

Administrative Law

The material in this chapter appeared in the first edition of *Thinking Government*. Due to space limitations in subsequent editions, this material is instead available to students via this designated website for the book.

As you read through the chapters in the text, you will note that *Thinking Government* examines a wide array of traditional subject matters of relevance to understanding public-sector management in this country. This chapter takes a somewhat different tack by presenting a close descriptive and analytical review of the field of Canadian administrative law. Although administrative law has been seen historically only as a branch of legal studies and thus the preserve of judges, lawyers, legal academics, and law students, this approach is far too narrow. Given its substantive focus on due process and administrative justice, the field of administrative law is an important and vital aspect of public-sector management. It deals with the legal dimensions of public policy and government decision-making: it addresses whether the exercise and application of state power in particular policy fields has been accomplished in a legally proper and just manner. Administrative law essentially deals with matters of process and procedures; it focuses on the rights and duties held by governments as they engage in implementing public policy; and, just as importantly, it deals with the rights and duties held by individuals, groups, and businesses as they confront the exercise of state power. Administrative law is thus crucially important to governments, since it provides them with a framework for their legal powers as they implement public policy. It is also important to individuals, groups, and corporations affected by such decision-making in that it delineates the legal entitlements, protections, and obligations that they possess when dealing with the administrative arm of the state. Given this nature of administrative law, it is of great importance to practitioners of public-

sector management, and it should be a field of interest to students of government and its administration.

Public Policy and Law

At the core of administrative law are public policy and administration. Administrative law is more than legal concepts and rules and decisions. Rather, those involved in or interested in public-sector management also need to understand the basic dynamics of administrative law—administrative rules, procedures, and legal issues—as these dynamics directly affect how governments govern.

Administrative law is about policy and administration for the simple reason that all policies have, as their foundation, some Act of Parliament or a legislature that gives the government legal authority to make decisions about a particular policy. An Act, or an Order-in-Council, such as the *Immigration and Refugee Protection Act* or the *Nova Scotia Workers' Compensation Act*, endows a particular government decision-making body—a department or a regulatory agency—with the power to make policy decisions in a particular field. This includes immigration and refugee policy, or rules governing workers' compensation. Enabling legislation will stipulate the scope of potential decisions made by a governing agency. As such, these decisions will have the force of law and are binding on all, subject to the scope of the Act. Orders-in-Council in turn enable the agencies created by such Acts to make regulations and establish bureaucratic procedures empowering them to carry out their duties.

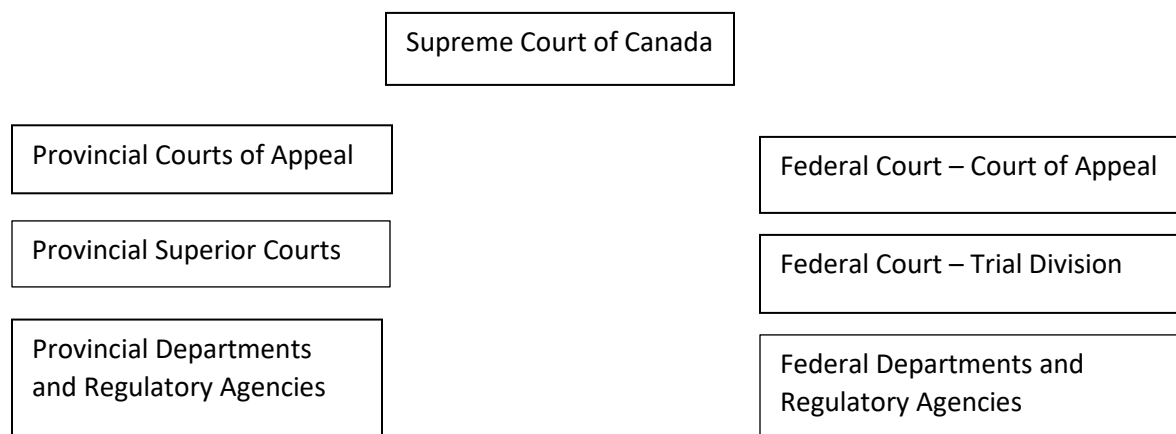
This framework, however, works in two directions. In one way it provides a legal structure through which departments and regulatory agencies are expected to implement their decision-making and policies. Provided that these actors conform to the legal rules, procedures, and powers established in their governing legislation, as well as to all other rules of

administrative law, their decisions are considered legally valid and fully enforceable throughout society. The other importance of the legal framework is that it usually establishes rights and obligations held by those persons, groups, or business corporations affected by relevant legislation. The legislation thus becomes a miniature “Bill of Rights,” stipulating the entitlements and duties of those in society who will be affected, either directly or indirectly, by government decisions in the given policy field (Jones and de Villars 1999, chap. 1).

This concept of a legal framework for decision-making is important because the framework, as established by legislation and as interpreted by the courts, becomes a foundation against which to judge the propriety, fairness, and justice of all government decision-making taken pursuant to the given Act. A framework explains what is permissible (hence legal) decision-making by a government actor and, by inference, what is not allowed in the decision-making process. From this viewpoint, one can begin to discern the origins and principles of Canadian administrative law.

Box 10.1

The Canadian Administrative Law System



Three of the classic principles of law found in any democratic political system are that governments can only exercise powers given to them from a sovereign legislative body—a legislature, that all laws must be scrupulously adhered to, and that all decisions taken under given laws must themselves conform to the procedures and substantive provisions found in them. In short, all government action is governed by law and all governments and their subordinate decision-making actors—departments and regulatory agencies—must obey all laws and legal provisions respecting their policy fields. All decision-making of government bodies must be consistent with the law. Any action of a government decision-maker that is contrary to established law is illegal and thus has no force or effect. Government actors are just as legally bound to adhere to the law as any individual, group, or corporation within society. And just as there are penalties for the latter, should they transgress the established legal order, so, too, are there penalties that can be enforced upon governments by the courts for the violation of law (Jones and de Villars 1999, 10–14).

Canadian courts play a pivotal role in the administrative law process, because so much administrative law (as any field of law) centres around the adjudication of disputes. A classic example of administrative law in action is one in which a governing agency claims a legal power to make a decision, but the decision may adversely affect another party. That party—person, group, or business corporation—challenges the legality of the government action on the grounds that the government’s decision was undertaken through a flawed process and/or that the decision-maker misinterpreted the substance of the law, resulting in the final decision being substantively wrong, therefore legally incorrect, and therefore null and void.

When legal disputes arise over the application of administrative decisions, as they often do in any complex government system, they must be resolved by an expert and independent legal

authority. In many instances first-level adjudication is conducted by specialized regulatory tribunals specifically designed to address administrative law disputes in a particular field of public policy. A classic example of a specialized administrative law tribunal is a provincial workers' compensation appeal tribunal. These institutions, which are quasi-judicial administrative tribunals, are specifically designed to resolve disputes surrounding the interpretation and application of decisions made by workers' compensation boards regarding compensation entitlements to be awarded to injured workers pursuant to workers' compensation legislation. Similar types of tribunals doing similarly specialized adjudication are the federal Public Service Staff Relations Board, the Quebec Human Rights Tribunal, the federal Immigration and Refugee Determination Board, the Ontario Environmental Assessment Board, and the British Columbia Licence Appeals Tribunal. In all of Canada there are more than 200 federal and provincial regulatory tribunals addressing every conceivable facet of public policy.

Standing above these bodies are the common courts of the land: provincial superior courts and courts of appeal, the Federal Court of Canada and the Federal Court of Appeal for matters of federal jurisdiction, and the Supreme Court of Canada. These federal and provincial courts stand in judgment of legal decisions made by regulatory agencies and tribunals or government departments exercising a regulatory function. The Supreme Court of Canada is the final court of appeal in the country, its decisions on administrative law setting binding precedent to be followed by all other courts, tribunals, regulatory agencies, and departments in their subsequent administrative law decision-making.

In certain instances the path from a regulatory tribunal to the courts will be by way of a right of appeal established in the legislation in question. In certain other cases, appeal rights may not be found, but in all instances parties aggrieved by any administrative decision can petition

the courts to assess the legality of the decision through their inherent right of judicial review. The process of judicial review is a legacy of the English courts' insistence on reviewing and assessing the administrative decisions of all government actors and either confirming their legality or striking them down as being illegal. As the Canadian legal system is a child of the English system, we have inherited this historic process. Final administrative law decisions are subject to judicial review, and they rest within the discretion of provincial courts and ultimately with the nine men and women on the Supreme Court of Canada. Some of the most significant developments in administrative law in the past 20 years centre around the institutional relationships between specialized regulatory tribunals and the common courts.

The Grounds for Judicial Review

Given that administrative decision-makers are required by law to adhere to the law if their actions are to be accepted and upheld by the courts as legally binding, what are the legal rules—the legal framework of decision-making—that must be upheld by departments and regulatory agencies? As Evans, Janisch, Mullan, and Risk (1995, 25–26) note, there are four basic grounds for seeking judicial review of a government decision: “procedural impropriety,” “illegality,” “unreasonableness,” and “unconstitutionality.” Put another way, all government decision-making must be undertaken in such a manner that it is

1. procedurally just;
2. with the decision-maker possessing proper legal jurisdiction to render the decision;
3. with the final decision being one that can be reasonably derived from the language of the given Act and the facts of the case; and
4. with the final decision also being in conformity with all other constitutional provisions, especially those deriving from the 1982 passage of the Canadian Charter of Rights and Freedoms.

These grounds for review have evolved over the past century in this country and in the United Kingdom, and an understanding of their substance is required before one can appreciate both the

importance and the limitations of administrative law and judicial review. Evans et al. (1995) have stressed that administrative law is essentially rooted in process and procedures. Judicial review of administrative action is sought when an aggrieved party believes that the decisions of a governing agent failed to respect due process and/or were otherwise flawed because the decision-maker failed to appreciate the limits of its jurisdiction, failed to understand its own governing legislation, and failed to adhere properly to basic constitutional rules. For a decision-maker to avoid judicial review on these matters, or at least to win a case once launched, the governing agent is then obligated to follow a strict set of procedural rules that can be both complex and demanding. As will be observed below, constitutional rules regarding rights and freedoms are often problematic, as is the issue of the proper interpretation of the provisions of an Act of Parliament or a legislature—the enabling legislation of a decision-maker. Furthermore, the interpretation of government jurisdiction has bedevilled judges, lawyers, public servants, legislators, academics, and students for more than a century. And, most basically, when governing actors are instructed to adhere to due process, they confront the complexities of natural justice and fairness.

