A CULTURE OF JUSTIFICATION

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INTRODUCTION

Alexander vavilov lived a normal suburban life in the United States until, one morning, his family home was stormed by armed FBI agents. Unknown to Vavilov, who had been born sixteen years earlier in Canada, his parents were Russian spies. Hollywood writers would later use his story as inspiration for the popular television series *The Americans.* Later still, Vavilov found himself in the Supreme Court of Canada, his lawyers arguing for his Canadian citizenship and for the wholesale reform of Canadian administrative law.

The Supreme Court is the body that sits at the top of the hierarchy in the Canadian legal system. Its nine judges and their support staff occupy an elegant art deco structure perched above the Ottawa River a few hundred yards upstream of Parliament and looking over the water to the city of Gatineau in the province of Quebec. The grand location befits its status as the final court of appeal for Canadians. In a small number of cases (mostly criminal matters), the Supreme Court automatically hears appeals from lower courts. Most of the time, though, litigants who lost in the lower court need to persuade the Supreme Court that their case involves a question of national importance that would merit a visit to both enjoy the architecture at 301 Wellington Street and fight their battle there. Litigants do this by preparing a detailed application that is then considered in secret by the nine judges, often over a period of many weeks or even months. Then, on a random Thursday at 9:45 a.m. Eastern Time, the Supreme Court tells the litigants whether their case will be heard. The message is published on the Supreme Court's website, and it is a simple

thumbs-up or thumbs-down – "leave to appeal" is granted or refused, without explanation.

So, on one of those random Thursdays in May 2018, there was something unusual on the Supreme Court's website. In exercising its discretionary power to grant leave to appeal, the court gave reasons explaining why it had decided to grant leave in three cases:

> The Court is of the view that these appeals provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190, 2008 SCC 9, and subsequent cases. To that end, the appellants and respondent are invited to devote a substantial part of their written and oral submissions on the appeal to the question of standard of review, and shall be allowed to file and serve a factum on appeal of at most 45 pages.

The three cases were decided, after a long period of deliberation, in December 2019. The most important of the cases was Vavilov's: *Canada (Citizenship and Immigration) v Vavilov,* where the Supreme Court laid out an entirely new framework for administrative law (and effectively concluded that Vavilov was indeed a Canadian citizen after all).[1] *Vavilov* was the "big bang," a legal landmark that is set to have an enduring legacy.

In this book, I will explain and place in historical context the Supreme Court's decades-long struggle to bring coherence to Canadian administrative law, describe the new framework elaborated in *Vavilov,* and discuss the likely legacy of the *Vavilov* decision.

What made *The Americans* such a great TV program was that its themes transcended the details of the Vavilovs' lives as undercover spies. Their story spoke to all viewers about the challenges of family life, especially preserving a sane balance between professional responsibilities and personal relationships. *Vavilov* deals with less titillating subject matter but is just as transcendent. The case and this book are all about "judicial review."

Judicial review is how the courts control government, ensuring that "administrative decision makers" stay within the boundaries of the law.

An administrative decision maker is someone who works for or on behalf of the government and whose job involves exercising powers accorded to him or her by legislation passed by Parliament or a legislative assembly. The Canada Border Services Agency (CBSA) officer at the border, or a municipal bylaw officer, or even the staff at a driver licensing centre are the most obvious front-line examples. There are more behind-the-scenes ones too, such as commissioners of the Canadian Radio-television and Telecommunications Commission (CRTC), who decide how much Canadian content should be available on TV, for example; and even the federal Cabinet, which hears appeals on technical matters such as railway rates and adopts regulations concerning everything from freezing the assets of supporters of foreign regimes to the types of guns and knives that can be imported into Canada. Each and every one of these people is an administrative decision maker. And, in principle, anyone affected by one of their decisions can seek judicial review to make sure the decision was lawful. The question for the court – which lawyers sometimes call the "reviewing court" – is not whether the decision was the right one but rather whether the decision was made in a procedurally fair way and whether it bore the hallmarks of reasonableness. "Reasonableness" is a very technical term that, as it happens, was at the heart of the *Vavilov* case.

The best place to start Vavilov's story is probably with that of another immigrant to Canada, Thanh Tam Tran, whose travails were considered in *Canada (Public Safety and Emergency Preparedness) v Tran.*[2] At issue in this case was the decision of a ministerial delegate, which was based in large part on a report from a front-line CBSA official (neither of whom was a lawyer), to refer Tran to an admissibility hearing. Tran's ability to stay in Canada hinged on this hearing. Should he have been referred to it in the first place?

Tran's troubles arose due to his role in a marijuana cultivation operation, for which he received a twelve-month conditional sentence. Although this was hardly the gravest of criminal infractions, the *Immigration and Refugee Protection Act* provides that individuals are inadmissible to Canada upon conviction for either 1) committing an offence punishable by a maximum term of imprisonment of at least ten years,

or 2) committing an offence for which a term of imprisonment of more than six months is imposed.

Between Tran's commission of the offence and his conviction, the maximum term of imprisonment had been increased from seven years to fourteen years. Tran had a constitutional protection under the *Canadian Charter of Rights and Freedoms* against a higher sentence being imposed retrospectively: before a criminal court, he could be sentenced to a maximum of only seven years. But was the ministerial delegate constrained by this, or could he look to the maximum term of imprisonment at the time he had to decide whether to refer Tran for an admissibility hearing? Alternatively, the delegate had to ask whether Tran's conditional sentence was a "term of imprisonment" in excess of six months. The decision did not go Tran's way, and so he went to the courts.

At the Federal Court of Appeal, Justice Johanne Gauthier upheld the decision as reasonable, but she did so with evident distaste. The first problem was that the delegate had not developed "a purposive and contextual analysis" of paragraph 36(1)(a) of the Act.[3] Given the issues at stake, the absence of a detailed interpretation in the delegate's decision was a significant shortcoming. For one, the rule of lenity – that penal provisions be construed in favour of the accused – was at least arguably in play. For another, the potential retrospective application of an increase in a sentencing provision calls attention to the values underpinning the Charter.

In addition, Tran observed that the delegate's approach could give rise to absurd situations, such as where the maximum sentence for an offence committed long ago is later increased, rendering the individual suddenly liable to removal from Canada. Yet Gauthier felt compelled, in light of the Supreme Court of Canada's instruction to Canadian courts to pay attention in administrative law cases to reasons that *could have been offered* – but were not *actually* offered – in support of a decision, to accept *any* reasonable interpretation that was implicit in the delegate's decision: "Deference due to a tribunal does not disappear because its decision on a certain issue is implicit."[4] This judgment was reflexive deference to a decision maker (in this case, the ministerial

delegate), *even where the decision maker evidently had not even considered the principles* at stake. Yet, as Gauthier observed, this deference was what the Supreme Court's administrative law jurisprudence at the time seemed to require.

There was a further twist in the tale. Gauthier explained (this time with exasperation as much as distaste) that it would also have been reasonable for the ministerial delegate to construe the provisions *in favour* of Tran.[5] Indeed, she wrote, it is "obviously open" to other decision makers "to adopt another interpretation should they believe that it is warranted."[6] Another decision maker could adopt a different interpretation in the future. Concretely, this meant that the rights and obligations of permanent residents and foreign nationals convicted of crimes in circumstances similar to Tran's could well depend on whether they appeared before decision maker A or decision maker B. The decision maker had the authority to decide – one way or another, and back again – and that was that. Again, this conclusion was compelled by the Supreme Court's guidance on administrative law.

