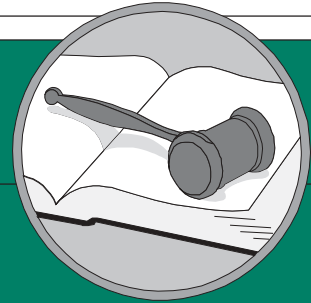


WORKING WITH THE LAW

NEWS FROM EMOND MONTGOMERY
CANADA'S LEADING PUBLISHER OF LAW-RELATED TEACHING MATERIALS



Mediation in the Canadian legal system

By Peter Bishop, Carleton University

It is important that lawyers, court officials and administrators, paralegals, legal assistants, union and labour relations professionals, and others involved in the Canadian legal system understand the nature and dynamics of the mediation process. The use of mediation has expanded greatly over the past 10 years and will continue to do so. Mediation is being used more and more in virtually all types of legal disputes, including:

- divorce and child custody disputes;
- civil court-connected mediation (for example, under rule 24.1 of the Ontario *Rules of Civil Procedure*);
- corporate-commercial disputes;
- labour disputes and grievances;
- estate disputes;
- victim-offender mediation in young offender and other criminal offences;
- human rights cases by the Canadian and provincial human rights commissions;
- municipal, planning, zoning, and land use disputes;
- environmental disputes; and
- disputes handled by tribunals and agencies such as the Canadian Transportation Agency.

What roles do legal professionals play in the mediation of client disputes? In many cases, they educate and/or advise their clients on the timely and appropriate use of mediation. They need to understand how and when mediation can be used

properly and beneficially, which includes knowing how to achieve success in a mediation and, at the same time, protect their clients' legal rights. That means understanding how and when the interest-based mediation process may be used effectively in a case proceeding in the adversarial legal system, in the "shadow of the court."

Those working in a legal environment may also prepare their clients for mediation by helping them to:

- understand the mediation process, the approaches used by mediators, and potential negotiation and communication strategies;
- clarify the issues at stake and the underlying interests of both parties;
- identify the range of options to meet the interests of all parties;
- consider the strategies and behaviours to expect from the other party or their lawyer or representative;
- recognize and respond effectively to adversarial, aggressive, or defensive approaches;
- gather and organize information and prepare documents or summaries to be used during the mediation;
- clarify issues of confidentiality, understand the use of agreements to mediate and written agreements, and ensure that communications within the mediation may occur "without prejudice" to the client's legal rights and position;
- formulate and analyze the client's alternatives, including the strengths, weaknesses, costs, and risks of proceeding with legal action for *both* parties;

- deal with logistics including location, timing, and attendance; and
- consider dispute resolution options other than court or mediation, including arbitration, mediation-arbitration or "med-arb," and fact finding or investigation.

To be successful, participants in the mediation process need to know how to present their position clearly and articulately, and also pursue an effective, principled negotiation approach throughout the process. Advisers who understand the practical strategies and dynamics of mediating in a legal context can greatly contribute to their clients' success in mediation. ■

Peter Bishop co-authored Emond Montgomery's recently published Art and Science of Mediation.

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Dave's corner office

By Dave Stokaluk

As we enter 2005, I want to take this opportunity to thank you for your business, and to assure you that we will continue to provide you and your students with the best possible teaching resources to support the numerous law-related courses offered at your college. Your feedback has made it possible for EMP to build one of the most respected collections of material for Paralegal, Law Clerk, and CTA programs in the country. While other publishers are experiencing shortfalls in their higher education sales, EMP sales continue to grow. By all accounts, we are publishing the texts you need.

Now I want to draw your attention to some of the new titles and second editions we have published over the past year.

ART AND SCIENCE OF MEDIATION

EMP has a long track record in mediation and ADR materials. Last summer we extended the list with *Art and Science of Mediation*, a text designed specifically for college students. Cheryl Picard and her authorial team have compiled an easy-to-understand text with clear examples and scenarios that explain the mediation process. The very positive feedback we've received demonstrates that this text is an essential resource for college courses that deal with negotiation, mediation, or dispute resolution. Its focus on communication and listening skills matches up wonderfully with the learning objectives and expectations of those courses.