Natural Justice and Fairness

Natural justice and fairness are legal concepts recognizing certain procedural entitlements held by citizens against governments that must be respected by state decision-makers (Jones and de Villars 1999, chap. 8). While the rules of natural justice and fairness have developed over the last century, particularly over the last 30 years, certain central provisions can be identified. If and when an administrative action affects the rights, duties, and interests of an individual, group, or corporation, that party generally has a right to

1. a government hearing on the matter prior to the decision being made;
2. notification of such a hearing;

3. legal representation at the hearing;
4. examination and cross-examination of any and all evidence and argument introduced at the hearing;
5. speak directly to the decision-makers regarding the merits of the case;
6. reasonable adjournments;
7. have the hearing conducted by a fair and impartial adjudicator;
8. written reasons explaining the final decision of the adjudicator.

Such procedural requirements grant important legal entitlements to any person, group, or business affected by government action. At the same time, these requirements impose substantial obligations on government bodies engaged in administrative decision-making. In many instances these obligations are so onerous as to be unreasonable. This brings us to the issue of threshold.

Administrative Law and the Threshold

The field of administrative law is filled with problems. The first one is simply: When should the basic rules of administrative law come into play with respect to government decision-making? (Evans et al. 1995, 45–49). The point is simple, yet crucially important and complex in its resolution. From the origins of our administrative law in the nineteenth century, there has been a commonsense recognition that basic rules of administrative law regarding natural justice and fairness cannot and should not be applied to *every* decision made by government.

As indicated earlier, the basic provisions of natural justice and fairness come into play if and when an administrative action affects the rights, duties, and interests of an individual, group, or corporation. While this statement is basically true, it now needs refinement. If this were a general rule governing the applicability of the provisions of natural justice and fairness in all cases, every single decision of government would have to conform to the rules and be preceded by full public hearings, with all citizens and other interested parties having full procedural rights of intervention. We know that this is not the case, and most would quickly agree that such an approach to decision-making would bring the wheels of government to a grinding halt. After all,

every single act of government decision-making—on everything from NAFTA and the WTO to the GST; to stationing troops in Bosnia and supporting US military action in Afghanistan; to engaging in First Nations’ treaty negotiations and closing offshore fisheries—does affect individual, group, or corporate rights, duties, and interests in one way or another. Does this mean that the rules of natural justice and fairness should be applied in these cases and hundreds of others like them? If so, every government would be swamped with public hearings, all decision-making would be consumed with legal wrangling, and the pace of government action would be slowed enormously, further inhibiting the ability of governments to act in economical, efficient, and effective manners.

Given this practical reality, the courts use their position of authority to tailor the rules of natural justice and fairness to apply only to a more narrowly defined range of government decision-making. Thus, given certain circumstances, some forms of state action will not need to conform to the rules of natural justice and fairness, while in other circumstances, other forms of actions will be subject to these rules. The difference between these two conditions is known as the *threshold* (Evans et al. 1995, 45–53).

The key to this threshold is understanding the scope and focus of a particular government action. The courts have long held that, if a government action is essentially legislative—that is, the making of a law or policy to be applied broadly and evenly across the entire country, or a province, with no distinctions made for particular persons, groups, or corporations—then such decision-making does not conform to the rules of natural justice and fairness. For example, actions to implement free trade and the GST or to dispatch peacekeepers to Bosnia or Rwanda are not preceded by full public hearings.

Similarly, should a department or regulatory agency address a policy matter with the scope and focus of its action generally and equally applying to all affected persons, groups, or businesses, then, again, such decision-making need not follow the rules of natural justice and fairness. Amendments to the Criminal Code or the Income Tax Act, or general changes to labour relations law, employment insurance policy, or student loans policy, fall into this category of generalized policy-making.

The threshold is crossed when the scope and focus of state action relate directly to the rights, duties, and interests of particular individuals, groups, or businesses in distinct circumstances. For example, the courts have held that state seizure, expropriation, and demolition of particular private properties for broader public purposes can only be undertaken after the affected property holders have been given notification and a full public hearing regarding the government plan. Likewise, a decision by a liquor licensing authority to strip a restaurant of a liquor licence for failure to comply with regulations must be undertaken only through a public hearing. Similarly, decisions to strip an individual of workers' compensation or unemployment insurance benefits, to expel a lawyer from a provincial bar association or a physician from a college of physicians and surgeons, to refuse to grant a claimant refugee status, or to impose disciplinary punishment on a prison inmate require adherence to the rules of natural justice and fairness. The basic guiding principle in all such cases is that when state decision-making directly affects a particular person, group, or corporation in relation to a particular circumstance or issue relating to the application of law, the state decision-maker is legally obligated to follow the rules of natural justice and fairness, thereby giving the affected party the opportunity to respond to the proposed state action prior to the decision being made (Evans et al. 1995, 53–147).

While this framework appears both logical and fair, certain controversial grey areas exist regarding application in the real world. Should prisoners in penal institutions be accorded hearing rights prior to their being disciplined for misbehaviour? Do non-Canadian citizens possess the entitlements of natural justice and fairness with respect to refugee determination cases? In both instances the Supreme Court of Canada has ruled in the affirmative, stressing that the consequences of the given decisions are so important to the person concerned that the rules of natural justice and fairness must apply, even to inmates and to those who are not Canadian citizens (*Martineau v. Matsqui Institution Disciplinary Board*, 1980; *Singh v. Canada*, 1985). In both cases, however, Canadian government authorities argued that their decisions—in imposing penal punishment and in denying refugee entitlement—were based essentially on long-established policies and, therefore, did not need to adhere to natural justice and fairness. In losing these cases, both penal and immigration authorities stressed that these precedents would have the effect of making the administration of prisons and the refugee system much more difficult, time-consuming, and costly.

Two other cases highlight the controversial nature of group rights to full public hearings in advance of particular government action. In the early 1980s, the government of British Columbia organized a wolf-kill program to cull the number of wolves in the province. No public hearings were held prior to the announcement of this policy. The Sea Shepherd Conservation Society challenged this decision on the ground that a hearing was required on the environmental issues surrounding this policy, especially in relation to the impact on the wolf population. The government rejected this claim, stating the issue in question related to a matter of general environmental policy of broad application throughout the province, in which Sea Shepherd has no direct personal or property interest in the outcome of the policy. In *Sea Shepherd*

Conservation Society v. British Columbia (1984), the British Columbia Supreme Court agreed with this understanding of the issue, stressing that the policy in question was essentially legislative, thus not crossing the threshold for the application of the rules of natural justice and fairness.

A related case occurred in Ontario in the early 1990s. The Windsor Roman Catholic Separate School Board, facing financial cutbacks, decided to close nine schools as a cost-saving measure. There were no public hearings held by the board prior to the announcement of this decision. Parents, students, and community groups affected by the announced closures claimed that the board decision should be quashed on the grounds that it had not adhered to due process, as public hearings should be held to gain the opinion of those persons and groups directly affected by the policy decision. The board rejected this claim, stressing that the closure decision was essentially a legislative decision designed to cover the entire jurisdiction of the board, not to target particular individuals or groups. The board held that some schools had to be closed, some people would obviously be affected by these closures, but the closures were in no way directed against any particular person or group. In a reversal of the basic logic from *Sea Shepherd*, however, the Ontario Supreme Court, in *Bezaire v. Windsor Roman Catholic Separate School Board* (1992), upheld the claim of the parent, student, and local groups on the grounds that the board's actions directly affected the interests of those parents and students affected by the closings, with the board, therefore, being under a legal obligation to notify these persons and to hear them out prior to rendering its decision. Is this decision fair and just? If so, how does one distinguish *Sea Shepherd* from *Bezaire*? Does the environment receive less legal protection than local schools simply because the environment is more removed from our daily lives? Is this

acceptable? If local groups can claim a direct interest in protecting their schools, why cannot other groups claim a direct interest in protecting our common environment?

The field of administrative law is filled with such problematics, and the courts have had to wrestle with the intriguing and complex issues of applying, or not applying, the rules of administrative law to administrative actions. In many instances, judicial decisions can be quite controversial, emphasizing the degree to which courts, governments, and citizens differ in their assessments of what is just and fair decision-making and how the rules of natural justice and fairness should be applied.

Natural Justice and Fairness: A Closer Look

The rights granted to those directly affected by administrative decisions provide substantial procedural entitlements to facilitate the participation of affected parties in the decision-making process. In fact, these entitlements resemble those found in any trial process. While these rules are easy to state in theory, the application of theory to practice often poses difficult problems. With respect to each of the rights or rules, particular circumstances can and do call into question how the rule should be applied or whether it should be modified or waived in a given circumstance. An exploration of a number of classic problems of rule application is now helpful.

We have stated that there is a right to legal counsel at regulatory hearings. This is a fair statement regarding current judicial interpretation of natural justice. This entitlement is relatively recent, however, having been established in practice only over the past 30 years; prior to this, courts in Britain and Canada expected parties to represent themselves at hearings or to be represented by non-lawyer agents. Many tribunals supported such a restriction on the appearance of legal counsel on the grounds that regulatory hearings were not trials and should remain free from certain characteristics associated with the appearance of lawyers into decision-making

processes. It was held that legal counsel would make the process more complex, cumbersome, and expensive. It was also argued that admission of legal counsel would tend to escalate, with each party retaining counsel, such that a process originally conceived as being an administrative hearing to gain and exchange information and opinion between interested “actors” would become an elite legal forum dominated by professional lawyers, in which the actual interested parties would become but secondary players. For these reasons, legal counsel were excluded from most hearings for most of this century.

With the increasing number of lawyers in Canada in the post-war era, however, and with the growing consciousness of rights over the past 30 years, it is not surprising that more and more tribunals have been allowing legal counsel to participate in hearings, with the courts endorsing such involvement. Most people now fully expect to be able to be represented by legal counsel when they must deal with regulatory bodies, to the point that we can speak of a right to counsel in regulatory hearings. But there are still controversies with this rule.

Many labour relations boards and tribunals long resisted the involvement of legal counsel in their deliberations for all the reasons mentioned above. The classic case here is *Men’s Clothing Manufacturers and Toronto Joint Board* (1979). Throughout the post-World War II era, labour disputes in the Toronto clothing industry had been resolved through a process of arbitration overseen by the Ontario Labour Relations Board. This process was founded on tripartite arbitration in which management and labour representatives were entitled to participate in the presentation and analysis of facts and arguments, but the board, on the initial agreement of all parties, had decided to prohibit representation by legal counsel. This exclusion was justified by the desire for speed, efficiency, economy, and simplicity in decision-making as well as by the belief that basic labour relations disputes can and should be resolved by the actual parties

involved—management and labour—without professional legal involvement. Such informal decision-making would result, it was believed, not only in more efficient and economical decision-making but also in more practical decisions acceptable to the concerned parties.