Tran successfully appealed to the Supreme Court, but the judges did not address the problems that had so vexed Justice Gauthier. Criticism in the legal community grew progressively louder, with *Tran* and other decisions brandished as evidence of severe weaknesses in Canadian administrative law. But it was not until 2018 that the Supreme Court finally turned to address these problems in *Vavilov, Bell Canada v Canada (Attorney General),* and *National Football League v Canada (Attorney General),*[7] the latter two being consolidated appeals from a single order of the CRTC. It was not especially surprising that leave was granted for both *Vavilov* and *Bell Canada/National Football League,* as these cases could be considered to deal with very interesting, high-profile matters.[8]

Vavilov was born in Canada to Russian parents who were spies. Normally, individuals born in Canada are Canadian citizens,[9] but there is an exception for children born to "a diplomatic or consular officer *or other representative or employee in Canada of a foreign government.*"[10] When Vavilov was sixteen, the family home in the United States was stormed by armed FBI agents, who arrested his parents. A "spy swap"

was arranged, which saw the family leave the United States for Russia. From Russia, Vavilov sought the renewal of his Canadian passport. After much procedural wrangling,[11] the Registrar of Canadian Citizenship refused to accede to his request. Indeed, relying on a report prepared by an analyst, the Registrar concluded that Vavilov's parents had been "employees of a foreign government" at the time of his birth, and thus revoked his certificate of Canadian citizenship. Vavilov sought judicial review: he was unsuccessful at first instance before convincing a majority of the Federal Court of Appeal to quash the Registrar's decision.

Bell Canada/National Football League was the latest instalment of the long-running saga that is the CRTC's "simultaneous substitution" regime. For some time, the starting point has been that Canadian broadcasters who are retransmitting feeds from foreign broadcasters are not allowed to alter those feeds in any way *unless* the Canadian broadcasters have permission to do so under the simultaneous substitution regime. If so, a Canadian television station can require a foreign broadcaster to substitute a Canadian feed for the foreign feed, which has been the case during the Super Bowl. From a consumer perspective, the most obvious result has been that for many years, during the Super Bowl halftime show, Canadian viewers have had access only to Canadian advertisements, not the high-profile American versions. From a commercial perspective, the result is that there is a larger advertising pie for the NFL (the copyright holder) and other actors to distribute, because of the national platform provided to Canadian advertisers. After a series of consultations stretching over several years, the CRTC proposed to maintain the simultaneous substitution regime in general but to exclude the Super Bowl specifically. This order was the subject of an unsuccessful appeal to the Federal Court of Appeal by Bell Canada and the National Football League.

Thus, it was no surprise that the Supreme Court decided to invite the lawyers in these cases to Ottawa to discuss spies and the Super Bowl, respectively. What was surprising was that the Supreme Court decided to signal openly its willingness to revisit its judicial review

framework. The giving of reasons accompanying a leave to appeal decision was unprecedented. Certainly, when the Supreme Court had previously attempted to reformulate its administrative law doctrine in *Dunsmuir v New Brunswick,* it gave no warning to the parties or the wider world.[12] The giving of reasons this time was almost certainly prompted by the widespread discontent in the Canadian legal community about the unsatisfactory way in which the law of judicial review of administrative action had evolved since *Dunsmuir.* In 2016, a respected appellate judge described Canadian administrative law as "a never-ending construction site,"[13] and at a 2018 symposium, sitting and retired judges, practitioners, and academics voiced a host of criticisms of the Supreme Court's recent jurisprudence.[14] Even the media took notice: on the eve of the release of the decisions in the trio of cases, the Supreme Court's administrative law meanderings were the subject of a detailed analysis piece in the national paper of record, the *Globe and Mail.*[15]

Indeed, the Supreme Court's administrative law construction project dates back to 1979. In the landmark case of *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation,*[16] Justice Brian Dickson stated that on some questions of law a court should intervene on judicial review only where the interpretation at issue was patently unreasonable. Deciding *when* the deferential standard of reasonableness should apply and outlining *how* the reasonableness standard should be applied have proven to be very difficult, however. This area of Canadian administrative law is known as "substantive review." Other important areas, such as procedural fairness (the procedures administrative decision makers must follow in making decisions) and remedies (the redress available from the courts when administrative decision makers have acted unlawfully), have not presented such difficulties. But substantive review, which courts have to engage in any time an individual or a company argues that administrative decision makers have misused their powers, accounts for the vast majority of Canadian administrative law cases. And, unfortunately, it is the area in which the courts have had the greatest difficulty.

Four points in particular are worthy of emphasis. First, the Supreme Court's approach has been to apply the same framework to *all* administrative decisions, whether issued by front-line officials, ministers, economic regulatory agencies, or administrative tribunals,[17] with interpretations of law *and* exercises of discretion subject to the same doctrinal rules.[18] Nonlawyer ministerial delegates like those who made key decisions in the lives of Vavilov and Tran are subject to the same framework as legally trained adjudicators with decades of experience serving in well-resourced administrative tribunals.

Second, the proverbial reasonable person might assume that where a statute provides for an "appeal" to a court of law, the judges would come to their own conclusion on the questions at issue. But had there been an appeal in Tran's case, the outcome would not have been any different. The Supreme Court had observed that even where a statutory appeal had been provided for, it might nonetheless be appropriate to defer to an administrative decision maker on matters within its specialized expertise.[19] This sensible observation was, in recent years, pushed to extremes, so that even the most carefully tailored appeal clauses – such as those providing for a right of appeal on questions of law or jurisdiction, with leave of the appellate court – did not overcome the presumption that judges should defer to administrative decision makers.[20]

Third, the Supreme Court's position on the role of reasons in administrative decision-making was ambiguous. Although it was made clear in *Dunsmuir* that the sufficiency or adequacy of reasons was not a stand-alone basis for judicial intervention,[21] *Dunsmuir* and its progeny also invited courts (and creative counsel) to supplement sparse or defective reasons with additional *ex post facto* rationalizations, such that the Supreme Court latterly veered incoherently between a "restorative" and a "restrictive" approach to the application of the reasonableness standard.[22] This incoherent veering was, unfortunately, emblematic of the Supreme Court's approach to administrative law as, in the years after *Dunsmuir,* it frequently issued contradictory decisions.[23]

And fundamentally, the very idea of deference to administrative interpretations of law remains controversial. Should a ministerial delegate in cases such as Tran's or Vavilov's ever be granted deference? Heck,

even if decision makers are well-respected experts on a particular area of law, why should their views override those of judges, who are independent from government and uphold the rule of law at the instance of citizens? Some members of the Supreme Court, such as Justices Suzanne Côté and Malcolm Rowe, have been hostile toward the notion and have sought to expand the areas covered by correctness review (where judges can substitute judgment on questions of law), whereas others, such as Chief Justice Richard Wagner, Justice Andromache Karakatsanis, and now-retired Justices Rosalie Abella and Clément Gascon, have embraced it fulsomely.[24] Dotted around the country are lawyers who are members of the "deference" camp and the "no-deference" camp. Those who believe in deference fly the flag of "reasonableness review" (i.e., the judge can intervene on judicial review only if the decision is unreasonable), while those in the no-deference camp march under the banner of "correctness review" (i.e., the judge can get involved if the decision was incorrect on a particular issue).

The Supreme Court therefore faced a daunting challenge with the trilogy. It appointed *amici curiae* to assist it, granted leave to twenty-seven interveners, and, of course, invited expansive submissions on the general principles of administrative law from the parties to the appeals. The *amici* were Professor Daniel Jutras and Audrey Boctor. Jutras was formerly the dean of the Faculty of Law at McGill University and, before that, served from 2002 to 2004 as the Supreme Court's executive legal officer. Boctor is a practitioner who previously clerked for the former chief justice of Canada, Beverley McLachlin. The Supreme Court's product, released a little more than a year after the three-day hearing, was contained in the decision in *Vavilov.* By a 7-2 majority (with Justices Abella and Karakatsanis writing vigorous concurring reasons that read as dissenting reasons), the Supreme Court adopted a new framework for judicial review of administrative action. Notably, the majority included a broad coalition of judges, bringing together skeptics (notably Justices Côté and Rowe) and proponents (notably Chief Justice Wagner and Justice Gascon) of deference on questions of law.

