

# Canadian Administrative Law: The Case for Judicial Humility

## Droit administratif canadien : à la défense de l'humilité judiciaire

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Article abstract

For decades, the Supreme Court of Canada has contemplated the appropriate standard of judicial review of decisions by administrative tribunals. The Court has grappled with the tension between the role of, and relationship between, courts and tribunals. The author, who has been both a judge and a tribunal member, argues for an attitude of humility towards these administrative bodies. With this approach, the author argues, even those most skeptical of tribunals might recognize their value as less formal, more expeditious, more expert, and binding dispute resolution mechanisms that complement—rather than detract from or compete with—courts. They may come to appreciate tribunals as the court's institutional justice sibling, pursuing similar ends through different means.

**ISSUES / ENJEUX****Labour and Employment Policies / Politiques du travail et de l'emploi**

# Canadian Administrative Law: The Case for Judicial Humility

Rosalie Silberman Abella

Judicial review is the process by which courts review the actions of public authorities. The “standard of review” describes the degree of intensity with which a court reviews administrative decision-making. The applicable standard of review determines the level of respect—or deference—that a court must show to the decision of an administrative decision-maker on review.

The issue of what standard of review applies has been an endless source of business for the Supreme Court of Canada. In fact, the Court has, for the last 50 years, been engaged in a dialogic identity crisis between tribunals and courts, one essentially launched when *Anisminic*<sup>1</sup> laid down the Diceyan gauntlet resisting the independent legitimacy of administrative decision-making. *Anisminic* passionately embraced jurisdictional error, a fluid concept whose reach always exceeded its grasp, becoming the Praetorian Guard of the judiciary which saw errors in need of protection everywhere it looked.<sup>2</sup>

Over the next fifty years, the Canadian Supreme Court disentangled itself from *Anisminic*'s grasp and came to develop an approach of presumptive respect—or deference—for a tribunal's specialized expertise, something Diceyans came to see as judicial trespass on the rule of law, and I came to see as judicial wisdom and understanding. For me, it was not a sign of judicial abdication, as Dicey's disciples charge, but a sign of judicial maturity, a sign, in turn, of judicial humility.

I know there is that perennial philosophical debate out there that starts with the question “The Rule of Law: Can it exist without the courts?”. And I think the answer to that question both explains the divide and the reluctance of some to move on from the past and embrace reality.

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Lecture delivered on January 31, 2019 at the Faculty of Law of the University of Toronto and by video to the Symposium in Auckland, New Zealand in honour of the retirement of Sian Elias, the Chief Justice of New Zealand.

1 *Anisminic Ltd. v. Foreign Compensation Commission* (1968), [1969] 2 A.C. 147 (U.K.H.L.).

2 *Ibid*, at p. 171.

Here is my thesis: like many legal scholars and most members of the Supreme Court of Canada ever since the Court's 1979 watershed judgment in *CUPE v. New Brunswick Liquor*,<sup>3</sup> I see both the Courts *and* administrative decision-makers as equally responsible for, and capable of, interpreting the applying law within their separate, assigned legal spheres. In other words, the rule of law *and* respect for the right of administrative decision-makers to decide questions of law are not binary concepts, they are parallel legal universes.

Administrative law *is* law, no less than the judge-made law Dicey gave pre-eminence to, in order, successfully it turned out, to reign in the nascent, regulatory administrative state. In fact, the courts became such successful agents of declawing the government's social and labour reform agenda, that Prime Minister Salisbury was moved to rebuke Lord Halsbury with the following: "The judicial salad requires both legal oil and political vinegar, but disastrous effects will follow if due proportion is not observed."<sup>4</sup>

If I can borrow a metaphor from the arts, just as it took a while for people to come to appreciate that jazz, a deeply distinct form of music, was nonetheless "music" albeit differently textured, so it has taken a while for the legal world to appreciate that administrative decision-making, although a deeply distinct form of dispute resolution, is still law albeit differently textured. And that, in turn, leads to understanding that *both* are entitled to respect, that law is not only the domain of judges, and that courts are not the only legal apothecaries that dispense justice.

