

*Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan*

G. Huscroft & M. Taggart, eds  
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*Inside and Outside Canadian Administrative Law*<sup>1</sup> is a *Festschrift*, defined by *Wikipedia*, the free encyclopedia, as a book honouring a respected academic that contains original contributions by the academic's close colleagues and often includes important contributions to scholarship. Its editors, Michael Taggart and Grant Huscroft, invited scholars who had some association with David Mullan and had engaged with his work to contribute articles relating to the broad themes that run through Mullan's work: procedural fairness; scope of review and deference; the interrelationship of administrative law, human rights, and the rule of law; the legitimacy of state regulation and tribunal adjudication and common law comparativism. The result is an eclectic and stimulating collection of articles written by judges and academics from Canada, the United States, England, Australia, New Zealand and South Africa. It is a glowing tribute to Mullan's intellectual influence in the field of public law and to his qualities as a colleague, mentor and friend to many of the contributors. *Inside and Outside Canadian Administrative Law* is also a useful and informative read for any student of Canadian public law because its various contributions frame many of the familiar debates that are central to this area of law in a broad theoretical and comparative context.

Although the articles in *Inside and Outside Canadian Administrative Law* intersect on many levels, I have chosen to group them into four categories for the purpose of my review. One group of contributions focuses on the theme of deference to administrative decisionmaking and the legitimate role of judges and legislatures in ensuring the legality of

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\* Faculty of Law, University of Manitoba. I thank Mark Walters for reviewing a previous draft of this review. I am grateful to Beth Bilson for inviting me to review this book of essays in honour of David Mullan, whose friendship and contributions as scholar, teacher, supervisor, colleague and mentor have enabled and enriched my own academic career in public law.

<sup>1</sup> G. Huscroft & M. Taggart, eds., *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto Press, 2006) [*Inside and Outside*].

the exercise of statutory or public powers. Another group of contributors — the comparativists — trace the important milestones in the recent evolution of administrative law in their jurisdictions and compare and contrast these with important contemporaneous developments in Canadian administrative law. A third group of contributors use the pragmatic “real questions” approach privileged by Mullan to illuminate and bring coherence to specific doctrinal issues. Contributors in the fourth and final group examine Mullan’s contribution to the teaching of administrative law from the perspective of students, judges, teachers and practitioners. My review touches on every contribution to this *Festschrift* but focuses primarily on the first group. To set the stage for a discussion of the legitimate role of courts in the review of administrative action, I begin with a short history of the elaboration by Canadian courts of their current approach to substantive review.

When should courts intervene to set aside the decisions of administrative decision makers? Until the 1979 decision of the Supreme Court of Canada in *CUPE, Local 963 v. New Brunswick Liquor Corporation*,<sup>2</sup> the answer to this question turned on the concept of jurisdiction. Put briefly, the term “jurisdiction” stands for these ideas: that state officials can only exercise powers that are derived from a constitutionally proper statutory source or within the limits of prerogative power; and that superior courts have the constitutional responsibility to ensure that officials make decisions within the scope of these limits (within jurisdiction) and to intervene when officials exceed the bounds of their jurisdiction. An attractively simple concept, the exact meaning of jurisdiction proved elusive. In principle, a statutory authority could overstep the boundaries of its statutory powers and “lose” or “exceed” jurisdiction and attract the intervention of the superior courts if it erroneously determined any question of law or fact. However, Canadian courts did not accept this broad concept of jurisdiction. Instead, they distinguished between two categories of questions confronting statutory authorities. First, there were questions within the authorities’ jurisdiction, over which Parliament intended them to have primary, if not exclusive, power to decide. Second, there were questions that “affected” or “went to” their authority, over which courts were to have the final word.<sup>3</sup> How, then, could reviewing courts distinguish between questions that fell within a statutory authority’s jurisdiction and

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<sup>2</sup> [1979] 2 S.C.R. 227 [ *CUPE v. N.B. Liquor* ].

<sup>3</sup> This view of substantive review rested on acceptance of certain fundamental constitutional tenets: Parliament may assign or delegate primary responsibility for the exercise of state power on statutory authorities; and the rule of law does not require the courts to have the final word on all questions of law; see David J. Mullan, *Administrative Law* (Irwin Law, Toronto: 2001) at 55.

those that affected it? For many years, the answer depended on how the court classified the particular question to be answered by the authority: was it a question that was preliminary to or a prerequisite for the exercise of further powers? In *CUPE v. N.B. Liquor*, the Supreme Court rejected this “classification” approach as unhelpful and warned courts against branding as “jurisdictional, and therefore subject to broader curial review that which may be doubtfully so.”<sup>4</sup> In the years following that seminal decision, the Court abandoned its formalistic approach to determining whether the legislature intended to give a statutory authority primary or exclusive authority to answer the specific question under review. Instead, it adopted an approach whose overall aim remained that of discerning legislative intent “keeping in mind the constitutional role of the courts in maintaining the rule of law,”<sup>5</sup> but that paid “more attention to statutory purposes and structures and the sense they conveyed of the relevant tribunal’s expected areas of competence or expertise.”<sup>6</sup>

This “pragmatic and functional” approach to ascertain the legislative intent requires an assessment and balancing of relevant factors, including (1) whether the legislation that confers the power contains a privative cause; (2) the relative expertise as between the court and the statutory decision maker; (3) the purpose of the particular provision and the legislation as a whole; and (4) the nature of the question before the decision maker.... The examination of these four factors, and the “weighing up” of contextual elements to identify the appropriate standard of review, is not a mechanical exercise. Given the immense range of discretionary decision makers and administrative bodies, the test is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent.<sup>7</sup>

Analysis in accordance with the pragmatic and functional approach leads to the selection of one of three standards that govern the intensity with which courts review an administrative decision or, in other words, the level of deference that the courts will show the decision under review. On a correctness standard, the least deferential, the court may undertake its own reasoning process to arrive at the result it judges correct. That standard assumes there is a single right answer to the question under review and that the court is responsible on judicial review for deciding what the answer is. Review on the intermediate standard of reasonableness requires the court to assess whether the reasons given by the administrative decision maker for its decision adequately support that decision. It must adopt an attitude of respectful attention, not submission

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<sup>4</sup> *Supra* note 2 at 233.

<sup>5</sup> *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 26. [*Dr. Q*].

<sup>6</sup> Mullan, *supra* note 3 at 63.

<sup>7</sup> *CUPE v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 149 [*Retired Judges*].

to the administrative authority's reasons. The reasonableness standard assumes there may be no single right answer to the question under review, and that it is not the court's role to decide which is the best answer. Review on the patent unreasonableness standard — the most deferential standard — requires the court to assess whether the decision maker's reasons are marked by an immediate or obvious defect that makes the decision clearly irrational and so flawed that no amount of curial deference can justify letting it stand.<sup>8</sup> A more deferential standard of review is called for when the authority's decision is protected by a strong privative clause; when the decision raises questions, including issues of statutory interpretation, that fall in an area over which the authority has greater expertise than the courts; when the authority administers a statute that aims to balance competing policy objectives or the interests of various constituencies, or that confers broad discretionary powers, a decision-making context with which courts are less familiar; or when the matter at issue involves a finding of fact or credibility, for which first instance decision makers have an advantage over reviewing courts.

In *Baker v. Canada (Minister of Citizenship and Immigration)*,<sup>9</sup> the Supreme Court extended the pragmatic and functional approach to the review of discretionary decisions. Canadian courts had traditionally distinguished “discretionary” decisions from decisions involving the interpretation of rules of law, intervening only on limited grounds amounting to jurisdictional error, such as when officials exercised discretionary powers in bad faith, for an improper purpose, or based on irrelevant considerations. In *Baker*, the Court rejected a rigid dichotomy of “discretionary” or “non-discretionary” decisions and underlined that statutory interpretation and discretion were not easily distinguished. It also blurred the boundaries between procedural and substantive review by recognizing that in certain circumstances, the common law duty of procedural fairness would require administrative decision makers to provide reasons for their decisions.

I conclude this thumbnail sketch of the Supreme Court's development of the pragmatic and functional approach to substantive review with Mullan's assessment of the approach — one that is, on balance, positive:

Ultimately, the question comes down to statutory interpretation. There can be little doubt that the court now addresses more directly and usually with more sophistication than ever

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<sup>8</sup> For a discussion of these standards, see *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at paras 48-56 [*Ryan*].

