CURRENT DEVELOPMENTS IN CANADIAN ADMINISTRATIVE LAW

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The growth of administrative law in the last twenty years or so has been remarkable and is a phenomenon that most common law countries have witnessed. In one form or another, the law has come to be seen as an important part of the answer to the free-fall of public confidence in the political process and its traditional institutions and mechanisms. No longer are they regarded as adequate for redressing individual grievances arising from the administration of government programs, for ensuring open public participation in both the making and implementation of public policy and, more generally, for enhancing governmental accountability for the decisions made within the public sector. Whether as a result of the expanded role of law in government or because of it, agencies of the state are increasingly expected to respect the 'rights' claimed by both individuals and by groups.

It has become quite clear during the years of deregulation and privatisation that the importance of administrative law does not depend on the perpetuation of the older forms of state regulation of the economy. Indeed, just the opposite seems to be the case. First, the move that has been taking place in some countries from government-run enterprises to publicly-regulated private enterprises is likely to increase the role of lawyers and administrative law. Regulatory agencies of the kind familiar in North America typically hold hearings before making significant changes to their policy and before deciding how the law and any relevant policies should be applied in individual cases. Second, public expectations that government should tackle new (or newly-identified) problems show little signs of abating. In recent years, demand for occupational health and safety, freedom from discrimination on grounds of race, ethnic origin and sex, protection from environmental hazards and consumer protection, for example, have all required the enactment of legislation and the creation of administrative structures to implement it.

At a general level, the concerns of administrative law are broadly similar, regardless of jurisdiction. They include the protection of individual rights and the redress of grievances that arise from the administration of programs, the quality of the decisions made and the efficiency of the bureaucracy and a concern to preserve democratic values such as fidelity to statutory mandate, public participation, accountability and transparency. In comparison to some other countries, including Australia, Canada has not recently engaged in any comprehensive examination of its system of administrative law. At the federal level, there is no Ombudsman, and no body, like Australia's Administrative Review Council, to monitor the operation of the system, to identify points of difficulty and to recommend corrective measures.

I have no doubt that the enormous quantities of energy and resources that have been devoted to dealing with the constitutional crises through which Canada has struggled over the last ten years has diverted attention from other, less pressing issues of public law reform. However, Canadian law has made some

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interesting and significant contributions to the development of administrative law that are, I believe, of interest.

Refugee determination

An issue currently facing many countries of the developed world is that of dealing with claims for refugee status made by individuals who present themselves at a port of entry or on a deserted beach, or who have been admitted temporarily in some other capacity (visitor or student, for example) and seek to avoid deportation when their leave to remain expires. Claims made by a comparatively small number of Cambodians seem to have thrown Australia's refugee determination process into a state of crisis and have provoked the Commonwealth Parliament into passing legislation in the middle of the night that retrospectively validates the detention of the Cambodian boat people and removes the jurisdiction of the courts to order their release. The success rate of the approximately 300 refugee claims being made each month in Australia is less than 10 per cent. Ultimate decisions are made by the Minister, on the basis of recommendations made by officials, and by a review committee whose members are drawn from Government departments. There is no shortage of critics who claim, with considerable justification, that Australia's current scheme is both inefficient and unfair. The lack of any oral hearing is seen as a particular flaw.

In 1989, Canada introduced a system for the determination of inland refugee claims that has produced remarkable results. Its origin can be found in a decision of the Supreme Court of Canada that held that the scheme then in place was a denial of liberty and security of the person, other than in accordance with the principles of fundamental justice and thus a breach of s7 of the *Canadian Charter of Rights and Freedoms*. The Court held that the principles of fundamental justice required that no claim should be rejected without first affording the claimant an oral hearing, given both the potentially life-and-death nature of the decision to be made and the importance of credibility in most refugee claims.

