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# **towards a modern federal administrative law**

ADMINISTRATIVE LAW SERIES

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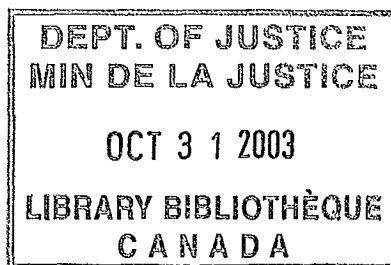


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TOWARDS A MODERN  
FEDERAL ADMINISTRATIVE LAW

Administrative Law Series



Consultation Paper

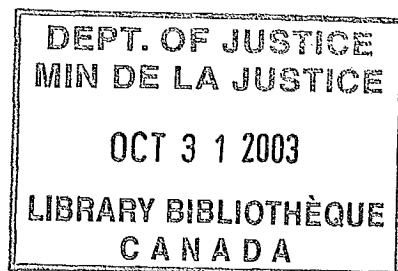
# TOWARDS A MODERN FEDERAL ADMINISTRATIVE LAW

Administrative Law Project

Consultation Paper prepared for the

Law Reform Commission of Canada

by



John Frecker, Commissioner  
Patrick Robardet, Project Co-ordinator  
John Clifford, Research Consultant  
Daniel Mockle, Research Consultant  
Kernaghan Webb, Research Consultant

Available by mail free of charge from:

Law Reform Commission of Canada  
130 Albert St., 7th Floor  
Ottawa, Canada  
K1A 0L6

or

Suite 310  
Place du Canada  
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## Table of Contents

INTRODUCTION .....	1
CHAPTER ONE: The Current Situation .....	5
I. The Traditional Approach to Administrative Law .....	5
A. Origin and Description .....	5
B. The Emphasis on Judicial Review .....	6
II. Problems with the Traditional Approach .....	7
A. The Decline of Ministerial Responsibility .....	7
B. The Growth of the Administrative State .....	8
C. The Political Autonomy of the Administration .....	9
CHAPTER TWO: The Reform Challenge .....	11
I. Towards a New Administrative Law .....	12
II. Rationale for Renewal of Administrative Law .....	14
A. The Existence of the State .....	14
B. <i>Charter</i> Imperatives .....	16
C. Democratization .....	17
CHAPTER THREE: A Conceptual Approach .....	19
I. Themes .....	19
A. The Legal Status of the Administration .....	19
B. Processes, Procedures and Instruments of Administrative Action .....	20
C. Administrative Structures and Organization .....	21
D. Internal and External Controls .....	22
II. Proposed Topics for a Five-Year Plan .....	24
A. Short-Term Research .....	25
B. Medium-Term Research .....	26
C. Long-Term Research .....	27

## Introduction

The purpose of this Consultation Paper is to present for comment the basic issues which the authors feel should underlie any effort to modernize Canadian administrative law. As law reformers, we want to propose specific substantive and procedural reforms that will serve to enhance the fairness, efficiency and effectiveness of the federal public Administration. We address matters such as decision making by government, the role of the Federal Court as overseer of administrative actions, and the legal status of the various units of the federal Administration. We are also concerned with the role of law in government action, and the means by which policy is communicated to the operational level where it directly affects individuals. In short, we want to improve the capacity and utility of law as a tool for maximizing fairness, efficiency and effectiveness of government. Our aim is to identify and correct those instances where legal regimes hinder such objectives; moreover, we intend to explore more fully the possibilities for using law to promote them.

In the interests of brevity we have omitted detailed analysis and sourcing in this Consultation Paper. This will be provided in subsequent fully documented research papers which are being prepared as background material for a Report to Parliament. These papers will elaborate on the points raised here. At this stage of our work our aim is to present issues in an accessible, uncluttered way in the hope that we shall thereby prompt many immediate, constructive responses.

The prevailing approach to administrative law emphasizes the role of law as a means for controlling and correcting administrative error. The Law Reform Commission of Canada (LRCC) has adopted a wider approach, emphasizing close examination of the administration at work, with a view to formulating rules and standards to promote correct administrative action in the first instance. One objective is to minimize the need for corrective action by the courts. To date our research has consisted primarily of detailed studies of independent administrative agencies such as the Unemployment Insurance Commission and the Canadian Radio-television and Telecommunications Commission. The first phase has culminated in presentation to Parliament of our Report 26 entitled *Independent Administrative Agencies* (LRCC, 1985) setting forth our general recommendations with regard to the legal decisions made by independent administrative agencies.