In this case, however, the management side made the unprecedented request for representation by counsel, on the grounds that the case involved a particularly difficult issue of legal interpretation, thereby requiring management to have professional legal advice. The union challenged this request, making the classic defence for the exclusion of legal counsel. In its initial decision, the Labour Relations Board essentially upheld the union position, stressing that representation by legal counsel in such labour relations disputes was generally both unnecessary and undesirable. Yet, in a partial victory for the management side, the board held that, given the technical legal issue in dispute in the case, both parties could retain counsel, but only in relation to this one matter. On all other issues the parties would have to represent themselves in their dealings before the board, as had been the board's tradition.

Management was dissatisfied with this ruling and sought judicial review in the courts. In 1979, the Ontario Supreme Court agreed, stressing that management had a full right to legal representation. The court ruled that the case involved matters dealing with legal rights and duties under labour relations law that were "considerable" and "complex." The outcome of the case could also have substantial impact on the economic interests of the parties, thus the court held that management and labour should have full entitlement to legal representation before the board, should they so wish.

Is this decision sound? Similar legal disputes had long been resolved without recourse to legal counsel. Why the change now? And if there is a particularly complex legal issue in this case, as recognized by the board, what was wrong with the board's approach to partial, selective

legal representation? Does the court's decision fail to address the negative side effects of legal representation? Is there a danger of having more and more quasi-judicial administrative decision-making reduced to legalistic decision-making, in which professional lawyers dominate the stage? Such questions still perplex those involved in the practice of administrative law.

A further problem area involves the application of the right to examination and cross-examination. The basic rule holds that a person whose rights, duties, or interests are directly affected by a government decision has the right to a hearing, during which he or she can have legal counsel engage in the examination and cross-examination of all evidence and argument presented to the decision-making body by any party. But does such a right apply to those in prison facing disciplinary action for misbehaviour? In *Demaria v. Canada* (1987), an inmate—Demaria—was transferred by Corrections Canada from a medium- to a maximum-security prison for disciplinary reasons. At no time was he notified of the reasons for this move. He subsequently sought judicial review on the grounds that Corrections Canada had violated his right to a hearing and his right to examine and cross-examine the evidence that Corrections Canada had against him. Corrections Canada responded that the action of moving Demaria was a matter of routine administrative discretion based on highly confidential information gained by guards from prison informants. The prison authorities stressed that access to such information is vital in assisting them in managing prisons, and they need to be able to act on such “tips” without jeopardizing the secrecy of their contacts. In turn, Demaria argued that such decision-making was akin to a rumour-fed witch-hunt.

The eventual outcome was a defeat for Demaria. In 1986 the Federal Court of Canada held that while he had a right to a hearing, at which time he must be made aware of the basic reasons for his punishment, the penal authorities were under no obligation to release the sources

and direct contents of their background research. The court held that the need for prison authorities to protect the confidentiality of prison informants outweighs a prisoner's right to examination and cross-examination of information derived from such informants.

Most people would probably agree with this judgment, but many others will challenge the finding that Demaria had a right to a hearing at all. In past decades Canadians' opinions about prisoners' rights have hardened, with many people arguing that a criminal conviction should strip the convict of any rights under either the Charter or administrative law. But now consider the case of *Gough v. Canada* (1991).

In this case, Gough had been on parole for five years and had, as admitted by the National Parole Board, an unblemished record. He was considered the ideal parolee, until his parole officer received several confidential complaints alleging that he had been involved in some form of sexual misconduct. On the basis of these criticisms, Gough was detained, his parole was revoked, and he was returned to prison. While he was given a hearing prior to the revocation of parole, he and his legal counsel were refused disclosure of the complaints and those who had made them. Gough demanded a right to be made aware of his accusers and a right to have them cross-examined in public. The only evidence against him was from these secret complaints, and this evidence had been instrumental in denying him his freedom. He and his counsel argued that such decision-making was both unfair and dangerous in that the accused could not effectively respond to the accuser, meaning that the whole process could be perverted by those with malicious intent seeking, for whatever reason, to exact revenge on someone they know to be in a vulnerable position on account of his parole status. The National Parole Board rejected these claims, making an argument in favour of maintaining the confidentiality of its sources. In this case, however, the informants were not prison inmates but common citizens

within the community. Does this make a difference? Should the basic precedent of *Demaria* apply here or should Gough be accorded different treatment?

The final outcome was a victory for Gough. The Federal Court of Canada ruled that in such disciplinary hearings, one has to distinguish between cases arising within prisons and those dealing with inmates on parole within society. In the former cases, prison authorities' concern for confidentiality of sources is paramount, but, in the latter cases, the court held that the parolee's right to examine and cross-examine evidence was now paramount. The court found that there was no justifiable concern for protecting the anonymity of civilian sources of information and that, when a person's freedom is at stake, such informants should be made subject to cross-examination so as to allow the board to determine whether their allegations are truthful or not. Is this decision fair and reasonable, or does it pose a threat to the maintenance of order with respect to persons on parole?

A further point in regard to the application of the rules of natural justice and fairness centres on the concept of bias and the need for judicial review to control and counteract perceived bias. The basic logic of natural justice and fairness, long accepted by the courts, is that under certain conditions individuals, groups, and corporations have the right to hearings regarding their rights, duties, and interests, with the recognition that the quasi-judicial administrative decision-maker in these cases will be unbiased. The basic rule against bias is that the decision-maker must be independent of, and impartial to, the parties involved in any given case; in other words, one cannot be involved in decision-making when one has a direct personal interest in the outcome of the case (Jones and de Villars 1999, 352–54).

Bias will thus be found to exist if a decision-maker has a pecuniary interest in the outcome of a case or if he or she directly knows or is related to one of the parties in the case. The

courts have held that bias also exists if a decision-maker has previously been a solicitor or client of one of the parties or has had or still maintains business relations with one of the parties. Bias is also found to exist if the decision-maker acts as both prosecutor and judge in a given case, if the decision-maker receives secret communications from one side in the dispute, or if the decision-maker sits on appeal from its own decision. In any such case, if such conditions are found, an aggrieved party can seek judicial review on the grounds of a biased proceeding, demanding that the courts rule the proceeding and any resultant decision null and void.

These basic provisions have long been accepted as necessary and sensible to fair, quasi-judicial administrative decision-making, but difficulties do arise in how they are to be applied and interpreted in particular instances. In *MacBain v. Canada* (1985), MacBain, a manager, was alleged to have sexually harassed a female employee under his supervision. The employee launched a complaint against MacBain with the Canadian Human Rights Commission. MacBain steadfastly denied the allegation, so the conciliation process, the initial first step in a human rights case, failed. The commission then appointed an investigator to assess the merits of the case. The investigator found that the complaint was “substantiated.” The commission then established a tribunal to deal with the complaint and appointed the members of the tribunal. Once established, the commission acted as prosecutor against MacBain before the tribunal it had created, and the defendant was found guilty of sexual harassment. Not surprisingly, MacBain sought judicial review on the grounds that the process was biased, and he won.

In 1985, the Federal Court of Appeal found that the process to which MacBain had been subjected was biased in a number of respects. First, the court held that the investigators finding that the complaint had been “substantiated” suggested a note of pre-judgment on the behalf of the commission. The court stressed that, in future, such investigations should simply report

whether or not there is substantial evidence to merit proceeding with the case. It is then to be left to the tribunal to decide how this evidence is to be interpreted.

Second, the court ruled that the institutional connection between prosecution and adjudication was exceedingly close. The commission acted as chief investigator, tribunal creator, and prosecutor. This, to the court, resulted in an apprehension of bias and of a foregone conclusion. The court stressed that in the future there should be a stronger separation between prosecution and adjudication, with some other legal authority being responsible for the creation and appointment of tribunals. Given this ruling in *MacBain*, this responsibility now resides with the minister of justice, with the Department of Justice being responsible for the establishment and staffing of tribunals when one is requested by the Human Rights Commission. In this manner those acting as adjudicators on such tribunals are now insulated institutionally from the commission itself.

A different but even more perplexing challenge of bias arose in the late 1980s. In *Sethi v. Canada* (1988), Sethi sought refugee status in this country, but his claim was rejected by the Immigration Appeal Board. Sethi's legal counsel sought judicial review on a claim of bias, claiming that the members of the appeal board at that time were systemically biased against all refugee claimants, due to pending legislation. The argument was that proposed legislation—Bill C-55—was before the House of Commons, with the thrust of this legislation being the abolition of the Immigration Appeal Board and the creation of a new refugee determination board. When this legislation took effect, the abolition of the old board would also result in the abolition of all appointments to it. Consequently, all those officers working for the Immigration Appeal Board and wishing to work for the new board would have to gain reappointment from the minister if immigration. Sethi's counsel claimed this dynamic of job insecurity on behalf of hearings

officers had the effect of biasing their judgment, in that those wishing to maintain their positions would be more likely to rule in favour of the government than against it as a means of ingratiating themselves with the minister and those senior department officials who would later have the duty of making appointments to the new board. The Immigration Appeal Board, of course, wholly rejected this line of argument, stressing before the court that all its officers were impartial and in no way subject to any pressure from any department official or from any pending legislation.

At trial, Sethi won, with the trial judge holding that, given the proposed legislation, the members of the board may “have been put in a position where they have every reason to think that their immediate financial future is unsettled and in the hands of the government.” Given this, the court found that the potential for bias existed, since board members might have acted to please the government in order to gain reappointment. Upon appeal, however, the Federal Court of Appeal overturned this decision, claiming that any inference of bias from the facts in this case was unreasonable and that to hold otherwise would be to accept that the government’s interest lay in denying refugee status to claimants. The Court of Appeal held this conclusion to be unreasonable.

But was it? This was precisely Sethi’s point of concern. Was it reasonable to believe that a Conservative government would exert subtle influence on hearings officers to render decisions favourable to the government and its restrictive policy approaches to refugee rights? The decision ultimately rests on what one considers to be a reasonable interpretation of the facts and arguments in the case. Note, however, that differing courts came to diametrically opposed conclusions on this matter. Sethi eventually lost because the Court of Appeal could overrule the

trial court and the Supreme Court of Canada refused to hear the case. But did the Court of Appeal arrive at the most reasonable decision?