The administrative structure created by the new Act is notable in two respects. First, it vests the responsibility for determination of refugee status in an independent administrative agency, the Immigration and Refugee Board. Secondly, it provides for a non-adversarial hearing for all claimants. Especially impressive has been the sheer size of the resources that the Canadian Government has been prepared to devote to ensuring a high quality of administrative justice. The Board is by far the largest administrative agency in Canada, with a full-time membership of 250 (of whom all but 20 are assigned to the Refugee Division of the Board) and a support staff of 750. In 1990-91, the operating budget of the Board was $90 million, while another $30 million was spent on legal aid for claimants. In addition, the provision of welfare benefits to claimants pending the final disposition of their claims and the additional departmental staff required have made significant demands on public resources, especially at a time of public sector fiscal restraint and a level of unemployment that might be expected to create a public opinion that is hostile to the admission of refugees.

The work load of the Board and the time taken to process the claims indicate a high level of efficiency. Currently, about 3 000 claims enter the system each month and the Board renders approximately 2 700 decisions a month. Perhaps most telling of all is the fact that the success rate for claimants is currently running at about 70 per cent, a figure that masks a much higher rate for claimants from major refugee producing countries (such as Sri Lanka, Somalia, Ethiopia and El Salvador). The bold decision of the Canadian Government to legalise the refugee determination process has made

a significant contribution to administrative justice in Canada and is a beacon in an area of human rights that in many other countries is one of gloom.

Limits of the judicial paradigm: doctrinal developments

One of the great dangers of the legalisation of public administration is that public administration will be forced to conform to judicial paradigms that are inappropriate and an impediment to the effective discharge of their statutory mandates. Let me give you two examples of very different contexts in which, despite their *quasi*-judicial appearance, the distinctive nature of the administrative agencies has been recognised.

The independence of tribunal members

The issue of tribunal independence that has traditionally captured attention is that of the independence of its members from the Executive. Recently, however, the attention has been given in Canada to the relationship between the administrative tribunal as a corporate entity (and in particular its Chair) and individual members who sit to hear particular cases. Broadly, the issue raised is to what extent the tribunal as a whole has a responsibility for the quality of the decision rendered by individual members sitting as a panel of the tribunal and how this institutional responsibility can be accommodated to notions of procedural fairness.

In an important recent case, *Consolidated-Bathurst Packaging Ltd v International Woodworkers of America*,[1] a challenge was made to a long-standing practice of the Ontario Labour Relations Board. The Board, I should explain, has jurisdiction over the certification of trades unions as the sole collective bargaining agent for groups of workers and over allegations of unfair labour practices. The Board typically sits in panels of three; a representative each of labour and management and an independent chair. Many of the Board's members are part-time appointees, although the Chair and Vice-Chair are full-time appointees.

The case arose out of a determination by a panel that the company was guilty of an unfair labour practice by breaching its statutory obligation to bargain in good faith. The complaint was made by the union when the company shut down its plant, soon after negotiating a new collective agreement with the union. The panel approved an earlier Board decision holding that bargaining in good faith required a company to reveal to the union that the plant might close, provided that the decision-making process had reached a point that this was very possible, even though no formal decision to close had been taken. This information is obviously of great importance to the union, because it would cause the union to focus its bargaining on issues relating to the laying-off of workers, rather than on wage increases. The company obviously has its own reasons to delay the publication of its corporate plans.

The Board's practice has been to hold meetings of the full Board to discuss cases heard, but not yet decided, by panels that raised difficult or important issues of labour law and policy. The panel that had heard the *Consolidated-Bathurst* case wanted it discussed. At these meetings, the Chair invites members of the panel to outline the issues as they see them and to indicate the conclusion that they have tentatively reached. There is then a discussion by all the Board members at the meeting, at the end of which the Chair expresses the wish that the panel has found the discussion helpful, reminds them that the ultimate decision is theirs alone and tells them that the Board looks forward to reading the reasons for decision, whatever they might be. Needless to say, counsel who appeared before the panel in the cases under discussion are not invited to attend these full Board meetings. Shortly after this meeting, the panel handed down its decision, finding

the company guilty of bargaining in bad faith and imposing a fine of $0.75 million.

An application for judicial review was made by the employer, on the ground that the discussion of the case at the meeting of the full Board in the absence of the parties raised an apprehension of bias and breached that aspect of the rules of natural justice which provides that only those who hear a case may decide it. The Supreme Court of Canada, by a majority, dismissed the application, pointing out that a multi-member Board that sits in panels faces a particular administrative difficulty, especially when many of the members are part-time and may be relatively inexperienced. The difficulty is to ensure that the decisions rendered by panels across the Province are consistent and are properly informed by an understanding of the implications of the issues in the wider context of labour relations law and policy. The Court emphasised that there was a strong public interest in the quality of the Board's decisions, because the development of equitable and harmonious labour relations was important for the economic well-being of the Province of Ontario.

