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Administrative Law of the Seventies

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Reviews

Administrative Law of the Seventies.

By Kenneth Culp Davis. Rochester, New York:
The Lawyers Co-operative Publishing Co.,
San Francisco, California:
Bancroft-Whitney Co., 1976. Pp. xvii, 753
Price \$23.00

Administrative Law.

By Bernard Schwartz. Boston, Toronto:
Little, Brown and Company, 1976. Pp. xv, 730
Price \$15.00.

Canadian lawyers make far too little use of the rich body of administrative law which has been developed in the United States. To some extent this is because the very sophistication and complexity of that law makes occasional unorganized forays and serendipitous research intimidating and, all too often, frustrating ventures. The purpose of this review is to introduce the Canadian reader to the latest volume of the leading treatise and to a new one volume textbook. Each, in its own way, may serve as an invaluable guide and introduction to American administrative law.

Before going any further it would be well to consider why a working knowledge of American administrative law will be of value to a Canadian lawyer. After all, we have a different system of government and do not "judicialize" all our social, economic and political problems to anything like the same extent. Law and the courts have never played the dominant role here as in the United States. For us the emphasis is on parliamentary sovereignty and ministerial responsibility, not on limited powers and judicial review. How relevant are American solutions to our problems?

A realistic response to these objections must take the form of confession and avoidance for it would be naive to refuse to recognize that the differences between parliamentary and presidential systems of government create different expectations of administrative law. It is quite understandable that more is expected of judicial review where, as in the United States, political accountability is highly diffuse, or that, for much the same reason, greater faith is placed in the United States on a system of

independent regulatory agencies subject to close judicial scrutiny rather than political control.

Conceding all this, there remain two good reasons why Canadians should know more about American administrative law. First, the differences between the two systems of government are often exaggerated and used as a facile excuse to avoid further study. Second, what should be aimed at is not a wholesale importation of American solutions, but rather a receptiveness to new ideas which can be used to help create a uniquely Canadian system of administrative law which recognizes that, for all our British inheritance, we have, in fact if not in theory, adopted many techniques of government very similar to those which exist in the United States. Moreover, the size and ambitions of modern government with its immense delegation of discretionary power, force us to recognize that, even in a system of government which has ministerial responsibility at its heart, great and growing reliance has to be placed on judicial checks on the exercise of power.¹ As well, many of the most creative American developments have nothing at all to do with such basic distinguishing concepts as "checks and balances" and "separation of powers", but are concerned with the universal need for sound administration of big government. While it is always necessary to be aware of the contextual origins of American ideas, they cannot simply be ignored as irrelevant because they do not originate in Westminster.

One illustrative example of the applicability of an idea developed in the United States to Canadian administrative law will suffice at this stage. Canadian courts have long recognized that a "hearing" may be provided in different ways and not necessarily by way of oral proceedings.² Yet no adequate theory has emerged to explain

1. Philip Anisman identified and classified 14,885 "discretionary powers" in the *Revised Statutes of Canada, 1970* which

"... probably provides a reasonable sample of the discretionary powers subordinate to Parliament, of their nature and of the authorities who exercise them. Nevertheless, it should be stressed that the powers enumerated show only the tip of the iceberg. Many express powers are not included in the tables, none of the discretionary powers granted in the regulations themselves were considered, and, most important, no attempt was made to discover the number of implicit powers capable of exercise or actually exercised."

A Catalogue of Discretionary Powers in the Revised Statutes of Canada 1970 (Ottawa, Law Reform Commission of Canada, 1975) at 23-24

2. The leading cases are *R. v. Quebec Labour Relations Board, ex parte Komo Construction Inc.* (1969), 1 D.L.R. (3d) 125 (S.C.C.) and *Quebec Labour*

when written submissions will suffice and when an oral hearing will be required.

Davis has long urged that an analysis of this issue should centre on the nature of the facts in dispute as the key for determining the appropriate nature of the hearing.³ This cuts through the shop-worn general categories of "judicial" "administrative" and "quasi-judicial". (As Schwartz archly notes, "To soften a legal term by a 'quasi' is a time-honored lawyers' device." (p. 32)) Where the facts involved are general or "legislative" and the matter concerns policy or discretion, then an "argument" is called for which typically consists of written briefs and not necessarily oral argument. Where the facts in dispute are "adjudicative" and involve particular facts about particular parties, then an oral "trial" is appropriate along with confrontation and cross-examination.

An encouraging (although as will be seen not very typical) example of the willingness of the Supreme Court of Canada to break away from its reliance on broad conceptual classifications and concentrate instead on the particular issues involved is to be found in the 1965 case of *Wiswell v. Metropolitan Corporation of Greater Winnipeg*.⁴ While it did not involve a specific articulation of the "Davisian distinction" it does contain, to all intents and purposes, a functionally similar analysis. The issue was whether local residents were entitled to notice of a proposed zoning change. Technically, this involved the making of a by-law and was thus a "legislative" act which did not require notice. The majority refused to be entrapped in this general classification and adopted the perceptive analysis of Freedman, J.A. in the Manitoba Court of Appeal.

But to say that the enactment of By-Law 177 was simply a legislative act is to ignore the realities and the substance of the case. For this was not a by-law of wide or general application, passed by the Metropolitan Council because of the conviction that an entire area had undergone a change in character and hence was in need of reclassification for zoning purposes. Rather, *this was a specific decision made upon a specific application concerned with a specific parcel of land* [emphasis added] (p. 763).

