PART ONE

INTRODUCTION

CHAPTER ONE

THE ADMINISTRATIVE STATE AND THE RULE OF LAW

I. WHAT IS ADMINISTRATIVE LAW ABOUT?

Administrative law is a branch of public law. In the law school curriculum, it has the closest affinity with constitutional law in that it concerns the legal structuring and regulation of sovereign authority, both in the state's relations with individuals and in the allocation of authority among various institutions. Thus, administrative law is inevitably enmeshed in theoretical controversies about the legitimate roles of the state and the foundations of state authority, the proper scope of individual autonomy, the content of democratic values, including the rule of law, and the ways in which those values can best be realized. The study of administrative law also raises questions about the nature of law: to what extent is law discrete and autonomous from other social phenomena, or is it merely a vehicle for transporting debates about public policy and political power from one forum to another?

Administrative law applies to a wide and eclectic range of governmental activity. It affects virtually all areas of law, even if peripherally, because in essentially all areas of law there is some role for government and for the authorization and constraint of regulatory activity. Put differently, administrative law is pervasive because of the extensive and often integral role of government in modern society.

Given its focus on the administration of regulatory authority, a course on administrative law delves into many nooks and crannies of government. However, it does not do this in a subject-specific way. Rather, administrative law moves between government contexts and involves unpacking and distilling rules and principles that apply to all public decision-makers and powers. The concerns of administrative law are general and can arise in connection with the administration of any statute or public program. This makes it important to appreciate the administrative, legal, and policy context in which questions about, for example, procedural fairness or the interpretation of the legislation come about. Yet administrative law does not focus on a detailed study of any particular statutory framework or program. This more specialized role is realized in courses on, for example, labour relations, land-use planning, securities regulation, broadcasting and communications, environmental protection, human rights, and immigration. Nevertheless, having a sense of the scope and application of administrative law in particular governmental contexts is helpful. For this reason, we start with an overview of the administrative state and set out a number of areas of government in which administrative law principles are relevant.

II. THE ADMINISTRATIVE STATE: IMPLEMENTING POLICIES AND DELIVERING PUBLIC PROGRAMS

In this section, we indicate the range of public programs implemented by administrative agencies, the kinds of institutions through which the programs are delivered, and the tools typically available to enable administrators to discharge their mandates. Given the diversities in any federal system of government, this introductory description is of the broad-brush variety.

Much of the subject matter of administrative law is the law governing the implementation of public programs, particularly at the point of delivery, where they are likely to have their most immediate impact on the lives and rights of individuals. Most of these programs are administered under the authority of a statute, enacted by either the Parliament of Canada or a provincial or territorial legislature, depending on the level of government with constitutional competence in the area. Some of the earliest public programs concerned the regulation in the public interest of natural monopolies in electricity, natural gas, railways, and telephones. Urbanization required the regulation of land use in matters such as drains and sewers, fire safety standards, the density of dwellings, and expropriation for public works. More recent schemes have been created to enhance consumer protection or the protection of human rights.

Many government polices originate in the identification by government of a problem created by or not adequately addressed by the operation of the market or private law, often stemming from inequalities of power. Having identified a problem, often as a result of

political lobbying and other forms of public pressure, government may respond in a number of ways: it may decide to do nothing; to deal with the problem through existing legal tools and institutions—for example, the criminal law or taxation; or to create a new legal framework, administered by some agency other than the courts of law, designed specifically for this purpose. The adoption of this third option is a primary realm of administrative law, in which concerns for fairness and participation in decision-making, the adequacy of the legal and factual bases for administrative action, rationality in the exercise of discretion, and the availability of legal remedies to address concerns about the legality of the exercise of public power play out.

Starting with the Reagan and Thatcher administrations in the United States and Britain in the 1980s, governments in many parts of the world experienced a revival of faith in market solutions. The impact of this moment over the past four decades has been powerful and widespread, and has continued to echo in the policies of some provincial and federal governments. Deregulation, privatization, and lower taxes have been the principal rallying cries. Across the country, the issues are seldom far from public discussion as evidenced, for instance, by debates about the appropriate role of government in responding to climate change. The increasing urgency of addressing climate change, reconciliation with Indigenous peoples, and socio-economic and racial inequality, as well as the imperatives for strong government responses to the public health and economic crises caused by the COVID-19 pandemic, may eventually mark a generational shift away from the domination of deregulation, privatization, and globalization as forces shaping domestic government policies and programs. However, it is too early to assess whether new directions have been set for public policy and their attendant impacts on the structure and size of the administrative state.

Past policy choices, including entering into globalizing trade and investment agreements, such as the *Canada-United States-Mexico Agreement* (CUSMA), also constrain the ability of governments to design and deliver programs of regulation and social benefit. Trade agreements have also reached into the institutional structure of the state, prompting modification of the role of domestic courts and international arbitration tribunals. Other international agreements and international law instruments, whether on refugee protection, climate change, the rights of Indigenous peoples, or other subjects, may also constrain government policy choices and institutional structures when implemented in domestic law, and may inform government policy more broadly.

More recently, advancements in artificial intelligence and online connectivity have begun to influence how governments choose to implement their policy directions, and how government programs—including justice services—are delivered. The impact of technological change on the administrative state and on the principles of administrative law are nascent but can be expected to be a force of change in the future. Regardless of policy directions and influences, governments continue to be regarded in most if not all countries as a central actor in addressing societal problems of all shapes and sizes.

A. THE SUBJECT MATTER OF PUBLIC ADMINISTRATION

Administrative law plays a role in a wide range of specialized areas of regulation and dispute resolution, as indicated by the following examples. Most of these areas have given rise to litigation that is dealt with in this book. Needless to say, we have not attempted to compile a comprehensive list, or anything more than a thumbnail sketch of those on our list.

Employment. The employment relationship is extensively regulated by statutory programs. The individual contract of employment and its attendant private law rights and remedies are only one component, and in many contexts they are relatively insignificant.

For example, in labour law, employees have a statutory right to be represented by a trade union of their choice. A union may apply to a labour relations board to be certified as the sole bargaining agent of a group of workers. If the application is granted, the board polices the relations between the union and the employer through its power to determine whether either side has committed an unfair labour practice by, for example, failing to bargain in good faith

toward a collective agreement or engaging in an unlawful strike or lockout. Labour legislation commonly requires that complaints of a breach of the collective agreement (the wrongful dismissal of an employee, for example) be referred to an arbitrator appointed by the parties.

Statutes also typically prescribe basic employee entitlements that are of particular importance to those who are not covered by a collective agreement. These may include, for example, a minimum wage, holiday entitlement, and maximum hours of work. Health and safety standards and the compensation of workers who are injured in the course of employment, contract a work-related illness, or suffer a disability are also the subject of legislation. Employment insurance provides some financial relief for those who lose their job, and the Canada and Quebec Pension Plans are important sources of income for retired employees.

Employees and applicants for employment also have a statutory right not to be discriminated against on grounds such as race, national and ethnic origin, colour, religion, sex, gender, sexual orientation, age, and disability. Legislation has also been introduced to ensure equal wages for work of equal value and employment equity for under-represented groups.

Regulated industries. Faced with the rapid industrialization and urbanization of the 19th century, the market proved incapable of ensuring certain public goods. As a result, the operation of some industries is subject to extensive statutory regulation. For example, to check their monopolistic tendencies, many utility companies require the consent of a regulator before they may increase the tariff they charge to consumers.

Also, broadcasters require a licence to ensure an allocation and use of the airwaves that serve the public interest in developing a national cultural identity and provide an accurate and balanced coverage of public affairs. The terms of licence may specify the kinds of programming to be carried, prescribe the amount of Canadian content and live performance, and require broadcasters to ensure that the content of their programs is balanced and impartial. Internet providers and services remain an evolving area of regulation, with touchstones in both the more established approaches to broadcasting and utilities regulation.

The exploitation of natural resources, renewable and non-renewable, is also heavily regulated. Larger resource extraction projects often require environmental assessment to establish the public desirability and sustainability of the proposed projects. In both large and small project contexts, licences or permits are required before specific activities, like building an access road or exporting natural gas or oil, are pursued. The fishing and logging industries are restricted in the amount they may cull and are required to contribute to the regeneration of the resource. Consultation with affected Indigenous peoples in environmental assessment and licensing processes are an important part of the regulation of natural resources industries, responding to the Crown's constitutional obligations to Indigenous peoples. Indigenous participation may include participation in decision-making, particularly where reconciliation agreements or treaties have been concluded.

Agriculture is also heavily regulated. To shelter producers and consumers from the worst effects of periodic shortages and gluts, agricultural marketing schemes may regulate what and how much farmers may grow, as well as aspects of the distribution and sale of produce. Animal welfare is an area of increasing policy attention in this field.

