

TRANSFORMING ADMINISTRATIVE LAW: THE DIDACTIC ROLE OF THE SUPREME COURT OF CANADA

H. Wade MacLauchlan*
Charlottetown

For the past three decades, the field of administrative law has been one of the greatest contributors to the workload of the Supreme Court of Canada. During that period, the Court has handed down at least ten cases per year dealing with mainstream issues of judicial review. This substantial body of jurisprudence, totalling some three hundred decisions since 1970, has pointed the way to a transformation in Canadian administrative law.

Durant les trois dernières décennies, le droit administratif a été l'un des domaines qui ont apporté le plus de travail à la Cour suprême du Canada. Au cours de cette période, la Cour a rendu au moins dix décisions par année, qui traitent de questions centrales de la révision judiciaire. Cette jurisprudence substantielle de quelque trois cents arrêts, depuis 1970, a tracé la voie d'une transformation du droit administratif canadien.

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I. Introduction

While few commentators would debate the claim that Canadian administrative law has evolved in a remarkable degree, there are many who would question why it has required such an effort. The Court's decisions in this area, notably on questions of substantive review, have been arduous and by times fractious. It has been difficult to find language that definitively settles new standards. And it has been difficult for the Court to lay down principles that can be applied in a definitive way by superior and appellate courts.

* H. Wade MacLauchlan, of the University of Prince Edward Island, Charlottetown, Prince Edward Island.

This paper will review the principal strands in the Supreme Court's administrative law jurisprudence. The main focus will be on substantive review, with coordinate reference to procedural review and to interpretation. It will contend that there has been an underlying shift in the terrain. However, it will also argue that this shift has not been carried to its full and logical extent, at least not yet. The collateral purpose of this paper, appropriate for this 125th anniversary of the Supreme Court of Canada, will be to reflect on, and to invite others to reflect on, *why* it continues to be such a challenge to definitively settle issues of judicial review of administrative action. In this sense, the paper presents an opportunity to talk about the didactic role of the Supreme Court.

II. *Three decades, and a significant degree of change*

Administrative law provides an excellent example of how the role of the Supreme Court of Canada has been transformed over the past thirty years. In 1970, it was a court of final appeal, weighted down with an as-of-right docket. Its primary work was to ensure the correct application, and sometimes clarification, of precedent-determined rules. In limited areas, notably in the constitutional division of powers, the Court played a more overt public policy role.

As of 1970, the Supreme Court served mainly as a further level of appeal in matters where parties had the resources and the time to protract matters, and to hope for a different outcome, through judicial review. The Court's administrative law jurisprudence was largely derivative, positivistic, and driven by a rule-of-law oriented suspicion of the administration. Interpretation was a modest discipline, focussed on a correct reading of legislative intent or the correct application of precedent-bound rules of interpretation. Administrative justice was still considered to be an exception to, or derived from, a court-defined norm.

By the mid-1970's, it was clear that the Supreme Court wanted to achieve greater finality for administrative decision-making. Articulating a doctrine of curial deference was an important measure, as was the initiative in procedural review to move from all-or-nothing classifications to a more fluid approach. Perhaps the most important initiative was to develop, and to model, a more comprehensive and functional approach to interpretation. The overall result has been to move, sometimes ever so indiscernibly, toward an integrated "pragmatic and functional" approach.

The formal approach to judicial review was built around doctrinal categories that were more about remedial constraints and the limits of judicial power than they were about good administration or about a functional assessment of what was actually happening in administrative decision-making. Procedural requirements were derived from analogies to adjudication, and only extended to decision-makers that could be classified as "quasi-judicial". Substantive interpretation adhered to the rule of law and the jurisdictional principle.

In both procedural and substantive terms, there has been a shift to a more flexible, functional and pragmatic approach. The privative clause is no longer as determinative of the degree of judicial scrutiny as it once was. The range of decision-makers considered to be beyond the scope of judicial review has been substantially reduced. The distinction between legislative, administrative and quasi-judicial decision-makers is no longer talismanic. Interpretation is a much more comprehensive and nuanced exercise.¹

In the first instance (i.e., in the early stages of the move away from formalism in the 1970's), the Supreme Court's concerns included a desire to gain greater control of its own docket.² The risk of runaway judicial review was readily apparent to the Court of the mid-1970's, as the Court tested the scope of its expanded leave-to-appeal functions.

Beyond concerns about its docket, the emerging majority on the Court in the 1970's was alert to criticisms that judicial review demonstrated an anti-administration bias, and an excessive tendency to intervene, notably in some of the Court's own leading administrative law decisions of the late 1960's.³ There was sustained academic criticism of the administrative law performance of the Court during this period.^{3a} The new leadership of the Supreme Court had been involved in various capacities in building up the administrative state, especially in regulatory and industrial relations

¹ For an elaboration on developments marking the shift to greater functionalism in judicial review, see: W. MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986) 36 U.T.L.J. 343; "Developments in Administrative Law: The 1989-90 Term" (1991) 2 Sup Ct. L.R. (2d) 1; "Developments in Administrative Law: The 1990-91 Term" (1992) 3 Sup Ct. L.R. (2d) 29; "Approaches to Interpretation in Administrative Law" (1988) 1 C.J.A.L.P. 293; and, "Reconciling Curial Deference with a Functional Approach in Substantive and Procedural Judicial Review" (1993) 7 C.J.A.L.P. 1.

