

THE SUPREME COURT OF CANADA AND TRIBUNALS - DEFERENCE TO THE ADMINISTRATIVE PROCESS: A RECENT PHENOMENON OR A RETURN TO BASICS?

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Over the last twenty years, the jurisprudence of the Supreme Court of Canada has in general afforded the administrative process considerable room for manoeuvre. Deference to the judgment and choices of administrative tribunals and other statutory authorities has been the accepted norm. Many have assumed this represented a novel development. In this paper, the author argues that there is reason to question this assumption. An examination of the Court's decisions from the very first year of its existence to the abolition of appeals to the Judicial Committee of the Privy Council in 1949 reveals a number of significant examples of judicial restraint in the scrutiny of administrative decision-making both by way of judicial review and statutory appeal. These examples at the very least suggest the need for more sustained research into the early history of judicial review of administrative action in Canada.

Au cours des vingt dernières années, la jurisprudence de la Cour suprême du Canada, en général, a accordé une marge de manœuvre considérable à l'activité administrative. La norme généralement acceptée a été de faire preuve de déférence à l'égard du jugement et des choix des tribunaux administratifs et autres autorités créées par des lois. Plusieurs ont présumé qu'il s'agissait là d'une nouveauté. Dans cet article, l'auteur avance qu'il existe de bonnes raisons de remettre en cause cette présomption. Une étude des décisions de la Cour, depuis sa toute première année d'existence jusqu'à l'abolition des appels au Comité judiciaire du Conseil privé en 1949, révèle plusieurs exemples significatifs de réserve judiciaire dans l'examen de la prise de décision par l'administration, aussi bien dans le contexte de la révision judiciaire que de l'appel en vertu de la loi. À tout le moins, ces exemples suggèrent qu'il existe un besoin de faire des recherches plus poussées sur les débuts de l'histoire du contrôle judiciaire des actes de l'administration au Canada.

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I think the above enactment of the "Land Purchase Act," clearly indicates the intention of the Legislature as to celerity of action and proceedings, as to denial of any revision or appeal, as to avoiding a multiplicity of proceedings in the law Courts, and as to the correction and revision by the Commissioners themselves alone of any defect or informality duly pointed out to them within thirty days from the promulgation of the award.¹

It is by now almost universally acknowledged that the impact of A.V. Dicey's description of the "rule of law" on the early history of Anglo-Canadian administrative law was remarkably influential.... Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power....²

I. Introduction

Over the last twenty to twenty-five years, there has been a remarkable evolution in the state of Canadian Administrative Law or, more accurately, judicial supervision of the administrative process.

In the domain of review of substantive determinations by tribunals and indeed other statutory and prerogative authorities, the aptly-named "pragmatic and functional"³ approach dominates. Under this approach, the Supreme

¹ Taschereau J. in *Prince Edward Island (Commissioner of Public Lands) v. Sullivan* (1877), 1 S.C.R. 3 at 61.

² Wilson J. in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1332, 1336.

³ This term first surfaces in one of this approach's foundation cases, the judgment of Beetz J. in *Union des employés de service, loc. 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1088. However, the aspirations which it implies had been part of the Court's philosophy for quite some time before that and the first full flowering is generally identified as the judgment of Dickson J. in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227. See also his earlier judgment in *Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382. In fact, the advocacy of a "functional" approach to issues of judicial review of administrative action can be traced back to John Willis's article in the very first volume of the *University of Toronto Law Journal*: "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 U.T.L.J. 53. In the course of that article, Willis declaims at page 80, "Let us approach the question functionally," and that exemplifies his whole approach to the matter.

Court has mandated that courts engaged in judicial scrutiny of administrative and executive action of all kinds have regard to the total context in which the decision-maker is operating. This is so both in determining the appropriate standard or level of intensity of judicial review and then in the application of the chosen standard to the particular matter or matters in issue.

With a limited number of notable and at times controversial exceptions,⁴ the adoption of such an approach has led the Supreme Court itself to by and large be deferential to the expertise and operational imperatives of the administrative process. This curial respect is captured most graphically in the terminology of the least intrusive standard of review or appellate scrutiny; intervention is allowed only where the determination of the tribunal or other administrative authority is "patently unreasonable"⁵ either in law or in fact.

In contrast, where litigants advance claims of procedural unfairness, the Court has engaged in a dramatic expansion of the statutory and prerogative contexts in which such claims can be made. Gone is any notion that the common law will engraft procedural fairness requirements onto otherwise silent statutes, subordinate legislation, or prerogative orders only where the power being exercised approximates closely the functions of a regular court, the world of what used to be known as the judicial and the *quasi-judicial*. Rather, obligations of procedural fairness now apply across a broad spectrum of governmental processes.⁶ Moreover, in some measure, this development has been spurred on by the explicit constitutionalization of procedural entitlements in both the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, albeit that the actual reach of these entitlements is quite limited.

⁴ The most notable examples of the Court's unwillingness to concede expertise to particular tribunals are: human rights tribunals, to which the Court will generally defer only on questions of fact (see *e.g. Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554); the Immigration and Refugee Board, at least on questions of general law and perhaps even more widely (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982); grievance arbitrators under collective agreements on questions other than those involving the interpretation of the collective agreement (see *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230); and Municipal Boards in the context of a statutory appeal on questions of law (*Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32). Of these, the most controversial is the first, human rights tribunals, even though, for the most part, these matters come before the Court by way of statutory appeal rather than judicial review.

⁵ The first Supreme Court of Canada articulation of this test in an Administrative Law case was in *New Brunswick Liquor*, *supra* note 3. However, it had earlier been articulated in a Criminal Law case: *R. v. Corbett*, [1975] 2 S.C.R. 275, and there are examples of earlier lower court use of the expression in Administrative Law settings: see *Re Sam Richman Investments (London) Ltd. and Riedel* (1974), 52 D.L.R. (3d) 655 (Ont. Div. Ct.) and *Delaney Boat Lines & Services Ltd. v. Barrie (City)* (1978), 90 D.L.R. (3d) 609 (Ont. C.A.).

⁶ Starting with *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* (1978), [1979] 1 S.C.R. 311.

The approach to procedural fairness issues has not, however, proceeded without regard to "pragmatic and functional" considerations. There is no longer any lingering sense that one size fits all. The nature and extent of the procedural protections that the Court is willing to recognize are varied and depend on the nature and context of the statutory or prerogative power in issue. Much more recently, there has also been a belated recognition that the courts do not always have a monopoly on expertise in the assessment of procedural claims. Thus, in *Baker v. Canada (Minister of Citizenship and Immigration)*,⁷ the Court emphasised that it was necessary at least on occasion to respect the procedural choices that were made by those engaged in front-line administrative action.

Deference to the administrative process and respect for legislative choice of decision-making instruments has also been a feature of the Court's modern jurisprudence on remedial issues. Three examples will suffice. Where a statutory right of appeal exists, the Court has generally accepted that aggrieved persons must pursue the legislatively designated route and not seek relief by way of judicial review. If an alleged wrong may be able to be rectified or rendered moot within the administrative process itself, the courts should generally dismiss an application for judicial review as premature.⁸ Collateral attack is severely circumscribed to the extent that it is not generally available if the person affected had an earlier opportunity to attack directly through statutory appeal or judicial review the allegedly void decision. To allow the affected person to wait in the weeds until enforcement measures are taken would be in many instances to countenance conduct aimed at frustrating the effective operation of administrative regimes.⁹

While this is a very superficial overview of the current state of Canadian judicial review law and while it presents the state of that law in a somewhat rosier light¹⁰ than is probably in fact the case, the essence of this description is of a Court that is committed to the positive virtues of governmental policies and programmes. By and large, judicial review and even statutory appeals are occasions for the correction of egregious unlawfulness on the part of administrative and executive bodies, not for minute parsing of every aspect of their activities with a view to making them conform to the courts' view of what is appropriate.

⁷ [1999] 2 S.C.R. 817.

⁸ As examples of the first two propositions, see *Harellin v. University of Regina*, [1979] 2 S.C.R. 561 and *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

⁹ See *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 and *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737.

¹⁰ See the other paper on Judicial Review of Administrative Action delivered at this Symposium for a more detailed examination of the recent jurisprudence and a more qualified assessment of its quality: H. Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" *supra* at 281. See also the literature referred to in notes 71, 91 and 92, *infra*.

In terms of the metaphor popularized by British legal academics in the 1980's,¹¹ the Court since the mid to late seventies¹² has by and large espoused a green light rather than a red or even amber light theory of its relationship to the administrative process. Its task is, where possible, to facilitate the smooth flow of traffic along the highway of administrative and executive action; to allow room for the effective and efficient functioning of statutory regimes and the fulfilment of broad legislative objectives. This contrasts with the red or amber light theories of the relationship between the courts and the various instruments of government policies whereby administrative action of all kinds must be clearly and explicitly justified by those trying to defend its exercise, a world in which the administrative process is constantly under the cautionary flag so common in motor racing over the last twenty years.

This whole domain is one that has been canvassed on numerous occasions in recent years by judges, practitioners and academics.¹³ The literature is voluminous and while the vision that I have presented here is not one with which everyone would agree, my principal purpose in this paper is not to revisit the familiar territory. Rather, on the occasion of this celebration of the first 125 years of the Supreme Court, I want to pursue a different question. Assuming that my characterization of the Court's recent acquaintance with tribunals and other forms of statutory and administrative decision-makers is a reasonable approximation of the true state of affairs, is it also accurate to assert that this represents the first flowering of Supreme Court recognition of the need for a balanced approach in the exercise of its judicial review powers, an approach which pays due regard to both the imperatives of the administrative process and the rights and interests-based claims of those who challenge particular features of its operation?

I am drawn to this question because many seem to have made the assumption that, until these recent developments, the Supreme Court of Canada had always been a red or amber light Court when it came to scrutiny of the administrative process. In other words, from the time that the Court first heard appeals in June of 1876,¹⁴ it was inherently suspicious of the administrative

¹¹ See C. Harlow and R. Rawlings, *Law and Administration* (London: Weidenfeld & Nicholson, 1984), c. 1 & 2.

¹² The genesis of the modern approach can in large measure be traced to the Trudeau Government's first three appointments to the Supreme Court of Canada and the Prime Minister's choice of Chief Justice, Bora Laskin, to succeed Fauteux C.J.C.: Laskin J. (1970) and C.J. (1973), Dickson J. (1973), and Beetz J. (1974). Each of these was to play a very significant role in the domain of Judicial Review of Administrative Action and, in particular, in developing the theoretical and terminological underpinnings of current Canadian law in this domain. For a review of the Laskin contribution, see H.N. Janisch, "Bora Laskin and Administrative Law: An Unfinished Journey" (1985) 35 U. of T. L.J. 557.