<sup>9</sup> [1999] 2 S.C.R. 817 [*Baker*].

before the underlying issues and tensions in the exercise of interpretation: for example, the spheres of institutional competence of generalist courts and specialist agencies respectively, regulatory goals and individual rights, and administrative expertise and democratic accountability....

We see no realistic alternative to the course, broadly understood, that the Supreme Court has charted for itself. This is not to say that we are always in sympathy with the way that the court weighs the competing considerations or evaluates its institutional ability to come to grips with the complexities of regulatory schemes and the dynamics of administration. And we still find too much formalism in the court's approach to statutory interpretation and too little concern for attaining the regulatory goals of the particular statutory scheme.

Perhaps the most that can be asked of the law in this area is that it forces judges to address the relevant questions. The law cannot constrain judges who are so disposed from doing "the wrong thing." It should, however, help others to consider thoughtfully what "the right thing" is and not hamper them from doing it.<sup>10</sup>

While Canadian courts have undoubtedly made great strides in achieving a "unified" theory of substantive review, the answer to the question of when courts should intervene in administrative decision making remains as controversial as ever. This is clearly evidenced by the fundamentally different perspectives on this question that may be discerned in the first group of contributions to *Inside and Outside Canadian Administrative Law*, to which I now turn.

In "Judicial Review from *CUPE* to *CUPE*: Less is Not Always More," Grant Huscroft contends that, despite the Supreme Court's assurances to the contrary, its decision in *Baker* to subject discretionary decisions to the pragmatic and functional approach has resulted in more intense judicial scrutiny of exercises of discretion and less deference. A case in point, in his view, is the Supreme Court's 2003 decision in *CUPE v. Ontario (Minister of Labour)*,<sup>11</sup> widely known as the *Retired Judges* case. Under Ontario's *Hospital Labour Disputes Arbitration Act (HLDAA)*, disputes over collective agreements in the healthcare sector were resolved by compulsory arbitration. The *HLDAA* granted the Minister of Labour a broad discretion to appoint as chair of the arbitration panels a person who was "in the opinion of the Minister, qualified to act." The Minister decided to break with the long-standing (though not consistently followed) practice of appointing arbitrators that were mutually acceptable to unions and employers. Instead, he appointed retired judges with experience as neutral decision makers but no labour relations or healthcare experience. A majority of the Court decided that

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<sup>10</sup> David J. Mullan, ed., *Administrative Law — Cases, Text and Materials*, 5th ed. (Emond Montgomery: Toronto, 2003) at 823-24 [EJMR]. In the earlier editions of the book, Mullan was joined as editor by John Evans, Hudson Janisch and Richard C.B. Risk — hence EJMR.

<sup>11</sup> *Supra* note 7.

these appointments were patently unreasonable because they frustrated the very legislative scheme under which the Minister's discretionary appointment power was conferred. Binnie J., for the majority, noted that the statute sought to achieve labour peace in hospitals and nursing homes through interest arbitration. To achieve this legislative purpose, it was essential that the arbitrators who ultimately drafted the most controversial terms of the collective agreements have labour relations expertise and be broadly acceptable to unions and employers. In support of this view, the Court relied on the Minister's own declaration that the parties had to perceive the system as neutral and credible, and expert evidence to the effect that arbitrators' neutrality was guaranteed not by institutional factors like tenure or financial security, but by their labour relations training and experience and their mutual acceptability. By excluding these as factors relevant to the exercise of his discretion, the Minister had acted in a patently unreasonable manner. In Huscroft's view, the Court's intervention was unjustified:

Clear statutory language conferred discretionary power on the Minister of Labour; the Minister is an expert decision maker; and the Minister's appointment decisions were protected by a strong privative clause. The Minister exercised his power to appoint retired judges as arbitrators. It is difficult to see what is wrong here, let alone that anything is so wrong as to constitute an abuse of discretion that demands judicial intervention.<sup>12</sup>

Unlike the classic examples of abuse of discretion cited in the celebrated case of *Roncarelli v. Duplessis*<sup>13</sup> — revoking a permit for lawfully paying someone's bail or refusing someone a permit because of their hair colour — the Minister's decision to appoint retired judges sought to address labour relations considerations that were relevant to the *HLDA*'s purpose: the unacceptable delay and costs associated with *HLDA* arbitrations. It was not an act of bad faith or an abuse of power. Rather, it was a policy that the Minister was entitled to pursue, and should have attracted deference from the court.<sup>14</sup> In Huscroft's view, the majority rendered the concept of deference "practically irrelevant" by inferring fetters of a jurisdictional nature on the Minister's broad and subjective discretion before establishing and applying the appropriate standard of review.<sup>15</sup>

Interesting connections can be drawn between Huscroft's concern over increased judicial intervention in discretionary decisions by ministers and Alfred Aman's overview of U.S. developments regarding deference. In "The Importance of Being Contextual: Deference South of

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<sup>12</sup> *Inside and Outside*, *supra* note 1 at 310.

<sup>13</sup> [1959] S.C.R. 121.

<sup>14</sup> *Ibid.* at 305.

<sup>15</sup> *Ibid.* at 307.

the Border,” Aman traces the evolution of deference to administrative decisions chronologically through three seminal cases: *Skidmore v. Swift & Co.*,<sup>16</sup> *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*<sup>17</sup> and *U.S. v. Mead*.<sup>18</sup> In *Skidmore*, the Supreme Court reviewed an administrator’s decision under labour standards legislation that requiring firemen to be present at or near the fire hall in the event of an alarm was not “work” entitling them to overtime compensation. In deciding whether the administrator’s decision was entitled to respect, the U.S. Supreme Court held that it would consider several contextual factors, including “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>19</sup> In *Chevron*, following the transition from the Carter to the Reagan administrations and in response to President Reagan’s directive that agencies re-examine their regulatory burden, the Environmental Protection Agency (EPA) conducted an informal rule-making proceeding which resulted in its repeal of rules that sought to reduce overall pollution by strictly regulating the emission rates of newly purchased or modified industrial equipment. In their place, the EPA promulgated rules that allowed polluters to install polluting machinery as long as current emission rates did not increase. In Aman’s view, the EPA’s “dramatic change in philosophic approach” transformed the law from “a consumer oriented statute to one with a distinct producer bias.”<sup>20</sup> Rather than addressing these important questions of law and policy, the court set down a very deferential approach to the review of agency decisions that was based less on agency expertise than on the fact that “agencies were controlled by the president and, thus, their discretionary judgments were the responsibility of the executive branch, which was accountable to the electorate.”<sup>21</sup> Under the *Chevron* doctrine, if the court determined that the relevant statute was silent or ambiguous with respect to the precise question at issue, the agency’s rule or decision could stand if it was based on a permissible construction of the statute.<sup>22</sup> The courts’ application of *Chevron* deference was accompanied by a “textualist” approach to interpretation of statutes that eschewed analyses of legislative history in favor of a “plain language” construction. Within this review framework, courts could characterize rule changes as exercises of policy discretion within the purview of executive agencies and thus deserving of

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<sup>16</sup> 323 U.S. 134 (1944) [*Skidmore*].

<sup>17</sup> 467 U.S. 837 (1984) [*Chevron*].

<sup>18</sup> 533 U.S. 218 (2001) [*Mead*].

<sup>19</sup> *Skidmore*, *supra* note 16 at 140.

<sup>20</sup> *Inside and Outside*, *supra* note 1 at 359.

<sup>21</sup> *Ibid.* at 360.