All forms of commercial transportation, both passenger and freight, are regulated in the interest of public safety. Because of their potential to cause serious and widespread illness, the production and marketing of food and the supply of drinking water are closely regulated, as is the pharmaceutical industry. Financial institutions (banks, trust companies, and the insurance and securities industries) are subject to statutory controls designed to safeguard the public interest in an orderly and honest capital market that attracts investment and in the stability and integrity of those who provide financial services.

Economic activities. The state regulates important aspects of economic activity, regardless of the industry or business in which it occurs. For example, mergers and takeovers are scrutinized for their possibly adverse impact on competition. Foreign investors who take over large

Canadian companies are subject to federal approval and conditions based on a net benefit test. Canadian manufacturers are protected from unfair competition caused by the importation of goods for sale at less than the cost of production. The grant and regulation of rights to industrial and intellectual property are secured through legislation. Land development is regulated in the interests of community planning, including ensuring an appropriate mix of housing and other civic amenities. Public works and other major projects are sometimes subject to an assessment of their likely impact on the environment.

All economic activity is subject to taxation in order to raise revenue to provide public services and to redistribute wealth. "Taxes," the American jurist Oliver Wendell Holmes is believed to have said, "are the price we pay for civilization." Moreover, the imposition and level of taxation, as well as the exemption of certain activities, may be designed to achieve other policy goals: the discouragement of some businesses (the tax on tobacco products, for example) and the encouragement of others (the favourable tax treatment of the film industry and research and development, for instance).

Reconciliation with Indigenous peoples. Although often seen as concerns related to constitutional law, the tools and instruments of the administrative state, and reforms to the administrative state, are also important to the Crown's pursuit of reconciliation with Indigenous peoples. Administrative actors, and particularly commissions of inquiry, have been important advisors to government. The Royal Commission on Aboriginal Peoples, the Truth and Reconciliation Commission, and National Inquiry into Missing and Murdered Indigenous Women and Girls are all examples. In light of the power imbalance between the Crown and Indigenous peoples, and the Crown being implicated in all aspects of colonial policy and ongoing social and economic harms, the independence of the commissions and involvement of Indigenous commissioners are critical to the development of policy and program agendas capable of being viewed as legitimate across Indigenous and non-Indigenous peoples in Canada.

These commissions, as well as other policy reviews, have recommended many changes to policies and to the delivery of public services and programs to address colonial legacies of harm. They have also recommended the creation of independent, specialized, and representative tribunals to adjudicate historical wrongs, constitutional rights, and other claims, as well as to oversee and resolve disputes regarding the negotiation and implementation of modern treaties. The federal Specific Claims Tribunal, which addresses historical grievances in relation to specific Crown promises and commitments, such as in the process of setting aside reserve lands, is one example of a tribunal established by legislation to address reconciliation with Indigenous peoples.

Professions and trades. The members of most professions enjoy a statutory monopoly to render the services associated with that profession (law, engineering, architecture and health care, for example) or to use a particular professional designation (psychologist, for example). In return, applicants for membership must satisfy prescribed educational standards, and in some instances a good character requirement. Once granted a licence to practise, members of professions are subject to discipline by their governing body on grounds of incompetence or unethical conduct and, in serious cases, may lose their licence.

One of the rationales for this kind of market intervention is consumers' lack of knowledge and their consequent inability to make an informed selection of an appropriate service provider or to assess the quality of the work performed. Power disparities between the professional and the consumer make the latter vulnerable to exploitation (overcharging or sexual impropriety, for example). Also, widespread incompetence or dishonesty in the performance of professional services may inflict more generalized public harm: a reluctance to seek medical treatment or legal advice when needed, or the collapse of poorly designed buildings.

Regulatory schemes also apply to trades and vocations: persons selling cars, real estate, insurance, securities, and travel typically require a licence, as do taxi drivers, street vendors, plumbers, heating engineers and others engaged in the building trades, and funeral

directors. The extension of a licensing system to those selling or providing a variety of goods and services is explained by similar rationales of consumer protection as apply to the professions. The precise list of trades and occupations for which a licence is required varies by jurisdiction and is often determined by the scale of reported incidents of dishonesty or incompetence, or by the historical experience of scandal or crisis. While the licensing and discipline of professionals is normally administered by members through the governing body of the profession as part of their professional responsibility, other forms of vocational licensing are administered by public officials.

Social control. Some public programs restrict individuals' freedom of movement. Those sentenced to imprisonment are subject to the disciplinary regime of the penal institution in which they are confined. While confined to the institution, they may suffer further restrictions on their liberty by being transferred to a maximum security facility or by spending time in solitary confinement (also known as "administrative segregation"). When eligible, inmates may serve part of their sentence on parole, a benefit that can be revoked for misconduct.

Public programs also provide for the incarceration of the mentally ill. For example, those found unfit to stand trial or not criminally responsible on account of mental disorder may be detained in custody and are discharged subject to conditions imposed by an agency to ensure the safety and security of the public. Persons who suffer from a mental illness and pose a threat to their own safety or that of others may also be involuntarily committed to a psychiatric institution. Their detention is subject to periodic review by a specialized tribunal.

The *Immigration and Refugee Protection Act*, SC 2001, c 27 regulates the admission to Canada of non-citizens and authorizes the detention and removal of those who enter without permission or remain in Canada in breach of the conditions imposed on their leave to remain. Even non-citizens who have lived in Canada nearly all their lives may be deported after a criminal conviction. Those charged with or convicted of criminal offences abroad, including Canadian citizens, may be extradited to the jurisdiction that has requested their surrender in order to stand trial or to serve out their sentence.

Human rights. Public awareness and debate about discrimination led to the enactment of statutory schemes for the protection of human rights. Typically these schemes prohibit discrimination on the grounds listed earlier in connection with the regulation of employment. Protection from discrimination on these grounds also extends to housing and the provision of services offered to the public. While the equality right contained in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the Charter) applies only to government and entities carrying out governmental activities, the human rights statutory schemes also apply to the activities of private individuals and corporations.

Income support. Although vulnerable to reform and retrenchment in accordance with shifts in the political priorities of governing parties, the provision of income support programs remains an important function of the Canadian state. These programs include injured workers' compensation, employment-linked pensions, and employment insurance. In addition, financial benefits are available to people in need under provincially designed programs, funded in part by federal grants under the Canada Health Transfer and the Canada Social Transfer under the *Federal–Provincial Fiscal Arrangements Act*, RSC 1985, c F-8. The COVID-19 pandemic led to the creation of temporary benefit programs and has given new impetus to discussions of a potential annual guaranteed income program across the country.

Public services. Government also delivers or pays for a range of services. The most familiar are health care, education, child welfare, road construction and maintenance, public parks, fire services, police forces, garbage collection, and some public transportation and broadcasting. In most cases public services are delivered under statutory authority.

The public program and policy areas described above are implemented through a number of different policy tools and targets. Some regulate or guide the relationship between the state and individuals, corporate bodies, or communities. In its regulatory role, governments require approvals before actions can be taken and often set conditions on these activities, imposing limits on what is otherwise lawful conduct. Acquiring a professional or trade designation, acquiring status as a permanent resident of Canada, or securing a permit before altering the habitat of an endangered species each involve government in its regulatory role. In what is known as its "welfare role," government creates programs that confer benefits and determine eligibility, such as income support, universal health insurance, and public education programs.

In other contexts, governments regulate relationships between private actors (or governments acting in private capacities), such as the regulation of employment relationships and protections against discrimination. All regulatory programs are intended to confer benefits on members of the public as, for example, citizens, residents, or consumers. However, programs that regulate relationships between private individuals both create benefits and impose obligations that are legally enforceable. Thus, statutory requirements, such as overtime pay for specified work hours, must be provided by employers regardless of the terms of the employment contract. Similarly, while human rights and pay equity legislation regulates individuals' freedom of contract, it also provides legal redress to victims of unlawful discrimination.

The distinction between statutory restrictions on common law rights (especially physical liberty, freedom of contract, and property rights) and statutory benefits has often surfaced when administrative action has been challenged in the courts. On the whole, the courts have historically seemed more committed to protecting existing rights that are limited by statute than to ensuring that intended beneficiaries of a program receive the benefits for which the statutory scheme was established. In other words, over the past two centuries, the law has more often tended to uphold the status quo than advance the redistributive and welfare objectives of legislation.

B. INSTITUTIONS OF THE ADMINISTRATIVE STATE

In this section, we identify the principal institutions encountered in the study of administrative law and briefly describe the role that each plays in the design and delivery of public programs in the administrative state.

1. Legislatures

The legislature is, in principle, the leading public forum where the most important political decisions taken in the name of the electorate are explained, debated, and potentially approved, although the role of legislatures appears to have declined as senior executive bodies—especially the prime minister's or the premier's office—have centralized and consolidated their power by various means. Even so, from a legal point of view, nearly all public programs must originate with a statute enacted by the provincial or territorial or federal legislature in order to create new legal rights and duties.