More recently we have branched out to study how government policy is implemented in practice and how present approaches to law making and law application facilitate or hinder compliance (see Working Paper 51, *Policy Implementation, Compliance and Administrative Law*, LRCC, 1986). Concurrently we have undertaken inquiries regarding the many privileges and immunities which the various components

of the federal Administration enjoy because of their identification with the Crown (see Working Paper 40, *The Legal Status of the Federal Administration*, LRCC, 1985 and a Study Paper on *Immunity from Execution*, LRCC, 1987).

The further we have gone in this enterprise, the more difficult it has become for us to reconcile the prevailing traditional view of administrative law with the world of administration encountered in our studies.

Our misgivings about this prevailing approach to administrative law are not novel or unique. Numerous earlier commentators have noted the same problems. Identification of the problems, as these commentators have mentioned, is merely a first step towards remedial action. At this stage, however, we are not inclined either to associate ourselves with, or dissociate ourselves from, the reform prescriptions advocated by others. In our view, the most serious problem is the lack of any accurate understanding of the relationship between law and administration. It is our feeling that such an understanding, a prerequisite to meaningful reform, must be developed through a fundamentally new approach to the study of administrative law.

We should approach the study of administrative law mindful of the functions of the State's administrative apparatus. It is also important to be aware of what the Administration is seeking to accomplish, both in terms of the general promotion of public order and in terms of the specific policies being pursued. The instruments used to implement these objectives give rise to questions about the rights and obligations of the Administration and individuals in the context of the administrative relationship.

The organizational structures utilized by government to carry out various administrative activities are in need of examination. Organizational forms range from government departments through independent administrative agencies and tribunals to Crown corporations and mixed government/private sector institutions. Mechanisms for holding the Administration accountable will vary according to the form used for any particular administrative function. Also, the rules governing the activity of particular administrative institutions will vary according to the organizational form in place. In administrative law we should develop appropriate procedural standards and accountability mechanisms to match the different organizational forms.

The choice of a specific organizational form carries with it certain legal consequences which must be carefully assessed. For instance, ministerial control over departments or public enterprises is generally accepted, whereas such control over adjudicative tribunals is frowned upon. Such legal consequences have not been systematically addressed in the past.

As noted in our Working Paper 51 *Policy Implementation, Compliance and Administrative Law* (LRCC, 1986), administrative activity involves much more than the enforcement of rules and the imposition of sanctions for violation of those rules. Administrators achieve their objectives primarily through negotiation, persuasion and the selective application of incentives. If we are to bring administrative activity more



effectively under the rule of law, we need to develop a fuller and clearer understanding of all the instruments employed by administrators to execute laws and to achieve policy objectives.

We must also develop a clearer understanding of the many existing mechanisms for controlling administrative activity. The traditional focus of administrative law has been largely on the courts as the primary control mechanism. Our approach to administrative law must be developed to recognize and to make creative use of other, non-curial control mechanisms, such as an ombudsman, the internal reconsideration of decisions, or internal ordering.

Legal regimes do not exist in isolation from society. Legal structures and rules have profound economic and sociological effects which must be studied; as well, criteria must be developed for assessing the desirability of proposed alternatives in administrative law. The analytic tools of related disciplines such as political science, economics, sociology and public administration can be used to improve our understanding of administrative law.



## CHAPTER ONE

### The Current Situation

#### I. The Traditional Approach to Administrative Law

##### A. Origin and Description

Administrative law in Canada has been overwhelmingly defined by judges controlling State actions. In other words, administrative law in Canada is mainly viewed as the sum of pronouncements by the courts in the context of judicial review cases, regarding the legality of administrative action.

The intellectual well-spring of this dominant approach to administrative law is generally conceded to be Dicey's *Introduction to the Study of the Law of the Constitution*, first published in 1885 (10th ed., London: MacMillan, 1959). While the phobic anti-statist elements of Dicey's nineteenth-century liberal creed have largely been abandoned, the fundamental elements of the rule of law as articulated by Dicey are still reverentially invoked as the very underpinning of our democratic political order. Also, Dicey's declaration that a separate body of law to govern the Administration and relations between the Administration and the public is "utterly unknown" to, and "fundamentally inconsistent" with, our common law traditions is still widely accepted almost as a truism. In Dicey's view, the Administration is nothing more than the sum of its members, all of whom are subject to the ordinary law of the land in the same way as is every person. Moreover, the task of enforcing conformity by members of the Administration to this ordinary law of the land is entrusted to the same courts that are responsible for interpreting and enforcing all law.

