

*CIAJ's Note: The following are notes supporting Justice Yves-Marie Morrisette's oral presentation at CIAJ's National Roundtable on Administrative Law held online on May 29, 2020.*

## IS A UNIFIED THEORY OF ADMINISTRATIVE LAW DESIRABLE OR EVEN POSSIBLE?

- I approach this question as someone who studied Administrative Law and worked in it for the last 49 years, who taught it for 25 years at McGill University and who has now dealt with it as an appellate judge for the last 18 years or so. I am well aware, of course, that Judicial Review is only a small subset of Administrative Law and I bear that in mind.
- I will begin in a roundabout way by mentioning two wonderful and witty books, certainly among my favourite books in law and jurisprudence. Both are by Grant Gilmore :
  - *The Death of Contract*, based on the Law Forum Lectures Gilmore gave at Ohio State University in 1970, and published in 1974; and
  - *The Ages of American Law*, based on the Storrs Lectures Gilmore delivered at Yale in 1974, published by Yale in 1977, and which came out in a second edition with a foreword and postscript by Philip Bobbitt in 2014.
  - Gilmore taught at various universities, notably Chicago and Yale, where he served as Sterling Professor of Jurisprudence from 1973 until his retirement in 1978. He is also the author of a standard treatise on Admiralty Law but his perspective transcended any particular branch of positive law.
  - There is a common theme or thread that runs through both of these lovely books of 1974 and 1977:

- If you look at how things change in law over a sufficiently long period (say a century or a century and a quarter), you cannot help noticing that, although there appears to be an evolutionary movement or trend towards improvement, the movement (and its appearance) can also be cyclical, in that often what was considered just a while back is now considered unjust and, conversely, what was considered unjust a while back is now considered just. And indeed Gilmore offers several illustrations of this in the Law of Contract: let's just mention here how freedom of contract was understood at the end of the XIXth century and what a lot of subsequent legislation, consumer protection legislation for example, but also legislation on landlords, tenants and rental boards, and much case law as well, did to those dogmas of yesterday.
  - In jurisprudence (I don't mean case law, here, I mean "jurisprudence" as legal theory), the same kind of reversals or inversions are observable between what was considered true and what was considered untrue at a given point in time, and which became the untrue and true of jurisprudence at a later date. The point is made elegantly in *The Ages of American Law*, and indeed there can be no doubt that what was considered true or untrue by the Langdellians in 1890 became untrue or true for the Realists in 1930, and that process repeated itself several times, notably when the Realists were trashed from the Left by the several schools of Critical Legal Studies or, from the Right, by Law and Economics.
- The "Quest", shall we say, for a unified theory of Administrative Law is a constant yearning or aspiration but such a theory, in my view, is probably unattainable, in large measure because there occurs, all along, these repeated shifts in values, and these

cognitive or epistemic shifts, in what we consider just or unjust, and true or untrue.

- Therefore, what we have is a gradual movement towards an appearance of improvement, unity and merciful simplification, but it's a movement which is frequently disrupted by emerging perceptions and by setbacks. The new "Just", the new "True", are rarely if ever eternal, and the old "Just" often resists with considerable aplomb, not to say doggedness, the advent of the new "Just". In Judicial Review, at any rate, because it is largely the affair of the courts, an ebb and flow is a better characterization of how things evolve. Think of what happened in the last several decades.
  - There was the substantial *McRuer Report* of 1968, an attempt to fix things for good and "unify" them.
  - Remember how the report was ferociously panned that same year by John Willis, a scholar of the first order who courageously and consistently sided with tribunals and the Public service, not with courts.
  - Yet, the *Judicial Review Procedure Act* of 1971 (the "JRPA"), was an offshoot, and a positive one, of the McRuer Report.
  - *Nicholson*,<sup>1</sup> in 1978, was made possible by the JRPA and effectively broke down the firewall between, either, Full Natural Justice or No Natural Justice at all, by inserting the idea of a duty of fairness at the low end of the spectrum.
  - With *CUPE v. New Brunswick Liquor Corporation*,<sup>2</sup> in 1979, came Light at long last! A crucial turning point in our understanding not just of Judicial Review but also of Administrative Law.

