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CHAPTER TWO

Governments in Miniature: The Rule of Law in the Administrative State

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I. Introduction

If there is one concept that ties together the seemingly disparate strands of administrative law, it is surely the rule of law. This chapter discusses several attributes of the rule of law and explores their relevance for Canadian administrative law. Although it is unlikely that the rule of law will constitute a direct and complete basis for answering a law exam question, the puzzles that administrative law evokes cannot be understood without recourse to this foundational concept.

Section II presents several of the main features of the rule of law: the rule of law as a foundational legal principle, the rule of law as a political ideal concerning institutional relations and competencies, and the rule of law as a distinctive political morality.[1] Section III assesses the Canadian articulation of the rule of law in the jurisprudence of the Supreme Court of Canada. Section IV focuses on judicial review of administrative action as a key component of the rule of law, the importance of statutory interpretation, and three difficulties for the "deference as respect" model of Canadian administrative law. The conclusion argues that Canadian administrative law is committed to a distinctive form of the rule of law, which simultaneously attempts to ensure rule-of-law accountability and democratic accountability in all parts of government.

II. The Rule of Law in Theory

Certain philosophical concepts—for example, democracy, freedom, autonomy, equality, and the rule of law—do not have a firmly agreed-upon core of meaning and, therefore, can be considered essentially contested.[2] Despite this uncertainty, I will argue that the rule of law can be characterized by three interrelated features: (1) a jurisprudential principle of legality; (2) institutional practices of imposing effective legal restraints on the exercise of public power within the three branches of government; and (3) a distinctive political morality shared by all in the Canadian political community. While this presentation may seem uncontroversial, deeply embedded within any discussion of the rule of law is a debate about the legitimate scope and content of judicial power, particularly in a democratic state.

A. The Purpose of the Rule of Law: The Non-Arbitrary Rule of Men (and Women)

The rule of law initially seems a simple and straightforward idea, concisely articulated by Aristotle in his view that the laws, not men, should rule in a well-ordered political community.

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1 By political morality, I mean principles of justice that are publicly endorsed and justify the use of coercive state power—power that the state claims universal authority to exercise over all members of a political community. As will be discussed further, different political moralities provide different bases to justify the supervisory role of courts and the scope of judicial power in the Canadian legal system.

2 For an elucidation of the nature of "essentially contested concepts" with reference to the rule of law, see Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 Law & Phil. 137. Waldron discusses how disagreements about underlying normative issues—issues such as what values the rule of law is meant to promote or what is the best understanding of the rule of law—are pervasive and predictable. Disagreement can also exist about what the most important features are, or what features are necessary but not sufficient, or how the features work together in a successful realization of the concept.

Though men and women do, of course, wield public power, the rule of law represents a normative standard by which all legal subjects can evaluate and challenge the use of public power. Because the concept stands for the supremacy of law over unconstrained political power, a state committed to the rule of law will go some distance to guarantee that all public officials are both authorized and bound by law in the exercise of their functions and powers. In a legal system governed by the rule of law, all persons will possess formal equality, ensuring that elected officials and high-ranking members of the executive branch of government will be held legally accountable just like any other person. This aspirational prescription for good government has united thinking about the rule of law from the ancients Greeks down to contemporary theorists.

The principle of the rule of law is animated by the need to prevent and constrain arbitrariness within the exercise of public authority by political and legal officials in terms of process, jurisdiction, and substance. Arbitrariness commonly connotes indifference by the decision-maker about the procedures chosen to reach an outcome. Indifference about the procedures used to make a decision makes it more likely that the result will be unjust or unfair. In Canada, it is a generally held belief that all government decisions should be made using processes that put relevant considerations before decision-makers who care about achieving the best possible outcomes. As Binnie J. writes regarding procedural fairness in the *Mavi* decision, "it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions … [because the] simple overarching requirement is fairness, and this 'central' notion of the 'just exercise of power' … ."[3]

All branches of government—executive, legislative, judicial, administrative—can behave arbitrarily in relation to other branches of government. For example, if the federal or a provincial government acts in contravention of the constitutional division of powers, it is acting arbitrarily and will be found *ultra vires* its jurisdiction. If one branch of government attempts to monopolize government power, or encroaches on the powers of another branch, the action will offend the doctrine of the separation of powers, which is a principle that authorizes a particular distribution of public power in a state. If a decision-maker in government uses statutory powers outside the purpose of the enabling statute, the decision will be found arbitrary and will be invalidated because it is incorrect or unreasonable in law.

In addition to the examples concerning procedure and jurisdiction, a decision may be found arbitrary in substance because it is biased, illogical, unreasonable, or capricious. In other words, it will offend what appear to be shared standards of reasonableness, rationality, or morality. Such a decision may exhibit a lack of care, concern, or good judgment on the part of the decision-maker toward the affected individual or group. It can, instead of a justified response, show mere opinion, preference, stereotyping, or negative discrimination. Decision-makers act arbitrarily when they treat individuals with a lack of respect, ignore dignity interests, or deny the equal moral worth that we all share as members of the Canadian political community.[4] Arbitrariness can also suggest that a decision-maker possesses

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3 *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504 at paras. 39 and 42.

4 The benefits of the rule of law can extend to non-citizens who are present in Canadian territory. Evan Fox-Decent and Alexander Pless, in Chapter 12, The Charter and Administrative Law: Cross-Fertilization or Inconstancy?, discuss how cases involving non-citizens in the immigration context have posed challenges for, and often been the source of extensions to the scope of, procedural fairness in administrative law.

unconstrained discretionary powers, such that he or she alone can decide on how to use these expansive powers; hence, arbitrariness can be associated with a unilateral method of decision making or one that is not sufficiently reciprocal, consultative, or participatory. Historically, this type of arbitrariness has been associated with the type of power wielded by absolute monarchs. Most familiarly, arbitrariness is expressed in the idea of an untrammelled exercise of will, or the uncontrolled power, of a public decision-maker. A decision, for example, may exhibit unilateralness to a degree that becomes oppressive and will therefore be considered an abuse of power. This understanding informs familiar criticisms of majority decision making that infringes minority rights. Finally, arbitrariness seems to suggest the absence of a rule, but it should be remembered that judges or administrators can arbitrarily apply a valid rule.

A recent example of substantive arbitrariness is *Insite,*[5] a case concerning North America's first government-sanctioned safe injection facility, located in Vancouver, which provides medical supervision to intravenous drug users. The federal minister of health decided not to renew the exemption protecting the provincial facility from federal drug laws concerning possession and trafficking in the *Controlled Drugs and Substances Act*.[6] The lack of an exemption meant that the facility would have to close. On review, the Supreme Court of Canada found that the CDSA was a valid federal statute, was applicable to Insite and its activities, and had only an incidental effect on the provincial health care facility. Section 56 of the CDSA gave the minister of health a broad discretionary power to grant exemptions from the application of the Act "if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest." Relying on this provision, the claimants argued that the CDSA limited their s. 7 rights under the Charter[7] because the effect of the discretionary decision denied injection drug users access to potentially life-saving medical care. The Court held that the CDSA did not violate s. 7, even though liberty and security interests were engaged, because the possibility of an exemption acted as a safety mechanism. Nevertheless, the Court went on to find that it was the minister's actual exercise of discretion in not granting the exemption that violated s. 7 of the Charter and was, therefore, "not in accordance with the principles of fundamental justice because it [was] arbitrary, disproportionate in its effects, and overbroad."[8] The Court considered all of the available evidence before the decision-maker when he made the decision, and concluded that the decision was inconsistent with the statutory objectives of public health and safety found in the CDSA. The discretionary decision to deny the licence was therefore arbitrary in the sense that it did not further the statutory objectives and lacked a real connection on the facts to the statutory purposes—during its eight years of operation, Insite proved to save lives without undermining public health and safety. The Court also

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5 *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 [*Insite*].

6 S.C. 1996, c. 19 [CDSA].

7 *Canadian Charter of Rights and Freedoms* (the Charter), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 7 guarantees that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

8 *Supra* note 5 at para. 127.

concluded that denying the essential services Insite provides was grossly disproportionate to the benefit of having a uniform drug policy. In a surprising move, the Court used the remedy of *mandamus* to order the minister to grant the exemption to Insite.

The ever-present political and legal problem of the arbitrary use of public power profoundly animates rule-of-law attempts to ensure the legality, reasonableness, and fairness of administrative processes and their outcomes so that public authorities do not overreach their authority. Before turning to administrative law, however, this section considers legal and political theory in order to identify several common features of the rule of law.

B. Attributes of the Rule of Law

The rule of law acts as a foundational "metaprinciple"[9] that organizes an open set of related principles such as the principle of legality, the principle of the separation of powers, the principle of responsible government, the principle of judicial independence, the principle of access to justice, the principles of fundamental justice, the principle of the honour of the Crown,[10] and so on. If the rule of law has a core meaning in jurisprudence, it is the principle of legality, which conveys the basic intuition that law should always authorize the use and constrain the risk of the arbitrary use of public power. The principle of legality restrains arbitrary power in three ways: first, it constrains the actions of public officials; second, it regulates the activity of law making; and third, it seeks to minimize harms that may be created by law itself. The views of three prominent legal theorists—Albert V. Dicey, Lon Fuller, and Joseph Raz—illustrate how the principle of legality constrains the misuse of public power in each of these ways. Their views will then be contrasted to Ronald Dworkin's rights-based model of adjudication at the end of this section.

The first model of legality was most famously articulated by Albert V. Dicey in his theory of 19th-century British constitutionalism. In Dicey's view, the rule of law possessed three features: (1) the absence of arbitrary authority in government, but especially in the executive branch and the administrative state; (2) formal legal equality so that every person—including and especially public officials—in the political community is subject to the law; and (3) constitutional law that forms a binding part of the ordinary law of the land.[11]

Common-law courts, in this model, provide the institutional connection between rights and remedies and are the site for the development of the general principles of the common-law constitution. According to Dicey, judge-made law combined with an unwritten constitution represented a better mode of legal constraint than written codes and constitutions

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[9] See Friedrich A. von Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1978) at 205 [Hayek].

[10] In Chapter 13, In Search of Aboriginal Administrative Law, Janna Promislow and Lorne Sossin discuss the rule-of-law dimensions of the honour of the Crown in Aboriginal administrative law and the duty to consult and accommodate Aboriginal interests in decision-making processes. The Supreme Court confirmed the principle of the honour of the Crown and its supporting doctrine of the duty to consult as constitutional limits on executive discretion in *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103.

[11] Ordinary law usually means domestic law, and only international law if it has been incorporated by Parliament. This chapter focuses on domestic law. Gerald Heckman, in Chapter 14, explores the relationship between international human rights norms and administrative law.

because they were less vulnerable to executive attempts to suspend or remove rights. To take away the right to individual freedom in the English Constitution, Dicey wrote, would require "a thorough revolution in the institutions and manners of the nation."[12] In a common-law constitutional system like Britain's, the Constitution is not the source, but the consequence, of the rights of individuals as defined and enforced by the common-law courts. Dicey argued that this particular institutional advantage of the courts meant that they were best placed not only to control the political executive in the name of the rule of law, but also to provide superior protection of fundamental rights, like liberty and property, in the English system.

In the Diceyan model, Parliament was sovereign and supreme. Parliament was the primary source of all ordinary law and ought to be the source of all governmental power. If the use of public power was not authorized by Parliament, or if a decision-maker had acted beyond the powers delegated to it, then this would be considered *ultra vires* by the courts.[13] The justification for judicial intervention rested on a number of grounds, including:

1. the institutional role of the courts as the principal external check on executive and agency powers;
2. the specific task allocated to the courts through administrative law to constrain administrative discretion by ensuring that an administrative body did not overstep the jurisdiction that the legislature had set down in the statute; and
3. the judicial perception that a fundamental role of courts was to protect and vindicate the private autonomy of affected individuals, primarily through common-law rights derived from contract, tort, and property.

One key consequence of the Diceyan model was that administrative bodies were viewed with distrust as almost inherently lawless forms of governance and should be shown no curial deference in the review of their decisions.[14] This perception worsened when it became clear that Parliament could no longer provide proper oversight of administrative agencies in the modern state through regular legislative scrutiny or through political practices like ministerial responsibility.

In contrast to Dicey's common-law model, which offers institutional control on forms of executive discretion through the judiciary, other theories of the rule of law recommend a legal system that aims for a set of formal characteristics that are public and can guide the conduct of all legal subjects, including public officials. A common set of principles has evolved over time and includes those enunciated by Lon Fuller and Joseph Raz: publicity, non-retroactivity, clarity, generality, consistency, stability, capability of being obeyed, and declared rules constraining the administration of law as well as the discretion of public officials such as administrative decision-makers and the police. The presumed virtue of these

12 See Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Holmes Beach, FL: Gaunt, 1996) at 197.

13 For a more detailed exposition of the implications of Dicey's *ultra vires* model, see Paul P. Craig, "The Nature and Purpose of Administrative Law" in *Administrative Law*, 5th ed. (London: Sweet & Maxwell, 2003) at 3.

14 See e.g. Hayek's characteristic overstatement: "When the administration interferes with the private sphere of the citizen … the problem of discretion becomes relevant to us; and the principle of the rule of law, in effect, means that the administrative authorities should have no discretionary powers in this respect." Hayek, *supra* note 9 at 213.

formal requirements rests on the belief that they permit individuals to predict legal responses to their behaviour by state officials, thereby avoiding sanctions and benefiting from a minimum ambit of freedom. Such a presumption is especially important for criminal law.[15] People can also interact with each other secure in the knowledge that they know in advance the rules that will likely apply to their behaviour should a dispute arise between them. Advanced knowledge is, of course, not empirically true and this claim relies on the ability of the law to align with other co-existing normative orders (i.e., shared or general norms, custom, etiquette, workplace, religious, or business relations) in order to be effective. Individuals can also rely on a certain determinacy in the application of law so that like cases will be treated alike. In this minimalist form, the rule of law can be equated with legal formalism because adherence to the rule of law does not mean that the resulting laws are substantively just, only that they are valid and meet the minimum legal conditions considered essential for the realization of procedural justice.