¹³ For references to some of the more important writings and for a more detailed account of the law, see MacLauchlan, *supra* note 10.

¹⁴ The Court actually entertained a reference from the Senate on April 4, 1876: *In re the Brothers of the Christian Schools in Canada* (1876), Cout. Cas 1 (S.C.C.).

process and protective of individual and, more significantly, corporate or private enterprise interests against what it regarded as the intrusions of an activist state bent at least until very recently on more and more regulation.

From time to time, however, when I came across older and often largely forgotten judicial review authorities, I began to have an inkling or a suspicion that this represented an over-simplified account of the whole pre-1975 history of the Court's involvement with the administrative process. In preparing this paper, therefore, I wanted to delve a little more deeply into the history of the Court in the field of judicial review of administrative action to see whether it is indeed appropriate to characterize it during its first hundred years of operation as unremittingly an anti-state or anti-administrative process court.

My conclusion on the basis of what is no more than a preliminary inquiry by someone who is neither a legal historian nor an empiricist is that there is room for a reevaluation of what for many is accepted doctrine. By reference to seven brief "case" studies, I want to try to justify that conclusion¹⁵ As for the second area, excessive rigidity or formality towards subdelegations of statutory authority, it is worth noting that many of these authorities also come from a municipal context.^{15a} My hunch is that a comprehensive consideration would

¹⁵ I should acknowledge, however, that there are one or two domains where in fact there is support for the contention that the Court has, at least until very recently, had little sympathy for claims to autonomy in decision-making in either a substantive or a structural sense: the exercise of power by municipalities and the subdelegation of authority by those on whom statutory power has been conferred. *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 provides a recent example of the Court's tendency to read narrowly statutory grants of power to municipalities and, there, Sopinka J. cites a number of the leading precedents. However, even here, the evidence is not totally one-sided as revealed in Ann McDonald, "In the Public Interest: Judicial Review of Local Government" (1983) 9 Queen's L.J. 62. This article is cited extensively in McLachlin J.'s dissent in *Shell Canada* and it is at least plausible to argue that, in the wake of *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, the minority view now reflects more accurately the current state of the law. Irrespective of that, it is also worthy of note that there are early examples of the Court being deferential to municipal decision-making once the Court accepted that the exercise of power came within their general jurisdiction: *Sisters of Charity of Providence in British Columbia v. Vancouver (City)* (1910), 44 S.C.R. 29 (probably the first Canadian case acknowledging the legitimacy of policy statements by administrative tribunals provided that the statements are not treated as binding in individual cases, though with the tribunal to be given the benefit of the doubt in marginal situations); *Rodd v. Essex (County)* (1910), 44 S.C.R. 137 (exercise of municipal discretion as to location of court house not to be interfered with unless decision "arbitrary, capricious or biased"); *Lévis (Cité) v. Bégin*, [1926] S.C.R. 65 (decision not to provide water and drainage systems to a particular property not subject to judicial review when taken in good faith and without discrimination).

^{15a} See P.W. Hogg, "The Supreme Court of Canada and Administrative Law, 1949-1971" (1973) 11 Osg. Hall L.J. 187 at 211-14. The only exception that Hogg identifies in the period under review is *Canada (Attorney General) v. Brent*, [1956] S.C.R. 318. and to suggest that there needs to be a more sustained examination of the whole of the Court's record in the field of judicial review of administrative action.

reveal a Court which in the course of its history has vacillated in its desire to confront exercises of administrative and executive power. Moreover, there is also an argument to be made that, even in the era which produced most of the lamentations of the Court's lack of sympathy for the objectives of government programmes (roughly 1949 to 1975), there were a number of occasions where the Court in fact showed considerable respect for the exigencies of the administrative process. In short, the history is complex and not subjected readily at any one time or period to easy classification in terms of judicial approach and philosophy. I will then conclude this essay by engaging in some modest speculation as to where all of this might lead in the next few years.

II. *The First Administrative Law Case*

It was not until 1975 that a Supreme Court of Canada judge used the expression "Administrative Law" in a judgment. The judge in question was Laskin C.J.C. and he did so in dissent in *Law Society of Upper Canada v. French*.¹⁶ "Judicial review" in the sense of "judicial review of administrative action" achieved currency somewhat but not all that much earlier in the 1953 *Toronto Newspaper Guild* judgment.¹⁷ The Court did not entertain an appeal in which an issue of bias on the part of a statutory authority was raised until 1956 and the case of *R. v. White*.¹⁸ Thereafter, it was another thirteen years until the next examination of that question in *King v. University of Saskatchewan*.¹⁹

All of this might suggest that this was field upon which the Court seldom trod until the second half of the twentieth century and, to an extent, there is truth in that. The body of Administrative Law jurisprudence coming from the Court prior to the 1950's is quite thin both in quantity and frequently also in analysis. Moreover, given the flowering of the administrative state in the post-Second World War era, there is nothing all that surprising about this phenomenon.

Nonetheless, in the first volume of the Supreme Court Law Reports published in 1877, there are three judgments²⁰ among only fifteen which in

¹⁶ [1975] 2 S.C.R. 767 at 771. However, it was used as a classification category in captions to Supreme Court Law Reports headnotes starting with *Forest Industrial Relations Ltd. v. International Union of Operating Engineers, Local 882* (1961), [1962] S.C.R. 80.

¹⁷ [1953] 2 S.C.R. 18. Here too, the term is to be found in a dissenting judgment, that of Rand J.

¹⁸ [1956] S.C.R. 154.

¹⁹ [1969] S.C.R. 678.

²⁰ The other two were *Brassard v. Langevin* (1877), 1 S.C.R. 145 (involving the setting aside of the election of a Member of Parliament by reason of the undue influence exercised by his agents, priests who advocated his candidacy from the pulpit) and, much more in the mainstream of conventional judicial review, *Nicholls v. Cumming* (1877), 1 S.C.R. 395 (in which the Court held that a Court of Revision had violated the principles of natural justice in increasing dramatically the assessed value of a property without prior notice to the property owner). In a judgment which finds echoes in modern Canadian procedural fairness law, Strong J. (at 431) rejected the argument that the failure to give notice was of no moment since the Court of Revision's assessment was in fact a fair one.

today's terms involve judicial review of administrative action or Administrative Law issues. The Court heard its very first appeal on June 5, 1876, and three days later it moved to one of only two other appeals that were on the docket for that Session of the Court: *Prince Edward Island (Commissioner of Public Lands) v. Sullivan*, an appeal involving significant Administrative Law issues.²¹ Judgment in both of these first two appeals cases was then rendered on January 15, 1877 and, perhaps because it was read first, the latter is the very first case reported in the Supreme Court Reports. Moreover, notwithstanding its age, *Sullivan* deals with judicial review issues that are still of relevance to contemporary law and, indeed, does so by and large by the use of an approach that accords with that which exemplifies the current Court. In short, it resonates for the contemporary reader versed in Administrative Law.

Sullivan arose out of the attempts of the Government of Prince Edward Island to deal with a crisis in the development of the Island.²² In 1767, the British Crown divided virtually all of the Island into sixty-seven 20,000 acre parcels of land ("townships") and granted them directly and separately to individuals thought to be worthy of the patronage of the Crown. Many among the lucky group who secured these grants either rented out small parcels of the land for long terms or, contrary to the specific terms of the grant, let the lands lie fallow. The overall impact was a shortage of freehold land for purchase on the Island and much agitation about the way in which the original grantees (many of whom became absentee landlords) were dealing with the land they owned and, in particular, declining to sell the freehold to their tenants. After various forms of pressure failed to improve the situation sufficiently, the provincial legislature passed compulsory purchase legislation under which the Government had the authority to repurchase from the original grantees or their successors the land which was the subject of the grant with a view to converting it into freehold land either for the benefit of existing tenants or new purchasers. This was subject to the right of the owner to retain up to five hundred acres of the original grant.

That was not a permissible argument in the face of the procedural deficiencies. It is also interesting that the challenge in this case was a collateral one. The plaintiff was suing in replevin to recover forty-one chests of tea that had been seized for non-payment of rates levied on the basis of the assessment. *Quaere* whether the Court's recent restrictions on the scope of collateral attack would today have dictated that the plaintiff challenge the assessment directly on learning initially of the changed assessment on receipt of an account for municipal taxes.

²¹ (1877), 1 S.C.R. 3.

²² For a useful history of the grants, see F.W.P. Bolger, "The Beginnings of Independence, 1767-1787" in F.W.P. Bolger, ed., *Canada's Smallest Province, A History of Prince Edward Island* (Canada: John Deyell Co., 1973) c. 2 at 37 and, of the events giving rise to the legislation, W.S. MacNutt, "Political Advance and Social Reform, 1842-61", *ibid.* at 115. (I am grateful to Carrie-Lynn Barkley of Queen's Law 2001 for these references.)

For these purposes the Commissioner of Public Works had authority to apply to a tribunal, the Commissioners Court, for a compulsory purchase order and an award of compensation. This tribunal consisted of one person nominated by the Government of Prince Edward Island, one nominated by the federal Government (which was contributing funds in support of the whole initiative), and one nominated by the grantee or owner. In the determination of compensation, the tribunal was to take account not just of the value of the land but also to include arrears of rent owed by existing tenants and other claims arising out of ownership of the land. Its decisions were protected by a form of privative clause or, perhaps more accurately, a provision which allowed only limited opportunity for challenging the tribunal's determination. Section 45 of the *Land Purchase Act*, 1875 provided:

[In] no case shall any appeal lie from such award, either to the Supreme Court, the Court of Chancery, or any other legal tribunal, nor shall any such award, or the proceedings before such Commissioners be removed, or taken into, or enquired into by *certiorari* or any other process.....[but] the Supreme Court shall have the power, on the application of either of the Commissioner of Public Lands or the proprietor, to remit to the Commissioners any award which shall have been made by them to correct any error or informality or omission made in their award. Provided always, that any such application to the Supreme Court to remit such award to the Commissioners shall be made within thirty days after the publication thereof; and, provided further, that the said Commissioners shall have the power to revise and re-execute the same.