The majority reasons sought to achieve two goals: "To bring greater coherence and predictability" to the choice between correctness review

and reasonableness review,[25] and to provide "better guidance ... on the proper application of the reasonableness standard."[26] Whether the majority succeeded in this will be the subject of later chapters. For now, let us focus on the concrete outcome of the so-called trilogy, for Vavilov and for football fans.

In their appeals, Vavilov and Bell Canada/National Football League were successful.

Regarding the Super Bowl, the Supreme Court concluded that the authority under the statutory provision that the CRTC invoked "is limited to issuing orders that require television service providers to carry specific channels as part of their service offerings, and attaching [general] terms and conditions."[27] Accordingly, the CRTC's order in relation to the Super Bowl was unlawful, and so the 2020 Super Bowl once again featured Canadian advertisements during the halftime show.

For his part, Vavilov convinced the Supreme Court that the Registrar of Canadian Citizenship's decision was unreasonable. Considering the text, purpose, and context of the *Citizenship Act,* as well as Canada's international law obligations, the court determined that it was unreasonable to conclude that the Canadian-born "children of individuals who have not been granted diplomatic privileges and immunities" are excluded from Canadian citizenship.[28] Since it was clear that Vavilov's undercover-agent parents did not benefit from diplomatic privileges and immunities (quite the opposite!), the court found no basis for the Registrar to revoke his citizenship. Justices Abella and Karakatsanis agreed with this conclusion for substantially similar reasons. The most concrete outcome of the *Vavilov* case, therefore, was that Vavilov's Canadian citizenship was secure. Whether the future of Canadian administrative law is secure is a different question.

In Chapter 1, I discuss why administrative law has been such a complicated subject for generations of Canadian law students, practising lawyers, judges, and citizens by reference to the history of judicial review; the vast array of decision makers and decisions made in the contemporary administrative state; the complexity of concepts such as "jurisdiction," "deference," and "legislative intent"; and the variety of

judicial attitudes toward the administrative state. These factors in part explain the difficulties Canadian judges had that ultimately led to the reformulation of administrative law in *Vavilov*.

In Chapter 2, I take a deeper dive into Canadian judicial review. Since the late 1970s, the courts have struggled to develop a set of legal principles to regulate how judges conduct substantive review. From 1988 to 2008, the Supreme Court advocated a contextual approach, where the selection of correctness or reasonableness depended on the interplay of a variety of factors. From 2008 onward, the Supreme Court preferred to rely on a series of categories and then on an outright presumption that in most situations the reasonableness standard would apply. But the relationship between categories, context, and presumptions was never clarified, and the circumstances in which contextual factors would push a decision out of a category or rebut a presumption were somewhat nebulous. And the reasonableness standard was never comprehensively explained by the Supreme Court. That 2008 decision – *Dunsmuir v New Brunswick* – set the scene for a tumultuous decade.

In Chapter 3, I describe that tumultuous decade. I lay out the tensions in *Dunsmuir:* the imperfections in the categories, the lack of soundness of its categories, and the problems created by the adoption of a presumption of reasonableness review. I then explain how the Supreme Court's approach to reasonableness review layered confusion upon confusion, before turning to some of the contradictions in the court's case law, which created a distinction between the "law on the books" and the "law in action." Lastly, I discuss the impetus for revolution created by the changing composition of the Supreme Court.

In Chapter 4, I describe the long-awaited reformulation of administrative law. The Supreme Court's analysis in *Vavilov* has essentially four parts; two are the primary components and two are subsidiary. The two most important components of the new framework for administrative law are a set of simplified rules for selecting the standard of review and a detailed formulation of the standard of reasonableness. I explain the concepts of "institutional design," "rule of law," and "responsive justification" that underpinned these two components. The

subsidiary parts related to remedial discretion and how to retrofit the Supreme Court's previous decisions into the new framework. The changes wrought by *Vavilov* were intended to be radical, making deference much less likely in situations where there is a statutory appeal from an expert decision maker (such as the CRTC) to a court, and insisting on the need for administrative decisions to be justified by reasons that are responsive to the arguments, the evidence, and the stakes. Indeed, the new framework attracted strong opposition from two of the nine judges, who wrote lengthy reasons attacking the very premises on which the majority based its analysis. In this chapter, I analyze the majority reasons setting out the new framework and discuss spirited opposition it immediately provoked.

In Chapter 5, I address the reception and application of the new framework by Canadian courts. The area of statutory appeals has been considerably changed, with very significant decisions demonstrating that courts are much less likely to defer to expert regulators on matters relating to the interpretation of the statutes they administer, occasioning a significant transfer of power from regulators to the courts. Reasonableness review, meanwhile, has become a culture of justification in action. Decision makers, such as ministers and labour relations arbitrators, who historically had benefitted from significant judicial deference, are having to adjust their practices to take into account the new normal ushered in by the big bang.

In Chapter 6, I turn to unresolved issues. For the most part, the Supreme Court's analysis in *Vavilov* was comprehensible and comprehensive. On a number of key issues, however, the implications of *Vavilov* are obscure. In order of importance, these unresolved issues raise the following questions: What framework governs procedural fairness in administrative law? Are administrative decisions touching on the Charter still to be reviewed deferentially? And what are the constitutional foundations of *Vavilovian* judicial review? In this chapter, I will explain the importance of these issues and lay out answers and solutions that are faithful to the *Vavilov* framework. Chapters 5 and 6 address issues that are still in a state of flux. To keep abreast of developments in

Canadian administrative law, do read my blog, *Administrative Law Matters,* which also highlights other useful resources.

As Alexander Vavilov discovered, administrative law is hugely relevant to modern life, regulating the relationship between the state and the citizen. The tentacles of the administrative state reach into every corner of our lives and engage matters that are fundamental to individual dignity and humanity. Before *Vavilov,* Canadian administrative law had been in disarray, an unacceptable state of affairs given the high stakes for citizens and state alike. In the chapters to come, I will describe the reasons for such disarray, what the Supreme Court sought to achieve in *Vavilov,* and how the decision may bring "a culture of justification" to Canada's vast array of administrative decision makers.[29]

1

Why Is Administrative Law So Complicated?

In this chapter, I discuss why administrative law has been such a complicated subject for generations of Canadian law students, practising lawyers, judges, and citizens.[1] The discussion covers several topics: 1) the history of judicial review; 2) the vast array of decision makers in the contemporary administrative state, and the decisions they make; 3) concepts central to the development of administrative law; and 4) attitudes toward the administrative state.

Judicial review developed in an incremental fashion from humble historical origins. Over a period of many centuries, judges retrofitted ancient legal remedies to new forms of public administration. This was a difficult operation: administrative law in Canada is not bespoke, or even made to measure, but a centuries-old off-the-rack suit made from outdated fabric. Many of the features of today's law are the result of historical happenstance rather than careful planning: accordingly, it is important to consider the history of judicial review.

In the contemporary administrative state, the variety of decision makers spans a spectrum running from court-like administrative tribunals at one end to government ministers at the other, and they make decisions that can be either general or highly targeted in nature. Some of these decisions have life-changing consequences, whereas others are entirely mundane and have very low stakes.

Concepts such as "jurisdiction," "deference," and "legislative intent" have been central to the development of administrative law. Giving these concepts meaning is inevitably a difficult task, as the contours of each are uncertain (in part because of the haphazard way in which administrative law developed over the centuries); nonetheless, the concepts remain important to understanding present-day administrative law, again because many features of our contemporary legal system are attributable to historical happenstance.

Judges have a variety of attitudes toward the administrative state. Some judges are comfortable with the idea that on questions of law arising in the interpretation of complex regulatory schemes, courts should defer to expert decision makers; others are much less comfortable. If pushed, some judges will concede that a legislative instruction to defer is enough, but others will insist on a reasoned basis for doing so. Judges also diverge in their relative preference for rules as opposed to standards, or, put another way, in their preference for clear categorical distinctions versus a more nuanced, contextual approach. Given the diversity of administrative decision makers and administrative decisions, it is easy to understand why these traditional preferences make a significant difference to the shape of administrative law. Just to complicate things still further, sometimes judges will decide a case based on what they think is the best outcome, all things considered, even if this is not strictly driven by legal considerations.

