

*Beyond Standard of Review:
Towards a Unified Theory of
Administrative Law*

Introduction to the Agenda for the
2020 CIAJ Annual Roundtable in
Administrative Law

Today's Starting Point:

- Be it resolved: Canada lacks a unified theory of administrative law
- Overwhelmingly the recent focus of the Canadian administrative law community has been on issues relating to the standard of review framework and its application
- Of the 100 or so SCC decisions since *Dunsmuir* dealing with “administrative law”, just over 60 of them dealt with standard of review issues
- Culminating in *Canada v Vavilov*, 2019 SCC 65

Today's Starting Point:

- Time will tell whether the SCC's stated intention of bringing clarity to this area of administrative law proves successful
- And the standard of review framework still tells us a lot about the broader purposes of judicial review – the relationship administrative decision-makers and reviewing courts
- But there are many other aspects of Canadian administrative and public law that equally speak to the goals and purposes of our system of administrative law

The adversarial system:

- Our administrative law jurisprudence is the product of an adversarial system, where courts are (at least in theory) limited to deciding the live issues that present in the cases the litigants bring before them
- Tension between the focus of administrative law on the individual decision before the reviewing court, and the “apex” nature of the Supreme Court of Canada

A Hodge Podge of Issues and Rationales

- Each has seen the establishment of its own set of principles or rules governing their adjudication in cases where they arise
- Is administrative law the product of a number of discrete and unrelated theories and doctrines? Or one theory subject to myriad exceptions?

The reality?

- Throughout Canada, within the provincial and the federal realms, administrative decision makers serve a wide range of functions, pursuant to diverse statutory grants of authority (including within the same statute), and render decisions in countless different contexts and factual scenarios
- Must be “legal”, “constitutionally-compliant”, and “fair”

Today's Starting Point:

- When we look beyond standard of review to the whole of Canadian administrative and public law, we can give thought to whether the rationales and justifications for the various doctrines that make up Canadian administrative law are sound, principled, and internally consistent.

Looking Beyond Standard of Review

- Is standard of review any clearer post-*Vavilov*, and what does it say about the relationship between decision makers and the courts?
- What is the role of tribunals, and why do governments delegate statutory authority to administrative decision makers?

Looking Beyond Standard of Review

- What are the limits and possibilities of timely decision-making, and how does the design of the tribunal itself contribute to the goal of timely administrative justice?
- What kinds of decisions are subject to judicial review, and who is allowed to challenge them? What impact does the *Charter* have, and what impact should it have?

At the end of the day...

- What are the underlying principles that do (or should) influence our approach to the judicial review of administrative action or decision-making?
- Does the adversarial system limit our ability to develop a comprehensive theory of administrative law – or do we just keep changing our minds?

At the end of the day...

- Canadian administrative law is full of tensions:
 - Efficiency and fairness;
 - Imperfect, timely outcomes and supervision for legality and rule of law concerns;
 - Actual and inferred expertise;
 - Whether the *Charter* is engaged or not.

At the end of the day...

- And is characterized by a wide range of decision-makers:
 - Adjudicative tribunals (function “like” courts, decide live issues, often between private parties)
 - Government Agencies (granting or withholding benefits, permits, licenses, etc.)
 - “Line decision-makers” (Ministers of the Crown, high school principals, other government “*fonctionnaires*”)
 - Quasi-legislators (Regulatory Bodies, Municipalities, Policy-Making bodies)

Towards a unified theory of administrative law?

- Is it possible?
- Is it desirable?
- If so, which principles and justifications should influence our approach to administrative law?
- What is the goal of administrative law in Canada, and how do we meet that goal in a principled fashion?

Thank you. Enjoy the day!



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