<sup>22</sup> *Chevron*, *supra* note 17 at 842-43.

deference. Aman argues that the EPA's rule change in *Chevron* and other agency decisions made in a deregulatory context may effectively constitute fundamental reinterpretations of these agencies' statutory mandate in order to promote values (including market values) that "may not be part of the agencies' enabling act, or, more broadly, its regulatory constitution."<sup>23</sup> *Chevron* deference in its most formalistic incarnation may prevent the more intense judicial scrutiny required of such decisions, which should be based "on the substantive legislative bargains that are exemplified by the statute, its history, and the regulatory régime it creates."<sup>24</sup> In *Mead*, the U.S. Supreme Court decided that a tariff classification ruling by the U.S. Customs Service was not entitled to *Chevron* deference, which it appeared to reserve for more formal agency processes, but was eligible for deference under the contextual *Skidmore* test. Aman concludes that:

Like CUPE, *Chevron* deference is here to stay, though its uses are now more likely to be subject to contextual analyses. The factors involved in these analyses will always be subject to debate and there is no obvious set of principles available for all cases. There is no holy grail when it comes to determining how and when courts should or should not defer - no magic formula. Each case is different. In the end, the hard work of articulating the multiplicity of factors involved and their respective weights is what deference should be about and what courts should be able to do.<sup>25</sup>

It is hard not to see a parallel between Aman's description of *Chevron* and Huscroft's analysis of the *Retired Judges* case. Huscroft observes that in changing the government's informal policy regarding the discretionary appointment of arbitrators, the Minister may have been seeking to reduce delay in the arbitration system and to select arbitrators more sensitive to the government's ability to pay increased labour costs in the healthcare sector. However, it is arguable that, as in *Chevron*, the decision to privilege these values was a fundamental shift in the statutory goals of the *HLDA*. The *raison d'être* of the *HLDA* was to achieve, through interest arbitration, a compromise collective agreement which both parties could accept not necessarily because they liked the results, but because they believed they had been dealt with fairly by an expert and neutral (mutually acceptable) arbitrator who understood their interests. The Minister's decision to appoint inexperienced chairs who were not mutually acceptable to the parties, even if it was in furtherance of legitimate goals, denatured the statute entirely. The *HLDA* process was no longer about achieving labour relations peace through buy-in by the parties. It was about imposing agreements through the agency of retired judges expected to be more favourable to the employers' position,

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<sup>23</sup> *Inside and Outside*, *supra* note 1 at 366.

<sup>24</sup> *Ibid.* at 366.

<sup>25</sup> *Ibid.* at 372.



particularly with respect to the government's ability to pay. The *Retired Judges* case is a signal to ministers that they cannot subvert the intent of a statute through their appointment powers. Extreme policy changes can only be accomplished through legislative amendments. From this perspective, the majority's decision to examine the "substantive legislative bargains... exemplified by the statute" — the abandonment of the right to strike in return for compulsory arbitration — is preferable to the dissent's refusal to go beyond a purely "textual" interpretation of the Minister's discretion as revealed by its insistence that apart from the stipulation that appointees be qualified to act in the opinion of the Minister, there were no "obvious factors" in the statute that constrained the discretion:

Where the alleged defect is failure to consider relevant factors, I think it is important that those factors must themselves be immediately identifiable or obvious. In accordance with their duty, counsel for the respondents have assiduously compiled a record that presents the need for labour relations expertise and broad acceptability in its best light. They have collected excerpts from various reports, the legislative history of the HLDAA, and statements by Ministers of Labour. The fact that these materials are neatly compiled in the respondents' record makes the significance of those criteria obvious, or at least much more obvious, than it has ever been. I do not dispute that the respondents made a good case for the importance of reading those factors into the statute, but doing so was a difficult task. In my view, the general affirmations and aspirations Binnie J. refers to in para. 110 came nowhere near the evidentiary threshold for imposing a specific restriction on the wide discretion set out in s. 6(5). Would the factors Binnie J. relies upon have been obvious to a new Minister of Labour called on to exercise his discretion under s. 6(5)? Could the Minister have been expected to compile a thorough history of the HLDAA before acting? I do not believe so.<sup>26</sup>

Aman offers an appropriate response:

Courts have the institutional competence to engage in such [statutory] interpretation and, more important, they have the obligation to ensure that an administrative agency does not exercise any more power than Congress originally gave to it. Closing judicial eyes to the help that an examination of a statute's legislative history may provide only makes the fulfillment of that judicial role more difficult....[A]n examination of a statute's legislative history can be very helpful. It can deepen considerably the court's understanding of the kind of regulation Congress may have intended, the type of market failure it sought to correct, and the regulatory values Congress sought to further with the statutory framework it created. It is particularly those value questions that cannot be reflected on the face of the statute. This is not to say that recourse to legislative history will always be illuminating. It can, however, reinforce the court's view of the proper interpretation of the statutory language in contention or raise serious doubts when a purely textual interpretation of a statute is juxtaposed with its legislative history.<sup>27</sup>

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<sup>26</sup> *Retired Judges*, *supra* note 7 at para. 32 per Bastarache J.

<sup>27</sup> *Inside and Outside*, *supra* note 1 at 363.

Hugh Corder's article "From Despair to Deference: Same Difference?" examines the darker aspects of deference and is thus an interesting counterpoint to Huscroft's contribution. Corder recalls the inability or unwillingness of judges to curb efforts by South Africa's Parliament and executive to establish and entrench the apartheid regime. The approach of South African courts in reviewing discretionary executive action designed to enforce the separation of racial groups and suppress popular resistance to this policy was "characterized by an unquestioning deference, which at times bordered on the abdication of even the limited authority to review accorded to the courts by the principle of the separation of powers and the ultra vires doctrine."<sup>28</sup> It is not surprising, given this history, that reform of the legal system has been a central part of South Africa's implementation of a constitutional democracy. The South African constitution now guarantees to everyone "the right to administrative action that is lawful, reasonable and procedurally fair," and the right to written reasons for individuals adversely affected by administrative action.<sup>29</sup> South Africa's Constitutional Court has recognized that the common law principles that once governed judicial review of the decisions of public authorities are now subsumed under the constitution and gain their force from it. The Court has held, consistently with the terms of the constitution, that all public power is subject to a minimum threshold requirement of rationality, and has reviewed executive acts on this basis, including the authority of South Africa's president to sign a bill into law.<sup>30</sup> The question of whether this new constitutional framework and its insistence on reasonableness review leave any space for judicial deference to the executive has taken on great importance as the courts are asked to review executive actions designed to effect the social and economic changes needed to address the inequities wrought by apartheid. Corder reports that the Constitutional Court has not shrunk from its constitutional responsibility to determine the reasonableness of administrative action both in relation to the process used to reach the decision and its effects on the parties involved.<sup>31</sup> However, it has acknowledged that in particularly complex circumstances, including those surrounding the post-apartheid redistribution of economic power, judges will have to show "due respect to the route selected by the decision maker"<sup>32</sup> in accordance with the fundamental constitutional principle of the separation of powers. While Corder confesses some uneasiness at the courts' "ready embrace" of the notion of deference given their

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<sup>28</sup> *Ibid.* at 330.

<sup>29</sup> *Ibid.* at 332.

<sup>30</sup> *Ibid.* at 335-36.

<sup>31</sup> *Ibid.* at 340.

<sup>32</sup> *Ibid.* at 341.

submissive posture in the apartheid years, he concludes optimistically that much has changed since that time; the vigorous interpretation of South Africa's new constitution by the courts and the government's support of the judiciary's efforts indicate that judges in South Africa have turned a corner and are ready to engage in a meaningful review of the decisions of administrative authorities that remains respectful of their areas of relative expertise and their constitutional role.

In South Africa, reasonableness review of administrative action is expressly mandated by the text of the country's new constitution. In "David Mullan's Theory of the Rule of (Common) Law," David Dyzenhaus suggests that an unwritten common law constitutional order — the constitution of legality — requires a regime of reasonableness review characterized by a more or less intense scrutiny of reasons, and that the Supreme Court of Canada's substantive review jurisprudence is evolving in that direction. Dyzenhaus describes the development of substantive review in Canadian administrative law as moving from a search by the courts for formalistic grounds on which to justify judicial intervention in administrative action to an approach to judicial review based on principle. Despite the formal signal against judicial intervention represented by a privative clause, courts once justified review based on a formal distinction between jurisdictional questions, which were reviewable, and intra-jurisdictional questions, which were not (save on a patent unreasonableness standard). Broad statutory discretions were also formal signals against judicial intervention, and courts drew a formal distinction between a limited number of "nominate" grounds of review (bad faith, improper purpose) akin to jurisdictional error (whereby a decision maker exceeded the scope of the discretionary power) and the substantive decision which was wholly within the decision maker's discretion and consequently unreviewable.<sup>33</sup> While *CUPE v. N.B. Liquor* emphasized the importance of formal indicators — notably, the presence of a privative clause — it also recognized that the administrative state was necessary and legitimate and staffed by decision makers who were often more expert at interpreting their statutory mandate than courts.<sup>34</sup> Under the pragmatic and functional approach, formal indicia for review became progressively less important. The presence of a privative clause is but one of four factors to consider; of these, the expertise of administrative decision makers relative to that of the courts, as evidenced by formal statutory indicia but also by the quality of their reasons for decision, has become the most important. The discretionary nature of a statutory power no longer justifies a different approach to review than straightforward statutory interpretation. In sum, the questions of whether

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<sup>33</sup> *Ibid.* at 455.