HISTORY OF JUDICIAL REVIEW

What we now call "administrative law" or "judicial review of administrative action" began to develop across the Atlantic, many centuries ago, in the form of the writs of *certiorari,* prohibition, *mandamus, quo warranto,* and *habeas corpus,* the so-called prerogative writs. These writs were originally designed, by judges sitting in the King's common law courts in London, England, to control the actions of so-called inferior courts around the country. If those bodies erred, the writs could be issued against them, to quash their decisions (making it as though the

decisions had never been made in the first place) or to order them to act in a particular way.

Today's centralized court system was then in the earliest stages of its development; most justice was administered locally or in ecclesiastical courts. Of course, overseas in what became British colonies, the common law had not yet arrived – the Indigenous peoples in Canada and other countries developed and applied their own legal traditions. Later, however, when British settlers arrived on the shores of North America, they brought with them the common law. It is therefore impossible to understand Canadian administrative law without appreciating its historical origins in England.

A practical example of these historical origins may help. Consider the operation of the writ of *certiorari.* A common law court could issue a writ of *certiorari* against an inferior tribunal. The effect of this was to transfer the entire record of the proceeding in the inferior tribunal to the common law court: "The theory is that the Sovereign has been appealed to by some one of his subjects who complains of an injustice done him by an inferior court; whereupon the Sovereign, saying that he wishes to be informed – *certiorari* – of the matter, orders that the record, etc., be transmitted into a Court where he is sitting."[2] Once received in the common law court, the record could be scrutinized for error.[3] In this way, the common law courts were able to develop a body of centralized jurisprudence regulating the proceedings of inferior courts.

The writ of prohibition, meanwhile, functioned to stave off encroachments on the jurisdiction of the common law courts; ecclesiastical courts, for instance, could be prohibited from adjudicating on certain matters. *Quo warranto* enabled the common law courts to assess whether a particular decision maker was qualified to act. *Mandamus* and *habeas corpus* were available to correct a wide variety of wrongs, not just those committed by inferior courts.[4]

When deciding whether to grant a prerogative writ in a particular case, the common law courts did not conduct a trial. Judicial review was – and still is today – a paper proceeding, based entirely on the record of the proceedings before the inferior court. Sometimes the record would literally be carted from the other end of the country to

be scrutinized in the halls of Westminster. Lawyers would, of course, argue in court about whether the record revealed a basis for the intervention of the common law courts. But there were no witnesses, no jurors, and no dramatic Perry Mason–like moments where a brilliant cross-examination revealed fundamental flaws in a party's case.

Over the centuries, the common law courts extended the scope of the prerogative writs to cover a wider and wider range of bodies, generally reasoning by analogy to justify issuing writs against decision makers that were not, strictly speaking, inferior courts. An early example is *Groenvelt v Burwell.*[5] Here, a physician had been fined and imprisoned by the College of Physicians. Formally speaking, *certiorari* would not extend to the College, which was not an inferior court; indeed, the College was not a so-called Court of Record, nor was it acting judicially. Looking rather to the substance of the matter, Lord Chief Justice Holt held that *certiorari* could be issued against the College: any body with a power to examine, hear, and punish was a judicial body, and any jurisdiction with the power to fine and imprison was a Court of Record. Reasoning *Groenvelt*-style, the courts gradually and incrementally extended the prerogative writs to cover a vast range of nonjudicial decision-making.[6] As one of Holt's successors, Lord Chief Justice Parker, explained several centuries later, "the exact limits" of the prerogative writs "have never been and ought not to be specifically defined," but rather "have varied from time to time being extended to meet changing conditions."[7]

This basic structure was implanted in Canada by the Europeans who landed on the shores of North America. The King's common law courts in London were the "superior courts," with a superintending power to oversee the affairs of every inferior body beneath them. Canada, too, had superior courts, and their continuing existence is recognized by section 96 of the *Constitution Act, 1867.* The judges are appointed by the governor general on the advice of the federal government. Part of their core jurisdiction, historically, is to ensure that inferior courts and analogous bodies (basically, every administrative decision maker in Canada) act within the boundaries of the law.[8] This structure also extends to the civil law province of Quebec.[9] Most legal relations in *La*

belle province are governed by the *Civil Code of Quebec,* but the province's public law is (with some modifications) the same as the public law of the other provinces: the operation of the courts, criminal law, and oversight of public administration are done according to common law principles.

* * *

We have seen that administrative law evolved slowly and incrementally. For the most part, the slow and incremental growth of the oversight role of the superior courts was in lockstep with the slow and incremental growth of government institutions. Just as England developed bodies such as Commissioners of Sewers to implement national policy, so too did Upper and Lower Canada create entities like the Court of Escheat and arbitrators to determine and allocate customs duties payable on seabound traffic,[10] as and when such bodies were needed to respond to specific social or political problems. With the Industrial Revolution, however, and mass movement from the countryside to the towns, the need for regulation expanded dramatically. This need was supercharged by the expansion of the franchise: with more voters came more demand for legislation to remedy social problems, such as the absence of a robust system of workplace insurance. As the twentieth century wore on – with two world wars and a major economic crisis in the 1930s – the state in Western democracies played an increasing role, directly managing sectors of the economy, regulating others, and distributing resources to those in need.

This explosion of state activity posed significant challenges for administrative law. There is a reason that the word "Jesuitical" – which evokes casuistic, case-by-case analysis – is not always employed as a term of endearment. Yet the evolution of administrative law has been just this. While the prerogative writs were used to control the actions of an array of administrative decision makers, there was no "administrative law" as such. There were no general principles but various, discrete bodies of law relating to the individual writs: there was a "law" relating to *certiorari,* a "law" of prohibition, and so on, but there was no coherent body of principles that, as a whole, could be described as "administrative law." And, as one can readily imagine, with decisions

about the application of the writs rapidly accumulating the case law was difficult to interpret. For example, for purely historical reasons, *certiorari* was available to quash decisions tainted by "jurisdictional errors" but did not extend to errors, even serious ones, "within jurisdiction." Moreover, decisions relating to mere privileges, or decisions that were "administrative" or "legislative" in nature, were excluded from judicial oversight, as only those decisions affecting "rights" and made after a "judicial" or "quasi-judicial" process could be reached by the prerogative writs.

Given the state's increased role in distributing resources in the twentieth century, and making general policy decisions about how to manage national economies, these were severe restrictions. Much of public administration escaped any judicial oversight at all. And this was not a morally optimal position either – slumlords whose decrepit properties had to be razed to the ground in the public interest had "rights" the courts would protect, but indigent people reliant on state benefits had no recourse to the judiciary if ever their benefits were cut off.

Therefore, to observe the mid-twentieth-century literature on administrative law is to look at a world very different from ours. Indeed, this was the time of the "long sleep" of administrative law,[11] a prolonged period of judicial somnolence that gave rise to fears that we had witnessed the "twilight" of judicial review[12] or, at the very least, stern warnings that a "crossroads" had been reached.[13] Standing in the way of progress, clanking their medieval chains,[14] were the tripartite classification of functions into "administrative," "legislative," and "judicial" (only the last attracting much in the way of judicial control); a stark distinction between reviewable "rights" and unreviewable "privileges"; a deep divide between "jurisdictional" error, which attracted *de novo* judicial review, and "nonjurisdictional" error, which attracted none at all; and, of course, the procedural and technical restrictions encrusted like barnacles on the hull of the prerogative writs, which had evolved to be the primary means of judicial control of public administration. In that period, despite the creation of an enormous administrative state, with welfare, regulatory, and managerial functions, vast swaths of public administration were immune from judicial oversight.[15] Even judicial

imposition of *procedural* controls on how public officials could make decisions – putting no fetters on the *substance* of those decisions – could not be taken for granted.

