PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 1

by
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word "regulation-making" as well. It is clear that very few administrative agencies in Canada have the clear legislative authority to "rule-make" (and therefore "regulation-make"[5] just as it is clear that it is not at all uncommon for a government to reserve to itself or to share the right to issue "regulations". Thus in one sense, the word "rule" when exercised by an agency may have a slightly different legal concept behind it, than the word "regulation", when exercised by a government.

Perhaps I might mention at this point that there are a number of cases which have held that in the face of certain specifics of legislation that a matter ought to have been dealt with by "rules" (regulations) rather than by policy guidelines (policy statements).[6]

I wish to make it clear that when I use the word "policy-make", I intend to include the word "guideline-make", because, to me at least, both words amount to the same thing, unless they are clearly stated for obvious reasons not to be the same thing. (I suppose it could be argued in some quarters that "policies" represent a somewhat more demanding standard than "guidelines". Beauty, after all, is in the beholder's eyes.)

I would also add, if I may, that the reader will note that I use the words "tribunal" and "agency" interchangeably, not because I believe it correct to do so, but because that is a common usage. To me agencies are agencies, first and foremost. The courts seem to idealize the word "tribunal", but they also when speaking of agencies call them "inferior". Interestingly enough, very few agencies in Canada are called by their creators, "tribunals" in their mandating legislation and I believe for obvious reasons — they first and foremost are an agency of Parliament or the Legislatures, which courts (basically) are not.

Before proceeding further, however, it may be useful to identify what I believe is the major factor in administrative law which has given rise to the major role played by policy-making in agency decision-making and the resulting confusion respecting rule-making. This is the legal restraint upon agencies to use their decisions as precedents, or, in other words, the inapplicabilty of stare decisis in administrative decision-making.

6.2 THE ROLE OF PRECEDENT IN AGENCY DECISION-MAKING (STARE DECISIS)

Unlike administrative bodies, the traditional courts are generally bound to follow their own rulings. In so doing, parties in court proceedings rely heavily on the doctrine of precedent or stare decisis to substantiate their claims. Judicial decisions are usually categorized as either authoritative or persuasive. If author-

5 I am speaking of the authority to make regulations respecting substantive matters, rather than rules of practice and procedure which regulation-making authority is commonly given to agencies.

6 See *Swan v. Canada* (1990) 31 F.T.R. 24; *Elizabeth Fry Society of Sask. Inc. v. Saskatchewan (Legal Aid Commission)* (1988), 56 DLR (4th) 95 (Sask C.A.).

itative, they must be strictly followed; if persuasive, they may follow them. The authoritative or persuasive status of decisons depends upon the level of the court which issued them. Within a jurisdiction (e.g. a province, and one may treat the federal court as a separate province simply for the purposes of this discussion), the decisions of a higher court are authoritative (or binding) upon all lower courts. Decisions of the same level of court are persuasive (although courts generally say that they should be reluctant to depart from their own earlier decisions). Decisions of courts of other jurisdictions (e.g. courts of provinces, other than the province of the court hearing the case) of whatever level are persuasive. Decisions of the Supreme Court are authoritative everywhere in Canada. Decisions of the Privy Council prior to 1949 are also authoritative across Canada. In determining which judicial decisions are authoritative for administrative agencies one can use as a general rule of thumb that decisions of the courts of the same jurisdiction as the agency will be authoritative if the judges of that court are appointed by the federal government (i.e. courts known as s. 96 courts — referring to the appointment power set out in s. 96 of the Constitution) while decisions of courts whose judges are appointed by the provincial government will be merely persuasive. Decisions of courts of other juridictions, of whatever level are merely persuasive to an agency. Decisions of the Supreme Court of Canada are authoriative for all Canadian agencies.

In performing their mandates agencies should strive for continuity, consistency and a degree of predictabilty. Justice demands that equality of treatment and impartiality prevail when the merits of a case are considered. On the other hand, in the face of legal uncertainties and novel situations, it is not desirable to accord precedent and stare decisis a pivotal role. Facts are often not comparable. Old precedents are expanded, twisted and contorted so many times that they often no longer stand for the same principle they originally proclaimed. Furthermore, the public interst is not served by retelling antiquated stories which change with each retelling. Precedents can become worn out and sometimes serve no useful purpose.

Decisions of administrative agencies do not create precedents for anyone, including the agency. They are, at best, persuasive. While agencies should strive for consistency they are not bound by a mechanistic application of earlier administrative decisions. Rigid adherence to consistency can discredit an ageny's ability to improvise or adapt. I shall discuss the freedom of agencies from precedent in the next section.