The Land Commissioner made an application under the Act for the compulsory acquisition of land owned by Antonia Sullivan and for a setting of the compensation for that land. Following a hearing, the Commissioners set the amount of compensation, the then princely sum of \$81,500. At that point, Ms. Sullivan did not apply to the Supreme Court as provided for under section 45. Rather, some two months later after the money had been paid into the Island's Treasury for distribution in accordance with the Commissioners' order, Ms. Sullivan applied to have the order quashed. There were a number of bases for this application. Many of the allegations had to do with the process leading up to the hearing: the timing and content of the notice and formal requirements attending the appointment of the Commissioners. The other principal allegation concerned the form of the award made by the Commissioners. It was asserted that it failed to show that the Commissioners had dealt with all the matters they were required to deal with under the relevant substantive provision of the Act. In a sense, it was an argument that the decision was tainted by a failure to provide reasons or that there was insufficient proof that the Commissioners had taken into account factors made relevant and mandatory.

Before the Supreme Court of Prince Edward Island, the applicant was successful and the rule for relief in the nature of *certiorari* was made absolute. Thereupon, the Commissioner appealed to the Supreme Court of Canada where much of the Court's time was taken in a consideration of whether the appeal was properly before it. The respondent, Sullivan, urged on this point that the Court had jurisdiction to entertain appeals only from the final appeal court in

the province and it was asserted that there existed a right of appeal to the Lieutenant Governor in Council. This argument was, however, rejected and the Court moved to the "Administrative Law" grounds.

Here, the Commissioner asserted that the Supreme Court of the Island had no jurisdiction to entertain the application for relief in the nature of *certiorari* since section 45 had specifically removed that remedy from the Court's armoury. Rather, the only relief available to the proprietor of the land was to apply under section 45 within thirty days of the date of the order so that the Court could review the matter and, if necessary, refer it back to the Commissioners. Against this, Sullivan argued that this did not affect her right to seek a quashing of the decision outside of section 45 for jurisdictional error. In this respect, she also argued that the allegations of failure to adhere to statutory process and to set out the bases for the decision in the order constituted allegations that went to the jurisdiction of the Commissioners.

The Court had little or no sympathy for her claims. Most were of the view that the statutory remedial regime would not prevent the seeking of relief outside of the Act where there was fraud or true jurisdictional error. However, they held that the grounds on which the applicant was seeking relief did not come within these exceptional circumstances. Given that, the legislature's designated remedial route was the only way to seek relief.

In reaching this conclusion, the various judges made a number of statements that indicate a both a sensitivity to the overall purposes of the legislation and its regulatory objectives as well as a disposition to treat statutorily designated routes of review and appeal as the appropriate way to proceed with judicial review by way of *certiorari* a route reserved for situations where such special regimes did not exist.

For example, Richards C.J., in setting the scene for his consideration of the Administrative Law arguments, states:

The recital in the Statute that it was desirable to convert the leasehold tenures into freehold estates, indicates that it was a matter affecting the public interests. This Statute ought, therefore, to be viewed not as ordinary legislation but as the settling of an important question of great moment to the community, and in principle like the abolition of Seigniorial tenure in Lower Canada, and the settling of the land question in Ireland. In carrying out such measures as these, there may be cases where the law works harshly, where important rights may seem to be disregarded, and private interests are made to yield to the public good without sufficient compensation being given. Yet the legislation on the subject generally assumes to be based on the principle of compensation to individuals when their property is taken from them and points out a mode of ascertaining what the indemnity shall be, and how it shall be paid.²³

Later, he goes on to identify one of the policy reasons for obliging those affected to follow the statutory remedial route:

²³ *Supra* note 21 at 35.

But the course taken on Miss Sullivan's behalf in lying by until the time for applying to the Court under the Statute had passed, it can be seen, has worked great injustice and inconvenience to those acting on behalf of the public. If it had been urged that the award was faulty, it could have been corrected. The Commissioner of Public Lands does not complain of it, therefore there was no reason to apply on his behalf. The proprietor does object, therefore she ought to have applied sooner. She might have applied according to the terms of the Statute; she has deliberately chosen not to do so; she must therefore abide by the consequences.²⁴

And, as a final illustration, in response to an argument for the restrictive interpretation of the privative clause, section 45, he expressed the following sentiment:

I have not met with any case where special provision was made for the correction of the errors or omissions of the tribunal created by the Statute, and where the privative enactment was so strong and emphatic as it is in this Statute, when the Court has felt justified in setting aside the award of the inferior tribunal.²⁵

Indeed, Taschereau J. did not even enter the reservation that *certiorari* remained available in the instance of fraud or true jurisdictional error.²⁶ Immediately after making the statement with which this paper commences, he went on to rule:

The language of the section seems so clear and so energetic that I can see no way of eluding it.²⁷

What emerges from this judgment is a clear sense, even in a case involving the confiscation of private rights in land, that the Court is influenced by the public interest considerations that gave rise to the regulatory regime. In so doing, it approaches the privative clause in a purposive way and in recognition of the fact that it should not permit affected proprietors to delay and complicate the whole process by ignoring the time limit for utilizing the designated remedial route and arriving on the scene later with an application for relief in the nature of *certiorari*.

This notion that those seeking relief for failures in the administrative process should act promptly and make their objections known at the earliest possible opportunity also emerges from the Court's consideration of the nature of the allegations that Sullivan was making. In terms of the objections founded on lack of sufficient notices and alleged problems with the appointment of the Commissioners, Richards C.J. not only characterized the relevant legislative provisions as directory, rather than mandatory but also took particular notice

²⁴ *Supra* note 21 at 43.

²⁵ *Ibid.* at 51.

²⁶ Subsequently, in *Re Trecothick Marsh* (1905), 37 S.C.R. 79, Taschereau, now C.J., seemed to accept that a similar kind of privative clause (this time placing a time limit on the reviewing court for dealing with an application for a writ of *certiorari*) would not avail in the face of a challenge based on a lack of jurisdiction. However, there too, a majority of the Court refused to categorize the matters in issue as jurisdictional in nature.

²⁷ *Supra* note at 61.

of the fact that no objections were taken on these grounds at any earlier point in the process. He also pointed out that, in terms of the timing of the notice, the parties had appeared before the Commissioners.

The same judge also rejected the argument that the Commissioners were obliged as a matter of jurisdiction to make a finding in their award on all the factors identified in section 28 of the Act as relevant to the assessment of compensation. These were matters that were intended to guide the Commissioners in their computation of compensation but, in the absence of proof that they had not been taken into account, there was no room for court intervention. The Commissioners were to be given the benefit of the doubt and they did not have to provide findings on each of these matters on the face of the award. In any event, as Ritchie and Taschereau JJ. both made clear, complaints on matters such as this and also the procedural defects could have been raised in the context of an application under section 45. It was now simply too late to assert them!

While it might be argued in the wake of *Baker v. Canada (Minister of Citizenship and Immigration)*²⁸ that today this would involve a situation where the provision of reasons would be necessary because of the nature of the interest at stake and in order to effectuate the statutory right of "appeal", nevertheless, it is also clear that today's Court would still adhere to the proposition that these were all matters within the jurisdiction created by section 45 and should have been pursued there. There is also a very modern sense in the notion that, absent proof to the contrary, the Commissioners are entitled to the benefit of the doubt on matters such as this. Indeed, even under the "new" common law duty to provide reasons at least in certain circumstances, there will not necessarily be an obligation to cross every "t" and dot every "i".

In sum, this very first "Administrative Law" case is one in which the Court was unanimous in its determination to give effect to legislative intention, to respect the administrative and remedial processes established by the legislation, and to have regard to public interest reasons for disregarding normally predominant private rights. In short, it is remarkably "modern" and comparable to what today would be seen as a "pragmatic and functional" approach to the scope or extent of judicial review.

III. Review of Social Benefits Tribunals

In 1997, the Supreme Court was called upon to rule on the standard of review applicable to a determination by the Saskatchewan Workers' Compensation Board that a cause of action brought in the regular courts was statute-barred by virtue of the terms of the *Workers Compensation Act*. The Act conferred on the Board general authority to determine such questions and there were privative provisions that apparently protected such determinations from judicial review.

²⁸ [1999] 2 S.C.R. 817.

This led the Court in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*²⁹ to hold that the Board's ruling on a question such as this could be set aside only if patently unreasonable and that this threshold had not been met in that instance. In other words, tribunal determination of the existence of a common law right of action in the regular courts was protected by the most deferential test for judicial intervention. Jurisdictional saw offs between the regular courts and administrative tribunals were in this instance the primary responsibility of a statutory body, not the regular courts themselves.

In an earlier paper,³⁰ I commented to the effect that in a way this represented one of the more extreme applications of the principle that the Supreme Court had been espousing since its judgment in 1979 in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Commission*³¹: deference to tribunal decision-making where there has been an obvious legislative reposing of trust in the expertise of the administrative tribunal and a resulting reluctance to

...brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.³²

Even in instances of jurisdictional competition between the courts and tribunals and agencies, correctness review was not necessarily the case and clearly could be displaced by appropriately-framed statutory provisions.

What is, however, of particular pertinence to this paper is the fact the most apposite prior authority on this question was a judgment of the Supreme Court which predated the seminal *New Brunswick Liquor Commission* judgment by over fifty-five years. The relevant authority was *Dominion Cannery Ltd. v. Costanza*³³, and it is the first judgment of the Court in which a tribunal responsible for adjudication in the domain of social benefits came under scrutiny. Indeed, as in *Pasiechnyk*, it was the Workers Compensation Board, though of Ontario, not Saskatchewan.

The relevant legislative framework was also essentially the same as that which the Court confronted in *Pasiechnyk*: a privative clause conferring on the Board exclusive jurisdiction to hear and determine all questions and matters arising under the Act; a specific power to determine whether the Act has taken away a common law right of action; and a further provision to the effect that the Board's determination of that specific question was "final and conclusive".

The three plaintiffs were employees of the defendant and they contracted typhoid from drinking water from a well that served their lodgings, a building which was owned by the defendant. The defendant employer raised as a defence

²⁹ [1997] 2 S.C.R. 890.

³⁰ "Recent Developments in Administrative Law - The Apparent Triumph of Deference!" (1999) 12 C.J.A.L.P. 192.

³¹ *Supra*, note 3.

³² *Ibid.* at 233.

³³ [1923] S.C.R. 46.

to their action against him the assertion that their statement of claim disclosed no cause of action as it was excluded by the terms of the *Workmen's Compensation Act*. That argument was not successful at first instance nor on the defendant's subsequent appeal. The defendant then appealed further to the Supreme Court of Canada. In the meantime, the plaintiffs made an application under the Act and the Board ruled that they had not sustained personal injury arising out of or in the course of their employment. At issue before the Supreme Court of Canada was what effect, if any, the Court should give to the ruling of the Board.

