Anstett, Bernie Aron, Judith Goldstein, Donald Hale, Katherine Laird, David Lampert, Genevieve Leslie, Alan Levy, and Gary Yee.

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I remain grateful to the staff at Emond Publishing who brought the earlier editions to fruition, in particular Peggy Buchan, Sarah Gleadow, Jim Lyons, Christine Purden, and Paula Pike.

Finally, I would be pleased to receive suggestions for improvement from both students and teachers. Comments can be sent to my attention at help@emond.ca.

John Swaigen
January 2016

About the Authors

Liz Nastasi (LLB), a graduate of Osgoode Hall Law School called to the Ontario Bar in 1996, is a lawyer, a dispute resolution practitioner, and an educator. Currently, she is counsel with the Ministry of the Attorney General, Tribunals Ontario. Previously, she was an arbitrator and the senior arbitrator with the Financial Services Commission of Ontario (FSCO) in the litigation group of the legal services branch, where she adjudicated more than 1,000 disputes. Liz was a mediator with the Ontario Human Rights Commission, legal counsel with the Human Rights Tribunal of Ontario, and a volunteer mediator in the criminal courts. She is a dedicated trainer, teacher, and coach who has worked as a dispute resolution educator with York University and delivered administrative law courses at Osgoode's professional development LLM programs. Liz has taught courses in the paralegal program at George Brown College since 2010 and recently created Osgoode's first online program to help prepare foreign-trained lawyers for their certification exam. Liz's other past employment highlights include family and insurance law and time as a policy advisor at the Ministry of Housing. Her work as an immigration consultant in Korea left her with impressive karaoke skills and a love for all things spicy.

Deborah Pressman is a lawyer, legal educator, mediator, and adjudicator. Deborah is currently working as counsel at the Office of the Chief Justice (Ontario Court of Justice). Previously, she was counsel with the Ministry of the Attorney General, providing legal, policy, and strategic support to Tribunals Ontario. She was also the director's delegate in the Appeals Unit at the Financial Services Commission of Ontario (FSCO). She first joined FSCO as a mediator in 2004. In 2008, she worked as a senior policy analyst, and in 2011, she became an arbitrator, adjudicating disputes arising from Ontario's no-fault accident benefits scheme.

Deborah leads various training and teaching initiatives. She teaches administrative law at Osgoode and works with the Society of Ontario Adjudicators and Regulators designing and delivering training for the Certificate in Adjudication program. She trained adjudicators at Ontario's first online tribunal, the Condominium Authority Tribunal, and she created interactive online courses for Osgoode and Emond Publishing.

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PART I

Principles and Theory

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- Chapter 2** Administrative Agencies and Tribunals
- Chapter 3** The Foundations of Administrative Law
- Chapter 4** The Charter and Its Relationship to Administrative Law
- Chapter 5** Human Rights Codes and Other Quasi-Constitutional Laws
- Chapter 6** Fairness: The Right to Be Heard
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Introduction to the Legal System



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Learning Outcomes

After reading this chapter, you will understand

- what is meant by the term “law”;
- why we need laws, as well as other less formal rules, to govern our conduct;
- what kinds of behaviour are regulated by laws;
- how laws are made;
- who has the authority to make laws;
- what distinguishes various categories of laws; and
- how different kinds of laws are administered and enforced.

The law is the last result of human wisdom acting upon human experience for the benefit of the public.

Samuel Johnson

What Is a Law?

There are various ways of defining the concept of a law. For the purposes of this book, a **law** is described as a rule made by a body of elected representatives or their **delegates** or by a court, using procedures that are also prescribed by law. All of the steps set out in the procedural rules must be followed. For example, in the case of laws made by Canada's federal Parliament, a provincial legislature, or the council of one of the territories, the proposed law must be

- read three times in the open assembly,
- debated,
- passed at the second and third reading by a majority of the elected representatives present, and
- assented to by the Queen's representative (the governor general for federal laws and the lieutenant governor for provincial laws).

If any of these steps are missed, the law will not be valid.

Why Do We Need Laws?

People often think of laws as rules that prohibit individuals from doing certain things and that punish those who break them. Although that is the nature and effect of many laws, laws do not just impose duties and punishments; they also create rights. In addition, laws create a framework to ensure that the many complex activities of contemporary society are carried out in an honest, fair, efficient, and effective manner. Laws are, in effect, a blueprint or a set of "rules of the road" for carrying on business, protecting consumers, regulating the use and development of land, conferring government benefits, protecting human dignity and preventing discrimination, and distributing and redistributing wealth. Imagine driving a car in a crowded city if there were no rules governing motor vehicle safety, driver training, when to stop and go, when to make turns, how fast to go, and which side of the road to drive on. Imagine the chaos if half of the drivers chose to drive on the right-hand side of the road and the other half decided to drive on the left!

How Do Laws Differ from Other Rules?

In a democratic society, people have considerable freedom to do what they want in any way they want. However, certain behaviour is restricted, either by formal laws imposed by governments and the courts or by other kinds of rules that are followed by most people but are less strictly enforced. The latter may be imposed through social pressure or by mutual agreement (social norms), or may be accepted as a condition of belonging to some group or organization, such as a school, business, church, or club.

law
a rule made by a body of elected representatives or their delegates or by a court, using procedures that are also prescribed by law

delegate
a person or body entrusted to act in another's place