Relations Board v. Canadian Ingersoll Rand Co. Ltd. (1969), 1 D.L.R. (3d) 417 (S.C.C.).

3. K.C. Davis, *Administrative Law Treatise* (St. Paul, Minn., West Publishing Co., 1958) c.7

4. (1965), 51 D.L.R. (2d) 754. For an analysis of a number of similar cases in the United States where the courts were called upon to distinguish between municipal by-laws of general and of particular application, see Schwartz at 200-03.

As with any other useful legal tool, the distinction between “adjudicative” and “legislative” fact is not self-enforcing and does not magically provide instant answers. Indeed, the distinction itself is often only one of degree. Yet as Holmes observed, “I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort and are none the worse for it.”⁵ As Davis himself recognizes, in real-life situations administrative agencies will be confronted with mixtures of different types of fact calling for subtlety and dexterity in determining the appropriate type of hearing. Yet, this is but to point out that in any legal test, there will be grey zones of doubtful applicability. What is of real importance is that a lawyer who has command of the distinction has available to him an effective analytical tool with which to approach the issue of the type of hearing appropriate in any particular case.⁶

One final myth should be laid to rest before moving on to an assessment of the books themselves. It is popularly believed by Canadian lawyers that American reviewing courts completely retry all matters and substitute their judgment across the board for that of the administrative agencies. As a result it is supposed that Canada has nothing to learn from such an over-judicialized system.

It is true that an American reviewing court will undertake to satisfy itself that there is “substantial evidence” to support the administrative determination. Yet, as may be seen from the following extract from *Administrative Law*, this does not necessarily take the courts all that far.

It is not for the reviewing court to determine the correctness of the administrative factual determination upon its own independent judgment. “The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.” . . .

The reviewing court may not weigh the evidence, substituting

5. *Haddock v. Haddock* (1906), 201 U.S. 562 at 631 (N.Y.S.C.)

6. For a summary of the present confused nature of Canadian law on when an oral hearing is required see Robert Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1971) at 92-96.

Schwartz at 203 severely down plays the value of the distinction and suggests that, *in the end*, what is involved is the “traditional rulemaking — adjudication distinction”. Even if this is so, Davis’ insistence that the focus of analysis be on the facts in dispute is of the utmost value in breaking the tyranny of general classifications. If the level of analysis is not forced down to take full account of the facts in dispute, there will be an inevitable tendency to adopt a simplistic, “zoning = by-law = legislative” approach.

its judgment for that of the agency on the facts; but neither is it to rubber stamp fact-findings simply because they are supported by a scintilla of evidence. Substantial evidence means something between the weight of the evidence and a mere scintilla (pp. 592-3).⁷

Moreover, it cannot be smugly assumed that Canadian reviewing courts are never concerned with the quality of evidence taken in administrative proceedings. The *Federal Court Act* authorizes the Federal Court of Appeal to set aside any decision based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before the tribunal.⁸ Nor should the potential for growth of "no evidence" as a grounds for review be forgotten.⁹

It is particularly ironic that Canadians, who feel that American courts go too far, are almost certainly unaware that the most far-reaching grounds for judicial review, the jurisdictional fact doctrine, which is employed so widely in Canada, has been severely curtailed in the United States (Schwartz, pp. 628-42). Here a reviewing court will totally substitute its opinion for that of the administrative agency on any matter said to be a "jurisdictional question", and as Lord Diplock has warned, it may soon be possible to say "There is no question that cannot be turned into a jurisdictional question."¹⁰ Should the matter not be classified as jurisdictional, then review is largely confined to procedural issues. This means that where the substantive decision is thought to be unwarranted, the only way it can be reviewed is by concocting a procedural attack or "converting" the substantive error into one "going to jurisdiction." This, in turn, distorts the priorities of the administrative agencies which are encouraged to place inordinate emphasis on procedural regularity at the expense of substantive

7. For an excellent analysis of how the various verbal formulations work in practice, see Davis at 652-54.

8. S.C. 1970-71-72, c.1, s. 28(1) (c). This sub-section has not, so far, been much used. David Mullan has recently reported that he knows of no case in which it has been employed and that the Court has indicated that it does not intend to make an extensive use of this power. "The Federal Court of Canada — Reviewing Decisions of Administrative Tribunals," a paper presented to the Conference, "The Canadian Court System: A Reassessment", Osgoode Hall Law School, February 18, 1977.

9. See, for example, David Elliott, "'No Evidence': A Ground of Judicial Review in Canadian Administrative Law?" (1972-73), 37 Sask. L. Rev. 48.

10. Bernard Schwartz and H. W. R. Wade, *Legal Control of Government* (Oxford: Clarendon Press, 1972) at xiii.

analysis. An even-handed system of judicial review, *which tests the reasonableness not the rightness of evidence*, has much to commend it.

Administrative Law of the Seventies is the fifth volume of Davis' comprehensive *Administrative Law Treatise*. The first three volumes were published in 1958,¹¹ there was a supplement in 1970¹² and now a further supplement in 1976. However, as the author explains in his preface, it constitutes much more than a mere collection of new material.