² For example, see Laskin, "The Supreme Court of Canada: The First One Hundred Years, A Capsule Institutional History" (1975), 53 Can. Bar Rev. 459; and, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada" (1975), 53 Can. Bar Rev. 469; Estey, "The Supreme Court of Canada: Today and Tomorrow" (1980), 5 Hearsay 26. See Bushnell, "Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Interest" (1982), 3 Sup. Ct. L. Rev. 479, for a historical account of leave to appeal for the years 1970-81.

³ The decisions most identified with the Court's positivistic, derivative and anti-administration tendencies from that period include: *Jarvis v. Associated Medical Services*, [1964] S.C.R. 497; *Metropolitan Life Assurance Co. v. International Union of Operating Engineers Local 796*, [1970] S.C.R. 425; and, *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. These cases all deal with substantive review of administrative action, or with related issues of timeliness of collateral attack. On procedural issues, it is more difficult to sustain the claim that the Court was anti-administration, although there is ample evidence of a derivative and positivistic approach, as well as a preoccupation with adjudicative decision-making contexts to the exclusion of ministerial, administrative or legislative processes. See e.g.: *Calgary Power Ltd. v. Coppithorne*, [1959] S.C.R. 24; *Guay v. Lafleur*, [1965] S.C.R. 12; and *Mitchell v. The Queen*, [1976] 2 S.C.R. 570.

^{3a} For example, P. Weiler, "The 'Slippery Slope of Judicial Intervention'" (1971) 9 Osg. Hall. L.J. as one of many.

matters.⁴ The overall thrust of the 1970's administrative law jurisprudence was to facilitate rather than to stand in the way of its further development. In a more general sense, the Supreme Court of the 1970's was embracing the law-making and supervisory roles of the Court as it engaged in a creative, institution-building process.

The decade of the 1980's brought a further key change in the role of Canadian courts, and of the Supreme Court, with the entrenchment and early elaboration of the *Canadian Charter of Rights and Freedoms*. In many ways, the Court's *Charter* role, notably in supervising legislative and executive actions to ensure the least possible impairment of basic freedoms and liberties, was at odds with the policy of curial deference. An important collateral impact of the *Charter* was that it prompted a more robust and purposive approach to interpretation.

The 1990's have been mainly a decade of consolidation. The Court has struggled to reconcile its functional approach with the policy of curial deference. The more robust approach to interpretation continues. A second decade of *Charter* interpretation has brought a more elaborate discourse of deference, or of institutional comity, into the Court's constitutional decisions. An important contextual element, at least in the first half of the decade, has been the widespread acknowledgment of fiscal crisis, amplifying the case for ensuring that administrative decision-makers not fundamentally exceed their assigned role, as well as the case for checking against runaway judicial review.

With the several strands that have made up the Court's administrative law jurisprudence, and with the degree to which the underlying terrain has shifted, it should not be surprising that there are elements that have been criticized for being either ambiguous or inconsistent. There have certainly been elements of "two-steps-forward-one-back". Individual cases have been widely criticized for reverting to the old jurisdictional-labelling. There have been frequent internal differences among members of the Court, with multiple concurring opinions as well as majority-minority splits, making it all the more difficult for lower courts, the bar and for academics and students to interpret the Court's administrative law jurisprudence.

The majority of observers would probably say that, after something on the order of 300 judgments over three decades, the Court's administrative law jurisprudence should be more settled, and that the relevant standards should be more clear and predictable. Others would urge patience, and point to the extent of change that has taken place. Few would question that there has been a sustained effort by the Supreme Court to reach more broadly and deeply to explain its administrative law decisions, and to lead the way in a more functional approach to judicial review.

⁴ See e.g., Janisch, "Bora Laskin and Administrative Law: An Unfinished Journey" (1985) 35 UTLJ 557; contois, "Le juge Dickson et le contrôle judiciaire des Tribunaux administratifs", in [ital] Brian Dickson at the Supreme Court of Canada 1973-1990 [ital], Guth (ed.) (1998) 255-75.

As we look back over the past three decades, it is clear that the discourse of judicial review of administrative action has been transformed. Should it have happened more expeditiously? Should the Supreme Court have issued more economical, more united judgments? Should the administrative law bar have come forward with arguments and analyses better suited to the changing discourse? Did the administrative law professors do their part? These are questions that go to the "didactic" role of the Supreme Court of Canada, and more broadly to the question of how much we can expect to transform through judicial action. We will return to these questions after taking a more sustained glance at the Supreme Court's judicial review decisions of the past three decades.

III. Substantive Judicial Review

With its 1979 decision in *CUPE, Local 963 v. New Brunswick Liquor Corporation*,⁵ the Supreme Court enunciated a policy of curial deference, calling on courts to leave administrative decision-makers (or at least tribunals with full privative clauses) to carry out their assigned tasks. The policy of judicial self-restraint was perceived to be a response to decisions of the late 1960's that had been criticized for being excessively interventionist, as well as formal and derivative.⁶

While the *CUPE* judgment was heralded for its deferential tenor, and its underlying message of respect for administrative difference, commentators picked up right away on its "ambiguity".⁷ The case for curial deference was well understood: respect for decision making expertise; efficient use of administrative and judicial resources, as well as the resources of affected parties; and, respect for legislative or consensual intentions in establishing administrative decision-making structures. The ambiguity lay, in significant measure, in Dickson J.'s great efforts to demonstrate consistency with *Metropolitan Life* and other decisions whose main point was to find a path around privative clauses. It almost goes without saying that such a demonstration of consistency was necessary to achieve consensus on the Court in *CUPE*.⁸ More to the point, it was clearly the intention of Dickson J. that the policy of curial deference was to be a gloss on

⁵ [1979] 2 S.C.R. 227.

