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Administrative Law

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1. What Is Administrative Law?

There are three branches of government in Canada:

1. The legislative branch passes federal and provincial laws.
2. The executive branch administers and enforces these laws.
3. The judicial branch settles disputes between the citizens and between citizens and government, with respect to the interpretation or application of these laws.

Public law deals with relationships between the individual and the state and regulates how the three branches carry out their responsibilities. Constitutional, criminal, and administrative law fall under the public law category.

Administrative law falls under the executive branch of government. It governs how powers granted by statute or regulation must be exercised. Any individual or body that exercises a power granted by statue or regulation is subject to the principles of administrative law. For example, self-regulating professions, like nursing, are given powers by statue and must follow the principles of administrative law when exercising those powers.

2. Sources of Delegated Decision-Making Powers

Decision-making power is granted (i.e., delegated) by statues or regulation, which will also state who has the power to make decisions and the procedures applicable to rendering the decision.

For example, the delegated power may be issuing a liquor license when certain information is provided or a minister making a decision "in the public interest," which is a very broad power.

The statute/regulation, the Constitution, and the common law provide principles and rules that must be followed when exercising the delegated decision-making power.

3. Principles of Administrative Law

Administrative law is based on certain fundamental principles discussed below:

1. Statutes state the procedure to be followed by the decision-makers, who must stay within the legal authority or the statute.
2. The Constitution states that delegated decision-making power must be in accordance with the Charter. According to *Doré v Barreau du Québec*, 2012 SCC 12, the Supreme Court of Canada stated that a decision will be seen as reasonable if it proportionately balances the statutory objective with the Charter rights claimed by the party.

   Furthermore, the powers must be exercised according to the provincial or federal jurisdiction. For example, a provincial tribunal cannot address issues that are regulated by the federal government, such as banking.
3. Common law principles applicable to administrative law fall into three categories:
   a. Procedural principle—based on the rules of natural justice, whereby a person has the right to adequate notice of the case, the right to a hearing, and the right to an unbiased decision-maker.

      In Ontario, these procedural principles are incorporated into the *Statutory Powers Procedure Act*, RSO 1990, c S.22 (SPPA). However, if the SPPA does not apply in a particular situation, the common law principles are to be used.
   b. Jurisdictional principle—the decision-making power must be exercised in accordance with the jurisdiction of the statute or regulation (i.e., provincial agency must exercise powers granted by a provincial statute).
   c. Error of law principle—the decision-maker cannot base a decision on an incorrect interpretation of the law (e.g., basing a decision on irrelevant or insufficient evidence).

4. Procedure in Accordance with Natural Justice and Fairness

As stated above, common law principles and the rules of natural justice are some of the fundamental principles of administrative law. Decision-making powers and procedure stated in statutes should be based on these principles. However, if a statute, regulation, or by-law is silent about procedure, then the decision-makers must follow the rules of natural justice and fairness in order to ensure a fair process.

a. Natural Justice

i. Application

The principles of natural justice apply to judicial or quasi-judicial decision-makers.

In order to determine if the decision or order is to be made by a judicial or quasi-judicial decision-maker, the following factors are usually considered based on the Supreme Court of Canada case of *Minister of National Revenue v Coopers and Lybrand*, [1979] 1 SCR 495:

1. does the language or the general context of the statute suggest a hearing is contemplated before a decision is rendered?
2. are the rights and obligations of people directly or indirectly affected?
3. is the process adversarial in nature?
4. is there an obligation to implement policies on a broad scale, or is there an obligation to apply substantive rules on a case by case basis?

ii. The Right to Be Heard

The right to be heard is one of the main components of natural justice. A party who has the right to be heard, must have notice of a proceeding that is provided well in advance so that the party has time to prepare.

The notice must provide sufficient information as to the nature of the proceeding and what issues are to be decided (e.g., notice for minor variance application must indicate the nature of the variance, location of the property, and what the decision-maker is being asked to decide). The statute and/or regulations, in most cases, will identify what the notice must contain and who must be notified, whether the hearing will be in writing or if parties will have to appear, and if it is open to the public or private.

iii. Impartial Decision Maker

According to the rules of natural justice, the decision-maker must be unbiased and must not be perceived as being biased (whether consciously or unconsciously) by an informed person watching the proceedings: *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369. This concept is called a "reasonable apprehension of bias" in administrative law.

Apprehension of personal bias refers to a decision-maker being a party in a different case or acting in a way that would create such an apprehension. These cases are rare, since there is a presumption of impartiality. In order to have a decision-maker replaced, there must be substantial grounds for disqualification.

