Lawyers, Courts, and the Rise of the Regulatory State

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I. Introduction

In 1883, when Dalhousie Law School was created, lawyers in England, the United States, and Canada stood at the edge of a watershed. Massive changes in the law began during the late nineteenth and early twentieth centuries — changes in doctrine, institutions, practice, and ways of thinking. I cannot imagine how I might describe these changes in one short paper, even if I understood them all. Instead, I have chosen to talk about one large strand, regulation, because it is an important feature of law in the twentieth century and because it offers an opportunity to consider some distinctive characteristics of our Canadian legal experience. My primary interest is the thinking of the common law lawyers — judges, practitioners, and academics — and especially their thinking about the ideal form of their legal system and about regulation, in particular the relation between courts and agencies and the constitutional legitimacy of regulatory power. My topic is massive, and I can hope only to present some suggestions and an agenda for future work.

II. The Late Nineteenth Century

In the late nineteenth and early twentieth centuries, common law lawyers shared a set of ideals for law. The basic elements of these ideals were that the law should protect individual autonomy by setting generous boundaries within which each individual would be free from interference from other individuals and from the state. These boundaries were to be established by comprehensive general rules, largely common law rules which would govern all individuals and the state both prospectively and indifferently and which would be applied by courts in an objective and apolitical way. These ideals were primarily, but not entirely, a product of late nineteenth century liberalism. The nature of the other influences is debatable, but the most important possibilities are lawyers' interests (for example, a need to establish a coherent legal system after the abolition of the

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forms of action), the appeal of the scientific method, and a desire to establish a domain for their own knowledge and power. Dicey's famous statement of the rule of law expressed and was shaped by these ideals. Mingled with them and with the rule of law was a gulf between law and politics. This gulf appeared in many different forms and contexts, and especially in the areas of jurisprudence and legal education, and in conceptions of doctrine and the judicial process. It had existed for several centuries at least, but it had become especially deep and pervasive in the late nineteenth century.

The ideals were not, of course, exclusive, and did not take the same form for all lawyers. In the United States, a legal mandarinate, comprised primarily of academics, developed them in their purest form and included a distinctive emphasis on conceptual reasoning, an emphasis which was not present in England. The situation in Canada is harder to trace, as lawyers there did remarkably little recorded speculating. My impression is that the ideals were imported faithfully from England; nevertheless, we need to do much more work if we are to understand the Canadian lawyers' minds. We need especially to understand the role of the distinctive elements of our political traditions, especially our conservative tradition and its relation to these ideals.

Whatever form the ideals took, they were never fully realized. Yet, they must have seemed natural and realistic, considering the prevailing political and economic beliefs and the legal doctrine and institutions. For the common law lawyers, law was primarily common law, administered by the courts, and statutes were considered to be isolated and interstitial modifications, made to meet particular needs.¹

III. Regulation: 1900 to 1920

Canada never had the liberal state in the middle of the nineteenth century that England had and which some thinkers thought it should

have. The state encouraged the creation of the nation and its economic expansion primarily by creating and financing railways, creating a tariff barrier, and encouraging immigration. However, this encouragement usually did not take the form of regulation. The first major period for the creation of our regulatory state was from 1900 to 1920, although much of what was done was a continuation of steps taken in the nineteenth century. Standards were imposed for agricultural products, especially dairy products, and price and service requirements were imposed on public utilities, including the railroads. Broad and vague limits were imposed on restraint of trade and were expanded in the short-lived Combines and Fair Prices Act of 1919. Minimum requirements were established for conditions of work and for wages, and limits on strikes and the right to the investigation of disputes were imposed by the Industrial Disputes Investigation Act of 1906. Control over land use expanded with the development of zoning bylaws, and the beginnings of the administrative regulation of developments and licence requirements were imposed for a variety of professions and occupations. In short, although regulation was neither as extensive nor as intensive as it became later, some important institutions and patterns had been established. The legal world had begun to change and the ideals of the nineteenth century were threatened.

For my purposes, the most significant step in the process of regulation was the creation of the Board of Railway Commissioners in 1902, because it established the dominant model for our regulatory agencies and presented the issue of constitutional legitimacy. Requirements governing the construction and operation of the railways, as well as rates, had begun in the mid-nineteenth century, although they were far from being extensive or detailed, and in 1888 the administration of these requirements was assigned to a committee of the cabinet, namely, the Railway Committee of the Privy Council.