* * *

This was soon to change.[16] The origin story of contemporary administrative law involves academics, judges, and politicians working in consort to transform judicial review of administrative action.[17] In his classic text, *Judicial Review of Administrative Action,* Professor Stanley de Smith "provided the academic systematization of the principles of judicial review";[18] in landmark decisions such as *Ridge v Baldwin,*[19] *Anisminic v Foreign Compensation Commission,*[20] and *Padfield v Minister of Agriculture,*[21] the House of Lords cast aside the tripartite classification, the rights/privileges distinction, and the jurisdictional/nonjurisdictional error divide; and politicians effected or permitted, through legislation and delegated legislation, procedural reforms that replaced the barnacled prerogative writs with a unified application for judicial review.[22] This means that individuals whose interests have been affected by governmental action may make an application for judicial review in the superior court. Whereas Lord Reid could safely say in the 1960s that England knew no developed system of administrative law, just twenty years later – the blink of an eye in common law terms – Lord Diplock confidently stated; "[T]he English law relating to judicial control of administrative action has been developed upon a case to case basis which has virtually transformed it over the last three decades."[23]

Similar transformations occurred in Canada: for Professor de Smith, read Professors Harry Arthurs,[24] Peter Hogg,[25] David Mullan,[26] and Paul Weiler;[27] procedural reforms were effected at the federal and provincial level;[28] and over the years the Canadian judiciary invigorated the law of judicial review of administrative action.

The Supreme Court of Canada decision in *Nicholson v Haldimand-Norfolk Regional Police Commissioners*[29] heralded a similar change to *Ridge v Baldwin,* such that where once procedural protections attached only to decisions made "judicially," having an impact on "rights,"[30] they could by the early 1980s be imposed by judges with respect to any decision affecting "the rights, interests, property, privileges, or

liberties of any person."[31] The old law of "natural justice," closely modelled on the trial-type procedures employed by courts, was replaced by a context-sensitive "duty of fairness," where the question a court must ask is: "What procedural protections, if any, are necessary for this particular decision-making process?"[32] In particular, individuals are entitled to fair warning of potentially adverse decisions and an opportunity to respond. Indeed, there is an increasing trend toward "active adjudication," where an administrative decision maker becomes more actively involved *within* a hearing process,[33] and, arguably, toward "responsive legality."[34] Moreover, the impact of a decision on an individual has come to play an important role in determining the extent of the procedural protections required in a given case: "The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated."[35]

A wider variety of grounds of review became available of governmental action, a trend visible across the common law world.[36] In Canada, the Supreme Court developed a "pragmatic and functional" approach to judicial review (considered in more detail in the next chapter). Rather than relying on a stark distinction between jurisdictional and nonjurisdictional errors, Canadian courts employed a variety of contextual factors to calibrate the appropriate intensity of review – correctness, reasonableness *simpliciter,* and patent unreasonableness – for any given case.[37] On the application of any of these standards, courts were able to probe the reasons and the record to identify any flaws in an impugned administrative decision. Even where the legislature had enacted a privative clause – a statutory provision preventing the courts from judicially reviewing a decision – the courts could nonetheless consider the lawfulness of administrative action – that is, an individual affected by a decision made by an administrative decision maker could bring judicial review proceedings to determine whether the decision maker acted in a procedurally fair manner and whether the decision maker's analysis of the legal and factual issues was reasonable.

No-go areas were eliminated, as the boundaries of nonjusticiability were pushed back. In *Operation Dismantle v The Queen,* the Supreme

Court held that a state actor could not shelter from a claim of a Charter violation by invoking nonjusticiability.[38] All governmental action was, in principle, open to review for Charter compliance. Governmental action was, moreover, subject to judicial review in the superior courts,[39] a constitutional control that the Supreme Court held, could not be ousted by ordinary legislation.[40] Prerogative power has also come under judicial scrutiny, haltingly at times[41] but more confidently in recent years, with more attention to the particular context in which prerogative action is sought to be challenged.[42] Judicial review has also been extended to private bodies exercising public power,[43] and the law of standing has been significantly liberalized, allowing public-spirited citizens and non-governmental organizations to challenge administrative action.[44] It bears mentioning, finally, that governmental bodies have a duty to consult with and potentially accommodate Indigenous peoples when their rights protected by section 35 of the Charter might be affected by regulatory decisions.[45] Administrative decision makers, too, may fall under the consultation obligation,[46] meaning they will have to draw Indigenous peoples into their decision-making processes and "show that [they have] considered and addressed the rights claimed by Indigenous peoples in a meaningful way."[47]

Today, therefore, most administrative decisions can be reviewed in the courts for their reasonableness and procedural fairness: they must comply with the law and be made in a procedurally fair manner; and the reviewing process can be triggered by making an application for judicial review – writs don't come into it. When contemporary lawyers say that decision makers must act within their "jurisdiction," they mean simply that the decision maker must act within the boundaries of reasonableness and procedural fairness. This involves some deference by the courts to the decision makers: in determining whether the boundaries have been respected, the courts will give weight (sometimes significant weight) to the views of the decision makers in question. Again, the idea that a privative clause can exclude an entire area from judicial oversight has long since been rejected: reasonableness and procedural fairness permeate all areas of public administration.

(Jurisdiction, deference, and privative clauses are discussed further below.)

* * *

The upshot of all this is that administrative law is in a constant state of evolution. Textbooks and judicial decisions provide snapshots of what the law is at different points in time, but there is no certainty that things will stay the same. Indeed, the key contemporary concepts of reasonableness and procedural fairness are context-sensitive and so will shift shapes in different contexts.

THE VARIETY OF DECISION MAKERS AND DECISIONS

All Canadians are affected by the administrative state in all sorts of ways: when they return from abroad, apply for a driver's licence, pay municipal taxes, listen to music on the radio, choose a cable TV package, or turn on the gas stove. Officials all over the country make decisions about who can enter Canada, who gets to drive on the roads, how much tax is due, what mix of music, talk, and advertisements is acceptable on the airwaves, whether cable companies have to offer certain channels, and how energy companies can recover investments in infrastructure from users of their services. Hundreds of administrative agencies across Canada churn out thousands upon thousands of decisions every day, about everything from social welfare claims to the amount of French-language content on cable television. These officials are administrative decision makers. Their decisions are subject to the principles of administrative law.

A further complicating factor in grasping administrative law is therefore the sheer variety of decision makers in the contemporary administrative state.[48] The general principles of administrative law are applied in as diverse a range of settings as can be imagined: everything from the life-or-death context of immigration law to regulatory decisions about energy and transport that shape the economic future of the country, to matters of culture in the arts and telecommunications

sectors. Environmental law, municipal law, tax law: you name it, there is – somewhere – an administrative decision maker applying it, and therefore making decisions to which the general principles of administrative law can be applied. In a sense, then, administrative law is shaped by the specific substantive areas of law it is applied to. As these change, however, administrative law might well change with it.

Furthermore, the constraints of administrative law are tighter or looser in different contexts. One useful way to conceptualize the administrative state is to perceive it as a spectrum,[49] along which, as Justice Louis LeBel put it in *Imperial Oil Ltd v Quebec (Minister of the Environment),* the requirements of the law "may vary in order to reflect the context of a decision maker's activities and the nature of its functions":[50]

> The categories of administrative bodies involved range from administrative tribunals whose adjudicative functions are very similar to those of the courts, such as grievance arbitrators in labour law, to bodies that perform multiple tasks and whose adjudicative functions are merely one aspect of broad duties and powers that sometimes include regulation-making power. The notion of administrative decision maker also includes administrative managers such as ministers or officials who perform policy-making discretionary functions within the apparatus of government.[51]

This well-known idea of a spectrum[52] can be roughly mapped as follows: Ministers[53] → Crown corporations[54] → Social and economic regulation[55] → Quasi-judicial[56] → Judicial.