Lon Fuller's "inner morality" of law represents a procedural approach to understanding the principle of legality—in other words, the laws of lawfulness.[16] Fuller conceived of the rule of law as the enterprise of subjecting human conduct to the governance of rules in order to create and sustain a framework for successful social interaction. Compliance occurs, in part, because citizens derive benefits from following the law.[17] Lawmakers, then, have an interest in optimizing the legal conditions necessary for, and conducive to, voluntary compliance and cooperation. Fuller called this relationship between government and the citizen a "kind of reciprocity" that respects people's autonomy because the enterprise of law is not a "one-way projection of authority" onto legal subjects.[18] Fuller's principles of legality aim to guide lawmakers in achieving this end. For example, the principle of publicity guides accountability and transparency in government decision making because secret laws undermine legality and frustrate the citizen's ability to know where he or she stands in relation to a system of rights, benefit distribution, and/or enforcement and punishment. To take another example, the principle of congruency ensures a match between the rules as announced and the rules as applied in order to avoid a legal system composed of arbitrary or ad hoc commands. This last principle deeply informs discretionary decision making in the administrative state. These principles therefore guide law making wherever it is found in the state:

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[15] These principles differ according to the specific area of law. The principle of legality in criminal law, for example, includes the prohibition against retroactive criminalization or *ex post facto* laws as well as the void for vagueness doctrine with respect to provisions within criminal statutes. See *R. v. Grant*, [2009] 2 S.C.R. 353, where the Supreme Court explains the relationship between the principles of the administration of justice and the rule of law in a case concerning improper police conduct and the admission of evidence. On the relationship between the rule of law and vagueness in constitutional law, chiefly in the criminal law area, see Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: University of British Columbia Press, 2004).

[16] See Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven & London: Yale University Press, 1969) at 33 [Fuller].

[17] Hence the rule of law provides one basis for the duty to obey the law and invokes concerns about when it is morally appropriate to disobey the law. For a discussion of the relationship between the duty to obey the law and the rule of law, see *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at paras. 6-64, 90-121.

[18] Fuller, *supra* note 16 at 39, 207.

legislative, judicial, and administrative. But, unlike Dicey, Fuller's conception of legality does not assume that administrative bodies are inherently lawless. Rather, if they follow these principles, they may be more likely to engage in lawful activity and reviewing bodies, like the courts, may be obliged to show deference to their decisions.

Joseph Raz provides a third well-regarded interpretation of the rule of law.[19] Though in agreement with several of Fuller's principles, he believes it is possible to reduce the rule of law to one basic idea: law must be capable of guiding the behaviour of its subjects.[20] Raz further claims that most of the requirements we associate with the rule of law can be derived from this one basic idea in which the rule of law as the principle of legality acts as a practical guide for making effective law, thereby constraining the harms created by law itself. Raz's principles aim to guide both the formation and application of law, but he also emphasizes that his theory does not enumerate all of the possible principles associated with the rule of law. His set of principles explicitly includes the principle of judicial independence in order to preserve the rule of law. An additional principle that he proposes is access to justice—though Raz offers no views on how such access should be realized in practice, and whether or not access to the courts constitutes a positive duty on government.[21] Lastly, Raz emphasizes the necessity for a legal system to provide effective remedies so that affected legal subjects can vindicate their rights.[22]

Because law in part creates the danger of the exercise of arbitrary public power, the rule of law acts to minimize this risk, thereby minimizing harms that the legal system might itself create. For example, overbreadth in a statutory provision is a deficiency that makes it more likely that the law will cause harm by: (1) not adequately constraining the use of power; (2) not providing guidance for individual behaviour; or (3) widening the potential to infringe a specific right, such as individual liberty. Vagueness in statutory language may present similar risks. A lack of generality, on the other hand, may violate legal equality or individual dignity interests because the classification or categorization may disproportionately "single out" a particular segment of the population. A lack of generality may also indicate negative discrimination on the grounds of race, sexual preference, or other enumerated grounds.

According to Raz, the rule of law has an instrumental role as a means to realizing other important ends such as democracy, equality, and human rights.[23] This is because in a society

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19 See also Andrei Marmor, who claims to hold a position in between those articulated by Fuller and Raz, in "The Rule of Law and Its Limits" (2004) 23 Law & Phil. 1.

20 Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 214 [Raz, *The Authority of Law*].

21 He writes: "Long delays or excessive costs may effectively turn the most enlightened law into a dead letter and frustrate one's ability effectively to guide oneself by the law." *Ibid.* at 217. For judicial treatment of undue delay, see Grant Huscroft's discussion of *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 in Chapter 5, From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review, and Evan Fox-Decent and Alexander Pless's discussion of *Blencoe* in Chapter 12.

22 Cristie Ford, in Chapter 3, Dogs and Tails: Remedies in Administrative Law, describes the variety of administrative law remedies a tribunal might impose as well as those available through judicial review.

23 Raz controversially states that "[a] non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened

characterized by deep diversity, we may agree on a common set of values that we hold important, but we will not all or always agree how these fundamental values should be ranked in relation to each other.[24] Because we live in a modern, industrial pluralistic society, we require both democracy and the rule of law and this fact underscores the importance of democratic legislation in responding to different interests, perspectives, subcultures, and continuous social and economic change.[25] Courts and legal culture simply can neither respond as quickly nor as adequately as democratic politics can.

The relative autonomy of law from politics, for which Raz seems to be the strongest advocate, is a central requirement of the rule of law, but one that poses a number of challenges for the administrative state. Though it is impossible to isolate law from politics completely, a complex institutional structure helps guarantee impartiality and fairness in decision making. One way of thinking about this relative autonomy is through the doctrine of the separation of powers and the principle of judicial independence as fundamental constitutional requirements.[26] According to the doctrine of the separation of powers, sovereign power is divided and housed within three different branches of government, each with its own function and staff: the executive, the judiciary, and the legislature. Canada's Westminster system of government, however, cannot be characterized by bright-line distinctions among the three branches—particularly, the executive, Cabinet, and bureaucracy. In parliamentary systems such as Canada's, the executive branch exerts considerable influence in appointing judges as well as in controlling the legislative agenda during a majority government. As the Supreme Court writes in *Wells*:

Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law." Raz, *The Authority of Law*, *supra* note 20 at 211. For Raz, a legal system can be said to exist despite the fact that it does not conform to the principles of the rule of law. He therefore rejects the natural law maxim that "an unjust law is no law at all."

[24] Raz belongs to the philosophical school of moral or value pluralism, which holds that in modern societies, fundamental values may be correct, but will conflict with or be incommensurable with each other and therefore involve tough choices and sacrifices in order to resolve the conflict. Sometimes, a constitution will rank our values for us in terms of importance—consider, for example, how the Charter equally ranks equality and liberty, but explicitly excludes property interests. A statute can indicate this ranking of values—recall, for example, how the statute in the *Insite* case prioritized both medical or scientific purposes as well as public health and safety, though it was up to the judiciary, through interpretation, to resolve the conflict between them. Alternatively, the political process presents the chief forum for us to argue and work out collectively which values we hold most important. These value conflicts inevitably arise in legal decisions, especially in those cases involving dissents and concurrences. Raz and other value pluralists should be distinguished from moral relativists who hold that no objective or universal standards of right and wrong exist and that moral judgments are culturally and temporally dependent on the traditions, convictions, or practices of an individual or a group of people.

[25] Joseph Raz, "The Politics of the Rule of Law" (1990) 3:3 *Ratio Juris* 331 at 335 [Raz, "Politics of the Rule of Law"].

[26] For discussion of the separation of powers in constitutional jurisprudence, see *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 38; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 [*Cooper*]; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 [*Wells*]; and *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 [*Operation Dismantle*].

> The doctrine of separation of powers is an essential feature of our constitution. It maintains a separation of powers between the judiciary and the other two branches, legislature and the executive, and to some extent between the legislature and the executive. … The separation of powers is not a rigid and absolute structure. The Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and *de facto* controls the legislature.[27]

Nevertheless, the doctrine, when informed by the principle of judicial independence, constitutionally guarantees the separate function of the courts and informs the tradition of independence that our legal profession, police, and civil service share.[28] In Chapter 8, Caught Between Judicial Paradigms and the Administrative State's Pastiche: "Tribunal" Independence, Impartiality, and Bias, Laverne Jacobs further discusses both judicial independence and the independence of administrative bodies such as tribunals.[29] There she describes administrative tribunals as hybrid bodies, or "governments in miniature,"[30] possessing differing combinations of policy making, rule making, and adjudication, which make their purposes and functions difficult to separate. Because administrative tribunals are creatures of statute that "span the constitutional divide between the judiciary and the executive"[31] and have a significant policy-making role, their independence will be much less protected than that of the courts.

The growth of the regulatory state and administrative tribunals, however, underscores the importance of bureaucratic justice and the expectation that one can "conduct one's life without being frustrated by governmental arbitrariness or unpredictability."[32] As Raz argues, implementing the principle of the rule of law in modern government requires an elaborate institutional complex staffed by competent and relatively impartial officials, using predictable and fair procedures in order to make reasoned and public decisions that, if an individual wishes to dispute, can potentially be argued by specially trained legal professionals and reviewed by an independent judiciary.[33]

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27 *Wells*, *supra* note 26 at paras. 52, 54.

28 See *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; and *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286.

29 See, in particular, Jacobs's discussion of *McKenzie v. Minister of Public Safety and Solicitor General et al.*, 2006 BCSC 1372, a case concerning procedural fairness, tribunal independence, the rule of law, and the dismissal of a residential tenancy arbitrator for arbitrary reasons.

30 I borrow this phrase from John Willis, an important early Canadian public law scholar. See "Three Approaches to Administrative Law: The Judicial, the Conceptual and the Functional" (1935) 1 U.T.L.J. 53 at 73. See also Mary Liston, "Willis, 'Theology,' and the Rule of Law" (2005) 55 U.T.L.J. 767.

31 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 at para. 24.

32 Raz, "Politics of the Rule of Law," *supra* note 25 at 332.

33 Raz, however, notes that the bureaucratic model of the rule of law may serve the business and legal communities, but it makes the law both financially inaccessible as well as remote and alienating for ordinary people. *Ibid.* at 333.

C. Ruling the Judges

How might each of these theories inform judicial understandings of their role in a rule-of-law order? Returning to the three theorists discussed above, Dicey considered the courts to be the chief rule-of-law check on the executive in a Westminster system of government and, later, the primary means to control delegations of discretion from the executive to the administrative state. The Diceyan model saw the judiciary as guardians of common-law checks—in his words, "regular law"—on the arbitrary power of the executive and its delegates in order to protect individual rights. Such a view meant that courts need not defer to, or show respect for, the decisions made by administrative bodies that implicated common-law rights and interests. In matters of agency interpretation, his theory of the rule of law argues for the primacy of a correctness standard of review in order to scrutinize administrative decisions on their merits. The implications of a Diceyan approach to the standard of review will be discussed more fully in section IV.C.2 of this chapter.

As Colleen Flood and Jennifer Dolling explain in Chapter 1, An Introduction to Administrative Law: Some History and a Few Signposts for a Twisted Path, Canadian courts gradually became aware of the problems of legitimacy when intervening in decisions made by administrative agencies and sought to set some limits to the exercise of their own reviewing powers. Although courts were wary about too overtly substituting their views for those of the agency when they held a different opinion about the merits of the decision, they could still intervene easily through their approach to statutory interpretation. Through their approach to statutory interpretation, courts could argue that intervention was justified when the legislature intended that questions of law or mixed fact and law implicated the jurisdiction of the agency, thereby requiring judicial review.

The approaches articulated by Fuller and Raz are both aware of this dilemma and intend that their common set of principles also control judicial power and judicial exercises of discretion in order to prevent arbitrariness in the courts. The procedural practices available by virtue of the rule of law—rights to representation, cross-examine witnesses, *habeas corpus*, the right to appeal an adverse decision, standing to raise legal issues—ensure that judges play a prominent role in Fuller's theory. Moreover, because Fuller viewed law making as a shared and ideally cooperative institutional enterprise among state actors and institutions, he emphasized the democratic potential of law to ensure accountability in government by facilitating participation of affected individuals in the decision-making process. Nevertheless, Fuller argued that litigation alone is an unsatisfactory method of ensuring access to justice and just outcomes because "haphazard and fluctuating principles concerning this matter [standing] can produce a broken and arbitrary pattern of correspondence between the Constitution and its realization in practice."[34] Serious disadvantages of relying

[34] Fuller, *supra* note 16 at 81. In "The Form and Limits of Adjudication," Fuller controversially claimed that many polycentric disputes—disputes involving a large number of affected parties—are inherently unsuitable for adjudication and should therefore be considered non-justiciable in public law. According to Fuller, polycentricity is both pervasive and a matter of degree. Private law disputes, by contrast, take the familiar form of a bipolar encounter between plaintiff and defendant, and will likely have few polycentric elements. The problem Fuller identified is that of knowing when polycentric elements have become so significant that the proper limits of adjudication have been reached such that these disputes should be resolved by the legislature or by the market. (1978) 92 Harv. L. Rev. 353.

solely on the courts as a bulwark against the "lawless administration of the law" include the willingness and financial ability of the affected party to litigate, the inability of the courts to properly constrain police lawlessness, and the ability of courts to make things much worse by departing from principles, not articulating reasonably clear general rules, issuing contradictory rulings, changing direction frequently or suddenly, and aggravating the already vexed problem of interpretation.[35]

Raz's theory gives support to institutional design, such as revised procedures, because he intends the common set of principles to inform the creation of effective statutory purposes, standards, and rules with the overall aim of providing guidance to decision-makers and affected parties. His theory also attempts to reconcile the rule of law with democracy. As discussed earlier, Raz's approach places a great emphasis on the role of legislation in modern societies. Nevertheless, he does not deny a role for the courts in making and developing public law. For him, the rule of law consists of a core idea in the "principled faithful application of the law."[36] Legislatures are directed by, and satisfy, this ideal when they make reasonably clear laws that are coherent and transparent in their purposes. An open and public administrative of justice is directed by and satisfies the ideal when the judiciary and subordinate legal institutions apply statutory and common law faithfully, openly, and in a principled way in order to facilitate legislative purposes. The rule-of-law role of the courts arises out of the ability of the judiciary to ensure coherence in law by bringing legislation into line with legal doctrine.[37] In Raz's model, each institution mutually supports the other: legal institutions will be loyal to democratic legislation through interpreting intent while rejecting inconsistent purposes.[38] Democratic institutions will, in turn, respect civil rights, legal coherence, and long-term interests reflected in existing legal culture.[39]

Section II.A on the legal control of substantive arbitrariness above alluded to the normativity of the legal subject animating individual rights against the state as well as the duties with which the state must comply. This potentially authorizes greater judicial intervention, but not on the same grounds as in Dicey's model. A current and prominent proponent of this approach to adjudication can be found in the legal philosophy of Ronald Dworkin.[40] Dworkin's legal subject is an individual bearer of rights who is entitled to demand the resolution of disputes over the content of these rights through the legal system—specifically through courts, which he calls the "independent forum of principle."[41] Dworkin's theory

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35 Fuller, *supra* note 16 at 82.

36 Raz, "Politics of the Rule of Law," *supra* note 25 at 335.

37 *Ibid.* at 336.