In addition to debating and approving the legislation that establishes the program, the legislature will have a role to play in its subsequent administration. For example, the legislature may consider regulations made by the Cabinet or a minister under a power delegated by the statute, which flesh out the often bare-bones terms of the legislation. The minister responsible for the program may be questioned in the legislature about its operation, possibly as a result of a report from one of the legislature's independent officers, the ombudsperson, or the auditor.

2. Cabinet and Ministers

Typically, the Cabinet is made up of various ministers and is chaired by the prime minister or premier, who assigns ministerial responsibilities. The Cabinet adopts strategic policies, sets budgets, and passes regulations and orders in council. It usually divides its tasks among a series of subject-specific policy committees. The members of Cabinet are responsible collectively to Parliament (or the legislature) for the conduct of government. Working through Cabinet, ministers must find ways to exercise their individual responsibility in a way that will be supported by all ministers. Cabinet is also known federally as the governor in council and provincially or territorially as the lieutenant governor in council, which means, technically, the Queen's representative as advised by the members of Cabinet.

A minister generally has responsibility for a (federal) department or (provincial) ministry that is normally established by statute. The minister is accountable for the exercise of powers assigned to them or to the officials who are subject to their direction. Officials and staff of departments or ministries comprise the core of the civil service.

As already mentioned, the Cabinet, or individual ministers, may be empowered to supplement a statute with delegated legislation such as regulations. The minister, through departmental officials, may also exercise discretionary powers that directly affect individuals. Under the *Immigration and Refugee Protection Act*, SC 2001 c 27, for example, the minister of citizenship and immigration may allow a person to enter Canada who is not otherwise eligible; the minister of justice decides whether to surrender a person whose extradition has been requested by another government and upheld by a court in Canada. The minister within whose mandate a board, commission, tribunal, or other agency operates will normally be responsible for appointing the members of the agency. The minister will also report to the legislature on the operation of the program and answer questions from members of the House.

By its control of strategic policies and the allocation of funds, the Cabinet may play a decisive role in determining the shape and scope of public programs. A statute may also, in rare cases, provide a right of appeal to the Cabinet from decisions of administrative agencies.

3. Indigenous Governments

Indigenous governments represent, make decisions, and administer programs for Indigenous communities, individuals, and lands. By using the term "Indigenous" here, we are referring to the peoples recognized in international law through the *United Nations Declaration on the Rights of Indigenous Peoples* and referring also to those peoples' own legal orders. Indigenous peoples are referred to as "Aboriginal peoples" in s 35(2) of the *Constitution Act, 1982,* which refers to three groups of peoples: First Nations ("Indian" in the text of the Constitution and in some legislation), Inuit, and Métis. Elsewhere in this book, the use of the term "Aboriginal" signals that the discussion is specific to the interpretation of rights and obligations under the Canadian Constitution.

The most widely known Indigenous governments are First Nations chiefs and band councils recognized under the *Indian Act,* RSC 1985, c I-5. Other forms of Indigenous governments include governments recognized through modern treaties and self-government agreements; Métis Nation organizations at the national, provincial/territorial, and local levels, as well as other Métis organizations (and in Alberta, Métis settlement councils, a form of local government established under legislation); and tribal councils, which are associations of communities in a region with common history, language, kinship, and other ties. Urban organizations, which often operate in pan-Indigenous contexts, may also perform some roles of government and administer government programs. Indigenous governments also include bodies constituted and empowered in accordance with particular Indigenous legal orders, and which may or may not also have status as legal actors and governmental bodies within the state legal system.

Indigenous governments may exercise authorities delegated in state legislation—for example, in relation to the design and delivery of family or educational services or the management and taxation of reserve lands. They may also have statutorily delegated authority to address local government matters more broadly. Other authorities, however, draw on inherent rights, jurisdictions, Indigenous legal orders, constitutional law, and international law. For example, decisions to enter into power-sharing, intergovernmental arrangements with provincial, territorial, or federal governments and other actions in which an Indigenous government (whether a First Nation chief and council or not) represents and governs rights-bearing communities in relation to their inherent rights and treaty or unceded territories. The federal *Impact Assessment Act*, SC 2019, c 29, has adopted definitions of "Indigenous governing bodies" in relation to the role a body has in representing s 35 rights-holders, a shift that suggests increasing familiarity with and recognition of Indigenous governance authorities that are not delegated by statute. Under such legislation, this recognition may be of Indigenous jurisdiction, or may involve delegations of state jurisdictions to the governance bodies grounded in Indigenous legal orders. Similarly, Indigenous governments may exercise authorities that involve both state and Indigenous legal elements. For example, under federal legislation, First Nations electoral law may be set by the *Indian Act* or may be determined by the community, in accordance with its exercise of political will, regardless of whether it draws upon their Indigenous legal tradition, Canadian electoral law, or a mix of traditions.

This potential for governments to act on the basis of Indigenous law, state law, or a mix of legal authorities indicates that Indigenous governments may be acting as part of the administrative state, or as a distinctive Indigenous order of government, or both.

4. Municipalities

Municipalities exercise powers that are delegated by the provincial legislature, including tax powers. Many of the programs that frequently affect people are administered at the local level of government: police and fire services, schools, child welfare, parks, roads, garbage collection, public transport, building permits, land-use planning, the taxation of property, and the licensing of many trades. The members of municipal councils and trustees of local school boards are usually elected. The elected members debate and pass the by-laws and resolutions at public meetings that elaborate the legislative framework of the programs they administer. However, municipalities are subject to provincial guidance and control in these areas: standards may be set by the enabling legislation, ministerial policy directives or guidelines, or by the terms on which provincial funding is provided. In addition, some municipal decisions may be set aside on appeal by a provincial agency or to a provincial tribunal.

Municipal officials exercise delegated statutory power in order to deliver many of these programs. For example, an officer in the buildings department will decide whether plans to build an extension to a house comply with local fire and building codes; inspectors will ensure that construction work is carried out in accordance with approved plans; and public health inspectors will visit restaurants and can order the closure of those that do not comply with public health standards.

5. Crown Corporations

Some public services are provided through Crown corporations, which enjoy substantial independence in their day-to-day operations. The purpose of this independence is to enable them to make commercial decisions without government interference. However, through the power of the purse and other means, including the appointment of members of the board of directors, the government can exert considerable influence. Among the best-known federal Crown corporations are the Canadian Broadcasting Corporation, the Canada Post Corporation, the

Canada Council for the Arts, the Canada Mortgage and Housing Corporation, and the National Capital Commission. Provincial Crown corporations have been responsible for, as examples, the generation, distribution, and sale of electricity and the sale of liquor.

These bodies operate on the fringes of public and private law in that they may compete with privately owned corporations, much of their decision-making will be based on commercial principles, and their legal relations with suppliers and customers are governed by contract. Yet they also have governmental characteristics—for example, they were established by statute in order to perform functions that private corporations neglected; they typically occupy a powerful position in the industry (sometimes a statutory monopoly); they are publicly owned; they may be financed by government grants; their boards are appointed by government; and they report to the legislature through the minister responsible. In the 1980s and 1990s, Crown corporations fell from favour, whether as an imperative of international trade and investment agreements or as a part of the shifts in ideology and policy noted earlier. Nevertheless, Crown corporations are still used to implement public policy. In 2018, for example, the federal Trans Mountain Corporation, a subsidiary of the Canada Development Investment Corporation that reports to Parliament through the minister of finance, purchased the entities that own and operate the Trans Mountain Pipeline System that runs between Alberta, British Columbia, and Washington State.

6. Private Bodies and Public Functions

An important array of nominally private bodies are found in the borderland between government and the private sector. Some derive their legal authority purely from contract. Yet, by virtue of the control they exercise over particular activities and the nature of the functions they perform, private bodies may resemble the administrative agencies that otherwise discharge governmental functions. Indeed, if they did not exist, such bodies would often have to be created by statute.

Perhaps the most familiar examples of this type of actor are the governing bodies of many sports. As the gatekeepers of access to the sport at the most competitive levels, they establish rules on the affiliation of clubs to the governing body and resolve disputes over the eligibility of clubs and players. In other sports (for example, boxing), athletes, trainers, and managers may require a licence to participate in events under the control of the governing body.

Some regulatory functions are performed by bodies that operate under private legislation, but that rely on market power and contract, rather than a statutory monopoly, to control their industry and its members. Stock exchanges, for example, are associations of member firms that have assumed responsibility—in cooperation with the statutory regulators, the securities commissions—for protecting investors by establishing and enforcing standards in the industry.

In some provinces, private legislation has been enacted to recognize the regulatory power of real estate boards, stemming largely from their control over the multiple listing system for sale properties. Again, membership in a real estate board (as opposed to a licence from a public regulator, when one exists) is not a state legal requirement for engaging in the real estate business, but it may be a practical necessity.