⁶ *Metropolitan Life Insurance Co. v International Union of Operating Engineers Local 796*, *supra* note 2.

⁷ Notably Mullan, "Developments in Administrative Law: The 1978-79 Term" (1980) 1 Sup. Ct. L.R. 1 at 20-35.

⁸ See the analysis of Mullan, at 30-32, *ibid*. It is important to bear in mind that the Supreme Court of the 1970's was still very committed to the methodology of *stare decisis*. For a reflection on the judicial craftsmanship of one of the Court's most powerful members, see the essay: "The Honourable Ronald Martland: Reflections on Canadian Judicial Conservatism" (2000), 11 Sup. Ct. L.R. 547, where Crowper describes the "craftmanship" of Martland J. in the following manner: "[H]is judgments proceed with deference to the weight of history and precedent. The principle of *stare decisis* is not a stalking horse or superficial gloss in his judgments; it is a living, palpably governing principle in his decision-making. He truly acted on the basis that he was governed by the law..." (at 553).

the jurisdictional principle, not an alternative to it. In the measure that this position is ambiguous, or that it adheres to a Diceyan ideology of circumscribed - and court supervised - administrative action, it has been strongly criticized.⁹

Through the 1980's, there were signals that the Court was "wavering in its commitment to *CUPE*"¹⁰ The most overt signs came in two prominent opinions of Beetz, J. in *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*¹¹ and *U.E.S. Local 298 v. Bibeault*.¹² In both cases, Beetz J. attracted majority support for an approach that focussed primarily on judicial review for jurisdictional error. Ironically, the judgment of Beetz J. in *Bibeault* also contains key language calling for a pragmatic and functional approach. The following passage has become an important point of reference in the continuing development of the Court's approach to substantive review:

The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error. [When reviewing administrative interpretations of jurisdiction-limiting provisions] the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.¹³

Over the past decade, the Court has manifested its own internal struggles when dealing with substantive review. For example, in *CAIMAW v. Paccar of Canada Ltd.*, of six members of the Court who participated in the decision, two held that the interpretation of the BC Labour Relations Board was not patently unreasonable; two decided that it was correct; and, two members of the Court found the interpretation to be patently unreasonable.¹⁴ The policy of curial deference was proved by its exceptions in the 1990-91 term, when the Court preferred its interpretation to that of the administrative decision-maker in three of five cases. In the fourth case, the administrative interpretation was deferred to only after a searching review of the underlying reasoning; and, in the fifth, there was a strong dissent favouring intervention.¹⁵ My review of the five cases concluded with the following comment:

⁹ See e.g., Dyzenhaus, "Developments in Administrative Law: The 1992-93 Term" (1994) 5 Sup Ct L.R. 189 at 190-94; and Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osg. Hall L.J. 1. An important reminder of the continuity of principles of judicial review, and of the pervasive character of debate about curial deference can be found in David Mullan's paper *infra* 399, which looks at these issues in the very earliest decisions of the Supreme Court.

¹⁰ Wilson J., in *National Corn Growers v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1346.

¹¹ [1984] 2 S.C.R. 412.

¹² [1988] 2 S.C.R. 1048.

¹³ *Ibid.* at 1088.

¹⁴ [1989] 2 S.C.R. 983.

¹⁵ See MacLauchlan, "Developments in Administrative Law: The 1990-91 Term", *supra* note 1 at 32-49.

1990-91 can hardly be said to have been a good year for the policy of curial deference to administrative decision makers.....It is clear that the Supreme Court is no longer prepared to take judicial restraint to the point of abstinence.¹⁶

By the first half of 1993, there was considerable evidence that the Court was practicing a new functionalism in substantive review. In that six-month period, there were *seven* decisions involving challenges to administrative interpretations of law. A cross-cutting theme in these rulings was an increasingly overt assessment of the comparative expertise of courts and the tribunals in question. In *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*, L'Heureux-Dubé J. squarely stated that drawing the line on curial deference amounts to determining: "Who should answer this question, the administrative tribunal or a court of law?"¹⁷ In *Dayco (Canada) Ltd. v. C.A.W.*, La Forest J. considered the issue in terms of the location of the grievance arbitrator on a "spectrum" of entitlement to curial deference.¹⁸ In the end, the arbitrator was accorded very little deference, as the majority of the Court concluded: "in these matters the arbitrator has no exclusive or unique claim to expertise."¹⁹ This is not to say that the "sliding scale" approach was without opposition on the Court; for example, Cory J., who concurred with La Forest J. in the result in *Dayco*, protested that this approach to privative clauses would "open the way to many and varied judicial interpretations [and] encourage a proliferation of litigation and interminably delay a final resolution." In the same term, there were sharp differences within the Court over the comparative expertise of courts and human rights tribunals, notably on the interpretation of whether protection against discrimination on the basis of "family status" extended to same-sex couples.²⁰ David Dyzenhaus characterized the divisions within the Court on the proper approach to *Mossop* as "mind-boggling", and introduced his review of administrative law decisions in the 1992-93 term with this comment:

This mind-boggling division should in itself suffice to dispose of any hope that the courts can devise a coherent approach to jurisdiction. However, the number of important decisions in this term on this topic show that the Court has a long way to go before it will dig itself out of the pit it has helped to create.²¹

In the following year, 1993-94, the Court's administrative law decisions prompted this commentary from Philip Bryden: "the Court did very little to develop administrative law one way or the other." Bryden went on to make the following telling comment: "Unfortunately, I suspect that in the minds of

¹⁶ *Ibid.* at 47.