38 Raz distinguishes between conflicting and inconsistent purposes. Conflicting purposes are endemic to pluralistic societies and require compromise. But "no rational society should entertain inconsistent [values]": for example, a society cannot endorse the indissolubility of marriage while, at the same time, permit divorce on demand. Inconsistent purposes and values are a form of conflict that is logical, not political. *Ibid.* at 337.

39 Raz acknowledges that his model of the rule of law is anti-majoritarian because it constrains democratic legislatures. Though part of the culture of democracy, the rule of law demands restraint and a willingness to compromise by the majority so as not to disregard the rights and interests of minorities.

40 Two significant texts for this argument are Dworkin's *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) and *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

41 See *A Matter of Principle*, *ibid.* at 30-32 and Chapter 2, "The Forum of Principle."

therefore grounds what he calls the "rights conception of the rule of law."[42] For Dworkin, the rule of law necessarily entails the judicial determination of rights through principled interpretation in hard cases where a legal answer must be crafted by judges from existing legal sources (e.g., statutes, regulations, constitutional documents, and case law) and principles of political morality. A principled interpretation must fit the existing positive law but it also must be compatible with select principles from a larger political morality. Government respect for individual freedom and equality, for example, would be principled requirements of this larger political morality. A key consequence of Dworkin's theory is that judges, not legislators, are ultimately charged with guarding the moral integrity of the political order because, as the chief political actors in the form of principle, they possess the knowledge and the skills—honed through their unique access to the interpretation of the law—to be the better articulators of a constitutionalized public morality.[43] Dworkin's theory of adjudication has as its central focus a concept of justice designed to further political principles of autonomy, dignity, equality, and liberty for all individuals in the political community. Politics, on his account, should be held to a higher standard because we ought to prioritize the pursuit of justice in society. Nevertheless, if courts should respect pluralism as a political fact, and ideological pluralism in particular, their job is not to endorse wholeheartedly one particular substantive political morality: that, many critics of Dworkin argue, is typically seen as the role of the legislature.[44]

III. The Supreme Court of Canada on the Rule of Law

Legal and political theories like those canvassed above constitute the often unstated background assumptions that inform judicial understandings of the rule of law and appear either implicitly or explicitly in specific cases. The Supreme Court of Canada has articulated various features of the rule of law, but the Court has not (and perhaps never should) set out a fully articulated conception of the rule of law.[45]

A. The Heart of the Canadian Rule of Law

The marked difference between the formal and substantive approaches to the rule of law can be seen in the case of *Roncarelli v. Duplessis*,[46] which contains several examples of arbitrary

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[42] *Ibid.* at 11-12.

[43] Contrary to Dworkin, the authority of the courts in Raz's model to constrain legislation does not come from their superior wisdom or from their guardianship of superior law. Raz, "Politics of the Rule of Law," *supra* note 25 at 336.

[44] Many democratic theorists have criticized Dworkin's theory of adjudication and his conception of the rule of law. See e.g. the collection of essays in Allan C. Hutchinson & Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987); Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Toronto: Oxford University Press, 2001); and Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

[45] Perhaps because, as Raz writes, "judges who become philosophically ambitious are bad judges." *Supra* note 25 at 336.

[46] [1959] S.C.R. 121 [*Roncarelli*].

power: the existence of unlimited discretionary powers in an agency; a decision-maker acting in bad faith; inappropriate responsiveness to an individual situation where important interests were at stake; consideration of irrelevant factors in the decision; disregard of the purpose of a statute; and dictation of the decision by an external and unauthorized person. *Roncarelli* illustrates one of the primary functions of the rule of law: the control of executive arbitrariness.[47]

Frank Roncarelli owned a Montreal restaurant and was a Jehovah's Witness. At that time, the Quebec government and the Catholic Church joined forces to persecute Jehovah's Witnesses, whom they viewed as dangerous to the established order, seditious, and anti-Catholic. Hundreds of Jehovah's Witnesses were jailed for distributing religious pamphlets in violation of municipal bylaws. Roncarelli posted bail for fellow Witnesses. Premier Duplessis publicly warned Roncarelli to stop posting bail, and, when Roncarelli continued, Duplessis ordered that the liquor board cancel Roncarelli's permit to sell alcohol. The cancellation of the liquor licence forced Roncarelli to shut down his restaurant.

The Supreme Court examined the actions of Maurice Duplessis, who acted as both premier and attorney general, and found them invalid. Invoking the unwritten principle of the rule of law, the Court held that no public official is above the law. Duplessis had stepped outside the authorized bounds of his power as attorney general by ordering the revocation of Roncarelli's liquor licence. He also inappropriately exercised the power that was properly given to the chairperson of the Quebec Liquor Commission by the enabling statute, *An Act Respecting Alcoholic Liquor*. Last, regardless of who actually was the decision-maker, the decision offended the rule of law because the substance of the decision was incompatible with the purpose of the statute. Being a Jehovah's Witness was irrelevant to a decision concerning the continuation of a liquor licence for operating a restaurant. The true nature of the decision was to punish Roncarelli for exercising his civil right to post bail.

There are two ways to understand the use of the principle of the rule of law in this judgment: the formal Diceyan model, discussed in section II, above; and a more value-laden substantive constitutionalism, or what David Dyzenhaus calls the unwritten "constitution of legality."[48] On the Diceyan model, the Supreme Court held that Chairman Edouard Archambault of the Quebec Liquor Commission had not made a decision at all because Duplessis had substituted his decision for that of the proper authority, thus exercising his power arbitrarily. The case confirmed that Premier Duplessis had overstepped his jurisdiction as attorney general by, in effect, telling Chairman Archambault to cancel Roncarelli's liquor licence "forever" so that his restaurant would go out of business. Under the terms of the governing statute, however, this power had been delegated to Chairman Archambault, not to the attorney general who, at most, could only provide advice on the matter.[49] The legal wrong committed against the rule of law here was the violation of the legal principle

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47 For a detailed exposition of the relation between the rule of law and the administrative state in administrative law, see Gus Van Harten et al., "The Administrative State and the Rule of Law" in *Administrative Law: Cases, Text, and Materials*, 6th ed. (Toronto: Emond Montgomery, 2010) chapter 1.

48 See David Dyzenhaus, "The Deep Structure of Roncarelli v. Duplessis" (2004) 53 U.N.B.L.J. 111 at 124.

49 Alternatively, and to paraphrase Don Corleone in *The Godfather*, Duplessis provided "advice," the nature of which Archambault could not refuse.

of validity, which affirms that "every official act must be justified by law" or be found *ultra vires*: the decision was not valid because the power to cancel licences was not given to either the premier or the attorney general.[50] As Dyzenhaus points out, the problem with this line of argument is that had Archambault not consulted Duplessis, his decision would have been found valid, particularly because the enabling statute granted Archambault seemingly unfettered discretion.[51] Indeed, the relevant provision of the statute, s. 34, simply and broadly stated that the Commission "may refuse to grant any permit." On this basis, only when an administrative authority acts beyond the power given to it by Parliament can the courts legitimately enforce the rule of law or reaffirm the separation of powers.

In contrast, Rand J., writing in a concurring judgment for the majority, stated that public authorities, especially those with broad discretionary powers, are always constrained by the unwritten constitutional principle of the rule of law, even when the legislation contains no explicit or written constraints:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. … "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.[52]

Even if Archambault had acted on his own in cancelling Roncarelli's licence, he would have used his discretionary powers inappropriately according to Rand J. because his decision contradicted the substantive content of the rule of law:

> That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licences on the highest level of fair and impartial treatment to all may be forced to follow the practice of "first come, first served," which makes the strictest observance of equal responsibility to all of even greater importance.[53]

Conventionally in public law, the rule of law's constraints on government actors seeks to prevent such "[virtual] vocation outlawry" through enforcement of the purpose of the statute and good faith decision making achieved through the use of fair procedures.[54] Rand J.

[50] This is the view taken by Peter Hogg, *Constitutional Law of Canada: 2011 Student Edition* (Toronto: Carswell, 2011) at 34-4.

[51] Dyzenhaus, *supra* note 48 at 125.

[52] *Roncarelli*, *supra* note 46 at 140.

[53] *Ibid.* at 142.

[54] *Ibid.* at 141.

added more content: the administrative tribunal violated Roncarelli's rights as a citizen—freedom of religion, freedom of expression, freedom to pursue his livelihood—thereby damaging the normative relationship between the state and the citizen.[55]

On the formalist account, administrative law concerns the written statutes, rules, and principles that govern public decision-makers. Public decision-makers must not act outside their authority, must not abuse their authority, and must be seen not to do so. Judicial scrutiny within administrative law focuses on the limits on the authority given to decision-makers by statute or prerogative. On the substantive account, such authority is bound by the purpose and terms of the statute, by regulations and guidelines, by the Constitution, and by both written and unwritten legal principles. Formally valid exercises of discretion can offend the rule of law and can subsequently be determined to be a legal wrong as an abuse of power. *Roncarelli* still stands as a paradigmatic example of the deeper principled and purposive approach to understanding how the rule of law animates administrative law.

B. A Foundational Principle, but an "Unwritten" One

Roncarelli was an early implied bill of rights case that relied on the unwritten principle of the rule of law. As a foundational principle, the rule of law is both part of the written and (so-called) unwritten Constitution.[56] As an unwritten principle, the rule of law implicitly appears in the preamble to the *Constitution Act, 1867*, where it states that Canada will have a "Constitution similar in principle to that of the United Kingdom."[57] The rule of law also appears as an explicit principle in the preamble to the *Constitution Act, 1982*: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."[58] Whether implicit or explicit, then, the principle of the rule of law applies to the entire constitutional order and every part of government. The deepest and broadest articulation of the unwritten principle of the rule of law in the Canadian order appears in two reference cases: the *Manitoba Language Rights Reference*[59] and the *Secession Reference*.[60]

In the *Manitoba Language Rights Reference*, the Supreme Court invoked the rule of law to conclude that the Manitoba government's repeated failure to respect the mandatory requirement of bilingual enactment of provincial laws rendered all subsequent unilingual legislation invalid. By failing to adhere to the terms of the province's constitutional document,

55 Dyzenhaus, *supra* note 48.

56 Canada, as a former British colony, not only possesses a written constitution, but has also inherited the "unwritten" British constitution. In Britain, the constitution is said to be unwritten because no single constitutional document defines its constitutional system. Instead, a collection of statutes, decrees, conventions, customs or traditions, and royal prerogatives comprise the constitution. Seen from this perspective, it would be a mistake to think that a single document, even if comprehensive, could ever capture an entire constitution. For most countries, a constitution comprises a mix of written and unwritten sources including customary law, conventions, treaties, and other legal documents.

57 Preamble to the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

58 Preamble to the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

59 *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 [*Manitoba Language Rights Reference*].

60 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*].

Manitoba had acted without legal authority, had acted arbitrarily, and had allowed its officials to act outside the law. The Court concluded that these actions constituted a complete transgression of the principle of legality—that is, the "manner and form" requirements for provincial law stipulated by the constitution—while the larger normative force of the unwritten principle of the rule of law compelled invalidation of much of the provincial legal order and bilingual enactment of all unilingual provincial laws. In order to avoid creating legal chaos in Manitoba, however, the rule-of-law principle also justified the creation of a new remedy—the delayed declaration of invalidity—which the Court devised to maintain the existence of the unconstitutional legal order, while giving the province time to comply by re-enacting all of the offending legislation. Because of the extraordinary nature of the legal problem, the Court found an opportunity to provide more content to the rule of law, describing it as a "highly textured expression … conveying … a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority."[61] The Court also recognized the rule of law as a "fundamental postulate of our constitutional structure"[62] whose constitutional status was beyond question.

Throughout the judgment, the Court characterized the rule of law as the principle of legality. This principle was understood in two ways. First, it meant that the law is supreme over government officials as well as private individuals and therefore excludes the influence and operation of arbitrary power.[63]

Second, it meant that law and order are indispensable elements of civilized life within a political community. The rule of law therefore required "the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life."[64] For the Court, Canada must be thought of as a "society of legal order and normative structure"[65] in which the rule of law was embedded as both an implicit and explicit constitutional principle. As an expression of a commitment to peace, order, and good government over war, anarchy, and arbitrary power, the rule of law, to the Court's mind, represented a "philosophical view of society" that "in the Western tradition is linked with basic democratic notions."[66] Just how the principle of legality is linked to basic democratic notions was not spelled out fully in the *Manitoba Language Rights Reference*. Nevertheless, the Court stated that the Constitution is deeply intertwined with the principle of parliamentary sovereignty, because the Constitution "is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of legislature and government."[67] In Canada, the people have elected to be governed through a democracy, with its institutional forms, and political ideals. Democracy and parliamentary sovereignty, then, are related but not synonymous principles. The interconnectedness of the principles

61 *Manitoba Language Rights Reference*, *supra* note 59 at para. 62.

62 *Ibid.* at para. 63.

63 *Ibid.* at para. 59.

64 *Ibid.* at para. 60.

65 *Ibid.* at para. 64.

66 *Ibid.* at para. 61.

67 *Ibid.* at para. 48.

of democracy, parliamentary sovereignty, and the rule of law inform our understanding of what good or responsible government means.[68]

In the *Secession Reference*, the Court further articulated the content of the principle of the rule of law in the context of questions about the legal validity of a potential unilateral act of secession from Canada by the province of Quebec. In this judgment, the Court identified four unwritten principles that animate the Canadian constitutional order: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. These principles neither stand alone nor can they be used to trump each other. Instead, according to the Court, they are highly interrelated, permeate every part of the legal order, are the "vital unstated assumptions" that govern the exercise of constitutional authority, constitute the "lifeblood" of the Constitution, and mutually support every part of the Canadian state.[69] Moreover, in addition to their highly persuasive interpretive import, these principles can have "*full legal force*" in certain circumstances.[70] This means that they are binding upon courts, can give rise to substantive legal obligations (both general and specific), and may function as real constraints on government action.[71] It would be impossible, the Court declared, to understand the Canadian constitutional order without these architectonic and organic principles. The principle of the rule of law guarantees the existence of formal conduits and processes in government through which participation can occur, and obliges institutions comprising the legal and political system to realize these substantive constitutional commitments. The Court underscores this point in the *Secession Reference* when it declares that democracy cannot exist without the rule of law:

> To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. … Our law's claim to legitimacy also rests on an appeal to moral values, many of which are embedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.[72]

[68] Democracy—another contested concept—literally means "rule by the people." What distinguishes democracy from other forms of government is the participation of citizens in producing the laws that bind the entire community. Citizens rule themselves as free and equal beings, usually through formal voting equality and political freedoms, rather than being ruled by an internal elite or an external power. Democracy is therefore often strongly associated with majority rule in which the will of the majority is realized through the election of public officials into the legislature. A liberal democracy, on the other hand, will recognize a set of basic liberties such as the *Charter of Rights and Freedoms* that take priority over popular rule. For a helpful overview of the concept of democracy, see Amy Gutmann, "Democracy" in Robert E. Goodin, Philip Pettit, & Thomas Pogge, eds., *A Companion to Contemporary Political Philosophy*, 2d ed. (Malden, MA: Blackwell Publishing, 2007), vol. 2 at 521-31.