First, a surprisingly large portion of this volume deals with new problems that the older administrative law did not reach. . . . Secondly, the unprecedented volume of administrative law litigation during the 1970's has meant that nearly all administrative law problems have been considered, so that the result is something approaching a comprehensive coverage (p. iii).

This comprehensiveness makes the volume particularly valuable to a Canadian reader seeking to obtain an overall sense of the direction of current developments in American administrative law. It will act, as well, as a sourcebook through the references back to earlier volumes of the *Treatise* in those few areas where there have not been significant recent developments.

Davis disclaims any literary merit for his latest major work. "A Supplement to a treatise has to be mostly dreary, not suitable for enjoyment. But some of the 1970-75 developments can be quite fascinating — even when filtered through a treatise writer". (pp. viii-ix). This reviewer would most emphatically disagree with this self-assessment and associates himself completely with the opinion of Judge Leventhal.

Perhaps the most notable feature of this Supplement is that it can be profitably read as a book. This is a rare and difficult accomplishment in the case of treatises. One can read the book straight through and gain a reasonably faithful portrait of today's administrative law, warts and all. To be sure, it helps to have had at least modest previous exposure. But if the corpus of the law is substantially restated every twenty years, as Justice Holmes observed, then this is a field in which five years of restatement tells a lot.¹³

The preface to *Administrative Law of the Seventies* brings most

11. *Supra*, note 3

12. Kenneth Culp Davis, *Administrative Law Treatise, 1970 Supplement* (St. Paul, Minn.: West Publishing Co., 1970)

13. Harold Leventhal, Review, (Fall 1976), 44 Univ. Chic. L. Rev. 260

welcome news of plans for a new edition of the Treatise. The Fall, 1976 issue of the University of Chicago Law Review is dedicated to Professor Davis upon his retirement from teaching at the Law School. It contains a comprehensive list of his many publications on administrative law stretching back to the late 1930's. As Dean Norval Morris noted:

With singleness of purpose, Kenneth Culp Davis early set himself to bring shape and order, principle and direction, to the entire field of administrative law, widely defined. The job is not complete; it never will be; but no serious scholar of administrative law will fail to be influenced by the remarkable scholarly achievements of Kenneth Culp Davis.¹⁴

Bernard Schwartz, Edwin D. Webb Professor of Law at New York University School of Law, is probably best known to Canadian readers as co-author with H.W.R. Wade, Professor of English Law at the University of Oxford, of *Legal Control of Government*.¹⁵ This extraordinarily readable and perceptive comparative study of English and American administrative law should be required reading in Canada, a country which constitutes, after all, a natural meeting ground of the two traditions. Indeed, what makes Schwartz's book particularly interesting are the occasional comparative references to English experience.

Administrative Law is a courageous book. Schwartz recognizes only too well that the 1970's is a period of considerable change and turmoil. Rather than retreat into defensive, particularistic scholarship he has boldly set out his accumulated insights born of thirty years experience teaching administrative law. He describes his sense of obligation to assist in this time of ferment as follows:

If students must learn fundamental concepts, they must also be made aware of the fact that the subject is in the midst of a period of unprecedented change. These changes are a major part of the book's theme. The very fluidity of the subject makes a usable text more necessary than ever. Otherwise the student is left adrift on an uncharted sea, unable to find his way through the burgeoning mass of altering doctrine (preface, p.XV).

Unlike Davis, Schwartz does not concentrate exclusively on federal administrative law.¹⁶ This makes a lot of what he writes

14. *Id.* at 1

15. *Supra*, note 10

16. "The treatise has to focus on the place where the action is, and that place is the federal courts." Davis at iv

more meaningful for Canadians in that it more realistically reflects the level of sophistication and resources at which we must operate. For instance, Schwartz is far from committed to the need for a formal record on all occasions, noting, pragmatically, that "The needs of justice could be served adequately by requiring the hearing officer to take detailed notes . . ." (p. 256). His description of the often confused nature of state remedies (pp. 538-48), including the New Jersey "general utility *certiorari*" and California's "*certiorarified mandamus*" should remind us that the importance of the remedies reform in Ontario, British Columbia and federally should not be gainsaid.¹⁷ Similarly, after describing the massive daily publication program of the United States federal government and the 127 volume *Code of Federal Regulations*, Schwartz paints a much more familiar picture of inadequate regulation publication at the state level. "But expense alone is hardly a justification for the complete lack of publication that still prevails in a majority of states. The situation in them, where a lawyer may still have to dig out the relevant regulations himself at the state capital, is a modern version of Caligula's method of writing his laws in very small letters and hanging them up on high pillars, 'the more effectively to ensnare the people.'" (p. 179).¹⁸

There is so much of relevance and value in these two books that a reviewer must be careful in selecting topics for particular attention to emphasize that he is not thereby suggesting that others should be ignored. Indeed, as it is hoped has been made abundantly clear, the great strength of *Administrative Law of the Seventies* and *Administrative Law* lies in their integrated comprehensiveness. Subject to this important *caveat*, it would be useful to select, somewhat arbitrarily, a few topics for highlighting.