Institutional bias arises when decision-makers are also members of commissions. However, statutes may allow decision-makers to participate in various statutory functions. For example, a member of a securities commission present at meetings where investigations were discussed could later be a decision-maker on the case.

Allegations of actual bias or reasonable apprehension of bias should be raised before the decision-maker at the start of the hearing or as soon as it becomes evident. This is done by way of a motion seeking that the decision-maker recuse himself or herself before the proceedings continue. If a party does not make such a motion as soon as bias is evident, it may be seen that the party waived the right to allege bias by continuing to participate in the proceeding.

In the event that bias is found, then a decision, if one was rendered, is void.

b. Fairness

In situations where decisions do not fit within the judicial or quasi-judicial category, the principles of natural justice would not apply. In these cases, the principles of fairness are used in order for courts to assess whether the procedures provided in a statute or regulation, used by decision-makers in a non-judicial or non-quasi-judicial process, are adequate.

The right to fairness is made up of:

a. the right to know the case against the person, and
b. the right to make submissions to the decision-maker.

Depending on the consequences of the decision on the person affected, fairness may require reasons to be given for the decision (e.g., decision to terminate employment of a police officer).

The case of *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311 dealt with the dismissal of a probationary officer without giving him the opportunity to explain his actions. The regulations at that time did not apply to probationary constables. The Supreme Court of Canada stated that even though the officer could not claim procedural protection, he should still be treated fairly.

This doctrine ensures that a person has an opportunity, before the decision is made, to provide any relevant information that would enable a rational and informed decision to be rendered.

5. Situations When the Principle of Fairness May Be Applied

In cases where decision-making is not based on judicial or quasi-judicial principles (i.e., the decision-making process is not similar to the courts) the principle of fairness must be applied.

The Supreme Court of Canada provided some guidance when the principle of fairness would apply. The list is not exhaustive. Principles of fairness would apply when:

1. the procedure of an agency resembles a judicial decision-making model similar to court but does not provide a hearing and is not based on judicial or quasi-judicial principles,

2. there is no appeal provided within the statute,
3. the consequences of the decision are serious (e.g., decision effects a person's employment or the right to work in a profession like medicine or law), and
4. a person has legitimate expectations about the regular practices of the tribunal or other administrative agency.

6. Advocacy in Administrative Law

A statute or regulation from which decision-making powers are derived will indicate who may appear before a particular tribunal or agency. For example, paralegals or lawyers may appear before the Landlord and Tenant Tribunal.

Unlike court procedures, which apply to all cases appearing in a particular level of court, the rules and procedures are very different for each tribunal and agency. Even though tribunals resemble court procedures in some ways, they are very different in others. It is, therefore, important to understand the rules, regulations, and procedures of each tribunal in order to properly present the case.

Agencies do not hold hearings and do not provide reasons for their decisions. This makes it very hard for the lawyer or paralegal to determine how to properly present the case. There may be several officials involved from different departments or levels in the government hierarchy, and it may not be evident what information, policies, or guidelines are being used to render a decision. The lawyer/paralegal must therefore learn as much as possible about the rules, policies, and procedures of the agencies in order to provide the required information and properly represent their clients.

Some procedures are basic (e.g., identifying the parties, notifying parties about the hearing, and providing disclosure). Others may require a pre-hearing conference to attempt settling the case or resolving some of the issues. Some tribunals may allow pre-hearing motions (e.g., a motion to add a party). Formality and format of hearings vary among tribunals. Hearings may be oral (with everyone present in the same place), electronic, by telephone/video conference, or in writing.

7. Appeals

A final decision of a tribunal or an official may be appealed to a court or other independent authority only if it is permitted by the governing statute.

Sometimes, a statute will allow an appeal to the court on a question of law and to a government official on questions of fact, policy, or public interest. The statute will indicate if the appeal is "as of right," or if "leave" (i.e., permission of the court) is necessary. The statute will also indicate the procedure the court must follow in hearing the appeal and the remedies available.

8. Judicial Review

If a governing statute does not provide for a right to appeal, the party may apply to the courts for a judicial review. Courts created this process because it was unfair for a party not to have a right to appeal.

The Ontario Divisional Court and the federal courts hear applications for judicial review. The former reviews decisions of bodies governed by Ontario statutes and the latter reviews decisions of bodies governed by federal statutes.