In Ontario, responsibility for child welfare is discharged at the local level by children's aid societies. These societies are nominally private organizations answerable to their own boards, including Indigenous child and family well-being agencies and a few faith-based agencies. However, provincial legislation has conferred on them coercive legal powers, including the authority to remove neglected or abused children from the custody of their parents, take them into care, and assume parental powers over them. Their operations are almost wholly funded by government, which, at both provincial and municipal levels, prescribes policies and standards. In Indigenous contexts, First Nations and other communities are also involved in setting policies and standards.

Finally, as self-governing teaching and research institutions, universities are also located at the fringes of government. Considerations of academic freedom have contributed to placing them at arm's length from government departments with a responsibility for education and research. Universities have contractual relations with their employees and students, whose fees provide some of the university's operating budget. However, nearly all universities in Canada operate under a statutory framework, perform functions that are regarded as public in nature, and derive most of their funding from government, whether directly or indirectly in the form of research grants awarded to scholars by independent funding bodies. Also, universities are monopoly providers of academic tertiary education and degrees, and major employers.

7. Independent Administrative Agencies

These are the most distinctive institutions of the administrative state. While some have a substantial history, many emerged after the Second World War with the rapid expansion of the responsibilities assumed by government. Because they are not homogeneous, they are not easily described in a few sentences. Even their names vary, often with little rhyme or reason: boards, tribunals, and commissions are the most common and, to a large extent, these labels are interchangeable. New programs have spawned new agencies, while in other cases existing agencies have been assigned new but related statutory functions. Despite their haphazard proliferation, they occupy an important position in public law and administration.

a. Similarities

The independent agencies that are most frequently encountered in administrative law share at least four features. First, they enjoy a measure of independence from the government department with overall responsibility for the policy area in which they operate. This means, at the very least, that the minister cannot direct what decision they must reach in a matter that is before them. In turn, the minister is not politically accountable to the legislature for the agency's individual decisions. But it would be a mistake to imagine that members of agencies enjoy the same insulation from the political process as superior or even provincial court judges. Although statutes in some jurisdictions set predictable terms for appointments and parameters for re-appointment (and exceptionally, in Quebec, the human rights statute, the *Charter of human rights and freedoms*, CQLR, c C-12, protects the right to a hearing before an independent and impartial tribunal in s 23), outside of statutorily prescribed contexts, members are appointed by the responsible minister for relatively short terms of office, and their appointment may or may not be renewed. Agencies can be incapacitated by starving them of resources. Statutes may also enable the Cabinet to influence agency decisions, either by issuing a policy guideline that the agency must consider or, on appeal, by reversing, varying, or remitting a decision of the agency.

The second feature of independent agencies is that those who are liable to be affected by a decision are given an opportunity to participate in the decision-making process by producing evidence and making submissions. Administrative hearings vary greatly: some are hardly distinguishable from those conducted in a court of law (professional discipline hearings, for example). Others are informal and may be conducted exclusively on paper. To a large extent, procedural openness underpins the legitimacy of administrative agencies and, to some degree, counteracts the democratic deficit that is inherent in the nature of their members' appointments and in the lack of direct political accountability for the major questions of public policy that many agencies make.

Third, independent agencies typically operate at the sharp end of the administrative process—that is, at the point when a program is applied to the individual. This may involve the denial of a licence, a refusal to rezone, a determination that a person is not a refugee, or the

unfair dismissal of an employee. Some agencies also operate at the level of policy-making and hold hearings to allow those who are interested to participate in the formulation of a policy that will guide the agency when it decides individual cases.

Fourth, all administrative agencies are specialized. They deliver a particular program or a part of one. Labour relations boards certify unions to represent groups of workers and ensure that parties do not engage in unfair labour practices that undermine the fundamental premises of collective bargaining. Assessment committees determine property taxes. Agricultural marketing boards award quotas to farmers, thus regulating the amount they can produce. Some agencies work with one statute; others derive their jurisdiction from several. Courts of law, on the other hand, decide cases across a much broader spectrum of criminal and civil law.

b. Differences

It is more challenging to capture the generic differences among agencies. First, decisions made by agencies are found along a continuum. At one end are agencies that determine individual rights based on past events or facts, a relatively precise statutory standard, and a limited degree of discretion that is exercised in the particular circumstances of the case. Examples of these agencies include human rights tribunals, labour arbitrators, the Refugee Protection Division of the Immigration and Refugee Board, and professional discipline committees.

Other agencies have a much larger policy-making mandate and are guided more by their understanding of the broad public interest than by the impact of the decision on an individual or small group of individuals. For example, some administrative agencies approve the tariff structure for the rates to be charged to energy consumers, while others make recommendations on the siting of nuclear power stations and waste disposal facilities.

Some agencies resemble courts in their structure: there are opposing parties at the hearing; the decision is made by the members who conducted the hearing solely on the basis of the material presented to them, without the assistance of any staff, except perhaps for a lawyer to advise them on legal and procedural questions. Professional discipline committees and social assistance appeal tribunals are typically of this type. Other agencies, generally at the policy-making end of the spectrum, employ a large staff to provide expert economic, financial, policy, or legal analysis to assist in policy development. Counsel for the agency may participate at the hearing as a party, and outside the hearing staff will conduct research to assist the agency to reach the best decision. For these agencies the hearing represents one component of the process by which they inform themselves.

Some agencies have a massive caseload. For example, the Immigration and Refugee Board, the largest administrative tribunal in the country, decides tens of thousands of refugee and immigration claims annually, and this is only part of the Board's jurisdiction. The Social Security Tribunal of Canada and workers' compensation boards across the country also process huge numbers of claims. On the other hand, some provincial regulatory agencies devote most of their time to one or two large rate-making utility decisions.

Independent agencies also vary greatly in the place that they occupy in the overall decision-making process. For instance, some only make recommendations to a body with final decision-making power. This is the role of the judge who, after an inquiry, can recommend to the attorney general or lieutenant governor that a judicial officer or a member of a tribunal be removed from office. Commissions of inquiry may be appointed to investigate and report on the object of widespread public disquiet—for example, the Truth and Reconciliation Commission, addressing the legacies of residential schools, and National Inquiry into Missing and Murdered Indigenous Women and Girls, noted earlier; the collapse of the BC salmon industry; the rendition to torture of a Canadian citizen; the contamination of a municipal water supply; or the safety of Canada's blood system. On the strength of the commission's report, legislation and other policy reforms may be introduced to implement its recommendations.

In contrast, other agencies make the first, and sometimes final, determination of individuals' legal rights. Provincial human rights tribunals and securities commissions are typically of this type, as is the Refugee Protection Division of the Immigration and Refugee Board. Some agencies hear appeals, which may be from another independent agency or from a decision by an officer in a mainline government department. For example, the Social Security Tribunal, General Division, hears appeals from determinations of Employment Insurance, Canada Pension Plan, and Old Age Security benefits, while the Social Security Tribunal, Appeals Division hears appeals from decisions of the General Division.

Another important difference among independent agencies lies in the effect that their decisions have on individuals. Some can devastate the life of the person concerned. Revoking a parole may mean not only a return to prison but also the loss of remission of the sentence. Deporting a non-citizen may dispatch the person to a country where they have never lived as an adult, break up their family, or expose them to death or torture. Suspending a licence to practise may be a sentence of professional death. On the other hand, many agencies have a less serious impact on individuals. They may decide on the allocation of a relatively trivial benefit—for example, the approval of a plan to build a deck on a house. Or the decision may affect millions of people in a diffuse way—for example, an order requiring wireless carriers to offer seniors and low-income earners more affordable mobile phone plans.

The membership of agencies varies widely. For example, discipline committees of self-governing professions typically comprise members of the same profession as the person whose conduct has been called into question. That said, in response to a public perception that complaints of professional misconduct have not always been treated seriously, lay persons are often now included on these committees.

It is common to find tribunals operating in labour relations and employment that are constituted on a tripartite basis—that is, members of the tribunal are nominated respectively by the employer and by the employee sides, with a mutually agreed-on independent chair. This is true of labour relations boards and labour arbitration boards (although the parties may agree to a single-member board in order to save expense).

In resource management contexts, it is becoming more common to find joint or co-management boards involved in development assessment processes. In co-management contexts, the decision-making (or recommendation-making) board is constituted by appointees nominated by both state and Indigenous governments. Examples of co-management boards include the McKenzie Valley Environmental Impact Review Board and the Nunavut Wildlife Management Board, which were both created by legislation pursuant to the terms of modern treaties. In joint management contexts, the boards are co-created by Indigenous and state governments with representative members of the board appointed by each participating government. An example of a joint management board is the Haida Gwaii Management Council, created pursuant to the Kunst'aa guu—Kunst'aayah Reconciliation Protocol, signed by the Government of British Columbia and the Council of the Haida Nation in 2009.

