It is a cliché to say that we live in a changing world. Nowhere is this truer than in the business of governance – how the law is applied to the citizenry: the women, men and children who make up the fabric of Canada.

The past century has seen a revolution in governance, as western democracies, including Canada, moved from a traditional rule of law model of governance to governance in the modern regulatory state. This transition has confronted the Canadian legal system with a challenge: how to maintain the rule of law when most legal decisions are not made by legislatures, the executive or the courts – the traditional branches of governance – but by a host of administrative tribunals exercising delegated executive power. The rule of law requires that all official power be exercised within the framework of the law – fairly, reasonably and in accordance with the powers duly conferred on the body exercising them. The challenge is ensuring this in the modern regulatory state.

I will first offer an overview of the transition over the past century from the traditional governance model to the modern regulatory state. I will then track the Supreme Court of Canada's struggle to fit the modern regulatory model within our traditional concept of the rule of law. I will suggest that the jurisprudence falls into four periods: a period of confrontation; a period of contextual deference; a period of search for standards of review; and finally, a period of consolidation and – to use the vernacular – "settling down".

The Backdrop: Transition from the Traditional Model to the Modern Regulatory State

On the traditional model of governance, Parliament and the legislatures pass laws. The executive implements and enforces these laws. The courts, for their part, interpret and apply the laws Parliament and the legislatures passed in the course of adjudicating a particular dispute. The Criminal Code offers a good example of the traditional approach. Parliament makes laws setting out crimes. If people violate those laws, they are prosecuted by Crown attorneys, and tried by the courts.

Under this traditional model, the executive played a relatively modest role. Its functions were exercised by Ministers and their immediate delegates. But this simple model has increasingly given way to a more complex form of governance. In this new model, which began to emerge over a century ago, the legislatures did not content themselves with passing laws that told people what they must do or not do. Instead, governments began setting up administrative frameworks designed to govern a particular area of human activity. The result was the birth of the modern regulatory state.

The typical administrative scheme, as it came to be called, set out the legislature's basic objects and provisions in a general statute. But unlike the traditional model, most of the heavy lifting was now done by regulations, adopted by the executive branch of government under orders-in-council. To administer these government-made rules, various bodies were created. Commissions might have overall oversight and policy responsibilities. But inevitably, always, there was a tribunal – a body of people appointed by the government on a permanent, semi-
permanent or ad hoc basis to decide issues arising under the scheme between citizens and the state, and sometimes between citizens and citizens.

The result was a dramatic shift in who did society's judging. Vast and unlimited stretches of law and conduct that formerly fell under the jurisdiction of common law courts were swallowed up by these new schemes. Legislatures could not remove the constitutional power of the courts. But they proved that they could shift much of their work to administrative tribunals. More and more, administrative tribunals regulated the problems created by modern society. It was they who enforced the new laws and interpreted their ambit and provisions.

The move to administrative governance in a host of areas gained momentum in the last half of the 20th century. Now, in the beginning of the 21st century, literally thousands of administrative systems occupy the legal landscape. Virtually all the important areas of endeavour and social concern, from labour to human rights, from workers' compensation to mental health – areas once under the jurisdiction of the common law courts – have been, to coin a term, "administerized". Vast swaths of the rule of law are dealt with by commissions and tribunals.

Chief Justice Lamer acknowledged the centrality of administrative tribunals in Canadian society when he said, quite simply, "the impact of administrative agencies on the lives of individual Canadians is great and likely surpasses the direct impact of the judiciary". 1

The shift to regulatory governance has been wildly successful. In a word, it works. The complex modern state could not function without the many and varied administrative tribunals that people the legal landscape. Tribunals provide specialized and technical resolutions in different situations, ensure greater innovation, flexibility and efficiency in the delivery of governmental programs and strategies, and provide an informal and rapid forum for public hearings, thereby minimizing time and costs related to litigation before ordinary courts. 2 As Justice Abella stated while she was sitting on the Ontario Court of Appeal:

> Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly. 3

In sum, without administrative tribunals, the rule of law in the modern regulatory state would falter and fail. Tribunals offer flexible, swift and relevant justice. In an age when access to justice is increasingly lacking, they help to fill the gap. And there is no going back.

Yet the rise of administrative tribunals posed a problem. How could we have all the benefits of tribunal justice, and still maintain the rule of law? How, it was asked, could the public be sure that government-appointed tribunal members would hold fair hearings and stay within the ambit of their administrative powers? Would the gains made in the long fight for rights and fair adjudication before the courts be lost when appointed board members – accountable to no one but the government they hoped would re-appoint them – decided the rights and wrongs of people's disputes with each other and with the state?