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<sup>1</sup> [1979] 1 S.C.R. 311.

<sup>2</sup> [1979] 2 S.C.R. 227.

- *Crevier*,<sup>3</sup> in 1981, on the effect of privative clauses, was quite a mind-boggling reversal, a full U Turn in the Supreme Court, 180°, on the interpretation of privative clauses: they actually do what they say they do, and therefore, to an extent, they're unconstitutional.
- *Bibeault*,<sup>4</sup> in 1988, was quite a setback, introducing as it did the “pragmatic and functional approach” – a judgment of four judges of the Supreme Court (Beetz, McIntyre, Lamer and La Forest), not even five, out of the seven who had originally heard the case.<sup>5</sup> And a major setback, in my view, causing a specific Administrative Law disaster promptly neutralised by legislation in Quebec.
- The possibly misguided *Pezim*<sup>6</sup> in 1994 and *Southam*<sup>7</sup> in 1997 re-examined the status of administrative appeals and introduced reasonableness *simpliciter*, a pretty slippery (and vacuous?) device. Say it in latin if you want to get away with something *louche*...
- *Baker*,<sup>8</sup> in 1999, was probably a progressive step towards unified concepts.
- With *Dunsmuir*,<sup>9</sup> in 2008, we could think that the New True of *CUPE*, at last, prevailed over the Old True that had been partly revived in *Bibeault*.

... and I could go on and on and on.

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<sup>3</sup> [1981] 2 S.C.R. 220.

<sup>4</sup> [1988] 2 S.C.R. 1048.

<sup>5</sup> The case was heard on October 29-30, 1986, and judgment was delivered on December 22, 1988. In the meantime, Chouinard J. had died. Le Dain and Estey had both retired and neither of them signed the judgment.

<sup>6</sup> [1994] 2 S.C.R. 557.

<sup>7</sup> [1997] 1 S.C.R. 748.

<sup>8</sup> [1999] 2 S.C.R. 817.

<sup>9</sup> [2008] 1 S.C.R. 190.

- It is not all that long ago that we wrestled with issues now completely forgotten. When I started as a student, “in my lifetime”, an inordinate amount of time was still spent on questions such as:
  - “What is the proper remedy here, prohibition, *certiorari* or *mandamus*?” There were endless theological disputations on why prohibition was really not the same as *certiorari*. We’ve long turned the page on those kinds of highly formalistic debates but if we bear the past in mind, there is a high probability that a good part of today’s substantive progress is tomorrow’s formalistic nonsense.
  - Another solemn article of faith was that “judicial review must never be confused with appeals”. They were ontologically different, we were told, among other reasons because an appeal could lead to a reversal and a new, “correct” decision, whereas judicial review could only lead, where appropriate, to the quashing of an “invalid” decision (but not a “valid” though “erroneous” one”) and to returning the case to the original decision-maker.
- So why do we now, at this juncture, ask ourselves whether there is, or there can be, a Unified Theory of Administrative Law? Well, very probably because of *Vavilov*,<sup>10</sup> *Bell*<sup>11</sup> and *Canada Post*,<sup>12</sup> the three extremely wordy (416 pages) judgments filed by the Supreme Court of Canada on December 19 and 20, 2019. Judgments on matters of Judicial Review, which, I repeat, is but a small subset of Administrative Law.
- And in my view, on the whole, these judgments are the last effort of the Old Just, or even the Old True (it’s that deep epistemically, though I don’t think those who wrote *Vavilov/Bell/Canada Post* were ever aware of it), to wrestle to the ground the New True, or

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<sup>10</sup> 2019 SCC 65.

<sup>11</sup> 2019 SCC 66.

<sup>12</sup> 2019 SCC 67.

the New Just. Which by the way is not so new after all, since it surfaced when Dickson J. (“as he then was”, a future C.J.C.) appeared to have mortally wounded in 1979 the then prevailing Old Just and Old True. The cause of this *dernier sursaut*, I believe, is an ultimate rearguard action fought by a new generation of judges who, regrettably, may be immensely knowledgeable in many areas of the law, but about whom it may be said politely that Admin Law and the theory of Judicial Review just isn’t their thing.