The members of many tribunals serve on a full-time basis for the duration of their term, while others are appointed to hear a particular dispute. Labour arbitrators and human rights tribunals are typically of the latter type, although it is important to note that many of those appointed to these tribunals are often experienced and asked regularly to serve.

Tribunals often include lawyers and even judges among their members. Indeed, judges of the Federal Court of Canada usually act as the president of the Competition Tribunal, and the Specific Claims Tribunal leans on the independence of superior courts to adjudicate historical disputes between First Nations and the Crown by seconding superior court judges as tribunal members. On the other hand, members of other agencies are appointed for different kinds of experience, knowledge, or skills. Some members have a sophisticated understanding of the area in which they operate. Others have no claim to expertise, although with experience as

members of the agency they are likely to acquire knowledge of the statutory framework and field sensitivity to the relevant issues.

These and other variations among independent administrative agencies assume particular importance to lawyers when called on to advise an agency on the procedure that it should adopt for making its decisions, to represent a client before an agency, or to seek a legal remedy against an agency in the courts. It is a serious mistake for lawyers to stereotype agencies and to assume, for example, that because the agency in question holds hearings and is independent from the government it is functionally like a court. The powers, membership, and procedure of many agencies are designed to perform tasks that, as we have tried to illustrate, may differ significantly from those assigned to courts.

An important strand in the often conflictual history between courts and administrative agencies has been lawyers' predilection for general rules and a single model of decision-making. This is usually, of course, the common law and adversarial procedure as practised in the courts. Lawyers have too often sought to absorb administrative agencies into a vision of the legal system in which the superior courts are at the apex. The truth is that administrative agencies occupy a unique position based on their unique strengths, relative to courts. They have one foot planted firmly in the world of government and bureaucracy and the other in the world of law and the judiciary. Agencies are part of government in that they are responsible for advancing the public interest by implementing the program they administer. On the other hand, like courts, they may conduct hearings and must justify their decisions, which invariably affect the rights of individuals, in light of the applicable law and the evidence.

Why have legislatures so regularly resorted to independent agencies, rather than mainline government departments or courts, to play such a major role in the delivery of public programs? There is no single answer to this question. Some common issues and possible answers follow.

c. Independent Agencies or Government Departments?

Independent agencies have certain advantages over government departments as makers of administrative decisions. Because they are insulated from the pressures of day-to-day partisan politics, it is easier for agencies to maintain an open process and develop longer-term consistent policies. The other side of this is that it is convenient for ministers to shed political responsibility for individual decisions, especially in sensitive areas of policy, where the chances of attracting unfavourable publicity are high.

From the perspective of the individual who is in dispute with a government department over their eligibility for a statutory benefit or the imposition of a liability, it is very important that the matter can be taken for reconsideration to a body that is perceived to be independent of the government.

The relationship between agencies and their sponsoring departments may create difficulties. A recurring dilemma is the location of responsibility for policy issues, especially for federal agencies that regulate industries and for provincial land-use planning agencies and securities commissions. When a legislature enacts a regulatory statute, it is impossible for the legislature to foresee or answer many of the policy questions that will arise in the delivery of the relevant programs. Hence, broad discretion is given to many agencies in order to allow them to make additional rules or formulate policies on a case-by-case basis. Yet it has been a key principle of the Westminster system of government that major issues of public policy should be made in the name of a minister or by the Cabinet collectively, so that ministers can be held politically accountable in the legislature for their decisions.

How, then, can the virtues of agency independence in making individual decisions be reconciled with the constitutional demand for political accountability to the electorate on matters that are important to many people? One attempt to reconcile these priorities involves

allocating the responsibility for formulating policy to the political branch of government (for example, through the promulgation of regulations or less formal policy directives) and leaving to the independent agencies the administrative task of applying the policy to individual cases. The basic problem is that no bright line divides policy from administration.

Another device for linking agencies to traditional channels of political accountability has been to provide a right of appeal from agencies to the Cabinet. While this places responsibility for major policy decisions in the hands of the elected leadership, a shroud of secrecy surrounds Cabinet decision-making, which is often suspected of being more responsive to partisan political considerations than to the demands of regulatory policy.

Perhaps it is appropriate to reconsider the extent to which we rely on traditional political institutions as the sole authentic source of democratic legitimacy for important policy decisions. Just because members of independent agencies are not elected does not make them politically unaccountable. They are, after all, appointed by the government for relatively short terms; they report to the legislature through the responsible minister or directly in parliamentary committee; their budget is allocated by the minister; they often hold public hearings; they may consult widely on policy issues; and they often provide reasons for their decisions. To what extent do these characteristics satisfy your sense of democratic legitimacy?

d. Independent Agencies or Courts?

Who should resolve disputes that arise from the implementation of a public program? The main reasons for assigning this role to an independent agency rather than a court follow.

First, the nature of the decisions made by many agencies are far more governmental than judicial—for example, establishing a Canadian content policy for broadcasters, allocating quotas to import chickens, and setting utility rates. The judicial process is simply not apt for making multifaceted decisions of this kind. Second, it may be desirable that decisions be made by persons other than judges. Experience and expertise in areas beyond law may be required, as well as an approach to the issues that is more sympathetic to the aims of the program than that which is often displayed by judges. Trade unions, for example, had good cause historically to complain that the judiciary was quicker to understand the position of management than that of labour. Third, many of the disputes with which we are concerned involve relatively small sums and, as important as these claims are to individuals, to process them through the superior courts would be a misallocation of public resources.

Fourth, a more informal process than that associated with the courts may enable more expeditious decisions and reduce the need for legal representation. The adversarial model of procedure assumes a rough parity of resources between the disputing parties, leaves to them the responsibility for presenting the evidence and arguments necessary for making the decision, and reduces the decision-maker to the passive roles of ensuring that the proceedings are orderly and fair and deciding the case on the relative strength of the presentations of the parties. This model is unsuited to many decisions that are made in implementing public programs. For instance, when it is important that the best decision be made (for example, on the assessment of the environmental impact of a large development project), it would be inefficient to deny the decision-maker the benefit of a broad range of staff expertise in exploring the issues.

C. ADMINISTRATIVE TOOLS

Public officials and institutions typically have available a wide range of tools with which to deliver the public program for which they are responsible. Adjudication is an important tool for many administrative agencies, but unlike courts, the agency's adjudicative functions are often only part of its overall mandate. Take, for example, the self-governing professions. Considered in isolation, the functions of discipline committees appear to be much like those of courts of

law. Their task is to determine, on the evidence and arguments presented to them by counsel for the member and the governing body of the profession, whether the member is guilty as charged and, if so, the appropriate penalty. Even so, adjudication by the discipline committee is only one way in which the governing body discharges its statutory responsibility to maintain and enhance the quality of service provided by the profession. For example, a governing body will typically ensure that, on admission to the profession, members have had a good education and training in the technical and ethical aspects of practice. It will also conduct programs of continuing professional education, provide information to the public, issue formal rules and informal explanations, define the standards of professional behaviour and competence, conduct spot checks of members' practices, and investigate complaints from the public against members.

III. POLITICAL AND ADMINISTRATIVE REDRESS OF INDIVIDUAL GRIEVANCES

Law assumes particular importance in public administration when things have gone wrong, at least in the eyes of those affected by a decision made in the course of implementing a public program. For this reason, lawyers are often involved in the design of institutional arrangements for the investigation and review of administrative action about which there is a complaint. Indeed, this book is primarily concerned with forms of redress based on access to the courts. The focus is thus on the role of the courts in reviewing administrative agencies and on the remedies that a court may award where the decision-maker is found to have acted unlawfully.

This focus is important because some of the most complex aspects of administrative law arise in the narrow context of judicial review. And, while a range of professional specializations may be involved in government decision-making outside the courts, it is lawyers who are expected to have expertise in the litigation of disputes arising from governmental activity. To provide legal advice in many areas of practice, it is important to have an understanding of the underlying framework for judicial review.

Nevertheless, the focus on judicial review can be misleading because most government decisions are never subject to litigation. An alternative approach to the subject matter of administrative law would be to examine various types of powers and responsibilities of government in general, instead of narrowing one's study to instances in which an individual or group happens to challenge administrative action in the courts. Although not the orientation of this book, it is important to emphasize the need for lawyers to keep in mind that litigation may not offer a realistic or useful remedy, that courts are not always the best institutions to resolve complex policy issues, and that other forms of expertise besides legal expertise have a major role to play in developing and implementing public policy.

A. LEGISLATIVE OVERSIGHT OF THE ADMINISTRATIVE PROCESS

As we have noted, the involvement of legislatures with public programs does not end with the enactment of the enabling statute. Even so, legislative oversight is inadequate for investigating complaints from individuals about decisions made in the course of implementing the many public programs of the administrative state. Legislators do not have the resources or the legal powers (to compel the disclosure of information, in particular) needed for the job.