Over the dissent of Duff J., the Court ruled that it should take judicial notice of the Board's ruling. Indeed, all members of the Court (including Duff J.) agreed that the Act made the Board the sole judge of whether the plaintiff's common law claim had been excluded or removed. However, despite that, the majority felt that there had been a problem with the Board's determination of the issue in this instance. It had made that determination on the *ex parte* application of the plaintiffs. This violated the majority's sense of the requirements of procedural fairness. As a result, the Court ordered the appeal stayed until such time as the Board had redetermined the matter, this time on notice to the employer.

Interestingly, Idington J., dissenting on this point, was of the view that the Court should accept the Board's ruling. The employer could also have applied to the Board to have this question determined and had chosen not to do so, almost certainly because there was no argument that the harm suffered was a work-related injury. He also felt that the maxim *audi alteram partem* did not oblige the Board to provide the employer with an opportunity to be heard on the plaintiff's application. Considerations of administrative efficiency and the Board's experience in such matters meant that the Court should not second-guess its mode of proceeding in matters such as this. The plaintiffs were entitled to their judgment.

What is fascinating about all the judgments in this case is their "pragmatic and functional" approach and their willingness to be governed by what they saw as the clear intention of the legislature. In this regard, the following quite lengthy extract from the majority judgment of Anglin J. is instructive:

In my opinion by giving to the board "exclusive jurisdiction to examine, into, hear and determine" all such matters and questions the legislature intended to oust and did oust the jurisdiction of the ordinary courts to entertain them, and required that they should be examined into, heard and determined solely by the board.

...

The purpose of the legislature apparently was to secure uniformity in the determination of what classes of cases fall within the operation of the Compensation Act by having a single tribunal deal with that question, and also to ensure that no workman injured in the course of his employment should find himself in the position of having been denied damage by the courts because he was, in their opinion, entitled to compensation under the Act, and refused compensation by the board because he was, in its view, not so entitled.³⁴

³⁴ *Ibid.* at 61-62.

Indeed, it is of some significance that there is no assertion of residual judicial authority in the instance of patently unreasonable rulings by the Board. This was to come later!

The disagreement over the requirements of procedural fairness also has a modern sense to it. Anglin J. (for the majority) adopts what is still the Court's position: that the provisions of privative clauses do not protect determinations that are tainted by procedural unfairness and it is not for the court to preclude those rights on the basis of its sense that the Board's ruling on the merits was indeed correct.³⁵ In contrast, Idington J. seems clearly of the view that natural justice entitlements should not extend to secure the reopening of clearly unmeritorious substantive claims. While that does not find sympathy in the current rule that a violation of the rules of natural justice amounts to a free-standing ground of judicial review, there may, however, be much to be said for his other grounds for disagreeing with this argument: that the conduct of the defendant in relation to this issue was in effect a waiver of its right to now raise it and also that experienced tribunals may decide to proceed *ex parte* in cases where there are no meritorious arguments to be made for the other side and all sorts of costs in delaying until there is a hearing. On the other hand, my hunch is that this form of pragmatism may still not appeal to the current edition of the Court even given its high degree of commitment to the "pragmatic and functional" approach.

In short, what this first encounter with a social benefits tribunal demonstrates graphically is a Supreme Court in the 1920's which was committed (at least in this case) to realistic and purpose-driven interpretation of legislative initiatives creating an administrative tribunal and this notwithstanding the fact that that tribunal was clearly "trespassing" in domains previously occupied by the courts. It is also a judgment that is very sensitive to the situation of those whom the legislation was designed to benefit (employees) and to ensure that, subject to overriding concerns about adherence to the principles of natural justice, they were not left in a no-man's land between the regular courts and the Board.

IV. *Business Sector Regulation*

Through the first half of the twentieth century, the tribunal encountered most frequently by the Supreme Court of Canada was the Board of Railway Commissioners and its successor the Board of Transport Commissioners. As its name indicates, this body, which itself replaced the Railway Committee of the Privy Council, had significant regulatory jurisdiction over a vital sector of the Canadian economy. In time, however, its mandate broadened to include federally regulated telephone companies and ultimately federally regulated road transportation.

³⁵ See the judgment of LeDain J. in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643.

Under the *Railway Act*, there was an appeal directly to the Supreme Court of Canada from the Board of Railway Commissioners. On questions of jurisdiction, leave from the Supreme Court itself was required and on questions of law the statute required leave of the Board of Railway Commissioners. This regime was subject to criticism by John Willis in his article "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional".³⁶ In particular, he characterized the Court's ability to review the decisions of the Commissioners on issues of law as "simply mean[ing] that the amateur is entitled to upset the expert."³⁷ Nonetheless, it is not surprising that the Court in exercising its powers never articulated them as limited by considerations of the expertise of the tribunal under scrutiny. To the extent that the courts have always adjudicated questions of jurisdiction on the basis of correctness, this absence of deference was inevitable. Moreover, given that other questions of law only reached the Court with the leave of the Commissioners themselves, it was not surprising that the Court treated its review powers over such questions as also being exercised on a correctness basis.

This does not, however, mean that the Court was necessarily hostile to the regulatory objectives of the legislation and the role of the Railway Commissioners. There is also evidence that deference or respect for the expertise of the Commissioners was present implicitly in many judgments. A number of indicators can be cited in support of these propositions.

In some instances, the *Railway Act* removed civil disputes involving the obligations of railway companies from the jurisdiction of the provincial superior courts and conferred it on the Board of Railway Commissioners. In at least two early cases, the Supreme Court showed itself sensitive to the legislative objectives in giving a purposive reading to the statutory exclusions of ordinary court jurisdiction and sustaining the exclusivity of the Board's authority over the disputes in question.³⁸ There are also early examples of the Court sustaining the decision of the Board on detailed questions of interpretation by simply incorporating the Board's decision into its own judgment and indicating concurrence with that.³⁹ In the domain of jurisdictional error, there is evidence that the Court exercised its leave powers in some instances on the basis that the issue raised was not one of jurisdiction or that the Board had been obviously correct.

Moreover, as the Court's exercise of this appellate power matured and the scope of the powers of the Board increased, there was more of a tendency in the domain of appellate scrutiny of questions of law for the Court to classify the

³⁶ *Supra* note 3.

³⁷ *Ibid.* at 79.

³⁸ *Grand Trunk Railway Co. of Canada v. Perrault* (1905), 36 S.C.R. 671 and *Grand Trunk Railway Co. of Canada v. McKay* (1903), 34 S.C.R. 81.

³⁹ See e.g. *Canadian Northern Railway Co. v. T.D. Robinson & Son* (1906), 37 S.C.R. 541; *Grand Trunk Railway of Canada Co. v. Robertson* (1907), 39 S.C.R. 506; and *Essex Terminal Railway Co. v. Windsor, Essex & Lake Shore Rapid Railway Co.* (1908), 40 S.C.R. 620.

matter in issue as a question of fact or a matter for the discretion of the Board rather than a question of law. Initially, this manifested itself in members of the Court expressing some level of frustration with what they thought was a too ready giving of leave to appeal. Thus, in one of the first telephone cases to come before the Court,⁴⁰ Fitzpatrick C. J. made the following observation:

I am of the opinion, as I have already said, that the evident intention of Parliament was to give the Board, in the public interest, absolute power to regulate this public utility, which has grown to be almost an essential factor in the every-day life of the whole community, and for that purpose has conferred the widest discretion upon the Board. In that view I fail to see the practical use of this reference, but the questions are before us and must, therefore, be dealt with.⁴¹

Later, however, the Court in some cases simply rejected the appeal as ill-founded and in effect dismissed the appeal without dealing with the issues raised. A prominent example is the 1939 judgment in *Canadian National Railways Co. v. Bell Telephone Co. of Canada*.⁴² In delivering the judgment of the Court, Duff C.J. identifies the general principle which should guide the Court in the exercise of its appellate authority:

True, it is the duty of all public bodies and others invested with statutory powers to act reasonably in the execution of them, but the policy of the statute is that, subject to the appeal to the Governor in Council under section 52, in exercising an administrative discretion entrusted to it, the Board itself is to be the final arbiter as to the order to be made.⁴³

He then proceeded to examine what constituted a question of law for the purposes of the appeal provision in the Act and stated that, in his opinion, it did

...not embrace such questions: whether (that is to say) there is any evidence to support a given finding of fact.⁴⁴

While this is a controversial proposition as far as general judicial review law is concerned, it demonstrates the extent to which the Court was prepared to go in according recognition to the Act's provisions making the Board's findings and determinations of questions of fact "binding and conclusive". Indeed, Duff C.J. then proceeded to elaborate on this matter by reference to considerations which are clearly the equivalent of the current "pragmatic and functional" approach:

The effect of this section is that where a question of fact is within the jurisdiction of the Board, then the determination of that question of fact by the Board is final and conclusive. I do not think it is consistent with the provision, according to its true intendment, that the determination by the Board of an issue of fact within its jurisdiction should be susceptible of review on appeal to this Court, even by leave of the Board. The Board is not bound by the ordinary rules of evidence. In deciding

⁴⁰ *Ingersoll Telephone Co. v. Bell Telephone Co. of Canada* (1916), 53 S.C.R. 583.

⁴¹ *Ibid.* at 589.

⁴² [1939] S.C.R. 308.

⁴³ *Ibid.* at 315.

