

*ADMINISTRATIVE LAW AND PRACTICE*  
(SECOND EDITION)

By Robert F. Reid and Hillel David  
Toronto: Butterworths, 1978, lxxxii and 504 pp. \$65.00

*A GUIDE TO JUDICIAL REVIEW*

By John A. Kavanagh  
Toronto: Carswell, 1978, xl and 280 pp. \$31.00

CAMERON HARVEY\*

The first edition of *Administrative Law and Practice* in 1971 was well received. It was the first Canadian administrative law text in English. Abe Anhang wrote, "The book is a worthy addition to the libraries of both practising and academic lawyers and deserves to take its place next to the works of de Smith, Jaffe, Davis and Cooper."<sup>1</sup> D.H.W. Henry commenced his book review with, "We owe a debt of gratitude to Mr. Reid for having undertaken this work. Members of the bench, bar, law schools and the vast array of administrative tribunals will alike profit by it."<sup>2</sup> Peter Hogg summed it up as follows,

The book will be indispensable to the practitioner with an administrative law problem, for it will lead him to all the relevant authorities and will suggest to him all the relevant arguments . . . . In the long run this book will help Canadian administrative law to accommodate to the uniquely Canadian situation. It will no longer be excusable for counsel appearing in Canadian courts to fail to refer to Canadian cases or materials which are relevant. It will no longer be excusable for teachers to teach 'warmed-over' English law (as Willis' has described it). The criticism which I have made (which in any case reflects a personal opinion) is not intended to minimize the author's achievement. His book is a most welcome addition to Canadian legal literature.<sup>4</sup>

These were the views of three lawyers; the first, a private practitioner, the second, the then Director of Investigation and Research for the Department of Consumer and Corporate Affairs, and the third, a law teacher.

The second edition is simply an update of the first. This means three things. (1) The chapter structure for the first 22 chapters is the same. To the first-time reader, familiar with English administrative law texts, the organization of the first 11 chapters, which is certainly original, may seem unwieldy and *deja vu* will be experienced in numerous places. But, as Peter Hogg wrote, "familiarity will probably cure the difficulty."<sup>3</sup> (2) The focus of the second edition remains on judicial review. For the most part, despite

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1. (1971), 49 Can. B. Rev. 490, at 492.

2. (1972), 5 Ottawa L. Rev. 598, at 598.

3. Incidentally, John Willis described the first edition as filling "a real and long-felt need." (1974), 24 U.T.L.J. 225, at 230.

4. (1971), 9 Osgoode Hall L.J. 663, at 666.

5. *Ibid.*

the "administrative practice" portion of the title of the book, the administrative process, except for judicial review, is not treated directly, and the ombudsman remains an ignored institution of review. (3) Although there is excellent commentary at various points throughout the book,<sup>6</sup> it continues to be essentially an encyclopedic work.

I shared the view of Peter Hogg that it was unfortunate that a person of Mr. Reid's stature in administrative law (as a writer, lecturer, and counsel), did not provide more analysis and offer more opinion in his first edition. Peter Hogg wrote:

The author does not, however, (speaking generally) see his task as one of synthesizing, detecting trends, and selecting the best from conflicting doctrines . . .

[I] think it is a pity that the author did not impose more coherence on the material by identifying and elaborating those doctrines which seem to him to be satisfactory and by criticising those which seem to him to be unsatisfactory . . .

[I]t would be more help to the lawyer who is trying to find his way through the maze if the policy issues were identified and analyzed, and an attempt was made to evaluate the cases in the light of the analysis.

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[I]n my view the author goes too far in presenting an admittedly sombre scene as one of unrelieved darkness. There are shafts of light and they must be encouraged to illuminate more of the cases. The text-writer can assist these developments if he is willing to pass judgment on issues upon which the courts have differed, and impose more order on the data . . . [I]t is fair to ask how the courts can be expected to stay on the track of consistent doctrine if the text-writer will not help to show the way.