It concluded that a member of the Board was no more guilty of bias as a result of discussing a case that she had heard, but not decided, than was a member of the Court of Appeal who consulted other members of the Court who had not sat on the appeal. Moreover, since responsibility for deciding the case remained squarely with the panel members who had heard it, there was not a breach of the *audi alteram partem* rule. However, said the Court, its approval of the full Board procedure was subject to two limitations: first, the facts of the cases discussed were to be taken as given and not debated; second, if a new point emerged for the first time at a meeting it should be put to the parties for their comments before the panel made its decision.

While basing its decision on a legal recognition that the Labour Relations Board performs functions and has public policy responsibilities that courts of law do not, the Supreme Court appeared not to notice important institutional differences. In particular, its acceptance of an analogy between the discussions of individual cases among members of the Court of Appeal and the meetings of the full Board overlooks the more strongly hierarchical nature of the Board and, especially, the important position occupied by the Chair in the decision made by the Minister on whether members' appointments should be continued. Might not a losing party reasonably suspect that, if the Chair or another senior member of the Board expresses a view about the way that a given matter should be decided, it would require a particularly strong-minded panel member to ignore this advice?

A somewhat similar issue has been raised about the practice of the Chair of the Immigration and Refugee Board in issuing Board position or policy papers on the interpretation of various provisions of the Immigration Act that have not been the subject of an authoritative judicial pronouncement. There are also policy papers advising the members on the approach favoured by the Board to the exercise of the various statutory discretions conferred on the Board. As I have already indicated, this is a large administrative tribunal, with some 250 members sitting, typically, in panels of two across the country. Consistency and the quality of decisions is a matter of grave concern to the Board. Incidentally, the Chair is described in the statute as the Chief Executive Officer of the Board.

These position papers are not issued under statutory authority and are therefore not legally binding on Board members. Indeed, if they purported to be, they would be unlawful fetters on the decision-making powers of the Board members hearing the case. The status and propriety of these Board policy

statements are the subject of some controversy among Board members. Some members of the Board, particularly those geographically furthest-removed in a westerly direction from Ottawa, have suggested that they represent improper pressure from Board headquarters, because it has been made clear to them that members are expected to give considerable deference to the position papers and, except in the most compelling instances, to give effect to them. Again, the influence of the Chair in the reappointment of members is seen by some as a powerful inducement to members to comply.

Whether the issue of these position papers is an unlawful fetter on the performance by members who hear cases has not yet been litigated in the courts. It is my view, however, that this proactive initiative by the Board is a commendable attempt to maintain the quality of the Board's work and of the level of administrative justice that it dispenses. Traditional notions of 'judicial independence' must be accommodated to the institutional nature of this agency. Statutory powers are conferred on members in their capacity as members of an institution, not as individuals operating entirely on their own.

It is important to point out that the Board's policy or position papers are available to the public and are the product of extensive consultation both within the Board and outside. Those that I have seen are of a very high quality indeed. If members feel constrained normally to defer to the collective wisdom of their colleagues, that is, in my opinion, quite appropriate. Allegations of bias and lack of independence connote the apprehended influence on decision-makers of some improper kind of pressure and there is nothing improper in the assertion of corporate responsibility by the Board for the quality of its members' decisions. To the extent that the independence of members is diminished, the benefits accruing from consistent and fully- informed decisions outweigh the costs.

Statutory interpretation and jurisdictional review

The second important area in which relevance of the judicial paradigm to administrative decision-making has been called into question concerns the interpretation of agencies' enabling statutes and the scope of the courts' power to review for jurisdictional error administrative decisions that are protected by a strong statutory preclusive clause. I should add that the Supreme Court has held that provincial legislatures lack the constitutional power to exclude judicial review for jurisdictional error. 'No *certiorari*' clauses in Canadian legislation are largely confined to tribunals operating in the area of labour relations, although the courts have recently held that simple finality clauses also have the effect of limiting judicial review to jurisdictional issues.