In 1898, the government appointed a young and unknown academic, Simon J. McLean, to investigate railway rates and railway commissions. He had been born in the United States and received his early education in Canada. His record at university would make a modern graduate student weep: he obtained a B.A. in 1894 and an LL.B. in 1895 (both from the University of Toronto), an M.A. from Columbia University in 1896, and a Ph.D. from the University of Chicago in 1897. Most of his proposals, made in reports in 1899 and 1902, were accepted by the government. He concluded that regulation was necessary and that it should be carried out by a commission. In designing the commission, he looked to the experience in England and in the United States, although in the end his proposals included much of his own thinking and took into account the Canadian past. He rejected continuing the cabinet committee because it combined "administrative" and "political" functions. He said, "the regulation is essentially an administrative function; an intermingling of this with political duties leads to lack of harmony and efficiency." He did not define these functions and the distinction between them, although he stressed that experience, technical knowledge, and security of tenure were needed for the performance of administrative functions. This analysis was probably derived from thinking which was predominant in the United States, and especially from that of one scholar, Frank Goodnow, who was one of the fathers of American political science and a professor at Columbia when McLean was a graduate student there.

The last major issue that McLean considered was control of the commission. He opposed giving the courts any control at all, because "in matters of railway regulation questions of policy are involved, but of these the courts have for the most part been oblivious." The government disagreed and a right of appeal to the Supreme Court on questions of law and jurisdiction was given. At the end of his second report, McLean proposed another form of

5. Goodnow presented the distinction between political and administrative functions in Politics and Administration, published in 1900. Dates cause a problem, because McLean's first report is dated 1899 and none of Goodnow's earlier writings suggests the distinction in any sustained way. However, the parallels in the thinking make the influence seem likely. The problem is to determine its path, not its existence. The writings of both forbid one from wondering whether McLean influenced Goodnow.
control which the government did accept, namely, review by the cabinet. His reason was simply that "ministerial responsibility to Parliament must be recognized." The result was a distinctive institution which combined the "independent" regulatory agency and ultimate direct political control. Afterwards, many more agencies were created, and took a surprisingly wide variety of forms, but McLean's commission and his accommodation of independence and control slowly came to be our dominant model.

This model presents an issue of constitutional legitimacy, that is, the legitimacy of giving powers to officials who are neither elected nor judges. This issue was not perceived or discussed in any substantial way in McLean's reports, but several justifications are implicit. The first and most obvious one is the power of the cabinet to review. The government is ultimately responsible both for the decisions that it reviews and, with some unrealistic assumptions about tacit approval, for the decisions it does not review. The second justification is derived from the distinction between political and administrative functions and from the legitimacy given by expertise and experience. Ultimately, these two justifications are inconsistent because they are based on different conceptions of the functions being performed, one being political and the other apolitical. Both have appeared and reappeared in our discussions of regulation during the past eighty years.

IV. The Courts: 1900 to 1930

The doctrine for judicial review of the exercise of regulatory power is the general doctrine of administrative law. It was, until the advent of the Charter of Rights and Freedoms, determined by the British North America Act and by basic constitutional principles inherited from Britain. The two major principles were that the legislature was the supreme lawmaker and that the limits of authority conferred by

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6. Most of the discussion that did occur was about municipal government; see, for example, Rutherford, ed., Saving the Canadian City (1974); Rutherford, Tomorrow's Metropolis: The Urban Reform Movement in Canada, 1880-1920 [1971], Can. Hist. Assoc. Hist. Papers 203; and Weaver, " 'Tomorrows' Metropolis' Revisited: A Critical Assessment of Urban Reform in Canada, 1890-1920", in Stelter and Artibise, eds., The Canadian City (1979) 393. See also Stewart, The Employment Service of Canada (1919), 27 Queens Quar. 37; Clark, The Board of Commerce (1920), 28 Queens Quar. 304; McFall, Regulation of Business in Canada (1922), 37 Pol. Sci. Quar. 177; and Dawson, The Principle of Official Independeance (1922), Ch. 4.
the legislature were to be determined by the courts. In the late
nineteenth century, when my story begins and when this function of
the courts began to be an important part of their work, these
principles were shaped by the general ideals of law and the
distinction between law and politics: the ideal for the allocation of
functions was that legislatures should make choices about values.
The courts should not make these choices; instead, they should
determine the limits of authority in an objective and apolitical way,
without considering the merits or values of the legislation or the
regulatory action (unless a right of appeal was given by statute).

In the early twentieth century, legislative supremacy was clearly
demonstrated and loudly proclaimed in several judgments in which
statutes modified or terminated property rights and contracts.
Proposals were made for constitutional amendments, but most of
the fuss was created by the use of the constitutional arguments for
transparently political purposes, and were forgotten when the
political needs passed.\(^7\) The delegation of power by legislatures to
regulatory agencies was permitted without significant restriction,\(^8\)
and section 96 of the British North America Act, whatever purposes
it was intended to serve, was not yet a significant limitation on the
creation of agencies by the provinces.

Legislative supremacy stood in contrast to the constitutional
protections established in the United States for property and
contracts, and for the separation of powers. These differences made
the forms of reasoning obviously and fundamentally different, but
the differences in the effective extent of the limitations on
legislative choice are more problematic. In general, the differences
were probably greater early in the twentieth century than they were
later, when courts in the United States restricted the protections of
contracts and property. However, respect for the separation of
powers has continued to be much greater in the United States than in
Canada.

