de Smith's

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Fourth Edition

J. M. Evans

Stevens

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By

the late
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FOURTH EDITION

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"Let no man weakly conceive that just laws, and true policy, have any antipathy; for they are like the spirits and sinews, that one moves with the other."

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PREFACE

DURING its first three editions this book established itself throughout the Commonwealth as the most authoritative and comprehensive exposition of the part played by English courts in administrative law. It is not difficult to discern the reasons for its high reputation amongst judges, practitioners and the academic community. In *Judicial Review of Administrative Action* de Smith displayed to the full his remarkable ability to reveal from a mass of material emanating from a diverse range of legal systems and governmental settings the legal principles underlying his subject. He also had an acute sensitivity to the contextual influences that determine the way in which those principles had been or should be applied in particular situations. These attributes, together with the author's fluid and distinctive literary style, his judicious choice of illustration and references, and his meticulous accuracy and thoroughness earned this book in the author's lifetime a status in contemporary English legal literature surpassed by few. Whatever the deficiencies of this edition, it would have been a grave loss had the significance and value of de Smith's achievement lapsed gradually but inevitably into the realm of legal history. On a personal level, I have endeavoured in producing this fourth edition to repay some of the debts of gratitude that I owed to Stanley de Smith, former colleague, philosopher and friend.

My primary purpose has been to incorporate within the existing fabric of the book the developments in the law that have taken place since 1973. For the most part this has been possible without radical alteration to either the substance or the organisation of the third edition. The most important single change that I have made is to add a new chapter to deal with the application for judicial review, a new remedy brought into effect at the beginning of 1978 by the revised Order 53 of the Rules of the Supreme Court. I have transferred to this chapter, with the necessary modifications, the account previously given in Chapters 8 and 11 of the practice and procedure formerly pertaining to the prerogative orders of certiorari, prohibition and mandamus. After considerable hesitation I decided not to consolidate in a separate chapter an overall examination of *locus standi* in administrative law, despite evidence of an emerging rationalisation in the case law and whatever encouragement in this direction may be provided by the new Order 53. The decision of the House of Lords in *Gouriet* v. *Union of Post Office Workers* has reinforced the importance of remedial distinctions in this area. Subsequent events may, however, require further rationalisations of this kind in the treatment of the law of remedies in future editions. Elsewhere, I have amended foot-

notes and text to accommodate changes attributable both to the passage of time and to the advent of a new editor able to sympathise in most important respects with the manner and content of the exposition of the law contained in the third edition.

A number of important statutes that bear upon the subject-matter of this book have been enacted in the period covered by this edition. The ferment that has surrounded the legislative framework within which individual and collective industrial relations are conducted appears to have abated somewhat, although further statutory changes in this politically volatile area seem perennially imminent. The activities of the various statutory agencies that operate under the Trade Union and Labour Relations Act 1974, the Employment Protection Act 1975 and the consolidating statute of the same name passed in 1978, seem likely to provide a continuing stream of problems of interest to administrative lawyers. Also of importance in the employment field, and elsewhere, are the Sex Discrimination Act 1975 and the new Race Relations Act of 1976. Important statutory modifications have also been made to the machinery for regulating price increases, monopolies and mergers and for improving consumer protection from other unacceptable business practices. The Community Land Act 1975 was passed to enable public authorities positively to plan land use and was part of a legislative package designed to keep within the public domain increases in the value of land attributable to its development: the potential impact of this programme is yet to be fully realised. I have taken account in Chapter 1 of those provisions of the National Health Service Reorganisation Act 1973 and of the Local Government Act 1974 that extend to their respective public authorities an element of extra-judicial scrutiny analogous to that exercised since 1967 over central government departments by the Parliamentary Commissioner for Administration.

Events in the courts have contrived to bring several important aspects of our subject to the attention of a wider audience than usual. Such *causes célèbres* as *Congreve* v. *Home Office, Laker Airways Ltd.* v. *Department of Trade* and *Tameside Metropolitan Borough Council* v. *Secretary of State for Education and Science* have confirmed the courts' continuing readiness in a number of contexts to subject to closer judicial scrutiny the exercise of ministerial discretion. The decision of the House of Lords in *D.* v. *National Society for the Prevention of Cruelty to Children* has raised the possibility that the circumstances in which the courts will allow evidence to be withheld in the public interest from disclosure in litigation may be extended in novel directions. It seemed apposite in this context to relegate the use of the increasingly anomalous

term "Crown privilege" in favour of the more apt, but not totally satisfactory, "public interest privilege." The implications of the opinions delivered in the House of Lords in the *Gouriet* case for the future of the injunction and the declaratory judgment as public law remedies I have canvassed principally in Chapter 9, although they are also considered in the more general remarks about *locus standi* contained in Chapter 8.

It would be out of place to catalogue here other instances of the many significant developments in the law that have been generated in the courts. Suffice it to say that the tide of interesting judicial decisions that in the last decade and a half has transformed much of administrative law shows no sign of ebbing. Moreover, in recent years many judges throughout the Commonwealth have joined their English brethren along a number of the trails of administrative law that have been blazed by our courts since the mid-1960s. Although the important statutory elements recently added to the law of judicial review in Australia, Canada and New Zealand are likely to reduce further the extent to which principles of public law should be assumed to be uniformly applicable in different jurisdictions and administrative structures, it would be unjustifiable to conclude that legal cross-fertilisation in this area of the law has ceased to be beneficial. I am grateful that the publishers have not so pressed me on space that I could not have included material of interest and significance from other Commonwealth jurisdictions. Even so, I have been aware of the importance of containing the book within manageable proportions and of retaining its clarity of exposition, without at the same time omitting anything of value that may assist the reader to navigate that difficult gulf between the beguilingly simple statement of a general proposition and its application to a particular problem in a specific context. Indeed, the extent to which a book about the courts and the administration achieves this latter objective is perhaps the essential criterion of its worth.

The debts of gratitude that I have incurred in the preparation of this edition are heavy and numerous, only some of which can I specifically acknowledge here. I am grateful to the publishers for their encouragement and co-operation (including the preparation of the tables of cases and statutes and the index). The Canada Council and the Law Foundation of Ontario generously provided financial assistance during the time that I spent on research in London, and the various requests that I made of the library staff and two successive Deans of Osgoode Hall Law School were always sympathetically and helpfully answered. My research assistant, Mr. Greg Ludlow, has been resourceful and thorough in undertaking a number of laborious tasks in the latter stages of this project. And it is a pleasure to be able to thank my secretary, Mrs. Elsie Ramkhelawan, for her

patience and skill in producing a typescript from my execrable handwriting.

The length of time that it inevitably takes to produce a book of this size and the vagaries of transatlantic mail have made it difficult to ensure that I have always been able to incorporate the most recent developments in this rapidly changing area of the law. I submitted the last portion of the manuscript to the publishers early in 1979, but was able to note the more important material that reached me up until the time that I returned the page proofs at the beginning of November 1979. Unfortunately, the law refuses to stand still for the convenience of authors, and I regret that the reader will search these pages in vain for a discussion of the decisions of the House of Lords in *Burmah Oil* v. *Bank of England* (*Governors and Company*), *Science Research Council* v. *Nassé* and *R.* v. *Inland Revenue Commissioners, ex p. Rossminster Ltd.* The important decision in *R.* v. *Hull Prison Board of Visitors, ex p. St. Germain* (*No. 2*) also came to hand too late for inclusion.

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