On the purely political end of the spectrum lies ministerial decision-making, where political control through conventions of accountability to the legislature predominates. Here, procedural protections are diminished – indeed, in *Imperial Oil,* an argument that the minister was biased because his department would have won a budgetary windfall from penalizing an oil company failed for precisely this reason. In addition, the range of considerations that a minister might take into account in making a decision is often very broad indeed.

On the purely legal end of the spectrum lies judicial decision-making. By "judicial" in this context, I do not mean decision-making by courts of law. Rather, I am concerned with the application by administrative bodies of objective legal norms to the facts as found. The French term *juridictionnelle,* which does not have a ready English equivalent, captures the idea. Here, political interference is – or at least should be[57] – frowned on, for the distribution of costs and benefits set out by the legislature should not be interfered with by executive fiat.[58] Legal control is heightened, in the sense that the range of considerations that a judicial decision maker may legitimately take into account is tightly constrained: if the question is whether an applicant has accumulated enough days of work to claim an entitlement, the decision maker cannot peer into the applicant's conduct or utility to society. Procedural protections are at their strongest here, where the decision-making process – the application of objective legal norms to facts after hearing from the parties – closely resembles that of a court of law.

Between the two extremes, the extent of political and legal control varies as one moves back and forth along the spectrum, more strongly legal toward the judicial end, more strongly political toward the ministerial end. Thus, not only are the general principles of administrative law a function to some extent of the specific, substantive areas to which they are applied but the weight of those general principles will vary from area to area depending on the nature of the decision maker.

To this must be added the huge divergences between the different types of decisions that are made. At the most basic level, some decisions are general in nature – the promulgation of regulations or guidelines, for example – while some are specific to identifiable individuals or groups – determinations of refugee status or of minimum carrying requirements for cable providers, for example. These general or specific decisions, furthermore, can be made by all types of decision maker, from politicians who give no reasons all the way to adjudicators who give very detailed reasons. And the effects of the decisions can be quite different. The stakes in an immigration case are extremely high, whereas a decision not to fund an application for government support for an

academic research project is of a different nature entirely. Even the same type of decision can have different stakes depending on the identity of the parties concerned: if my driver's licence were revoked, I could still get around using taxis or Uber, but if a taxi driver's licence were revoked, the driver's family would face economic ruin. Administrative law's general principles, applied by these different decision makers in such diverse specific areas of substantive law, have to account also for the particularities of the type of decision.

Take three different areas: railways, refugees, and regulations.

- As common carriers, *railways* have long been subject – under the common law and statute – to a variety of duties to those who seek to use their services. In *Patchett & Sons Ltd v Pacific Great Eastern Railway Co,*[59] the Supreme Court explained that railway companies have a duty to accept goods for travel, as long as the requests are reasonable. Those obligations of reasonableness are now set out in the *Canada Transportation Act,* but have to be understood against the backdrop of *Patchett* and several decades' worth of decisions by the Canadian Transportation Agency. Complaints can be made under the Act by shippers of goods whose requests were not accepted: they can argue that the railway was not reasonable, the railway can defend itself vigorously, and the agency adjudicates. Or the agency can initiate a complaint on its own motion, engaging in a much more flexible and open-ended inquiry.[60] Common law, statute, adjudication, investigation – all meshed into the same statutory scheme. There is a limited right of appeal from decisions of the agency to the Federal Court of Appeal, with the permission of a judge, only on a question of law or jurisdiction, and a broader right to seek review from the federal Cabinet (supported by civil servants in the Privy Council Office).
- Someone who arrives in Canada fleeing persecution can apply for *refugee* status. At first, an officer of the Immigration and Refugee Board of Canada's Refugee Protection Division will determine whether the person is a refugee. This is not an adversarial proceeding; rather, the officer asks questions, explains doubts he or she may

have about the claimant's story, reviews documentary evidence, and makes a decision. If the application is rejected, the claimant can appeal to the Refugee Appeal Division in most instances. This appellate body reviews the record from the Refugee Protection Division and comes to its own conclusion about whether the claimant really is a refugee. An unsuccessful appeal is not necessarily the end of the road: a failed refugee claimant can later resist deportation on the basis of a Pre-Removal Risk Assessment, performed by still another type of official. And at most points in this tale, the claimant can apply to the courts to judicially review unfavourable decisions (and have them issue a stay – putting the proceedings on ice – while the review is conducted).

- Railways and refugees involve corporations and individuals. *Regulations,* by contrast, typically involve rules made for the world at large. I say typically because sometimes regulations will target individuals or groups – like regulations freezing assets because of economic sanctions against a foreign country. Regardless, the making of regulations does not involve any sort of adjudicative or inquisitorial proceeding. Rather, they are drafted by civil servants to implement statutes. They can have drastic consequences for individuals and industries, yet for the most part, the only formal requirement is that regulations be laid before the legislature (Parliament for federal regulations, a provincial legislature for provincial regulations) without a member of the legislature objecting – and objections *never* happen. Sometimes, general rules that do not qualify as regulations – the definition is a "confused microcosm"[61] – are not subject to any procedural requirements at all.

This is just an aperçu to illustrate the variety of forms administrative action can take, the range of decision makers involved (sometimes performing different functions), and the differing stakes of the decisions for the individuals concerned. Sometimes the decision maker will be a sophisticated multi-member tribunal (or even the federal Cabinet), but often it will be a lower-level official, such as a civil servant acting for a minister.

There is one last strand to consider. There is a reflexive relationship between the principles of administrative law and administrative decisions. The reasons and records of administrative decisions reviewed by judges are now much more extensive than in the past. Modern records are voluminous, and modern reasons extensive. Administrative proceedings are increasingly subject to the open-court principle;[62] access-to-information legislation imposes high standards of transparency on administrative decision makers; there are many statutory obligations to give reasons for decisions; considerations of fairness between individual and institutional litigants drive the publication of scores of decisions on decision makers' websites; and technological advances facilitate the production of reasons even in the face of large numbers of applications "by employing information technology, using decision templates, drop-down menus and other software."[63]

The upshot is that judges conducting judicial review hearings will have a large volume of material on their desks, reasons potentially running into hundreds of pages, supported quite possibly by an even more extensive record. It is only natural for courts reviewing reasoned decisions to focus on the internal coherence of the reasons given, interrogating whether they do indeed justify the decision given.[64] Judicial review judges are likely to consider that they have the capacity to test whether decision makers' conclusions follow from their premises: there is no special expertise required to assess whether a decision is logical and rational, or whether it is justifiable in view of the relevant legal and factual constraints. Where there were no reasons to scrutinize, as in previous eras, it was much more difficult for judges to conclude that an administrative decision should be quashed.

Where reasons were never given for administrative decisions, the flaws in those decisions or in public administration generally were concealed from the judicial eye. Once reasons came to be given more or less as a matter of course, public administration was on display, warts and all. As soon as judges became aware of shortcomings in public administration (or even just the potential for shortcomings), it was perhaps inevitable that they would develop more exacting standards

of reasonableness and fairness to hold administrative decision makers to account.

COMPLEX CONCEPTS

Three concepts have been of central importance to Canadian administrative law in recent decades. One of them, jurisdiction, is found in every textbook in every common law country, often taking up many pages that are often not (sometimes by the author's own admission) especially illuminating. The two others, deference and legislative intent, can be found in other countries from time to time but rarely play the important roles they have played and continue to play in Canada. All three concepts are complex and difficult to grasp.

Jurisdiction

You will often find lawyers – be they advocates, judges, or professors – saying things like "The tribunal exceeded its jurisdiction," "The minister had no jurisdiction to take that decision," or "The regulator made a jurisdictional error." What are they trying to convey?