Although the Supreme Court continues to wrestle with the conceptual tension between those who argue for a *judicial* apex to administrative decision-making and those who see judicial oversight as judicial trespass on the integrity of administrative decision-makers, the Supreme Court has, I think, largely emerged from the myopic darkness of Dicey's Den into the Daylight of Deference's broader legal vision, seeking ultimately to confirm a mutually respectful relationship between the Courts and administrative decision-makers.

It is, to me, fascinating to trace the jurisprudential evolution from the Court's 1970 decision in *Metropolitan Life*,<sup>5</sup> the case that applied *Anisminic* with enormous enthusiasm, branding everything the Labour Board did in that case as jurisdictional error; through *CUPE's* introduction of a brave new world that parted the waters and made a safe path on which to respect the decisions of tribunals that had privative clauses; through the 1994 decision in *Pezim*,<sup>6</sup> which extended the respect based on

3 [1979] 2 S.C.R. 227.

4 Cited in G. Jones, "Should Judges be Politicians?: The English Experience" (1982) 57 Ind. L. J. 211 at 213.

5 *Metropolitan Life Insurance Co. v. International Union of Operating Engineers*, [1970] S.C.R. 425.

6 *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

a recognition of specialized expertise even where there was a statutory right of appeal and *no* privative clause; through *Southam*<sup>7</sup> three years later, which introduced a new “reasonableness *simpliciter*” standard; and finally to the iconic *Dunsmuir*<sup>8</sup> in 2008, which collapsed patent unreasonableness and reasonableness *simpliciter* into one standard—reasonableness—and designated it as the presumptive standard unless it fell into one of the four categories in which correctness applied.<sup>9</sup> The four categories were; was the issue one of central importance to the legal system and outside the expertise of the decision-makers; was it a true question of *vires*; was it related to the jurisdictional lines between administrative decision-makers; or was it a constitutional question such as the division of powers.<sup>10</sup>

*Dunsmuir* was an effort at simplifying the ongoing debates about how or whether to review the decisions of administrative decision-makers and for a while it seemed to work. But not for long. We soon found ourselves being asked to clarify various pieces of *Dunsmuir* – what does reasonableness review mean, what is a question of central importance to the legal system, how do you assess reasons, what about statutory interpretations, what does ‘true question of jurisdiction’ mean, and where do privative and appeal clauses fit in. In the last 10 years, we’ve seen *Dunsmuir*’s judicial progeny occupy the administrative law field, with, on the one hand, Dicey’s philosophical descendants reasserting their—and his—authority and trying, once again, to tame the administrators by using the judicial whip, and, on the other, Deference clinging tenaciously to its claim of having equal authority in law’s arena.

Rather than dive deeply into the jurisprudence, what I would like to try to do is explain how I learned to understand administrative law, and, by understanding it, came to appreciate and then love it. So what follows, in brief, is the story of a rare creature in the legal universe: someone who has been a judge *and* on a tribunal. What I want to share with you is one judge’s learning curve about the tribunal universe, a learning curve that taught me that law does not just belong to judges, that justice is in good hands when people other than judges dispense it too, and that the relationship between the two is healthiest when each understands the limits of their authority. So this is a talk about judicial humility. It is a view from below. In other words, how I learned to appreciate and apply what Herbert Spencer called “The Tragic Murder of a Beautiful Theory by a Gang of Brutal Facts”.<sup>11</sup> So here are my facts.

7 *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

8 *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

9 *Ibid*, at paras. 45, 58-61.

10 *Ibid*, at paras. 58-61.

11 Attributed by Walter Lippmann in *Public Opinion* (New York: Harcourt and Brace, 1922) at page 15.

After I graduated from law school in 1970, I was a civil and criminal law litigator for four years who did everything that walked in my door. Administrative law never did. Then I became a family court judge in 1976 and for 7 years came to appreciate the importance of specialization. But still no administrative law. The phrase “standard of review” was nowhere in sight and yet my life seemed full. So you can imagine the delight of my new colleagues at the Ontario Labour Relations Board in 1984 when they learned that I was going to be their new Chair. A family court judge, which was not only *not* labour Law, it meant a courtroom, the adversarial system, rules of evidence, lawyers to debate them, and a food chain of appeals that never hesitated to tell you when you were wrong.