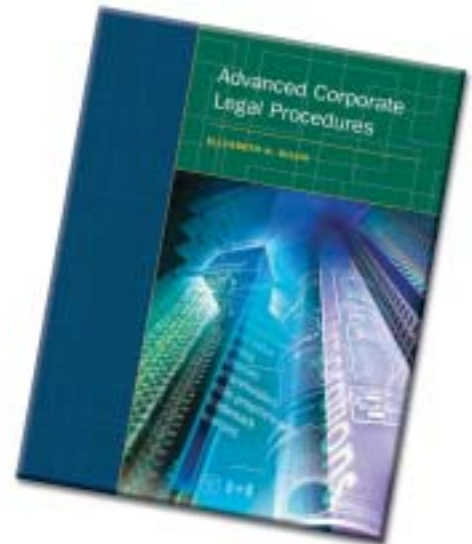
WILLS AND ESTATES, 2ND EDITION

Wills and Estates, 2nd Edition, also a summer publication, has been extensively updated with more examples of Superior Court of Justice forms and documents. This text describes a law firm's transactional dealings encountered during estate planning, administration, and litigation. The text was recently listed by the Institute of Law Clerks of Ontario (ILCO) as the required text for their Wills and Estates continuing education course.

ADVANCED CORPORATE LEGAL PROCEDURES

Advanced Corporate Legal Procedures by Elizabeth Gillis approaches its subject in a way that will satisfy the needs of both pre-service students and in-service practitioners. Current practices in the area of corporate transactions are thoroughly covered. Unique to this book is the chapter on corporate procedures for Not-for-Profit Corporations. ILCO has also endorsed this text for their program. The text has numerous forms and precedents, as well as a useful instructor's guide.

EMP realized some time ago that there is a multitude of courses on employment and labour law throughout the college system. These courses are offered in business, HR management, and continuing education programs — often in support of HRPPO standards and certification. We are publishing two new texts this year to address the obvious need for current teaching material in employment and labour law.



LABOUR RELATIONS: THE UNIONIZED WORKPLACE

Labour Relations: The Unionized Workplace by Laurence Olivo (Seneca College) and Peter McKeracher (Durham College) tackles this challenging subject head-on. It begins by addressing the history of industrial relations and the labour movement, and then systematically describes the key elements of collective bargaining from both the HR manager's and the union's perspective. Organizing a workplace union, negotiating a collective agreement, and administering a collective agreement are discussed. The book will be available by the time you read this column. Order your desk copy today!

EMPLOYMENT LAW FOR BUSINESS AND HUMAN RESOURCES PROFESSIONALS

Employment Law for Business and Human Resources Professionals covers the essential elements of employment law. The author, Kathryn Filsinger, teaches Employment Law in the HR Management program at Atkinson College, York University, and in the post-graduate HR Management certificate program at Humber College. Topics include human rights and common law issues in the hiring process; employment contracts; the *Employment Standards Act*, *Workplace Safety and Insurance Act*, and the *Occupational Health and Safety Act*; equity issues; and much more.