Alternatively, every Canadian province has an officer of the legislature called the ombudsman, ombudsperson, citizens' representative (Newfoundland and Labrador), or *protecteur des citoyens* (Quebec). This institutional office, originally a Scandinavian institution, was taken up with enthusiasm in the common law world in the late 1960s and 1970s as a potential panacea for individual situations of administrative injustice. The details of these legislative schemes for

redress vary, although the essential functions and powers of the office of ombudsperson follow. First, the ombudsperson is empowered to investigate action taken in the administration of a government organization that affects individuals. Second, the ombudsperson has the power to obtain information in connection with the investigation, which is conducted in private. Third, to set the investigative process in motion, the complainant merely has to file a complaint. Fourth, unlike other avenues for redress, the ombudsperson can consider a wide range of possible errors that may have been committed in the delivery of a public program. Fifth, in the event that the ombudsperson concludes that something went awry, the organization will be asked to provide a remedy, which could include a simple apology, the revision of the agency's operating procedures, or the payment of compensation. If the recommendation is not acted on, the ombudsperson may report the matter to the relevant committee of the legislature. However, because the ombudsperson's conclusions are not legally binding, any recommended remedy is ultimately enforceable only through the political pressure that can be exerted by the legislature and public opinion.

B. ADMINISTRATIVE REMEDIES

Administrative agencies invariably have internal mechanisms for dealing with citizens' grievances. This may be simply a matter of asking the person who made the decision to revisit it or speak with a more senior person in the agency. Sometimes there are formal levels of appeal that can be pursued within the agency. Furthermore, unlike courts of law, independent administrative agencies often have an express statutory power to reconsider their decisions.

If none of these provides a satisfactory solution, the complainant may need to consider taking the matter to an outside body that is independent of the original decision-maker. In most jurisdictions this will be the regular courts, although, since 1996, Quebec has had in place the Tribunal administratif du Québec, which is the country's closest model to a general administrative appeal tribunal.

Also, statutory rights of appeal are now commonly available to an appeal tribunal from decisions made by government departments about individual entitlements. These may include, for example, appeals from the refusal or revocation of a business licence or the refusal, reduction, or termination of a social security benefit. Administrative appeal tribunals can generally reconsider the whole case after hearing from the parties and substitute the decision that, in their view, the original body should have made. On the other hand, it is relatively unusual to find a right of administrative appeal from an independent agency that makes the first-level decision in a dispute, such as, for example, human rights tribunals.

IV. COURTS AND ADMINISTRATIVE AGENCIES

In this section, we provide an overview of the principal ways in which courts may be required to resolve disputes between an individual and an administrative official or institution. It is important to keep in mind, however, that public law litigation is generally a remedy of last resort. The cost of taking the administration to court is high; the prospect of success in court is limited; and even if one gets a favourable judicial decision, the possibility remains that, having corrected the legal error, the administration may not change the substance of the decision that generated the complaint.

A. ORIGINAL JURISDICTION

The legislature may not have established a mechanism specifically for the purpose of challenging an administrative decision, in which case a person may take their claim against the

government directly to court. Generally speaking, it is also possible to proceed directly to court, without recourse to administrative avenues of redress, when an administrative action has infringed an individual's private legal rights by constituting a tort, breach of contract, or some other wrong for which an award of damages may be made or specific relief (such as an injunction) granted.

One of the most famous cases dealt with in this book (in Chapter 3), *Cooper v Board of Works for Wandsworth District* (1863), 143 ER 414 (Eng CP), was an action for damages for trespass dating from the 1860s. It turns on the legality of a resolution passed by the defendant Board of Works, without prior notice to the plaintiff, authorizing its officials to demolish a house built by the plaintiff—a decision that the Court found to be procedurally unfair and, therefore, invalid. Although not reflected in the Court's judgment in *Cooper*, the Board of Works' resolution was likely passed after the house had been built without separating its below-ground water and sewage pipes, a requirement first introduced to counter the threat of cholera and other waterborne diseases in the sprawling cities of industrial England. Thus, *Cooper* points at an early stage to the tension between effective administration of public programs and judicial protection of individual property and procedural rights.

B. APPEALS

Since the early 1970s, statutory rights of appeal to the courts from administrative decisions have become a familiar feature of schemes established to deliver public programs. Such rights of appeal come in different forms. The most generous provide for an appeal on questions of law, fact, and discretion and authorize the appellate court to substitute its opinion for that of the agency. Others limit the appeal to questions of fact and law, while the narrowest are confined to questions of law and jurisdiction. If the court concludes that the agency erred, it may refer the matter back to the agency, or reverse the decision and find in favour of the appellant.

It is difficult to discern any cost–benefit criteria that are used consistently by legislatures to determine when a right of appeal to a court is an appropriate form of redress or, if granted, how broad the right of appeal should be. However, there is an emerging pattern that, in the absence of a strong reason to the contrary, the legislature will include a statutory right of appeal to a court from administrative agencies where the agency exercises a power to make decisions that restrict an individual's common law rights or that refuse a significant social security benefit.

A major exception is the regulation of labour relations and employment, where the general legislative policy has been to minimize the opportunities for judicial intervention. This has been partly to avoid the damaging delays of litigation and its expense; partly because the relevant agencies are usually made up of nominees of employer and employee interests and are seen to have more understanding of labour relations than the courts; and partly because the courts and the common law were perceived historically as biased against the interests of labour, especially those based on collective rights.

C. COURTS' INHERENT JUDICIAL REVIEW JURISDICTION

In the absence of a statutory right of appeal to the courts, the superior courts of the provinces nevertheless retain a supervisory jurisdiction over the institutions and officials that administer our public programs. The superior courts inherited this supervisory jurisdiction from the English royal courts of justice, which exercised it long before the modern state and central government in order to review the activities of local justices of the peace (who had not only summary criminal jurisdiction, but also local government functions such as the repair of bridges and roads, local taxation, and liquor licensing), borough councils, commissioners of

sewers, and the few other public bodies that exercised statutory powers over individual rights. Since 1970, the Federal Court and the Federal Court of Appeal—which are statutory courts rather than superior courts with inherent jurisdiction under the common law—have exercised virtually exclusive jurisdiction over federal administrative agencies.

1. Judicial Remedies of Administrative Law

The courts exercised their supervisory jurisdiction under the common law through remedies that were available only in respect of *public* duties or powers. Known as the prerogative writs, three have been particularly important in the development of administrative law. The remedy of *certiorari* is used to quash or set aside a decision. The remedy of prohibition is used to order a tribunal not to proceed in a matter. And the remedy of *mandamus* is used to order the performance of a public duty. (In Quebec, where the law of judicial review is based on the common law, the remedy of evocation performs the functions of both *certiorari* and prohibition.)

A fourth prerogative remedy, *habeas corpus*, issues to determine the legality of a person's detention, whether by a private person or public official, with a view to ordering the release of a person who is unlawfully imprisoned. The writ of *habeas corpus* has a strong association in constitutional history with the protection of the liberty of the person and remains important today, both in criminal procedure and in areas of public administration such as immigration, prisons, extradition, and mental health. Even for federal agencies, which are otherwise subject to the jurisdiction of the Federal Court, the superior courts of the provinces retain their jurisdiction to issue *habeas corpus*. The Federal Court itself has only a limited capacity to grant this remedy. Because of its specialized nature, though, *habeas corpus* stands outside the mainstream of administrative law and thus receives less coverage in this book.

Historically, the prerogative remedies of *certiorari*, prohibition, and *mandamus* were directed as much to ensuring that bodies with limited legal powers did not exceed those powers at the potential expense of the power of central government as to vindicating the legal rights of the individual. This aspect is still apparent in that, unlike awards of damages in private law, the prerogative remedies (and their modern statutory equivalents) are granted in the discretion of the court on the basis of public interest considerations. Applicants also do not have to show that the administrative action complained of affected them in a way that infringed their private law rights; a court may instead grant relief on the basis that the applicant was an appropriate person to assert the public interest in ensuring that governmental bodies do not act unlawfully.

Since the early 1970s, courts and legislatures have vastly simplified the law relating to the remedies of judicial review (often by the creation of a single catch-all application for judicial review) and the accompanying practice and procedure. This has been a great benefit to those who study and work in administrative law.

2. Grounds of Review

When the legislature has not provided a statutory right of appeal, in what circumstances may a court intervene in the administrative process at the instance of a person who has invoked its supervisory jurisdiction? There are four principal grounds of judicial review in contemporary law, although these grounds may overlap.