And what did I walk into? I was like Dorothy in the Wizard of Oz who found herself in a lush new world and said “Toto, I don’t think we’re in a court anymore”. What I entered was not only the world of labour relations, it was housed in an institutional framework very different from the one I had just come from. As a descendent of the court system, I had developed certain loyalties to the judiciary. I was no stranger to dispute resolution or hostile adversaries, but I approached them through a formalistic model of decision-making, with strict rules of procedure, accepted notions of reviewability by a higher court, and clear evidentiary guidelines.

What I faced when I joined the Labour Board was a very differently constituted legal environment. The expectations of the public and the parties were nowhere near as clearly defined, the rules significantly less formal, and the policy component substantially increased.

I was smitten. And, over time, sitting with and listening to people who spent every day of their professional lives wrestling with law to blend the statutory mandate with common sense and good labour relations, I was in awe. It was a tripartite process. A neutral but experienced lawyer presiding, flanked by two actual labour relations experts, one from labour and one from management, neither of them lawyers. The middle knew the law, the sides knew its real world implications and helped the lawyer in the middle make sure that the outcome was not just *legally* sound, it was labour relations sound. These synergetic deliberations—law blended with experience and seasoned with policy—gave the Board’s decisions credibility and protected its integrity in the labour relations community. The neutral lawyers in the middle met every week to discuss cases and to make sure we were developing consistent policies, and, every once in a while, the full board met if there was a profound issue that needed everyone’s input. The whole objective was to serve the public interest in the labour relations field and it was a wondrous thing to behold. And all these adjudicative tools complemented by labour relations officers, non-lawyers with experience in the field, who settled over 80% of our thousands of cases, on the theory that a quickly negotiated

settlement was more conducive to long-term workplace relationships than an imposed fiat after a lengthy legal struggle.

As a result, much of the law at the Board was counter-intuitive to a judge like me—but it was the air these experts breathed. And it taught me that law and policy were not oxymoronic strangers. They were both in the justice business, but it was a different business from what they were doing across the street at the court house.

So I became not only an advocate for my tribunal and others, I felt relentlessly protective of their uniqueness, of their specialized wisdom, and especially of their right to be called an institutional justice sibling with the courts. Not a twin, mind you, just a sibling who did justice differently from its judicial relatives but, in its own sphere of authority, did it no less effectively.

But tribunals had their own justice relatives too: other tribunals. A Securities Commission to deal with stock markets, a Human Rights Commission for discrimination, an Environmental Assessment Board to prevent environmental pillaging, a Labour Relations Board to protect collective bargaining, and a Municipal Board to promote responsible urban growth. The list goes on. We were created to fill a vacuum. We were a policy response and a policy tool. Governments set us up and held us out as specialized experts to further their policy objectives by giving us the authority to make decisions exclusively in a particular area. They funded us, chose us, and defined our policy base. Go forth and decide, they said.

So we did. And here we confronted the rest of the legal profession, lawyers and judges. This profession was raised and weaned on a very strict diet—no policy, no informality, and no change. Creativity, like dessert, was permitted, but not to excess. Lawyers were very comfortable in their familiar institution—the court—and believed in its omniscience, as opposed to its infallibility. The procedures were complicated but, to them, functional. They called us “inferior” tribunals, a word I have therefore never used in a judgment. The credo of the profession was that to be court-like was to be quintessentially just. The clearly delineated procedures provided a predictable framework within which to resolve and decide disputes. Everyone sang from the same song sheet and the chorus seemed harmonious. It took a long time and often cost a lot, but few lawyers left a courtroom feeling bereft of the opportunity to use the system to its full advantage. The system provided a full arsenal of machinery from which to choose the best strategy.

I came to see that the profession’s veneration of the courts, its commitment to this process, and its homage to the hierarchy of respectability, left tribunals practically off the map—or perhaps, more aptly, in the role of a developing

nation whose global presence is accepted, but which is never invited to the major Summits. Generalist lawyers sought more structure, more process, and greater formality. And in this, they were ably assisted by the judiciary.

Bear in mind what the courts understood to be part of the decision-making hierarchy. At every level of civil judicial decision-making except the Supreme Court of Canada, there is a right of appeal, an appeal not only of any procedural rulings, but the right to have the final decision replaced with a different one. All judges understand this cultural imperative, and although no judge relishes the prospect of an overturned decision, he or she recognizes the appeal process as a legitimate safeguard against the potential for error and a normal part of the judicial food chain.