SPECIAL BUNDLED PRICE FOR EMPLOYMENT LAW AND LABOUR RELATIONS

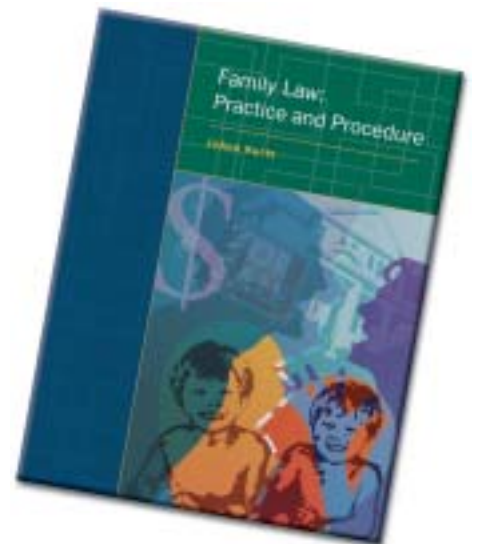
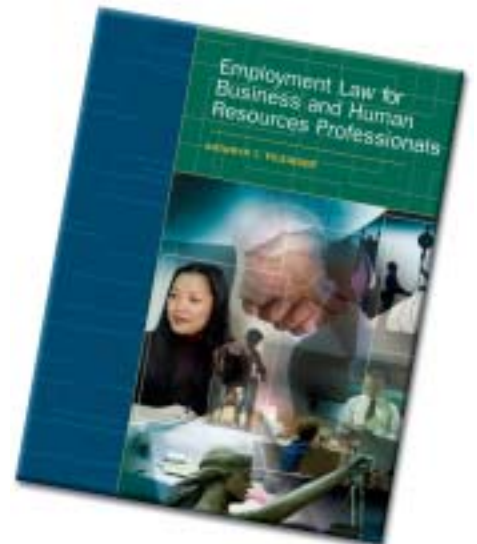
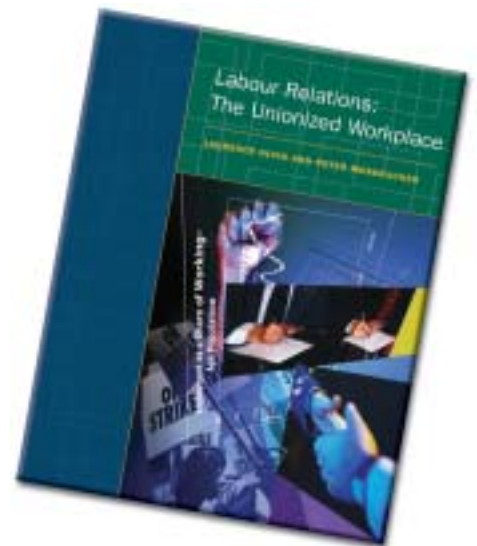
We are offering a special bundled price of \$80 for *Labour Relations: The Unionized Workplace* and *Employment Law for Business and Human Resources Professionals*. Please contact me for further details.

FAMILY LAW: PRACTICE AND PROCEDURE

EMP strives to provide you and your students with the most up-to-date teaching resources. Our greatly anticipated *Family Law: Practice and Procedure* by JoAnn Kurtz of Seneca College was published late in 2003. Although the book was as current as possible when we sent it to press, during the summer of 2004 we were faced with the challenge of addressing an abundance of significant legislative changes. We quickly got to work and compiled a 100-page perfectbound supplement to the text. The supplement is being provided at no charge to all students who purchase the book. We have found that the most effective way of providing this additional resource to your students is by sending the supplements directly to instructors teaching the course, who will distribute it to their students. We have been pleasantly overwhelmed with the positive feedback from instructors who appreciate our going the extra distance to provide current classroom resources. We are awaiting pending federal legislation before publishing a new edition. I will keep you apprised.

INTERVIEWING SKILLS FOR LAW ENFORCEMENT PROFESSIONALS

Interviewing Skills for Law Enforcement Professionals has been very well received by paralegal instructors and students. Author Doug Cochran has now prepared an extensive instructor's guide that incorporates useful teaching tips, a test bank, and interactive classroom exercises. The teaching of interviewing skills needed by



Dave's corner office continued from page 3

paralegals in the workplace already figures importantly in several programs. This text focuses on how to build and manage client relationships in a legal environment. The text approaches client interviewing through a combination of theoretical and practical approaches, and is generously peppered with humour and anecdotes that illuminate important real-life challenges encountered by both the novice and more practised interviewer. The emphasis throughout is on practice and skill acquisition. Please contact me if you have not yet received the instructor's guide or text.

ADMINISTRATIVE LAW: PRINCIPLES AND ADVOCACY

As administrative law courses come to the fore in paralegal programs, and as more paralegal graduates move into careers that require them to assist in presentations to agencies and tribunals, the need for a student-friendly text on the subject has become more pressing. Our answer is *Administrative Law: Principles and Advocacy* by John Swaigen. Several colleges have already incorporated this text into their winter term courses. The book covers all aspects of administrative tribunals. Also outlined are the key procedural elements for conducting hearings, as well as a historical review of the interaction of administrative tribunals and the Canadian legal system. The second part of the book provides a wealth of practical advice on conducting advocacy before administrative bodies. (For more on the author and an excerpt from the book, see p. 5.) Order your complimentary desk copy today.

DEBTOR-CREDITOR LAW AND PROCEDURE, 2ND EDITION AND CIVIL LITIGATION

Laurence Olivo has produced a series of updates to accompany two of his texts: *Debtor-Creditor Law and Procedure, 2nd Edition* and *Civil Litigation* (co-authored by Mary Ann Kelly.) I e-mailed these documents to those teaching the courses and to program coordinators. If you did not receive my e-mails, please let me know.