- For a number of reasons, I cannot believe that these three cases will bring about a unified, or even just a more manageable, theory of Administrative Law, and I have been quite surprised at how respectful and uncritical the reactions to these cases have been. That, by the way, is why Law so resembles Theology and why, every so often, it is in dire need of a Martin Luther to destroy some noxious myths and clean up the workspace.
- The first thing that came to my mind when the Court announced in May of 2018 that it would soon undertake to overhaul (or as it said later in *Vavilov*, “simplify”) Administrative Law, was “WHY???” “Why is this necessary?” And I am tempted to add that every single seasoned Administrative Law person I know in Quebec, among my colleagues, academics and practitioners, asked himself or herself the very same question. But our perception was not shared by all. On December 18, 2019, the day before *Vavilov* was made public, Sean Fine in *The Globe and Mail* published an article entitled “*Top court ruling could quell chaos surrounding administrative law*”. Chaos? What planet does he live on? Again, not a single one of my colleagues would have considered that that was, by any stretch of the imagination, a fair description of the state of Administrative Law. But there were different perceptions afoot and some views expressed by Mr. Justice Stratas of the Federal Court of Appeal expressed in judgments and published material had “primed the pump”, if I may so express myself.

- There is, of course, some good and there is some bad in these cases. They are so lengthy that, perforce, some good ideas manage to float to the surface.
- On the positive or semi-positive side, I would mention the following 5 points:
  - **1.** It is a positive development to get rid at long last of the toxic concept of jurisdictional questions. An excess of jurisdiction occurs when, for example, the Rental Board grants you a divorce. I've never seen that happen. But for years the concept had been constantly distorted and abused to disguise what were really appeals as judicial review. *Ultra Vires!* was the rallying call. The *Bell* case, decided on the same day as *Vavilov*, is yet another damning illustration of what these inept and catastrophic distortions entail.
  - **2.** Also positive is the reinforcement of the presumption (mind you already pretty strong) that the most encompassing standard of review in Judicial Review across the board is the standard of reasonableness, or unreasonableness if you look at it from the other side of the mirror.
  - **3.** A semi-positive change is the ditching *Pezim*, *Southam* and their progeny. It's not that I'm a fan of administrative appeals, particularly administrative appeals to a court, as opposed to internal administrative appeals or review. I'm very suspicious of the former; the latter, well OK, perhaps... But if a legislature decides that it wants a full process of substantive review to go to a court of law (thereby, incidentally, threatening finality, speed of decision-making, expertise and low-cost accessibility), that's the legislature's choice. We have a number of such appeals in Quebec and treating them as a form of judicial review has always felt uncomfortable. Now, as I said, I am not a fan of administrative appeals, but I'm a judge, I'm not a legislator,

and I heartily agree with Oliver Wendell Holmes when he wrote in a letter to Harold Laski: “...if my fellow citizens want to go to Hell in a handbasket, I will help them. It’s my job.”

- **4.** Still on the semi-positive side, yes, the Supreme Court’s insistence on moving the focus of judicial review proceedings from the determination of the standard of review to an examination of the merits of what is under review, is probably not such a bad thing. But, two caveats here: (a) the Supreme Court had already been trying to bring about that change of focus for many years, without much success, and (b) there is quite a reverse side to this coin. It depends very much on what lens you will use to review the merits, and if it turns out that the lens will be pretty much the same as that used by courts of law when they hear appeals, that radically defeats the purpose of Administrative Law.
- **5.** Finally, the insistence on transparent reasons is probably an improvement, and it would be difficult to argue the reverse. But that’s more easily said than done, for as everyone knows, transparency does not always work with the inevitable bootstrap, conclusory statements and other rhetorical devices that all too often make up the content of decisions rendered in a litigious context. I think that on this point Justices Abella’s and Karakatsanis’s reservations in their “concurring in the result” – but in reality their dissenting – opinion in *Vavilov* respond to that. But I agree that there was room for improvement here and all in all it is probably desirable to place some emphasis on that aspect of things.
- But there is also quite a bit that is negative, or deeply negative, in these cases, primarily because there are strong indications that the Court reverts once again to an Old Just and Old True. In my view, the negative here outweighs the positive by a substantial



margin. You could say that *Vavilov* resembles a *Bibeau* <sup>power 5</sup>. I will be selective and focus on the most significant – but on the negative, and at times on the very negative side, I would offer 6 points.