[69] *Secession Reference*, *supra* note 60 at paras. 50-51.

[70] *Ibid.* at paras. 51-54 (emphasis added).

[71] *Ibid.* at para. 54.

[72] *Ibid.* at paras. 67, 68.

Canada, then, is a complicated state: it can be described as a democratic, federal, constitutional monarchy. Though all acts of government are done in the name of the Queen—our head of state—the authority for these acts comes from the Canadian people and from the participation of, and accountability to, the people through public institutions created under the Constitution at both the federal and provincial levels of government. The unwritten principle of the rule of law therefore constrains the principle of parliamentary sovereignty from its tendency to define democracy merely as a set of formal institutional arrangements.[73]

Democracy presupposes that we have a process for arriving at binding decisions that take everyone's interests into account. But, though all members may possess equal constitutional rights to participate politically—the s. 3 right to vote in the Charter, for example—the democratic process may not be representing all interests equally as a result of continuing historical exclusions and deep socio-economic biases. Public policy making, for example, may be undermined by active minorities such as interest or lobby groups who can "capture" particular policy areas and legislative outcomes. Andrew Green discusses this problem—commonly labelled the principal–agent problem—in Chapter 4, Regulations and Rule Making: The Dilemma of Delegation. But, as the Supreme Court emphasizes above, the principles of democracy and the rule of law are mutually supportive in the shared goal of minimizing the abuse of public power. They can also, under the right conditions, work in harmony to secure accountability and legitimacy in public institutions. Both democracy and the rule of law justify the creation of institutional mechanisms for citizens and affected persons to prevent or challenge the abuse of power by public officials. As we have seen, the rule of law supports the creation of procedures that treat individuals fairly when their rights, interests, and privileges are affected in public decision making. The rule of law also supports judicial review of administrative decisions on their merits and greater access to the courts through the expansion of standing and intervener status. The hope here is that judicial deliberation will lead to better and more reasonable decision-making processes and policy outcomes. A participatory democracy will create conduits for direct participation in political decision making through, for example, public hearings. The hope here is that greater participation will lead to greater accountability and less abuse of power through public oversight. A deliberative democracy supports the creation of open, deliberative processes for public reasoning and debate on political issues. Rather than continual direct political participation, then, deliberative democracy seeks ongoing accountability about public issues. The hope here is that greater public deliberation will lead to more justifiable public policies. Contemporary governance therefore offers a range of institutional possibilities for public participation on democracy and rule-of-law grounds. These institutional spaces for participation aim to secure legitimacy, justice, and administrative efficiency. Some processes will be open to all, while others may engage only certain stakeholders or interest groups.

[73] One crucial institutional arrangement for a democratic state is the design of the electoral system. Citizen participation through the electoral system is called popular sovereignty. When citizens participate directly in the production of law—for example, in referendums—we call this popular democracy. Canada has a system of indirect participation by citizens, called representative democracy, where we elect party members to represent us and work on our behalf to implement law and policy. The principle and practice of responsible government ensures that elected officials who are ministers in Cabinet are collectively answerable to the House of Commons or the provincial legislature.

Participants may simply offer information on paper or take positions, exchange reasons, and influence substantive policy matters. In its most robust form, participation actually authorizes the resulting decision such as with referendums and general elections.

C. The New Minimalist Rule of Law

Perhaps not surprisingly, Supreme Court judges disagree about the scope and content of the principle of the rule of law. In a trilogy of cases—*Imperial Tobacco*,[74] *Charkaoui*,[75] and *Christie*[76]—the Supreme Court has considerably narrowed the scope and effect of this principle within Canadian law. In Canada's constitutional house, the current decor is sleek and spare.

The Supreme Court continues to affirm the unwritten constitutional principle of the rule of law by asserting its status as a foundational principle at the root of our system of governance, implicit in the very concept of a constitution. According to the Court, the rule of law incorporates a number of familiar themes and embraces at least four principles: (1) it is supreme over private individuals as well as over government officials, who are required to exercise their authority non-arbitrarily and according to law; (2) it requires the creation and maintenance of a positive order of laws; (3) it requires the relationship between the state and the individual to be regulated by law; and (4) it is linked to the principle of judicial independence.[77] These four attributes clearly conform to the theoretical discussion of the rule of law presented in section II, above.

Although the rule of law may possess additional principles, there is one key attribute that this principle does not possess: the ability to strike down legislation based on its content.[78] The rule of law, then, does not speak "directly" to the terms of legislation (or provisions of statutes). This does not mean that the rule of law has no normative force at all, says the Court, but simply that the government action it is able to constrain is usually that of the executive and administrative branches. Legislatures are constrained by "manner and form" requirements in the processes of enacting, amending, or repealing legislation.[79] This is because the principles of democracy, constitutionalism, and judicial independence favour the validity of legislation that conforms to the express terms of the Constitution, or those terms that follow as necessary implications from the express terms.[80] Nevertheless, the normative force of the rule of law on this understanding does appear to have been significantly curtailed and the Court has minimized reference to substantive rule-of-law values.

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74 *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 [*Imperial Tobacco*].

75 *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*].

76 *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 [*Christie*].

77 *Imperial Tobacco*, *supra* note 74 at para. 58; *Charkaoui*, *supra* note 75 at para. 134; *Christie*, *supra* note 76 at para. 20.

78 *Imperial Tobacco*, *supra* note 74 at para. 59.

79 But see *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, both for troubling insights into how an executive-controlled government can manipulate and avoid the manner and form requirements of enacting legislation, and for a tragic example of a systemic failure of accountability.

80 *Imperial Tobacco*, *supra* note 74 at para. 66.

The Court took its clearest stance concerning the power of and limits on the unwritten principle of the rule of law in *Imperial Tobacco*. *Imperial Tobacco* concerned a statute enacted by the province of British Columbia, the *Tobacco Damages and Health Care Costs Recovery Act*,[81] which allowed the province to sue manufacturers of tobacco products for compensation of tobacco-related health care costs incurred by individuals exposed to tobacco products. The tobacco companies challenged the validity of the statute on three constitutional grounds: extra-territoriality, judicial independence, and the rule of law. Major J., writing for the Court in *Imperial Tobacco*, focused on the debates concerning the meaning of the rule of law and what principles it might incorporate, noting with approval Strayer J.A.'s dictum in *Singh v. Canada (Attorney General)*[82] that: "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be."[83] The Court affirmed that the rule of law does not require that legislation be prospective (except in criminal law) or general. It also does not prohibit the conferral of special privileges on the government, except where necessary for effective governance.[84] Lastly, it does not ensure a fair civil trial.[85] The Court claimed that to affirm these features constitutionally, as the tobacco companies had argued, would be tantamount to endorsing one particular conception of the rule of law, thereby seriously undermining the legitimacy of judicial review. The written Constitution has primacy, such that the attributes of the rule of law are simply broader versions of the rights already contained in the Charter.[86] Protection from unjust or unfair legislation "properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box."[87] When legislatures use their powers validly but arbitrarily, and the content of such legislation does not engage an express constitutional provision, then citizens must look to other forms of government accountability as well as the democratic process of elections for correction, not to the courts.[88]

The *Charkaoui* decision declared unconstitutional the detention review hearings process set out in the *Immigration and Refugee Protection Act*.[89] The Court held that the statutory scheme violated several Charter provisions, including s. 7 principles of fundamental justice, ss. 9 and 10 guarantees against arbitrary detention, and the protection against cruel and

81 S.B.C. 2000, c. 30.

82 [2000] 3 F.C. 185 (C.A.).

83 *Imperial Tobacco*, *supra* note 74 at para. 33.

84 One effect of the Act was to permit not only the recovery of current and future costs, but also to recover costs retroactively from the past 50 years. The statute also changed rules of civil procedure in order to counter the systemic advantages that tobacco manufacturers enjoy in private law litigation by shifting the onus of proof from the government to the tobacco manufacturers. Tobacco companies had to prove, on a balance of probabilities, that their products did not and do not cause harm to affected persons in British Columbia. The tobacco companies argued that the shift of the evidentiary burden interfered both with the guarantee of a fair trial and the ability of judges to assess and weigh the relevant evidence.

85 *Imperial Tobacco*, *supra* note 74 at para. 63.

86 *Ibid.* at para. 65.

87 *Ibid.* at para. 66.

88 See *Bacon v. Saskatchewan Crop Insurance Corp.* (1999), 180 Sask. R. 20 at paras. 30, 36 (C.A.).

89 S.C. 2001, c. 27 [IRPA].

unusual treatment in s. 12. The Court, however, could not actually review the reasonableness of security certificates (certificates issued jointly by the ministers of public security and immigration) because they are not subject to review or appeal. The Court held that the use of secret evidence and the likelihood of indefinite detention without meaningful and timely review for non-citizens clearly violated due process rights. To guarantee a fair hearing under the Charter, a different procedure should be created—one that does not so greatly infringe Charter rights. But the rule of law did not support a right to appeal from the Federal Court judge's determination of the reasonableness of the certificate, nor could it prohibit automatic detention or detention on the basis of executive or ministerial decision making[90] and therefore the rule-of-law argument against the certificate provisions in the IRPA was relegated to the margins. While the *Charkaoui* decision should be celebrated for upholding s. 7's requirement of a fair procedure for determining an issue of vital importance to a detainee, the Court's reliance on a formal conception of the rule of law comes at a cost: where s. 7 of the Charter is not triggered, as in administrative proceedings, the reach of the *Charkaoui* decision will be considerably truncated. Incorporation of substantive rule-of-law values, like those found in the *Roncarelli* decision, would provide a toehold for judicial scrutiny of the failure to provide a right of appeal from the reasonableness of a security certificate, as well as the power of detention given to executive actors under the IRPA.[91]

The *Christie* case involved a constitutional challenge brought by Dugald Christie, a lawyer and political activist, who claimed that British Columbia's 7 percent legal service tax made it impossible for many of his low-income clients to retain him to pursue their claims. The Court affirmed that one purpose of the rule of law is to ensure access to justice. The Court noted that, when rights and obligations are at stake, individual access to justice can often only happen through lawyers whose role is to bring citizens' complaints about unlawful or abusive private or state action to courts or administrative tribunals. As a component of the rule of law, access to justice may guarantee a right to legal services, such as a right to counsel in some circumstances (particularly in the criminal context). But the rule of law does not underwrite a general right to legal services, to legal assistance, or to counsel in relation to court and tribunal proceedings.[92] It therefore also cannot constitutionalize a particular type of access to justice, such as a specific institutional form of legal aid.[93] Although the argument against the use of the rule of law in this case does not foreclose the possibility of a circumscribed right to counsel in other circumstances, a general right to counsel could not be found. Once again, the Court emphasized that the principle of the rule of law could not

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90 The Court noted that the Federal Court is a superior court, not an administrative tribunal—such a right could be said to flow from a decision made in the administrative context. The legality of the process, according to the Court, is nevertheless reinforced because the Federal Court of Appeal can circumvent the privative clause where the constitutionality of the legislation is challenged or where the individual alleges bias on the part of the judge. *Charkaoui*, *supra* note 75 at paras. 136, 137.

91 Craig Forcese further analyzes the national security context in more detail in his online chapter at <adminla0wincontext.emp.ca>.

92 *Christie*, *supra* note 76 at paras. 23-27.

93 In an effort to raise awareness about the inadequacy of legal aid across Canada, Christie decided to bicycle across the country, starting in Vancouver. While cycling through Ontario in 2006, Christie was killed when he was hit by a van.

be used to strike down otherwise valid legislation. As Lorne Sossin discusses in Chapter 7, Access to Administrative Justice and Other Worries, the relationship between the unwritten principles of the rule of law and "access to justice" remains unclear in Canadian law, although his chapter concretizes several factors that inform the quality of access to justice.

The tensions among the rule of law, fairness, equality, and efficiency remain particularly acute in administrative law because many tribunals were established to provide inexpensive and efficient access for low- and middle-income or otherwise vulnerable individuals; however, these tribunals may fail to do so and, for reasons concerning the separation of powers, recourse to the courts may not provide a remedy. Indeed, in *Toussaint v. Canada*, the Federal Court of Appeal held that in the context of the humanitarian and compassionate grounds contained in s. 25 of the IRPA, the rule of law cannot be used to create an application fee waiver for low-income or indigent persons who are applying for permanent residency under that provision where none exists in the legislation.[94]

Recalling the concepts of the rule of law advanced by the three theorists in section II, above, all suggested some degree of access to the legal system.[95] Each theory therefore comports with the fundamental conviction that individuals should have access to due process when their rights and interests have been affected by government action. Each also supports some measure of access within a rule-of-law state, but again none explicitly argues for effective equal access for all legal subjects. Indeed, of all the theorists considered in this chapter, only Ronald Dworkin explicitly considers access to be a matter of fairness that benefits the least well off and satisfies the demands of legal equality in the rule of law. When government is the wrongdoer, then it is contrary to the rule of law for citizens to be without a remedy, but how and when a legal system permits access to accountability remains problematic.[96]

In the consideration of the jurisprudence after the *Manitoba Language Rights Reference* and *Secession Reference*, it is clear that the Court has become anxious about the risks of its

94 *Toussaint v. Canada (Citizenship and Immigration)*, 2011 FCA 146. The Court held that the ability of the minister to waive such fees—$550—for low-income or poor persons is a function that is not analogous to access to the courts because it is limited to providing individuals with an exceptional discretionary benefit. *Ibid.* at para 60. The Supreme Court dismissed leave for appeal. The IRPA has since been amended by the *Balanced Refugee Reform Act*, S.C. 2010, c. 7 to preclude fee waivers under s. 25 of the IRPA. The Supreme Court denied leave to appeal.

95 Access to justice appears in Dicey's conception of the rule of law by necessity in his common-law model, in Fuller's procedural understanding of the rule of law, and explicitly as one of Raz's principles. Yet none of these theories dictates a particular institutional arrangement facilitating or guaranteeing access to justice.