A final point to note in regard to the principles of natural justice and fairness and how they are applied in a complex world deals with written reasons. On the face of it, this appears to be a simple and straightforward requirement of any decision-maker. Once a decision has been made on a given case, the parties to that case are provided with written reasons explaining the decision-maker's judgment and highlighting the relevant factual and legal positions that led the decision-maker to the final assessment. In this sense, the rule for written reasons is based on the same logic as that applying to judges in any significant court decision. But many regulatory agencies are not like courts, in that some of the former can possess mammoth caseloads that make the requirement of providing detailed written reasons an onerous prospect. Workers' compensation boards across the country, for example, can have caseloads reaching into the hundreds of thousands a year, meaning that on any given day they are deciding hundreds if not thousands of cases, with many of these matters being routine and repetitive. In such instances, is it reasonable to expect claims officers to write elaborate reasons for each decision? Or, in other words, is it acceptable and just for such claims officers to use pro forma reports designed to explain particular routine findings and conclusions, either for or against a claimant, in a particular routine fashion? A number of high-volume regulatory agencies across the country have resorted to such techniques for producing written reasons, and, in most instances relating to routine matters, these actions have been upheld by the courts (Evans et al. 1995, 507–09). For decisions that are not routine, however, for those that break new ground on law and policy, the courts will expect much more elaborate reasons, and this policy position is readily endorsed by most agencies.

Judicial Review and Jurisdiction

The second major ground for judicial review of administrative action is that of an alleged error in the jurisdiction of the decision-making body (Jones and de Villars 1999, chap. 5). The legal concept of jurisdiction and the jurisprudence surrounding its interpretation are complex. The following is a summary of major points as they relate to public administration.

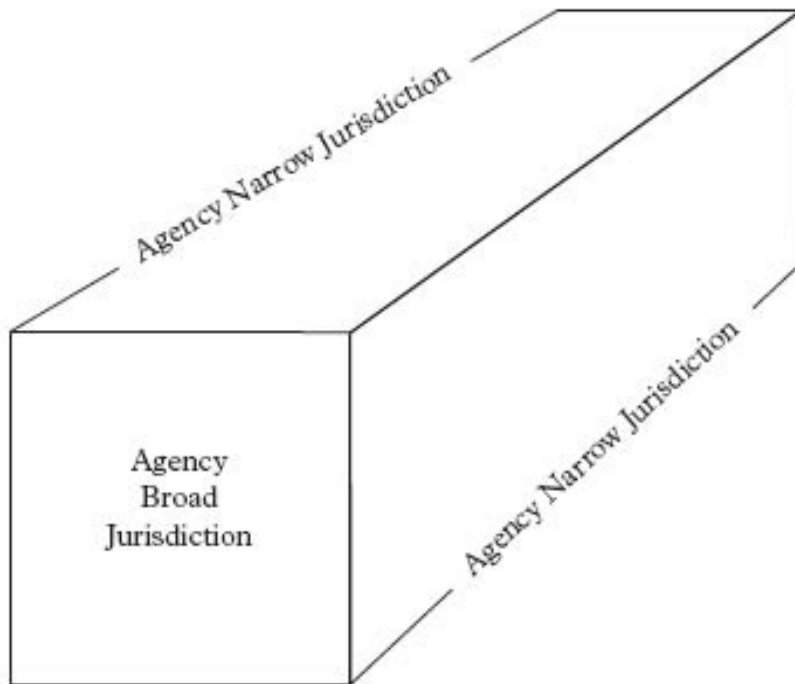
Jurisdiction refers to the legal authority of an administrative decision-maker—a minister, department, agency, board, or commission—to render decisions affecting the rights, duties, and interests of individuals, groups, and corporations. Such decision-makers can only render decisions within their scope of jurisdiction. If decisions and the process leading to them are within jurisdiction, the decisions are legally valid and binding; if not, if the process and the decisions have exceeded the jurisdiction of the decision-maker, the resultant decisions are null and void.

As Jones and de Villars (1999, chap. 6) point out, jurisdiction can be seen as having two interrelated aspects, one narrow and the other broad. Narrow jurisdiction refers to the legal quality of the shape, form, and procedure of the given decision-maker. The question here is whether the decision-making agency has been properly constituted to allow it to make legally binding decisions and whether, in so doing, it has followed all procedural requirements demanded by law. Narrow jurisdiction can be best understood as referring to the structural and procedural qualities of the decision-maker and whether these conform to law, giving the body its legal legitimacy to engage in quasi-judicial administrative decision-making.

Box 10.2

The Concept of Jurisdiction

The box represents the legal boundaries of the authority of a department or agency to make legally binding decisions.



The exterior boundaries reflect the “narrow” jurisdiction of the decision-maker. These are the procedural rules and obligations that decision-makers must adhere to in order to create the legal boundaries—the legal structure—that will enable them to engage in legitimate decision-making.

“Broad” jurisdiction exists within the boundaries. As long as the decision-maker has properly established its “narrow” jurisdiction, the decision-maker will claim full legal power to make all decisions and judgments within the ambit of its legal powers.

Broad jurisdiction, in turn, refers to the substantive ambit of a decision-maker’s authority once it is recognized that the agency is duly constituted and has properly fulfilled all the requirements of narrow jurisdiction. Broad jurisdiction refers to the legitimate authority of a quasi-judicial administrative body to make any and all substantive decisions within its jurisdiction so as to allow it to deal effectively with the problems and issues before it. As such, broad jurisdiction addresses the matter of the substance of an agency’s decision, not the process by which that decision is made. This distinction between narrow and broad jurisdiction becomes important with regard to the concept of error of law, privative clauses, and the power relationships between courts and regulatory agencies.

Historically, the courts have been most concerned with controlling the narrow jurisdiction of decision-makers; that is, with determining whether departments and regulatory agencies have the right to engage in legal decision-making by having fulfilled all legal requirements expected of them prior to reaching a decision. But once it has been established that they (regulatory agencies especially) have met and fulfilled all the requirements of narrow jurisdiction, agencies and their responsible governments have sought to expand and protect the ability of administrative decision-makers to make decisions, interpret law, establish jurisprudence, and apply policy free from strict judicial scrutiny. This is the heart of broad jurisdiction: once an agency has properly established its right to engage in quasi-judicial administrative decision-making, its leaders have sought to have its legal and policy decisions stand as the final word on the application of law and policy in its given field—regardless of whether superior courts agree with the interpretation of law and policy taken by the given agency. Such attempts at making regulatory agencies, and not courts, the final decision-makers in matters of administrative law are codified in privative clauses—legal provisions found in enabling statutes that serve to deprive the courts of the right to review the legal decisions of agencies. The courts, however, have ruled that privative clauses can only be valid if the agency in question has properly established and respected its narrow jurisdiction, hence the importance of the distinction.

Narrow Jurisdiction

As Jones and de Villars (1999, 127–30) explain, any administrative decision-maker must meet certain legal requirements to establish its narrow jurisdiction. First, the agency must be validly constituted by law. If, for example, enabling legislation stipulates that a labour relations board must be tripartite, with board members coming equally from the ranks of organized labour,

management, and government, then this is how the board must be constituted. Any deviation from this form will result in the board having failed to establish its narrow jurisdiction.

Second, the decision-maker must actually possess the legal powers it is seeking to exercise. Departments and agencies can only exercise those powers conferred on them by statute. A workers' compensation board, for example, has the power to award compensation entitlements to injured workers; such a board has no authority, however, to grant injured workers a liquor licence enabling them to become involved in a new line of work. Only a liquor licence board has legal authority to grant liquor licences. Thus, an agency seeking to exercise a legal power that it does not possess is liable to judicial review for violating its narrow jurisdiction.

Third, in exercising their powers, all decision-making bodies must comply with all statutory procedural requirements regarding their decision-making, as well as with the rules of natural justice and fairness. If the enabling legislation of an environmental assessment board, for example, stipulates that notices of hearings must be published in local papers in advance of hearings, then this is a mandated procedural requirement, and failure to comply will result in the board being in violation of its narrow jurisdiction. Similarly, all requirements of natural justice and fairness are treated in the same manner. A failure to adhere to the rules of due process will result in an agency losing its narrow jurisdiction, rendering its decisions null and void.

Finally, decision-makers must comply with all preliminary and collateral matters legally required of them prior to engaging in decision-making. If, for example, securities regulation law makes distinctions between the rights and obligations of firms that are solvent as opposed to those that are bankrupt, and those with successor obligations and those without, then securities regulation commissions are required to interpret and apply these concepts to the actors in any

given case. Failure to do so correctly, in turn, will result in judicial review and a finding of violation of narrow jurisdiction.

Error of Law, Broad Jurisdiction, and Judicial Review

Error of law stands as the third major basis for judicial review of administrative action (Jones and de Villars 1999, chap. 11). The simple position here is that any error of law committed by a quasi-judicial administrative decision-maker can be made subject to judicial review by the court; if the court then agrees that a legal error was committed, it can render the affected decision null and void. The basic rule is that regulatory bodies must always adhere to the law in making decisions and that any violation of law must be subject to oversight and correction by the courts. Jurisprudence has long established that an error of law occurs when a decision-maker fails to properly interpret its legal powers, define its terms of reference, interpret its statute, apply past precedents, or interpret and apply its powers to specific fact situations. The concept of error of law is directly related to the concept of broad jurisdiction. Broad jurisdiction, as noted, refers to the broad issue area within which a decision-maker is allowed to make substantive legal decisions, and the concept of error of law stipulates that all substantive decisions must be legally correct.

Within this seemingly simple and desirable set of ideas, however, an explosive issue has dominated administrative law for the better part of four decades, has divided courts and regulatory agencies, and has resulted, in Hudson Janisch's words, in a "battle royal" being fought within the Supreme Court of Canada (Janisch 1978). The issue centres on the broad jurisdiction of agencies and the assessment of the legal merit of their substantive decision-making. The questions are simple, yet go to the heart of the system of administrative law: What is the law? What is and what should be the law with respect to a given policy field? When the law is

ambiguous and requires interpretation, as is usually the case, what body is best suited to provide that interpretation and guidance: specialist regulatory agencies or generalist courts?

These issues are best understood in context. Since 1914 the Ontario Workers' Compensation Act (WCA) has established a Workers' Compensation Board (WCB) with the legal power to award compensation benefits, either temporary or permanent, depending on the severity of injury, to those persons injured while at work. The key to gaining compensation was to demonstrate that one had been injured by an accident at work. Until the 1980s the WCB had interpreted the statutory term "accident" in its commonsense meaning as referring to an unintended, sudden, undesirable occurrence resulting in "injury" or harm. Common accidents resulting in compensation claims involved such injuries as twisted and sprained backs, crunched fingers, cut or severed limbs, and so forth, up to and including death. Given this approach to legislative interpretation, for most of its history there was little debate as to whether the WCB was properly interpreting the terms "accident" and "injury" (Johnson 1990, 379–85).