¹⁷ [1993] 2 S.C.R. 756 at 772.

¹⁸ [1993] 2 S.C.R. 230.

¹⁹ *Ibid.*

²⁰ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554. See also, *Berg v. University of British Columbia*, [1993] 2 S.C.R. 471.

²¹ "Developments in Administrative Law: The 1992-93 Term" (1994) 5 Sup. Ct. L.R. (2d) 189 at 194.

several members of the Court, and indeed many others, this will be regarded as a year well spent.”²² Bryden’s assessment of the administrative law output for the following year, 1994-95, was not so sanguine. It was more like despair. After remarking on the multiplicity of opinions (two cases had five sets of reasons, one case had six), and reviewing the various decisions, Bryden remarked: “There is much in these decisions that is useful, but it seems to me that there is too much that is unnecessarily confusing and divisive.”²³

Sandra MacCallum began her review of the 1995-96 term by observing, with respect to substantive review: “The test seems to be settled but its application is not.”²⁴ In her review of the 1996-97 term, Professor MacCallum conceded that she had been in error in two respects:

First I adopted as shorthand for “not patently unreasonable” the word “reasonable”. Second, I mused that the test to be applied to the standard of review appeared settled. Not only is “reasonable” not shorthand for “[not] patently unreasonable”; it has emerged as a test in its own right. Given that we now have at least three tests, one certainly cannot say that “the” test is settled, for we have to ask which one?²⁵

After almost two full decades of applying and elaborating on the policy of curial deference signalled in *CUPE*, and with well upwards of one-hundred decisions dealing with these precise issues, it is not encouraging to find that commentators who follow the Court’s administrative law work express such a level of frustration with the jurisprudence on substantive review.

In the most recent Supreme Court terms, there were three decisions dealing with substantive review in the area of labour law; yielding results that Lorne Sossan characterized as “uneven at best” in their application of the patent unreasonableness standard.²⁶ The big news from the 1998-99 term is the unanimous decision of the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*.²⁷ This decision has been described as “one of the most significant administrative law judgments ever delivered by the Supreme Court of Canada.”²⁸ Other commentators have been equally positive. Lorne Sossin calls *Baker* a “fundamental watershed for

²² Bryden, “Developments in Administrative Law: The 1993-94 Term” (1995) 6 Sup. Ct. L.R. (2d) 1 at 43.

²³ “Developments in Administrative Law: The 1994-95 Term” (1996) 7 Sup. Ct. L.R. (2d) 27 at 80.

²⁴ “Developments in Administrative Law: The 1995-96 Term” (1997) 8 Sup. Ct. L.R. (2d) 25 at 25.

²⁵ “Developments in Administrative Law: The 1996-97 Term” (1998) 9 Sup. Ct. L.R. (2d) 9 at 27.

²⁶ “Developments in Administrative Law: The 1997-98 and 1998-99 Terms” (2000) 11 Sup. Ct. L.R. (2d) 37 at 51.

²⁷ [1999] 2 S.C.R. 817.

²⁸ D. Mullan, “*Baker v. Canada (Minister of Citizenship and Immigration)* - A Defining Moment in Canadian Administrative Law” (1999) 7 Reid’s Administrative Law 145 at 146. See also Mullan, “Recent Developments in Administrative Law - The Apparent Triumph of Deference!” (1999) 12 C.J.A.L.P. 191.

Canadian administrative law.”²⁹ For starters, it has been rare in the past decade to have a unanimous decision from the Supreme Court in a case dealing with substantive review. More significantly, *Baker* makes it clear that discretionary decisions are reviewable on a reasonableness standard. Justice L’Heureux-Dubé confirmed that there are now three standards of review: patent unreasonableness, reasonableness *simpliciter* and correctness. Discretionary decisions must be made within the bounds of the jurisdiction conferred by the statute, but considerable deference must be given to decision-makers by the courts in reviewing the exercise of that discretion and determining the scope of the discretion. The bottom line is that discretion must be exercised in a manner “that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (citing *Roncarelli v. Duplessis*), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (citing *Slaight Communications*)”.³⁰ While many implications of *Baker* and the substantive review cases remain to be worked out, there is a clear pattern favouring an overall approach of deference, within a model that respects the rule of law.

The most thoroughgoing analysis of the Court’s jurisprudence in this area comes in a 1998 address by Justice McLachlin (as she then was) to the Annual Education Conference of the British Columbia Council of Administrative Tribunals.³¹ The now-Chief Justice acknowledged that claims for the rule of law have often contributed to a climate of suspicion between courts and tribunals, and that it has by times been misconstrued as a “bridle for Leviathan”.³²

As explained by Justice McLachlin, the rule of law should be seen as an essential attribute of decision-making in a democratic society, taking as its overarching principle “a certain *ethos of justification*”, under which an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*. She speaks of mutual roles for courts and administrative tribunals: “While courts cannot avoid reviewing the decisions of administrative agencies to ensure that the agencies are operating within their statutory powers and observing the principles of natural justice, they must exercise that duty in a way that recognizes the enormous role that these agencies play in the life of the country.”³³ Thus the Supreme Court’s functional and pragmatic approach provides a basis for dealing in a flexible, context-sensitive

²⁹ “Developments in Administrative Law: The 1998-99 Term” (2000) 11 Sup. Ct. L.R. (2d) 37 at 99.