It is this denial of the very notion that there might be a special body of law, possibly interpreted and enforced by special courts, that underlies what we have described as the prevailing view of administrative law. In short, this view denies the existence of "administrative law" and defines its subject simply in terms of the application of the ordinary law of the land to problems that may arise between the State and individuals.

The dominant approach does not recognize the existence of the Administration as a distinct legal entity; yet our legal traditions accord to the Administration significant privileges and immunities, with the result that much administrative action is not, in

fact, subject to the ordinary laws of the land as postulated in Dicey's rule of law. Furthermore, preoccupation with correction of administrative errors in response to individual grievances often interferes with the realization of desirable policy objectives which have been legitimately formulated through the democratic process.

## B. The Emphasis on Judicial Review

Our criticism of the traditional approach to administrative law in Canada should not be taken as a declaration that there is no place for judicial review of administrative action as part of the overall scheme of administrative law. Rather, it is a measure of our frustration in the face of legal literature and practice which exaggerate the importance of judicial review and its outcome. Constructive examination of other problems is necessary and should be central to the modernization of our administrative law. The time has come to develop a more comprehensive and timely perspective on what should be the subject-matter of administrative law.

It is impossible to determine the proper place for judicial review without first developing an understanding of how law can and does condition and control administrative action. In subjecting prerogative powers of the Crown to judicial review, the case of *Operation Dismantle v. R.* ([1985] 1 S.C.R. 441) shows that law has now become central to the ordering of administrative action. As traditional theories of the Administration's political accountability through Parliament become more strained by the increasing institutional complexity of government, what place is there for widening the range of legal accountability?

Let us consider two aspects here. On the one hand, judicial review can be assessed for both its potential and its actual achievements. This approach stresses review remedies, the grounds and the extent to which judicial orders can order or reorder administrative action. On the other hand, the submission of administrative action to law means more than judicial review. This wider approach not only stresses the need for law to regulate the Administration; it also underlines the need to expand legal accountability. Indeed, we must define legal control not in terms of judicial review, but primarily in terms of constitutionally mandated regimes, created by statutes, regulations and internal ordering. Reforms of decision making can thus be made independent of hypothetical judicial review outcomes, and law can organize government in accord with the functional requirements of a good administration. This still keeps judicial review as a final control of administrative processes.

While recognizing the contribution of judges, we cannot expect the courts to assume the primary responsibility for reformulating administrative law. The capacity of the courts to promote reform is inherently limited. Courts can only react to specific situations which are brought before them on a piecemeal basis. The cases for review usually represent marginal problems rather than patterns which indicate structural defects in the system.

## II. Problems with the Traditional Approach

The dominant approach sees administrative law as a system of negative control. From this point of view, relations between individuals and the Administration are perceived as intrinsically antagonistic. The focus has been on judicial review as an external, after-the-fact, negative checking mechanism. By emphasizing the particular and the pathological, not the general and the normal, this way of looking at the issues distorts perception of the ongoing administrative process. More precisely, such a focus does not explain how law governs the Administration or the State. This approach may have been adequate in the *laissez-faire* world of Dicey's nineteenth-century England, but it is hopelessly inadequate today.

### A. The Decline of Ministerial Responsibility

In the common law tradition the Administration is, at least in theory, held accountable to Parliament through the doctrine of ministerial responsibility. Since an adequate avenue of political accountability is thought to exist, there seems to be no need for a special body of law to control administrative actions. Administrators, like all individuals, are considered to be subject to the ordinary law of the land. Thus the English legal tradition had denied the existence of a special body of law to structure and control activities of the Administration acting for the State.

The adequacy of the common law approach today hinges very much on the effectiveness of the doctrine of ministerial responsibility as a mechanism for controlling the Administration. It is not our intention here to present a lengthy treatise on the present state of ministerial responsibility in Canada. A great deal has already been written about this issue. Suffice it to say that, at the applied level, there is good reason to assert that ministerial accountability, while still central in our constitutional theory, is in a poor state of health.