There are two basic ideas. First, the variety of decision makers described above get their powers from statutes made by a legislature (there are some nuances here about prerogative powers and entering into contracts, but they can be safely ignored). This is their "jurisdiction," which they cannot exceed.[65] Second, the statute grants powers – but it also limits them. If a statute provides that a decision maker can do Y only if X is present, then the presence of X is a precondition to the doing of Y.[66] So, for example, if a tribunal is granted the power to make findings of discrimination with respect to the letting of self-contained dwelling units, then the fact that a given dwelling is a self-contained dwelling unit (X) is a precondition to making a finding of discrimination (Y).[67] X has been laid down in a statute by the legislature. If a decision maker does Y when X is not present, then it is acting in excess of its powers: "Any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions."[68]

The primary problem with the concept of jurisdiction is that no formula has ever been devised for distinguishing X from Y: "No satisfactory test has ever been formulated for distinguishing findings which go to jurisdiction from findings which go to the merits."[69] All statutory provisions can be cast in the basic form: if X is present, then the decision maker shall or may Y. The problem then becomes acute, as the boundaries of jurisdiction are "impossible to draw precisely because the two matters [X and Y] [are] inextricably interwoven."[70] Because an X component may be identified in all statutory provisions, a court could invoke the doctrine to justify intervening whenever it so pleases, a risk borne out by the historical record: "There was no predictability as to how a case would be categorised before the court pronounced on the matter. There was also no *ex post facto* rationality that could be achieved by juxtaposing a series of cases and asking why one case went one way and another was decided differently."[71] To say things like "The tribunal exceeded its jurisdiction," "The minister had no jurisdiction to take that decision," or "The regulator made a jurisdictional error" announces a conclusion (in impressive-sounding language) without explaining it. What matters are the reasons for coming to the conclusion – and these are often obscured by the language of "jurisdiction."

Although there is much more to say about the concept, it is unnecessary to wade any further into the morass here, for, as we shall see, especially in Chapter 2, the concept of jurisdiction has been marginalized in Canadian administrative law. Nonetheless, it is difficult to understand the process by which it was marginalized without understanding why the concept is complex. And it is difficult to appreciate why administrative law is so complicated without spending some time discussing jurisdiction – hence the infliction of these paragraphs on the reader.

Deference

The concept of jurisdiction has been marginalized and, in large part, replaced in Canada by the concept of deference. This concept is helpfully discussed by Gary Lawson and Guy Seidman in a recent book, *Deference: The Legal Concept and the Legal Practice*.[72] They note that

the use of deference in judicial decisions is in contrast to the conventional use of the term "deference," which tends to involve complete obeisance, say, in "deferring" to another's choice of restaurant. When lawyers use the term, it is typically "to describe a sliding scale of weight rather than the kind of yield likely to be meant in ordinary conversation."[73] In deciding to uphold an administrative decision (or not), a judge will give weight to the views of an administrative decision maker explaining the decision maker's preferred interpretation of a statutory provision or justifying a policy choice. Deference is therefore a way "of representing an allocation of decision-making responsibility among multiple actors."[74]

This allocation can be made in a variety of ways. Giving weight is one possibility; making space is another. Consider an everyday example. Patients visit doctors to receive advice about their ailments and possible cures. Ultimately, patients will decide what to do, but in making the decision, will allocate responsibility between themselves and their doctor. Some patients might simply give weight to the views of the doctor, which go into the mix with what they learned on Google or what they have learned from past experience. Indeed, patients who are trained doctors might give much less weight to the views of their doctor (hence the expression that doctors make the worst patients). Other patients might accept the advice of their doctor, subject to the general quality of the doctor's explanations: as long as these seem reasonable and grounded in the evidence, a patient will accept them; if they are not, the patient might reject them or seek a second opinion.

Deference in administrative law can function the same way. Let's stay in the doctor's office: assume that the patient complains to a disciplinary body about the treatment received from the doctor, the disciplinary body finds that the doctor mistreated the patient, and the doctor challenges this finding in court. The court can give weight to the disciplinary body's findings on what the professional standard of conduct is but keep the final word for itself, or the court can say something like, "a judge can intervene only if the findings were unreasonable or unsupported by evidence," carving out a space for the disciplinary body to develop its interpretation of the standard of

conduct. Unsurprisingly, in this area, courts much more often create space than give weight.

The qualifier "in this area" is important. Determining the professional standard of conduct typically involves a value judgment, which is heavily dependent on the context of the patient-doctor relationship and the general approach to such relationships in the community of doctors. It is a question of fact, or perhaps of applying standards to fact (a "mixed" question) – but it is certainly not a question of law. Relatedly, if a government minister determines that it is not in the "national interest" to fund a particular project or allows a particular permanent resident to remain in Canada despite serious criminal offences, this is best characterized as an exercise of discretion. When questions of fact, mixed questions, or exercises of discretion come up before the courts in judicial review proceedings, the courts will generally be very respectful of the decision maker. They will not simply give weight to the decision maker's views; rather, they will accept those views as conclusive, unless there is something seriously wrong with the reasons for those views and/or the underlying evidence.

Where matters become trickier, as you might imagine, is on questions of law. When it comes to interpreting statutes, or case law, judges find themselves doing something they were trained to do since their very first days as law students. Why would they give any weight at all to the views of others, let alone carve out a space for nonlawyers? Over the years, the response to this question has occupied many pages of Canadian law journals and judicial decisions. For the moment, let us simply acknowledge that in some areas of regulation answering questions of law might require technical knowledge beyond the ken of judges – for example, where a body of economists has to determine whether a merger would lessen competition "substantially." Here, space might even be appropriate, notwithstanding that the word "substantially" appears in a statute, and weight surely would be. Of course, expertise is a slippery concept: if you prefer, the rationale for carving out a space or giving weight could be efficiency, inasmuch as the optimal way for judges to spend their time is not second-guessing economists about the meaning of "substantially" in a statute about competition law.

Legislative Intent

This leads us to the third complex concept – legislative intent. It provides another potential justification for deference, alongside expertise and efficiency: the legislature might require the courts to either give weight to the views of a decision maker or simply accept them as long as they are reasonable and based on the evidence.

Here, great care is needed. To begin with, "legislative intent" does not require us to look into the hearts and minds of legislators. We are concerned with the words they used in their statutes, not the message they intended to communicate. "Legislative intent" does not have a free-standing meaning floating in the ether above the words used in the statute. Those words sometimes include so-called privative clauses, designed to *deprive* the courts of the authority to review particular decisions. These clauses can take a variety of forms: they have targeted particular prerogative writs (a "no *certiorari* clause," for example) when this was appropriate, or provided that "no decision shall be called into question in a court of law." Canadian courts (and their counterparts elsewhere in the common law world) have regularly had to grapple with such clauses. Beyond privative clauses, however, one can say that the choice to create a decision maker and give it significant powers – be it a competition authority, a minister, or a disciplinary body – also evidences a legislative intent that the decision maker should not be routinely second-guessed by the courts. Whether this is true and, if it is, whether it requires the giving of weight or the carving out of space has also occupied much of the time of Canada's administrative lawyers.

Evidently, a legislature need not intend, through its language, for deference to be given. It might give decision-making powers to the courts, or provide for appeals from decision makers to the courts. Here again a wide variety of provisions can be found in Canada's law libraries: giving power to courts directly; allowing decision makers to ask courts to give a binding ruling on a question of law; creating a right of appeal on questions of law only (sometimes only with the court's permission); providing for an entirely new proceeding before a court; or simply giving individuals the option of an appeal. Legislative intent and the relationship between clear expressions of intent, such as privative clauses

and rights of appeal, and not-so-clear expressions of intent, such as delegating significant decision-making authority, have been a central concept in Canadian administrative law.

The purpose of this discussion has been, on the one hand, to assist in answering this chapter's main question – why is administrative law so complicated? – and, on the other hand, to introduce some concepts that will be central to the story told in subsequent chapters. Jurisdiction, deference, and legislative intent will all rear their heads at various points. There be dragons, but at least the reader will know what to fear from them.