³⁰ *Supra*, note 27 at 853-54.

³¹ McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1999) 12 CJALP 171.

³² *Ibid.* at 173, quoting Harvey, “The Rule of Law in Historical Perspective” (1961) 59 Mich. L. Rev. 487 at 491.

³³ *Ibid.* at 178.

manner with this dual function of the rule of law. The overall trend in relations between Canadian courts and tribunals has been, according to Justice McLachlin, “from suspicion to respect”. The new approach “allowed courts to emerge slowly from Dicey’s shadow and, indeed, from 800 years of suspicion and distrust.”³⁴

What is especially positive about Justice McLachlin’s paper is its initiative to situate the Supreme Court’s jurisprudence in the historical and philosophical context of the rule of law, and to explain the Court’s functional and pragmatic approach, from a sanguine, long-range point of view. She charts a nuanced course between deference and jurisdictional review, suggesting that we should expect a continuing evolution.

IV. *How much functionalism can we reasonably bear?*

In 1986, as a young law professor, I published an article: “Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?”³⁵ The central message was one of frustration with the formalistic discourse of both statutory interpretation and judicial review. The proposed way forward was a more frank and functional assessment of the *how* and the *who*. Specifically, the degree of deference would depend on responses to five questions:

1. Is there evidence that the administrative decision-maker has performed an interpretive exercise at all? Has the interpretation been conveyed in a form that is acceptable to the relevant community?
2. For the purpose of interpreting the text does the administrative decision-maker have reference to specialized knowledge or field-related information?
3. Is the decision-maker in fact an expert?
4. Are there occasions where, all questions of expertise and field-sensitive reasoning aside, it would be inappropriate for superior courts to defer to administrative decision-makers?
5. Is the interpretation of the administrative decision-maker patently unreasonable?

The analysis urged by the 1986 paper was very much in the spirit of the Supreme Court’s “pragmatic and functional” approach, although it went several steps further. The paper recognized that there would be resistance to a fully functional discourse, especially because it would imply “profound changes of process and of attitude for both administrators and courts.”³⁶ It went on to

³⁴ *Ibid.* at 185.

³⁵ (1986) 36 U.T.L.J. 343.

³⁶ *Ibid.* at 388.

suggest that the “real fear about a less formal world” was that lawyers and legal academics would not have the capacity to bring forward the evidence to resolve issues of statutory interpretation and judicial review along the lines suggested. One of the paper’s concluding comments was:

In the end the conventions which are most resistant to a non-formal discourse may be neither doctrinal nor theoretical: the real problem may be disciplinary. Perhaps lawyers with one eye on the metre [i.e., billings] and legal scholars scrambling to meet tenure and promotion expectations find it easier to fall back on familiar forms of discourse than to develop a complete appreciation of the administrative state and the people whose lives are affected by it.³⁷

In the intervening fifteen years, there have been admirable signs of progress in the discourse of judicial review, and even more notably in the practice of interpretation. The Supreme Court is far from tied up in rigid formalism. There are frequent decisions that talk openly about policy choices, and about institutional effectiveness. In interpretation, there is a new sense of purposiveness, prompted in significant measure by the experience of interpreting the *Charter*. Justice McLachlin indicated in her B.C. address that the pragmatic and functional approach has become a vehicle for “allowing courts to move beyond technical questions of jurisdiction and to look instead at the broader relationship between courts and administrative tribunals.”³⁸ In her view, the underlying question should be: “whether or not *this* exercise of public power, by *this* board, in *this* circumstance, can be justified.”

To test whether the commitment to functionalism has been adopted by lower courts, I conducted a quick search of decisions in which *Baker* has been cited since it was released in mid-1999. For starters, one gets a measure of the continuing volume of judicial review litigation from the fact that *Baker* has been cited 176 times in superior and appellate courts since it was handed down barely a year ago. Without going through every one of these decisions, it doesn’t take long to gain a sense of the pattern. It is now almost standard for judgments to include a preliminary discussion of the “standard of review”, often as a separate chapter of analysis. *Baker* will be cited along with any of a number of Supreme Court decisions, including *Bibeault*, *CUPE*, *Southam*,³⁹ *Pasiechnyk*,⁴⁰ *Pushpanathan*,⁴¹ *Paccar*,⁴²

³⁷ *Ibid.* at 391.

³⁸ *Supra*, note 31 at 182.

³⁹ *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

⁴⁰ *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890.

⁴¹ *Pushpanathan v. Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982.

⁴² *CAIMAW, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983.

Bradco,⁴³ *Mossop*,⁴⁴ *PSAC*,⁴⁵ or *Pezim*.⁴⁶ The most frequently mentioned criterion affecting the standard of review is whether the challenged decision is protected by a privative clause, followed closely by whether the legislation provides for an appeal. There is often reference to whether the decision-maker is a specialized or expert board or tribunal, although this rarely goes beyond a bare assertion. It is striking to note the extent to which reviewing courts still focus on whether the question "goes to" or "lies within" jurisdiction. And, it is not uncommon for there to be an assessment of whether the point in issue is a "general question of law."