If administrative law is to be reformed in a manner that is responsive to the present-day needs of society, it is essential that we reassess the constitutional assumptions upon which our present approach is based. The solution to the problems uncovered in such a reassessment cannot be presumed at this time, but a solution must be found. The system of administrative law must be reformed to take into account the evolving relationships between Parliament and the Administration. Furthermore, either the decline in the Administration's effective accountability to Parliament must be reversed so that practice conforms to constitutional theory, or else new accountability mechanisms ought to be created.

## B. The Growth of the Administrative State

The realities of governing in the late twentieth century are a far cry from the more basic, less complex circumstances of earlier times. At the very least, three key dimensions of modern governing realities must be addressed in a revised approach to administrative law.

- (1) The federal bureaucracy has evolved from humble beginnings in 1867 to the vast administrative complex we have today. The institutional dynamics of this bureaucracy are totally overlooked in the traditional approach.
- (2) The functions of the federal government have multiplied and diversified to the point where they now affect almost every aspect of our lives, from the content of the television programs we watch and labelling of the food we eat, to our basic social security entitlements such as health services and unemployment insurance. The traditional approach, based as it is on a perception of antagonistic relationships between individuals and the State, fails to grasp the significance and the legal implications of the growing dependency of individuals on State functions and services.
- (3) The techniques of administrative action, that is the means by which government implements its policies, are considerably more sophisticated and complex than are accounted for in the traditional "black letter law" approach which supposes that government merely prescribes rules in statutes or regulations and sets forth penalties for violation of those rules. As noted in our Working Paper 51, *Policy Implementation, Compliance and Administrative Law* (LRCC, 1986), the "command-sanction" model accounts for only a fraction of the interactions between the Administration and the public. Governing instruments such as tax incentives, grants and negotiated compliance schedules, all of which materially affect the legal relationships between individuals and the State, fall largely outside the purview of what is traditionally seen as administrative law. While this diversity of means of administrative action is *not* new, the failure to recognize it in our approach to administrative law becomes increasingly disturbing as the scope of administrative action expands.

The traditional approach to administrative law is rooted in a nineteenth-century, *laissez-faire* ideology which viewed the State as having only limited functions. According to that ideology, the State is seen primarily as an arbiter between social forces and a maker of legal rules for the general arrangements of social life. It exercises a police function but reflects a philosophy of limited government. Law as made by Parliament is applied first by the courts; social change and adaptation is left primarily to private initiative. Central to that ideology is rejection of the idea that the Administration can be a primary force and apparatus for social ordering.

Such an approach fails to take account of the greatly enlarged functions of the modern federal State in Canada. From its very beginnings the federal government has

pursued an interventionist course which is out of keeping with the ideology which informs our approach to administrative law. The federal Administration has become a primary means of social control, adaptation and change. Governments in Canada, both federal and provincial, have responded to needs and desires through active social management and engineering.

This shift in perception of the functions of the State has a profound bearing on administrative law. Once it is recognized that the State is more active and interventionist than accounted for in the ideology underlying traditional administrative law, the need for new approaches becomes evident. The modern Administrative State has taken on a life and will of its own which must be recognized and understood if it is to be made truly subject to the rule of law.

### C. The Political Autonomy of the Administration

Traditional democratic theory holds that policy choices are generated and translated into societal objectives through the political process, the competition among political parties for electoral support that gives temporary control over the levers of power. However, as has long been recognized by students of public administration and political science, the public bureaucracy in the modern State plays a crucial role not only in implementing policy, but also in setting the policy agenda. Many regulatory initiatives, for instance, are undertaken by the Administration acting on its own motion, not in response to grass-roots political pressure for such initiatives; indeed, the politicians and the public may not even be aware that a problem calling for intervention exists. The reasons for such administrative initiatives are varied and complex, ranging from altruistic public service commitments to self-serving empire-building. For present purposes we are not concerned with the reasons why the Administration behaves and functions as it does. However, we are concerned that our traditional approach to administrative law fails to address or even recognize this autonomous character of the modern Administrative State. Administrative law should have the means to hold the Administration accountable for the way it influences the policy objectives of society.

The Administration constantly produces and applies rules which, even though they are not legislation, nonetheless govern the activities of administrators. Within most federal government institutions there are numerous rules which apply to internal functioning. These may be found in circulars, instructions, guidelines, manuals and so on; the names under which rules appear vary among institutions. Although such rules are binding internally, they do not meet the formal requirements of delegated legislation and are therefore not binding externally when a decision is made which affects individuals. Nonetheless, these internal rules clearly affect the public. Means should exist within administrative law for controlling the Administration's production and application of its rules.