96 This includes the expansion of standing, the limiting of non-justiciability, and the ability of courts to craft and enforce appropriate remedies. See *Reece v. Edmonton (City)*, 2011 ABCA 238 (CanLII), a novel case that considers the circumstances under which citizens or advocacy groups such as Zoocheck Canada and People for the Ethical Treatment of Animals (PETA) may be granted public-interest standing to seek a declaratory judgment that the municipal government has failed to comply with animal welfare laws. Chief Justice Fraser's powerful dissent argued, on rule-of-law grounds, that public-interest standing ought to be granted to advocacy groups representing Lucy, an elephant in the Edmonton Valley Zoo, because this would be the most effective way to hold the executive branch of government accountable and to speak for animals whose voices are not otherwise audible to the law. The City, on the other hand, argued that two regulatory agencies already had the statutory authority and powers to oversee the Zoo's operations and that the appellants were inappropriately using a civil action to circumvent existing procedures and abusing access to the courts. The Supreme Court denied leave to appeal.

own forms of arbitrariness through recourse to unwritten principles and is attempting to constrain the use of these principles by judges, counsel, and litigants. Judges seem to have an interpretive monopoly on unwritten principles, thereby "ousting" interpretations from other branches of government. Robust use of unwritten principles—and ironically the rule of law itself—risks entrenching the rule of judges and opens the door to judicial arbitrariness by permitting courts to unilaterally and anti-democratically substitute their views for that of Parliament's. This has led the Court to move to what Peter Hogg and Cara Zwibel define as the "middle" ground where unwritten principles like the rule of law have no direct legal effect, but are merely influential, interpretive "constitutional values."[97]

D. Lower Court Unruliness?

Though the Supreme Court of Canada has not completely shut down the legal and normative force of the unwritten principle of the rule of law, it has signalled a marked unwillingness to engage in any such "gap-filling" through the use of unwritten principles.[98] Such a conclusion cuts against the grain of earlier jurisprudence concerning unwritten constitutional principles. Those who wish to see robust use of unwritten principles must look to lower-court decisions where the unwritten principle of the rule of law, in conjunction with other unwritten principles, has supplemented the written constitutional text.[99]

Unwritten principles provided the justification for judicial intervention in discretionary decision making. In *Lalonde*, for example, the Ontario Court of Appeal[100] reviewed a discretionary decision made by the Health Services Restructuring Commission to close the sole

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97 Peter W. Hogg & Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 53 U.T.L.J. 716 at 718. Hogg and Zwibel suggest that the claim that the rule of law requires our laws to "respect equality, human dignity, and other good moral values is really just natural law in disguise. The rule of law is not a protection against laws that are bad." Remedies for bad laws are to be found in the written constitution and democratic institutions. *Ibid.* For a sophisticated, contrary argument, see Mark D. Walters, " 'Common Public Law in the Age of Legislation': David Mullan and the Unwritten Constitution" in Grant Huscroft & Michael Taggart, eds., *Inside and Outside Canadian Administrative Law* (Toronto: University of Toronto Press, 2006) at 421.

98 This seems to be the conclusion despite some tension with McLachlin C.J.'s public remarks: "I will suggest that actually quite a lot is going on, and that it is important. What is going on is the idea that there exist fundamental norms of justice so basic that they form part of the legal structure of governance and must be upheld by the courts, whether or not they find expression in constitutional texts. And the idea is important, going to the core of just governance and how we define the respective roles of Parliament, the executive and the judiciary." "Remarks of the Right Honourable Beverley McLachlin, P.C.," given at the 2005 Lord Cooke Lecture in Wellington, New Zealand, December 1, 2005, online: <http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/UnwrittenPrinciples_e.asp>.

99 See e.g. the discussion by the majority in the Court of Appeal of British Columbia of the principle of the rule of law in relation to the principle of access to justice. *Christie v. British Columbia*, 2005 BCCA 63. The Supreme Court rejected this line of argument in its decision discussed above.

100 *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (Ont. C.A.) [*Lalonde*]. In Chapter 12, Evan Fox-Decent and Alexander Pless discuss unwritten principles in the relationship of procedural fairness to legislation. They note that judges have imposed duties to give reasons where an unwritten constitutional principle was at stake and the relevant legislation was silent on the issue. In *Lalonde*, for example, the principle of the protection of minorities led to the imposition of a duty to give reasons.

francophone hospital in Ontario, a decision allegedly made in the public interest. The statute stipulated that a right to receive French language services could be limited only if all reasonable and necessary measures to comply with the statute had been exhausted.[101] Montfort was explicitly designated as a francophone hospital for the Ottawa-Carleton community and the decision to restructure it was a shift in policy for which little explanation was given.[102] While the Commission could exercise discretion to change and even limit the provision of these services, "it cannot simply invoke administrative convenience and vague funding concerns as the reasons for doing so."[103] The Health Services Commission forfeited its entitlement to deference by providing no justificatory policy for impinging on fundamental constitutional values. In this case, the Court of Appeal relied on the Supreme Court of Canada's decision in *Baker*[104] to conclude that "the review of discretionary decisions on the basis of fundamental Canadian constitutional and societal values"[105] is possible and, despite being accorded a large degree of deference, such discretionary decisions are not immune from judicial scrutiny. Because the commission failed to give serious weight to the linguistic and cultural significance of the Montfort Hospital to the Franco-Ontarian minority, it acted in a contrary manner to the normative and legal import of the unwritten constitutional principle of respect for and protection of minorities; the decision was therefore quashed.

In *United States of America v. Khadr*,[106] the Ontario Court of Appeal concluded that national security interests and intelligence objectives cannot trump the rule of law by putting vital human rights interests at risk. In this judgment, Sharpe J.A. concluded that the courts could not permit the extradition of suspected terrorist and Canadian citizen, Abdullah Khadr, to the United States, the very country that participated in human rights violations while he was arbitrarily detained in Pakistan and subjected to executive lawlessness by two countries.

101 The normative force of unwritten constitutional principles therefore animated a large and liberal interpretation of the relevant provincial statute, the *French Language Services Act*, R.S.O. 1990, c. F.32, and motivated the Court's less-deferential attitude toward the commission's decision.

102 See *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761 [*Lake*], which discusses the adequacy of reasons in the context of a discretionary decision made by a minister. See also the discussion in section IV.C.3.

103 *Lalonde*, *supra* note 100 at para. 168.

104 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*].

105 *Lalonde*, *supra* note 100 at para. 177.

106 *Attorney General of Canada on behalf of the United States of America v. Abdullah Khadr*, 2011 ONCA 358 (CanLII). In 2004, the United States paid the Pakistani intelligence agency, the Inter-Services Intelligence (ISI) Directorate, half a million dollars to abduct Abdullah Khadr, who was suspected of supplying weapons to Al Qaeda forces in Pakistan and Afghanistan. Khadr was secretly held in detention for 14 months in Pakistan and abused by the ISI who interrogated him for intelligence purposes. The ISI refused to deal with the Canadian government, but did have contact with a Canadian Security Intelligence Service (CSIS) official. The American authorities discouraged the CSIS official's request that Khadr be granted consular access, and the ISI denied access for three months. The ISI refused to bring Khadr before the Pakistani courts. Once the ISI had exhausted him as a source of anti-terrorism intelligence, it was prepared to release him. The United States, however, insisted that the ISI hold Khadr for a further six months in secret detention so that they could conduct a criminal investigation and start the process for Khadr's possible rendition to the United States. When Khadr was finally repatriated to Canada, the United States sought to have him extradited on terrorism charges.

Invoking the need to maintain respect of the rule of law in times of crisis, Sharpe J.A. affirmed that the appropriate judicial response was to deny the minister of justice's surrender order and affirm the extradition judge's decision because:

> the rule of law must prevail even in the face of the dreadful threat of terrorism. We must adhere to our democratic and legal values, even if that adherence serves in the short term to benefit those who oppose and seek to destroy those values. For if we do not, in the longer term, the enemies of democracy and the rule of law will have succeeded. They will have demonstrated that our faith in our legal order is unable to withstand their threats. In my view, the extradition judge did not err in law or in principle by giving primacy to adherence to the rule of law.[107]

On Sharpe J.A.'s terms, the rule of law is both part of a larger democratic culture and sustains a pervasive culture of legality that we, as Canadians, hold in common.

IV. Administering the Rule of Law

All of the authors in this textbook allude to the lengthy and complex history in relations among the administrative state, democracy, and the rule of law. As discussed earlier, at the beginning of the 20th century the emerging administrative state was often seen as a threat both to parliamentary sovereignty and to the rule of law because delegated powers from the political executive operated outside legislative scrutiny. Not only did these new administrative bodies possess substantial powers to restrict freedom, redistribute property, and make decisions on matters relating to individual rights, but they also handled many more cases than courts did. Governments—and the executive in particular—could control these new bodies through the appointments process and had significant influence over delegated policy areas. The growth of regulatory law also meant an expanded scope of discretion for government officials in interpreting standards and defining goals in various statutory schemes and executive regulations. This development was extremely worrisome for those concerned with accountability, because Parliament, the responsible minister, and the courts together could not provide full oversight, given their lack of specialized policy knowledge and the sheer quantity of cases that the administrative state generated.

As a result of the expansion of the administrative state, and well before the Charter, administrative law had to struggle to construct a relationship with the modern state that respected the expertise and policy choices of various administrative agencies and boards while simultaneously recognizing the legitimacy and effectiveness of parallel bodies of justice such as administrative tribunals. Because so many of these administrative bodies—labour and marketing boards, for example—were created to respond to political pressures and regulatory problems, courts, through administrative law, had to rethink their attitude in relation to them in the post-war era. This attitude was usually characterized by the term "deference." More important, the courts' view of the state had to change as well. The older

107 *Ibid.* at para. 76. The Supreme Court of Canada dismissed the application for leave of appeal.

and classical liberal view of the minimal state no longer matched reality, and courts had to change their institutional practices to acknowledge the legitimacy of the welfare state. McLachlin C.J. draws on this historical context in *Alberta v. Hutterian Brethen* where she writes: "Concern about overextension of regulatory authority is understandable. Governments should not be free to use a broad delegated authority to transform a limited-purpose licensing scheme into a *de facto* universal identification system beyond the reach of legislative oversight. … [H]ostility to the regulation-making process is out of step with this Court's jurisprudence and with the realities of the modern regulatory state."[108] Finally, administrative law served as an important pre-Charter vehicle to challenge government policy and to secure rule-of-law restraints on discretionary decision making in social and economic policy, a role that contained both positive and negative features, depending on one's political perspective and the particular issue at bar.

A. Deference as Respect: The Canadian Model of Administrative Law

While the rule of law traditionally serves as a bulwark against the executive branch of government and supports judicial oversight of broad statutory grants of discretion, this role becomes more complicated in the modern administrative state. With legislatively delegated powers to different kinds of administrative bodies, the role of courts can be understood in two contrasting ways. On the one hand, courts provide an essential accountability function by policing the exercise of delegated powers to ensure that they are confined to terms and purposes specified by the authorizing statute. On the other hand, courts are conscious of the separation of powers and, given their lack of expertise in determining the merits of certain policy-making exercises, are themselves under rule-of-law constraints to respect legislative and executive branches. The history of the relations between the courts and the other branches of government in administrative law began as a bipolar relationship: courts showed greater deference to executive decision-making and prerogative powers, as well as to legislation, but were highly antagonistic toward decisions made by actual administrative bodies that were not seen as credible or competent decision-makers on questions of law. The history of this bipolar relationship is nowhere better exemplified than in the courts' treatment of statutory delegates with a significant democratic pedigree. Judicial review of municipal bylaws fluctuated between extreme deference on the basis that municipal councils were accountable to their electoral and pointed intervention on the basis that the contested bylaw was patently unreasonable on rule-of-law grounds. Recent jurisprudence holds that, though municipalities are often given broad legislative discretion, their discretion is not unfettered and their decision making must provide reasonable grounds for courts to defer.[109]

[108] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 40.

[109] A recent decision discussing the relationship between the rule of law and democratic government at the municipal level is *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII). These considerations will also inform judicial scrutiny of elected school boards and First Nations band council decisions.

The relationship of courts to other branches now aspires to a kind of respectful deference[110] characterized by an "institutional dialogue" as a joint effort in governance.[111] Despite this new normative underpinning, the relationship between administrative bodies and courts encounters recurring problems arising from the interpretation of privative clauses, broad statutory grants of discretion, and the choice of standard of review.

B. An Example of Deference as Respect: National Corn Growers

Contrasting approaches to the intensity of judicial scrutiny of agency decisions inform the substance of the differing opinions written by Gonthier and Wilson JJ. in *National Corn Growers Assn. v. Canada (Import Tribunal)*.[112] The Canadian Import Tribunal conducted an inquiry into the importation of corn grain from the United States into Canada, an inquiry authorized under s. 42 of the *Special Import Measures Act*,[113] and determined that continued importation of grain had already caused, or in the future would likely cause, injury to Canadian producers of corn grain. This decision reaffirmed the deputy minister's prior preliminary conclusions that material injury existed and, thus, provided support for his decision to impose a provisional duty on American corn in order to protect Canadian corn growers. The *Federal Court Act*,[114] however, allowed for judicial review if a board, commission, or tribunal had, among other grounds, "based its decision or order on an erroneous finding of fact that it made in a *perverse or capricious manner* or *without regard for the material before it*."[115] Because the Tribunal's decision was based on a factual finding of harm informed by its expertise, and because the Act also contained a privative clause (s. 76(1)) stating that "every order or finding of the Tribunal is final and conclusive," this meant that the decision would

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110 David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's L.J. 445 at 489-502 ["Constituting Fundamental Values"]. See also David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Oxford University Press, 1997), where the original phrase occurs at 286. Dyzenhaus contrasts the principle of "deference as respect" to the traditional principle of judicial deference. He labels the traditional approach a Diceyan "deference as submission" where judges must submit to the intention of the legislature because of the overriding principle of parliamentary sovereignty. Deference as respect is the opposite of deference as submission.

111 See Geneviève Cartier's conception of discretion as dialogue versus discretion as power in Chapter 11. Noteworthy articles from the voluminous literature on institutional dialogue include T.R.S. Allan, "Constitutional Dialogue and the Justification of Judicial Review" (2003) 23 Oxford J. Legal Stud. 563; Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49 Am. J. Comp. L. 707; Peter W. Hogg & Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75; Christopher P. Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003" (2004) 23 Sup. Ct. L. Rev. (2d) 105; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); and Jeremy Waldron, "Some Models of Dialogue Between Judges and Legislatures" (2004) 23 Sup. Ct. L. Rev. (2d) 7.

112 [1990] 2 S.C.R. 1324 [*National Corn Growers*].

113 S.C. 1984, s. 25 [SIMA].

114 R.S.C. 1970, c. 10.

115 *Ibid*., s. 28.1(c). Emphasis added. Readers will recall that these are familiar expressions connoting arbitrariness in decision making.

be assessed on the (now obsolete) standard of patent unreasonableness so that courts could best respect legislative intent.[116] Review turned on whether or not it was patently unreasonable for the tribunal to refer to the *General Agreement on Tariffs and Trade* (GATT)[117] in interpreting the SIMA, whether the tribunal's interpretation of s. 42 in its constitutive legislation was unreasonable, and whether the tribunal reached its decision without any cogent evidence to support its determination of material injury.