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\(^7\) Florence Mining v. Cobalt Lake Mining (1909), 18 OLR 275, and Smith v.
4; Nelles and Armstrong, “Private Property in Peril: Ontario Businessmen and the
Federal System, 1898-1911”, in Porter and Cuff, eds., *Enterprise and National
Development* (1973) 20; MacPhail, Andrew, *Confiscatory Legislation* (1911), 10
Univ. Mag. 192; and Darby, Arthur E. *The Individual and the State* (1918), Univ.
Mag. 488.

\(^8\) Hodge v. The Queen (1893), 9 AC 117 (PC); Re Gray (1918), 57 SCR 150.
The courts considered only a few cases involving challenges to regulatory power. Their decisions suggest two basic conclusions. First, the doctrine was simple. Most of the judgments were put in terms of interpretation — for example, did the statute grant a given agency the power to do what it did? All of the wonderful complexities that now plague courts, practitioners, academics, and students lay ahead, decades away. One example is the case of remedies: virtually all of the review was done through appeals, and the mysteries of the prerogative writs had not yet been unveiled.

The second conclusion about the decisions of the courts concerns their attitudes toward regulatory powers. Of course, these attitudes are difficult to determine and may depend upon some assumptions about the proper allocation of functions. However, my impression is that the courts did not demonstrate any general hostility. I offer two examples to support this claim. The first is *Ingersoll Telephone Company v. Bell Telephone Company*, in which the Supreme Court dismissed an appeal from a decision of the Railway Commissioners regarding the compensation to be paid by local telephone companies for use of Bell Telephone’s long distance lines. Anglin J. said that “it was the purpose of Parliament to entrust to the Board the widest discretion, not merely as to the amount of the compensation to be directed, but also as to the elements which should be taken into account in fixing it.” The second example is *Re Consolidated Telephone Company and the Townships of Caledon and Erin*, in which the Ontario Court of Appeal dismissed an appeal by the telephone company from the refusal of the Ontario Railway and Municipal Board to approve the sale of its system to two townships. Meredith C.J.O. said, “the Board does not, in my

opinion, act judicially, but acts as the designate of the Legislature. . . . the board would have to consider the matters which the Legislature itself would have considered if application had been made to it for a special Act; . . . the discretion of the Board is absolute, subject only to review by the Lieutenant-Governor in Council."

These attitudes are difficult to explain because the general ideals about law that were shared by lawyers in the late nineteenth century would have suggested much less willingness to accept regulation and discretion on the part of government. I can suggest two explanations. The first is the influence of general Canadian political attitudes, particularly the conservative element, or "Tory touch" — an organic conception of society and a willingness to undertake and accept extensive governing. Put in this simple form, this explanation is itself an assertion that needs explanation, and the Tory touch and the attempts to explain it are a battleground for Canadian historians. In the recent battles, it seems to have been bloodied or unmasked, or to have retreated into mist at the edge of the field.\textsuperscript{11}

The second explanation is derived from attitudes toward the content and purpose of the regulation. It begins with the hypothesis that the regulation was approved or accepted by business interests, and that its purposes were to manage or control the market for their benefit or to compromise with other interests, especially labour. It supported, rather than threatened, the established economic order and patterns of power. Attitudes and strategies toward regulation have been extensively debated in the United States, but much more analysis and research is required in Canada. The work done so far in

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this country suggests that this hypothesis is reasonable, although our attitudes toward the state forbid exclusive reliance on the American analysis. This explanation also requires that the judges shared the attitudes of the legislatures and the business interests, which is another reasonable possibility and another topic for research. Ultimately, these two explanations can be merged, or the second can swallow the first and the Tory touch attitudes toward regulation can be perceived as the attitudes of business interests.12

A comparison of the attitudes of the Canadian courts with those of the courts in England and the United States would be an interesting and useful test for these and any other explanations of the attitudes of the courts toward regulatory powers. However, such comparisons would be complicated by the different legislative structures involved and would ultimately depend upon general impressions.

Whatever the explanations may be, the attitudes of the courts had to be accommodated with the nineteenth century ideals. This provides an example of a general theme, namely, the relation between these ideals and the Canadian political tradition, which is a promising perspective for the study of Canadian legal history. My impression is that one way the lawyers made the accommodation was to ignore any inconsistency; such are the benefits of not speculating. In addition, the lawyers may have been helped by the prevailing distinction between law and politics. The law was the common law and its values, and politics was legislation — and choice and compromise. This distinction may also explain a conspicuous lack of discussion of legislation and regulation in the professional journals. Whenever the lawyers were self-consciously thinking about the law and their functions, they may have perceived their domain as the common law and private practice. Their dominant response to the advent of regulation seems to have been to insulate their thinking from its implications.