<sup>34</sup> *Ibid.* at 457.

judicial intervention is warranted and what standard of scrutiny should be chosen are settled by “the common law way of law-making,” where judges “actively inquire into the legality of administrative decisions but without any prejudice that legality is synonymous with consistency with formal criteria.”<sup>35</sup> Both the Supreme Court’s recognition of a common law requirement that administrative authorities provide reasons for decision and its formulation of reasonableness review as focused on assessing whether administrative decision makers have offered in their reasons an adequate explanation for the decision are, to Dyzenhaus, important steps in the evolution of judicial review away from formal distinctions.

Dyzenhaus criticizes those who are inclined to retreat from this “principled progression” by reinstating formal distinctions in substantive review, a retreat to formalism most clearly seen in the courts’ insistence that it is impermissible, as part of the reasonableness review of a discretionary decision, for judges to second-guess the weight accorded by the decision maker to considerations relevant to the exercise of discretion. This was dramatically illustrated by the Supreme Court’s judgments in *Baker* and *Suresh v. Canada (Minister of Citizenship and Immigration)*.<sup>36</sup> In *Baker*, the majority would have set aside an immigration officer’s decision to deny Baker’s application, on humanitarian and compassionate grounds, for an exemption from a statutory requirement that she be removed to Jamaica because the officer had given *insufficient weight* to the impact of Baker’s removal on the best interests of her children. In *Suresh*, the court insisted that *Baker* did not “authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process...”<sup>37</sup> Rather, if discretionary decision makers had, in exercising their powers, considered the appropriate factors in conformity with the statutory and constitutional constraints imposed on these powers, the courts could not intervene, even if they would have weighed the factors differently and come to a different conclusion.<sup>38</sup>

Dyzenhaus suspects that David Mullan has also retreated to a more “conservative” view of the appropriate role of courts in reasonableness review, prompted by the concern that allowing courts to engage in a re-evaluation of the overall decision or a re-weighing of the various factors would be indistinguishable from correctness review. Under this view, with the exception of decisions engaging individuals’ *Charter* rights,

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<sup>35</sup> *Ibid.* at 457.

<sup>36</sup> [2002] 1 S.C.R. 3 [*Suresh*].

<sup>37</sup> *Ibid.* at para. 37.

<sup>38</sup> *Ibid.* at para. 38.

which should be reviewed on a more searching standard, judges should refrain from interfering with discretionary decisions as long as these are justified by comprehensible reasons.<sup>39</sup> But for Dyzenhaus, reasonableness review focused on determining whether there is a rational basis in law for a decision inevitably involves an evaluation of the adequacy of the reasons offered by the decision makers:

If there is a duty on officials to give reasons, but those reasons are not subject to serious scrutiny, then the duty will be exercised in a pro forma way and those subject to the decision will rightly feel that the claim to govern in accordance with the rule of law is simply a veneer over arbitrary decision making.<sup>40</sup>

The source of Mullan's "conservatism," Dyzenhaus argues, is his reluctance to embrace a substantive conception of the rule of law — the idea that legislative and executive action is constrained by the values expressed in an unwritten or common law constitution of legality whose content is evidenced but not constituted by judgments and positive laws (including written constitutional texts) and evolves "as we come better to understand what legality requires."<sup>41</sup> This explanation of the common law of judicial review essentially erases the boundaries between constitutional and administrative law review that Mullan's approach would maintain. There is no justification for automatically requiring a more searching review for decisions that engage an individual's *Charter* rights and a less searching review for decisions that do not, since the latter may engage equally fundamental values contained in the unwritten constitution. In the end, Dyzenhaus suggests, judicial review is only the "more or less intense scrutiny of reasons, whether tribunals are engaged in interpreting the law of their enabling statute, or of another statute, or the common law, or the provisions of a written constitution, including, if there is one, a bill of rights."<sup>42</sup>

But as Mark Walters points out in his essay on "David Mullan and the Unwritten Constitution," Mullan recognizes that respect for individual rights and constitutional values including the rule of law play as important a role in establishing the appropriate standard of judicial review as legislative intention and pragmatic appreciation by courts of the relative expertise of decision makers:

[E]ach of these three sets of factors — parliamentary intention, pragmatic factors relating to expertise, and transcendent constitutional values — must be given independent weight

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<sup>39</sup> *Inside and Outside*, *supra* note 1 at 467.

<sup>40</sup> *Ibid.*

<sup>41</sup> See David Dyzenhaus, "The Rule of (Administrative) Law in International Law" (2005) 68 *L. & Contemp. Probs.* 127 at 139.

<sup>42</sup> *Inside and Outside*, *supra* note 1 at 475.

by judges when seeking the right balance of deference to extend to administrative actors.... That this equilibrium is established through a form of judicial reasoning in which legislative intention is just one factor to be balanced with other constitutional values confirms the importance of the unwritten Constitution to the theoretical structure of Mullan's account of public law.<sup>43</sup>

Why, then, if Dyzenhaus is correct in his assessment, would Mullan seek to draw a formal distinction between discretionary decisions that engage *Charter* rights and other discretionary decisions by requiring an "automatically" more intrusive standard of review for the former? Walters notes that for Mullan, "written constitutional texts — and the political acts of communities that lead to the adoption of written constitutional texts — matter."<sup>44</sup> There are, in his view, at least two reasons over and above respect for sovereign will to give written constitutional rights precedence in the hierarchy of legal norms that constrain administrative action:

First, [Mullan] concludes that the success of any attempt by judges to construct a new framework for human rights based on abstract moral or political principles will be limited by the incremental nature of common law reasoning. Such a framework could emerge, but only gradually as existing legal language is refined. So, when a written code of rights is available to provide a shortcut to that end, the shortcut should be taken....

Second, Mullan fears that if judges think about human rights within an unwritten or common law mindset — one that historically adopted a deferential stance toward executive and legislative power — the result will be the "debasement of the coinage of rights and freedoms." The adoption of written guarantees can have a "transformative impact" on our rights culture, an escape from limits inherent in the "earlier world of the common law," which will be missed unless judges direct their attention to the written texts.<sup>45</sup>

In the end, Walters' description of Mullan's approach to judicial review as opting for "rational pragmatism over theoretical dogmatism" may be closest to the mark:

The unwritten Constitution, as a form of common public law, will only emerge through practical and measured reasoning over time, and ... its strength may ultimately lie in its ability to resist theoretical extremes — to resist, in other words, any final victory for legal positivism or legal rationalism, any ultimate supremacy of either the conception of law-as-sovereign-will or the conception of law-as-reason.<sup>46</sup>

It may be that recognizing the need for a formal distinction between the review of discretionary decisions engaging *Charter* rights and other discretionary decisions illustrates Mullan's rational pragmatism. After

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<sup>43</sup> *Ibid.* at 435.

<sup>44</sup> *Ibid.* at 436.

<sup>45</sup> *Ibid.* at 438.

<sup>46</sup> *Ibid.* at 439

noting that opponents of the activist state have an aversion to discretionary power, Mullan and his fellow EJMR editors describe the role of discretion in contemporary government as follows:

[D]iscretion is the very life blood of the administrative state. It would be inconsistent with achieving the legislative aim of protecting the public interest identified by particular programs if the enabling statute was expected to define with precision all the situations in which, for example, non-citizens who have committed criminal offenses should be excluded from Canada or deported; those engaged in regulated businesses and professions (such as the sale of used cars and securities, law, and medicine) should either be refused a license to practice or have their license revoked; or land may be expropriated for public purposes.<sup>47</sup>

In this context, opting for an enhanced judicial scrutiny of discretionary decisions that includes the assessment of whether discretionary decision makers accord adequate weight to relevant considerations, including those values that comprise the constitution of legality (whose content is not yet fully determined and evolving with our understanding of what legality requires), while attractive in theory, may in practice cause much mischief. The importance of discretionary decision making to the administrative state, the sorry history of judicial intervention in the administration of programs designed to improve public welfare (that provided the impetus for the development of a doctrine of deference), the malleability and indeterminacy of the values contained in expansive conceptions of the unwritten constitution, the unbounded creativity of administrative lawyers, who could characterize any question as “constitutional” as easily as they once characterized all questions as jurisdictional, and the difficulty many trial and appellate judges have in maintaining “deferential self-discipline”<sup>48</sup> may well justify a cautious, if not conservative, attitude towards abandoning all formal distinctions and adopting the approach urged by Dyzenhaus. While the theory may be principled and thus attractive, further reflection is required on the challenges facing its implementation. More time may be needed, as Dyzenhaus allows may be intrinsic to the common law way of law-making, to permit the principles underlying judicial review to stabilize and become predictable through formalization into rules, before the “grip of rules” is loosened and new principles are articulated.<sup>49</sup>

Lorne Sossin’s review of the “Uneasy Relationship Between Independence and Appointments in Canadian Administrative Law” also has profound implications for the role of judges in reviewing discretionary decision making. Sossin asks whether tribunal

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<sup>47</sup> EJMR, *supra* note 10 at 948-49.