In the last few years, the Supreme Court of Canada has proved remarkably volatile in its approach to the review of labour tribunals' interpretation of their enabling legislation. The contested ground has been the proper allocation of responsibility between courts and tribunals for the interpretation of administrative statutes and, more particularly, the extent to which the courts are prepared to recognise that traditional attitudes to the interpretation of legislation are not necessarily appropriate for tribunals when interpreting the statutory framework within which they must discharge their regulatory responsibilities.

In the early 1980s, the Supreme Court of Canada reformulated the test of jurisdictional review in a way that explicitly recognised that the legislation administered by tribunals often provides no clear answer to a problem, usually because Parliament had not foreseen the particular issue that has arisen. And in

filling the silences and resolving the ambiguities of the statutory text, said Chief Justice Dickson, the labour relations expertise of the members of the specialist tribunal is just as relevant as the techniques and skills traditionally brought by the judiciary to the interpretation of statutes. In many ways, the most remarkable thing was that these statements were made in a case (*CUPE v New Brunswick Liquor Corporation*) in which the issue of statutory interpretation was whether an adverb that follows two verbs qualified both verbs, or only the verb immediately preceding it. The Court said that there was no 'correct' answer to this question and that the tribunal's decision should only be set aside if the tribunal had placed an interpretation on the legislation that was 'patently unreasonable'.

If the Court was prepared to recognise that the interpretation of legislation involved the exercise of implicit discretion in the context of the kind of syntactical issue that judges have traditionally regarded as peculiarly within their province, then one might have expected the Court to adopt a position of curial deference in a great many cases. Unfortunately, the judicial paradigm of statutory interpretation seems to have recaptured the imagination of the Supreme Court and judges are once again proceeding on the assumption that, even when legislatures have created specialist tribunals to administer a regulatory scheme and have protected their decisions with preclusive clauses, those provisions in the legislation that confer or limit the jurisdiction of the tribunal must be interpreted 'correctly' by the tribunal if the decisions are to be afforded legal authority as within its jurisdiction.

You will not be surprised to learn that it is about as easy to identify a 'jurisdiction conferring' clause in a statute as it used to be to distinguish a 'preliminary' or 'collateral' question from one that went to the 'merits' of the tribunal's decision. It is equally important to note that the resurgence of judicial activism in this area has been very much to the advantage of the employers' side of labour relations disputes.

The Canadian Charter of Rights and Freedoms

The adoption, in 1982, of a constitutionally-guaranteed bill of rights has added an important new source of public law in Canada. Approximately half of the cases that have been decided under the *Charter* have concerned criminal law and procedure but the *Charter* has also had a significant impact on public administration in Canada.

The provisions of the *Charter* that have been of most importance to public administration have been the right to freedom of expression and of the press (s2), the right to life, liberty and security of the person and the right not to be deprived thereof other than in accordance with the principles of fundamental justice (s7), and the right to equality before and under the law and the right not to be discriminated against on grounds that include ethnic and national origin, sex, race and religion (s15). Section 1 of the *Charter* expressly recognises that none of the rights protected by the *Charter* is absolute and that measures that infringe them may still be upheld if they are reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic country. Finally, I should add that while the *Charter* is part of the supreme law of the land (and states that laws that are incompatible with it are inoperative) many *Charter* rights - but not s2 - can be expressly overridden by legislation, a power that legislators have in the main been reluctant to invoke. The difference between Canada's constitutional guarantee that can be expressly overridden and New Zealand's statutory affirmation that requires other enactments to be interpreted consistently

with it whenever possible, is one of degree, not of kind.

In a remarkably short time, the Canadian *Charter* has become an integral part of our system of law and government. It has prompted public servants, politicians, the courts and public opinion to measure legislative and administrative action against its guarantees of basic civil liberties. On the whole, our courts have interpreted the *Charter* provisions in a manner that recognises that government plays an important role as the provider of goods, services and benefits and as the regulator in the public interest of much economic activity.

As Chief Justice Dickson once observed, the *Charter* is not an invitation to the judiciary to roll back the frontiers of the regulatory and welfare state.