In the mid-1980s, however, a fascinating debate arose over injuries and accidents. Two sewing machine operators working in a Toronto garment industry "sweatshop" developed repetitive strain syndrome in their hands and arms so that they were incapable of working. Both women filed claims for compensation on the grounds that they had been "injured" at work as a result of narrowly repetitive hand and arm motions over some 10 years of employment. The WCB rejected both claims, however, on the grounds that there had been no "accident" as understood by the board and that compensation could only be awarded as a result of a work-related accident. The claimants and their lawyers appealed this decision to the Workers' Compensation Appeal Tribunal (WCAT), and, in a landmark decision, the WCAT overturned the WCB and upheld the claim, stressing that the term "accident" should be given a broad and liberal

interpretation to ensure that justice is done to injured workers. The WCAT held that many approaches can be taken to the concept of accident, including viewing certain accidents as arising slowly over time but resulting in definite injury. In this sense it ruled that the work process was the accident that led to the claimants' injuries and that they should be compensated.

The employer sought judicial review of this decision on the basis that the WCAT had committed an error of law in improperly interpreting the meaning and application of the term "accident." The employer argued that the traditional definition, as long accepted by the WCB, should be upheld, both because of its simplicity in application and because of its narrow scope. Indeed, many employer groups were fearful that if repetitive strain syndrome was accepted by the WCAT and the courts as a valid injury requiring compensation, the WCB would be flooded with such cases, leading to a resultant increase in the compensation costs borne by employers. On review, the Ontario Divisional (Administrative Law) Court upheld the position of the employer, overturned the decision of the WCAT, and reaffirmed the ruling of the WCB.

The WCAT, however, appealed this decision to the Ontario Court of Appeal, and this superior court, in turn, overturned the divisional court ruling in *Re Kuntz and WCB, Re Dagenais and WCB* (1987) and upheld the decision of the WCAT. In making this ruling, the Court of Appeal stressed the complex nature of repetitive strain injuries and how the entire case turned on the legal interpretation to be given to the term "accident," arguing that there was no one "correct" interpretation of this term, but, rather, a number of ways the term could be understood and applied. In essence, the court recognized that the law was ambiguous and that the agencies and the courts were confronted with a choice as to how the law regarding compensation should be developed for the future. Regardless of the choice made, the resulting decision would have a legal foundation supported by a reasonable understanding of the concept of accident. The

question became which legal decision-maker should be accorded the authority to make this decision, to choose which legal approach is more desirable and appropriate to the development of workers' compensation law and policy. In answering this question in favour of the WCAT, the Court of Appeal asserted that the WCAT, not the courts, was the body specifically designed by the government and legislature to address these issues of legal interpretation and application regarding compensation policy. The WCB and the WCAT were designed to specialize in the field of compensation policy, bringing their expertise, their corporatist representation, and their practical judgment to bear on these cases. The court ruled that these bodies, and ultimately the appeal tribunal, are best suited to decide these difficult issues. Thus, providing that the WCAT's narrow jurisdiction was valid and that the agency's basic interpretation of the law was reasonable, the court held that it should defer to the legal judgment of such a regulatory agency.

This decision was important at the time, but it was neither unique nor exceptional. By the mid-1980s this approach of judicial deference to major decisions of expert regulatory agencies had been well established in Canadian administrative law, dating from the 1979 decision of the Supreme Court of Canada in *CUPE v. New Brunswick Liquor Corporation* (1979). What this compensation case illustrates, however, is the ambiguous, problematic nature of "law," the varying approaches one can take to "law," and the power relations and issues that exist between regulatory agencies and courts. The law is not some absolute set of rules, fully and immutably formed, that is simply and methodically applied by regulatory bodies and courts the way a mathematician applies the rules of arithmetic to basic numerical problems. Rather, the substance of the law is always in a state of flux because the law, and understandings of it, emerge from public policy fields that are themselves always changing. As political, social, and economic values and assumptions change in regard to desirable public policy, these changes affect the way

citizens, politicians, public servants, lawyers, and judges understand and interpret justice in relation to any given public policy field. Because of this state of flux, it is not surprising that a near constant stream of legal disputes arises surrounding the merits of government action, as differing interests seek to advance their preferred interpretation of what the law and justice should be. Likewise, given all this, it is not surprising that significant tensions have existed between the courts and regulatory agencies regarding what body should have the last word on legal interpretation in administrative law.

The Constitution and Judicial Review

The fourth and last basic ground for judicial review is that of a constitutional deficiency in the action of an administrative decision-maker. Traditionally, the main constitutional problems that decision-makers had to be wary of were those relating to the federal-provincial distribution of power. Federal bodies had to be careful not to intrude into provincial jurisdiction and vice versa. With the passage of the Canadian Charter of Rights and Freedoms in 1982, however, an important new legal framework entered the scene. Quasi-judicial administrative decision-makers must now also ensure that their actions are consistent with the provisions of the Charter, and any violation can be grounds for judicial review.

Box 10.3

The Charter of Rights and Administrative Law

A number of provisions in the Charter are directly relevant to administrative law, namely:
Section 7: Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
Section 8: Everyone has the right to be secure against unreasonable search and seizure.
Section 9: Everyone has the right not to be arbitrarily detained or imprisoned.
Section 15(1): Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A number of provisions in the Charter are especially applicable to the work of administrative bodies. By far the most significant has been Section 7, closely followed by Section 15(1). As the Supreme Court of Canada has ruled, Section 7 is a two-pronged set of rights, granting everyone in this country rights to life, liberty, and security and guaranteeing that if state action will affect these rights, such action must be undertaken in accordance with the provisions of fundamental justice. The importance of Section 7 in administrative law was spelled out nowhere more clearly than in *Singh v. Canada (Minister of Employment and Immigration)* (1985). In this case, Singh sought refugee status in this country. His claim was rejected first by the Canadian immigration authorities and then by the Immigration Appeal Board. At no time during any of these proceedings and determinations was Singh accorded an oral hearing where he and his counsel could speak directly to the decision-makers about the conditions in India that made him fear for his life and security. Rather, given the existing refugee determination process, Singh could only make written representations about why he should be accorded refugee status.

Upon his claim being rejected by the Immigration Appeal Board, Singh appealed to the courts on the grounds that his Section 7 rights under the Charter were violated. A deportation order would threaten his life and security, and the board procedure in denying him refugee status had not been in accordance with natural or fundamental justice. In a major ruling, the Supreme Court of Canada agreed with him and set certain important precedents. First, when the Charter speaks of “everyone,” the court held that this truly means *everyone*, not just Canadian citizens and landed immigrants. Every person present within Canada and subject to Canadian law is entitled to the same rights and freedoms in the Charter. Second, in refugee cases, the court proclaimed that fundamental justice required that all claimants be accorded at least one full oral

hearing at which time they or their counsel could examine and cross-examine evidence and argument and generally speak to the decision-makers about the merits of their claim.

With this decision the Supreme Court radically transformed the policy process for refugee determination, giving Canada one of the most progressive refugee systems in the Western world. At the same time, the requirement of offering full oral hearings in all cases, in keeping with the requirements of natural justice, has placed significant administrative and financial burden on the federal government in its refugee determination process. This process has experienced backlogs and case delays for the past decade, as managers now have to address the demands for expeditious handling of cases, the sorting out of valid from invalid claims of refugee status, the deportation of invalid claimants, and the granting of landed immigrant status to valid claimants, while providing all claimants with a full oral hearing. Granted, the demands on the refugee system are now much greater than in the past; in fact, this field of administrative law has been one of the great growth areas in law in the past decade, and, as noted above with reference to *Sethi*, the federal government has struggled with developing appropriate administrative mechanisms to meet these requirements effectively yet economically. Nonetheless, as the Supreme Court of Canada stated, these refugee determination decisions are of the utmost importance to the claimants and to the Canadian government—lives are at stake, and a wrong deportation order can result in deprivation or death to the failed claimant and a charge of incompetence against the Canadian authorities.

In ruling as it did, the Supreme Court held that the term “fundamental justice” found in the Charter is essentially synonymous with the concept of natural justice as found in administrative law. Thus, the Charter provision serves as an additional bulwark for all those seeking to advance claims of natural justice and procedural protections with regard to life,

liberty, and security of the person. Such claims, in turn, extend far beyond refugee policy to penal policy, welfare policy, environmental policy, and corporate regulation, to name a few.

Administrative Law Remedies

When an individual, group, or corporation—the plaintiff—brings an administrative law challenge against a governmental decision-maker—a department or regulatory agency respondent—alleging that the government authority has violated one or more elements of administrative law to the detriment of the plaintiff, the plaintiff will also seek one or more remedies for the alleged breach of law. The major remedies, or “forms of relief” as Kernaghan and Siegel (1999, 454–55) call them, can be briefly highlighted.

Box 10.4

Administrative Law—Major Remedies

- certiorari
- prohibition/injunction
- mandamus
- habeas corpus
- damages

The writs of *certiorari* and *prohibition/injunction* are the most commonly sought administrative law remedies. *Certiorari* is a judicial writ, or order, quashing a pre-existing decision of a department or agency with respect to an administrative law matter. Such an order voids the previous decision on the grounds that it was contrary to one or more provisions of administrative law. The writs of *prohibition/injunction*, as the name suggests, are court orders either prohibiting a department or agency from making a decision that the court holds to be contrary to administrative law, or ceasing a state action, usually for a temporary period of time to allow a court to review the merits of the government action. In these senses, in seeking a writ of

prohibition, for example, a plaintiff seeks to exercise prior restraint on the decision-making activity of a government agent, while in seeking an injunction a plaintiff is usually attempting to temporarily stop an action of the state. Classic examples of such writs of certiorari and prohibition/injunction are found in the field of environmental law when courts order a department of public works or transportation either to cease to engage in, or to refrain from engaging in, the construction of sites and facilities that may be in violation of environmental standards and the property rights of individuals, groups, or corporations.

In contrast to the writs of prohibition/injunction is that of *mandamus*. A writ of mandamus is a court order commanding or mandating that a government department or agency actually make a decision that is required by administrative law, but that, for some invalid reason, the department or agency may be unwilling to make. The writ of mandamus thus compels a proper decision from a department or agency, but with the plaintiff having the onus of proving to a superior court that the government body actually does have a legal obligation to rule in favour of the plaintiff but is unwilling to do so. Classic examples of mandamus are found in regulatory and licensing law, where particular plaintiffs may claim that their right to an occupational licence is being denied to them because of unacceptable bias on behalf of government actors. The famous decision of *Roncarelli v. Duplessis* (1959) falls within this category.