<sup>48</sup> Ryan, *supra* note 8 at para. 46.

<sup>49</sup> *Inside and Outside*, *supra* note 1 at 477.

independence requires not only that tribunal members, once appointed, be free from ongoing executive influence through the *Valente* guarantees of security of tenure, financial security and administrative control,<sup>50</sup> but also that the executive select and appoint tribunal members based on merit rather than considerations of political patronage. Canadian courts have by and large been unwilling to view appointments as a question of independence. The decision of the Ontario Court of Appeal in the *Retired Judges* case was an exception to this general trend.<sup>51</sup> The Court determined that the unilateral appointment of arbitrators on an ad hoc basis with little financial security or security of tenure by a Minister whose government, as a funder of the hospitals and nursing homes opposing the unions in the arbitrations, had a financial stake in the outcome gave the appearance of an interference with the institutional independence and impartiality of the boards of arbitration.<sup>52</sup> In the Court of Appeal's view, the Minister's broad discretion to appoint arbitrators had to be exercised in conformity with the principle of independence.<sup>53</sup> The Supreme Court overturned the Court of Appeal on this point, noting in effect that the Legislature had by statute "clearly and unequivocally" authorized the Minister to appoint ad hoc arbitrators; the common law requirements of independence had been displaced by express statutory language or necessary implication.<sup>54</sup>

Though Canadian courts have not yet recognized a generalized common law or constitutional requirement that tribunal appointments accord with objective merits criteria rather than subjective criteria of political desirability,<sup>55</sup> Sossin suggests that the principles of transparency and the rule of law must nevertheless animate the discussion of independence in appointment processes.<sup>56</sup> Governments should have transparent appointment policies or guidelines that clearly set out selection criteria, including criteria other than merit, such as diversity or regional or linguistic balance. Though guidelines setting out who is "qualified" for appointment may appear to be a non-binding form of "soft law," the extent to which courts may give them real "bite" should

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<sup>50</sup> *Valente v. The Queen*, [1985] 2 S.C.R. 673.

<sup>51</sup> *CUPE v. Ontario (Minister of Labour)* (2000) 51 O.R. (3d) 417 (C.A.).

<sup>52</sup> *Ibid.* at paras. 98-99.

<sup>53</sup> *Ibid.* at para. 104.

<sup>54</sup> *Retired Judges*, *supra* note 7 at para. 117. Arguably, the Court's reasoning here is unconvincing. The statute in question confers on the Minister a broad discretion to appoint arbitrators but does not specify that (s)he may do so in a manner that appears to interfere with their institutional independence. Without such express language, would it not be open to the courts to read down the scope of the Minister's discretion consistently with fundamental common law norms of independence?

<sup>55</sup> *Inside and Outside*, *supra* note 1 at 64.

<sup>56</sup> *Ibid.* at 65-66.



not be underestimated. Courts have signaled that in reviewing the reasonableness of a discretionary decision, they will place significant weight on the views of ministers and departments regarding the purpose of discretionary powers or the factors relevant to their exercise whether these views are expressed in formal guidelines (*Baker*) or even the public statements of ministers (*Retired Judges*). The rule of law, in Sossin's view, implies that administrative adjudication requires "a minimum degree of competence and impartiality that a purely political appointment process cannot guarantee,"<sup>57</sup> a logic that "could lead to constitutionalizing minimum appointment criteria, which would mean that some minimum standards would prevail over even expressly worded statutory provisions purporting to suggest that no qualifications are required for a given adjudicative provision."<sup>58</sup> Sossin's review of the law and policy on tribunal appointments in Canada shows that several jurisdictions are enhancing the transparency of their appointment process and devising ways to reduce or control the influence of partisanship over tribunal appointments by conferring more responsibility over appointments to appointment advisory committees. He concludes that while this insulation of administrative decision making from the political process has largely been achieved through legislative and policy initiatives, courts should be able to intervene, presumably on the basis of a minimum common law or constitutional requirement of competence and impartiality, to prevent governments from improperly pursuing policy agendas through partisan appointments.<sup>59</sup>

The elaboration by judges of a common law or constitutional requirement of competence that provides yet another ground to attack the exercise of ministerial discretion will likely not be welcomed by Huscroft and others who argue that courts do not presently show ministers' decisions the respect they deserve. Because of its constitutional nature, courts may be reluctant to show any deference on the question of whether a ministerial appointment meets the minimum standard of competence. Moreover, while a minimum constitutional standard of competence would likely vary with the statutory context,<sup>60</sup> its origin and elaboration would to some extent be external to the relevant statute, while the Supreme Court's intervention in the *Retired Judges* case was firmly based on its interpretation of the *HLDA*'s purpose.

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<sup>57</sup> *Ibid.* at 65.

<sup>58</sup> *Ibid.* at 66.

<sup>59</sup> *Ibid.* at 71-72.

<sup>60</sup> Sossin notes that the principles of transparency and the rule of law do not suggest simply one kind of appointments process; see *ibid.* at 66.

*Inside and Outside Canadian Administrative Law* celebrates David Mullan's contribution to Commonwealth administrative law. Like many of his colleagues from New Zealand and other Commonwealth countries, several of whom came to Canada for their graduate legal education and later made their academic careers here, Mullan displays "a curiosity about how problems are dealt with elsewhere in the common law world and a facility and confidence in finding out."<sup>61</sup> This tradition of common law comparativism is alive and well and very much in evidence in the second group of contributions to *Inside and Outside Canadian Administrative Law*. An excellent example is editor Michael Taggart's essay on "Globalization, 'Local' Foreign Policy, and Administrative Law." Drawing on cases and academic commentary from the United Kingdom, Canada, New Zealand and the United States, Taggart traces the gradual subordination of city local governments to central governments. The subordinate status of local government is reflected in the rule that municipalities have "only such powers as are expressly delegated by statute or are necessarily or fairly implied in or incident to the powers expressly granted."<sup>62</sup> Known as "Dillon's Rule" in the United States, this principle is replicated in most other common law countries.<sup>63</sup> Taggart explores how courts in the United Kingdom and Canada have relied on Dillon's Rule to prevent municipalities from exercising their authority to implement "local foreign policy," and in particular, adopt selective procurement and other policies to apply pressure on companies that do business in countries with poor human rights records. He finds that courts have severely limited the ability of local governments to implement such policies by characterizing them as exercises of power for improper purposes that exceed cities' jurisdiction, narrowly confined to core municipal issues, including the health, safety and welfare of city residents. Taggart notes that the courts' application of the formalistic and facially apolitical Dillon's Rule masks the competing policy arguments for and against recognizing local government authority over foreign policy matters. Allowing local governments to assume a greater role in foreign policy may strengthen democracy, promote legitimate local concerns, and give voice to citizens on international issues of importance to them without impairing the nation's dealings with foreign governments or involving local politicians in complex matters of international relations for which they lack the institutional competence.<sup>64</sup>

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<sup>61</sup> *Ibid.* at 6.

<sup>62</sup> *Ibid.* at 261.

<sup>63</sup> Taggart explains that John F. Dillon was the author of an influential treatise on American Municipal Corporations; see *ibid.* at 261.

<sup>64</sup> *Ibid.* at 277.