This criticism — that the author does not give us enough of the benefit of his own evaluation of doctrine — applies to most of the text.<sup>8</sup>

Notwithstanding this deficiency in the first edition, it was still a laudable and very useful first step in the development of a Canadian text on administrative law. However, I must say that I am disappointed that Messrs. Reid and David did not follow up on Peter Hogg's criticisms to extend the accomplishment of the first edition in a broader and more analytical second edition.

In saying that the second edition is simply an update of the first edition, I do not mean to say that the second edition does not contain extensive changes. A casual glance at the second edition does not reveal the actual extent of the changes. For example, a more careful vetting of the current first two chapters indicates changes of varying degrees to roughly 35 of the 99 pages of text of the first edition, as well as changes to the footnotes.

On what may be a picayune level, Reid and David do not always indicate the jurisdiction of the cases which they cite and they do not give provincial legislative references in the text. I think that their coverage of clarity or uncertainty and of *habeas corpus* is rather sparse, and that the grouping of delegated legislation and sub-delegation of powers in Chapter 9 seems

6. R. Reid and H. David, *Administrative Law and Practice* (1978), e.g. on the impact of Anglo-American law on Canadian administrative law, at 4; on when a hearing is required, at 13; on cross-examination, at 81-82; on the obligation to reveal information, at 90; in the introduction of Chap. 4; on rights being affected by investigatory inquiries, at 156; and on privative clauses in Chap. 5.

7. To some extent this has been corrected in the second edition by the excision of certain paragraphs at various points throughout the book.

8. *Supra* n. 4, at 663-65. D.W.H. Henry held the contrary view, for he wrote of the first edition that it does "[not] attempt to set out what should be the future course of law . . . [and] the author wisely refrains from attempting, as some might wish, to rationalize or simplify the effect of the jurisprudence." *Supra*, n. 2, at 598.

odd.<sup>9</sup> They make no mention of Sarna's treatise on declaratory relief<sup>10</sup> in Chapter 18. Two more serious shortcomings are the absence of any discussion of the merits of the "broad view" of privative clauses, given the space devoted to the "limited view," and the ignoring of critical comment on the jurisdictional fact doctrine by scholars such as D.M. Gordon and Peter Hogg.<sup>11</sup>

As mentioned earlier, the first 22 chapters of the second edition deal with the same topics as those covered in the corresponding chapters of the first edition. Chapter 22 of the first edition is entitled "Recent and Impending Legislation." In the second edition this Chapter has become "The Ontario Divisional Court, The Federal Court, The Statutory Powers Procedure Act, and The Judicial Review Act." Chapter 23 of the first edition is entitled "A Summing Up"; regrettably this is not a feature of the second edition. The current Chapter 23 is entitled "Words and Phrases Considered in an Administrative Law Context." This Chapter has possibilities, but it needs to be expanded. Also, I wonder if it does not duplicate more comprehensive existing efforts? The "Case Citor" (which might have been more appropriately entitled "Tribunal Annotator"), an excellent feature of the first edition, is not included in the second edition. Instead, there is Chapter 24, entitled "Statutory Provisions Considered in an Administrative Law Context," which is quite selective and not nearly as successful a feature as the "Case Citor."

John Kavanagh's *A Guide To Judicial Review* is similar to *Administrative Law and Practice* only in its focus. It is not an exhaustive treatise. According to the author,

It is an attempt to classify and categorize in summary and illustrated fashion the most important principles and procedural features of judicial review particularly as they apply in Ontario and the Federal Court of Canada. In more important areas, such as the rules of natural justice, the summary format gives way to more lengthy explanation and analysis.<sup>12</sup>

Compared to traditional Anglo administrative law texts, the organization of the topics in this book is more unorthodox than that of Reid and David. This aspect of the book and the case references, which are quite selective, lead me to think that the book is an outgrowth of the materials which the author has used in his teaching at the University of Ottawa. This is not a criticism of the book, but merely an observation.