⁴⁴ *Ibid.* at 317.

upon questions of fact, it must inevitably draw upon its experience in respect of the matters in the vast number of cases which come before it as well as upon the experiences of its technical advisers. Thus, the Board may be in a position in passing upon questions of fact in the course of dealing with, for example, an administrative matter, to act with a sure judgment on facts and circumstances which to a tribunal not possessing the Board's equipment and advantages might yield only a vague or ambiguous impression.⁴⁵

He then applied this approach to the matters before the Court in this instance. The case involved an appeal by the railway company against a Board order requiring it to reimburse the respondent telephone company for the costs incurred by the telephone company as a result of the railway company carrying out works that had been authorized by the Board. In previous cases, the Board had developed principles under which it would exercise its broad statutory discretion with respect to the allocation of costs in cases of interference necessitated by the execution of Board authorized works. In its appeal against the Board's decision or order, the railway company alleged that the Board had not properly applied to this matter the principles that it had adopted in previous cases in the exercise of its statutory discretion. Duff J. rejected this argument:

But the question whether the Board in a given case has properly appreciated its own rule of practice, or the considerations on which the rule is based, cannot be a question of law within the meaning of section 52(3); nor can the question whether in a given case the Board has properly appreciated the facts for the purpose of applying the rule be such a question. This is so because, to repeat what has already been said, there is no statutory rule and there is no rule of law that prescribes the considerations by which the Board is to be governed in exercising its administrative discretion under section 39(2).⁴⁶

Wrapped up in this are a number of propositions which are respectful of the Board's exercise of its discretionary powers: a reluctance to second-guess the Board on the principles it adopts in the exercise of broadly-worded discretionary powers and the application of those principles to the facts of particular cases, as well as a rejection of the proposition that, as a matter of law, the Board must act consistently with the principles it has enunciated and applied in previous cases. To the extent that, in other contexts, all these matters might be treated as raising issues of law, Duff C.J.'s classification of each of these questions as being part of the fact determination process bespeaks a Court which is anxious to preserve a significant area of autonomy for the Board. Moreover, lest it be thought that this case stands alone, reference call also be made to the 1965 judgment of the Court in *Canadian Pacific Railway Co. v. Québec (Attorney General)*.⁴⁷ There, Hall J. for the Court, in reference to the same statutory provision (albeit now exercised by the renamed Transport Commissioners of Canada), spoke in terms of the "discretionary powers so exercised [not being] subject to review by this Court".⁴⁸

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 319.

⁴⁷ [1965] S.C.R. 602.

⁴⁸ *Ibid.* at 606.

V. *The Role of the Courts in Dealing with Appeals
from Statutory Authorities*

In recent years, the Supreme Court has accepted on at least three occasions that, even where there is a statutory appeal to a court from the decision of an administrative tribunal or statutory body, it is still necessary for the court to engage in a "pragmatic and functional" analysis to assess what the appropriate standard of judicial scrutiny should be. Most have treated this as another novel development in Canadian Administrative Law and a further step along the road to increased deference or respect for the administrative process. However, there is an argument to be made that *Bell Canada v. Canada (CRTC)*⁴⁹ (and Gonthier J.'s use of the term "specialization of duties" as a concept relevant to the scope of an appeal court's powers), *Pezim v. British Columbia (Superintendent of Brokers)*,⁵⁰ and *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*⁵¹ (and its acceptance that the standard of review in the context of the relevant statutory appeal was unreasonableness, not correctness) are not in fact novel features of Canadian judicial review law.

As already noted in the previous section, the approach taken by Duff C.J. (for the Court) in the 1939 *Canadian National Railways* case clearly has deferential perspectives to it in delineating the appropriate scope of the right of appeal on questions of law found in the *Railway Act*. Moreover, late in 1938, in *Pioneer Laundry & Dry Cleaners Ltd. v. Canada (Minister of National Revenue - M.N.R.)*,⁵² a majority of the Court had expressed similar sentiments in evaluating the room that existed for judicial intervention in a situation where there was a right of appeal to the Exchequer Court of Canada from a Ministerial denial of a claim for a depreciation allowance for the purposes of the *Income War Tax Act*. The relevant provision⁵³ stated that an allowance could be made for "[s]uch reasonable amount as the Minister, in his discretion, may allow for depreciation" and, on the basis of the absence of criteria in and the subjective language of this section, the majority held that, notwithstanding the right of appeal, the Ministerial decision was effectively beyond scrutiny:

In the present case, the Minister has exercised his discretion and, as already stated, the statute does not define or limit the field for the operation of such discretion.⁵⁴

The minority was not persuaded by this. To treat the discretion as effectively beyond scrutiny would be to nullify the right of appeal. Rather, the discretion had to be exercised in accordance with proper legal principles. Moreover, to the

⁴⁹ [1989] 1 S.C.R. 1722.

⁵⁰ [1994] 2 S.C.R. 557.

⁵¹ [1997] 1 S.C.R. 784.

⁵² [1939] S.C.R. 1.

⁵³ Section 5.

⁵⁴ *Ibid.* at 10.

extent that the Minister had in effect pierced the corporate veil in making the decision to disallow what was essentially a second claim for depreciation on the same capital items, there had been such an error in principle. This view subsequently found favour with the Judicial Committee of the Privy Council⁵⁵ and is perhaps indicative of an illegitimate importation or use of a legal concept in a context where the terminology of the relevant provision and the purposes behind it indicated that the Minister was not to be governed by ordinary legal principles in deciding whether to approve an allowance for depreciation.

Subsequently, however, the Judicial Committee itself in another Canadian revenue appeal appeared to stake out a middle ground in the role to be played by the Exchequer Court in determining an appeal from such discretionary determinations. In *Minister of National Revenue v. Wrights' Canadian Ropes*,⁵⁶ Lord Greene, delivering the advice of the Judicial Committee, spoke in terms which bear similarities in approach to those expressed much more recently by Iacobucci J. in *Southam Inc.*:

This right of appeal must, in their Lordships' opinion, have been intended by the Legislature to be an effective right. This involves the consequence that the Court is entitled to examine the determination of the Minister and is not necessarily to be bound to accept his decision. Nevertheless the limits within which the Court is entitled to interfere are in their Lordships' opinion strictly circumscribed. It is for the taxpayer to show that there is ground for interference and if he fails to do so the decision of the Minister must stand. Moreover, unless it can be shown that the Minister has acted in contravention of some principle of law the Court, in their Lordships' opinion, cannot interfere: the section makes the Minister the sole judge of the fact of reasonableness or normalcy and the Court is not at liberty to substitute its own opinion for his.⁵⁷

In short, even within a general right of appeal, the nature of the decision under appeal will influence the reach of the courts' powers and, more particularly, in the case of broad discretionary powers, will not involve correctness review but deference to the choices made by the decision-maker unless they conflict with some overarching legal principle.

VI. Executive Decision-Making

In general, the Supreme Court has been generous in its treatment of the scope of executive powers. This was no more manifest than in its unwillingness to interfere with regulations promulgated by the Governor in Council under wartime emergency legislation.⁵⁸ The most vivid and obviously troubling example of this was the upholding of the regulations providing for the deportation of persons of Japanese ancestry including those who were

⁵⁵ [1940] A.C. 127 (P.C.).

⁵⁶ [1947] 1 D.L.R. 721 (P.C.).

⁵⁷ *Ibid.* at 730.

⁵⁸ See *Re Gray* (1918), 57 S.C.R. 180 and *Reference re Chemicals Regulations*, [1943] S.C.R. 1.

Canadian-born or had become naturalized.⁵⁹ At least, the Supreme Court of Canada, though divided on the point, held that the regulations could not extend to the Canadian-born spouses and children of persons ordered to be deported.⁶⁰ However, on appeal and cross-appeal to the Judicial Committee of the Privy Council,⁶¹ even this part of the regulations was sustained. Indeed, later, the Judicial Committee was also to reverse the one judgment of the Court in which it did strike down regulations promulgated under the authority of wartime emergency legislation.⁶²

More importantly for present purposes, the Supreme Court was traditionally deferential to the exercises of executive power in situations where Ministers of the Crown were making decisions involving the determination of individual obligations or liabilities in the manner of an administrative tribunal. Thus, in the last section, I noted the judgment of the Supreme Court in the *Pioneer Laundry* case, where the Court, despite the existence of a statutory right of appeal, held that the exercise of a broad ministerial discretion over an element of tax assessment was virtually beyond judicial scrutiny.⁶³ While that particular version of deference to executive decision-making was "corrected" by the Judicial Committee of the Privy Council, the Court itself was quick to distinguish restrictively the advice of the Judicial Committee.

*Canada (Attorney General) v. Noxzema Chemical Co. of Canada*⁶⁴ involved a challenge to a ministerial determination that the company was selling goods to its distributors at prices less than fair value and should therefore pay excise and sales tax on the basis of a higher price. In the context of enforcement proceedings, the company challenged this determination. The Supreme Court, reversing the Exchequer Court of Canada, rejected the challenge. In so doing, the Court held that it was not its role to assess whether the Minister, acting through his officials, had been correct in his determination. Rather, given the wording of the relevant provision, this was a matter for the "judgment"⁶⁵ of the Minister, and the Court could intervene only where he had failed to act "honestly or impartially"⁶⁶ or (in the case of three of the five judges) failed to give the

⁵⁹ See B. Baines, "The Justiciability of Multiculturalism and Minority Rights in Canada" (1999) 31 *Hosei Riron* 130 at 136-38.

⁶⁰ *Reference re Persons of Japanese Race*, [1946] S.C.R. 948.

⁶¹ *Co-operative Committee on Japanese Canadians v. Canada (Attorney General)*, [1947] 1 D.L.R. 577 (P.C.).

⁶² *Canada (Attorney General) v. Hallet & Carey Ltd.*, [1952] A.C. 427 (P.C.), rev'g *Canada (Wheat Board) v. Hallet & Carey Ltd.*, [1951] S.C.R. 81.

⁶³ For an earlier example, see *Home Appliances Manufacturing Co. v. Oneida Community*, [1923] S.C.R. 570 (in the context of a Ministerial refusal to register a trademark).

⁶⁴ [1942] S.C.R. 178.

⁶⁵ Section 98 of the *Special War Revenue Act*, R.S.C. 1927, as inserted by 23 & 24 Geo. V., c. 50, s. 21.

⁶⁶ *Supra* note 64 at 186.

taxpayer the "opportunity of being heard".⁶⁷ For these purposes, the Court also noted explicitly that, as opposed to *Pioneer Laundry*, there was no statutory appeal from the exercise of ministerial discretion.

The conduct of enforcement inquiries and investigations under revenue and other economic regulatory regimes provides yet another domain of ministerial power where the Court exhibited a deferential attitude, this time on issues of process. The first example of this is provided by the 1935 judgment in *St. John v. Fraser*.⁶⁸ This involved the conduct of an investigation ordered by the Attorney General of British Columbia under the *Securities Fraud Prevention Act* and the assertion of procedural entitlements by a person whose connections with the relevant company's affairs had emerged during the course of the investigation. He complained of a lack of notice and a lack of an opportunity to cross-examine relevant witnesses. In rejecting this argument, Crocket J., delivering one of two judgments, noted the argument of the Attorney General that the acceptance of such arguments would mean that such an inquiry "would become utterly ineffective, prolonged in duration and costly in administration". He then went on to accept the proposition that what was the accepted procedure for a court of law was not necessarily so for administrative or executive officers or administrative tribunals. This led to the conclusion that, in instances such as this, it was not for the court to interfere with the investigator's failure to provide St. John with an opportunity to cross-examine the relevant witnesses. Some thirty years later, in *Guay v. Lafleur*,⁶⁹ the Court in effect applied *St. John v. Fraser* directly in a case involving a ministerial-ordered investigation into a taxpayer's affairs under the *Income Tax Act*.

