Beyond Jurisdiction: Judicial Review and the Charter of Rights

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As the title of these remarks suggests, I wish to propose a polite challenge to the continued relevance of the declared topic of this workshop session, "Errors within Jurisdiction, Excess and Loss of Jurisdiction." My purposes are both ambitious and modest - ambitious in that I wish to question a major basis on which Canadian administrative law is built but modest in that I am not at all sure that I yet appreciate the full consequences of my temerity. Thus, I feel somewhat like one of those magicians who bolding sets about jerking the tablecloth out from under a table setting, except that in my case, I am not at all confident that much ancient and well beloved china and cut glass, which had been in the Canadian legal family for some time, will not be dashed to the ground.

I am also encouraged to speak out with some exaggerated (and, I should add, unaccustomed) bravado in the hope of keeping you all awake this afternoon. As you all know, our legal system in all its splendour and majesty has not been able to cope with that most enduring of human ailments - mid-afternoon drowsiness. I was most pleased to read very recently of judicial recognition of this condition... It would appear

that jurors at the big Teamsters bribery-conspiracy trial in Chicago are having difficulty staying awake as lawyers and witnesses drone on about internal Teamsters records going back to 1965. The presiding judge, Judge Prentice H. Marshall, is sympathetic. As he told jurors, in what I find to be a remarkably candid admission as to the true nature of the burden placed upon judges, "The hardest thing I do is to stay awake between 3 and 3:30 in the afternoon."[1]

As a teacher of administrative law I am required to review a large part of the body of that law at least once a year. This requirement was recently re-enforced for me when my colleagues Dick Risk, John Evans, David Mullan and I compiled a book of cases and materials which ranges widely across the whole field of administrative law.[2] This type of experience, which is very different from that of practitioners and judges, places a law teacher in a unique position to generalize about the state of the law writ large. I have three general impressions from these forced marches across the length and breadth of administrative law which I propose to use today to lay the foundation of my remarks.

First of all, I am struck by the abrupt unevenness in the availability and scope of judicial review and by its "all or nothing" character. Second, I am disturbed by the distortions in analysis caused by commendable efforts to respond indirectly to what cannot <u>now</u> be dealt with directly. Third, I find that this has led to much contrived analysis instead of forthright thinking.

Let me develop these concerns very briefly.

Any seismic graph of the scope and scale of judicial review would resemble that on the day of an earthquake with extreme fluctuations from

equilibrium to 10 on the Richter Scale (the latter being a force which would finally detach California from the rest of those United States!). At the one end stand "jurisdictional errors" where the courts are prepared to intervene extensively on the basis of correctness while at the other stand "errors within jurisdiction" where the courts will not intervene at all. Scattered between these polarities are errors of law on and off the record, and errors of fact based on no evidence or possibly no credible evidence. While the consequences of the classifications employed are profound, the line between them is all too often far from bright.

I am enough of a pragmatist to recognize that legal doctrine may be manipulated to bring about sensible results. But I also recognize that there are limits to what may be accomplished indirectly. Recall, for example, the common law's inability to countenance directly contributory negligence and apportionment of damages which led to the indirect sophistry of the last clear chance doctrine as developed in Davies v. Mann[3] in which the injured party was, appropriately enough, a fettered ass upon the highway. Administrative law abounds with similar benign distortions with facts being made to masquerade as law, and inadequate fact finding being turned into questions of law involving the fact finding process such as relevance, presumptions and rules of evidence. Today, as we know, virtually all questions of law are said to go to jurisdiction and jurisdictional facts are readily conjured out of the air by ingenious counsel. In all this legal smoke and mirrors, real questions such as, "How far should the court respect the expertise of the administrator?" and, "Who is better qualified to answer the

issue in dispute?" become obscured and even overlooked. Too much time is spent learning and applying the complex rules of the jurisdictional game, too little thought is given to the functional basis for these rules.