- **1.** There is the astonishing extent to which the second part of the Court’s opinion in *Vavilov* (I’ll call it the Main Opinion in *Vavilov*<sup>13</sup> – Part II is where the Court purports to explain to us how to assess reasonableness), is ahistorical. That is made perfectly evident when one contrasts, on that particular aspect, the Main Opinion with the opinion of Justices Abella and Karakatsanis (I’ll call it the Separate Opinion in *Vavilov*). You get a sense that the authors of that segment of the Main Opinion have never even heard of *Anisminic*,<sup>14</sup> or *Bell v. Ontario Human Rights Commission*,<sup>15</sup> or countless other such cases, let alone read them at all and understood what was at stake in them. But, after all, hey! why bother? It’s “old stuff”.
- **2.** Then, there is the fact that much of the (admittedly limited) good accomplished in Part I is annihilated in Part II. The description of how one is to determine whether a decision is reasonable or not strikes me as the exact same description of what precisely is done when we hear an appeal. So we’re back to the late sixties, when the absurd abuse of the vacuous category of jurisdictional questions and jurisdictional “error” threatened to wreck administrative decision-making: thus *Bell v. Ontario Human Rights Commission*.<sup>16</sup>

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<sup>13</sup> I mean here by Part I “Determining the Applicable Standard of Review”, §§ 16 to 72, and by Part II “Performing (*sic*) Reasonableness Review”, §§ 73 to 142 of *Vavilov*. In the actual reasons, these are respectively Part II and Part III, the Court having devoted a short Part I of eleven paragraphs (§§ 4 to 15) to underscore the “need” for a “clarification” and “simplification” of the Law of Judicial Review. I have already explained what I think of this “need”: not in my neck of the woods, but suit yourselves.

<sup>14</sup> [1967] 2 All E.R. 986 (C.A.), [1969] 2 A.C. 147 (H.L.).

<sup>15</sup> [1971] S.C.R. 756.

<sup>16</sup> *Ibid.*

- **3.** The strange realignment of the members of the Court in the Main Opinion augurs quite poorly, I am afraid. You may remember the alignment in *Wilson v. Atomic Energy Canada*,<sup>17</sup> where Justice Abella says three things: (i) we should have a single standard of review, reasonableness (i.e. let's have more deference), (ii) the standard here is reasonableness, and (iii) the decision under review was reasonable. Five of her colleagues, McLachlin C.J.C., Cromwell, Karakatsanis, Wagner and Gascon agree with Abella on (ii) and (iii) but express no opinion on (i). Moldaver, Côté and Brown dissent, chat away about the vaunted Diceyan Rule of Law, state that the standard here is correctness, and would have quashed this “incorrect” decision – you see, they know what’s correct or not, yessir. Well, in *Vavilov*, the majority is reversed. Moldaver, Côté and Bown, now joined by Rowe, form a majority with Wagner, Gascon and Martin. And that looks suspicious.

My former colleague at McGill, Daniel Jutras, who was one of the two *amicus (amici) curiae* in *Vavilov/Bell* (and who, by the way, took over on Monday June 1<sup>st</sup>, 2020, as the next as Rector of the Université de Montréal) thought like me that the authors of Part I of the Main opinion were not the authors of Part II. He wrote to me:

Les fondements théoriques de l’une et de l’autre ne sont pas conciliables sur plusieurs plans. La volonté d’atteindre un consensus suffisant a très probablement conféré un réel pouvoir aux juges dissidents dans *Wilson*, auxquels s’est maintenant ajouté le juge Rowe. Ils devaient plaider pour le maintien d’un véritable espace d’intervention « quand ça n’a pas d’allure en droit ». La fracture entre les deux morceaux recollés est parfaitement visible, et elle était tout à fait apparente au cours des débats devant la Cour il y a un an.