One of the oldest writs in existence is that of *habeas corpus*. This writ (literally meaning “to have the body”) emerged in common law as a means of allowing courts to test the legitimacy of state decisions to restrain persons and hold them in custody. While the writ’s origins derive from criminal law, over the twentieth century it developed unique administrative law applications, especially with respect to immigration and refugee law and penal law. Refugee claimants or inmates in prisons claiming either wrongful detention or the improper application of

discipline while in custody can bring writs of habeas corpus against government authorities in order to have the courts review the reason for and the quality of state-ordered detention. The courts are then in the position of either affirming previous government decisions or altering and amending them to take account of proper administrative law procedures.

Finally, but certainly not least, there is the remedy of *damages*. This remedy will take the form of a court order commanding a government body found to be in breach of administrative law rules to pay restitution to individuals, groups, or corporations to compensate for damages they suffered at the hands of such improper state action. A damage claim by a plaintiff is invariably connected to a prior claim protesting the legality of administrative actions already undertaken by the state, with these actions having caused some form of monetary harm to the plaintiff. A writ for damages will then usually be associated with writs of certiorari, injunction, and mandamus. It is important to note that plaintiffs can seek multiple forms of relief from state actors through the filing of more than one writ against a government decision-maker. And damage claims can range from mere token amounts to considerable sums of money.

Judicial Deference and Privative Clauses

Judicial review of administrative action stands at the centre of administrative law. Much of this review focuses on procedural issues involving natural justice and fairness and jurisdiction but, as we have seen, an important and controversial aspect of judicial review revolves around the concept of error of law and the appropriate means of assessing the proper application of the law. While the courts have the undisputed legal right to decide all disputes regarding the validity of procedural and substantive actions of administrative decision-makers, an interesting debate continues as to what bodies should have the practical prerogative of deciding the substance of administrative law. As already observed, the courts are clearly recognized as being the

institutions best suited to rule on disputes about the narrow jurisdiction of administrative bodies, but strong differences of opinion exist as to whether the courts, or regulatory agencies, are best suited to have the last word on the substantive merits of law.

According to the traditional legal perspective dating back to the 20th century, superior courts should retain final oversight and control over all legal decisions made by administrative decision-makers. According to authors such as Dicey (1961), Hewart (1929), and McRuer (1969), the courts are ideally suited to this task in that they are specifically designed to evaluate and adjudicate the legal merits of all decisions having the force of law. As such, the courts, rather than regulatory bodies, are the guardians of the law. Moreover, these authors stress that courts are especially capable of fulfilling this task of imposing legal accountability over governments because judges are experts in the law while being independent from the government of the day and impartial to any specific policy initiative. The same, it is argued, could not be said of administrative decision-makers, regardless of how much distance they have from their ministerial supervisors. Finally, the argument is made that judicial review, ultimately culminating in review by the Supreme Court, allows for uniformity in the basic principles and practices of administrative law; the law is shaped by one institution with one vision of appropriate administrative law and justice for the entire country.

In contrast to this traditional and persuasive legal perspective stands an alternative administrative perspective championed by many in government, in academia, and even in the courts themselves. As analysts such as Willis (1935), Arthurs (1979), Nonet (1969), and Janisch (1978) contend, substantive decision-making in regard to administrative law should remain the prerogative, as much as possible, of specialized regulatory agencies. Such agencies, and not the courts, are best suited to determine complex legal and policy issues that arise in particular fields

of administrative law, as witnessed in the compensation policy field outlined above. Agencies tend to be specialized bodies, staffed by experts in a given policy field, with such staff often being representative of the diverse socio-economic interests affected by the agencies' decisions. These persons bring an expert knowledge of a policy field to their decision-making, as well as a practical understanding of the broad social and economic undercurrents within that field. The courts, in contrast, are generalist bodies, ironically in no way able to claim specialist knowledge in specific fields of law and policy.

Certain authors will also point to an institutionally conservative bias within the courts, because judges are recruited from the ranks of the private bar, having little practical awareness and understanding of the collective functions of government policy-making and administration. Thus, judges will be less sympathetic to the actions of government bodies, tending to favour individual and private property rights over collective interests. It is further argued that, similar to courts, regulatory agencies usually do possess strong institutional independence and impartiality, meaning that they are sound adjudicative bodies; if and when doubts arise on this account, such a dispute becomes a matter of narrow jurisdiction regarding bias, a matter for the courts to decide. This, however, does not reflect on the substantive merits of regulatory agencies as being legal decision-makers.

The defenders of regulatory agencies as final arbiters also argue for the practical benefits of quasi-judicial administrative decision-making. Given their specialization in one particular form of policy and adjudication, agencies can develop economies of scale as they become expert in their case-flow management. This managerial point is not to be downplayed. The annual caseload of some agencies is enormous. For example, the Ontario Workers' Compensation Board decides some 425,000 claims every year, roughly 1,500 per day. An already overburdened

Ontario court system would collapse with this additional caseload. A similar reality is found in every province. Besides case-flow management, there are also the practical benefits of economy and efficiency. In all instances it is less expensive for individuals, groups, or corporations to access regulatory agencies than to deal with the courts. Procedures are simpler; in certain instances legal counsel is not required or the agency will bear legal costs of complainants, as in human rights complaints; and in most instances cases are resolved far more expeditiously by regulatory agencies than by courts.

For these substantive and practical reasons, advocates of agency autonomy in decision-making assert that, as long as agencies can demonstrate that they possess these attributes, their substantive decisions should be respected and deferred to by the courts in all judicial review proceedings that concern error-of-law applications. In other words, as long as agencies possess these attributes of specialization, expertise, representation, independence, economy, and efficiency, and as long as their substantive legal rulings are reasonable, they should be free from being overruled by the superior courts. If it were otherwise, the whole point of having separate quasi-judicial administrative agencies could be thrown into jeopardy.

Privative Clauses and Judicial Review

In support of this latter perspective of judicial review, most governments in Canada have moved to insulate their major regulatory agencies from judicial review on matters of law (Jones and de Villars 1999, 691–703). The means by which they seek to accomplish this is through inclusion of a privative clause in the enabling legislation of the given agency. As seen in Box 10.5, a privative clause essentially stipulates that the decision of an agency is final and not subject to judicial review in any court.

Box 10.5

A Privative Clause

This is the Privative Clause found in Section 108 of the Ontario Labour Relations Act, Revised Statutes of Ontario 1980, dealing with the powers of the Ontario Labour Relations Board.

108. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgement, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

This would appear to be a straightforward conclusion to the entire issue, but nothing in administrative law is straightforward. The courts have generally reacted with hostility to privative clauses, because they circumscribe their jurisdiction as ultimate adjudicators of law. Canadian courts have been able to neuter the effectiveness of privative clauses through an ingenious legal logic. The courts have held that when privative clauses speak of a decision, they must mean a legal decision, as it would be irrational and unreasonable to believe that a government and legislature would want to protect an illegal decision from judicial review. Thus, only legal decisions are protected from review, and when questions arise as to whether a decision is legal or not, the courts have asserted that they must have the final power to resolve the issue, since the agencies themselves would be biased in such adjudication. Yet, as we will later see, courts have recently given greater consideration to privative clauses when conducting a standard of review analysis.

Courts and Agencies

This does not resolve the tensions between courts and agencies. Clearly, courts are the superior adjudicative institutions in Canada, and they will assert and defend their supremacy in this respect, notwithstanding any privative clause. Though the courts have an undisputed right to oversee and assess all legal decision-making, this does not necessitate that they will actively

exercise such a right in all instances. In certain cases, the courts may well agree to defer to the judgment of a regulatory agency, thereby giving the agency the *de facto* if not the *de jure* last word on a given subject. This, of course, is the result of the compensation case recounted above, *Re Kuntz and WCB; Re Dagenais and WCB* (1987).

As mentioned in the commentary on that case, the trend toward judicial deference has been developing since the late 1970s. Many judges respect the role of regulatory agencies in the Canadian administrative law system. In many ways, regulatory agencies can be better legal decision-makers than courts for all the reasons noted above. Many courts, including the Supreme Court of Canada, have spoken in favour of a policy of judicial deference to agency decisions under certain circumstances. The landmark case here was *CUPE v. New Brunswick Liquor Corporation* (1979).

This case dealt with a complaint from a Canadian Union of Public Employees (CUPE) local that the New Brunswick Liquor Corporation was replacing striking employees with management personnel contrary to Section 102(3)(a) of the New Brunswick Public Service Labour Relations Act:

102(3) Where Subsection (1) and Subsection (2) are complied with employees may strike and during the continuation of the strike

- (a) the employer shall not replace the striking employees or fill their position with any other employee, and
- (b) no employee shall picket, parade or in any manner demonstrate in or near any place of business of the employer.

The basic logic of the provision was that employees of the New Brunswick public service had the right to strike; that once on strike the employer was not to replace these striking employees with any other employees (scab labour, in the eyes of the union); and that in return for this guarantee against the use of replacement workers, the union would agree not to picket the job site subject to strike action. The problem in this case arose when the employer began using

management personnel to perform the functions of striking employees. The union quickly brought action under Section 102(3)(a), demanding a prohibition on the use of such management personnel for the performance of “employee” work. The Liquor Corporation countered by arguing that its actions were perfectly legal because its management personnel were not “employees” as understood by the Act, and thus the use of such management personnel did not constitute the replacement of “striking employees” by “any other employee.” Instead, striking employees were being replaced by management personnel, and such a development was not expressly prohibited. In turn, CUPE argued that the management personnel who had been redeployed during the strike were no longer engaged in managerial supervisory activities but were doing the work of “employees” and, therefore, should now be viewed as “employees.” In other words, the employer was, indeed, replacing striking employees with “any other employee,” which was illegal. The critical questions in the ensuing legal actions were: What does the term “employee” mean in this legislation? Should one read this term in a more narrow, technical, and formalistic sense, or in a broader, functional, and operational sense? And which legal decision-maker is best suited to make this determination—a labour relations board or the court?

The New Brunswick Public Service Labour Relations Board ruled in favour of the union, stressing that while the legislation was vague regarding the meaning of “employee,” the broad policy purpose of the section in dispute was clear and important. Thus, the board brought an expansive sensibility to matters of legislative definition and related operational activities and responsibilities. The Liquor Corporation appealed this decision to the New Brunswick Court of Appeal on the grounds that the board had made an error of law in misconstruing the meaning of the term “employee” and thus had misapplied the law to the case in dispute. A majority on the Court of Appeal agreed with the management position, stressing that the corporation was correct

in its legal understanding of the term “employee,” that the Public Service Labour Relations Board had misdefined the term, that the term should be read in the “narrow” sense of employees being distinct from managers, that this was the only appropriate legal definition of the term, and that the action of the corporation in using managers to keep their stores open was acceptable. The union, in turn, appealed this decision to the Supreme Court of Canada, and so a rather simple argument about the proper interpretation of the word “employee” had to be decided by the highest court in the land. Of course, the dispute was much more involved than this, for it now dealt not only with the relative rights and wrongs of this particular labour dispute and the actions of the management side, but also with the role of the Labour Relations Board, the appropriate doctrinal approach to interpreting debatable legislative language, and the proper relationship that should exist between specialized regulatory agencies and the general courts.