Taggart does not discuss whether the Canadian Supreme Court's decision in *Nanaimo (City) v. Rascal Trucking Ltd.*<sup>65</sup> to adopt a "broad and purposive" or "benevolent" approach to the interpretation of municipal jurisdiction marks a departure from its narrow approach in *Shell Canada Products Ltd. v. Vancouver (City)*.<sup>66</sup> This may be a moot point, however, with regard to the use by local authorities of procurement policies to make foreign policy statements on behalf of their citizens, since, as Taggart observes, the *Agreement on Government Procurement 1994*, an international treaty administered by the World Trade Organization, restricts the ability of states, including sub-national organs (like local authorities) to use procurement to address non-trade matters, such as environmental or human rights issues.<sup>67</sup>

Public lawyers with a comparativist bent will find the contributions by Robin Creyke and K.J. Keith extremely useful in understanding Canadian developments in administrative law from a broader perspective. Creyke's article "Where do Tribunals Fit into the Australian System of Administration and Adjudication?" is a wide-ranging review of the role played by administrative tribunals in Australian government. It discusses their relationship to the legislative, executive and judicial branches with a particular focus on whether they are independent from these branches. Creyke begins and ends his article by asking where tribunals fit in the structure of government. He notes that tribunals, like other institutions including the auditor-general, ombudsman and royal commissions, operate outside of the legislative, executive or judicial branches, and could be said to form a fourth arm of government. He proposes that these "integrity arm" institutions share common characteristics that include supervisory responsibilities over executive decisions and independence. Like their Canadian counterparts, Australian tribunals face challenges in securing their independence. There have been some victories. An ambitious attempt to merge several federal tribunals into one administrative review tribunal was defeated in Australia's Parliament because of concerns that the proposed contraction of rights to oral hearings, representation and administrative merits review, the selection of tribunal members by the minister of the department whose decisions the members would review, and a lack of statutory qualifications for membership eroded the independence and quality of administrative decision making. The executive's appointment of members for very short fixed terms, its chosen methods and terms of employment and tribunal under-funding continue, however, to undermine tribunal independence and effectiveness. As in many

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<sup>65</sup> [2000] 1 S.C.R. 342.

<sup>66</sup> [1994] 1 S.C.R. 231.

<sup>67</sup> *Inside and Outside*, *supra* note 1 at 280.

Canadian jurisdictions, selection criteria for tribunal appointments are not always publicized and ministers ultimately control tribunal membership. The role of performance appraisals of tribunal members and their ability to meet caseload targets and other performance measures in reappointment decisions is also a controversial issue in Australia. Observers have voiced concerns over the possibility that, in order to meet productivity standards, individual tribunal members may not conduct their cases as carefully and diligently as they otherwise would.<sup>68</sup>

One striking contrast between Canadian and Australian administrative law raised in Creyke's article is Australia's embrace of generalist tribunals, which have the authority to review decisions across the whole of government. At the federal level, Australia's Administrative Appeals Tribunal provides independent merits review (reconsideration) of a wide range of administrative decisions by federal ministers, officials, authorities and other tribunals under over 400 statutes and legislative instruments, and particularly in the areas of social security, taxation, veterans affairs and workers compensation. Creyke notes that this model has spread to most states and territories in Australia.<sup>69</sup> Another significant difference with Canadian law is that Australian courts do not recognize a formal, overarching doctrine of deference to the decisions of administrative tribunals, primarily, in Creyke's view, because of the judiciary's eagerness to "jealously guard" their supervisory authority over tribunals and its lack of confidence in the quality and competence of administrative decisionmaking. In certain situations, Australian courts will accord significant weight to tribunal opinions, including "such matters as the field in which the tribunal operates, criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning."<sup>70</sup> Deference will more commonly extend to the practical and factual decisions of specialized tribunals, however, and Australian judges will usually not defer to tribunals' interpretation of legislation because they view this as part of the judicial role which, at the federal level, is constitutionally reserved to the courts. That said, Australian courts have acknowledged Australia's developed system of administrative merits review by exercising restraint where administrative decisions may be appealed on the merits, and Creyke concludes that "in practice, the exercise of restraint is more common than might be expected in a country

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<sup>68</sup> *Ibid.* at 100.

<sup>69</sup> *Ibid.* at 84.

<sup>70</sup> *Ibid.* at 103.

which ostensibly denies the existence of any formal deference doctrine.”<sup>71</sup>

In “Administrative Law Developments in New Zealand as Seen Through Immigration Law,” Sir Kenneth Keith takes the reader through 50 years of significant developments in New Zealand’s administrative law by presenting the decision makers, processes, powers and remedies at play in the regulation of immigration. Keith observes that while the elaboration of substantive immigration policy remains largely an executive prerogative, albeit increasingly constrained at the margins by New Zealand’s international human rights obligations under conventions such as the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child* and the 1951 *Convention Relating to the Status of Refugees*, significant strides have been made on the procedural front: immigration policy must now be published, followed and administered through a fair process. While this evolution is not unlike that undergone in Canada and other comparable countries, the significant role played in these developments by New Zealand’s office of Ombudsman is distinctive. While judges were reluctant to impose even minimal hearing, disclosure or reasons requirements on immigration decision makers, the Ombudsman undertook inquiries of his own motion into immigration decisions and, armed with the statutory right to automatic and full access to department files, recommended substantive and procedural remedies that were in fact implemented. In addition to making a difference in individual cases, the Ombudsman made more general recommendations to improve the transparency of removal criteria and the quality of materials forwarded by Immigration Department officials to the minister for decision. The performance of the Ombudsman’s office, notes Keith, suggests that it was more effective than reviewing courts in improving decisionmaking in the immigration context. In this respect, policy makers in Canada and other Commonwealth countries may well wish to examine the New Zealand example more closely.

Like the first group of contributors, Janet MacLean tackles the subject of judicial restraint in “Roadblocks, Restraint, and Remedies: The Idea of Progress in Administrative Law.” However, her contribution distinguishes itself by its comparative approach and its focus on how courts exercise their remedial discretion rather than on general doctrines of deference. Through a discussion of United Kingdom and New Zealand cases, MacLean illustrates that judicial restraint — motivated by the need to balance collective with individual interests, allow governments to govern, respect the relative expertise of administrative decision makers

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<sup>71</sup> *Ibid.* at 105.

and recognize judges' limited institutional capacities in the sphere of polycentric decisionmaking — may be exercised in different sites. Judges may exercise restraint as a threshold question (for example, by declining to intervene on procedural fairness grounds in "legislative" decisions), in determining whether a particular ground of judicial review has been made out and in deciding whether to exercise their discretion to grant a remedy.<sup>72</sup> MacLean argues that since there are now fewer threshold barriers to judicial review, courts' remedial discretion has become, in relative terms, a more important site for judicial restraint. Courts will be most comfortable exercising their discretion to deny a public law remedy when the grounds of review are narrow and technical and least comfortable when the successful grounds are more substantive (when, for example, the decision is unreasonable) or human rights-based.<sup>73</sup> MacLean suggests that a review of the case law indicates that courts may be choosing to decide judicial review applications on more technical grounds in order to more easily justify their decision to deny individual relief for reasons of public interest. Such an approach, in MacLean's view, threatens the transparency and coherence of judicial review.

In "Process and Substance in Judicial Review," Paul Craig transcends the boundaries of common law comparativism and analyzes trends in European Union law to make more general observations about judicial review in the context of administrative law. Craig examines the inter-relationship between the development of "process rights" in the jurisprudence of the European Community courts and substantive review of regulations, decisions and directives adopted by E.U. governing bodies, including the European Council, Commission and Parliament. He focuses on three process rights. First, affected parties have a right to reasons justifying the adoption of particular measures. Secondly, affected parties have a right of "access to the file" — a right similar to, but broader in scope than the common law concepts of discovery or disclosure.<sup>74</sup> Thirdly, the administration is subject to a "duty of care" or of "diligent and impartial examination" requiring it to carefully "examine the relevant factual and legal aspects of the individual case."<sup>75</sup> The case of *Pfizer Animal Health SA v. Council*<sup>76</sup> well illustrates the application of this duty. In dismissing Pfizer's challenge to the decision of the European Council to withdraw authorization for an antibiotic

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<sup>72</sup> *Ibid.* at 212.

<sup>73</sup> *Ibid.* at 233.

<sup>74</sup> For example, it applies before and after a decision is made by the administration, and in competition proceedings, requires the European Commission to disclose all documents obtained in the course of an investigation subject to claims of confidentiality or secrecy; see *ibid.* at 167.