When judges were confronted, therefore, with an organism like a tribunal which presumed in its area of expertise to be the final arbiter of a given problem or issue, when privative clauses appeared to be worn as shields from judicial scrutiny to protect this expertise from the generalism of the courts, judges were being asked to ignore their own culture and give to tribunals a deference they were not themselves routinely accorded. So they wanted to remake tribunals in their own image.

Which gave us *Anisminic*, *Metropolitan Life*, the preliminary question, and jurisdictional error. In a 1983 article in the *Revue du Barreau*<sup>12</sup>, Dean Rod MacDonald found 28 examples of what constituted jurisdictional error. But if you looked closely, what he found was the wolf dressed up as the sheep of jurisdictional error to disguise a wish simply to replace a tribunal's decision with one a judge was more personally comfortable with.

It is a perfectly natural response, this desire on the part of the judiciary to substitute its opinion for that of a lower tribunal. Descartes might have said "I judge therefore I review". But it comes with a cost.

And the cost was accessibility. The tribunals were trying to stay true to their mandate of being a less formal, more expeditious, more expert and binding dispute resolution mechanism, while the legal culture was trying to impose its traditional catechism of raw adversarialism, procedural density and endless appeals.

This left the tribunal's public somewhat bewildered. They expected the opportunity to know and meet the case against them. They expected fairness and impartiality in the process even if they could not always achieve success in the result.

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12 Roderick MacDonald, "Absence of Jurisdiction: A Perspective" (1983) 43 *Revue du Barreau*, 307-351.

What they most decidedly did *not* expect, or want, was the same labyrinthine justice journey the courts were offering at enormous financial and psychic cost; but they were constantly told that only the court really understood justice, so the expeditious expertise they'd been promised had to yield, in their own interests, to a higher authority. True this might delay access to a resolution if it did not have the judicial stamp of approval on the bells and whistles of adjudication. It was a titanic clash of cultures, and while well-intentioned, it was parental supervision, it was unnecessary, and it was demeaning to tribunal justice.

So back to where I started—I am very proud to be a judge and I am very proud to have been on a tribunal. My respect for both is limitless and so is my gratitude for what each has taught me.

## SUMMARY

### Canadian Administrative Law: The Case for Judicial Humility

For decades, the Supreme Court of Canada has contemplated the appropriate standard of judicial review of decisions by administrative tribunals. The Court has grappled with the tension between the role of, and relationship between, courts and tribunals. The author, who has been both a judge and a tribunal member, argues for an attitude of humility towards these administrative bodies. With this approach, the author argues, even those most skeptical of tribunals might recognize their value as less formal, more expeditious, more expert, and binding dispute resolution mechanisms that complement—rather than detract from or compete with—courts. They may come to appreciate tribunals as the court's institutional justice sibling, pursuing similar ends through different means.

KEYWORDS: Canada, justice, administrative law, tribunal, recognition, role.

## RÉSUMÉ

### Droit administratif canadien : plaider en faveur d'une plus grande humilité judiciaire

La Cour suprême du Canada se penche depuis plusieurs décennies sur la norme de contrôle judiciaire applicable aux décisions des tribunaux administratifs. La Cour s'est alors retrouvée aux prises avec les tensions qui existent entre le rôle des cours et celui des tribunaux administratifs et avec les tensions relatives à leur relation. L'auteure, qui a été à la fois juge et membre de tribunaux administratifs, préconise une plus grande attitude d'humilité envers ces dernières instances. Elle soutient que cette approche est susceptible d'amener même les plus sceptiques à l'endroit des tribunaux administratifs à reconnaître leur valeur en tant que mécanismes de règlement des différends moins formels, plus rapides, plus spécialisés et qui complètent les cours plutôt qu'ils ne leur nuisent ou ne leur font concu-



rence. Ils pourront ainsi considérer les tribunaux administratifs comme partenaires des tribunaux judiciaires au sein d'une justice institutionnelle, poursuivant des fins similaires, même si par des moyens différents.

MOTS-CLÉS : Canada, justice, droit administratif, tribunal, reconnaissance, rôle.