Procedural impropriety. Before taking action that may adversely affect the interests of individuals, administrators generally have a legal duty to act in a way that is procedurally fair. This typically requires them to give prior notice, and a reasonable opportunity to respond, to those likely to be affected. Impartiality in the decision-maker is another attribute of procedural

fairness. Much of the law defining administrative action that is subject to the duty to be fair, and the precise contents of the duty in a given context, has been developed by judges as a matter of common law (sometimes disguised as statutory interpretation) and, since 1982, under the rubric of the Charter. In addition, legislation may prescribe the procedures to be followed by a particular agency, or groups of agencies, in making decisions.

An agency that indicates that it does not intend to comply with the duty of fairness, or a statutorily required procedure, may be prohibited from proceeding to a decision or be ordered to proceed according to the proper procedure. More commonly, an applicant will ask the court to quash (or set aside) a decision that was made in breach of a procedural duty. When relief is granted, the agency will normally be free to decide again, after it has complied with its procedural duties; in substance, its second decision may be the same as the first.

Illegality. There is a strong presumption that the legal powers of governmental institutions are limited and that it is the function of the courts, as the branch of government that is independent of the executive and legislature, to determine those limits. Administrative action has no legal validity if it is not authorized by law. For the most part, the legal powers of concern to administrative law are statutory. This means that the courts must determine the scope of the legal powers and duties of the agency by interpreting the relevant legislation. As we shall see, this is an exercise that implicates fundamental notions about law and government and about the appropriate roles of specialist agencies and the courts in the administrative state.

Unreasonableness. Administrators also have a legal duty not to exercise their powers unreasonably. This duty has emerged relatively recently as a general principle of judicial review. The principle was originally derived from a series of specific rules and principles. For example, there must be some evidence to support the material findings of fact on which an agency bases its decision. An administrative agency's interpretation of ambiguous language in its enabling legislation must be reasonable. Likewise, lack of reasonableness is a ground of review of the exercise of many discretionary powers conferred on public authorities. Similarly, when administrative action engages a Charter protection, it may be upheld as reasonable when any limit on the protection is proportionate with the statutory objective in issue.

Unconstitutionality. The Constitution is an important element of the legal framework within which administrative agencies deliver public programs. Although a thorough exploration of this element is appropriately pursued in a book or course on constitutional law, it is impossible in a text on administrative law to ignore the constitutional dimensions of the subject, and its intersections with constitutional law in the formal sense: the *Constitution Acts, 1867–1982*.

Since the Charter was adopted in 1982, it has become common for lawyers to frame court challenges to administrative action in terms of both the common law and the Constitution. For example, a refusal by the Immigration and Refugee Board of a claim to refugee status might be impugned both on the ground that it was made in breach of the common law duty of fairness and that it amounted to a denial of security of the person, other than in accordance with the principles of fundamental justice, contrary to s 7 of the Charter.

Two introductory points about the relationship between administrative law and constitutional law can be made before these subjects are addressed later in this book. First, regardless of whether it is authorized by statute, administrative action may always be impugned in court on the ground that it breaches a provision of the Constitution. An administrative agency cannot do what a legislature lacks the constitutional competence to authorize. Second, both constitutional law and administrative law are branches of public law and their concerns overlap. It is important, therefore, that the standards imposed by constitutional law are informed by previous experience at the level of administrative law—for example, in balancing procedural fairness against administrative efficacy. Conversely, it is important that the non-constitutional

standards to which public administration is held through legislation and the common law reflect the constitutional values and principles emerging from constitutional rights litigation.

V. THE RULE OF LAW AND THE ADMINISTRATIVE STATE

This section identifies some of the theoretical foundations and general themes that animate the principles and doctrine examined in this book. The rule of law is an ideal that is regularly invoked by both proponents and critics of regulatory measures and public programs. Like the concepts of liberty and democracy, the rule of law has no generally agreed meaning as applied to law and administration. In the same respect, the rule of law is rejected by few people, although specific versions of its meaning are keenly contested. It is tempting to say that an idea with no agreed content has little practical value as a critical standard by which to assess the appropriateness of the legal framework within which public programs are administered. However, the root idea—namely, that government should be subject to law—is, like democracy and liberty, an enduring one.

Most would agree, then, that an important function of administrative law, including the contribution of the courts, is the vindication of the rule of law. Indeed, the four principle grounds of review identified above can each be related to upholding the rule of law. The challenge is to amplify this concept in a way that is compatible with the democratic claims of majoritarian government and the tasks with which it has charged the modern administrative state, including the regulation of private power, the promotion of social equality, and the redistribution of wealth. Following is an introductory sketch of some versions of the rule of law that, in our view, have significantly shaped or captured lawyers' thinking about issues of law and public administration. This seems to us part of what is needed to get started on developing an understanding of what administrative law is *really* about.

A. DICEY AND THE LIBERAL IDEA OF THE RULE OF LAW

AV Dicey was a professor of English law at the University of Oxford and then the first professor of public law at the London School of Economics. It was critical to Dicey, writing in the late 19th century, to establish public law as a legitimate and respected discipline alongside private law subjects, which were more established in the English common law tradition. Dicey's classic work, *An Introduction to the Study of the Law of the Constitution*, was first published in 1885. In it, Dicey defined a version of the rule of law that he thought both described English constitutional law (then found in the common law and in legislation) and explained what he saw as the success of the English Constitution in protecting the liberty of the individual. For our purposes, the key elements in Dicey's definition of the rule of law are (1) that no one should be made to suffer except for a distinct breach of the law, (2) that government and citizens alike are subject to the general law of the land, and (3) that the law of government should be administered in the ordinary courts (that is, the English common law courts) and not in a specialized system of administrative courts (as in France).

Each of these notions is reflected in contemporary administrative law and in debates about the appropriate scope of government powers. The first element has been employed to attack the statutory grant of broad discretion enabling public officials to restrict individual freedom of contract and property rights. The main objections to such powers are that they may be used to discriminate improperly against or to favour particular individuals or groups, that it is difficult to hold officials democratically accountable for highly discretionary decisions, and that individuals should be able to plan their lives in accordance with known rules of general application.

A related influence on public law has come from the aspect of Dicey's definition of the rule of law that insists that, in the common law world as opposed to legal systems derived from

or influenced by the Napoleonic Code, there is no distinct body of public law that applies to relations between individuals and the state and that is administered outside the "ordinary courts." Two examples, one specific and the other more general, are particularly important. First, Dicey's assertion has provided a justification for the exercise by the superior courts of their supervisory jurisdiction over administrative agencies on grounds of procedural unfairness and illegality, even when the legislature has apparently expressly excluded judicial review. Courts have regarded the powers of government as legally limited, and the judiciary as the body that is ultimately responsible for determining those limits. Second, entrenching the superior courts as the arbiters of disputes between individuals and the administrative institutions of the state has given pre-eminence to common law patterns of thought in shaping the legal framework for public programs. For instance, the rights most keenly protected in law are those recognized by the common law: liberty of the person, private property, and freedom of contract. On the other hand, the courts experienced difficulties in dealing with interests created by the administrative state, such as licences and welfare benefits, and with demands by members of public interest groups for an opportunity to participate before agencies that formulate important policies.

B. THE FUNCTIONALIST CRITIQUE

Since the 1930s there have been contrary views expressed in England, the United States, and Canada from the dominant tradition of public law most famously associated with Dicey. In Canada, the most important proponent of a dissenting position was John Willis, whose principal writing on administrative law spanned the 1930s to the late 1960s. Functionalist criticisms of the liberal version of the rule of law, especially as propounded by Dicey and taken up in 1968 by the *Report of the Royal Commission on an Inquiry into Civil Rights in Ontario* (known as the *McRuer Report*), have taken various forms.

First, some writers challenged the historical accuracy of Dicey's assertions. They have asked whether it was ever true that the rights of English people were subject to general law, and not to official discretion, and that there was in England (fortunately, according to Dicey) no special body of public law equivalent to the French *droit administratif* developed by *tribunaux administratifs*, headed by the *conseil d'état*, to regulate legal relations between citizens and the state. On these points, they have pointed out that at common law the Crown was immune from liability in tort, that wide discretion was exercised by local magistrates to dispense often brutal forms of criminal punishment, that Dicey misunderstood the French system of administrative law, and that Dicey overlooked the local courts and specialist agencies in England that were already hearing disputes arising from the enforcement of regulatory legislation (especially in protecting the safety of workers in factories and mines), claims for the recovery of wages, and the growth of social security.

Second, they have pointed out that Dicey's disapproval of administrative discretion and his support for affording to the "ordinary courts" (and, of necessity, the intellectual baggage of the "common law mind") a key position in the resolution of disputes between the individual and the administrative state could only thwart the implementation of legislative arrangements for regulation and redistribution in the public interest. The litigation process may reduce complex policy choices to a question of law or an issue of procedural fairness, whereas an agency that has specialized expertise and field experience, and access to a range of methods of investigation and decision-making, may be better positioned to resolve multifaceted questions of policy.