V. The 1930s

During the 1920s, little new regulation appeared, other than securities regulation, which was established in most provinces. By contrast, the 1930s saw massive changes in regulation, both in

12. For a review of this literature, see McGraw, Regulation in America: A Review Article (1975), 49 Bus. Hist. Rev. 159.
degree and in kind. These changes were part of a ferment which made it an exciting decade — perhaps the most exciting single decade in Canadian legal history. The New Deal and its constitutional fate are familiar to us, at least in their general outlines, but much more regulation was imposed during this period and much of it remains in place today. Diversity among the provinces was great, and makes generalizations both necessary and precarious. Nevertheless, imagine the impact on the economy and on the minds of lawyers that these changes had, most of which appeared between 1932 and 1935. Modest additions were made to the inventory of licensing and of standards for agricultural products. In agriculture, the regulation of prices and output began with the farm products marketing acts, which encountered large constitutional difficulties, and with the extensive control of dairy products by the provinces. The Wheat Board was established, although until the 1940s it was given only price support functions. In the area of transportation, the Board of Railway Commissioners was replaced by the Board of Transport Commissioners, which was given expanded functions. The licensing of commercial vehicles was expanded to include controls on entry for the "public necessity and convenience", and licensing and price controls for the sale of gasoline were established. In the market, the strains of the depression produced restrictions on the common law remedies of creditors and mortgagees, as well as restraints on prices, although the federal legislation about prices was declared ultra vires. With respect to labour, legislation about minimum wages and the number of hours and the conditions of work was extended, although again the federal legislation was declared ultra vires. More important, provincial statutes gave government the power to impose uniform wages and work hours throughout an entire industry after they had been agreed upon by representatives of the employers and employees. Finally, licensing was imposed on the emerging field of radio broadcasting.

At the end of the 1930s, many of the major structures of our regulatory state were established, although most of them became more complex and powerful after World War II. The market and

individual responsibility were challenged and restricted much more than they had been in any other single decade, and the very purposes of regulation seemed to be changing: redistribution and planning had become larger and more apparent objectives.

(a) Lawyers and Academics in the 1930s

The legal literature, particularly the periodicals, are my only source of the opinions of lawyers during the 1930s; whether other material, especially unpublished material, can be found and whether it will offer more information awaits research. Scattered comments about regulation began to appear in the literature in the middle of the 1920s, and the topics and attitudes contained in it fairly quickly became sharply divided between those of the practitioners and those of the academics. In the late 1920s, the practitioners began to sound warnings about regulation. At first, most of these warnings were a dutiful reflection of controversy in England, especially books by Lord Hewart and C.K. Allen and the report of the Donnomore Committee. In 1934, the Chief Justice of Ontario, on his ninetieth birthday, protested against the "ever-increasing practice of . . . depriving our people of the protection of the law and of the Courts, by vesting in autocratic bodies the power to arbitrarily deal with matters affecting our liberties and other rights without the intervention of any court. . . . There are but two ways whereby the people's rights can be determined: one is by the courts, the other by the exercise of arbitrary power. . . . The national safety is in danger. Let this invasion of the people's rights continue and the ultimate result must be despotism, a Frankenstein; we will cease to be a free people, and our condition will be like that of unhappy Russia, not the England of old." And, in 1938, J.W. Farris complained that, "Whatever menace there is today to the justice of the Courts comes from Parliament."

The most suggestive record of the practitioners' attitudes during the 1930s is the annual reports of the Committee on Noteworthy Changes in the Statute Law of the Canadian Bar Association. Throughout the 1930s, these reports contained increasingly strident and despairing warnings about "apparently irresistible" and "relentless" developments. The major elements of these warnings were the diminishing scope for private enterprise; the dangers of extensive and vague grants of discretion to the government and to agencies; the limitations on resort to the courts; and the threat that regulation posed to freedom of contract — that is, to "the fundamental and essential place of contract," — and to private property, "the pillar on which our whole civilization rests". In 1938, the committee suggested that "the time may be approaching when we will find that we cannot maintain a democracy and the rule of law without something which at all events has the effect of a written constitution." In 1939, doom must have seemed imminent. The committee said that "unless we can govern ourselves according to settled and generally recognized principles of right and wrong, we are headed either for anarchy or despotism," and it could "find no place in any civilized system of law" for some of the Alberta legislation. These protests suggest that the initial response of insulation was replaced by hostility. One cause may have been the threat that regulation would limit the power of the lawyers and their clients, but another was the threat that these changes made to the foundation of ideals that had shaped their understanding of law and their constitutional beliefs, as well as their perceptions of reality and the justifications of their role.