<sup>75</sup> *Ibid.* at 169.

<sup>76</sup> T-13/99, [2002] E.C.R. II-3305.

additive used in animal feed, the Court of First Instance effectively found that, in that context, the duty of care required the Council to carry out a thorough scientific risk assessment based on “scientific advice founded on the principle of excellence, transparency and independence,” an inquiry necessary to preclude “arbitrary measures.”<sup>77</sup> Craig observes that each process right is linked to an aspect of substantive review. Reasons are obviously required to facilitate judicial review of the merits of the decision. Enforcing the right of access to the file requires courts to form an opinion as to whether the disclosure of a document could have made a difference to the decision reached — an effort which implies a review of the reasoning underlying the decision. The *Pfizer* decision expressly draws the link between the duty of care and the avoidance of a substantively arbitrary decision. The expansion of these process rights, Craig concludes, will likely lead to more intense scrutiny of the merits of decisions, since they will provide reviewing courts with the detailed reasons and full evidentiary record they need to confidently engage in substantive review.<sup>78</sup> It remains to be seen whether a similar trend will result from the broadening of process rights in Canadian administrative law and, in particular, the imposition on administrative decision makers of a common law duty to give reasons.

Denis Lemieux’s article on the “Codification of Administrative Law in Quebec” reminds administrative lawyers in the common law provinces that though administrative law in Quebec shares an English public law heritage, Quebec has developed its own distinctive approach to administrative justice. Lemieux’s contribution is an overview of how administrative law in Quebec “has been profoundly changed by laws of general application that enshrine fundamental societal values.”<sup>79</sup> Quebec’s *Charter of Human Rights and Freedoms* sets out a quasi-constitutional right to be heard by an independent and impartial tribunal<sup>80</sup> and, by implication, a quasi-constitutional right to reasons for decisions that deprive a private person of his or her rights.<sup>81</sup> Moreover, its application to public and private entities means that its guarantees continue to apply if the delivery of public programs is privatized. The *Administrative Justice Act, 1996*<sup>82</sup> established a regime of uniform procedural guarantees, requiring public authorities to act fairly but with celerity and efficiency, taking into account the requirements of administrative justice. Streamlined procedures were balanced with a

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<sup>77</sup> *Ibid.* at para. 172.

<sup>78</sup> *Inside and Outside*, *supra* note 1 at 179.

<sup>79</sup> *Ibid.* at 252.

<sup>80</sup> R.S.Q., c. C-12, s. 23.

<sup>81</sup> *Ibid.* s. 24.

<sup>82</sup> R.S.Q., c. J-3.

right of full merits review before the Tribunal administratif du Québec, with jurisdiction over decisionmaking in social and economic affairs, land-use planning and the environment and municipal taxation, or before the Cour du Québec in disciplinary matters. The Act specifies the content of the duty on administrative decision makers to act fairly, including disclosure of personal files in advance of a decision, written or oral hearings, and a right to written reasons in unfavourable decisions that specify any remaining available recourses.<sup>83</sup> Reforms to the *Civil Code*<sup>84</sup> have extended its application to public entities. The Code's role in public law is now essentially analogous to the common law — public entities must conform to its strictures unless these are expressly displaced by their enabling statute. Lemieux reports that civil law rules have since been used as sources of administrative power and constraints on administrative power, and that judicial efforts to harmonize civil law rules with common law rules of administrative law have made Quebec “a laboratory for comparative law.”<sup>85</sup> Lemieux's article demonstrates that administrative lawyers in common law provinces need look no further than Quebec to discover a distinct model of administrative law, with its own advantages and shortcomings, from which they can draw ideas for change and reform.

Several of the contributors to *Inside and Outside Canadian Administrative Law* note that one of the strengths of David Mullan's scholarship is his determination to strip administrative law of unnecessary formalism in order to pose and answer “the real questions.”<sup>86</sup> Two contributors in particular — Geneviève Cartier and John Evans — apply this approach in their exploration of complex and controversial areas of administrative law: the doctrine of legitimate expectations and the authority of administrative decision makers to decide constitutional issues arising from the execution of their statutory mandates. In “A Mullanian Approach to the Doctrine of Legitimate Expectations,” Geneviève Cartier analyzes the rationale underlying the doctrine of legitimate expectations and its elaboration by the Supreme Court of Canada. Under this doctrine, a decision maker whose representations have induced in an individual affected by a decision a legitimate expectation that he or she will receive either a procedural entitlement before a decision is made or a substantive result must take this legitimate expectation into account in making its decision. Canada's Supreme Court has interpreted the doctrine restrictively. First, it has

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<sup>83</sup> *Inside and Outside*, *supra* note 1 at 246.

<sup>84</sup> Art. 1260 C.C.Q.

<sup>85</sup> *Inside and Outside*, *supra* note 1 at 251.

<sup>86</sup> David J. Mullan, “Fairness: The New Natural Justice?” (1975) 25 U.T.L.J. 281 at 300.



stated that the doctrine cannot apply to decisions of a legislative nature where procedural fairness would not otherwise be owed. This is an odd restriction, because the court has also described the doctrine as allowing individuals to make procedural claims in circumstances where none could otherwise be made at common law, circumstances which would logically include decisions of a legislative nature. Second, the Court has emphatically held that the doctrine cannot secure substantive results such as the granting of a license promised by a decision maker; it can only provide enhanced or additional opportunities to be heard by a decision maker proposing to renege on a representation. In this respect, Canadian courts have refused to follow the lead of the U.K. courts, which have recognized that in certain circumstances, a court may intervene to quash the decision of a public authority to renege on a promise or depart from an established practice if the authority is unable to demonstrate, to the satisfaction of the court, that such a course of action was required by an overriding public interest.<sup>87</sup> Finally, lower courts have refused to apply the doctrine absent evidence that the party affected by the decision was aware of the decision maker's representation and relied on it to its detriment.

While Cartier persuasively argues that the Supreme Court's version of the doctrine of legitimate expectations is not explained by the *ultra vires* doctrine — its traditional justification — she claims that the Court's recent decision in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*<sup>88</sup> recognizes the values underlying a substantive version of the doctrine and achieves a just result by other means. In *Mount Sinai*, a hospital originally licensed as a long-term care facility for tuberculosis patients agreed to relocate its facilities in return for the Minister's undertaking that once this was done, it would receive an operating license that reflected its new focus on the treatment of respiratory diseases in general. When the relocation was completed several governments later, the current Minister of Health declared that he would not grant the modified permit because this would require additional public expenditures that the government could not afford. Bastarache J., writing the majority judgment, examined the history of the negotiations between the hospital and successive health ministers and concluded that the government's behaviour indicated the Minister had in fact exercised his discretion to issue the modified permit. Moreover, the Minister could not reverse his decision without express statutory authority. In a concurring judgment, Binnie J., while refusing to apply a substantive version of legitimate expectations, found that the Minister's

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<sup>87</sup> *R. v. North and East Devon Health Authority, ex p. Coughlan*, [2000] 3 All E.R. 850 (C.A.).

<sup>88</sup> [2001] 2 S.C.R. 281 [*Mount Sinai*].

decision not to issue the modified permit was patently unreasonable: it showed a “singular lack of recognition” of the serious consequences of the Minister’s reversal of position for the hospital<sup>89</sup> and, because there was no evidence that granting the modified permit would in fact require additional government funding, there was no serious policy reason justifying the Minister’s decision. The only reasonable outcome was for the Minister to grant the permit. In Cartier’s view, both judgments in *Mount Sinai* reflect the same justification underlying the substantive version of the legitimate expectations doctrine applied by the U.K. courts: “a decision will be illegal if made in violation of the preceding history of the relationships, promises, engagements, and understandings that had occurred between the parties, in a context where no overriding considerations of public interest justified that departure.”<sup>90</sup> Cartier views the *Mount Sinai* decision as a step forward in the field of public accountability, but correctly points out that, as regards Canadian courts’ treatment of the doctrine of legitimate expectations, “there is still much to be done in terms of clarification.”<sup>91</sup> In this respect, Binnie J.’s recognition in *Mount Sinai* of the difficulty caused by the exclusion of “legislative functions” from the scope of application of the doctrine of legitimate expectations and his observation that the issue “remains open for another day” are a promising sign.<sup>92</sup> When that day comes, and the Supreme Court combines the pursuit of substance over formalism with an attention to doctrinal coherence, it will truly be adopting a “Mullanian” approach.