WORKING WITH THE LAW

We will continue to publish a wide array of new texts for our Working with the Law series in the new year, including second editions of *Legal Research: Step by Step*; *Residential Real Estate Transactions*; *Fundamentals of Contract Law*; and *Working with the Tenant Protection Act*. Our forthcoming titles will address such subjects as business law, immigration law, international trade law, small claims court procedure, and legal office procedures. Please let us know if you have a publishing idea you would like to explore with us.

INSTRUCTOR'S GUIDES

On a final note, if you wish to download our instructor's guides, you may find them at www.emp.ca/instructor.

I am available to assist you throughout the school year. Please do not hesitate to contact me, by e-mail at stokaluk@emp.ca or by phone at 416-975-3925 or toll-free at 1-888-837-0815. Best of luck with the winter and spring terms. ■



PROFILE

John Swaigen and Administrative Law

By Peggy Buchan

John Swaigen, author of the new college and university text *Administrative Law: Principles and Advocacy*, is currently an adjudicator with the Ontario Information and Privacy Commissioner. John's interest in administrative law dates back to his days at the Canadian Environmental Law Association, where he got his article and then worked as counsel for seven years after being called to the Ontario bar in 1974.

In the early years of his career, John appeared before a variety of administrative tribunals, and he was struck by the lack of respect that was being shown to applicants. Disclosure was inadequate and the rules of procedure were unclear.

and its goal is to improve the administrative justice system. It has produced a Code of Professional and Ethical Responsibilities for Members of Adjudicative Tribunals, provides training courses for adjudicators and administrators, and hosts an annual conference.

"Things have improved a great deal," says John about the state of administrative procedure, since his early days. The general trend is toward a more open and fairer process, although some people still complain that they aren't dealt with as fairly as they would like. Tribunals always face the problem of balancing fairness and flexibility.

When he was chair of the Environmental Appeal Board, John heard a number of applications from irate citizens who had been denied approval for septic systems. Sometimes they talked over other witnesses and counsel at inappropriate times. An ad hoc solution was to swear everyone in at the start, and then let the hearing take on a more conversational flavour. At least the testimony, even if put forth in a disorganized fashion, was properly sworn as truthful.

When he is not fine-tuning administrative process, John can be found enjoying canoeing, swimming, cross-country skiing, and yoga. In his spare time he writes books. He has written *Regulatory Offences in Canada*

(Carswell 1992), *How To Fight for What's Right: The Citizen's Guide to Public Interest Law* (Lorimer 1981), *Toxic Timebombs* (Emond Montgomery 1995), three editions of *Environment on Trial* (Emond Montgomery), *A Manual for Ontario Adjudicators* (SOAR 1999) and *Fundraising for Non-Profit Groups*, 5th Ed., with Young and Wyman (Self-Counsel Press 2002).

John received his law degrees from Osgoode Hall Law School, including his master's in Environmental Law. Paul Emond was his thesis adviser.

The following excerpt from John's new text outlines the steps of advocacy before an administrative agency.

A watershed event occurred when John represented the neighbours of a noisy tavern before the Liquor Licence Board of Ontario. His clients received a favourable ruling revoking the tavern's liquor licence. However, two weeks later the tavern owners contacted the board and, without notice to John or his clients, convinced the board that the problem had been corrected. The licence was reissued before John or his clients even knew about it.

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This experience motivated John to get involved, and in 1992 he helped found the Society of Ontario Adjudicators and Regulators (SOAR). This organization consists of chairs, members, and executive staff of administrative justice system agencies,

John Swaigen and Administrative Law, page 6

BOOK EXCERPT

ADVOCACY BEFORE AN ADMINISTRATIVE AGENCY

Understanding the Decision-Making Structure

As discussed in part I, different procedures apply to decision making by tribunals and other administrative agencies. Tribunals are required to hold public hearings and follow quasi-judicial procedures. Other agencies make their decisions behind closed doors. They often do not describe in detail the procedures that they will follow. They may obtain information from many sources and do not always reveal what information they have relied on, or what policies, guidelines, or criteria they have applied. Officials at several levels in the organization's hierarchy, and even in several different departments, may play a role in reaching the final decision, and officials from other agencies also may be consulted. Often there is no blueprint that sets out the responsibilities or functions of these various participants.