If these fears have not been realized, if tribunals work within the rule of law and not outside it, it is because the courts took on the task of ensuring that administrative tribunals remain true to their fundamental mandates, both procedurally and substantively. In a word, it is because of judicial review.

Judges have intervened to ensure that administrative tribunals administered justice in conformity to the fundamental tenets of the rule of law. English constitutional lawyer and professor Albert Venn Dicey led the way, pronouncing that the rule of law
Two important principles emerge from Dicey's vision of the rule of law. First, "regular law" is supreme and individuals should not be subject to "arbitrary power". Second, the state's officials are as much subject to the "ordinary law" of the land as other citizens. As guardians of the rule of law, it is therefore incumbent on the courts to ensure that any body relying on power delegated by the legislature abide by the terms and conditions on which that power was granted. In other words, it is the courts' task to ensure that administrative tribunals exercise their power in a manner consistent with their delegated mandate.

The courts in the first half of the 20th century developed two modes of control to ensure the rule of law was preserved. They enunciated principles of natural justice to assure procedural fairness: the right to notice, the right to be heard, the right to a coherent procedure and a reasoned decision. These were the guarantees of the rule of law from a procedural perspective. And on the substantive side, they moved to ensure that administrative tribunals exercised their powers as the legislature intended or was presumed to have intended. The legislature could not have intended the tribunal to make arbitrary or wrong decisions, the courts reasoned. Therefore, courts were empowered, indeed obliged, to set such decisions aside.

This is the backdrop. It brings us to the beginning of the story I want to trace today – the four periods of Canadian administrative law, as the Supreme Court struggled to find a practical and principled way to reconcile a vibrant regulatory system with judicial review that maintained the rule of law.

I have been involved in two and a half decades of this saga, and sometimes, I must confess, the image of the tribes of Israel wandering in the desert for forty years has come to mind. Yet I am optimistic that our journey may be nearing its end.

The First Period: Confrontation

The period between 1950 and 1975 was characterized by a period of confrontation. Courts intervened repeatedly and routinely in tribunal decisions using a sweeping and fluid definition of jurisdictional error. In 1969 in Port Arthur Shipbuilding Co. v. Arthurs, the Supreme Court of Canada overturned an arbitration board's findings without suggesting that the standard of review governing this kind of body was any different from that governing a lower court. And in 1970 in Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796, the Supreme Court quashed a labour relations board's decision to grant certification despite the presence of a strong privative clause. The case was described as the "high water mark" of activist review in Canada. As Justice Cory would later remark, it approved "a definition of jurisdictional error that was so broad as to include any question involving the interpretation of a statute".

The goal was to ensure that administrative tribunals operated within the principles that define the rule of law. Not arbitrarily. Not capriciously. Not unreasonably. Fairly and in accordance with the law.

But some felt the courts were going too far. Legislatures responded to judicial intervention by telling the courts to mind their own business and leave tribunal decisions alone. They took to routinely inserting privative clauses in administrative statutes. Decisions were declared to be "final" and "not subject to review".

The courts responded that, under the Constitution, legislatures did not have carte blanche to oust the rule of law. Nor could privative clauses confer jurisdiction on tribunals that the statute did not. More and more courts used lack of jurisdiction to oust tribunal decisions. Legal battles raged over what constituted a question of
jurisdiction and what the courts could not touch. At times the debates took on a weird, academic air, far removed from the concrete dispute between the parties.

The Second Period: Contextual Deference

Starting in the late '70s, a new, less confrontational approach began to emerge. The decisions of the Supreme Court began to acknowledge that administrative tribunals were doing important policy and adjudication work – work that an overly expansive approach to judicial review could frustrate.

Thus, in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp, Justice Dickson, as he then was, held that courts should defer to what administrative tribunals think is reasonable within their own context and special expertise, even if this included statutory interpretation. In reviewing the decision of an administrative tribunal, the question that the Court had to ask was "was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?"  

The adoption of a "reasonableness" test marked an important shift away from the earlier view that tribunals should be subject to the same standard of review as courts. In effect, the Court recognized that deference may further the goals and purposes underlying the legislature's decision to delegate ultimate responsibility to an administrative agency rather than to the courts. This "more sophisticated understanding of the role of administrative tribunals in the modern Canadian state" was among the most significant developments in the Canadian law of judicial review to that point. As Justice Iacobucci put it:

"Central to Justice Dickson's revision was an understanding of the role of expertise in the modern administrative state, because it was an appreciation of specialized expertise that allowed Justice Dickson to acknowledge that judges were not always in the best position to interpret the law."  