17. Davis, characteristically, would brook no such gradualism in this regard. "An imaginary system cunningly planned for the evil purposes of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies." Treatise, *supra*, note 3, vol. 3, at 388-89

"My own view is that either Parliament or the Law Lords should throw the entire set of prerogative writs into the Thames River, heavily weighted with sinkers to prevent them from rising again." Davis, "English Administrative Law — An American View", [1962] P.L. 139 at 149

18. For some current proposals for improving access to federal regulations, see *Second Report of the Standing Joint Committee of the Senate and of the House of Commons on Regulations and Other Statutory Instruments*, Ottawa, 1977, at 13,39. And see, H.N. Janisch, "Publish or Perish", (a comment on *R. v. MacLean* (1974), 46 D.L.R. (3d) 564), Nova Scotia Law News, Vol. 1, No. 1, p. 11; "Secret Law Condemned", (a comment on *Re Michelin Tires Manufacturing (Canada) Ltd.* (1976), 15 N.S.R. (2d) 150); *Id.*, Vol. 3, No. 2, p. 19).

Schwartz includes a particularly lucid section on "Advice and Estoppel" (pp. 130-36). He cautions that, unlike a situation involving a private principal and agent, more than only private interests are at stake where official advice is involved. There is always a valid public interest to ensure that public authorities do not go outside their statutory mandate. If officials can be held to their advice by way of estoppel then this can give *de facto* validity to *ultra vires* administrative acts. "This reasoning, which results in denial of any remedy," he concludes, "has all the beauty of logic and all the ugliness of injustice" (p. 134). Thus, the no-estoppel rule has to be carefully confined to instances where the acts performed in reliance are clearly contrary to statute. In such cases, the fact that the government is involved is really not a determining factor, for no person can be estopped into a position contrary to law.

Canadian administrative law has not yet developed an adequate exhaustion doctrine. Schwartz has provided us with a very ably articulated rationale for the requirement of exhaustion of administrative remedies.

The exhaustion requirement is both an expression of administrative autonomy and a rule of sound judicial administration. The agency is created as a separate entity, vested with its own powers and duties. The agency should be free, even when it errs, to work out its own problems. The courts should not interfere with the job given to it until it has completed its work. Premature interruption of the administrative process is no more justified than premature interruption of the trial process by interlocutory appeals. The agency, as the tribunal of first instance, should be permitted to develop the factual background upon which decisions should be based. Like the trial court, the agency should be given the first chance to exercise direction and apply its expertness (p. 498).

This stand is subject, of course, to the objection that if the very jurisdiction of the agency is under attack, then why should the citizen have to exhaust his administrative remedies, the very validity of which he wishes to contest in the courts? Should he not be entitled to raise this matter immediately on review? This line of argument has been resisted to a large measure in the United States. It is said that the legislature has committed to the agency the job of finding the facts after a hearing. For the courts to try the facts (even those relating to jurisdiction alone) would be to impair the autonomy of the administrative process (pp. 505-12).¹⁹

19. Note, however, Davis' warning: "The common judicial statement that one

Courts in this country, encouraged by the Canadian Supreme Court's example in *Bell v. Ontario Human Rights Commission*,²⁰ have often not hesitated to intervene at the earliest possible opportunity.²¹ This constitutes another example of the dangerously seductive siren call of the jurisdictional fact doctrine, which leads to great unevenness in judicial review, as noted earlier.

The most interesting section of Schwartz's book deals with his reaction to *Goldberg v. Kelly*, a 1970 decision of the United States Supreme Court which laid down that a welfare recipient had to be granted a full "evidentiary hearing" *before* any termination of welfare benefits (pp. 224-61). So far reaching is the decision that Schwartz is of the opinion that the traditional central concern of American administrative law, the regulation of business by independent regulatory tribunals, will soon be dwarfed by social welfare concerns. This development will not be without severe resource allocation problems.

Perhaps an individual whose benefits are being terminated (as in *Goldberg v. Kelly*) should be afforded the same procedural protections as a business adversely affected by a regulatory decision. But must the same be true of the decision denying \$3.50 of the amount requested in a special grant for underwear? Only a legal system determined to furnish proof of Mr. Bumble's celebrated observation ("if the law supposes that," said Mr. Bumble ". . . the law is an ass") could impose an inexorable requirement of a fully judicialized trial even when the amount involved does not begin to cover the cost of transcribing the record (pp. 242-3).

The demands of mass administrative justice pose a fundamental challenge to administrative law. It is simply no solution to extend

must exhaust administrative remedies before going to court is false almost as often as it is true" at 446.

20. (1971) 18 D.L.R. (3d) 1

21. See, for example, *Re Balchen and Council of Engineers* (1972), 25 D.L.R. (3d) 754 (Man. C.A.), *Board of Governors University of Saskatchewan v. Human Rights Commission*, [1976] 3 W.W.R. 385 (Sask. Q.B.). There have, however, been some signs of holding back. For instance, where the facts are so underdeveloped as to make it impossible to determine whether there has been a breach of natural justice as in *Re Lilly and Gairdner* (1974), 42 D.L.R. (3d) 56 (Ont. Div. Ct.); *Re Wilson and Law Society of British Columbia* (1974), 47 D.L.R. (3d) 760 (B.C.S.C.). As well, it has been held that prohibition should not be granted until the administrative agency has itself made its decision on the issue of jurisdiction as in *R. v. Canada Labour Relations Board, ex parte Jessiman* (1971), 18 D.L.R. (3d) 226 (Man. C.A.); *Maritime Telegraph and Telephone Co. v. C.L.R.B.* (1976), 67 D.L.R. (3d) 55 (Fed. Ct., T.D.).

complex procedural rights *ad infinitum*. At the same time it would be invidious to suggest that the rights of business stand on a different plane from those of welfare recipients — especially in an age of “Lockheedization” when it is difficult to determine exactly who are welfare recipients. Yet, as Schwartz points out, some sense of proportion has to be maintained. While he has no quick answers for us here, his descriptive analysis of the workings of the Social Security Administration is most helpful. “The great need,” he emphasizes, “is to deal efficiently and fairly with a horde of cases, rather than to preserve all the accoutrements of the courtroom” (p. 254).