What can be readily seen is that Canadian courts are now comfortable with the sliding scale of standards of review, and have accepted that substantive review is not an either/or choice between "deference" and "no deference". On the whole, there has been, as assessed by David Mullan, an "apparent triumph of curial deference."⁴⁷ It is more difficult to spot widespread evidence, especially at the trial level, that courts truly engage in a functional assessment of the interpretive capacity of administrative decision-makers. The analysis remains largely at the level of the application of labels, most of them related to the intention of the legislature. It is rare to see a sophisticated assessment of the reasoning process and expertise of the decision-maker in question, along the lines implied by Justice McLachlin's paper. In the Supreme Court, elements of such a pragmatic and functional assessment can be seen modelled in decisions such as *Southam*, *Baker* or *Pushpanathan*. However, it is apparent from the continuing volume of judicial review applications that parties who are not happy with the outcome of an administrative decision still take a "what have we got to lose?" approach when assessing their prospects of success on judicial review.

The message of functionalism is getting out but it is still muted, more than twenty years after *CUPE*. And the Supreme Court has had its own difficulties, especially in the first half of the 1990's, in applying the pragmatic and functional approach in an internally consistent manner. At the outset, this paper asked why this has been such an arduous process. For starters, there is the weight of precedent. It is clear that Justice Dickson went out of his way in *CUPE* to demonstrate consistency with *Metropolitan Life* and other Supreme Court decisions that were fundamentally at odds with the new policy of curial deference. Related to this adherence to precedent has been the Court's continued reliance on the jurisdictional principle as the foundation of judicial review. This continued attachment to jurisdiction as a trigger for key issues of reviewability, or for standards of review, has made it very difficult to leave behind the inside-

⁴³ *CJA, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316.

⁴⁴ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

⁴⁵ *Canada (Attorney General) v. PSAC*, [1991] 1 S.C.R. 614.

⁴⁶ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

⁴⁷ D. Mullan, "Recent Developments in Administrative Law: The Apparent Triumph of Deference!" (1999) 12 C.J.A.L.P. 191.

outside characterizations that have plagued the jurisprudence in this area. In a review of the Court's 1990-91 term, I made the following comment on the difficulty of jurisdictional labelling:

The doctrinal difficulty lies in finding reliable criteria for drawing the line, for determining the perimeter of the jurisdictional circle, and for distinguishing between matters that "go to" jurisdiction and those that "lie within" jurisdiction. The conceptual difficulty lies in the inside-outside construction of decision-making competence. The real issue is one of legitimacy and comparative expertise.⁴⁸

The task of developing workable standards has been further impeded by the Court's own diversity of views. While there are, without question, useful purposes served by animated debates and well-reasoned diversity within a final court of appeal, the Supreme Court's lack of consensus as to how the new standards of review should be applied had become a problem by the mid-1990's. More recent decisions have gone a considerable way toward achieving a greater degree of coherence.

For the Court to have its greatest didactic impact, it should go out of its way to *model* the functional and pragmatic approach, notably as enunciated by Justice McLachlin in her British Columbia address. The Court should clearly address the empirical and contextual issues that justify curial deference. Where it is considered necessary to intervene, it is even more important that the contextual reasons for not deferring be clearly spelled out. This includes a more fulsome analysis of the limited number of areas where the Court has asserted an across-the-board claim to superiority, or at least "home turf", such as in human rights. While there is a justifiable "subject matter" basis for retaining the last word on matters of such cross-cutting or constitutional importance, courts should be willing to consider whether the administrative decision-maker in question, such as a human rights tribunal, may bring an advantage in terms of field sensitivity or superior fact-finding abilities. The Court will have its greatest impact on administrative law when cases are dealt with fully and functionally in lower courts, such that parties are satisfied and appeals are not pursued to the Supreme Court. Better still, the Court's administrative law work will be most rewarded when administrative tribunals demonstrate an interpretive sophistication that settles differences in the first instance, without recourse to judicial review.

The ability of courts to apply the functional and pragmatic approach is very much contingent on the quality of information; and the sophistication of argument dealing with the empirical context. The presumption of deference is easier to support where the challenged decision is supported by reasons. The poor quality of reasons was an important element in *Baker*. And the desirability of reasoned, transparent decision-making is vital to the rule of law vision outlined by Justice McLachlin in her BC address. One of the Court's most

⁴⁸ W. MacLauchlan, "Developments in Administrative Law: The 1990-91 Term" (1992) 3 Sup. Ct. L.R. (2d) 29 at 33.

significant demonstrations of respect for administrative uniqueness came in *Consolidated-Bathurst*, where the Court acknowledged the legitimacy of the Ontario Labour Board practice of holding "full Board" meetings to discuss matters of general policy importance.⁴⁹ In doing so, the Court recognized the difference between adjudication based on a model of civil litigation and "corporate" decision-making by a large administrative agency with an explicit policy mandate. It is significant that the OLRB panel in *Consolidated-Bathurst* re-opened its hearing to deal with the employer objection to the full Board process and prepared an extensive set of reasons outlining the empirical context in which the Board operates and develops its policy mandate.

It is also noteworthy that in *Consolidated-Bathurst* the OLRB participated as a respondent in proceedings in all courts, including the Supreme Court of Canada. The traditional position of the Supreme Court, as outlined in *Northwestern Utilities*, has been that an administrative tribunal may appear only to address its jurisdiction to make the order in question.⁵⁰ This position should be revisited, with a view to developing a more flexible approach to when tribunals can participate. This is especially important in view of changing conceptions of the concept of jurisdiction. The new functional approach suggests that the jurisdictional principle should fade into the background. On the other hand, the functional approach requires better and more complete information about policy priorities or institutional implications. Ways must be sought to permit administrative decision-makers to furnish such information, without the tribunal being drawn into adversarial positions between parties. Ideally, this would be done through well-reasoned decisions.