This decision-making structure can make the job of the advocate, or representative, a difficult one. A great deal of detective work, along with some guesswork, may be needed to find out who is involved in making decisions, and when and how decisions are made. Since much of the information that the advocate needs may not be written down anywhere, or, if written, may not be public, the process of shepherding an application through the bureaucracy consists mainly of asking questions and finding out the points in the process at which recommendations and decisions will be made, who will make them, and what internal policies and criteria those officials will apply in arriving at their decisions.

Submissions on the client's behalf should focus directly on the issues identified by the decision makers and by external opponents to the application. The arguments should be presented within the framework that the agency will use in making the decision.

To me, a lawyer is basically the person who knows the rules of the country. We're all throwing the dice, playing the game, moving the pieces around the board, but if there is a problem, the lawyer is the only person who has read the inside top of the box.

Jerry Seinfeld, *Seinfeld*, "The Visa," episode 56, broadcast January 27, 1993

Steps in the Advocacy Process

Advocacy before an agency that is not a tribunal involves some or all of the steps outlined below.

Determine What Laws and Policies Apply

As discussed in part I, government decision makers exercise powers granted by statute. The statute or regulation that delegates those powers generally sets out broad rules for decision making, including the nature and scope of the decision, the persons responsible for making the decision, the general procedures to be followed, and the criteria to be applied. The details of the process are often left to be determined by the decision-making body. They are found in written policies or guidelines, or in informal administrative practices.

Determine Stages in the Process and Deadlines

There are often stages in the decision-making process at which recommendations and interim or tentative decisions are made. At some or all of these stages, there may be an opportunity for the advocate to provide input. Therefore, it is important to identify those stages and to find out the deadlines for making comments and suggestions or providing information.

Determine Who Makes the Decision at Each Stage

As mentioned earlier, often several departments or branches will be consulted during the decision-making process. Each will bring to bear its own perspective and will want to ensure that its particular areas of concern are addressed. Consequently, the advocate will need to find out who is involved at each stage and make contact with the various participants.

Determine Concerns of the Agency and Other Stakeholders

As well as determining who is involved, it is important to understand the particular concerns of each participant. For example, certain issues related to an application may be raised internally by agency staff. Other stakeholders may raise additional concerns with politicians and agency officials. For example, if a client is applying for a licence to open a casino and neighbours wish to block the application, the advocate should try to find out the details of their concerns both from the neighbours themselves and from agency officials.

Tailor Submissions

Submissions on the client's behalf should focus directly on the issues identified by the decision makers and by external opponents to the application. The arguments should be presented within the framework that the agency will use in making the decision. For example, they should refer to any policies, guidelines, and criteria that support the application and explain why those that do not support it should not be given weight in the circumstances of the case.

Obtain Reasons for the Decision

Once the final decision has been made, it is part of the advocate's job to ensure that the client is informed of the reasons for the decision. Generally, the agency will have either a statutory or a common law duty to give reasons.

Under s. 7 of Alberta's *Administrative Procedures Act (APA)*, administrators must provide written reasons for their decisions. In contrast, under s. 13 of Quebec's *Administrative Justice Act (AJA)*, there is no requirement for agencies other than tribunals to provide their reasons in writing. These agencies are, however, required to communicate their decisions "in clear and concise terms" and if they are making an unfavourable decision on an application for a licence or permit, they must give reasons. Ontario's *Statutory Powers Procedure Act (SPPA)* and British Columbia's *Administrative Tribunals Act (ATA)* do not require agencies other than tribunals to provide reasons.

E-mail address update

Effective March 1, 2005, the EMP Bellnet e-mail addresses will no longer be in service. For your convenience, listed below are the appropriate e-mail addresses of EMP staff with whom you may want to be in contact.

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2005 catalogue arriving soon

You can expect to receive a copy of our 2005 Working with the Law catalogue by the end of February. ■

Publish what you teach

Do you teach from your own home-grown material? If you think that this material may be suitable for publication, and that other instructors may benefit from it, give us a call. We are always looking for authors for our college law and law-related texts.

To discuss a specific proposal or to contribute a feature article to a future issue of this newsletter, *Working with the Law*, contact us at 416-975-3925 or 1-888-837-0815.

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