Likewise administrative law must be adapted to account for the varied means deployed by the Administration to realize policy objectives, whether these objectives

are established through political processes or by the Administration itself. There are at present few legal standards or procedures to govern important aspects of administrative action such as the distribution of financial incentives and the exercise of prosecutorial discretion. While it may not be desirable to become excessively legalistic about these matters, there is a need to study the nature and the working of the Administration at close hand if we are to bring our system of administrative law into line with present needs.



## CHAPTER TWO

### The Reform Challenge

Reform of administrative law can take place at many levels. First, and most basic, is the reform which flows from appropriate changes in attitude on the part of all players involved in the administrative process. Administrators must come to accept the value of bringing their activities more effectively under law. Those who are affected by administrative action, together with the lawyers who represent them, must be more sensitive to the legitimate public policy objectives which inform administrative actions. They must acknowledge that the relationship between the Administration and the public is not inherently antagonistic. Judges charged with ultimate oversight of administrative activities should also become more aware of the nature of the relationship which now exists between the Administration and members of the public. They must use their authority with restraint, being ever vigilant to protect individual liberties while taking into account the nature of administrative action and the policy objectives being pursued.

However, change in attitude is not sufficient to ensure realization of the needed reforms in administrative law. The ultimate responsibility for the required reforms must be carried by Parliament. It is necessary and desirable to allow administrators wide latitude with respect to implementation of legislation since it is impossible to frame specific rules to cover every fact situation with which administrators must deal. However, the legislators should make clear the policy objectives which particular laws are intended to advance; they should also, wherever possible, prescribe general guidelines or standards for the implementation of those objectives.

Many of the reforms required to adapt administrative law to present-day needs will require specific legislative initiatives. With the proliferation of distinctive administrative institutions and special legislative regimes for particular administrative purposes, administrative law has become much less a thing of hoary common law doctrine. Responsibility and authority to make the necessary legislative reforms rest with Parliament.

The Law Reform Commission of Canada can and should be a catalyst for attitudinal change and for the more fundamental reforms which Parliament must ultimately establish through legislation. However, we cannot perform this task in isolation. The reform process requires the combined energies of legal scholars as well as administrators and scholars from related social science disciplines such as political science, public administration and economics. It also requires lawyers and judges to reorientate their thinking; they must come to recognize the limitations of judicial review and become sensitized to the dynamics of the administrative process.

The process of administrative law reform must include an effort to reconcile lawyers' and administrators' values. The problem, as succinctly described by John Willis ((1968) 18 U.T.L.J. 351), is that lawyers, steeped in an ideology that seeks to limit encroachment by the State on freedoms of the individual, are often hostile to the broad social goals which inform administrative actions. Lawyers tend to see administrative initiatives from the perspective of the affected individuals and are often insensitive to the broader redistributive objectives which shape the administrators' approach. While lawyers' values predominate in the context of a system of administrative law based on judicial review, the divergence of values has had a negative consequence. With the growth of the Administrative State, a great deal of administrative action which should be subject to legal constraints has fallen outside the purview of our administrative law regime.

## I. Towards a New Administrative Law

The traditional approach has focused predominantly on the checking function of administrative law. It views administrative law as the mechanism through which aggrieved individuals may challenge administrative acts and seek redress through the courts and as the law which circumscribes administrative action and controls bureaucratic excesses. The common law, as it is applied to the actions of the Administration, is primarily concerned with abuses to individuals. While this concern with controlling administrative abuse is laudable, it is not the totality of administrative law.

Administrative law has two purposes: to serve both the Administration, and those affected by the actions of the Administration in their relations with the State. While this statement may seem obvious to some, it represents a fundamental shift in focus for administrative law.

Administrative law must be the law of administrative functioning. Administrative actions ought to be framed by rules of law. The first step towards development of a system of administrative law which properly governs the full range of administrative activity is to acknowledge that the function of the Administration is, on the one hand, to organize and define its means and its purposes and, on the other hand, to make concrete the relationship between the State and the individual. The way in which the Administration goes about discharging its functions can and should be governed by administrative law. Likewise our system of administrative law should make clear the legal consequences of the various kinds of administrative acts: That is, in what manner and at what stage do these acts affect the rights and obligations of individuals who are the subjects of the acts. Questions which need to be addressed in a systematic way include:

- What, in law, constitutes an administrative decision as opposed to an act which amounts to something less than or other than a decision?