The bases of judicial review and the remedies of review, including the Federal Court, are covered in the first 152 pages of the book, whereas Reid and David devote approximately 475 pages to these topics. Then follows the closing chapter on "Ontario Jurisdiction and Procedure," and 3 appendices. These appendices contain a survey of Ontario statutes which provide for administrative and judicial appeals in regard to administrative action, a set of Federal Court precedents, and a reprint of the *Statutory Powers Procedure Act* and *Judicial Review Act*, excerpts from the *Federal Court Act and Rules*, and Chief Justice Jockett's Practice Direction of November 21,

9. It might also be said that other miscellaneous improprieties covered in Chapter 9, such as bad faith, discrimination, uncertainty, and unreasonableness, are not limited to legislative powers. They might better have been treated in Chapter 8.

10. L. Sarna, *The Law of Declaratory Judgments* (1978).

11. *Supra* n. 6. These two matters are covered at 186-96.

12. J. Kavanagh, *A Guide to Judicial Review* (1978) iii.

1974. It may be of interest to note that in block form, Kavanagh devotes significantly more pages to the Ontario procedure and review legislation and to the Federal Court than do Reid and David.

There are fairly frequent references to David Mullan's excellent segment on administrative law in the *Canadian Encyclopedic Digest* (Ontario, 3rd edition), to S.A. de Smith's classic *Judicial Review of Administrative Action*, both Stevens-Carswell publications, to Rene Dussault's pioneering *Le Contrôle Judiciaire de l'Administration au Québec*, to the McRuer Inquiry Into Civil Rights, and to H.L. Molot's annual surveys of administrative law in the *Ottawa Law Review*. But, references to Reid and David's pre-eminent book, published by the rival Butterworths Company, which might naturally be made along with references to Mullan, de Smith, and Dussault, are practically non-existent.<sup>13</sup>

A feature of the book, which I think is particularly good, is the generous quotation of excerpts from significant judgments. Given the relatively few cases cited,<sup>14</sup> I also find it convenient that the case and other reference citations are included in the body of the text. There are no footnotes.

Kavanagh's book does not appear to be as scholarly as that of Reid and David. Being a Guide book, perhaps this is not surprising. However, on the whole, my impression is that Kavanagh offers the reader almost as much analysis and opinion as do Reid and David. Kavanagh's book has its strengths and weaknesses. For instance, I think that it is strong on disclosure of information,<sup>15</sup> but weak on reasons.<sup>16</sup> Again, Hogg and Gordon are ignored in connection with preliminary or collateral questions,<sup>17</sup> but Chapters 7-9, which deal with "Discretionary Nature of Judicial Review," "Privative Clauses," and "Alternatives to Judicial Review: Exhausting Other Remedies" are superior.

Regarding judicial review of administrative action generally, Canada is now well served by the writings of Reid and David, Dussault, Mullan, Kavanagh, McRuer, and Molot. Reid and David ought to be in every law firm's library. For my purposes as a teacher, I will not recommend either of the books for purchase by my students. Reid and David is too massive for the course which I teach and far beyond the purchasing power of the students. However, I do recommend that the students read and skim various portions. Although to date in my 13 years of teaching I have always put together my own materials for my courses, and notwithstanding the Ontario oriented portions of John Kavanagh's book, I am sufficiently impressed with it that I might be tempted to use it as the basis of my administrative law course, even though it differs considerably from my current materials. But, there is one problem — namely its price, at \$31.00. When I take into account the supplements which I would feel compelled to prepare, the price becomes simply too high. And that is too bad.

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13. *Id.* I noted only two references, at 100-01.

14. I reckon that Kavanagh cites about 475 cases, compared to Reid and David's roughly 1900 cases.

15. *Supra* n. 12, at 19-25.

16. *Id.*, at 28-29.

17. *Id.*, at 39ff.