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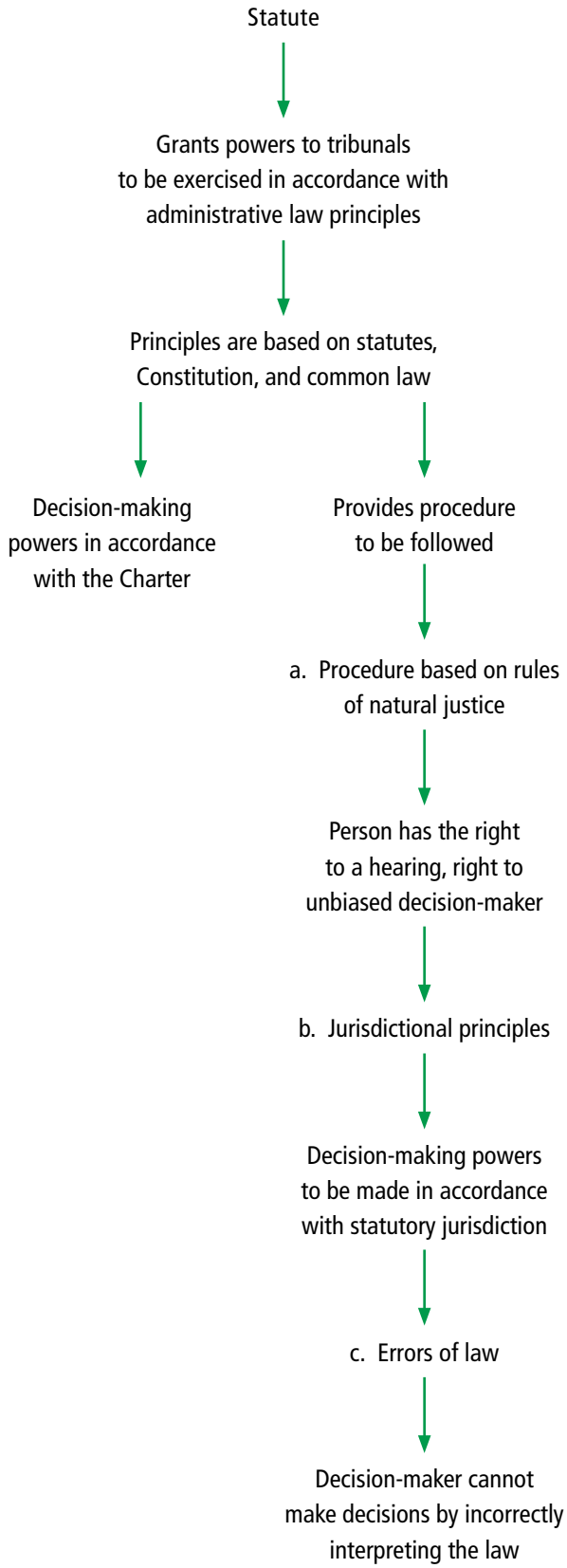

Not every decision is subject to judicial review. Below are some examples of errors in administrative law which may be subject to judicial review:

1. decision-maker does not act within the powers granted by the statute,
2. decision-maker does not abide by the statutory pre-conditions required in order to exercise its power,
3. decisions were not based on relevant information which is described in the statute,
4. deciding cases by applying general rules rather than being decided on its merits,
5. decision-making powers are not exercised in good faith,
6. decision-making powers are not exercised in accordance with natural justice and fairness where applicable, or
7. findings of fact were not based on evidence.

9. Standards of Review

According to the Supreme Court of Canada decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, the court will apply a correctness or reasonableness standard in reviewing a tribunal's decision. In other words, the court will assess if the tribunal's decision was "correct" or whether it was "reasonable." The use of either one of the standards depends on various factors, such as expertise of the tribunal, its purpose, whether there is a privative clause in the statute (i.e., no right of review), etc.

The reason for having more than one standard of review is due to the concept of deference. For example, if a tribunal makes a decision that is clearly within its jurisdiction, such as interpreting its governing statute, the court will respect the decision (i.e., give deference to it), even if the court disagrees with it, as long as the decision was reasonable.

On the other hand, if the issue decided by the tribunal falls within the special expertise of a court (such as applying a statute that is different from the area of law of its governing statute), then the court will feel free to pay less deference to the tribunal's decision and will be more likely to substitute its own decision for that of the tribunal.

The Supreme Court of Canada tried to further simplify the analysis. In the case of *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, the Supreme Court of Canada stated that the reasonableness standard of review is to be used when interpreting a tribunal's home statute or closely related statute. This was confirmed by the Supreme Court of Canada in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47.

There are various remedies that the court may grant on an appeal or judicial review. If the court decides to overturn the decision of a tribunal, the court may choose to substitute its own decision, or it may send the case back to the tribunal for reconsideration after advising it of its error.