H.W.R. Wade, in a striking allusion has described the dominant role of jurisdiction in English administrative law as a Procrustian bed onto which must be fitted not only the obvious cases of inconsistency with statute but also more sophisticated notions such as unreasonableness, irrelevant considerations, improper motives and breaches of natural justice.[4] This recognition of the highly uncomfortable basis for judicial review is all the more striking when it is recalled that Wade himself is adamant that jurisdiction must remain the basis. As he has put it:

> At a time when the courts are mobilizing all their resources for controlling governmental power it is unlikely that they will abandon rules which have served them well for centuries. Their addiction to the technicalities of jurisdictional control is not a mere aberration. It is the consequence of their constitutional position vis-a-vis a sovereign legislature: only by showing that they are obeying its commands can they justify their interventions. By one means or another, therefore, the doctrine of ultra vires must be stretched to cover the case. The courts of the United States, with their entrenched constitutional status, can afford to dispense with these subleties. The position of British judges is fundamentally different.[5]

The immediate and obvious question which this gives rise to is whether similar restrictions apply in Canada especially in view of the Charter. Before addressing that question I believe that a detour to the United States is in order.

Canadian and American administrative law have similar origins in 17th Century England and thus originally relied very extensively on jurisdiction as the springboard for judicial review. Today, however, jurisdiction plays virtually no role at all in the United States--as Louis Jaffe of Harvard put it, it is functus officio.[6] It is important to note that this state of affairs came about not merely as a result of attrition or neglect but as a conscious decision that the whole concept of jurisdictional control was inherently flawed in that it was, for practical purposes, impossible to apply and led to erratic overintervention by the courts. As Justice Brandeis had warned, "Most statutory schemes imply a large number of findings on which jurisdiction turns and full review over them could practically do away with the limitations imposed by the courts on their review power over factural issues. ... there are few factual issues of any importance that, if incorrectly decided by the agency, cannot be made the basis of a claim of lack of at least statutory jurisdiction."[7] As Lord Diplock was to remark bluntly many years later, if prevailing trends were to continue in England, "There is no question which cannot be turned into a jurisdictional question".[8]

Since a jurisdictional basis for judicial review allows a court to substitute its judgment for that of the administrative agency reviewed it was recognized that the ease with which the jurisdictional threshold could be crossed could easily lead to overintervention by the courts. And as Justice Frankfurter delighted in pointing out, jurisdiction was a particularly slippery test. As he observed on one occasion, "Analysis is not furthered by speaking of such findings as 'jurisdictional' and not even when--to adopt a famous phrase--jurisdictional is softened by a quasi. 'Jurisdiction' competes with 'right' as one of the most deceptive of legal

pitfalls."[9] And, on another, "I do not use the term 'jurisdiction' because it is a verbal coat of too many colours."[10]

Justice Frankfurter's reference to administrative law's favourite fudge word, "quasi," calls to mind Justice Jackson's wonderful observation, "The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications are broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."[11]

Rather than chase down the chimera of jurisdiction, American concerns have been with a broader and more functional approach. This quest has led to the abandonment of jurisdiction as such in favour of two general tests to be applied to all questions of law and findings of fact. Briefly stated, a "rational basis" test is applied to law and a "substantial evidence" test to facts.

In practice both tests are more tolerant of administrative expertise than Canadians might assume from an apparent American prospensity to judicialize absolutely everything from abortion to zoning. Bernard Schwartz has summarized the position with respect to substantial evidence as follows:

> It is not for the revewing court to determine the correctness of the administrative factual determination upon its own independent judgment. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body! ...
>
> The reviewing court may not weigh the evidence substituting its judgment for that of the agency on the facts; but neither is it to rubber stamp fact-findings simply because they are supported by a scintilla of evidence. Substantial evidence means something between the weight of the evidence and a mere scintilla.[12]

The same author in his comparative study of English and American administrative law with H.W.R. Wade concluded with respect to the rational basis test.

> ... review of questions of law tends, in practice, to become review only of the reasonableness (rather than the rightness) of administrative determinations. While the courts possess the power to substitute their own judgment for that of the administrator, they will, more often than not, uphold administrative findings on issues of law where they have a rational basis, particularly where they are questions of interpretation which are of central importance in the agency's work.[13]

As the last sentence indicates with its reference to judicial deference to determinations made with respect to matters of "central importance in the agency's work," the notion of jurisdiction does have some vestigial importance. As Jaffe has noted,

> Our ultimate aim is to provide a reasoned assurance of the existence of the crucial facts upon which the exercise of power is to be conditioned. The now standard scope of review applied to a finding based on decent administrative procedure will ordinarily provide that assurance. This conclusion does not exclude a judgment that in a given case we amy want even greater assurance. In a criminal case, for example, we are not satisfied with the ordinary degree of proof. The drive for uniformity in administrative law should not force it into a strait jacket.[14]

This suggests that these tests can respond to the functional aspects of jurisdiction without becoming too rigid and dogmatic.