- How can we distinguish in law among types of administrative acts (contractual, non-contractual or mixed)?
- What legal effect should be ascribed to administrative guidelines, promulgated through instruments such as interpretation bulletins and management manuals, which shape administrative action but are clearly less than formal legal rules?
- What procedural requirements should be imposed on administrators in the exercise of their various functions (for example, rule making, decision making, policy making, allocating of public resources)?
- To what extent should the policy implementation activities of administrators (for example, negotiation, granting of incentives, inspection, prosecution) be subject to legal rules and standards?
- When and through what channels can affected individuals seek review of particular administrative acts?

The traditional approach to administrative law, based as it is on the assumption that administrative law is ordinary law applied to issues arising in the context of public administration, fails to recognize the unique attributes of governmental action. Many of the governing principles upon which the common law, and even much of statute law, is based were developed in the context of relations among private parties. Concepts and principles which are appropriate to private law are often ill-suited to deal with problems arising in the public law context. Tort liability of the Crown, for instance, is addressed in the same terms as are used to determine liability between private parties. The use of private law offers many opportunities for the State to escape liability which we might, as a matter of public policy, want it to bear.

Administrative law must take cognizance of the unique nature of administrative acts. Of necessity these acts have a *public* dimension because they are the acts of the administrative apparatus of the State. The State, in contrast to private parties, has the legal capacity to impose its will unilaterally when it acts. In the context of administrative action, there is no legal requirement for consensus of the affected parties, as there is in private legal relationships. It is quite possible for the Administration to engage in consensual commercial activities which should not be governed by administrative law. However, in situations where the Administration possesses the ultimate power unilaterally to alter individual rights and obligations, we need a system of distinct legal rules to organize and control the exercise of that power. One of the essential functions of administrative law is to provide the required system of rules. It is this attribute of administrative law as the law of State action that distinguishes it from other branches of law.

If administrative law is to fulfil this function, it must primarily address the substance, as opposed to the form, of administrative acts. Our present approach focuses excessively on form. For instance, the characterization of a function as quasi-judicial rests upon an analysis of procedural formalities more than on the substance of decisions. Administrative law must be developed to evaluate administrative acts in

terms of their real impact on the legal position of affected individuals, rather than on the basis of their conformity to prescribed form.

The realities of the modern Administrative State create an inevitable inequality of position between the Administration and the individual. It may be necessary to develop a special body of administrative law to redress the imbalance and to protect the liberty of individuals. It should be remembered that in the Western world administrative law emphasizes the protection of rights and freedoms of individuals through judicial control of administrative action, and that it is in essence a liberal force in society and one of the fundamental manifestations of democracy. The inherent liberal character of administrative law must be recognized and preserved in any reform effort.

The need for a special body of administrative law does not necessitate the creation of specialized administrative courts. Our analysis may be seen by some common lawyers as a heretical, insidious attempt to import alien, continental European legal concepts into our system. However, at this early stage we are not suggesting that the continental approach is necessarily more appropriate for our present circumstances. We are simply pointing out that, if we are to reform administrative law and make it responsive to the realities of the modern State, it is necessary to pose fundamental questions and to be open to the practical consequences of the answers to these questions.

## II. Rationale for Renewal of Administrative Law

As we have already noted, administrative law must be reformed to take proper account of the existence of the State as a distinct legal entity. Resort to the constitutional fiction of the Crown as the embodiment of the State is inadequate. Administrative law must also be reformed to take into account the new legal imperatives imposed by the *Canadian Charter of Rights and Freedoms*. In light of administrative law's intrinsically liberal character, reforms should foster democratization of the relationship between the State and individuals. We address these three points below.

### A. The Existence of the State

We have faulted the traditional approach to administrative law for its failure to recognize the State as a distinct legal entity. The "State" is admittedly a fiction, but it is useful as an interposition. It can be characterized as the supreme authority in society, although distinct from society. The authority and power of the State and the obedience of the subject are derived from law. As such, the State represents a bundle of legal powers. Therefore, the relationship between the State and individuals must be addressed in terms of how State actions affect the rights and obligations of individuals.

It is important to recognize the dual function of the State. While performing a negative, constraining and ordering function, it is also a provider. The State as provider requires a different dynamic in the functioning of law than does the State as orderer and constringer. Administrative law must be developed to address both these functions and to provide adequate legal guarantees for individuals.

