

THE ROLE OF ADMINISTRATIVE LAW IN THE PROMOTION OF GOOD GOVERNANCE IN CANADA

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INTRODUCTION

1. The question that we would like to address in this paper is: how does the law, in particular administrative law, contribute to an improved method of governing?

2. Before we can identify what role administrative law has to play in the promotion of good governance, it is important to define exactly what we mean by administrative law and to situate this branch of the law within the Canadian legal system. Once we have done this we will examine the basic administrative law principles that relate to the manner in which public authorities exercise their functions and the remedies available to citizens if these functions are not exercised according to the law.

ADMINISTRATIVE LAW: DEFINITION AND SCOPE

3. For the purposes of this paper we are defining administrative law in its broad sense, as the law that applies to the control of government power.

It is the "body of general principles that govern the exercise of powers and duties by public authorities."¹ This includes the entire spectrum of public law outside of the formal constitutional sphere (common law, statutes, prerogatives, conventions and administrative policies) that governs the institutional structures, acts and operations of the public administration. In this context the concept of "public administration" encompasses the executive (Cabinet and Ministers), departments, and various decentralized agencies, commissions, tribunals, Crown corporations and other representatives of government.

4. When we speak of "government", or "public administration" in this paper however, we

do not include Parliament. Constitutional law is the principal law governing the primary organs of Canadian government which are the Parliament of Canada and the provincial legislatures, the Crown and the Courts. For the purposes of this discussion we are defining constitutional law narrowly, as the *Constitution Acts 1867-1982*. On the other hand, the main subject of administrative law is the exercise of powers delegated by a legislature to a subordinate body. This body may be politically accountable (such as the Cabinet or a Minister of the Crown) or independent to a lesser or greater degree of the central government.

5. Both administrative law and constitutional law relate to the legal framework in which our government operates. But while constitutional law sets out the broad legal structure of the government, administrative law provides details of how the administration operates on a day-to-day basis. Administrative law is also informed by private law notions. As Dussault and Borgeat note: "administrative law abuts on the traditional boundaries of constitutional law and private law; in effect it occupies a halfway house between the two and draws upon each in turn."² Towards the constitutional end of the continuum lie questions of Crown prerogative and the rules of natural justice. Towards the private law end lie the principles governing the power of government to contract and to hold and control property. In between the two lies the complex legal issues that we will address in this paper, namely the question of legal and judicial controls on the exercise of discretionary power by public authorities.

6. Defined broadly administrative law fulfils two major functions: it provides the rules for the organization and internal operations of the administration and it establishes relationships between administration and citizens (by providing remedies against the administration). At the foundation of administrative law is the law governing the organization and operation of the administration, as well as the law establishing its powers and duties. While this is clearly the framework of administrative law, for the purposes

¹ H.W.R. Wade and C.F. Forsyth., *Administrative Law* 7th ed. (Oxford: Clarendon Press, 1994) at 5 [hereinafter Wade].

² R. Dussault and L. Borgeat, *Administrative Law: A Treatise* 2d ed. vol 1 (Toronto: Carswell, 1990) at 12 [hereinafter Dussault].

of this paper we will concentrate on the rules governing the manner in which public authorities must exercise their functions and on the remedies available to citizens if these functions are not exercised according to law. This is the law of public power as it relates to ordinary citizens.

THE EXERCISE OF POWERS AND DUTIES BY PUBLIC AUTHORITIES

7. The public administration plays a central role in the lives of Canadians. In the same way that Parliament creates duties and prohibitions by means of statutes, the administration also restricts the rights and liberties of citizens in a number of ways. The administration enacts regulations which have the same force and effect as statutes. It may also bind citizens by means of contract. The administration exercises judicial or quasi-judicial powers when it grants or refuses to grant licences, permits or other benefits. Also, Parliament has conferred upon the administration certain discretionary powers which it exercises in the performance of a multitude of acts of a purely administrative nature. Given the impact of the actions of the administration on the lives of Canadians, the public must be able to rely on the law to ensure that the power of the administration is used in a way which conforms to the ideas of fair dealing and good administration. The role of administrative law is, therefore, to keep the powers of government within their legal bounds.³

8. The first and most important point to be made is that the powers of the public administration are subordinate to the law. Public authorities only possess the power which has been given to them by statutes and regulations and have no authority to exceed this power. This means that legal norms are both the source and the measure of acts taken by the administration.⁴ For the public administration respect of the law includes:

- (a) **Respect for the Constitution**
- (b) **Respect for the Limits of their Powers**
- (c) **Respect for the Principles of Natural Justice**

9. If a public authority fails to respect the law, one speaks of an excess of jurisdiction or of an *ultra vires* act. In such a case, administrative law provides the citizen or group of citizens affected by

³ Wade, *supra* note 1 at 5.