For Davis, undoubtedly the most encouraging developments have been those involving rulemaking. “The United States is entering the age of rulemaking, and the rest of the world, in governments of all kinds, is likely to follow. The main tool of getting governmental jobs done will be rulemaking, authorized by legislative bodies and checked by courts” (p. 168). The mainstay of modern rulemaking procedure remains the system of notice and written comments as prescribed by the *Administrative Procedure Act*. “The system is simple and overwhelmingly successful” (p. 170). It is important to note that the APA does *not* normally require an oral trial type hearing because the statutory requirement to provide an “opportunity to participate” in rulemaking only requires a trial type hearing where specific facts are in issue.

In Canada rulemaking procedure remains singularly underdeveloped. Neither the McRuer Commission²² nor the MacGuigan Committee²³ felt that there was any need for formal pre-regulation making procedures, being satisfied that widespread informal consultation took place in any event. Neither undertook any empirical research to determine whether informal consultation is truly representative of all interests.²⁴ Current legislative proposals

22. *Royal Commission Inquiry into Civil Rights* (Ontario: Queen’s Printer, 1968) at 363-64

23. *Third Report of the Special Committee on Statutory Instruments* (Ottawa: Queen’s Printer for Canada, 1969) 43-48

24. My concern is, of course, that less organized and influential interests such as consumer, safety and environmental will not be consulted unless a formal forum for participation is created. Interestingly, the MacGuigan Committee was not aware that the Air Transport Association of Canada passed a unanimous resolution of no confidence in the Air Transport Committee of the Canadian Transport Commission, and demanded that formal rulemaking procedures be adopted in order that their views might be heard. *Globe & Mail*, November 4, 1969

reflect the unsettled nature of Canadian thinking on this subject. The *Telecommunications Bill*, *National Transportation Act Amendment Bill*, and the *Competition Bill* all provide that where either the regulatory agency or the Governor in Council propose to make regulations it “. . . shall cause to be published in the *Canada Gazette* a copy of each regulation that [it] proposes to make and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.”²⁵ In sharp contrast, the Governor in Council is to be given power to issue binding general “directions” to the Canadian Transport Commission and the Canadian Radio-television and Telecommunication Commission (although not to the Competition Board) without any provision whatsoever for public participation.²⁶

After a number of years as a still small voice crying out in the wilderness of uncontrollable discretionary powers, Davis must find considerable, well-deserved satisfaction at recent developments in an area in which he has made an outstanding contribution starting with *Discretionary Justice* in 1969.²⁷ Since then he has undertaken two more specific studies on police and presecutorial discretion, the results of which are incorporated in a magnificent chapter on “Informal Action.”²⁸

We stand today in a position in Canada to start to do something about untamed discretionary power. Recent cases have made it quite clear that fears of fettering need no longer stand in the way.²⁹ Administrative agencies with broad discretionary powers may use

25. *Telecommunications Bill*, Bill C-43, First Reading March 22, 1977, Second Session, Thirtieth Parl., 25 - 26 Elizabeth II, 1976-77, ss. 33(1), 61(1); *National Transportation Act Amendment Bill*, Bill C-33, First Reading January 27, 1977, Second Session, Thirtieth Parl., 25-26 Elizabeth II, 1976-77, s. 278.1; *Competition Bill*, Bill C-42, First Reading March 16, 1977, Second Session, Thirtieth Parl., 25-26 Elizabeth II, 1976-77, s. 39.22(2)

26. *Telecommunications Bill*, ss. 3.2 and 22(1) (b); *National Transportation Amendment Bill*, s. 9

27. For a particularly valuable assessment of Davis, *Discretionary Justice: A Preliminary View* (Baton Rouge: Louisiana State University Press, 1969) and how his views relate to Canada, see Philip Anisman, Review (1969), 47 Can. Bar Rev. 670.

28. *Police Discretion* (St. Paul, Minn.: West Publishing Co., 1975); *Discretionary Justice In Europe and America* (Urbana, Ill.: University of Illinois Press, 1976). For a review of *Police Discretion* by Judge Henry J. Friendly, see Review (Fall 1976), 44 Univ. Chic. Law Rev. 255. Judge Friendly concludes his review with a warm personal tribute to K.C. Davis on his retirement from teaching at the Law School.

29. See, for example, *Re North Coast Services Ltd.* (1973), 32 D.L.R. (3d) 695

open guidelines, policy statements and the like to structure their mandate — *if they have a mind to do so*.³⁰ The problem now is *how* improvements are to be brought about if the administrative agencies find it convenient to cling to *ad hoc* decision making when considerations of fairness and predictability call for the use of open precedents, rules, guidelines and the like. Moreover, there is evidence to suggest that a number of agencies do have guidelines and policies which, although ostensibly established for internal purposes only, do, in fact, affect the rights of persons generally.³¹ Will any Canadian court be willing to adopt the forthright judicial pronouncements cited in *Administrative Law of the Seventies*?