The academics were a happy few. Led by J.A. Corry, W.P.M. Kennedy, and John Willis, they wrote a distinctive set of articles in the mid-and late 1930s. Five themes were common to most of

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17. These reports are printed in the annual *Proceedings of the Canadian Bar Association*: 1932 at 138; 1934 at 219; 1935 at 212; 1936 at 210; 1937 at 256; 1938 at 191; 1939 at 196; and 1940 at 120.

their writing. The first was a realization that society and its law were changing dramatically, and unlike the lawyers, most of the academics were hopeful and even enthusiastic about the change. The second theme was a conviction that change brought uncertainty and a need for continual experimentation in designing the new institutions. The next was a deep scepticism about conceptual and abstract thinking and about the traditional ideals about law. This scepticism was accompanied by a determination to study what administrators ‘‘really do’’ and by a belief that effective solutions to problems would tend to be particular to each context. The fourth theme was an awareness that the new powers brought with them the challenge of controlling the bureaucracy, and an increasing conflict between individual freedom and the state.

The fifth and last of these common themes was the legitimacy of the delegation of powers and agencies. Here there was a jumble of ideas. The two major ones were a faith in expertise and experience, and a rejection of the attitudes and procedures of the courts. The minor ideas were the promise of flexibility, which could permit experimentation, and of a savings of cost and time. Most of these ideas seem to have been derived from England, for example from Carr’s *Delegated Legislation*. The most coherent and original of the justifications was a ‘‘functional approach’’, announced by John Willis: ‘‘The problem put is, how shall the powers of government be divided up? The problem is neither one of law nor of formal logic, but of expediency. The functional approach examines, first, the existing functions of existing governmental bodies in order to discover what kind of work each has in the past done best, and assigns the new work to the body which experience has shown best fitted to perform work of that type. If there is no such body, a new

one is created *ad hoc*.' Note the rejection of conceptual and abstract thinking and the stress on particular contexts. Ultimately, this approach depends upon having some conception of different kinds of functions, and Willis' writing contains some traces of the distinction between political and administrative functions.

This kind of thinking was a denial of the traditional ideals and the distinction between law and politics. It paralleled much of the writing of the realists in the United States, especially in its scepticism about conceptual and abstract thinking, its rejection of the courts, and its concern for facts and context, and it paralleled trends in other disciplines, such as economics and history. It had less effect than the realists, however, and again I can only make suggestions for some explanations for the differences. First, there was much less of this kind of writing in Canada and it was probably a smaller proportion of all legal scholarship. Second, one of the major targets of the realists was the distinctive effort to make legal reasoning conceptual, and this effort had not been taken as far in England and Canada. Finally, academics in Canada have, in general, had less influence than their counterparts in the United States.

John Willis has already been honoured during these celebrations. I wish both to add to the honour and to give some evidence of why the honour is due. During the 1930s and early 1940s, he wrote three major pieces on the topic discussed in this paper: a book, *The Parliamentary Powers of Government Departments*, and two articles, "Three approaches to Administrative Law" and "Administrative Law and the British North America Act". He also edited another book, *Canadian Boards at Work*, and wrote two other major articles that bear on the topic, "Statutory Interpretation in a Nutshell" and "Section 96". All of them were original

contributions, and were far better than anything that had been written in England and were as good as the writing being done in the United States. They are still provocative and valuable. He did not propose comprehensive doctrine and programs for the future, but he challenged us to do our own thinking for our own times. He perceived the changes and the distinctive elements of the Canadian experience rigorously and clearly. One example of a relatively technical perception is his emphasis on the agencies as "governments in miniature," although he did not invent the phrase. He unmasked pomp and myth with a wonderful combination of passion and reason, and he was especially perceptive and eloquent about the deep gulf between the lawyers' myths and proclaimed ideals, and the reality of government — which the lawyers were making and experiencing.

(b) The Courts in the 1930s

During the 1930s, the courts continued to decide only a few cases involving regulation, and in general they continued to be willing to respect administrative powers, probably more willing than the Privy Council.\(^20\) The doctrine became more specialized and complex, and, in particular, the distinction between administrative and judicial powers became important. Indeed, this distinction became the dominant element of the doctrine in the 1930s. These two terms — administrative and judicial — had been used before in England and Canada, but they had usually not been the central element of the

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reasoning, except in cases involving certiorari and section 96 of the
BNA Act; they had no settled meanings and were not consistently
opposed to each other.

In the late 1920s and early 1930s, D.M. Gordon wrote four long
articles for the Law Quarterly Review. It is some measure of the
attitude of English lawyers that these articles are all but a few of
those in the Review on regulation and administrative law, and it
may be a source of some pride that Gordon was a Canadian. These
articles were, however, different from the articles in the Canadian
journals. They were powerful and intense analyses of cases and
abstract concepts, such as jurisdiction, law, fact, and ministerial,
administrative, and judicial functions. Gordon’s thinking about the
basic issues of the allocation of functions emerged only obliquely
through this analysis.