In a concurring judgment, Wilson J. evoked the *CUPE* case[118] to caution the majority (and other like-minded judges) about the effects of engaging in a probing examination of a decision. Wilson J. believed that such a detailed examination sanctioned judicial intervention rather than the restraint represented by *CUPE*. *CUPE* was a landmark case that signalled the beginning of the end of the Diceyan model for administrative law in Canada. It concerned a labour relations tribunal, the Public Service Staff Relations Board of New Brunswick, which had to interpret a poorly worded provision in its enabling statute concerning the meaning of the word "employee." The legislation stated that the employer could not replace striking employees with other employees; moreover, other parts of the statute excluded management from the definition of employee. The representative union, the Canadian Union of Public Employees, complained to the Board that the employer was replacing striking employees with management personnel, contrary to the statute. The Board examined the enabling statute, provided an interpretation of the ambiguous provision, and ordered the employer not to use management to replace striking workers. The Board's decisions were protected by a privative clause. On review, the Supreme Court held that deference was owed to the Tribunal based on its expertise, the privative clause, and the reasonableness of its determination. In cases of statutory ambiguity, and where there are multiple interpretations that are reasonable, a reviewing court should defer to the interpretation of the expert tribunal.

According to Wilson J., *CUPE*'s approach to the standard of review, particularly with respect to patent unreasonableness, entailed a relationship between courts and administrative agencies where the courts should recognize that (1) administrative agencies, not courts, bear primary statutory responsibility for their legislative mandate in the area of regulation; (2) administrative agencies possess expertise, experience, and contextual knowledge about which the courts know very little; and (3) statutory provisions, such as those found in *National Corn Growers*, do not admit only one uniquely correct interpretation but, rather, can sustain a variety of reasonable interpretations. Though concurring with the result reached, Wilson J. clearly feared that such a wide-ranging and probing examination of both the agency's interpretation of its enabling statute and the reasonableness of its conclusions

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[116] See Audrey Macklin's Chapter 9, Standard of Review: Back to the Future?, and Sheila Wildeman's Chapter 10, Pas de Deux: Deference and Non-Deference in Action, on the recent demise of the patent unreasonableness standard of review.

[117] The General Agreement on Tariffs and Trade was an international agreement, originally negotiated in 1947, governing trade in goods. The GATT aimed to increase international trade by reducing tariffs and other trade barriers hindering the free flow of goods across national borders. The GATT was succeeded by the World Trade Organization in 1995.

[118] *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227 [*CUPE*]. In Chapter 9, Audrey Macklin describes *CUPE*'s "blockbuster" effect on the standard of review in Canadian administrative law.

risked reintroducing the correctness standard under the guise of reasonableness and displacing the patently unreasonable standard.[119] In other words, this approach would likely gut the hard-won jurisprudential ground symbolized by the earlier *CUPE* decision.

Wilson J. underscored what she believed to be the appropriate institutional attitude or posture. In the face of a privative clause, courts must not engage in a wide-ranging review concerning whether or not the tribunal's conclusions are unreasonable. The merits of a tribunal's interpretation of international obligations, such as the GATT, are for the legislature to address by amending the terms of the statute if interpretive disagreement exists between institutions. And, most important, meticulous analysis of a tribunal's reasoning concerning the evidence should not become the norm. As she tersely wrote:

> Faced with the highly charged world of international trade and a clear legislative decision to create a tribunal to dispose of disputes that arise in that context, it is highly inappropriate for courts to take it upon themselves to assess the merits of the Tribunal's conclusions about when the government may respond to another country's use of subsidies. If courts were to take it upon themselves to conduct detailed reviews of these decisions on a regular basis, the Tribunal's effectiveness and authority would soon be effectively undermined.[120]

The conclusions advanced by Wilson J. explicitly rejected the older Diceyan model in which the rule of law provided the justification for judicial control of administrative agencies and their interpretations, to be replaced by a new model where the rule of law buttressed the "pragmatic and functional" methodological approach to determine the appropriate standard of review. Instead of an unreasonable administrative body whose straitjacket laces are ever more tightly pulled by the courts, the modern judicial approach to the administrative state ought to be informed by a more flexible, respectful, and contextualized methodology that recognizes different exercises of legitimate power by competent institutional partners.

The majority decision written by Gonthier J. also concluded that the tribunal was not unreasonable with respect to any of these three matters. To reach this result, Gonthier J. delved deeply into both how the tribunal came to the decision as well as the decision's merits. In the face of criticism from the concurring judgment written by Wilson J., Gonthier J. responded: "With respect, I do not understand how a conclusion can be reached as to the reasonableness of a tribunal's interpretation of its enabling statute without considering the reasoning underlying it, and I would be surprised if that were the effect of this Court's decision in *C.U.P.E.*"[121] Gonthier J., however, did not believe that his more probing approach repudiated *CUPE*; instead, he continued to see his method of review as more respectful and deferential than that found in the traditional Diceyan model. The effect of this more probing inquiry, however, seemed to move the standard of review away from patently unreasonable and closer to correctness.

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119 This worry surfaces in the discussion of the so-called intermediate standard of review, reasonableness *simpliciter*, as discussed by Audrey Macklin in Chapter 9 and Sheila Wildeman in Chapter 10.

120 *National Corn Growers*, *supra* note 112 at 1349-50.

121 *Ibid.* at 1383.

National Corn Growers illustrates how different theoretical models of adjudication can help explain how judges understand their institutional role as well as how these models shed light on the underlying rationale behind the judicial choice of the standard of review. In the confines of the case, the fact that the tribunal had not abused its discretion and had exhibited its expertise suggests that Dicey's approach is a non-starter. Fuller's perspective would support the more respectful approach articulated by Wilson J. According to his model of adjudication, where a reasonable range of policy choices exists, or when multiple reasonable interpretations of an ambiguous statutory term are possible, or when a decision involves balancing multiple sets of competing interests, then these functions are best left with the expert tribunal. Raz narrows the reach of the rule of law to correction for the harms created by law itself. His argument for guided discretion, principled decision making, and judicial faithfulness to the legislative intent seems to support Gonthier's approach. Gonthier's judgment underscored the active role of the courts in interpreting the law and in demanding public and principled justifications from the tribunal. Though this approach may present the best way to control harms created by the administrative state, it perhaps may not address as well the risks created by active judicial oversight.

A different case might produce a different alignment. For example and as discussed below, the later creation of the reasonableness standard of review seems to have generated more unanimity on the part of the Supreme Court in the selection of the appropriate standard of review. Indeed, reasonableness closely mirrors the approach that Gonthier J. undertook in *National Corn Growers*—so much so that one could say that his judgment laid out the path for its future development. What remains unclear is, with the elimination of patent unreasonableness, whether Wilson J.'s approach is part, or at the very margins, of reasonableness review. As with so many aspects of administrative law, context matters greatly, though your own tendencies concerning the appropriate ways that the rule of law constrains judges and administrative decision-makers might reflect one approach more than another.

C. Three Interpretive Problems for Deference as Respect: Privative Clauses, the Standard of Review, and the Adequacy of Reasons

In administrative law, legislative intent should constrain judicial interpretation of statutory provisions and purposes. But the principles of the rule of law, democracy, and parliamentary sovereignty imperfectly guide the interpretive process because statutory language is highly ambiguous, conflicting, does not anticipate or provide many issues that come to court, or indicates that some matters never occurred to the legislative mind. Despite the somewhat fictive nature of legislative intent, courts and other interpreters are obliged to construct the meanings and purposes so far as that intention is discoverable from the language of the provision at issue and in the context of the statute as a whole. Where the text is unclear or ambiguous and the ordinary meaning cannot be determined, judges may draw on other materials to assist in the interpretive effort including legal principles, parliamentary debates, ministerial statements regarding statutory purposes, legislative history, agency interpretations, commission reports, policy manuals, international law, and scholarly opinion. After this often in-depth, creative, textual, and contextual exercise, they will then impute the meaning and purpose as legislative intent and analyze intent in relation to the particular facts of the case. This account of statutory interpretation seems at odds with the rule of law

if we understand the content of law as "fixed" by the legislature and the judicial task as simply a legal and technical exercise in rule-application within a simplistic or literal conception of language. As Ruth Sullivan argues, the attraction of the more contextual view is that it "openly acknowledges that interpreting statutes is a complex and creative activity that is not reducible to the mechanical application of fixed legal rules. And it raises an important question, namely, whether the persons who are given power to interpret legislation—police officers and bureaucrats as well as members of administrative tribunals and courts—are appropriately chosen and adequately prepared for the task."[122] In order to counteract arbitrariness in interpretation, courts and other interpreters must give effect to rule-of-law constraints such as transparency, predictability, consistency and even-handedness in their judgments and in considering the impact of implementing the legislature's programs and rules on citizens.

In several recent administrative law cases, the Supreme Court has returned to statutory interpretation with renewed vigour to talk about the role of the statute in guiding exercises of interpretation by all legal actors, themselves included.[123] As the Court has set out, the "General Roadmap" for the modern approach to statutory interpretation is contextual and purposive. Words are read in their entire context, in their grammatical and ordinary sense when not defined, and harmoniously with the scheme of the Act, the purpose or object of the Act, and the intention of Parliament. Invoking the democratic principle and the principle of judicial restraint, the Court has affirmed that interpreters cannot ignore the words chosen by Parliament and rewrite legislation according to the interpreter's perspective concerning how the legislative purpose should be better promoted. If the statutory words are precise and unequivocal, then the ordinary meaning dominates. If the words can support more than one reasonable interpretation, then the ordinary sense plays a lesser role but the interpreter must construct an interpretation that best fulfills the purpose(s) of the statute. Finally, some statutes require a broad and liberal reading—human rights legislation, for example—because they deal with fundamental rights or are quasi-constitutional.

The principles of deference and judicial restraint inform statutory interpretation in multiple ways, three examples of which will be considered here. First, interpretative challenges arise when courts encounter privative clauses purporting to limit or oust judicial review. Second, courts have grappled with the principle of deference when considering the standard of review to be applied when a statutory delegate is interpreting its enabling or home statute. And third, in applying the reasonableness standard, courts will often need to scrutinize the adequacy of the reasons that an administrative decision-maker has given for a decision.

1. Privative Clauses

As seen in the *National Corn Growers* case discussed above, privative or ouster clauses historically posed challenges for the rule of law. Several types of privative clauses exist, but the general form is a statutory provision protecting the decisions made by public officials in boards, tribunals, and ministries either from further dispute internally (that is, a finality

[122] Ruth Sullivan, *Statutory Interpretation* (Toronto: Irwin Law, 1997) at 39.

[123] See *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3; *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160; and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 S.C.R. 306.

clause) or from external judicial review (that is, an ouster clause).[124] The powers conferred on administrative agencies through privative clauses were often conferred in absolute terms and, therefore, decisions were meant to be final. A particularly strong example of a privative clause might be: "The Board shall exercise exclusive jurisdiction to determine the extent of its jurisdiction under this Act or the regulations, to determine a fact or question of law necessary to establish its jurisdiction, and to determine whether or in what manner it shall exercise its jurisdiction." The conundrum for courts was that the statute prescribed limits on delegated power but, at the same time, authorized officials to act with seemingly unfettered discretion within those broad confines. The risk to the accountability function of the rule of law was that these officials could behave as a law unto themselves because they would be the sole judges of the substantive validity of their own acts. The institutional result of privative clauses was a system of competing and irreconcilable supremacies between the legislative and judicial branches of government. Those who supported the development of the administrative state, meanwhile, worried about the growth of administrative law and the consequent judicial review of administrative decisions, seeing judicial scrutiny as an altogether too constraining legalism that would hinder the flexible regulation needed in a complex industrialized society.[125]

Courts approached the interpretation of privative clauses in several different ways: reading them out of the statute if a jurisdictional error was implicated in the case, deferring to Parliament's intent to oust judicial oversight, and later developing methods of statutory interpretation grounded in the common-law presumption that Parliament always intends to respect procedural fairness, even with respect to statutorily delegated powers with broad scope.[126] This last approach laid the basis for deference as respect, found in the *CUPE* decision, in which the privative clause came to be viewed as a communication from the legislature that courts should recognize the interpretive authority of the tribunal within its area of expertise, but that judges could exercise their rule-of-law powers of oversight on constitutional and jurisdictional matters.

In Binnie J.'s concurring judgment in *Dunsmuir v. New Brunswick*, he argued that a privative clause should not be conclusive with respect to the choice of the standard of review; nevertheless, it is also not just another factor in the standard of review "hopper."[127] On his account, a privative clause presumptively forecloses a judicial finding of unreasonableness on substantive grounds unless the applicant can satisfy the legal burden of demonstrating how a tribunal's interpretation cannot stand.

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124 For a discussion of privative clauses in administrative law, see Audrey Macklin, Chapter 9, and Sheila Wildeman, Chapter 10. For a detailed analysis of the history, types, and constitutional effects of privative clauses, see David Dyzenhaus, "Disobeying Parliament? Privative Clauses and the Rule of Law" in Richard W. Bauman & Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) at 499.

125 As Audrey Macklin points out in Chapter 9, the motive behind privative clauses was not simply to oust judicial meddling, but to direct judicial respect for the relative expertise of the administrative body and to provide efficient resolution of disputes and allocate scarce judicial resources by restricting access to the courts.

126 See Evan Fox-Decent and Alexander Pless, Chapter 12, for their discussion of privative clauses and procedural fairness.

127 [2008] 1 S.C.R. 190 at para. 143 [*Dunsmuir*].

This argument for the robust role that a privative clause can play in statutory interpretation was developed differently by Rothstein J. in his concurring judgment in *Khosa*[128] where he affirmed that reviewing courts must follow the express (or necessarily implied) legislative intent, absent a constitutional challenge, that a privative clause represents. According to Rothstein J., and in contrast to Binnie J.'s majority judgment in *Khosa*, the conceptual and jurisprudential origins of the standard of review are grounded in the privative clause. Rothstein J. argued that the majorities in *Dunsmuir* and in *Khosa* see the judicial review of administrative decisions as automatically entailing a judicial–legislative tension, whereas he believes it only occurs when a privative clause is engaged. Expertise—contrary to the majority—is not a free-standing basis for deference; rather, expertise stands as a basis for deference only when protected by a privative clause signalling legislative intent, especially when a tribunal is considering legal questions. Courts, he wrote, ought not to construct this intent in the absence of a privative clause and without a full interpretive exercise or else risk being arbitrary themselves because express legislative intent and judicially determined expertise may or may not align. For Rothstein J., "privative clauses and tribunal expertise are two sides of the same coin."[129] Where legislative intent is not clear or necessarily implied, Parliament intended correctness standard to apply. The majority, on the other hand, suggested that both the privative clause and expertise as determined by the courts each independently represent legislative intent for the reasonableness standard to apply.