“Judicial review must operate to ensure that the administrative process will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.” The Court . . . was so pleased with its idea that it said somewhat dramatically: “We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts.” . . . the administrator “has an obligation to articulate the criteria

(Fed. Ct. App.). But note that this can only amount to structuring, and where a rigid policy is laid down which does not entertain the possibility of exceptions, then fettering doctrine will be applied as, for instance, in *Re Lloyd and Superintendent of Motor Vehicles* (1971), 20 D.L.R. (3d) 181 (B.C.C.A.).

30. The Canadian Radio-television and Telecommunications Commission’s practice of making extensive use of policy statements was specifically upheld in *Re Capital Cities and CRTC* (1975), 52 D.L.R. (3d) 415 (Fed. Ct. App.).

Davis himself has pointed out that the leading Commonwealth case, *British Oxygen Co. Ltd. v. Minister of Technology*, [1970] 3 W.L.R. 488 (H.L.), has cleared the way for the use of open rules to structure discretion. Kenneth Culp Davis, *Administrative Law and Government* (2d ed., St. Paul Minn.: West Publishing Co., 1975) at 220-22.

For a proposal that greater use be made of policy statements and the like in the regulatory process, see H.N. Janisch, *The Canadian Transport Commission*, an agency study for the Law Reform Commission of Canada, (forthcoming) chapter 7, “The Commission and Transportation Policy”.

For a recent reassessment of the potential use of predetermined policies, see D. J. Galligan, “The Nature and Function of Policies within Discretionary Power”, [1976] P.L. 332.

31. The classic illustration in Canada is the long drawn out battle over the publication of “immigration guidelines”. Back in 1969 the MacGuigan Committee zeroed in on this secret law and was clearly of the opinion that under the new legislation it proposed they would be made public. *Committee on Statutory Instruments*, *supra*, note 23 at 22-29. Yet in 1977 the Statutory Instruments Committee reported that no progress has been made, and that it had been consistently blocked in its efforts to get departmental directives published, *supra*, note 18 at 17-19.

that he develops in making each individual decision.” The court’s purpose was to require administrators themselves to “provide a framework for principled decision-making” (pp. 225-6).³²

In thinking about the need to structure discretion, it must always be remembered that discretionary power is often granted in the United States to independent regulatory agencies whereas in Canada the same power is often exercised by those subject to direct political accountability. The possible significance of this difference was well articulated in the Schwartz and Wade comparative study referred to earlier.

The American conception is that discretion, whether judicial or administrative, should in all possible cases be exercised in accordance with rules ascertainable in advance, and that the policy to be applied should somehow be fixed or standardized. The British conception is that within its legal limits administrative discretion must be free, and that the object of policy should be to produce the best solution as it appears at any particular time. . . . The main cause of the difference, such as it may be, is probably the constitutional background in each country. Abuse of political discretion may be more a imminent danger in the United States where the executive is not directly responsible to the elected legislature and where so much vital power is in the hands of independent agencies which are responsible to no-one. The American yearning for the crystallization of policy by rules may be prompted by the desire to fill this void.³³

Here, then, is a classic example of the caution with which Canadians must approach the transposition of a doctrine of American administrative law. Above all, we should be prepared to make a tough-minded assessment as to the allocation of power, and the contemporary effectiveness of the checks placed on that power, in our political system. In this regard we should bear in mind Ellen Wilkerson’s sobering warning: “Nothing is as dangerous in a democracy as a safeguard which appears to be adequate but is really a facade.”³⁴ How much power is, in fact, delegated to politically

32. The case cited in *Environmental Defense Fund v. Ruckelshaus*, (1971), 439 F. 2d 584 (C.A.D.C.). The mind reels at the thought of how one would characterize a judicial statement that a “fruitful collaboration” prevails in Canada!

33. Schwartz and Wade, *supra*, note 10 at 106

34. As quoted in Vanderbilt, *The Challenge of Law Reform* (Princeton, New Jersey: Princeton University Press, 1955) at 122.

“The literature of English administrative law”, K.C. Davis pointed out in a memorable exchange some fifteen years ago, “needs to move from bombast to

irresponsible bodies? How far is talk of political accountability merely a convenient excuse to avoid the agony of reform? Yet considerations such as these are but specific examples of the basic premise mentioned at the outset of this review, and indicate only that care must be taken neither to import unsuitable American solutions for Canadian problems nor to ignore developments which are truly relevant and worthy of study and emulation.

While a study of *Administrative Law of the Seventies* and *Administrative Law* will suggest many innovative ways of looking at particular issues, there is a much more profound and disturbing message contained in these texts. A Canadian reader cannot come away from them but with a sense of disillusionment with the quality of judicial determinations in this country and a realization of the unwillingness of our courts to address the real issues in cases coming before them. The curse of Canadian administrative law is the continued reliance on overbroad conceptual classifications such as "judicial," "administrative," "right" and "privilege" which obscure the actual down-to-earth issues with which the courts should be prepared to grapple.