In the same era, though six years earlier, in *Calgary Power Ltd. v. Copithorne*,⁷⁰ the Court also exhibited considerable deference in both the procedural and substantive domains to a ministerial expropriation of a right of way over farm land to enable the placing of power transmission lines. In justifying its sustaining of the Minister's decision on substantive grounds, the Court once again placed considerable emphasis on the language of the empowering section and, in particular, its use of the terminology "which the Minister deems necessary". According to Martland J. delivering the judgment of a unanimous Court:

The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary. In the order which he made he specifically states that he did deem them necessary for the authorized undertaking of the appellant company. There is no suggestion of bad faith on his part.⁷¹

⁶⁷ *Ibid.*

⁶⁸ [1935] S.C.R. 441.

⁶⁹ [1965] S.C.R. 12.

⁷⁰ [1959] S.C.R. 24. For a more recent example in the context of regulations made by the Governor in Council, see *Thorne's Hardware v. The Queen*, [1983] 1 S.C.R. 106.

⁷¹ *Ibid.* at 34.

He then went on to quote from English authority⁷² to the effect that, in this kind of case, it was not for the Court to call upon the Minister to justify his decision. This was for Parliament or, in this instance, the Alberta Legislature.

This abnegation of judicial capacity to intervene in the substance of the decision-making process was replicated on the procedural issues. After extensive reference to English and Privy Council authorities, Martland J. concluded:

In my view, the powers of the Minister, under the statute in question here, were to make an executive order. His functions were not judicial or quasi-judicial. His decision was an administrative decision to be made in accordance with the statutory requirements and to be guided by his own views as to policy which, in the circumstances, he ought to pursue.⁷³

Earlier, in justification of the conclusion that the landowner was not entitled to a hearing, the Court had also labelled the decision a "policy" one for which the Minister was "answerable only to the legislature".⁷⁴

These statements are worthy of note not just because they represent an unwillingness to impose natural justice or hearing requirements on ministerial decision-making but also because they characterize what had, by this time, become a feature of Supreme Court decision-making in the domain of procedural fairness claims: the use of labelling rather than analysis as the basis for dealing with procedural claims. If the power was administrative rather than judicial or quasi-judicial, there were no procedural entitlements with the assumptions being both that the criteria for distinguishing between these two categories were self-evident and that those criteria, if discernible, were in fact appropriate bases for the parcelling out of procedural entitlements.

In this regard, there is quite a contrast between the approach of Crocket J. in *St. John v. Fraser* and that of the Court in *Copithorne*. While Crocket J.'s judgment is deferential to the procedural choices made by the minister's official conducting the investigation, that deference is, albeit somewhat cursorily, based upon functional considerations related to the exigencies of the assigned statutory role. By the time of *Copithorne*, labelling and a lack of concern for the meaning of concepts without any necessary functional connections to a proper assessment of procedural claims have taken over.

Indeed, by the time of *Noxzema Chemical Co. of Canada*, there were already signs of what was to come in *Copithorne*, seventeen years later. Two of the three judges in that case decided the procedural issue simply by reference to an assertion that the Minister's assessment power under the

⁷² *Robinson v. Minister of Town and Country Planning*, [1947] 1 K.B. 702 at 716 (C.A.), Lord Greene M.R..

⁷³ *Supra* note 70 at 34.

⁷⁴ *Ibid.* at 33.

Act was a "purely administrative function".⁷⁵ The majority also classified the Minister's power as administrative but, nonetheless, may be read as accepting that it was attended by a duty to give the affected tax payer a chance to put its case against the assessment.⁷⁶

VII. 1949-75 - *The Bad Old Days*?

Calgary Power v. Copithorne serves as a useful linkage to a consideration of the era of the Court which provides most of the commonly cited examples of excessive intervention in and lack of judicial respect for the administrative process. Indeed, to the extent of its virtually unquestioning acceptance of executive judgment on the procedural and substantive matters in issue, it calls into question immediately any assertion that the Supreme Court of Canada at that time was completely out of sympathy with the administrative process and willing to intervene at the least provocation. Certainly, in the arena of ministerial decision-making, the disposition seems to have largely been in the other direction, that of a tendency to accept broad grants of statutory decision-making at face value and not subject them to any procedural or substantive controls in the name of "legal principle" or broadly-based notions of the already accepted judicial review grounds for abuse of discretion.

Copithorne does, however, provide a possible clue as to why the situation might have been different in the case of administrative tribunals. First, Martland J.'s references to the accountability of the Minister in Parliament or the Legislature, even at that time one suspects a theoretical rather than a real possibility in most instances, might be read as implying that different standards would apply in the case of administrative tribunals who were not directly accountable to the legislature in the same way. In their case, the alternative accountability mechanism of judicial review was essential. Secondly, to the extent that, in many instances, these tribunals decided questions of law rather than exercised a broadly-based discretion, the courts might be inclined to assert at least a comparative level of competence with respect to such questions.

In fact, beginning as it does in the year of the abolition of appeals to the Judicial Committee of the Privy Council and the true achievement by the Supreme Court of Canada of the status that its title implies, this period is one that has been subject to extensive examination and assessment by academics. I do not, therefore, want to traverse that territory in any great detail in this paper save to emphasise a few salient points.

First, most of the scholarly commentary came from those whose basic discipline was Labour Law and, in most instances, with a perspective that was sympathetic to widely dispersed collective bargaining, strong, autonomous Labour Boards, and the efficient, effective resolution of workplace disputes by

⁷⁵ *Supra* note 64 at 180 (*per* Davis J., Duff C.J. concurring).

⁷⁶ *Ibid.* at 156-186 (*per* Kerwin J., Rinfret and Hudson JJ. concurring).

grievance arbitrators. Viewed from that perspective and, indeed, I would argue even from a more neutral stance on such matters, there were instances during this era in which the Court showed itself to be excessively interventionist in decision-making by both Labour Boards and grievance arbitrators. Moreover, there is a case to be made that that intervention tended to favour employer interests over those of employees and unions and reflected implicitly a distrust of the institutions chosen by Parliament and the legislatures for the regulation of relations in the workplace.⁷⁷

Secondly, even in the domain of Labour Law, those critiquing the Supreme Court's performance took care to acknowledge that there were indeed instances in which the Court's intervention was justified because it reflected review on the basis of transcendent legal principles. Thus, Paul Weiler in *In the Last Resort*⁷⁸ and the prior law review article on which the relevant portions of that book are based,⁷⁹ concedes the appropriateness of the Court's judgments in cases such as *Alliance des Professeurs Catholiques de Montréal v. Québec (Labour Relations Board)*⁸⁰ and *Smith & Rhuland Ltd. v. The Queen*.⁸¹ In the first, the Labour Board had cancelled the union's collective bargaining certification without notice and, in the second, the Court rebelled against the Nova Scotia Board's refusal to certify a union as a bargaining agent by reason of the political beliefs of the union's secretary treasurer; he was a Communist.

Thirdly, the theory on which intervention was based was in many instances that of jurisdictional error. While this has always been part of the rubric of British and Canadian judicial review law, the scope of what constituted jurisdictional error for the purposes of judicial review generally and avoiding privative clauses in particular seemed to have broadened considerably from the concept that featured in the early cases discussed in this paper, *Sullivan and Costanza*. Indeed, perhaps more accurately, the concept of jurisdictional error in which the Court was trading was so malleable as to be capable of justifying the inclusion within its reach of any question of law or mixed law and fact that a tribunal was called upon to decide in the exercise of its mandate. The primary

⁷⁷ See e.g., aside from Weiler cited below, B. Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952) 30 Can. Bar Rev. 986. Indeed, some have maintained that this approach survived the adoption of the "pragmatic and functional" approach. See B. Etherington, "Arbitration, Labour Boards and the Courts in the 1980s: Romance Meets Realism" (1989) 68 Can. Bar Rev. 405 and later "An Assessment of Judicial Review of Labour Laws Under the Charter: Of Realists, Romantics and Pragmatists" (1992) 24 Ott. L.R. 685. Writing more generally, John Evans questioned at about the same time whether the Supreme Court was as committed in practice as it was in theory to a "pragmatic and functional" approach characterized by deference: J.M. Evans, "Jurisdictional Review in the Supreme Court: Realism, Romance and Recidivism" (1991) 48 Admin. L.R. 255.

⁷⁸ (Toronto: Carswell, 1974) at 135.

⁷⁹ "The 'Slippery Slope' of Judicial Intervention" (1971) 9 Osg. Hall L.J. 1.

⁸⁰ [1953] 2 S.C.R. 120.

⁸¹ [1953] 2 S.C.R. 95.

examples always cited in this context were the labour case of *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*⁸² and *Bell v. Ontario (Human Rights Commission)*,⁸³ the Court's first encounter with the comparatively recent creation of human rights commissions and tribunals or boards of inquiry.

Fourthly, while Labour Boards and arbitrators may have fared badly in some instances at the hands of the Court and while prospects looked poor for autonomy and respect for expertise in the domain of human rights adjudications, at least one other species of tribunal continued to attract respect: Workers Compensation Boards. In *Farrell v. British Columbia (Workers'/Workmen's Compensation Board)*,⁸⁴ the Court not only fought off (in very short order) a long-anticipated section 96 challenge⁸⁵ to the constitutional validity of the Workers Compensation regime but also resisted the application of the concept of jurisdictional error as a basis for engaging in review of the Board's determination that an employee's death was not the result of a workplace accident. Indeed, not too long after this, the Court rejected (in circumstances that would probably attract review today) an allegation of procedural unfairness in the Board's treatment of a specialist's certificate in the context of an appeal from the discontinuation of benefits.⁸⁶

Fifthly, this was also the era during part of which the Court showed considerable sensitivity to overarching conceptions of political and civic participation and religious and other forms of freedoms, principally in cases involving Constitutional and Administrative Law challenges to various aspects of the then Québec Government's sustained attack on the activities of Jehovah's Witnesses. In the Administrative Law domain, the most dramatic example of this was *Roncarelli v. Duplessis*⁸⁷ and the awarding of damages against the Premier of Québec for securing illegally the cancellation of Roncarelli's restaurant liquor licence for providing bail to fellow adherents when they were charged with various *Criminal Code* and provincial offences.

⁸² [1970] S.C.R. 425.

⁸³ [1971] S.C.R. 756.

⁸⁴ [1962] S.C.R. 48.