Because of the fundamental nature of this jurisprudential debate—the constitutional basis for deference—administrative agencies play an important interpretive role in the construction of purposes of their home statutes, and they would be wise to demonstrate and emphasize their expertise because they can shape the interpretive direction a reviewing court might take.

2. The Standard of Review

Pre-Charter administrative law was limited to the review of questions of law, jurisdiction, and procedural fairness in order to determine whether or not decision-makers acted in excess of jurisdiction, without authority, or had otherwise abused their discretion on unreasonable grounds. Reviewing courts were not to examine the full merits of the decision, save on exceptional grounds, so that they would be constrained from substituting their preferred outcome for that of authorized decision-makers. Judicial interpretation of the rule of law and other legal principles, such as the separation of powers, animated the level of deference shown to administrative bodies. This deference was most fully exhibited in the choice of the standard of review—correctness and patent unreasonableness (with reasonableness as a post-Charter development)—to be applied in order to analyze a particular administrative decision. The standard of review therefore functioned as a prime rule-of-law constraint on judges in administrative law. As we have seen in *National Corn Growers*, the contemporary approach to the standard of review reflects fundamental concerns about judicial legitimacy within a democratic state.

128 *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 [*Khosa*].

129 *Ibid.* at para 96.

The tensions among the rule of law, deference, the standard of review, and the administrative state were forcefully made in the *Baker* case,[130] which involved the review of an immigration officer's biased discretionary decision in the context of a humanitarian and compassionate grounds application by an illegal immigrant. Courts usually show a large degree of deference in this policy area, given the expertise of the decision-maker in immigration cases and the discretionary nature of the exercise.[131] Instead, the treatment of one individual at the hands of the administrative state precipitated the expansion of the content of the duty of fairness, a vital component of the rule of law.[132] On this point, L'Heureux-Dubé J. for the majority wrote:

> The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.[133]

According to the Court, the discretionary administrative decision in *Baker* displayed arbitrariness: it did not exhibit a mind that was attuned to the humanitarian and compassionate requirements stipulated in the department's own guidelines; it showed a lack of regard for the person affected; and it gave the impression that important factors, such as the best interests of the children, were outweighed by discriminatory biases. The decision therefore did not meet the threshold of reasonableness that could "command respect" from the reviewers. It might be tempting to position *Baker* closer to the Diceyan model with its distrust of administrative discretion, but it is important to remember, as the Supreme Court argued in the subsequent case *Montréal (City) v. Montreal Port Authority*, that

> in a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. While this discretion does of course exist, it must be exercised within a specific legal framework. Discretionary acts fall within a normative hierarchy … . The statutes and regulations define the scope of discretion and the principles governing the exercise of discretion, and they make it possible to determine whether it has in fact been exercised reasonably.[134]

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130 *Baker*, *supra* note 104.

131 On the one hand, the fact-specific nature of the inquiry, the role of a humanitarian and compassionate grounds application within the statutory scheme as an exception, the fact that the decision-maker is the minister, and the considerable discretion evidenced by the statutory language suggest that a large degree of deference would be appropriate. On the other hand, the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court, and the individual rather than polycentric nature of the decision, argued against patent unreasonableness as the proper standard. "Reasonableness," the intermediate standard, was therefore chosen.

132 Grant Huscroft provides a more detailed examination of the facts of the *Baker* case as well as the scope and content of the duty of fairness in Chapter 5. Historically, the duty of fairness was akin to a jurisdictional question and therefore privative clauses could not protect procedural errors.

133 *Baker*, *supra* note 104 at para. 56.

134 [2010] 1 S.C.R. 427 at para. 33.

Cases like *Baker* and *Montreal Port Authority*, then, continue the jurisprudential lineage originating in *Roncarelli* and judicial review for abuse of discretion.

In the transformative case *Dunsmuir v. New Brunswick*, the Supreme Court invoked rule-of-law values and attributes to justify reducing the standards of review from three to two: correctness and reasonableness, with reasonableness subsuming the most deferential standard of patent unreasonableness.[135] The Court's goal in this judgment was to provide greater guidance for reviewing courts, counsel, litigants, and decision-makers by striving to introduce clarity, fairness, consistency, and simplicity into administrative law. The Court also finalized an earlier jurisprudential line of thought—most clearly articulated by LeBel J. in *Toronto (City) v. C.U.P.E., Local 79*—that patent unreasonableness and reasonableness were not clearly distinguishable. Moreover, patent unreasonableness no longer seemed consistent with the rule of law if it meant that persons could be subjected to a class of decisions that were valid even though they were clearly very irrational interpretations, or that they were valid simply because they failed to reach the level seemingly required by patent unreasonableness.[136] As will be discussed in more detail by Audrey Macklin and Sheila Wildeman in their respective chapters on the standard of review, the Court introduced a new two-step test in which review would proceed first by examining past jurisprudence to see what level of deference was owed. If past jurisprudence did not address the question satisfactorily, then the standard of review analysis would be used to contextually analyze and determine legislative intent regarding the nature and scope of agency jurisdiction and expertise within the home statute. At least four factors guide this analysis: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal from an interpretation of enabling legislation; (3) the nature of the question at issue (fact, law, mixed fact and law); and (4) the expertise of the tribunal. With this re-crafted approach, the Court suggested that it had found a means to reconcile the tension between the rule of law and democracy. Properly performed, the determination and application of the standard of review ensures that all exercises of public authority are lawful, reasonable and fair, but also respects legislative supremacy by recognizing effective limits on judicial discretion and by rejecting a "court-centric" conception of the rule of law.[137]

Correctness, on the other hand, should be limited to: (1) a constitutional issue; (2) a question of general law that is both of central importance to the legal system as a whole *and* outside the specialized area of expertise; (3) drawing jurisdictional lines between two or more competing specialized tribunals; or (4) a "true" question of jurisdiction or *vires*. According to the majority, rule-of-law values such as universality, consistency, uniformity, predictability, stability justify the unique role of the courts in reviewing tribunal decisions

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135 *Dunsmuir*, *supra* note 127.

136 *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77. Instead of eliminating the patently unreasonable standard, David Dyzenhaus conversely argues that the Court should have gotten rid of the correctness standard—a move he sees as more consistent with the principle of deference. See David Dyzenhaus, "David Mullan's Theory of the Rule of (Common) Law" in Huscroft & Taggart, eds., *Inside and Outside Canadian Administrative Law*, *supra* note 97, 448 at 462.

137 *Ibid.* at paras. 27-33.

on a correctness standard as well as underpinning both the lack of deference in the face of judicial expertise and the constitutional basis of judicial review. The principles of universality and equality demand that the same general legal rules are applied to each legal subject equally and in similar situations.

In *Dunsmuir* and subsequent cases, reasonableness appears as the presumptive standard in administrative law when: (1) a specialized or expert tribunal; (2) interpreting its enabling or home statute; (3) on a question of fact or mixed fact and law; (4) or exercising broad statutory discretion; (5) correctly applies all legal principles or tests; (6) to construct an interpretation of its statutory powers that falls within range of possible acceptable interpretations; (7) resulting in a decision that demonstrates justification, transparency, and intelligibility; (8) and produces a reasonable outcome that is defensible in respect of the facts and law. Should the tribunal satisfy all of these conditions, the decision must be found reasonable by the reviewing court. According to the Supreme Court in *Khosa*, review on the reasonableness standard is not "a single, rigid Procrustean standard of decontextualized review"[138] for administrative agencies, but rather encompasses a range of degrees of deference based on the circumstances of the case. The scope of this range includes both approaches in *National Corn Growers*. It may also authorize deference in the face of a Charter violation.[139]

This presumption appears to be borne out in the cases that have followed *Dunsmuir*, but not all rule-of-law concerns have been laid to rest. Though it is still too early to state definitively whether or not *Dunsmuir* has been a success in controlling the unpredictability of judicial review, it is fair to say that the standard of review methodology has gotten simpler with only two standards from which to choose along with the emerging framework and presumptions for guidance.

Never content to let things stand still for long, though, emerging disagreements about the relationship between the home statute, the interpreter, and expertise have appeared that disclose that the constitutional basis for deference remains unsettled. As Deschamps J. questions in her concurring reasons in *Smith v. Alliance Pipeline Ltd.*, a tension continues to exist around the role of the privative clause and expertise in the standard of reasonableness:

> Deference towards administrative bodies raises important issues, both of a political and legal theoretical nature. This Court has not dealt with this topic lightly, sometimes struggling to find a balance between deferring to the expertise or experience of many of these administrative bodies and reviewing the limits to their decision-making authority under the rule of law. A consistent holding of this Court has been, and continues to be, that legislative intent should, within the confines of constitutional principles, ultimately prevail. In the case at bar, the issue of deference is shaped narrowly: Should an administrative decision-maker's interpretation of its "home" statute usually result in a court deferring to that interpretation—through the adoption of a standard of review of reasonableness—based on a presumption that the decision-maker has particular familiarity with its home statute?[140]

[138] *Supra* note 128 at para. 28.

[139] See e.g. *Lake*, where the Court applied a reasonableness standard to review of a s. 1 Charter limitation extradition decision by the minister of justice. *Lake*, *supra* note 102.

[140] *Supra* note 123 at para. 78.

In this case, Deschamps J. raised concerns that according expertise to a decision-maker simply on the basis of the existence of a privative clause, and without further contextual analysis of statutory language indicating a decision-maker with specialized knowledge, pays mere lip service to legislative intent and risks sweeping too many issues into a single standard; the result, she fears, may be arbitrary judicial decisions upholding arbitrary administrative interpretations.

3. The Adequacy of Reasons

On some accounts, *Baker* represents an instance of judicial creativity in the crafting of a context-specific duty to give reasons, particularly in the immigration sphere. Mavis Baker and her counsel were lucky to gain access to the "reasons" for the negative decision in her case—the immigration officer's unofficial notes. In order to control for the arbitrariness of luck, the Court imposed a duty to give reasons on statutory and prerogative decision-makers in certain administrative contexts where important individual interests are at stake. Despite the fact that this is not a general duty for all decision-makers in the state, it nevertheless still stands as a substantive procedural protection. Ideally, the duty to give reasons has the potential to advance both restraint and respect, thereby facilitating rule-of-law concerns and administrative legitimacy. The provision of reason stands as an opportunity for the agency to show both its expertise and the adequacy of concern for affected individuals by observing procedural fairness. Judicial recognition of reasons—that is, acknowledgment that the reasons are justified and justifiable—constrains the ability to re-weigh the factors and affirms specific instances of non-arbitrary decision making. On this account, deference does not occur simply because the statute has a privative clause ordering courts not to intervene; rather, deference is the result of institutional competence, expertise, and mutual respect for the rule of law.

The subsequent trajectory of the duty to give reasons has taken several interesting turns since *Baker*. It is clear that the absence of reasons may constitute a breach of procedural fairness and, if so, will be remedied by the imposition of the duty to give reasons as a common-law requirement. But how should a court treat inadequate or unreasonable reasons? Canadian case law, for some time, remained uncertain whether inadequate reasons were a procedural deficiency to be reviewed on the fairness standard or part of substantive review and reviewed on a reasonableness standard. Recall from *Dunsmuir* that reasons and deference possess a strong interrelationship. Judicial deference to a decision is appropriate where the decision demonstrates justification, transparency, and intelligibility within the decision-making process, and where the outcome falls within a range of possible, acceptable outcomes defensible with respect to the facts and law. Reasons are generally held to serve three functions: (1) they disclose expertise in the subject area of the home statute "using concepts and language often unique to their areas and rendering decision that are often counter-intuitive to a generalist";[141]

[141] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII) at para. 13 [*Newfoundland Nurses' Union*].

(2) they justify the decision using transparent, intelligible, and reasonable reasoning that all audiences—counsel, affected persons and especially the losing party, reviewing courts, other agencies, and the general public—can understand; and (3) they illustrate that the outcome is also reasonable when, as is often the case in administrative decision making, more than one reasonable result is possible. This means that reasons support the principle of deference because the reviewing court ought to defer to the decision-maker who provides legally valid reasons that support a reasonable outcome even if the court disagrees with the outcome. Reasons therefore hearken back to the import of the *CUPE* decision and its articulation of the principled grounds for deference.

In *Newfoundland Nurses' Union*,[142] the Supreme Court clarified several problems that inadequate reasons raised in the lower courts. First, they confirmed that inadequate reasons are not analyzed under procedural fairness but, rather, reasonableness review. The Court then outlined the analytic framework for determining adequate reasons. If a decision-maker must give reasons, the reasons should justify the decision—that is, show that the decision-maker has considered relevant facts and law, applied legal principles and tests correctly, and is able to explain the decision in a way that both the affected person and the reviewing court can understand. In language that evokes *Baker*, Abella J. wrote that reasons show a mind that is "alive to the question at issue."[143] Reasons must be transparent and show the basis for the reasonable outcome. And, reasons should be reviewed as an organic exercise, not with a forensic or microscopic lens because reasons are not a stand-alone basis for intrusive review. Therefore, reasons do not have to be perfect, do not have to be comprehensive or lengthy, may contain some errors, do not have to be well written, and speed, economy, and informality may take priority given the day-to-day realities administrative officials face. Nevertheless, they still must permit effective review in order to satisfy the principles of legality, accountability, and the rule of law.

But what, then, do inadequate reasons look like and where found imperfect, what would judicial deference look like?[144] The test is functional and purposeful. The reasons must address the substance of the live issues, key arguments, contradictory evidence, and non-obvious inferences. Bare or opaque conclusions with no supporting information or not supported by principles will be found unsatisfactory. Inconsistencies and irrelevant considerations, or when relevant considerations or obvious topics are omitted, will be considered serious flaws. The decision-maker cannot write minimal reasons that effectively provide

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142 *Ibid.*

143 *Ibid.* at para. 26. In *Newfoundland Nurses' Union*, the Court characterized the "bread and butter" decision made by the labour arbitrator as a simple interpretive exercise in the home statute, involving a decision-making process that is very different from judicial contexts, and in a context with which the decision-maker was highly familiar and expert. The Court found the decision to be reasonable in terms of the form, content, and outcome.