6.3 THE POWER OF AN AGENCY TO DEPART FROM PREVIOUS DECISIONS

When I use the term "precedent" in this discussion I am referring to the situation when an agency is urged to interprete a law, or exercise its discretion,

in a certain way because the agency had interpreted it or exercised its discretion in that way in the past.[7]

The question as to the role of precedent for agencies most commonly arises in one of two situations: i. where an agency is empowered to consider an issue involving the same party on a regular or periodic basis (e.g. rate setting); ii. where an agency is required to adjudicate an issue similar to that in other cases. In either case, the prevailing rule is easy to state: an agency is not bound by its prior decisions.[7.1] Stated otherwise, the notion of *stare decisis* is not applicable in the administrative sphere. Agencies are not only at liberty not to treat their earlier decisions as precedent, they are positively obliged not to do so.

This is clear in respect to matters where the agency has some discretionary authority which it has to decide how to exercise or a decision involves some policy element which the agency is to formulate.

In *Hopedale Developments Ltd. v. Oakville (Town)*[8] the Ontario Court of Appeal held that the Ontario Municipal Board could not decide the case before it solely on the basis of principles enunciated in earlier decisions. As McGillivrey J.A. stated (at pp. 487-488 D.L.R.):

> In laying . . . down . . . principles and stipulating that the defendant must come within them the Board has sought, one must conclude, to reduce the scope of the inquiry. To lay them down as principles by which the Board would be guided may therefore be both reasonable and wise but to say that the appellant *must* comply with them before the Board will allow the application in clearly wrong and the Board, if it so fettered its jurisdiction, would be in error.

On the facts of the case, however, the Court held that the Board had in fact *not* relied exclusively on principles derived from precedent to determine the outcome of the application before it. Rather, it had conducted a proper inquiry by giving full weight and consideration to all matters which it was called upon to determine.

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7 For the effect of a statutory direction that a decision of the Ontario Labour Relations Board was to be conclusive for all purposes see the Ontario Court of Appeal decision in *C.U.P.E. Local 1394 v. Extendicare Health Services Inc.* (1993), 14 O.R. (3d) 65, 104 D.L.R. (4th) 8, 64 O.A.C. 126, 93 C.L.L.C. 14,052 (C.A.). The Court held that that section did not make the Board's interpretation of a statutory provision conclusive and binding upon a subsequent decision-maker in a different matter.

7.1 See for example, *Communications, Energy and Paperworkers Union of Canada, Local 219 v. St. Anne-Nackawic Pulp Co.* (1999), 212 N.B.R. (2d) 120, 541 A.P.R. 120 (N.B. Q.B.) where the N.B. Court of Queen's Bench held that the New Brunswick Labour and Employment Board was not bound by precedent to follow an earlier decision of the Board as to what evidence was necessary to establish union membership (as per *United Brotherhood of Carpenters and Joiners of America, Local 1023 v. Laviolette* (1998), 199 N.B.R. (2d) 270 (C.A.)). See also *Ontario (Minister of Municipal Affairs & Housing) v. Transcanada Pipelines Ltd.* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.) ("A tribunal is not bound to follow its own decisions on similar issues, although it may consider an earlier decision persuasive and find that it is of assistance in deciding the issue before it.")

8 [1965] 1 O.R. 259, 47 D.L.R. (2d) 482 (C.A.).

See also the English case of *Merchandise Transport Ltd. v. British Transport Commission*, where the Court of Appeal issued a similar warning to the Transport Tribunal not to permit 15 discretionary powers to become "hidebound by authority."[9]

The principle also extends to interpretations of law. Thus, it seems that while agencies are bound by the decisions of superior courts as to the meaning of law their own decisions have no such effect.

In *Portage la Prairie (City) v. Inter-City Gas Utilities*[10] the Manitoba Court of Appeal rejected the contention that the provincial Public Utilities Bopard was bound by its prior interpretations of the term "public interest" when approving utility rates. Counsel for Portage la Prairies argued that the Board erred in not applying the same definition of "public interest" in this case as it had employed in a decision some eight years earlier in 1961. The Court, however, could see no reason for the Board to rely on something which it "said or did in 1961, in completely different circumstances, having little, if any relevance to the situation of the present time".[11] Freedman J.A., speaking for the Court, held that the Board could define the "public interest" broadly or narrowly, as it sees fit, and as circumstances dictated. This was a question of policy for the Board alone to decide; it was not the place of the Court of Appeal to intervene. Later, in a case again involving the authority of an agency, this time the Alberta's Industrial Relations Board, to depart from an earlier legal interpretation Chief Justice Milvain of the Alberta Supreme Court said that "I am sure the Board is not bound to follow its own previous conclusions as to the law. It may repent and recant."[12]

In *Turnbull Real Estate Co. v. Sewell*[13] the New Brunswick Court of Appeal dealt with a situation involving the regular annual tax assessment of a property owner's holdings. In 1933 and 1934 the tax assessment officers had given the property owner the benefit of a favourable interpretation of one of the provisions found in the Assessment Act of the City of Saint John. This resulted in a significant tax savings. In 1935, the tax assessors altered their previous approach and the property owner was hit with a much higher tax bill. Not surprisingly, he protested. The New Brunswick Court of Appeal held, however, that the tax assessors were not bound by their prior interpretations. The power of the assessment officers was to be exercised anew each year; a decision in one instance could not bind the exercise of their discretion thereafter.[14]

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9 [1962] 2 Q.B. 173 (C.A.) at p. 186 per Sellers L.J.