But the rule of law was not forgotten. As I explained in a later case, "the ... approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law".  

Deference in context and within the rule of law – this, broadly speaking, was the picture from the late '70s to the late '90s. Principled, yes. Nuanced, yes. But, as it turned out, difficult to apply.

The Third Period: The Search for Standards of Review

While the broad principle – contextual deference within the rule of law – had been laid out, just how to apply it was more elusive. Beginning in the late '90s the Supreme Court in a series of cases struggled with how to achieve deference within the rule of law. In 1988 in Bibeault, under the consolidating pen of Justice Beetz, the Court announced the "pragmatic and functional approach" to the standard of review. In cases such as Pezim, the Court spoke of a "spectrum of deference" depending on various factors. All very contextual. All very loose. And, said the critics, all highly uncertain.

Eventually, in the 1997 case of Southam, the Court came to recognize three standards of review – correctness, reasonableness and patent unreasonableness: in ordinary language, strict, deferential and very deferential. Uncertainty as to which standard applied when continued.

In 2008, after a decade of struggle to find the right formulation, the Court sought to simplify and consolidate in Dunsmuir. Reasonableness and patent unreasonableness were rolled into simple reasonableness, which has

come to be the standard applicable to the vast majority of tribunal decisions. Correctness was still the standard for general questions of law and perhaps jurisdiction, but the latter category became less and less applied. *Dunsmuir* maintained the multi-factored contextual test for what standard applied. But it also sought to introduce predictability by stating that once a standard of review has been identified as applicable to a particular type of decision, it was unnecessary to go through all the factors in each decision.

**The Fourth Period: Consolidation and Settling Down – 2008 to Now**

It is probably not an exaggeration to say that by the time *Dunsmuir* came around in 2008, administrative lawyers, academics and judges were suffering from collective standard of review fatigue. The passion that marked the early contretemps between the courts and the tribunals had given way to a weary wish that the problem would just go away. Difficulties remained to be sure. But there was a felt need to take a break from the endless theorizing, to settle down and apply *Dunsmuir* and its progeny and see if what we had, with tweaking here and there as necessary, could be made to work.

We may now be entering a period of relative calm in administrative review. There is general acceptance on the part of legislatures and tribunals – I say this with some trepidation, sure as I am that not all may share this view – of the importance of judicial review by the courts to ensure that administrative tribunals operate in a way that is procedurally fair and substantively appropriate. In a word, within the high principles of the rule of law.

There is also a growing appreciation on the part of the courts of the role of administrative tribunals and decision making in a modern society governed by the rule of law. Acceptance of the specialized expertise and policy perspectives that administrative decision-makers bring to their special tasks of judging – and the consequent need for deference – is universal.

One way to look at the last half-century in Canadian judicial review is as a time of tension between administrative decision-makers and the courts, marked by doctrinal uncertainty. Another is to say that over the last fifty years, we have made considerable progress in reconciling the modern administrative state with the rule of law on a theoretical and practical basis. The task we faced was difficult and important, and the journey has not always been smooth. But we have come a long way.

Justice Frank Iacobucci, himself a veteran of the wars over standard of review, signalled in 1998 that we have entered new, more peaceable terrain:

... hopefully the era of antagonism between the courts and the administrative state is now at a close as courts understand that they are no longer the sole caretakers of truth and justice.  

Like Justice Iacobucci, I believe that we have reached a new stage in the saga of courts, administrative tribunals and the rule of law. We have not resolved all the problems. But we understand better how to go about resolving them. We understand better than we once did that what matters is fundamental fairness, and that what is fundamentally fair depends profoundly on the particular mandate and context of the tribunal in question. We understand better that the rule of law does not always call for one right answer in every case, but rather that for many decisions there is a range of reasonable alternatives. And most importantly, we understand that both tribunals and courts are essential to maintaining the rule of law in our complex, rapidly changing world.

The words of the former Chief Justice in another context also resonate in the modern legal world where courts and administrative tribunals both play essential roles: "Let us face it, we are all here to stay."

2. Guy Régimbald, Canadian Administrative Law (Markham: LexisNexis Canada, 2008) at 3.


12. Ibid. at 237.


Remarks of the Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada
6th Annual Conference of the Council of Canadian Administrative Tribunals
Toronto, Ontario
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