“Ça n’a pas d’allure en droit” (which I could translate by “This makes no possible sense in law!”) is a good example

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<sup>17</sup> 2016 CSC 29.

of the bootstrap or conclusory statements which abound where litigation thrives. So let's not hope for much transparency where what we really have is more bombastic mastic.

We can probably infer from the foregoing that Justice Abella's hope for a unified or single standard of reasonableness (and for more, not less deference) is not about to rise and shine above the horizon.

- **4.** There is the unexpected reversal of the Court's position on "expertise". Now, I realize that that may be a myth in some parts of the country, as Ron Ellis argued in his 2013 book, *Unjust by Design – Canada's Administrative System*. But Ellis is careful to distinguish the case of Quebec, where the *Administrative Justice Act*, the Council of Administrative Tribunals, the security of tenure for virtually all members of administrative tribunal, their *Code of Ethics*, the conditions under which they are appointed, and a number of other features of Administrative Law, have over the years immeasurably enhanced the quality of tribunals' decisions. And let me tell you, to say that the members of the *Tribunal administratif du travail* in Quebec have no special expertise is, I weigh my words, grotesquely laughable.
- **5.** There is also the baffling way in which the majority of the Court reverses the CRTC the in the *Bell* case, on grounds which I personally consider to be extremely tenuous and verging on the disingenuous. "Oh! But here, you see, the CRTC had to be "correct", and we judges are real experts on what is correct and what is not, writ large, no matter what the field!" Months of preparation and a broad public consultation by a group of people, the members of the CRTC, who unquestionably have *real* expertise in the vast and complex field of telecommunications, all of that is thrown overboard because of the, at best, quite ambiguous

and accidental lay out of ink spots on the page of the statute book. Now Bell, the NFL and several of the other “BIG” players on their side know how to lobby and have enough money to do it well but, if these factors were not present, I’m pretty sure that what would happen in the wake of the *Bell* case of 2019 is what happened in the wake of the other *Bell* case, that of 1971, the one involving the Ontario Human Rights Commission: a quick legislative amendment to reinstate the power of the CRTC to do exactly what it did right here, “correctness” notwithstanding.

- **6.** Also of note is the opinion of Justice Abella in *Canada Post*. The views expressed there are not easily reconciled with the views expressed in the Separate Opinion in *Vavilov* or in the dissent in *Bell*, or also elsewhere in Justice Abella’s *corpus* of opinions, outstanding in my view, in Administrative Law. This apparent conflict could lead to further debate in all courts but notably in the Supreme Court. If this is the way of the future, as we go along, depending on the occasion, the tinkering ones will shift sides with the deferent ones, and vice versa. The evolution of this conflict, as with past conflicts, is unpredictable and will be compounded by impending changes in the Court. The existence of this irreducible conflict seems only to prove intractability of a “unified theory of Administrative Law.”
- There would be much more to say, of course, but as I mentioned earlier, and as I repeat here with a carnivorous smile, I am being selective. So I won’t comment on various other aspects of these judgments, aspects such as the suspiciously high-school-level of the passage about logic in *Vavilov* (in and around paragraph 104) – let’s hope that that is just *lawclerk law* that was left undeleted by accident, not *judge law*. Or aspects such as what precisely will be done under this “new” regime when, as was alleged in *Wilson*, there are apparent contradictions between equally reasonable

decisions (I have my idea of what will be done, now that Moldaver, Côté and Brown, no longer in dissent, are joined by Rowe).