V. Procedural Review

Much as in the case of *CUPE*, the Supreme Court's decision in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*⁵¹ was a response to a jurisprudence that was considered to be too reliant on rigid doctrinal classifications. The main point in *Nicholson* was to move beyond a traditional doctrine that reached too few decision-making contexts. In effect, the benefits of natural justice were extended only to contexts that were fully quasi-judicial.

Many commentators have pointed out an inconsistency or a tension between the two in that *CUPE* was a self-conscious attempt to circumscribe the scope of judicial review, whereas *Nicholson* was a self-conscious attempt to open it up - and make it more flexible. The point of *Nicholson* was to steer the doctrine of natural justice away from a classification of functions to a more

⁴⁹ *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.

⁵⁰ *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684.

⁵¹ [1979] 1 S.C.R. 311.

comprehensive and fluid consideration of whether the administrative procedures followed were fair in all the circumstances.⁵²

A consequence of the introduction of the doctrine of procedural fairness has been that Canadian courts have learned to take a more functional approach to administrative procedures, and to tailor judicially imposed requirements to the particular context. In *Martineau v. Matsqui Institution Disciplinary Board*, one of the first cases to apply the new procedural fairness, Dickson J. made the point that "[b]etween the judicial decisions and those which are discretionary and policy-oriented will be found a myriad decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum."⁵³ In determining the application of the doctrine to a particular context, the Supreme Court has emphasized the following considerations:

The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship between that body and the individual; and (iii) the effect of that decision on the individual's rights.⁵⁴

The more functional approach to administrative procedures has not posed a major challenge in terms of the process or legitimacy of judicial review, as the prevailing paradigm has remained adjudicative. After an initial clean-up of the hard cases that were just off the judicial/quasi-judicial spectrum, such as those dealing with prison discipline, parole, or administrative investigations and inquiries, the doctrine of procedural fairness began to show its limitations. While the duty to act fairly is, in principle, one that pertains to any public decision-making body, the Supreme Court has recognized that the duty is categorically inapplicable to "legislative" decision-making processes.⁵⁵ Further, the emphasis on the extent to which administrative decisions affect *individuals* and the general insistence that decisions be *final* in order to be reviewable have held the common law of procedural fairness close to the adjudicative paradigm.⁵⁶

The most comprehensive recent treatment of common law procedural requirements comes with the unanimous judgment of Justice L'Heureux-Dubé in *Baker*, including the following review of the Court's general approach to fairness issues:

⁵² For early commentary on the development of the doctrine of procedural fairness, see: Mullan, "Fairness: The New Natural Justice" (1975) 25 U.T.L.J. 281; Garant, "Le devoir d'équité procédurale et le contrôle judiciaire our quasi judiciaire de la procédure administrative" (1982) 23 C de D 587; Macdonald "Judicial Review and Procedural Fairness in Administrative Law" (1980) 25 McGill L.J. 1; and, Dussault et Patenaude, "Le contrôle judiciaire de l'administration: vers une meilleure synthèse des valeurs de liberté individuelle et de justice sociale" (1983) 43 R. du B. 163.

⁵³ [1980] 1 S.C.R. 602 at 629.

⁵⁴ *Knight v. Indian Head School Division No 19*, [1990] 1 S.C.R. 653.

⁵⁵ *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735.

⁵⁶ E.g., *Knight v. Indian Head*, *supra* note 54.

Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances.⁵⁷

Pursuing this theme, Justice L'Heureux-Dubé identified the following as relevant criteria: (i) the nature of the decision being made and process followed in making it; (ii) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (iii) the importance of the decision to the individual or individuals affected; (iv) the legitimate expectations of the person challenging the decision; and, (v) the choices of procedure made by the agency itself. In the end, the most remarkable procedural development in *Baker* is the recognition of a duty to provide reasons. As well, *Baker* will become a new point of reference for the doctrine of legitimate expectations.

While developing the doctrine of procedural fairness in a manner that respects individuals, the Supreme Court has laid a substantial basis through its procedural rulings for respecting administrative difference. The development that most threatens to undermine this respect for difference, and which calls for very sophisticated knowledge at the level of judicial review, is a fresh interest in structural or institutional independence. We have seen a tentative interest in a common law development along these lines in the minority judgment of Chief Justice Lamer in *Matsqui Indian Band v. Canadian Pacific Ltd.*,⁵⁸ as well as a less tentative development through the *Québec Charter of Rights and Freedoms*. In *2747-3174 Québec Inc. v. Régie des permis d'alcool du Québec*⁵⁹ the Court upheld rulings of the Québec Court of Appeal and Superior Court that found sections of the *Act respecting liquor permits* to be in contradiction of Article 23 of the Québec Charter for failure to respect guarantees of independence.⁶⁰

A major concern about these decisions is the slim evidentiary record. In the Québec case, the Court had the Annual Report of the *Régie*, the statute and by-laws. In *Matsqui*, Chief Justice Lamer based his assessment on the Band's by-laws. Challenges to the structural independence of administrative decision-makers require sophisticated insight into the operations and dynamics, as well as the economics, of the tribunal in question.⁶¹

⁵⁷ *Supra* note 27 at 211.

⁵⁸ [1995] 1 S.C.R. 3.

⁵⁹ [1996] 3 S.C.R. 919.

⁶⁰ Note the decision of the Court in *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405, where the Court, in a cryptic two-paragraph decision, upheld the institutional independence of the securities hearing panel. The Court affirmed the "practice over the years [which] demonstrated that the appointments were not arbitrary nor made in a way that could have led to a reasonable apprehension of bias."