⁸⁵ See J. Willis, "Section 96 of the *British North America Act*" (1940) 18 Can. Bar Rev. 517. I was anticipating there would be quite a lot of Supreme Court jurisprudence involving section 96 challenges to administrative tribunals. However, prior to the 1950's, almost all the relevant cases by-passed the Supreme Court of Canada and went directly from provincial Courts of Appeal to the Judicial Committee of the Privy Council, including *Toronto v. York*, [1938] A.C. 415 (P.C.) (much criticized by Willis for its striking down of various powers of the Ontario Municipal Board) and, of course, the foundational case for much of the modern jurisprudence: *Saskatchewan (Labour Relations Board) v. John East Iron Works Ltd.*, [1949] A.C. 134 (P.C.) (sustaining the challenged aspects of the Labour Relations Board jurisdiction). See, however, *Toronto (City) v. Olympia Edward Recreation Club Ltd.*, [1955] S.C.R. 454 (once again involving the invalidation of powers conferred on the Ontario Municipal Board).

⁸⁶ *Kinnaird v. British Columbia (Workers'/Workmen's Compensation Board)*, [1963] S.C.R. 239.

⁸⁷ [1959] S.C.R. 121.

Sixthly, and finally, the real failings of the Supreme Court during this period are perhaps still best captured by Peter Hogg in his article, "The Supreme Court of Canada and Administrative Law, 1949-71".⁸⁸ Writing from the perspective of someone whose primary field was not Labour Law and on the basis of empirical research into all the Administrative Law judgments of the period, he concluded that the statistics on their face proved that the Court had "[b]y and large... been restrained in the exercise of its review function".⁸⁹ However, he then goes on to lament a number of aspects of the Court's performance in the domain of Administrative Law. In my view, the most salient of these concerns are captured in the following extract:

But, if the Court's instinct for the proper result in each case is usually sound (as I believe it is), its reasons for judgment are often woefully inadequate. First of all, it is very rare to find the Court enunciating the grounds for what I detect as this tendency for restraint in review; since there are excellent policy reasons for this tendency it is a pity that they so seldom appear in the reports. Secondly, the Court occasionally does not state the legal rule upon which its decision is based, or (as in the delegation and natural justice cases) it states the rule in terms of meaningless formulae such as the classification of functions.⁹⁰

In short, he identifies the principal problem as one of judicial craftsmanship!⁹¹

VIII. *The Influence of Dicey and Lord Hewart*

The statement by Wilson J., which is the second of the two quotations forming the peroration to or lessons for this paper, assumes a Canadian judiciary which to that point (1990) had been influenced for too long by a particular aspect or aspects of A.V. Dicey's conception of the content of the Rule of Law as first prescribed in the initial 1885 edition of his *Introduction to the Study of the Law of the Constitution*.⁹² As is common knowledge, for Dicey, the Rule of Law

⁸⁸ *Supra* note 15.

⁸⁹ *Ibid.* at 221.

⁹⁰ *Ibid.* at 222.

⁹¹ Don Clark reaches essentially the same conclusion in an article written for a symposium marking the centenary of the Court: D.H. Clark, "The Supreme Court of Canada, the House of Lords, the Judicial Committee of the Privy Council, and Administrative Law" (1976) 14 Alta. L.R. 5. (Clark bases his conclusions almost entirely on the post-Second World War judgments of the Court.) The issues of the Canadian Bar Review devoted to the centenary of the Court ((1975), 53 Can. Bar Rev.) did not include a review of the Court's contribution to Administrative Law.

⁹² For similar sentiments expressed by the current Chief Justice of the Supreme Court, see The Honourable Justice Beverley McLachlin, "The Role of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 C.J.A.L.P. 171, where at page 185, she talks of the courts "emerg[ing] slowly from Dicey's shadow." For academic literature based in some measure on the same kind of assumption, see MacLauchlan, *supra* note 10; P.L. Bryden, "Canadian Administrative Law in Transition: 1963-1988" (1988) 23 U.B.C. L.R. 147 at 158-60; and H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osg. Hall L.J. 1, though interestingly Arthurs concedes (at 5) that Dicey has not been a "constant force" in Canadian Administrative Law but rather asserts

understood properly demanded the rejection not only of arbitrary and prerogative power but “even...wide discretionary authority on the part of government”.⁹³ It also involved the “the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts”.⁹⁴ This meant, there could in the United Kingdom, at least, be

...nothing really corresponding to the “administrative law” (*droit administratif*) or the “administrative tribunals” of France.⁹⁵

Of course, to the extent that the administrative state was manifesting itself in both Canada and the United Kingdom as early as 1885, there was very little that the judiciary could do directly about its very existence. Nonetheless, this did not stop as influential a judge as Lord Hewart of Bury, the Chief Justice of England, penning in 1929⁹⁶ a stinging diatribe, *The New Despotism*, against the existence of a world in which the law was administered at least partially by administrative tribunals rather than the regular courts. Perhaps, more disturbingly, Diceyan judges were those who, because of their lack of sympathy for the administrative state, would by inclination generally interpret grants of power to statutory authorities in a niggardly rather than a generous fashion; be very willing to second-guess on as broad a range of questions as possible the judgments and rulings of such bodies; give restrictive readings to privative clauses aimed at specifically restricting the judicial review powers of the courts; and be vigilant in assuring that administrative officials and tribunals observed every single detail in the statute conferring authority on them.

Nonetheless, if Dicey and Hewart were so influential, it is somewhat surprising that they were not quoted more on these matters by the Supreme Court of Canada. Of course, for a long time, academic writings (particularly of live authors) were not a common part of the currency of Canadian judges. Also, to the extent that adherence to these aspects of Dicey’s and Hewart’s theories involved an undercutting of the wishes of Parliament and the provincial

that his version of the Rule of Law is a “legal and cultural artifact” that must be exposed warts and all. See also D. Dyzenhaus, “Developments in Administrative Law - The 1991-92 Term” (1993) 4 Sup. Ct. L.R. (2d) 177 at 187-88 (particularly); “Developments in Administrative Law: The 1992-93 Term” (1994) 5 Sup. Ct. L.R. (2d) 189 (especially at 207-15 & 240-44); and “The Politics of Deference: Judicial Review and Democracy” in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing) c. 13 at 279. Dyzenhaus maintains that the Supreme Court is still living in the shadow of Dicey in part because it has never really come to terms with the inherent contradiction in the two poles of Dicey’s theory: the role of the regular courts as the final arbiters of all questions of law and the supremacy of Parliament.

⁹³ E.C.S. Wade, ed., 10th ed. (London: Macmillan, 1965) at 202.

⁹⁴ *Ibid.* at 202-03.

⁹⁵ *Ibid.* at 203.

⁹⁶ Given that he was still a judge at this point, the appearance of this book is somewhat remarkable in light of then current constitutional conventions against judges entering the “political” arena. Perhaps it was of some significance that 1929 also marked the election of the United Kingdom’s second Labour Government.

legislatures, it may also have been the case that the lack of citation did not indicate a lack of sympathy but rather an unwillingness to acknowledge what in many respects was a tainted exercise. However, even given all of that, the statistics on citation are of some interest in any assessment of the overall picture.

In fact, Dicey has been cited a surprising number of times by the Supreme Court of Canada dating right from the early days of the Court. In total, there have been seventy-four citations of which chronologically the judgment of Wilson J. in *National Corn Growers* was the sixty-third. Of the prior sixty-two, five were to his work on Domicile and thirty-two to his text on Conflicts. The remaining twenty-five were to *The Law of the Constitution* but, of those, only twelve were concerned with his definition of the Rule of Law and not a single one in the context of the scope and principles of judicial review of administrative action, and of the administrative process,⁹⁷ and the "evils" of discretionary power. Indeed, save for one case where the citation was merely incidental, all of the others break down into two categories.

In seven of these cases, the aspect of Dicey's version of the Rule of Law to which the Court appealed almost certainly remains uncontroversial as a matter of principle today - the use of the concept of the equal subjection of all to the normal legal regime to evaluate and in most instances to defeat various arguments for immunity from normal legal processes and principles. Most notable among these judgments is one of the shining beacons in the entire history of the Supreme Court of Canada, *Roncarelli v. Duplessis*,⁹⁸ where Abbott J. quotes Dicey in the course of his concurring judgment.⁹⁹

Of much more dubious pedigree were cases in which the Dicey version of "equality" was quoted in support of what we now see as an impoverished vision of the *Canadian Bill of Rights'* quasi-constitutional protection in section 1(b) of the "right of the individual to equality before the law and the equal protection of the law".¹⁰⁰ Suffice it to say that it was not long into the life of the equality provision in the *Charter* that the Court repudiated any adherence to that conception of equality.¹⁰¹

⁹⁷ Indeed, as Wayne MacKay has pointed out to me, the most sceptical expression of Supreme Court judicial opinion as to the capacities of administrative tribunals and, in particular, of the legitimacy of their authority to determine questions of law is to be found in a much more recent case, the concurring judgment of Lamer C.J. in *Bell v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854.

⁹⁸ *Supra* note 87. See also *Reference re Exemption of U.S. Forces from Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483; *Chaput v. Romain*, [1955] S.C.R. 834; *Canada (Conseil des Ports Nationaux) v. Langelier*, [1969] S.C.R. 60; *Chartier v. Québec (Attorney General)*, [1979] 2 S.C.R. 474; *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 55; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226; and *Beauregard v. Canada*, [1986] 2 S.C.R. 56.

⁹⁹ *Ibid.* at 184.

¹⁰⁰ See e.g. *Canada (Attorney General) v. Lavell*, [1974] S.C.R. 1349 and *R. v. Burnshine*, [1975] 1 S.C.R. 693.

¹⁰¹ See *Beauregard v. Canada*, [1986] 2 S.C.R. 56.

In Administrative Law, Lord Hewart is remembered for three things: his book, *The New Despotism*; his statement in *R. v. Sussex Justices, Ex parte McCarthy* to the effect that it is just as important that justice be seen to be done as that it actually be done,¹⁰² an aphorism that continues to have influence in the law relating to bias; and his so-called gloss in *R. v. Legislative Committee of the Church Assembly*¹⁰³ on an earlier dictum of Atkin L.J. in *R. v. Electricity Commissioners, Ex parte London Electricity Commissioners*,¹⁰⁴ a formulation as to the circumstances under which the common law would require adherence to the rules of natural justice which perpetuated over thirty years of confusion in this area of the law on both sides of the Atlantic.