ATTITUDES TOWARD THE ADMINISTRATIVE STATE

It should be clear from the foregoing discussion that there is no constitution or general codification of administrative law. Quebec has its *Civil Code* and Canada has its *Criminal Code,* but administrative law is not confined to one self-contained handbook that explains the relationship between public administration and the courts. Canada does not have anything like the specialized administrative courts of civil code countries such as France. There, the *Conseil d'État,* peopled by experienced civil servants rather than judges, oversees the actions of public administration, applying a set of rules that are distinct from those that apply between private parties. Public contracts, public liability, and public unlawfulness are governed by special rules, applied by specialized courts. In common law countries like Canada, however, the same superior courts that make decisions about contracts, property, and torts apply the principles of administrative law. They are staffed by generalist judges, not specialists in public administration.

One consequence is that judges do not have anything like a uniform view of public administration. They are not *Énarques* in whom the same principles have been inculcated, generation after generation. Moreover, there is a venerable tradition of lawyers being skeptical of the administrative state. The rise of the state in the twentieth century

brought with it an enormous increase in the scope of discretion of government officials. Lawyers, trained to identify and apply rules, have a natural antipathy to discretion. In formulating the general principles of administrative law, they have often sought to tame administrative discretion. In fact, the influential Victorian-era jurist Albert Venn Dicey at one point denied that there was any such thing as administrative law: there was, in the King's courts (just as much in the Dominions as in London), only one law for all, individuals and government officials alike. By the end of his life, Dicey had recanted, but his skepticism of administrative discretion casts a long shadow over the subject.[75]

Judicial attitudes toward the administrative state run along three fault lines: deference and nondeference, form and substance, and reason and authority.[76]

Deference and Nondeference

Some judges are hostile to administrative discretion, and others are much more open to it. Some seek to cut discretion down to the bare minimum, while others are comfortable with deferring to the views of administrative decision makers, especially those who can plausibly claim to be expert in their field of regulation.

Dicey's hugely influential account of English public law identified judges as the "guardians of the rule of law," on whom it was incumbent "to ensure that any person or body relying on power delegated by the legislature abide by the terms and conditions on which that power was granted."[77] A deferential approach to judicial review, however, requires judges to be satisfied by an answer that is merely reasonable, even on questions of law.[78] It does not need to be the answer the judge would have given after due consideration of the question. Intervention is possible only where an interpretation "cannot be rationally supported by the relevant legislation."[79] Deferring to administrative decision makers' interpretations of law requires judges to pull against the current of tradition.[80] Intervention is justifiable only in extreme cases, not in ordinary ones. Administrative autonomy must be respected, tradition put to one side. Whether or not judges accord weight – reserving for

themselves the final decision but according significant heft to the conclusions of the front-line decision maker – or space – carving out a zone into which courts will not intrude as long as the impugned decision is reasonable[81] – a deferential approach requires them to no longer think as lawyers traditionally have thought.

If you know any lawyers, you can imagine how much difficulty this has caused over the years![82]

Form and Substance

Some lawyers prefer form, and others prefer substance.[83] By form, I mean the development of conceptual categories, into which decisions must be placed without regard to whether the achievement of the substantive ends intended by the development of the categories is actually furthered by placing a particular decision in a category. By substance, I mean paying attention to the eccentricities of the individual decision and the statutory provisions pursuant to which it was made.[84]

An example might help the reader to grasp the importance of the form/substance fault line. The traditional distinction between jurisdictional and nonjurisdictional error was commonly seen as formal in character. It is formal because it sorts decisions into different categories based on the abstract features of the concept of jurisdiction. It does not operate by reference to the contextual considerations presented by individual decisions. This formalism marked the law prior to *New Brunswick Liquor*.[85] In the 1980s, the Canadian law of judicial review continued to have a relatively formal structure: jurisdiction retained a tenacious hold on Canada's legal imagination, and deference depended in part on a formal feature of decision-making structures, namely, the presence of a privative clause. If there was a privative clause, decisions were sorted into the deference category, as they were "within the jurisdiction" of the decision maker.

But this formal distinction was challenged by substantive opponents, such as the pragmatic and functional approach considered in the next chapter. Applying it forced courts to confront the nature of the statutory scheme, the nature of the relationship between the particular decision

and the relative expertise of the decision maker, and the nature of the particular question presented for review. Instead of mechanically sorting decisions into different categories based on their formal characteristics, it was necessary to grapple with the contextual particularities of the decision in question.

In general, some lawyers prefer bright-line rules and categories, whereas others are more comfortable with open texture and contextual considerations. Over the years, administrative law has yo-yoed between form and substance, depending on whether the formalists or substantivists have the upper hand.

Reason and Authority

The last fault line is between reason and authority.[86] Professor David Dyzenhaus has described this as the distinction between "deference as submission" and "deference as respect."[87] Some judges accord deference and apply deferential standards because there is some authoritative basis to do so. Others, though, require a reasoned basis to defer in the first place, and to uphold a decision.

This fault line overlaps the form/substance fault line to some extent. An authoritative basis for deference is a privative clause (or, perhaps, a broad delegation of authority). A reasoned basis for deference is the expertise of a decision maker. For a judge who seeks an authoritative basis for deference, deference is appropriate where a decision maker can claim authority based on a privative clause. By contrast, a judge seeking a reasoned basis for deference will look to contextual indicators such as expertise to justify according deference to a decision maker. Put another way, a judge deferring because there is a privative clause will defer "because the legislature told me to," whereas a judge looking for a reasoned basis will defer only "because doing so is justified by the decision maker's demonstrated competence." And, on the authority side of the line, a judge might happily uphold a decision as long as the conclusion is within the broad bands of acceptability, whereas across the divide, a judge who seeks reason will be satisfied only if the decision maker has provided a sound justification for its conclusions.

CONCLUSION

The goal of this chapter has been to introduce the complexity of administrative law by reference to history, the variety of decision makers, important concepts, and attitudes toward the administrative state.

Historically, today's administrative law is the result of a continual process of slow evolution, retrofitting devices designed for very different purposes to the realities of the contemporary administrative state.

This state has a vast array of decision makers: the general principles of administrative law that have been developed in recent decades are applied in specific situations that differ radically in terms of technical complexity, political sensitivity, and morality.

The general principles contain and are sometimes mediated through concepts – jurisdiction, deference, and legislative intent – that are themselves inherently complex.

Lastly, the general principles and concepts are applied by judges who often have radically different attitudes toward the administrative state and the role of courts in policing the boundaries of jurisdiction, giving deference, respecting legislative intent, and developing the general principles of administrative law. Complexity is layered upon complexity is layered upon complexity is layered upon complexity. In the next chapter, we will plunge into that complexity by taking a deep dive into the Canadian law of judicial review.

Before doing so, though, it is worth making an observation about how the politics of judicial review have evolved in recent decades. When the Canadian courts first built their doctrine of deference, it was in aid of progressive causes. There was a general view that judges were hostile to, for example, labour relations boards seeking to redress imbalances between employers and unions, and would conjure up any old reason to intervene and quash pro-union decisions. In that era, these labour relations boards were peopled by practitioners and academics of unimpeachable credentials, experts in every sense of the word.

But the expansion of judicial review has changed things significantly. The fault line between reason and authority became especially volatile. Opening policy-making, prisons, and immigration to judicial

oversight led the courts into areas where the stakes were much higher. Deference was nonetheless expanded, and benefitted decision makers who did not have expertise comparable with that of labour relations boards. With higher stakes but less expertise, those who would have cheered on labour relations boards became more muted – and sometimes openly hostile – to deference. Progressives in the 1970s would not necessarily make common cause with their fellow political travellers of the 2020s and sometimes find themselves in alliances with more conservative thinkers who are skeptical of the contemporary administrative state.[88] I say "sometimes" advisedly, because even within progressive circles one can find differing views on deference: those who advocate for clients who have suffered discrimination before well-funded human rights tribunals might be more pro-deference than those whose practice is primarily representing refugees and those with precarious status in Canada. Where someone stands on administrative law may depend on where they most often interact with the administrative state.

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