⁶¹ Sandra MacCallum commented on the decision in *Régie des permis des alcools*: "With respect, this seems rather slim evidence to reach a conclusion that is couched in the language of what a reasonably well informed person would decide." (1998) 9 Sup. Ct. L.R. 7 at 26.

VI. Conclusion: The Didactic Function of Judicial Review

As we look back over the past three decades, we can see that there are two quite different perspectives at play in Canadian administrative law. The first is suspicious of administration; courts discipline administration and “quash” errant decisions. They control “inferior” decision-makers. This might be called the policing function of judicial review. The second perspective is respectful of the contribution, and the imperative, of administrative government. It leaves space for administrative difference, and wants to know as much as possible about the empirical context. Courts draw on, and leave space for, the field sensitivity and policy judgment of administrative tribunals. In this second perspective, courts and tribunals are cooperative players in delivering administrative justice. The courts are both teachers and learners. This can be called the didactic function of judicial review.

The first perspective, the policing function, was firmly in command at the outset of these three decades. The second perspective has gradually moved to the fore, with occasional setbacks. It is the didactic perspective that underpins the address of Chief Justice McLachlin to the BC Council of Administrative Tribunals. While courts serve a necessary role as monitors of the rule of law, they do so as both teachers and learners. Chief Justice McLachlin embraces “a culture of justification”,⁶² and “a society governed by a contextual and richer understanding of the Rule of Law.”⁶³

In a society governed by such a contextual and richer understanding, courts will insist on learning more than they have traditionally been told about administrative decision-making and the parties whose lives are affected by it. Judicial review will be based on a firm sense of the policy choices at play, and on a well-developed assessment of the empirical and institutional context. The Supreme Court’s “pragmatic and functional” approach is eminently well-suited to evolve with, and to lead the development of, a better-informed *and* a better-informing practice of judicial review of administrative action.

A key practical issue underpinning this shift of perspective is one of communications, and quality of information. In a world where administrative decision-makers “order” and courts “quash”, the focus is mainly on remedies and jurisdiction. If, instead, we have a culture of justification, in which courts and administrative decision-makers work together to improve the quality of administrative justice, the emphasis will be on reasons - and on the quality of information on which decisions are based. And the emphasis will be on learning, including being more direct about what is not known or what is in a state of evolution. In such a world, the role of counsel becomes more oriented to providing courts with a full sense of what happens in administration, especially to policy and institutional implications, and less to advancing claims about the intention of the legislature. The role of tribunals is to provide adequate justifications, through reasons in particular cases, or through guidelines, policy statements, continuing

⁶² *Supra* note 31 at 188.

⁶³ *Ibid.* at 189.

education and other discipline-building instruments. More experimentation is required around the roles that administrative decision-makers play in judicial review. Perhaps a modern administrative equivalent of the famous *Brandeis Brief* needs to be developed.

The ultimate question for this 125th anniversary celebration is to ask how far we think we can go at the level of the Supreme Court of Canada in developing such a didactic practice of judicial review. The Supreme Court itself would become more of a modeller than a final court of appeal. In effect, this is the role that the Court has adopted for much of its work, notably in private law. It is ironic to think that it may be in the area of administrative law, where the Court has been most overt in developing a policy of deference, that it has been the least successful in letting go. It is further ironic to reflect that judicial review produces such a volume of leave applications, even though the overwhelming majority are dismissed with costs. Is there something about the underlying incentives in administrative law that differentiates this area from private law? Perhaps the advantage of delay weighs more heavily in the regulatory world, in which case we may need to pay more rigorous attention to the doctrine and sanctions affecting the passage of time. Clearly, there is need to work harder on, and to experiment with, the quality and format of information about the underlying context. The main incentive will be for the Court to use the information in a dispositive way.⁶⁴

The Supreme Court led the way in the 1970's. Beyond getting its own docket under control, the Court was laying the basis for a more productive set of relationships in a modern administrative state. In the intervening two decades, we have learned that it is not enough to preach the message of deference, and that deference is not the same thing as abstinence. While we may well ask whether it should require three decades to reach this point, the development of administrative law doctrine over this period proves the need for debates within the Supreme Court of Canada, and for an evolutionary approach. It also proves the limited ability of the Supreme Court to map out new doctrine through words alone.

For the Supreme Court to truly move the doctrine of administrative law, two steps are required beyond enunciating a policy of curial deference. The first is to confront the fine balance between a policy of curial deference and the imperative of the rule of law. The second is to develop and *model* practices that inform a pragmatic and functional approach. In effect, it is to *show* how the pragmatic and functional approach works together with an ethos of justification.⁶⁵ Taken together, the challenge is for the Supreme Court to fully embrace and to model the didactic function of judicial review.

⁶⁴ This brings to mind the challenge faced by the Court in encouraging practices of constitutional litigation appropriate to the development of the *Charter of Rights*. In a speech at the opening of the Cambridge Lectures (July 15, 1985), then Chief Justice Dickson predicted a "radical change in the realm of discourse" in constitutional litigation. According to the Chief Justice: "[...]linguistic analysis, Canadian precedents, and foreign jurisprudence] are not enough. What is required is open, clear and comprehensive discussion of the policy factors and interests which lie at the heart of most *Charter* cases. I call upon the practising bar to embrace this challenge of providing the courts with this type of analysis and argument."

⁶⁵ See McLachlin, *supra* note, at 174.