- For my part, I would have agreed with Justice Karakatsanis all the way. We know, of course, that before becoming a judge she was a high level civil servant, and that may be part of the reason why she shows an understanding of Administrative Law “from within” that would likely have pleased John Willis.
- So where does this leave us? Very hard to tell and predicting the future is always a risky business. I see two possible scenarios, one relatively benign and the other much more alarming, but the first may regrettably pave the way to the second.
- **The benign scenario.** There was, in recent years, a rather pronounced divide among some Canadian judges on the aims of Administrative Law and on the scope of Judicial Review. Some of my colleague judges in Alberta, in particular, just do not see things the way my Quebec colleagues and I do, as was well apparent from papers we delivered at conferences in the past few years. I’m not a fan of the Early Dicey but it seems that they are. I admire the Early or Late Dicey as a constitutional lawyer but certainly not the Early Dicey as an administrative lawyer. (The Late Dicey had actually changed quite a bit over time and in the last edition of his book which we owe to his pen, his views about Administrative Law had become very sensible indeed.) But it is possible now, perhaps more so than ever before, that the effects of this divide, or at the very least of these divergent perspectives, will become exacerbated, and that much less deference will be observed towards tribunals’ activities in those parts of the country where the Early Dicey commands considerable intellectual respect.

In my part of the country, however, and at my level of court, everybody took notice of these December 2019 cases (had we any choice?) and most of us laboriously read through the actual stuff,

all 416 pages of it. But the chances are that nothing will change in Quebec and that the *CUPE/Dunsmuir* arc of light will remain dominant because it is thought to work quite well and to be in no need of fixing. In other words, the relation of Judicial Review to Administrative Law will remain the same or will change depending on where you are and different parts of the country will sing to different tunes (not for the first time, as it is and has been observable in other areas of the law as well, such as criminal law, sentencing, evidence, etc...). Now, of course, we must not exclude the possibility that we in Quebec are all congenitally stupid, but at present we are not of that view. Which leads, inexorably, to the second scenario.

- **The alarming scenario.** This scenario is more problematic, no doubt about it. As I have attempted to explain, the very significant changes in both Administrative Law and Judicial Review which took place, let us say, between 1975 and 1985, amounted to the phasing in of a New Just and a New True and were in response to a series of humiliating fiascos that did not enhance faith in the judicial system. Part II (as I defined it) of the Main Opinion in *Vavilov* reads suspiciously like a plea to reinstate the Old Just and Old True: in deciding on judicial review whether a particular finding or ruling or decision by a statutory decision-maker is “reasonable”, you must conduct a review exactly of the kind of, and as exacting and exhaustive as’ what courts of appeal do when handling an appeal from a lower court: correctness being then the standard, which means “do we concur?”, because that is the real and only tenor of “correctness”. The Separate Opinion in § 252 of *Vavilov* well describes what will likely happen to appeals from tribunals, but it is hard to see why the same will not happen to “reasonableness review” under this reconfigured standard: pull out a large magnifying glass and a pair of tweezers and go hunting.

Thus, the fiascos of the 1960s and 1970s I mentioned above will again threaten to occupy the forefront. It will be left to legislatures to correct the inept “incorrect” or “unreasonable”

findings of courts of law who will become less deferential than ever in the exercise of their judicial review power: a return to the Old Just and Old True of *Parkhill Bedding*<sup>18</sup> (1961), *Jarvis*<sup>19</sup> (1964), *Port Arthur Shipbuilding*<sup>20</sup> (1969), *Metropolitan Life*<sup>21</sup> (1970), *Bell*<sup>22</sup> (1971), of countless other grouchy, not to say intemperate, appellate court judgments of the 1960s and 1970s and, yes, of even the pathetic latecomer *Bibeault*<sup>23</sup> (1988), in this last case a truly rearguard and reactionary action by worshippers of Old Just that was stomped out – for good reason – by a justifiably irritated legislature.

What happened in December 2019 on the Judicial Review front, and consequently in Administrative Law too, is the result of what Justice Ruth Bader Ginsburg once called “a change in the personnel of the Court.” Let’s hope the devotees of Old Just, Old True and Early Dicey do catch up, and soon.

Out of respect for the Canadian judiciary, deep respect I should insist, I remain hopeful, but only moderately so, because I’m also lucid.

Yves-Marie Morissette  
Court of Appeal of Quebec

CIAJ – National Roundtable  
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<sup>18</sup> (1964), 44 D.L.R. (2d) 407

<sup>19</sup> [1964] R.C.S. 497.

<sup>20</sup> [1969] RCS 85.

<sup>21</sup> [1970] R.C.S. 425.

<sup>22</sup> *Supra*, note 15.

<sup>23</sup> *Supra*, note 4.