144 Important lower-court judgments that have fleshed out the analytic framework for determining adequate reasons include: Justice Evans's dissent in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56 (CanLII); *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 (CanLII) [*VIAA*]; *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670 (CanLII); and *Spinks v. Alberta (Law Enforcement Review Board)*, 2011 ABCA 162 [*Spinks*].

immunization from review and accountability. And, finally, the decision-maker cannot exhibit an attitude of "Trust us, we got it right."[145]

While cases like *Newfoundland Nurses' Union* have provided much guidance and clarification, as well as a strong statement regarding how necessary deference is when reviewing reasons, some matters remain unsettled. Courts will disagree when a more intrusive review is required based on differing assessments of the seriousness of the perceived flaws.[146] In *Newfoundland Nurses' Union*, Abella J. cited with approval the concept of "deference as respect" regarding the function of reasons.[147] She agreed with David Dyzenhaus that even if the reasons do not seem wholly adequate to support the decision, the court must first seek to "supplement them before it seeks to subvert them" and therefore improve on the reasons that the original decision-maker gave.[148] The *Lake* decision provides a thought-provoking example of this kind of deferential review and judicial supplementation of inadequate reasons.[149] This case involved the review of the minister of justice's discretionary decision to permit extradition of a Canadian citizen, and convicted criminal, to the United States for prosecution on criminal charges there. Despite the fact the extradition clearly engaged Charter rights, the Supreme Court reviewed the decision on a standard of reasonableness, rather than correctness, because of the minister's superior expertise in foreign affairs and because he was better placed to weigh the relevant factors. Though the minister's reasons were brief, the Court held that they were not inadequate and could permit them to determine that the minister had applied the proper principles and fairly considered any submissions that provided alternative factors weighing against surrender.

An open question therefore remains whether or not authorizing reviewing courts to substitute reasons is only a superficial form of deference, opens the door too widely for intrusive merits review, or does not have the effect of disciplining administrative decision-makers as a matter of practice because they know that appellate courts will alter or even completely substitute their improved reasons for the original reasons.

D. Constraining the Charter

In Canada's pre-Charter Westminster system of government, the principle of parliamentary sovereignty traditionally meant that Parliament could pass laws on any subject, and that no

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145 *VIAA*, *supra* note 144 at para. 21. Stratas J.A. laid out four overarching purposes governing reasons: (1) the substantive purpose, which allows us to understand why the decision-maker reached this result; (2) the procedural purpose, which permits parties to decide whether or not to have the decision reviewed; (3) the accountability purpose, which enables a supervising court to assess whether the decision-maker met minimum standards of legality; and (4) the justification, transparency, and intelligibility purpose, which facilitates scrutiny by all observers and furthers the public interest because the decision-maker is part of our democratic governance structure. *Ibid.* at para. 16.

146 As Justice Côté writes in the *Spinks* decision, *supra* note 144 at para. 21: "And where the tribunal stated some unsatisfactory reason, what should the Court of Appeal do to defer? What would a deferential decision by the Court of Appeal look like? 'We can almost understand these reasons'? or 'These reasons are almost rational'? or 'Four of six vital topics were covered, and that is a good enough batting average'?"

147 *Newfoundland Nurses' Union*, *supra* note 141 at para. 11.

148 *Ibid.* at para. 12.

149 *Supra* note 102.

institution or person could override or strike down these laws. The rule of law required that statutes meet the "manner and form" criteria of enactment—that is, the legislature must be identified as the proper source of law and the proper legislative procedure must be used. Existence of these two factors sufficed in order to recognize a statute as valid or "prescribed by law" by all institutions and persons, including the judiciary. In the pre-Charter world of public law, the authority of legislatures was not constrained by courts, but rather by political sanctions. Political sanctions manifested themselves through regular elections as well as political conventions such as the confidence convention and by ministerial responsibility in which Cabinet ministers faced demands for accountability by way of scrutiny in Question Period in the legislature. The enactment of the Charter has fundamentally constrained the principle of parliamentary sovereignty. Legislatures can theoretically respond to some judicial rulings by using the s. 33 notwithstanding clause to override decisions temporarily.[150] Constitutional rights, however, can be limited subject to the government satisfying the justificatory requirements of s. 1 in the Charter.[151] In this way, Canada continues to endorse the principle of parliamentary sovereignty, but reconciles it with the principle of the rule of law as manifested in judicial review.[152]

The interpretive role of the courts in public law means that they must provide cogent and coherent justifications that explain the nature of the conflict and the appropriateness of the decision in favour of one right or one balance over another, even in the face of grants of broad powers of discretion. The Charter can significantly constrain delegations of broad discretionary powers where Charter rights and freedoms are directly or indirectly implicated, or which may not be sufficiently confined by the terms of the enabling statute. So, while the existence of broad discretionary powers is not suspect in itself, courts can be more demanding in cases that involve broad delegations of power by ensuring that discretion is structured or confined within the parameters of the Charter. In administrative law, this kind

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150 See Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale L.J. 1346. Although Waldron is discussing the role of the judiciary in the United States, his argument finds purchase in Canada with critics who bemoan the growth of judicial activism and the inability of legislatures to use the notwithstanding clause to advance a different interpretation of a constitutional matter for fear of political backlash. The abeyance of s. 33, they argue, gives judges the *de facto* last word and ensures that the courts remain supreme over other branches of government. The litmus test for this debate is whether or not one believes that in a reasonably democratic society with functioning legislatures, where its citizens disagree about the scope and content of rights, judicial review of legislation constitutes an inappropriate mode of final decision making.

151 Citing constitutional scholar Peter Hogg, the Supreme Court describes the constitutional and rule-of-law basis of the "prescribed by law" requirement of s. 1 as: (1) all government action in derogation of rights must be authorized by law or be found arbitrary and discriminatory; and (2) members of the public must have a reasonable opportunity to know what is prohibited by law so that they can regulate their conduct. Moreover, the law must be sufficiently precise in order to provide guidance to those who apply it. See *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] 2 S.C.R. 295 at para. 50.

152 See e.g. Wilson J.'s characterization of s. 1 of the Charter in her dissent in *Operation Dismantle v. The Queen*, [1985] S.C.R. 441 at para. 104: "Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a 'political questions' doctrine and permits the Court to deal with what might be termed 'prudential' considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review."

of activity is particularly controversial if it means judges can, in certain cases and with a constrained approach, "re-weigh" the factors that administrative decision-makers use based on their expertise and experiential knowledge, if such decisions violate constitutional values—as L'Heureux-Dubé J. arguably did in the *Baker* decision. Those who support this conclusion argue that the Charter reinforces the constitutional commitment that all persons—individuals, corporations, groups, and state actors—must adhere to the rule of law and respect fundamental constitutional values. *Baker* therefore represents an important link in the rule-of-law narrative that can be traced back to *Roncarelli*. Like *Roncarelli*, *Baker* discloses that administrative and constitutional law are attuned to underlying fundamental values such as basic concerns for human dignity, the vindication of rights, and the effects of political power on individuals.[153]

The recent *Doré v. Barreau du Québec* decision from the Supreme Court changed the methodological approach used to review discretionary decisions involving Charter interests and values.[154] Overturning the majority approach previously endorsed in the *Multani* decision, the Supreme Court confirmed that the orthodox approach used to review whether or not a *law* justifiably infringes a right or freedom—the *Oakes* test—should not replace administrative law review for discretionary decisions.[155] The standard of review will be reasonableness with "proportionality" serving, in such cases, as the central criterion of reasonableness. Deference will be shown and reasonableness will be recognized when the administrative body has asked itself how the particular Charter value will best be protected while recognizing statutory objectives, and then has properly balanced the severity of the interference in light of these statutory objectives. It seems clear that the primary way to show that proportionality analysis has been properly undertaken is through the provision of adequate reasons. *Doré* seems to align judicial review of discretionary decisions with the *Cooper* dissent, discussed immediately below. Several issues, however, remain unclear including: (1) how exactly will proportionality analysis be constructed in reasonableness review; (2) can administrative law adequately protect Charter interests and values in discretionary decision making; (3) how does the interpretation and weighing of Charter values relate to agency expertise; and (4) does *Doré* endorse judicial re-weighing of the values considered and balanced by the original decision-maker?

Another significant development in the relationship between the Charter and administrative bodies is the judicial finding that an administrative tribunal may have the jurisdiction

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[153] See Mary Liston, "'Alert, Alive and Sensitive': *Baker*, the Duty to Give Reasons and the Ethos of Justification in Canadian Public Law" for this understanding of *Baker* in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004). This collection of essays offers a multiperspectival examination of a public law culture of justification through the lens of *Baker*.

[154] *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*]. For further discussion of the implications of the *Doré* decision, see Chapter 10 by Sheila Wildeman, Chapter 11 by Geneviève Cartier, and Chapter 12 by Evan Fox-Decent and Alexander Pless.

[155] See Deschamps and Abella JJ.'s concurring reasons in *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6 [*Multani*]. See also LeBel J.'s dissent in *Blencoe*, *supra* note 21. The Court, therefore, has drawn a jurisprudential distinction between a law (i.e., a norm of general application produced by a legislative body which may also include a regulation and a bylaw) and decisions and orders made by administrative bodies. When a tribunal determines the constitutionality of a law, on the other hand, the standard of review will be correctness.

to consider Charter challenges to its enabling legislation and to award Charter remedies under s. 24(1).[156] This determination represents a major shift in the earlier approach, which allocated the power to determine questions of law to courts, while leaving administrative bodies the power to interpret and apply their enabling legislation. Originally, only administrative tribunals that structurally and purposively mirrored courts possessed the jurisdiction to hear Charter claims. Now, sometimes the enabling legislation will empower an administrative tribunal to interpret and apply all law, including the Charter, while at other times the statutory scheme as a whole will confer an implicit jurisdiction. These changes are grounded in concerns for access to justice and recognition of the competence and capacity of such tribunals as legal bodies to interpret legislation. Jurisdiction to apply the Charter to enabling legislation and to award Charter remedies may be explicitly given by the legislature in the statute. Certain rule-of-law considerations stemming from the separation of powers will flow from this mandate: the particular decision will not be binding authority as precedent for future cases; and, in subsequent judicial review, the decision will be subject to a standard of correctness, ensuring that it receives little or no curial deference.

The ability of administrative agencies to question unconstitutional enabling provisions not only provides an economical and efficient resolution of a rights dispute (avoiding the need to go to court), but also conforms to the "institutional dialogue" and "deference as respect" models. This democratically informed perspective emerged clearly in the dissent written by McLachlin J. (as she then was) and L'Heureux-Dubé J. in the case *Cooper v. Canada (Human Rights Commission)*. This case concerned the fundamental question of whether or not human rights tribunals have the authority to determine the constitutionality of provisions in their enabling statutes. In *Cooper*, they wrote a resounding affirmation:

> The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.[157]

The dissent in *Cooper* expresses a vision of democratic constitutionalism that respects the legitimacy of the administrative state and that has been subsequently affirmed in the *Martin* decision.[158] This vision of Canadian constitutionalism relies on a democratic interpretation of the separation of powers and therefore recognizes the appropriate role of administrative

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[156] In Chapter 12, Evan Fox-Decent and Alexander Pless discuss the difficulties in the relationship between the Charter and administrative law, including agency jurisdiction over the Charter and the trilogy of cases affirming tribunal authority to consider questions of law. See *R. v. Conway*, [2010] 1 S.C.R. 765 and Cristie Ford in Chapter 3 on the expansion of the ability of tribunals to award Charter remedies. Parliament and provincial legislatures, however, retain the power to make it clear in the enabling legislation that statutory delegates do not have the power to consider the Charter, other constitutional issues, or issue Charter remedies.

[157] *Cooper*, *supra* note 26 at para. 70.

[158] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504 [*Martin*]. Lorne Sossin in Chapter 7, Access to Administrative Justice and Other Worries, provides a fuller discussion of *Martin* and agency jurisdiction under the Charter.

tribunals—particularly human rights tribunals—in determining the content and scope of fundamental legal norms.[159] The institutional aspiration underlying this vision wishes to create a constitutional democracy that reconciles the formerly competing sovereignties and reinforces institutional competencies. On this account, administrative agencies as constitutional partners do exhibit rule-of-law attributes, have embraced rule-of-law values, and can facilitate access to justice for the benefit of citizens and other affected persons.

E. Other Routes to Accountability in the Administrative State

Judicial review represents an important, but not the sole, route to securing administrative accountability. Courts should be seen as merely one among the many means by which we hold government to account. Moreover, it will be better for the legitimacy of courts if we recognize them as one among a "family" of legitimate routes to securing accountability within a liberal democratic state: public inquiries,[160] task forces, departmental investigations, special legislative officers, and ombudsmen. The rule of law will also inform the various institutional alternatives to judicial review of government action.

V. Conclusion: A Democratic Rule of Law in the Administrative State

This chapter has explained how the concept of the rule of law and its associated legal and political principles are fundamental to understanding the relationship between courts and administrative bodies. The realization of the rule of law within a democratic culture cannot only legitimate the sharing of public power among courts, the executive, legislatures, and administrative bodies, but also facilitate the creation of multiple routes for citizens (and non-citizens) to secure accountability for the use of public power. All parts of and persons in the state participate in the creation and maintenance of the rule of law. This reality points to a conception of the rule of law, which recognizes that all branches of government have a duty to realize a rule-of-law state and that all branches can fail to do so in distinctive ways. The multiplicity of institutional environments, however, means that the rule of law will require different responsibilities and restraints for different institutional actors and practices. Though this makes administrative law a difficult field of study and provides unending complications for judicial review of administrative decision making, one positive reading of such complexity suggests that this is a necessary consequence of the interaction between the rule of law and democracy. The simple system suggested by both legal and political theory, then, is capable of infinite variations and complexity in the design of institutions and their constraints. These permutations must nevertheless continue to adhere to the substance and procedures of legality—a process in which courts play an important role through interpretation of legal principles and oversight of administrative practices.

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[159] For a more expansive argument, see Dyzenhaus, "Constituting Fundamental Values," *supra* note 110 at 453-87.

[160] See Peter Carver, Chapter 16, Getting the Story Out: Accountability and the Law of Public Inquiries, for a discussion of administrative law in relation to public inquiries.

How a judge understands the rule of law, and his or her role in upholding it through judicial review, will necessarily shape how he or she approaches the review of decisions made by an administrative tribunal. Judicial temperament is not completely predictable: judges may conceive of themselves as the Diceyan defenders of the rule of law against the administrative state; or they may view themselves the Dworkinian legal guardians of the constitution, committed to upholding the rights conception of the rule of law; or perhaps they may see their role as the Fullerian cooperative partner who recognizes democratic initiatives, but still maintains institutional fidelity to rule-of-law principles; and lastly, they may perceive themselves as the Razian interpreters of guided discretion and judicial faithfulness to coherent legislative purposes. Institutional dialogue and deference as respect stand as distinctive forms of the commitment to judicial restraint in Canadian administrative law—a restraint that simultaneously attempts to ensure judicial accountability and larger democratic accountability. Nevertheless, the modern development of deference and respect for administrative tribunals is both an ongoing and vulnerable achievement.

SUGGESTED ADDITIONAL READINGS

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