The best known of these articles were two about jurisdiction, and
especially the doctrine about preliminary and collateral facts. In
them, Gordon presented a powerful criticism of the doctrine, which
had virtually no effect. Two more of the articles, about courts and
agencies in general, are not really as well known, but they had a far
greater effect. In them, Gordon presented coherent and comprehen-
sive definitions of the terms “judicial” and “administrative”: a
judicial function was the determination of “pre-existing” rights and
liabilities through the application of “fixed objective standards”
and an administrative function was the creation of rights and
liabilities through “policy and expediency”. “A judicial tribunal
looks for some law to guide it; an administrative tribunal, within its
province, is a law unto itself.” Again, the distinction, between
law and politics is apparent. In 1934 these definitions were adopted
wholeheartedly in Re Ashby, an Ontario case, and it soon became
dominant in Canada. In contrast, the English courts never
committed themselves so firmly to the importance of the distinction,
or to any definitions. Rarely have our courts’ ways of thinking been
shaped so directly by a forgotten scribble. In the 1930s, the
distinction was used in cases involving section 96, the limits of
certiorari, and claims to procedural rights. However, in several of
the procedure cases, the courts included a less formal analysis and

The Relations of Facts to Jurisdiction (1929) 45 L.O.R. 459; The Observance of
Law as a Condition of Jurisdiction (1931) 47 L.O.R. 386 and 557; and
Administrative Tribunals and the Courts (1933) 49 L.O.R. 94 and 419.
22. Supra, note 20.
stated clearly that the distinction was not crucial because some rights would be available, even if a function was administrative.

VI. Patterns of Regulation: 1950 to 1983

The years from 1950 to 1983 cannot easily be considered one period or series of periods, since the timing of the trends that occurred in the patterns of regulation and in the thinking of the courts and lawyers differ substantially. During the war years, extensive regulation of the economy was imposed, primarily through the War Measures Act.23 Most of this regulation was removed when peace returned, but the experience, especially the exercise of regulatory power and the impressive results it achieved, may have contributed to the willingness to use and accept regulation. During the last few years of the war and during a few years afterward, several committees of the Canadian Bar Association protested against the expanding bureaucracy, but eventually these protests disappeared.24

From 1945 to 1980, there has been an immense increase in regulation, both in the intensity of the administration of the existing programs and in the creation of new powers.25 The changes in administration are suggested simply by the increases in budgets and staff, but firm conclusions about the timing and extent of these changes depend upon research that has not yet been done. The creation of new powers seems to have occurred in two very roughly defined periods. The first was from the end of World War II to the mid-1950s and included the compulsory marketing of wheat through the Wheat Board, collective bargaining requirements (which were essentially a continuation by the provinces of federal wartime requirements), municipal planning powers, and protections

25. For accounts of these changes, see Responsible Regulation: An Interim Report by the Economic Council of Canada (1979), Ch. 2, and Stanbury and Thompson, Regulatory Reform in Canada (1982).
of human rights. The second period was from the late 1960s to the mid-1970s and included regulation regarding occupational health and safety, consumer protection, environmental protection, restrictions on foreign investment, rent control, the national energy policy, and, for a few years, the control of wages and prices.

During this period, decisions were contested more often than they had been previously, and there were many more hearings, which became increasingly longer and more complex. Judicial decisions, statutes, and administrative practice widened the scope of judicial participation, although restrictions on standing and a lack of adequate funds severely restricted participation in decisions that had widely diffused effects, such as decisions about the environment. Perhaps lawyers became more conspicuous and powerful participants in the regulatory process at this time not only through judicial review, but through their roles as commissioners, counsel to commissions, arbitrators, and advisors and strategists. Incorporation and conquest may have replaced hostility.

The regulation during this time differed from that of the past in at least three ways, all of which are differences of degree, but important nevertheless. First, agencies tended more often to be given the powers to plan the general conduct of the industries they regulated, rather than the powers to police only limited aspects, such as entry or price. Second, the range of interests and effects to be considered was expanded greatly. An example of this "social regulation" is environmental control, and it can be contrasted to much of the regulation of entry and prices. Of course, much of this regulation has not been effective and has not achieved its "social" purposes, and the allocation of costs and benefits may be a major reason for this. Third, regulation tended more often to have objectives that were avowedly noneconomic — for example, the regulation of foreign investment and requirements for Canadian content in broadcasting. Regulation in Canada has always had noneconomic objectives, but they seem to have become more significant during the past few decades.26

In 1983, the result of this increase in regulation is obvious. We live in an intensely regulated society. The interest in "deregulation" that appeared during the late 1970s seems to be waning, and

Early in the 1970s, a shift occurred and regulation again became a topic for discussion. A long series of studies, reports, books, and articles began to be produced, including studies by the Law Reform Commission, the report of the Economic Council, and the Peterson Report. The reasons for this shift are doubtless complex, but some of the influences are probably the example of similar debates in the United States, the impact of the accumulation of regulation during the past two decades (especially the "social regulation"), the shift of some governments to the right, and, in particular, a "deregulation" movement that this shift produced. Much of this discussion was about the basic issue — how much regulation should we have — and it differed from the debate in the 1930s in one significant way. In the 1930s, the debate was primarily about political values and the clash between individual freedoms and the power of the state. In the 1970s, by contrast, the debate was much more about choices among costs and benefits, as well as economic analysis of the effects of regulation. We seem to have become more worldly — and resigned.