Let me make one last general observation about the *Charter*'s impact. It has increased enormously the importance of lawyers within the public service, where they are expected to advise on potential *Charter* difficulties posed by proposed legislation and administrative action. Lawyers in the public service have undoubtedly moved closer than ever before to the centre of policy making. In addition, the private Bar has benefited enormously from the litigation generated by the *Charter* and constitutional law has rapidly permeated all branches of the practice of law.

As for the courts, their public profile has undoubtedly been raised considerably as many of the social issues of the day come before them: abortion, refugee determination, restrictions on advertising children's toys on television, and tobacco, mandatory retirement at age 65, the extradition of fugitive offenders to jurisdictions where they face the death penalty and the compulsory payment of union dues, for example. The volume and difficulty of litigation produced by the *Charter* has undoubtedly put significant strain on the judiciary. The increase in the judiciary's importance has also turned the spotlight on the appointment of judges, especially to the Supreme Court of Canada.

Nonetheless, courts rarely have the last word on an issue, even when they strike down legislation on *Charter* grounds. As often as not, the issue is returned to the political process for rethinking. The end product is generally better than the original. The courts' role is often to put back onto the political or legislative agenda an issue to which the Government has given a low priority or with which the Government would rather not deal because of its politically volatile nature. Abortion and refugee determination are good examples.

Let me give you some examples of the kinds of impact that the *Charter* has had upon public administration. As far as the hearing process of administrative tribunals is concerned, the courts have invalidated the previous refugee determination scheme for lack of an oral hearing, held that a presumption that certain tribunal proceedings be held in private (especially professional disciplinary hearings) was a violation of the freedom of the press and established that inmates appearing before prison discipline tribunals on serious charges have the right to be represented by counsel. In addition, challenges have been made to the independence from the Executive of members of tribunals with power over liberty and security of the person and it has been held that the principles of fundamental justice include the right that administrative proceedings be concluded without unreasonable delay. This latter use of the *Charter* may force some administrative agencies to conduct rigorous efficiency and effectiveness audits of their operations, especially since the prospects of additional public funding are less than promising in the present climate.

The equality guarantee of the *Charter* has also had a significant impact on

public administration. For example, it has been used to expand the reach of statutory anti-discrimination legislation. Thus, the Ontario Court of Appeal held that the exemption from the Act of the rules of sporting organisations respecting single-sex sports teams was itself discriminatory on grounds of sex, and was struck out. Benefits targeted to adoptive parents but not extended to actual parents have been impugned in the Federal Court of Appeal. The Court held that the appropriate remedy was the extension of the benefit to all parents and not the total invalidation of the program. A union representing agricultural workers in Ontario has attacked on equality grounds the provision in the Labour Relations Act that excludes agricultural workers from the benefits of being represented by a union certified by the Labour Relations Board. Finally, the broad interpretation given by the courts in recent years to anti-discrimination statutes may also be, in part, the result of the constitutional entrenchment of a right to equality and freedom from discrimination. Indeed, the Supreme Court has gone so far as to describe these statutes as *quasi*-constitutional in nature, a far cry from the not-so-distant past, when they were construed narrowly, on the ground that they restricted freedom of contract and the right to dispose of property.

Conclusions

As I hope I have indicated, public law in Canada is very much alive and kicking. The difficulties of holding our improbable country together have not absorbed all the public law energy of our bureaucrats, commentators and lawyers. Needless to say, there is a vast array of administrative law issues that I have not been able to deal with but I hope that I have said enough to arouse your interest in Canadian developments, not only in the area of the *Charter* - with which you may have to acquire some familiarity - but with broader issues of administrative law as well.

Exercises in comparative public law are rarely straightforward. The law relating to government is always to a degree specific to the political culture, institutional arrangements and constitutional traditions of the particular jurisdiction. However, in a rapidly shrinking world, it would be extremely short-sighted if we public lawyers thought that we had nothing to learn from our respective experiences in tackling governmental and administrative problems that, in one form or another, face all liberal democracies: how to advance public welfare without sacrificing individual rights, how to enhance the transparency and accountability of the modern administrative state and how to ensure that concerns for effectiveness and efficiency in the way that we are governed are not pursued to the exclusion of democratic values.

Endnote

1 (1990) 68 DLR (4th) 524.