In its judgment the Supreme Court deferred to the judgment of the New Brunswick Public Service Labour Relations Board with respect to what it considered a complicated matter of labour relations interpretation. In contrast to the New Brunswick Court of Appeal decision, the Supreme Court held that there were a number of reasonable approaches to defining the term “employee”; that any one approach could constitute a valid basis for interpreting and applying the law within the context of orderly and just labour relations; and that the primary role of the courts should be to determine whether the Labour Relations Board, or any such similar specialized regulatory agency in any similar case, had exercised its powers and responsibilities in an appropriate, legal, and just manner. In its judgment, the Supreme Court noted that the decisions of the Labour Relations Board were protected by a privative clause. In assessing this, Justice Brian Dickson, in writing for the court, stated:

The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area. (*CUPE v. New Brunswick Liquor Corporation*, 1979)

Chief Justice Dickson went on to stress that because the board was the expert body specifically designed to address such matters as the definition of "employee" and the application of relevant legal rights and obligations pursuant to such definitional matters, the judgment of the board, or any such specialized agency, should be deferred to by the courts so long as its legal judgment was "not unreasonable." As Dickson argued:

Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the courts upon review?

I do not see how one can properly so characterize the interpretation of the Board. The ambiguity of s. 102(3)(a) is acknowledged and undoubted. There is no one interpretation which can be said to be "right." (*CUPE v. New Brunswick Liquor Corporation*, 1979)

In ruling as it did, the Supreme Court stressed that, as a general doctrinal rule for the future, the courts should defer to the decisions of regulatory agencies provided that the agencies are expert bodies administering a specialized legal and administrative framework and that their decisions are in accordance with the rules of narrow jurisdiction, as well as patently “reasonable.” If agencies could demonstrate to the courts that they had met these requirements, the courts were told to defer to their judgments.

This ruling inaugurated a revolution in the application of judicial review and in the relations between courts and agencies. Following decades of battling, the courts were now recognizing administrative agencies as major and legitimate players in the field of administrative law. We are still living through this period of change, as well as of retrenchment on behalf of the Supreme Court of Canada. In the late 1980s and 1990s the court was divided on the extent of deference to accord to agencies and the legal framework to be used in setting the precise boundaries of deference. These debates are both complex and divisive, tearing the Supreme Court into two opposed camps, one more administrative and one more traditional in outlook.

The former tend to support and defend the principles and practical implications enunciated by Dickson in *CUPE*, while the latter tend to support a more narrow approach to deference and the legal interpretation of statutory language as promoted by the New Brunswick Court of Appeal in the same case. This ongoing struggle, highlighted in such cases as *Syndicat* (1984), *Bibeault* (1988), *National Corn Growers Association* (1990), *Lester* (1990), *Econosult* (1991), and *Dayco* (1993), illustrates the continuing judicial and administrative interest in setting the appropriate balance between the courts and agencies, but it is one about change at the margins of the deference doctrine. In *Bibeault*, for example, the majority on the Supreme Court continued to recognize the “deference doctrine” expressed in the earlier *CUPE* decision, but now

the justices stressed that in determining whether an agency is deserving of such deference, the courts should engage in a “pragmatic and functional analysis” of the agency in question, its legislative foundation, its structure and operations, its personnel, and its expertise in the field of law and policy within which it works. While a minority thought such an analysis would be too restrictive of agency discretion, it can be argued that such a review of agency attributes is consistent with the rationale from *CUPE* in that if an agency is to be granted deference by the courts with respect to the quality and substance of its decision-making, it must be able to demonstrate that it possesses the legislative, organizational, legal, and managerial qualifications to merit deference. This position was upheld by the court in *Lester* (1990). As Justice Beverley McLachlin (now Chief Justice) asserted in this case:

Courts should exercise caution and deference in reviewing the decisions of specialized administrative tribunals, such as the Labour Board in this case. This deference extends both to the determination of the facts and the interpretation of the law. Only where the evidence, viewed reasonably, is incapable of supporting a tribunal’s finding of fact, or where the interpretation placed on the legislation is patently unreasonable, can the court interfere. (*Lester*, 1990)

The deference doctrine remains entrenched in Canadian administrative law, as further demonstrated in *Dayco* (1993). In writing for a majority judgment upholding an Ontario labour arbitration award in this case, Justice Gerard LaForest stressed:

To begin, I would not wish my conclusions on the standard of review in this case to be taken as a retreat from the deferential approach to judicial review of administrative tribunals since the decision of this court in [*CUPE*]. Nor are the conclusions here inconsistent with the previous statements by this court as to the

appropriate scope of judicial review of arbitration awards made pursuant to s. 44 of the Act. This court has stated in previous cases that courts should, as a matter of policy, defer to the expertise of the arbitrator in questions relating to the interpretation of collective agreements. (*Dayco*, 1993)

As we have witnessed, a special legal and operational relationship continues to exist between courts and specialized regulatory agencies. Provided that these agencies meet all the legislative, administrative, professional, and legal requirements set out for them by the 1979 *CUPE* decision, the courts will, as a general rule, defer to their judgments with respect to their operational decision-making. That this general doctrinal approach has been defended and upheld by the Supreme Court for nearly a quarter-century speaks not only to the importance and calibre of such administrative decision-making but to the special relationship between courts and agencies. So long as the former are assured that the latter are making just and reasonable decisions on the nature and application of administrative law, the courts will happily defer to such decision-making, thereby not only helping to establish and maintain the institutional legitimacy of such regulatory agencies but also helping to deflect and diminish the amount of routine administrative law decision-making required of the ordinary courts. In this sense one can see a distinct division of legal labour arising over the past decades, with the courts being increasingly content to witness the development of expert, specialized regulatory bodies as major administrative law decision-makers, so long as the superior courts can continue to oversee their actions through the process of judicial review—but review moderated by deference.

Update on Standard of Review 1

A Shift in Canadian Administrative Law

As previously explained, the importance of judicial review and deference, which is at the heart of Canadian administrative law, is something the Courts have struggled with over time, which we have seen throughout the chapter. Deference is a fundamental concept, in which tribunals with specific expertise are relied upon to make fair and just decisions. But the rules governing judicial review have changed with the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick* (2008). The court did away with a pragmatic and functional approach as a standard of review and instead developed two standards of review in administrative law. These two standards are reasonableness and correctness.

A standard of reasonableness means the court defers to the decision-maker, limiting its review to an inquiry as to whether the tribunal's decision is intelligible, transparent, justified, and within a range of possible outcomes given the applicable facts and law in question (*Dunsmuir* 2008, para 47).

A standard of correctness applies to questions of law, typically outside of the expertise of the tribunal, and questions of constitutional law.

In *Dunsmuir*, the Supreme Court breathed some clarity into the decision-making process, hoping to "provide real guidance for litigants, counsel, administrative decision makers and judicial review judges" by developing a more workable and coherent framework. Now, when undergoing a standard-of-review analysis, the Courts give consideration to the following factors:

1. Whether there is a privative clause
2. The expertise of the tribunal
3. The nature of the question at issue before the Court
4. An assessment of the enabling statute to determine the purpose of the tribunal.

Interestingly, the *Dunsmuir* framework has created a presumption of deference in substantive judicial review.

Update on the Standard of Review 2

Another Shift in Canadian Administrative Law

In 2019, the Canadian Supreme Court was called upon to offer a revision and clarification of the standard of review in assisting quasi-judicial administrative agencies and lower courts as to what considerations and criteria courts should use in assessing whether decisions made by such administrative agencies are legally valid. In *Canada (Minister of Citizenship and Immigration v. Vavilov* (2019) the Supreme Court provided a refined assessment of how and why, and under what conditions, lower courts should provide deference to the quasi-judicial decisions of administrative agencies. The framework the Court outlined in this case does not mark a major departure from their decision in *Dunsmuir*, with the court reiterating that the key principles of *Dunsmuir*, the “hallmarks of reasonableness,” remain valid law, namely transparency, intelligibility and justification.

In *Vavilov*, the Supreme Court established a check-list of factors and procedures that administrative agencies would have to follow, and document, in their decision-making and final assessments in any and all cases:

1. Identify the facts to be proven
2. Apply the appropriate standard of proof
3. Identify the relevant evidence
4. Assess the credibility of the evidence
5. Determine the evidence’s probative value
6. Determine whether or not the evidence is sufficient

7. Render a decision
8. Record the decision

By following, and fulfilling, all these procedural and legal requirements, the decisions of quasi-judicial administrative agencies with respect to particular matters would exist within a realm where courts would grant deference to these decisions (*Vavilov* 2019, Sect. 3).

Administrative Law: Structuring Discretion

In understanding administrative law, it is important that one understands the broad contours of the relationship between government decision-makers, departments, regulatory agencies—and the courts. Judicial review of administrative decisions is one of the core elements of the Canadian system of administrative law. Judicial review, however, is not synonymous with administrative law. While there is a special relationship between courts and agencies, and while there have been major developments in this relationship over the past quarter-century, it is instructive now to remove the courts from our analysis of the law and the legal obligations of governmental decision-makers. As Hudson Janisch (1993) argues, a focus on administrative law that overly concentrates on the courts and actual cases of judicial review can have the unintended effect of distorting one's understanding of the reality of administrative decision-making and the degree to which such decision-making is routinely undertaken in accordance with due process and substantive justice.

When one focuses on matters of judicial review and those cases that challenge the actions of government decision-makers, one should realize it is an abnormal occurrence for plaintiffs to claim that a government department or agency has violated one or more of the elements of administrative law. The vast majority of administrative decisions to which the threshold rules of administrative law apply do not result in legal challenges. The overwhelming bulk of

government decision-making is not subjected to judicial scrutiny, because most government decisions are not challenged as to their legality. Most decisions of government departments and regulatory agencies are properly arrived at and executed by responsible officials, with most affected parties accepting the legitimacy of consequent state actions. Were it otherwise, both the courts and government would quickly grind to a halt, with most Canadians wondering about the effectiveness of government and the stability of this society. The fact that this nightmare scenario has not happened, and is not likely to happen, says something about the general quality of government decision-making and the relationship of the law to government. Government departments and agencies take their legal obligations under administrative law seriously and work assiduously to ensure that their decisions will not be challenged by plaintiffs or, if they are challenged, that the decisions of the state will be upheld by the courts. Government decision-makers in departments and regulatory agencies seldom want to have to go to court, they tend not to wish to see their actions become the subject of judicial review, and they certainly do not want to be “corrected” by courts for having engaged in wrongful conduct. Thus, cases of judicial review of administrative action can be seen as examples of failed government action, where state officials have failed to avoid legal challenge to their decision-making.