Thus, far from offering a neutral prescription for the protection of liberty, Dicey designed his version of the rule of law to put public administration into a straitjacket. The judicial model of procedural fairness, for example, was likely to hamper an agency's capacity for effective decision-making and to benefit those with the means to hire a lawyer and go to court. In

addition, the courts' approach to the interpretation of legislation was driven by an ideology that generally deplored government intrusion in the market and the limitation of individuals' rights to pursue their economic interests without restraint.

According to functionalists, it was more likely that governments, in the face of obstruction from economic vested interests, would take the course of least resistance by curbing the effectiveness of public programs rather than risking judicial reproach in the name of private rights. Furthermore, the focus of litigation on the immediate parties to a dispute tends to downplay the interests of beneficiaries of the program, and the wider public interest, as components of judicial decision-making.

Third, on a philosophical level, it was argued that the positivist legal tradition, of which Dicey's thought is a part, had failed to appreciate that law is intertwined with policy. Legislatures cannot foresee all outcomes and, by implication, statutes must often be drafted in general terms. In turn, it may be impossible to arrive at the intended meaning of the language in an agency's enabling legislation without considering the consequences that competing interpretations will have for the program that the legislation was created to deliver. The specialist agency is more able than a reviewing court to make an informed assessment of the interpretation that will enable the program to be effective. It follows, therefore, that if judicial intervention on the ground of illegality means that a reviewing court is encouraged to substitute its own interpretation of legislation for that of the agency, then the agency's ability to develop a coherent strategy to discharge its policy mandate will be undermined.

A functionalist approach to administrative law also stresses the facilitative and legitimizing roles of law. That is, as regulator and provider of benefits, the state should be regarded as a source of good. It is the function of the law to enable administrative agencies to carry out effectively and efficiently the tasks assigned to them by the legislature, the institution that, by virtue of the election of its members by universal franchise, has the greatest claim to democratic legitimacy in our system of government.

The courts have limited institutional competence on matters that are often more accurately characterized, not as questions of law or legality, but as issues of public policy and administration. Thus, the courts should have a residual role in overseeing administrative action. While insisting on procedural openness and a minimum standard of rationality in, for example, the interpretation of legislation or the exercise of discretion, a reviewing court should afford a wide measure of deference to the reasoned choices of the specialist agency made on the basis of its experience in delivering the program. That experience may place an agency in a superior position relative to the courts in matters of procedure, statutory interpretation, fact-finding, and the exercise of discretion.

The functionalist approach has undoubtedly exerted a significant influence on administrative law in Canada since the early 1980s. For instance, as courts have expanded the applicability of the duty of fairness in the exercise of governmental powers, they have emphasized the importance of administrative context in deciding what procedures are legally required, including the costs and benefits to the public of affording to the litigant a particular procedural right. Context has also been considered in interpreting enabling legislation so as to give effect to legislative purpose. The courts have also been prepared to defer to agencies' interpretations of their enabling statutes, rather than to assume that the judiciary has a monopoly on the wisdom that is needed to elaborate on the legislature's instructions.

C. THE RULE OF LAW, DEMOCRATIC VALUES, AND FUNDAMENTAL RIGHTS

There is no doubt that the functionalist analysis has provided an important corrective to the view of the rule of law propounded by Dicey and other opponents of an interventionist role for the state in addressing problems unresolved or created by the operation of the market. The

common law did not have satisfactory answers to these problems. However, it seems also that a functionalist approach tends to attach insufficient weight to considerations of democratic accountability and fundamental rights and to the positive contributions that courts can make to realizing these goals. Despite their well-publicized shortcomings, courts seem to enjoy more public confidence than most other institutions of government. We see no necessary inconsistency between, on the one hand, the core values of the rule of law—government that is subject to law and respectful of the claims of individual dignity and basic liberties—and, on the other hand, the public interest in an administration with the capacity to deliver public programs effectively, efficiently, and responsively.

It is possible to rework some elements of the liberal version of the rule of law in order to provide a role for the law of judicial review in advancing these values in the contemporary administrative state. This is especially so in the age of the Charter. First, with the apparent dilution of public confidence in the capacity of the traditional political process to exercise democratic control over the operations of government, it is appropriate for administrative law, both through statutory reform and judicial review, to ensure procedural openness and enhance accountability in public administration. Public participation should be encouraged and not limited to those whose private rights may be adversely affected by administrative action. Direct public participation in decision-making at the level of the agency that is delivering a program may go some way toward compensating for the limited oversight of the legislature.

Second, while reviewing courts should normally show a measure of deference to a specialist agency's interpretation of its enabling statute, it is appropriate to scrutinize more closely those decisions that seem contrary to the interests of the intended beneficiaries of the legislation or to that aspect of the public interest that the legislation was enacted to protect. Examples include claimants under compensation and social security schemes; employees protected by labour legislation; and the protection offered by various statutory programs to members of the public in their capacities as consumers, airline passengers, or breathers of air and drinkers of water. In this way, the courts can provide a counterweight to the pressure that private economic interests often bring to bear on public agencies to sidestep their regulatory responsibilities.

Third, we recognize the force of the functionalist claim that it is often futile to imagine that the legislature had a meaning in mind when it enacted a provision in a statute that has to be applied to a set of facts that was almost certainly not foreseen at the time of enactment. We agree also with the functionalist point that the most reliable guide to the intention of the legislature is an interpretation that best furthers the purpose of the statute, a matter that the agency will often be better placed to determine than a reviewing court. However, the independence of the judiciary and its experience across a wide spectrum of the legal system make it appropriate for the courts to intervene when they are satisfied that—after allowance for agency expertise, linguistic ambiguity, and an approach to statutory interpretation that emphasizes legislative purpose—the agency's interpretation was nonetheless unreasonable or outright wrong. The courts have a role to play in preventing the subversion of the clear meaning of the statute by members of a specialist agency who are beholden to the government for reappointment or whose specialization may develop into tunnel vision. More broadly, the courts, when reviewing administrative action, have a role to play in upholding the democratic processes of the legislature.

Fourth, the constitutional rights entrenched in the Charter and s 35 have been identified by the Parliament of Canada that enacted it, and the governments of the provinces that approved it, as deserving of special protection. Because they apply to governments and legislatures, agencies charged with the implementation of a public program should be alert to the possibility that administrative action may violate constitutional rights and obligations. Regardless of whether it is legislation or administrative action that limits a Charter or s 35 right, or otherwise violates constitutional obligations, these infringements must be weighed carefully against

other competing public interests, an exercise to which administrative agencies will often be able to make an informed contribution.

The constitutional protection afforded to certain rights may be regarded as a signal that other rights—such as freedom of contract and private property rights—are less important and that their claim to a preferred position, even at the level of statutory interpretation, has been weakened. Thus, administrative agencies are not constrained to interpreting and exercising their legal authority in a manner that minimally interferes with the enjoyment of contract and property rights affected by the delivery of their statutory mandate. Indeed, even the constitutional protection of individual rights has been held not to constitute a licence for the judiciary to roll back the statutory protections of the welfare and regulatory state.

VI. MOVING FORWARD

The contents of this chapter suggest three directions from which administrative law should be approached. First, the details of the public program from which the particular dispute arises must be appreciated: the terms of the statute, the nature of the program, the characteristics of the officials and institutions, and the administrative and political contexts within which the statute operates. Second, a knowledge of the relevant legal principles and rules, both substantive and procedural, is essential to analyze the dispute and locate it within the elements that comprise our legal system: the rules and policies of the decision-maker, the common law, legislation, and the Constitution. Third, it is important to keep in view the theoretical dimensions of a problem and be able to consider it from the perspective of competing concepts of law and government.

The next three parts of this text deal with the grounds on which individuals may challenge administrative action in court, generally by appealing (when a right of appeal exists) or invoking its supervisory jurisdiction. In the balance of this part of the text, we provide an overview and general introduction to judicial review through the vehicle of what remains one of the most important administrative law judgments of the Supreme Court of Canada: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699. Part II examines administrative procedure and, in particular, the duty of decision-makers to act with procedural fairness. The final chapter of Part II considers the duty to consult and accommodate Indigenous peoples' interests in government decision-making, a different but related kind of procedural obligation that also includes substantive elements and serves to bridge the study of procedural review and substantive review. Part III considers the role of the courts in reviewing the substance or merits of administrative agencies' decisions rather than the process employed to reach these decisions. It discusses the framework governing the selection and application of the standard of review, through which superior courts uphold the rule of law by supervising administrative decision-makers' exercise of statutory powers, including where these touch on constitutional matters, while respecting legislatures' choice to create these bodies for the specific purpose of administering a statutory scheme. Finally, in Part IV, we focus on the remedies available from the courts to those who argue that, in making a decision or taking some action, an agency has breached the duty of fairness or made an incorrect or unreasonable decision.

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