⁴ Dussault, *supra* note 2 at 12.

the *ultra vires* act with various remedies against the administration and the right to have the exercise of the power reviewed. These remedies will be discussed in the next section of this paper. We will now examine each of the above categories.

(a) **Respect for the Constitution**

10. The Constitution represents the supreme law of Canada which Parliament and the provincial legislatures must obey when they enact laws.⁵ The most important Canadian Constitutional Laws are the *Constitution Act 1867*⁶ and the *Constitution Act 1982*⁷ (which includes the *Canadian Charter of Rights and Freedoms*⁸) and the "quasi-constitutional" statutes such as the *Canadian Bill of Rights*⁹ and the *Canadian Human Rights Act*,¹⁰ as well as various provincial human rights statutes.

11. An Act of Parliament or of a provincial legislature can only be reviewed by a court and declared *ultra vires* if it offends the Constitution by failing to respect the division of powers between federal Parliament and the provincial legislatures or if the rights and freedoms guaranteed in the *Charter*, or in a quasi-constitutional statute have been affected.

12. Likewise, when the public administration exercises its regulatory, administrative, judicial or quasi-judicial powers it is also subject to the review

⁵ As Dussault and Borgeat explain, this fundamental law has three major objectives: to indicate who exercises the legislative, executive and judicial powers of the state, to determine the division of legislative jurisdiction between the two levels of government, and lastly to guarantee citizens certain civil liberties, *supra* note 2 at 14.

⁶ (30 & 31 Vict.), c.3.

⁷ being schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

⁸ Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

⁹ R.S.C. 1985 Appendix III.

¹⁰ R.S.C. 1985, c. H-6.

by the courts for compliance with constitutional and quasi-constitutional requirements.

(b) Respect for the Limits of their Powers

13. As we noted above, regulations, acts and decisions of the public administration affect the rights of citizens and can impose duties and obligations upon them. It is for this reason that the functions of the administration can only be performed within a specific legal framework. Thus in addition to its duty to respect the Canadian Constitution, the public administration is always subject to legal limitations which have been established by statutes, regulations and the common law.

14. If, in performing its functions, an administrative body fails to respect the limits of its statutory or regulatory powers, it may be acting *ultra vires* its jurisdiction. Often therefore, determining whether the public authority has the power to act becomes a question of statutory interpretation. As Wade and Forsyth point out: "When the question arises whether a public authority is acting lawfully or unlawfully, the nature and extent of its power or duty has to be found in most cases by seeking the intention of Parliament as expressed or implied in the relevant Act."¹¹

15. While questions of statutory interpretation may be at the heart of the doctrine of *ultra vires*, the ways in which the doctrine can be invoked are virtually unlimited. For example, if a public authority exercises more power than it has been granted, or if it exercises its power with respect to the wrong person, it may be acting *ultra vires* its jurisdiction. Or if a validly created power is exercised by someone other than the person upon whom it was conferred, the courts may find the act to be illegal. Even if the power is exercised by the correct public authority, that authority must be properly constituted or appointed. All facts which are conditions precedent to the exercise of that action must be fulfilled.

16. Also, most of the legal powers possessed by the administration involve an element of discretion. A good example of this is the decision to grant or not to grant a licence. In making this decision the public authority will likely consider government policy and public interest. However, there is no such thing as unfettered administrative

discretion. The exercise of discretion by the administration must be exercised in conformity with the presumed intention of the legislature that conferred it, and it must not be abused. The discretion granted by the legislature must be exercised by the person to whom it was granted, and not by an agent or a delegate. Also, where discretion has been granted it must be fully exercised. It cannot be limited by contract, agreement or self-imposed rules. Finally, the cardinal rule of administrative discretion is that it cannot be abused. It must be exercised reasonably, in good faith and on proper grounds. Jones and deVillars identify five generic types of abuses of discretion that can lead a court to find that jurisdiction has been exceeded:

"The first category occurs when a delegate exercises a discretion with an improper intention in mind, which subsumes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations. The second type of abuse arises when the delegate acts on inadequate material, including where there is no evidence or without considering relevant matters. Thirdly, the courts sometimes hold that an abuse of discretion has been committed where there is an improper result, including unreasonable, discriminatory or retroactive administrative actions. A fourth type of abuse arises when the delegate exercises his or her discretion on an erroneous view of the law. Finally, it is an abuse for a delegate to refuse to exercise discretion by adopting a policy which fetters his or her ability to consider individual cases with an open mind."¹²

(c) Respect for the Principles of Natural Justice

17. Whereas the law relating to the exercise of discretion aims to control the substance of discretionary decisions, the principles of natural justice control the procedure under which these discretionary decisions are made. Wade and Forsyth note that "by developing the principles of natural justice the courts have devised a kind of code of fair administrative procedure".¹³

18. Procedure is a matter of primary importance. This is because, citizens are likely to accept laws that are applied according to a fair

¹¹ Wade, *supra* note 1 at 245.

¹² *Principles of Administrative Law* 2nd ed. (Toronto: Carswell, 1994) at 146.

¹³ Wade, *supra* note 1 at 464.

procedure. Ultimately the effective exercise of government authority relies on the consent, or at least the acquiescence of the governed. The consent required for the exercise of governmental authority must be achieved in spite of the fact that many governmental actions, while for the general good, are likely to have a negative effect on some people. Natural justice nourishes the consent required for the effective exercise of governmental authority. As long as the exercise of government authority is seen as having been fair, the vast majority of people will acquiesce in what is required of them.

19. In administrative law natural justice is often equated with fairness. The Supreme Court of Canada has affirmed that there is "a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual".¹⁴ There are two fundamental rules of fair procedure.

20. First, it is essential to fair procedure that both sides be heard. Thus the right to be heard, often referred to by the Latin maxim *audi alteram partem*, ("hear the other side") is the first principle of natural justice. In practice this means that people who will be affected by a decision must be given an opportunity to have input into the decision. They must be provided information concerning the decision to be made and they must be given a chance to express their views, before a decision maker who will genuinely take those views into account. These basic requirements of fairness lead to a variety of particular requirements in particular circumstances. The level of participation of the individual can range from simply the opportunity to respond to the case in writing, to an informal interview to a full and formal hearing. The greater the adverse affects on the rights of the individual, the higher the degree of procedural fairness required.

21. The second basic rule of fair procedure is that the decision maker must be unbiased. This notion is referred to by the Latin Maxim: *nemo judex in causa sua* (no man may be a judge in his own cause). Therefore a decision maker will be disqualified from deciding a case where he or she is biased or where there is a reasonable apprehension of bias. Problems of bias arise if the decision

maker has an interest in the outcome of the proceedings. This interest can be of a pecuniary nature, such that the outcome of the decision may have an impact on the financial interests of the decision maker. Also, if the decision maker has a personal interest in the outcome of the proceedings, because of personal relationships or connections, or personal attitudes, an argument of bias can be made. Problems of bias also arise if the decision maker may be seen to have an interest in the outcome of the proceedings because of the agenda, opinion or policy of the institution that he or she represents. This is known as institutional bias and it arises when a decision maker may be subject to being influenced by professional relationships.

REMEDIES

22. The exercise of the extensive regulatory, administrative, judicial and quasi-judicial powers delegated to various emanations of the public administration may give rise to abuse. It is important to underline that when we talk about "abuse" we are not necessarily implying malice or bad faith. Indeed government authorities "may misunderstand their legal position as easily as may other people, and the law which they have to administer is frequently complex and uncertain."¹⁵ Abuse, in the sense of exceeding jurisdiction, is therefore inevitable. In order to protect citizens from possible administrative abuse, the law provides a number of ways in which the legality of the acts of the administration may be questioned. The rules that have been developed to govern the various remedies available in administrative law have come to be known as the law of judicial review.

23. It is important to distinguish between the judicial review of a decision and its appeal. Generally speaking the appeal of a decision permits the reconsideration of the decision on its merits while review only examines the lawfulness of the decision. On appeal a judge may substitute his or her own opinion for that of the lower level judge, or may add reasons to the existing judgement. The judge who is reviewing an administrative decision, on the other hand, may only quash the decision or let it stand. Judicial appeals from federal agencies are generally made to the Federal Court of Appeal and are only possible under certain very specific conditions prescribed by legislation. We will concentrate on judicial review of administrative

¹⁴ Le Dain J. speaking for the Court in *Cardinal v. Kent Institution* [1985] 2 S.C.R. 643 at 655.