10 (1970), 12 D.L.R. (3d) 388 (Man. C.A.).

11 (1970), 12 D.L.R. (3d) 388 (Man. C.A.) at p. 397.

12 *Lethbridge Northern Irrigation District v. Alberta (Industrial Relations Board)* [1973] 5 W.W.R. 71, 38 D.L.R. (3d) 121 (Alta. T.D.) at p. 125 D.L.R.

13 [1937] 2 D.L.R. 218, 12 M.P.R. 136 (N.B. C.A.).

14 See also *C.U.P.E. Local 1394 v. Extendicare Health Care Services Inc.* (1993), 14 O.R. (3d) 65, 93 C.L.L.C. 14052, 104 D.L.R. (4th) 8, 64 O.A.C. 126 (C.A.) and *Canada (Minister of Employment & Immigration) v. Jawhari* (1992), 59 F.T.R. 22 (T.D.). That last case involved a "credible basis" inquiry under the Immigration Act held to consider whether certain children had a credible

The purpose of not encumbering agencies with the dead weight of precedent is to guarantee a flexibility and responsiveness in their decision-making which is not always forthcoming in the courts. Hence all the need to consider each case on its own merit. The danger is, however, that in releasing agencies from the moorings of stare decisis, they are being furnished, in effect, with a licence to be inconsistent. Inconsistency creates its own form of injustice, because it theoreti-

(*Continued on page 6-9*)

basis for a refugee status claim. The Federal Court Trial Division held that it was not open to the Immigration and Refugee Board to find that credible basis solely on an earlier Board decision that the parents of the children had a credible basis. The matter had to be determined on its own merits.

cally obviates the need to treat like cases alike. Furthermore, it means that a party may tailor its activites according to a give line of agency decisions, only to one day have the same agency "repent and recant", thereby throwing its affairs into disarray.

I believe that that it is this inability of agencies to resort to precedent which, in an effort to avoid purely ad hoc decision-making and to attain consistency in decision-making where appropriate which has led to the great role played by guidelines (and rule-making) in agency life.

6.4 A GENERAL DESCRIPTION OF THE AUTHORITY OF ADMINISTRATIVE AGENCIES

Writers, the courts, lecturers and others have tried to categorize agencies by a descriptive word of what function the agency performs. Thus some still call certain agencies "legislative" agencies; others are called "regulatory agencies" while some are called "adjudicative" agencies. I assume that it is easier for a judge to use these classifications than it is for those of us who have had practical experience in the design, creation, supervision and operation of the agency system.

Every so often a court will decry the classification system by function as the Supreme Court of Canada did in the *Canada (Attorney General) v. Inuit Tapirisat of Canada*[15] case and having decried functionalism it went right ahead and used the functional classification to explain why it held that the Cabinet had no duty to be fair in that case because it was performing a legislative function.

I see no need in this Chapter to get into the differences of function in administrative agencies. Suffice it to say, there are about 2,500 administrative agencies in Canada and some do this and some do that. It is only when one looks clearly and in substantial detail at their mandate and how they carry it out that one can visualize whether an agency could, even if it wanted, to rule-make, while it is quite clear that most administrative agencies may well need to policy-make from time to time.

Certainly, not all agencies adjudicate!

I have indicated to the reader that whether or not an agency has been given the legislative authority to "rule-make" will depend upon whether those who enacted the legislation thought that the agency required a "rule-making" power to effect the purposes of the act involved. The authority to rule-make can only be expressed and not implied.

Interestingly enough the authority to policy-make has been held to be possessed by all administrative agencies, whether the mandate so provides or not. One suspects that this is so because historically, policies of agencies are not binding and therefore they do not have the characteristics of law.[16]

15 [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1.

16 The power to make non-binding statements of views by an agency may also be seen as a power which is implied as being reasonably necessary for the carrying out of its mandate. In the *Capital*

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Comments / Commentaires:

Re: Nanisivik: first-round submissions on behalf of DIAND (Nunavut Water Board file NWB1NAN9702);

Please find the following attached:
(1) submissions;
(2) enclosure to submissions (namely, excerpt from Macaulay).

Thank you.

Lee F. Webber

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