In returning to Canadian law one must note at once that the Crevier[15] decision of the Supreme Court of Canada has given a clear constitutional basis for judicial review. However, the Court spoke only of the unconstitutionality of any attempt to immunize from

judicial scrutiny a determination by a tribunal of the limits of its own jurisdiction. Thus the decision reinforces the importance of jurisdiction as a means of getting around privative clauses and continues to encourage an expansive view of jurisdiction which is quite likely to lead to too much judicial intervention. On the other hand, the Charter holds out the prospect of a broad base for judicial review.

Briefly stated, s.52 declares the Constitution to be the supreme law of Canada; Canada is declared to be founded upon the principle of the rule of law, and s.7 provides "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Will a Canadian court be prepared to see in this the basis for judicial review over and above jurisdictional control. Consider, for a moment, the language of Justice Brandeis.

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which the facts were adjudicated was conducted regularly.[16]

Does the rule of law or the principles of fundamental justice require less? Will the government be able to show that privative clauses outside of jurisdictional matters are"...reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"?

A broad base for judicial review such as would greatly downgrade if not eliminate the role of jurisdiction need not necessarily lead, as we have seen from the American experience, to massive overintervention by the courts. What

it does provide is an opportunity for the courts to address the boundary issue between judicial and administrative competence freed from any need to force their thinking into jurisdictional/non-jurisdictional cubbyholes. In the same way that the "fairness revolution" has allowed the courts to deal with procedural matters on a continuum of expectation and not in a series of watertight compartments, so it would be possible for the courts to have regard to broad comparative qualifications which give full play to the particular competence of adminstrators and the courts.[17]

I am by no means persuaded that the courts and the law have all the answers. As to the courts I would agree with Justice Frankfurter's comment that they are not charged with "...general guardianship against all potential mischief in the complicated tasks of government".[18] As to law, let me conclude by giving the last word to Grant Gilmore.

> Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heavan there will be no law and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society the more law there will be. In Hell there will be nothing but law and Due Process will be meticulously observed.[19]

FOOTNOTES

1. "It may be the chance of a lifetime, but the Jurors cannot help dozing" Wall Street Journal, October 27, 1982.

2. Evans, Janisch, Mullan & Risk, Administrative Law Cases, Text, and Materials, Toronto, Emond-Montgomery, 1980.

3. Davies v. Mann, 10 Mees & W. 545.

4. Wade, Administrative Law, Oxford, Clarendon Press, 1977; p. 43.

5. Ibid., at pp. 256-7.

6. Louis L. Jaffe, Judicial Control of Administrative Action, Boston, Little, Brown, 1965, p.635.

7. Universal Camera Corp. v. NLRB, 340 U.S.474 at 478 (1951).

8. In his forward to Schwartz & Wade, below note 13, at xiii.

9. City of Yonkers v. United States, 320 U.S. 685 at 695 (1944).

10. United States v. L.A. Tucker Truck Lines, 344 U.S. 33 at 39(1952).

11. Federal Trade Commission v. Ruberoid Co., 343 U.S. 470 at 487-8 (1952).

12. Schwartz, Administrative Law, Boston, Little, Brown, 1976 at pp.592-3.

13. Schwartz & Wade, Legal Control of Government, Administrative Law in Britain and the United States, Oxford, Clarendon Press, 1972, p. 252.

14. Above note 6 at p.635.

15. Crevier v. Attorney-General for Quebec (1981), 127 O.L.R. (3d) 1.

16. St Joseph Stock Yards Co. v. United States, 298 U.S. 38 at 84 (1936).

17. There are, of course, already signs that the courts are moving towards some

form of rational basis test in the wake of the CUPE decision from the Supreme Court of Canada. See 1982 Supplement to Administrative Law Cases, Text and Materials, Toronto, Emond-Montgomery, 1982. pp. 95a-96.

18. Federal Communications Commission v. Pottsville Broadcasting, 309 U.S. 134 at 146 (1940).

19. Grant Gilmore, The Ages of American Law, New Haven, Conn., Yale University Press, 1977, at pp. 110-11.