In “Principle and Pragmatism: Administrative Agencies’ Jurisdiction over Constitutional Issues,” John Evans sets out a very detailed review of the Supreme Court’s new framework for determining whether administrative agencies have the authority to decide constitutional issues arising from the execution of their statutory mandates. Under this framework, set out in the leading case of *Nova Scotia (Workers Compensation Board) v. Martin*, “an agency which has the jurisdiction — explicit or implied — to decide questions of law arising under a legislative provision is presumed to have a concomitant jurisdiction to decide the constitutional validity of that provision.”<sup>93</sup> In deciding, if necessary, whether an agency has implicit jurisdiction to consider questions of law arising under a legislative provision, courts must consider whether the power to decide such questions is necessary to enable the agency to perform its mandate effectively; whether the nature

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<sup>89</sup> *Ibid.* at para. 63.

<sup>90</sup> *Inside and Outside*, *supra* note 1 at 202.

<sup>91</sup> *Ibid.* at 203.

<sup>92</sup> *Mount Sinai*, *supra* note 88 at para. 34.

<sup>93</sup> [2003], 2 S.C.R. 504 at para. 3 [*Martin*].

and capacity of the agency enable it, in practical terms, to decide questions of law; and whether the power to decide questions of law can be implied from the agency's place in the statutory scheme and other practical considerations.

While *Martin* does much to clarify this area of the law, some uncertainty remains as to the implications of the *Martin* test, particularly for agencies that do not benefit from an explicit grant of jurisdiction to decide any question of law. For example, since all agencies must interpret the provisions of their enabling statute in order to fulfill their statutory mandate, do all agencies have the implicit power to decide the constitutional validity of such provisions? While some of the language in *Martin* seems to support this inference, the *Martin* court also approved of the pronouncement in an earlier judgment that "the power to interpret law is not one which the legislature has conferred lightly on administrative tribunals."<sup>94</sup> To assess the impact of the *Martin* approach, or, in his words, "test-drive" the new test, Evans revisits two previous cases in which the Supreme Court had determined, respectively, that the Canadian Human Rights Commission exercising its gatekeeping function under the Canadian Human Rights Act<sup>95</sup> and the Board of Referees hearing appeals from the Employment Insurance Commission<sup>96</sup> did not have jurisdiction to decide the constitutional validity of their enabling statutes. Applying the *Martin* framework, Evans sets out strong arguments supporting a finding of jurisdiction over constitutional issues in both cases, hinting that the new approach may significantly expand the role of administrative agencies in elaborating constitutional norms in the context of their statutory schemes.

The fourth and final cluster of contributions to *Inside and Outside Canadian Administrative Law* focuses on David Mullan's impact as a teacher of public law. In "Learning Administrative Law from David Mullan," H. Wade MacLauchlan and Philip Bryden explore why the approach to administrative law teaching in *Administrative Law: Cases, Texts, and Materials* co-authored by Mullan, John Evans, Hudson Janisch and Dick Risk (EJMR) became the dominant paradigm for teaching administrative law in common law Canada. They canvas the essential characteristics of this approach: its focus on the judicial review of administrative action, in particular the decisions of administrative tribunals; its original focus on common law constraints to administrative

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<sup>94</sup> *Ibid.* at para. 43, quoting *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at 33 [*Tétrault-Gadoury*].

<sup>95</sup> *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854.

<sup>96</sup> *Tétrault-Gadoury*, *supra* note 94.

action with, over time, an increasing insistence on (written) constitutional norms and statutory codes of procedure; and its assumption that its core audience are students preparing to pursue careers as advocates for clients in administrative proceedings or in judicial review proceedings. MacLauchlan and Bryden contrast this approach with the more broadly focused “continentalist” tradition, exemplified in Dussault and Borgeat’s *Traité de Droit Administratif*,<sup>97</sup> a five-volume treatise that, in addition to judicial review of administrative action, extends to the law governing governmental contractual and tortious liability and the role of government in collecting and using information, as an employer and property owner and as a collector and spender of money.<sup>98</sup> They conclude that far from presenting “an impoverished view” of administrative law, the EJMR text “defines the scope and content of administrative law in a manner that serves the needs of a particular audience, but in doing so deflects into other disciplines (notably public administration and public policy studies) matters that could just as easily fall under the heading of administrative law.”<sup>99</sup>

MacLauchlan and Bryden praise the EJMR text’s dialogic approach, typified by the commentary, questions and hypotheticals set out in the “Notes” after each section:

Readers are encouraged to be alert to context, to the mix of law and fact, to the interrelationships of substantive issues and remedies, to the diversity of administrative decisionmaking contexts, and to the underlying importance of interpretation. They are continually encouraged to reflect, to be alert to subtle doctrinal shifts, and to reach a better understanding of administrative law.<sup>100</sup>

While they acknowledge the frequent criticism of the EJMR text that there is “too much text to allow the book to be used efficiently as a teaching tool,”<sup>101</sup> MacLauchlan and Bryden are staunch proponents of this “hard-working” text:

For students and teachers, it sets an agenda, a framework, and a dialogue. For those who decide to be serious and hard-working administrative lawyers, it is both a way-finder and companion. EJMR is a “chatty” companion, one that insists on an incessant and probing dialogue about administrative law. Above all, EJMR is motivated by commitment to administrative law as a discipline, a commitment that rises to what might be called passion, for those who stay at it.<sup>102</sup>

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<sup>97</sup> Québec: Les Presses de l’Université Laval, 1989.

<sup>98</sup> *Inside and Outside*, *supra* note 1 at 33.

<sup>99</sup> *Ibid.* at 38.

<sup>100</sup> *Ibid.* at 39.

<sup>101</sup> *Ibid.* at 31.

<sup>102</sup> *Ibid.* at 45.

I had the privilege to “learn” administrative law three times. On the first occasion, I was a student of Hudson Janisch who, enthusiastically teaching from the third edition of EJMR, first sparked my interest in the subject, which had not been on my “radar screen” when I began law school. On the second occasion, while completing graduate studies at Queen’s University under David Mullan’s supervision, I sat in on his administrative law class. A few years later, as an adjunct professor at Queen’s who was preparing to teach administrative law for the first time the following term and greatly in need of a confidence boost, I sat in on David’s class again. I have often thought about what made learning administrative law from David Mullan so enjoyable, and I agree with MacLauchlan and Bryden that the qualities that make Mullan an excellent teacher are partly reflected in the EJMR text and in his other contributions to administrative law. Mullan worked extremely hard to convey to students, from the very first class, a clear intellectual framework for the “structure” of Canadian administrative law, a trait acknowledged and praised by several contributors to *Inside and Outside Canadian Administrative Law*. The Chief Justice of Canada, Beverly McLachlin, makes this point eloquently at the conclusion of her revealing exploration of the evolving relationship between courts and academics, titled “Academe and the Courts: Professor Mullan’s Contribution”:

Establishing analytic architecture, commenting on current developments, and situating administrative law in context are not insignificant accomplishments. They attest to professor Mullan’s understanding of his primary role as an academic lawyer and his secondary, but no less significant, role in assisting courts to develop the law in a coherent and responsive way that meets society’s evolving needs.<sup>103</sup>

And though Mullan as law teacher, like his casebook, asked much of his students, he gave even more in return: respect, patience, humour and his passion for public law.

Michael Taggart and Grant Huscroft, the editors of *Inside and Outside Canadian Administrative Law*, note that they did not intend, by publishing a *Festschrift*, to put David Mullan “out to pasture.”<sup>104</sup> Based on the phenomenal rate at which he has been disseminating his latest contributions to the field of public law, including articles and conference presentations, the editors can lay that notion to rest. In fact, referring once again to the *Wikipedia* entry on *Festschrift*, I note that in the case of very prominent (and prolific) academics, “many *Festschriften* may be

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<sup>103</sup> *Inside and Outside*, *supra* note 1 at 24. David Dyzenhaus also underlines the significance to his own thinking on administrative law of Mullan’s “charts” of where administrative law has been and where it “might productively go”; see *ibid.* at 448.

<sup>104</sup> *Ibid.* at 4.

prepared.” I, for one, look forward to reading the next volume of essays in honour of David Mullan.