For example, let us return briefly to *Goldberg v. Kelly*,³⁵ the 1970 decision of the United States Supreme Court which, you will recall, established that an "evidentiary" hearing must be provided where termination of welfare benefits is proposed. In coming to its decision in favour of a pre-termination hearing, the Court recognized that a balance had to be struck between the interests of the eligible recipient in uninterrupted receipt of public assistance and the state's interest to prevent increases in the fiscal or administrative burden. Its conclusion was that "... the stakes are simply too high for the welfare recipient and the possibility for honest error or irritable misjudgment too great, to allow for termination of aid without giving the recipient a chance to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal."³⁶ The next step was to determine the type of hearing which had to be allowed and here the Court, while

realism. . . . Pontifications about ministerial responsibility should be obliterated by facing up to the reality that of a thousand adjudications, the Minister typically knows nothing of 950 and Parliament typically knows nothing of 990". "English Administrative Law — An American View", *supra*, note 17 at 139

35. (1970), 397 U.S. 254

36. *Id.* at 266

denying that a judicial trial was involved, laid down criteria which seemed to indicate that that was exactly what was being mandated.

An "opportunity to be heard" was spelled out to require an oral hearing on the grounds that a welfare recipient was unlikely to be literate enough to take full advantage of written submissions and that as credibility and veracity would likely be in issue, a right to cross-examination and counsel had to be included. Finally, the decision must state the reasons for the determination and indicate the evidence relied on.³⁷

This decision has led to a massive increase in formal administrative hearings and to grave concerns about the cost and effectiveness of such adversary hearings.³⁸ In what must be seen as something of a counter-revolution a majority of the Supreme Court in 1976 in *Mathews v. Eldridge*³⁹ decided that there was no need for a pre-termination hearing for social security disability benefits. The Court focussed on three fundamental questions. First, what was the nature and degree of the deprivation involved? Second, how fair and reliable were existing pre-termination procedures and what would be the value, if any, of additional procedural safeguards? Third, what administrative burden and other societal costs were involved?

It was the view of the majority that the deprivation of supplementary accident benefits was not the same as the loss of primary, life-sustaining welfare benefits as in *Goldberg*. The degree of potential deprivation was less because of the availability of other potential sources of temporary income and there was therefore ". . . less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action."⁴⁰

The fairness of procedures was to be determined, not in the

37. *Id.* at 269-71

38. See Davis, pp. 260-76; Schwartz, pp. 224-61. There has been a flurry of excellent law review writing. See, for example, Mashaw, "The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims" (1974), Cornell L. Rev. 772; Friendly, "Some Kind of Hearing" (1975), 123 U. of Pa. L. Rev. 1267; Rubenstein, "Procedural Due Process and the Limits of the Adversary System" (1976), 11 Harv. Civ. Rights — Civ. Lib. L. Rev. 48.

39. (1976), 47 L. Ed. 2d 18. Because of this decision's date, February 24, 1976, a very brief reference to it was only added in proof in Davis at p. 272 where it bears out his previously expressed preference as to how the law should develop. It is not mentioned at all in Schwartz.

40. *Id.* at 36-38

abstract, but in relation to the issues in dispute. Here the decision to terminate was, at heart, a medical one and not, as in *Goldberg*, a decision involving credibility and veracity.

To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decision maker is substantially less in this context than in *Goldberg*.⁴¹

Finally, the Court was prepared to come to grips with the vital issues of public interest and societal cost.

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggest that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.⁴²

41. *Id.* at 39

42. *Id.* at 40-41

The important thing here is not whether one agrees or disagrees with the decision. Rather it is its focus and willingness to deal openly with what remain, at best, only implicit and unarticulated factors in Canadian cases. Can it seriously be doubted that questions of administrative burden, societal cost and the like do not have to be asked, and answered, in Canada? Yet how often does one see Canadian courts struggling with these questions? There are admittedly no easy, quick answers, for, as Cardozo noted, "Justice is not to be taken by storm. She is to be wooed by slow advances."⁴³

A depressing recent example of the "classification cop-out" practised by Canadian courts is *Mitchell v. The Queen*,⁴⁴ the 1975 parole revocation decision of the Supreme Court of Canada. The majority summarily classified parole as a "privilege" and revocation of this privilege was then deemed to be an "administrative" matter. There is no analysis at all of what is actually involved in parole to support the conclusionary generalization that an "unfettered discretion" has been granted because of the "very nature of the task" entrusted to the National Parole Board.⁴⁵

There was no indication that the Court really sought to inform itself as to the operations of the Board. Ironically, it turns out that the Board is far more sophisticated and sensitive in its analysis of its powers and how they should be exercised than the majority of the Supreme Court of Canada whose approach, to put it at best, was simplistic. Unhappily, as Judge Clark has observed, "It is much easier to abdicate than to analyze."⁴⁶ William R. Outerbridge, Chairman of the National Parole Board, writing some nine months after *Mitchell*, indicated that he, at least, retains a healthy respect for the rule of law.

Within our administrative policy, we have, since 1970 provided hearings for inmates throughout federal institutions which go well beyond the limits required by law. We have given them

43. Benjamin Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1924) at 133

44. (1976), 61 D.L.R. (3d) 77

45. Per Ritchie, J. at 93. Judson, Pigeon and Beetz, J. J. concurred with Ritchie, J. Martland, J. concurred in the result in a separate judgment adopted by deGrandpré, J. Laskin, C.J. wrote a strong, cogent dissenting judgment adopting in large part the United States Supreme Court decision on parole revocation, *Morrissey v. Brewer* (1972), 408 U.S. 471. Dickson, J. concurred in this dissent as did Spence, J. in a separate judgment.