The right to engage in a legal challenge to alleged improper decision-making by the state is, however, a fundamental part of the rule of law. Moreover, while judicial review has helped, and always will help, to define the contours of natural justice and fairness, bias, and error of law, this alternative viewpoint to judicial review is important. Just as state officials do not desire legal challenges to their decisions, few plaintiffs actually want to go to court. Most individuals, groups, or corporations much prefer state decision-makers to come to a resolution of a matter that is generally viewed, from the outset, to be just and legal, fully appropriate under the rules of

administrative law, and thus beyond legal reproach. From the viewpoint of actors outside of the government but affected by state actions, the decision-making of the state may very well benefit from their active participation in the very process of decision-making. This calls for the close involvement of interested individuals, groups, and corporations in the initial decision-making of state actors. This ambition of establishing a framework for sound government decisions, such that the process of decision-making helps to diminish the likelihood or need for judicial review at a later date, has been at the centre of the concept and process of structuring discretion.

Structuring discretion refers to the scenario in which government decision-making authorities seek to clarify the rules and regulations, the meaning of statutory language, and the appropriate means by which they will engage in policy and program implementation prior to the actual undertaking of their statutory powers. Thus, structuring discretion can refer to a variety of issues, ranging from the broad policy aim of an agency and its general approach to particular fact situations, to the development of agency approaches to such matters as the training of staff, the development of case-flow management practices, and the initiation of agency public education undertakings designed to make target groups as well as the general public aware of the legal rights and obligations surrounding a given field of administrative law. In essence, while agency authorities have considerable discretion to define and apply their legal powers in a variety of ways, as a case like *CUPE v. New Brunswick Liquor Corporation* illustrates, Kenneth Davis (1969) asserted that these authorities will be much better off in the long run if they structure their discretion with respect to key policy, program, and managerial undertakings through the development of rules and plans derived from open policy-making hearings within which all interested parties can participate. State authorities benefit from the advice and wisdom of interested parties, just as these parties are exposed to the contending viewpoints of other parties

as well as to the broader policy goals and requirements of the state actors themselves. As the state agency develops policies, rules, and techniques of interpretation by which it will apply its discretion in future cases, at least it can be assured that all interested parties are aware of the policy and program approaches it is following, the definitional understandings it has of key legislative terminology, and the broad approach it takes to balancing the interests of various participants within the policy community. Davis stresses that such structuring of discretion is vital to effective and legally sound government decision-making, and this structuring requires that general rule-making hearings are held prior to the initiation of administrative decision-making.

In bringing interested parties together to establish a general approach for a department's or agency's understanding and application of its legal duties, the rule-making hearing is designed to benefit from the best of participatory management techniques. All interested and affected parties are brought together to discuss the role and work of the department or agency, all parties are allowed to put forward their interpretations of the desired role for the state decision-maker, and all are able to respond to the positions of the others. Likewise, state officials themselves can benefit from the exchange of views and inform the other members of the policy community of the policy and legal obligations of the government, its desired approaches to matters of legal interpretation, and its long-term objectives in policy implementation and law enforcement. In asserting the necessity of undertaking such rule-making hearings, Davis emphasizes the importance of open and free-flowing discussions between all interested parties:

The seven instruments that are most useful in the structuring of discretionary powers are open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal procedure. The reason for repeating

the word “open” is a powerful one: Openness is the natural enemy of arbitrariness and a natural ally in the fight against injustice.... Plans, policy statements and rules are three facets of essentially the same thing; all are designed to clarify and to regularize the purpose of the governmental activity. (Davis 1969, 102–03)

Such rule-making hearings, Davis argues, can make the administrative decision-making of the relevant state body better than it would have been otherwise, and this decision-making also becomes more understandable and acceptable to all interested parties, meaning that there will be less likelihood of it being challenged through the process of judicial review.

Evans et al. (1995, 1109–10, 1135–37) suggest that this rule-making process, very much an ideal approach to administrative law decision-making, has been increasingly supported and promoted by both the federal government and a number of provincial governments across this country. The benefits of such structured discretion, and the policy-making relationships engendered with major concerned interest groups, make the initiative one that governments are willing to undertake. It helps in the development of their administrative law enforcement and in either reducing the odds of legal challenges to their actions or enhancing the odds that state decisions will be upheld as not only being substantively just but also being the product of a just and fair participatory procedure open to all affected parties. The government of Canada has now endorsed such rule-making initiatives, as have the governments of Quebec and Ontario. Though these are important developments in the evolution of Canadian administrative law, it is important to note some of the problems attendant with such structuring.

As with any move to involve non-government elements in a participatory process designed to assist in the development of policy and the application of law, how does one determine who deserves involvement in the process? With whom should there be consultation,

and what should be the parameters of such consultation? If any and all interested individuals, groups, and corporations are given standing in such proceedings, the process could become so unwieldy as to be excessively time-consuming, costly, and cumbersome. Such a process can also become highly divisive if differing parties bring passionately held, yet sharply differing viewpoints to bear on the merits and demerits of desired courses of government action. This is nowhere better illustrated than in Sydney, Nova Scotia, where a joint federal/provincial/municipal initiative to provide advice to federal and provincial departments of the environment on the cleanup of the Sydney tar ponds was bogged down in bitter internecine squabbling between a variety of environmental groups and activists, business representatives, environmental engineers, and public servants for the better part of a decade from the mid-1990s to 2005. On the other hand, however, if participation in the process is strictly controlled by government decision-makers themselves, the resulting consultations run the risk of being viewed as being stage-managed and skewed to the institutional interests either of the government or of those major interests that have been invited to participate.

Once decisions about participation have been dealt with, there are further potential difficulties in regard to the organization of the rule-making hearings and their direction. Many persons and groups may be legitimately interested in such hearings and these hearings deal with some complex matters of law, legal interpretation, the development and application of public policy, and the appropriate interrelationships between interest groups and government departments and regulatory agencies; should legal counsel or other professional support be provided to those who might be at a competitive disadvantage given their lack of professional legal or managerial knowledge? The issue here is the quality of participation that differing individuals and groups can bring to such a process, and the fear that certain groups and

individuals—especially those that are wealthy, possessing greater educational and professional capital, and usually representing business interests—may come to dominate such participatory hearings. Government departments and agencies could move to level the playing field by providing financial or other professional support to “needy” individuals and groups, but then new questions arise about the selection criteria for such support, whether such support represents undesirable state subsidy of otherwise private interests, and whether that support simply becomes an unnecessarily costly imposition on the budgets of government departments and agencies.

A final point of concern regarding such participatory initiatives is the degree of control that state actors may exert over both the mandate of the process and its final conclusions. If the mandate of a rule-making exercise is left entirely to the decision-making of process participants, then the sponsoring department or agency will likely be criticized for having lost control of the process, with private-sector interests leading the policy and program direction of a public entity. No government entity would ever allow such a state of affairs to exist, so those engaged in these participatory undertakings will routinely set and maintain the agenda that the rule-making hearing will follow. But excessively tight control of the agenda, with a refusal to allow the process to evolve in order to respond to emerging concerns of participants, may result in the process being too tightly circumscribed, so that the participation of outside actors and groups becomes more symbolic than real. In this event, the legitimacy of participation is questioned, as is the worth of the final outcome of the process. The ability of the state actors to control the final results of the process also merits reflection. Given that such rule-making hearings are designed for the benefit and use of government departments and agencies, it is no surprise that they will control the final results. Government officials invariably will be responsible for the drafting of any final reports and recommendations emerging from the process. For it to be fair and

ultimately productive, these reports and recommendations should accurately reflect the discussions and decision-making occurring in the hearing. If this is not the case, or if the “tone” of the discussions is skewed to represent a pre-existing policy position preferred by state actors, then again the legitimacy and authenticity of the process will be called into question (Craig 1994, 374, 398–400).

The foregoing are just a few of the problems that departments and agencies encounter even when they begin to consider rule-making hearings and the structuring of department and agency discretion. Given the potential complexity of these problems, it is a testament to the perceived benefits of such structuring that the federal and various provincial governments have promoted and undertaken a number of such initiatives. As Evans et al. (1995) assert, this is one of the most interesting areas in the development of administrative law, but because it takes place beyond the glare of the much more traditional and court-centred process of judicial review, it is a development that has attracted relatively little public or even academic attention.

Administrative Law: A Retrospective

The presence and effect of government policies are all around us, and most government policies find themselves rooted to some form of law. To this end, we should expect to find administrative law all around us as well. Indeed, government decision-making that directly affects the rights, duties, and interests of particular individuals, groups, and corporations involves the world of administrative law. This world, in turn, encompasses everything from refugee and immigration law to labour relations and workers’ compensation, from radio and television broadcast licensing to restaurant and liquor licensing, from penal policy to environmental policy. In one way or another we are all, directly or indirectly, touched by administrative law.

Despite this importance, this field of law and public administration has been one of the least studied and understood aspects of both law and political science. Many in the legal community have been attracted to the more glamorous and lucrative fields of private and corporate law, while many in political science and public administration have tended to believe that administrative law is a technical field of law and thereby outside the bounds of these other disciplines.

Administrative law has become one of the fastest-growing fields of law as this society becomes more rights conscious. And, as we have seen here, administrative law is a fundamental component of political science and public administration. As the state exercises power in society, it must do so in a legal manner. The procedural and substantive rules of administrative law are designed to ensure that such power is subject to the dictates of law and justice. But achieving this goal is no easy task. In some instances, due respect for law and justice will necessitate state actors being held to account for the legal quality of their administrative procedures. In other instances, a due respect for law and justice may require courts to defer to the substantive decisions of quasi-judicial administrative actors, provided that those actors can demonstrate both the procedural and substantive merit of their decisions. Sometimes, development of just and effective administrative law may require departments and agencies to engage in the complex and trying, yet potentially beneficial, process of structuring discretion through the use of participatory rule-making hearings.

In all of this, one set of ultimate goals is essential to respecting the rule of law: actions of the state must be in accordance with law and due process; they must be ultimately subject to judicial review by independent courts; and they must be demonstrably reasonable and just. If public policy is a mirror showing us what we as a society value, then our system of

administrative law is a public affirmation of the principle that power must be subject to reason and justice.

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