¹⁵ Wade, *supra* note 1 at 5.

action, which is by far the most common means of reviewing the actions of the administration.

24. The types of remedies available at the federal level can be divided into two categories. First there are the extraordinary remedies, which are the traditional common law remedies that are specifically designed to review the activities of administrative authorities. These remedies are exercised by means of an application demanding the issuance of a prerogative writ. The second group of remedies are the ordinary remedies. These are remedies that are not only designed for the purposes of judicial review and are provided for by statute. We will examine each category.

EXTRAORDINARY REMEDIES: PREROGATIVE WRITS

25. The traditional common law means for the review of decisions made by the administration are *certiorari*, *mandamus*, *prohibition quo warranto* and *habeas corpus*. These remedies involve the review by a Superior Court of the legality of decisions by the administration.

26. Both *certiorari* and *prohibition* are used as a general means of supervision and control over any public body whose decision may affect the rights of an individual. They are available in cases where the body exceeds its jurisdiction, fails to act in accordance with natural justice, or in the case of a procedural defect. The difference between these two remedies is that while *certiorari* is used to quash decisions of inferior bodies, the writ of *prohibition* is used to prevent inferior tribunals from exceeding their jurisdiction before a decision is made.

27. *Mandamus* is a means of compelling a public body to perform its statutory duty. It is important to note, however, that where the duty involves an exercise of discretion, *mandamus* cannot compel a particular result.

28. Two other prerogative writs are *quo warranto* and *habeas corpus*. *Quo warranto* is a remedy that is used to question the legality of an appointment. A writ of *quo warranto* "asks by what warrant or authority a person holds a public office and ascertains whether he [or she] is rightfully entitled to exercise the functions claimed."¹⁶ A writ of *habeas corpus* is most often used in criminal

law, but it has application in administrative law in matters of immigration and extradition. This remedy allows a person who is detained illegally to apply to a judge of the Superior Court to obtain a writ of *habeas corpus* ordering the person under whose custody he or she is detained to bring him or her forthwith before a judge of the Court and to show the cause of the detention, so that it may be decided if such a detention is justified.

ORDINARY REMEDIES

29. Ordinary remedies include declaratory judgments and injunctive relief.

30. A motion or an action for a declaratory judgment allows a court to determine the rights and obligations of the parties in a dispute. The court declares the rights and obligations of the parties but does not make any coercive order. In other words, the court pronounces on the law without ordering any sanctions or ordering either party to do anything.

31. A party may also seek an order of injunctive relief which enjoins the government, or its agents, officers or employees not to do something or to cease doing something or to perform a particular act. Injunctive relief may be prohibitive, in that it orders that a certain act not be performed or mandatory if it requires a person to perform a certain act contrary to their will or desire (failing which the person is penalized).

32. As we can see from the above discussion the Court is vested with a number of mechanisms of supervision and control over a public authority whose decisions may affect the rights of an individual. In addition to the above remedies, an individual can, in some circumstances, make a claim for damages if he or she suffers financial loss because of the action or inaction of a public authority who subsequently turns out to be acting *ultra vires* his or her jurisdiction.

CONCLUSION

33. The question that we asked at the outset of this paper was: "How does administrative law contribute to an improved method of governing?" We have seen that in Canada the public

¹⁶ R. F. Reid and H. David, *Administrative Law and Practice*, 2nd ed. 1978 at 419

administration has the power to affect the rights and liberties of citizens in a number of ways. However, the powers of public authorities are subordinate to the law. This means that in exercising its functions the public administration must respect the Constitution. It must also respect the limits of its powers by not exercising its functions in a manner that was not intended by Parliament and it must not abuse its discretion. Finally, respect for the law requires that public authorities conform to the principles of natural justice which control the procedures under which discretionary decisions are made. Natural justice requires that people who will be affected by a decision be given an opportunity to have input into the decision and it also requires that the decision maker be unbiased. If a public authority fails to respect the law, administrative law provides citizens affected by the *ultra vires* act with the right to have the exercise of the power reviewed by the courts and to seek various remedies against

the administration. Therefore, administrative law helps improve our method of governing by keeping the powers of public authorities within their legal bounds and by ensuring that the exercise of these powers conforms with the principles of good administration and fair dealing.

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