More interesting for my purposes is the fact that some of the debate was about the structures and procedures for regulation. There were two major topics. The first was political control of the independent agencies. The general, and unquestioned, assumption was that this form of control was desirable — or at least inevitable — and the debate was essentially about how it should be achieved. It was an attempt to make McLean's proposal work. Most observers agreed that the appeal to the cabinet had substantial disadvantages, and proposals were made for different ways of asserting the control by both the legislature and the cabinet, for example, through directives, policy statements, and clearer specifications of objectives in legislation. The other major topic was procedures, especially the right to participate in regulatory decisions. The discussion included the theoretical justifications for participation, the choice of the appropriate procedures for different kinds of decisions, and the most common topic, the need for state support for funding for participation in decisions with widely diffused effects. Doubtless, much of this discussion was a mask for debates about regulation itself, but much of it was about the legitimacy of administrative powers and it was our first sustained discussion of legitimacy. The previous lack of discussion is remarkable and is probably a reflection of our willingness to accept extensive governing.
the nature of post-industrial capitalism and our political traditions suggests that this intense regulation is our fate for the future. Whether the impact of regulation in Canada is greater or less than it is in England or the United States is debatable and difficult to determine. The differences, whatever they are, are probably not great, and certainly there is a greater difference in the structure of the regulation in these countries than there is in its impact. The structures in England and in Canada differ relatively substantially, especially because government ownership has been so extensive in England and because so much of the regulation is done by government departments and so much of the determination of individual benefits is done by separate tribunals. Our structures bear a greater resemblance to those in the United States because of the extensive use of the independent agency in both countries, but the differences make Canada distinctive: our agencies usually have more discretion, they often regulate both private and publicly owned corporations, and, most important, the government often has some form of direct political control.

VII. Thinking About Regulation in the 1970s

During the 1950s and 1960s, there was little public debate about regulation and little thinking was done on the subject by lawyers and academics. Most of what was done by common law academics was constrained by narrowing visions of scholarship and especially by a preoccupation with the doctrine of judicial review and analysis of cases. Civil law academics seem to have been less constrained. Much of the cause of this narrowing vision may have been the dominance of the ideals of the major law schools in the United States, which now seem to me to have been less of a blessing than I thought they were when I was a student in the 1950s. The McRuer Report,27 which appeared in the late 1960s, made some proposals for modest changes affecting regulation, primarily by establishing rights to participate and procedures for seeking remedies for judicial review. It also proclaimed the late nineteenth century ideals eloquently, especially a faith in abstract generalizations, in courts, and in individual rights. One of the marks of the narrow visions of scholarship was that only one academic, John Willis, commented on it at the level of constitutional principle.28

VIII. The Courts: 1950 to 1980

During the 1950s and 1960s, the volume of cases involving review of regulatory powers increased greatly. My impression is that the courts were certainly no more willing to respect regulatory powers than they had been in the past, and some were especially hostile to certain agencies, especially labour boards. I am, however, more interested in their ways of thinking (although I realize that ways of thinking are related to attitudes). The basic structure and the dominant form of the reasoning continued to be the expression of the late nineteenth century ideals. The doctrine was composed of abstract general rules, which were to be applied by the courts in a neutral and apolitical way, and their application was in itself a justification of the results. The doctrine became more specialized, and the prerogative writs, especially certiorari, became the primary remedies for its elaboration, although appeals remained more common. All of the complexities of the current doctrine finally emerged. Formal analysis was able to find them implicit in the earlier doctrine, but they had not dominated reasoning the way they did during this period. Jurisdiction, which had been the central principle and usually had simply denoted authority, became even more abstract and was defined in complex ways. The mysterious and wonderful concept of the preliminary or collateral matters upon which jurisdiction might depend was manufactured out of some general propositions in old English cases, primarily for use in labour cases. The use of certiorari to review errors of law within jurisdiction was revived, and the distinction between administrative and judicial functions became more abstract and crucial to procedural rights.

The doctrine tended to produce mutually exclusive categories: issues were either law or fact and functions were either judicial or administrative. The edge of jurisdiction was a sharp line; an agency either had jurisdiction or lost it, as though it were a football to be fumbled. More generally, functions tended to be divided between those that would be reviewed and made to resemble courts and those that were free from review and were presumably a wilderness of discretion and arbitrariness. Again, the distinction between law and politics appears in a different form. These distinctions often made little functional sense and often obscured crucial issues about the rationality and fairness of the exercise of power. For example, the distinction between administrative and judicial powers may have
contained a simple and useful consideration, but, elevated to a monolithic and exclusive litmus, it obscured other considerations and had no justification at all as a limitation on remedies.