There have been forty-three citations to Lord Hewart in the Supreme Court Reports, most of them to his judgments in criminal law and thirty-eight prior to Wilson J.'s judgment in *National Corn Growers*. On four occasions, however, his gloss on the Atkin dictum has been cited. The first instance was in 1959 in *Calgary Power Ltd. v. Copithorne*,¹⁰⁵ where Martland J. treated it as authoritative in rejecting demands for a hearing in the context of an order expropriating a right of way over farm land for the purposes of running power lines. Eventually, however, the analysis on which Lord Hewart relied was in effect repudiated or marginalized by in *Martineau v. Matsqui Institution*.¹⁰⁶ Somewhat surprisingly, on only two occasions prior to 1990 did the Court quote his famous statement on the policy behind the rule that an appearance of bias is sufficient to disqualify an adjudicator and both these citations occurred in criminal matters.¹⁰⁷ But what is even more significant for present purposes is that, prior to *National Corn Growers*, only one judge had referred to *The New Despotism*. This was Estey J. in his partially dissenting judgment in *Douglas Aircraft Co. of Canada v. McConnell*,¹⁰⁸ a case involving the appropriate standard of review to be applied to labour arbitrators. Moreover, the Estey reference is of the same ilk as that of Wilson J. in *National Corn Growers*. *The New Despotism* is treated as an anachronism or, more accurately, as a work finding its reference in some bygone age when there was a "thinly disguised rivalry between the courts and the statutory tribunals".¹⁰⁹

What this evidence makes clear is that whatever they thought of the ideas of Dicey and Hewart about the essential illegitimacy of administrative tribunals and broad discretionary powers in a legal system committed to the Rule of Law,

¹⁰² [1924] 1 K.B. 256 at 259.

¹⁰³ [1928] 1 K.B. 411.

¹⁰⁴ [1924] 1 K.B. 171 (C.A.).

¹⁰⁵ *Supra* note 70 at 30.

¹⁰⁶ [1980] 1 S.C.R. 602 at 620 [in the concurring judgment of Dickson J.].

¹⁰⁷ *Reference re R. v. Coffin*, [1956] 1 S.C.R. 191; *R. v. Brouillard*, [1985] 1 S.C.R. 39. Indeed, the same is true of the two post-*National Corn Growers* references to this statement: *R. v. Latimer*, [1997] 1 S.C.R. 217 and *R. v. R.D.S.*, [1997] 3 S.C.R. 484.

¹⁰⁸ [1980] 1 S.C.R. 245 at 268.

¹⁰⁹ *Ibid.*

judges of the Supreme Court of Canada were not about to articulate those views by reference to two of the most prominent advocates of the perpetuation of the monopoly of the regular courts. While it may be the case that either consciously but silently or even unconsciously, some judges were adherents to this position, they certainly did not reveal that support explicitly in their judgments. The evidence for such support must therefore be found elsewhere such as in what they actually did in cases involving the administrative process or perhaps in their extra-judicial pronouncements. The latter is a task that I have not undertaken for the purposes of this paper.¹¹⁰ Subsequently, another Chief Justice of Ontario, McRuer C.J.H.C., was seen to be a disciple of Dicey as a result of his highly influential report on the state of administrative justice in Ontario: the Royal Commission Inquiry Into Civil Rights. The first volume of the first report of this Commission was issued in 1968. See *e.g.* Arthurs, *supra* note 90. However, as the earlier "case" studies suggest, there may be less of a basis for drawing that conclusion from the former than has commonly been supposed to be the case.

IX. *Conclusions*

As noted in the Introduction, the purpose of this paper is limited. By the exploration of a range of judgments across the 125 years of the existence of the Supreme Court of Canada, I was hoping to ascertain whether there is strong support for the contention that, until recently, the Court was not well disposed to the administrative process in general and administrative tribunals in particular. Was this is a Court that both held and applied the Diceyan views that broad discretion and the existence of administrative tribunals deciding questions of law were antithetical to the Rule of Law as viewed through the perspective of British constitutional principles?

My conclusion on the basis of those studies is that, save perhaps for thirty years of the Court's existence, there is no clear evidence of any such antagonism to legislative objectives at least as manifest in the terms on which judgments were rendered. Indeed, even in the period where there are indicators of a lack of sympathy with the creation of administrative tribunals often in domains previously occupied by the regular courts, the evidence is mixed.

What does, however, emerge from the case studies and particularly those involving the lengthy period during which the Privy Council was still the final

¹¹⁰ J. Willis in his article, "Three Approaches to Administrative Law", *supra* note 3 at 61, does, however, provide a revealing quotation from the then Chief Justice of Ontario, Sir William Mulock, in the course of a speech at a dinner honouring his 90th birthday and published in (1934) 12 Can. Bar Rev. 35. He there (at 38) railed against legislation which reposes

...the decision of [a person's] legal rights at the mercy of any non-judicial body, often ignorant of the law, bound by no law, free to disregard the evidence and the law, and practically at its own will, to dispose finally of his rights.

court of appeal for Canada, is a high level of judicial commitment to another constitutional principle to which Dicey adhered: the sovereignty of Parliament. Thus, among the early judgments of the Court, there are frequent references to legislative intention and a clear willingness to give effect to that legislative intention, even if perhaps, as in the case of privative clauses, the Court's inclination may not have been to agree with such provisions as a matter of policy. Indeed, the early judgments reveal a generous, purposive interpretation of privative clauses.

What is also interesting about some of the early cases is the extent to which they do refer to what in today's terms would be called "pragmatic and functional" considerations and especially those stemming from legislative choice of the statutory authority as the appropriate decision-maker rather than the courts or some other body in relation to the matters in issue. There is in some of the cases clearly a willingness to accede to that objective by not intervening too readily in the decisions that have been made or the processes that have been chosen, and even on occasion, a concession of expertise and the expression of a desire not to allow judicial review to hinder the operation of the administrative process. However, on this, given the limited range of my research, it is not appropriate to assert these as values that the Court by and large adhered to during that entire period. As suggested in the Introduction, my limited objectives in this regard were to explore whether there were sufficient possibilities in this point as to justify further research.

In terms of theoretical underpinnings, it is important to realise that in the years at least up until the Second World War, we are assessing the performance of a Court in an era where the administrative state as we have come to know it was in its infancy and where judicial scrutiny of administrative action (save in the case of railways and later other common carriers) was a relatively infrequent phenomenon. As a consequence of this and also the absence of any recognition of Administrative Law as a separate discipline or subject, it is not surprising that the Court's analysis during this period falls back on general principles of purposive interpretation founded on conceptions of the sovereignty of Parliament. That aside, it does not offer too much else save an important sense on occasion that courts may not be the repositories of expertise in all arenas and that administrative officials and tribunals deserve respect for their expertise and competence. Given the much more sophisticated application of this same approach by the current Court, there is therefore very little to learn from this aspect of the Court's first seventy-five or so years.

What then makes the period from 1949 to 1975 (or thereabouts) so disappointing is that, at a time of rapid growth in the administrative state and the recognition of Administrative Law as an independent category of law, the Court rather than advancing on the theoretical front actually seemed to retreat. The reliance on sterile classifications referred to by Hogg and illustrated in this paper marked a distinct departure from what had been the more functional approach of the Court to that point.

Thus, at the end of the day, it may well be that that feature as much as

anything else makes the more recent contributions of the Court (starting with the Laskin and Dickson Chief Justiceships) seem that much more refreshing, enlightened and appropriately respectful of most, if not all elements of the administrative process. Nevertheless, to the extent that such an assertion might seem to be damning the Court's recent and contemporary efforts with faint praise, it does, of course, have to be added that the Court's post-1975 jurisprudence has also both untangled many knots and resolved many inconsistencies by the development of new ways of thinking about or conceptualizing problems and of a sophisticated theory of judicial review more appropriate for delineating the courts' relationship with decision-making in the modern administrative state.

Nonetheless, there are obviously challenges still to be faced (as indeed there will always be). Thus, the Court has still not really had to come to terms with the appropriate judicial response to the phenomena of deregulation, downsizing and contracting out and especially resolving how the courts should deal with the increasing blurring of the lines between the public and private domains. There also remain many questions as to the role to be played by the *Canadian Charter of Rights and Freedoms* and, indeed, such quasi-constitutional statutes as the *Canadian Bill of Rights* and the *Québec Charter of Human Rights and Freedoms* in the assessing of legislation creating administrative regimes and in the judicial supervision of the operation of those regimes.

At an even more fundamental level, the task of the Court over the next period will be to become more specific as to how precisely some of its more recent pronouncements on underlying constitutional values intersect with the accepted policy of deference to the expertise and statutory mandate of not only tribunals but also discretionary decision-makers of all stripes. In what circumstances will the four underlying principles of the Canadian Constitution identified in *Reference re Secession of Québec*¹¹¹ (federalism, democracy, constitutionalism and the rule of law, and the protection of minorities) dictate intervention in the administrative process?¹¹² If not a Diceyan conception, what version of the rule of law will emerge from the evolution of these concepts? In the domain of abuse of discretion review (and perhaps more generally), in terms of *Baker v. Canada (Minister of Citizenship and Immigration)*,¹¹³ what will be the detailed content of "the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*"? Indeed, it may well be that it is here

¹¹¹ [1997] 3 S.C.R. 3.

¹¹² For an early example, see *Lalonde v. Ontario (Health Services Restructuring Commission)* (1999), 48 O.R. (3d) 50 (Ont. Div. Ct.), in which the Ontario Divisional Court struck down a decision ordering the closure of the predominantly Francophone Montfort Hospital in Ottawa. The Commission's decision was taken with insufficient regard to the underlying constitutional value of the importance of protecting minorities.

¹¹³ *Supra* note 28 at para. 56.

in the judgments of Justice Rand in cases such as *Roncarelli v. Duplessis* and *Smith & Rhuland v. The Queen* that the Court will gain most profitably from attention to the pre-1975 jurisprudence of the Court in Administrative Law. In Rand's use of the Implied Bill of Rights theory and in the contrast between the spirit of these cases and that of the Court in *Reference re Persons of Japanese Race*, there is a starting point for a modern conception of when precisely it is appropriate for the Court to intervene in the substantive exercises of broad discretionary powers which today more than ever are a constant aspect of legislation establishing administrative regimes.

My hunch is that the Supreme Court's record in dealing with these questions in forging both the theory and practice of a modern law of judicial review may well be the critical point in any examination of the Court's performance in the domain of Administrative Law on the occasion of its 150th anniversary. Has the Court developed a coherent and readily applied theory and methodology for an appropriate reconciliation of the interests of individuals and groups, on the one hand, and the needs of an efficient and effective administrative process, on the other?