46. *Burk Bros. v. National Labour Relations Board* (1941), 117 F. 2d 686 at 688

reasons orally, again well beyond requirements of the law. In April, 1974, we initiated a program that when a warrant of suspension is issued against a parolee or a person on mandatory supervision, he must be seen by a parole officer within ten days of apprehension, and the reasons for suspension must be explained to him. These are procedural safeguards we are now providing because we feel they are right and fair.

There is need to enshrine these procedural safeguards into law. If I were to say, right now, there will be no more parole hearings in the institutions, I could just say it and they could not be reinstituted. That kind of authority should not reside in a bureaucrat.⁴⁷

Even more striking was Chairman Outerbridge's willingness to engage in the struggle which the majority of the Supreme Court of Canada so ignominiously avoided. He recognized that the nature of the parole process may place limits on the applicability of some of the general tenets of natural justice and that the real problem is one of specifics, not generalities.

There is some information we withhold and will have to continue to withhold from inmates, as far as I'm concerned. There's some information in psychiatric reports. Sometimes letters from wives to husbands say, "I can't wait until you come out"; at the same time they are writing to us that on the last temporary absence he came home, got drunk and beat them up, and they are frightened. We will not give that information to the inmate.

Sometimes we get security and intelligence information about organized crime and involvement in criminal activity that, if we shared with the inmate, would inevitably result in the lives of undercover agents and police officers being put in jeopardy. We can't share that information either. But, having said that, I believe we can move a considerable distance in providing information to persons who are applying for parole, and this we want to try to implement over the next few years.⁴⁸

Under these circumstances, Chief Justice Laskin's castigation of the National Parole Board would seem misplaced. He said, "The plain fact is that the Board claims a tyrannical authority that I believe is without precedent among administrative agencies

47. Outerbridge, "Bullets Parole Board Members Have to Bite", discussion, Vol. 4 No. 2, p. 16 at 17 (June, 1976). Discussion is published quarterly by the Public Affairs Division of the Canadian Penitentiary Service and the National Parole Service, Ottawa. See also, Carrière and Silverstone, *The Parole Process, A Study of the National Parole Board* (Ottawa: Law Reform Commission of Canada, 1976).

48. Outerbridge, *Id.* at 19

empowered to deal with a person's liberty. It claims an unfettered power to deal with an inmate almost as if he were a mere puppet on a string."⁴⁹ With the benefit of hindsight, it might have been more appropriate for him to have adopted Lord Atkin's timeless admonition: "I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive."⁵⁰

The majority's approach highlights the central weakness of Canadian administrative law — the catastrophic consequences of the use of crude, all-or-nothing, conceptual classifications such as "judicial", "administrative", "right" and "privilege". "The baby", we have it on good authority, "is not to be thrown out with the bath."⁵¹ The Court should have been willing to struggle with the specifics of parole. Can pre-revocation hearings ever be granted? Is a dangerous parolee who is thought to be planning an armed robbery to be treated in the same way as a petty forger who is said to be preparing to pass a bad cheque? If post-revocation procedures are adopted, how far should they go? If the information relied upon has come from the wife of a potentially violent parolee, must the source be revealed? What if it is from a valued police informer? How far should we be prepared to go to provide for fairness in order to demonstrate the validity of the legal system to those who have gone against it? If the Courts refuse to give any guidance to the National Parole Board and indicate that the procedure for the treatment of parolees is none of their concern, will this not tend to re-inforce anti-social attitudes? Does a decision like *Mitchell* not give credence to the criticism that the law is more concerned to protect property values than human values?⁵² Have parolees, and now prison inmates,⁵³ been declared to be "outlaws", at least as far as their procedural rights are concerned?

49. *Mitchell v. The Queen*, *supra*, note 44 at 81

50. *Liversidge v. Anderson*, [1941] A.C. 206 at 244 [H.L.]

51. The authority is no less than Mr. Justice Frankfurter in *International Salt Co. v. U.S.* (1947), 332 U.S. 392 at 405.

52. For, as Chief Justice Laskin noted, it is disturbing that the Court can find grounds to intervene to protect an owner of property condemned as unfit for human habitation (*Board of Health v. Knapman* (1956), 6 D.L.R. (2d) 81), but not to protect a parolee from unfair treatment. *Mitchell v. The Queen*, *supra* note 44 at 84.

53. In *Martineau v. Matsqui Institution* (1977), 74 D.L.R. (3d) 1 the Supreme Court of Canada held, 5 to 4 that as a "directive" of the Commissioner of Penitentiaries was not "law", prison disciplinary proceedings could not be reviewed under s. 28 (1) of the *Federal Court Act*, *supra* note 8.

If the quality of Canadian administrative law judgments is to be improved it will be because of the resolve of lawyers and judges, with the assistance of outstanding writings such as those of Davis and Schwartz, to abandon the lofty but sterile heights of conceptual classification and come to grips with the real issues of administrative law. For, as Mr. Justice Frankfurter has cautioned, "Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable".⁵⁴

54. *A.F. & L v. American Sash Co.* (1948), 335 U.S. 538 at 557

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