The record of the Supreme Court’s experience with this doctrine in the 1950s, 1960s, and early 1970s is disappointing, if not lamentable.29 The results often failed to express any intelligible pattern or attitude toward review. The reasoning often failed to explain the results in any way other than by invoking the abstract doctrine, and it failed to discuss other recent decisions that seemed relevant and perhaps inconsistent. The court demonstrated no sustained effort to create any consistent attitude toward review. It seemed content with the doctrine, even with the distinction between administrative and judicial functions, and with its role, and it made no significant effort to assess or change the doctrine.

In the late 1970s changes began to occur in the form of the court’s reasoning. Two decisions were dominant. In Nicholson,30 the court announced the “fairness” doctrine: in claims to participate, the distinction between judicial and administrative functions would no longer be crucial, and in several other decisions it sought to mitigate the difficulties of distinction. In CUPE,31 it held that review for jurisdictional review, especially statutory interpretation, would include consideration of the rationality of the decision, rather than be limited to the barren question of whether the issue was preliminary (or collateral) or within or beyond some sharp line of jurisdiction. In other cases, the court showed considerable respect for the judgment of agencies in administering their own affairs.

The great expansion of government during the preceding three decades may have been a stimulating context for this change. A more particular stimulus may have been the ferment and change in the English courts, especially in cases about rights to participate, although a similar expansion of procedural rights in the United

States may suggest the influence of some more pervasive change in attitudes toward government.

The significance of these changes is not yet clear, except for the expansion of the rights to participate. Doctrine does not determine results and merely changing its terms cannot change results, but the changes hold out some hope for an escape from abstract, monolithic distinctions. Unfortunately, some other decisions of the court have obscured this hope. In some decisions it has failed to give adequate reasons (for example, the thoughtful judgment in *CUPE* lies in contrast to the lack of explanation in some other judgments) and in others it has failed to respond to obvious and important issues. In addition, the court has occasionally seemed inconsistent, especially in dealing with the implications of *CUPE* and in its attitudes toward the distinction between functions.  

IX. Conclusion

I began by describing the ideals of lawyers in the late nineteenth century. These ideals have been fundamentally challenged in the twentieth century by both reality and scholarship. The reality was the changes in the social context, especially the emergence of regulation and the welfare state and the increasing diversity and complexity. The most dramatic challenge of scholarship came from the realists in the United States, especially through their attacks on conceptual and abstract thinking and on the distinction between law and politics. The ideals still shape much of our doctrine and the form of our thinking, but the gap between them and the reality of government is great and much of our faith has become only habit and ritual. The ideals have failed us — or we have failed them. During the past decade, legal scholarship has been in turmoil, especially in the United States. Much of this turmoil can be seen as responses to these challenges, and the struggle is crucial because the ultimate stake is a legal theory for a liberal society (although again I wonder whether the differences in political traditions should make the issues different in Canada than they are in the United States). The Charter will not save us this effort, because the issue is how to think about the Charter.

32. The recent work of the court is discussed in a series of articles by Mullan in *The Supreme Court Review*, entitled *Developments in Administrative Law...* (1980), 1 at 1; (1980), 2 at 1; (1982), 3 at 1; and (1983), 5 at 1.
The struggle is about the entire legal system and not just the topic of this paper, regulation. But regulation does present distinctive problems, especially with the individual and the state. Two examples of such problems are interpretation and the rule of the law. Usually, review of regulatory powers for error of law or jurisdiction is ultimately an issue of interpretation. We still often profess to believe that a statute is a text that contains a discrete meaning which can be found by an objective and detached reader, perhaps with the help of some vague reference to social policy or the intent of the legislature. The 1930s shattered the foundations of this belief, and we still seek a secure replacement.33

The fate of the rule of law is a more general problem and a crucial one, because it is at the heart of our legal system. Lawyers have been preoccupied by Dicey's formulation of the rule and especially by its peculiarities and inaccuracies. This preoccupation is inadequate, however, because it fails to grapple with the central question of whether the ideal — laws that are general, prospective, and govern individuals and the state indifferently — is coherent, just, and attainable. The ideal has caused much harm; for example, it has legitimated much abuse of private power. But it can be a valuable ideal for controlling public power. Our regulatory state gives immense discretion to officials; whatever we may believe or hope, the lawyers in the 1930s were correct: the rule of law in the form in which they knew it was passing. Our problem is whether it can be reformulated in a complex and intensely regulated society.34

33. The literature is vast and some of the most recent writing is among the most provocative; see, for example, a symposium entitled Law and Literature, in (1982), Texas L.R. 373-586. See also Fiss, Objectivity and Interpretation (1982) 34 Stanford L.R. 739; and Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles (1983), 96 Harvard L.R. 781.
34. Again, the literature is vast. Some of the major items and examples are Dicey, The Law of the Constitution (1885), Ch. 4; Hayek, The Constitution of Liberty (1960), Pt. 2; Raz, The Authority of Law (1979), Ch. 11; Thompson, Whigs and Hunters: The Origins of the Black Act (1975); and Horwitz, Review 86 Yale L.J. 565.