The failure of the prevailing approach to recognize the State as a distinct legal entity is compounded by its failure to comprehend the number and diverse types of decision-makers in the present-day federal government. The traditional approach dichotomizes administrators acting in an "administrative" capacity and those acting in an "adjudicative" capacity. It assumes that all those operating within the traditional departmental structure are acting administratively and struggles to classify the activities of those acting outside of departments on the basis of arcane criteria. In addition, administrators' activities are sometimes commercial in nature but the traditional approach does not adequately distinguish such activities on a functional basis.

As a consequence of the increasing complexity of governing, the theoretical tripartite constitutional division of power among legislature, executive and judiciary has blurred. The diversity of institutions and of activities performed by those institutions defies simple characterization. In the parliamentary system it is implicitly recognized that there is no absolute separation of legislative and executive functions. An independent judiciary is recognized in the court system. However, "judicial" functions are also exercised outside the courts by the executive branch. It remains to be determined whether the *Charter* requirement for independence of the judiciary precludes the executive branch's exercise of "judicial" functions or necessitates a more clear-cut separation of "adjudicative tribunals" from the executive branch.

An interesting side-issue, which may or may not be directly within the subject of administrative law but which needs to be addressed if we are to develop a system of administrative law that is responsive to present needs, is the sociological impact of particular legal structures on the society served by the legal system. Rules and procedures dictated by the legal system structure the behaviour and the expectations of the participants in the system, sometimes in unexpected and counter-productive ways. Our approach to administrative law should be sensitive to these distorting effects of legal arrangements; the legal regime should include, where possible, appropriate corrective mechanisms. At this stage we do not pretend to know how this might be achieved. We simply point out that it is an area of inquiry that must be pursued in the course of modernizing our administrative law.

Possibly the most significant consequence of the growth of the Administrative State, or more precisely the Welfare State, is the growing dependency of individuals on the State. The general improvement in the material well-being of our society is hailed as one of the triumphs of capitalist democracy. However, the growing dependency of the public on State initiatives may carry with it profoundly anti-democratic seeds, particularly if the legal system fails to redress the fundamental inequality of legal and economic power which exists as between the Administration and individuals.

The system must also accord appropriate legal status to those affected by the actions of the Administration. As users of public services and subjects of State regulation, individuals have certain rights and obligations which should be clearly set forth in our administrative law regime. In this way, appropriate legal remedies and sanctions can be invoked to maintain the correct relationship between individuals and the State.

In the modern Administrative State, management, organization and technique can easily overshadow public policy objectives, legal principles and social values. The federal bureaucracy has responded to the increasing complexity of governing with varying degrees of success. The law must help ensure that the Administration remains accountable for the ways in which programs are achieved.

## B. *Charter* Imperatives

Proclamation of the *Constitution Act, 1982* (enacted by the *Canada Act 1982* (U.K.) 1982, c. 11), which includes the *Charter*, has entrenched principles such as legality, proportionality and equality which have a direct bearing on administrative action. The *Charter* is promoting a general awareness of the need for better legal guarantees. The implications of these developments must be clearly understood by Parliament as it undertakes new initiatives towards the exposition and development of administrative law in Canada.

At this stage it is not clear in which direction the *Charter* will push administrative law in Canada. We noted above that the challenge for reformers is to find a proper balance between administrative and legal values. However, this approach might not hold under the *Charter*. Subject to section 33, the *Charter* can be invoked from an individualistic perspective and be made to prevail over collective dimensions of State action. Viewed from this perspective, the *Charter* accentuates the role of law in the legalization and entrenchment of liberal values about the State and society. This may hinder the recognition of administrative values and bring us back to the old notion of a limited State.

However, it does not necessarily follow that the *Charter* will be applied to return the State to its traditional role as rule-maker and umpire. The underlying social imperatives which have given rise to the Administrative State are not simply wiped away by invocation of constitutional doctrine. It is necessary to seek creative applications of *Charter* principles to deal with the realities of the Administrative State. The new order calls for justifications to support State action and administrative law rules. Such actions and rules are now susceptible to the courts' critical evaluation against the constitutionally entrenched values set forth in the *Charter*.

The judicial tradition of exercising minimum control over the ordering function of the Administration is changing in the wake of the *Charter*. We see this as an essentially positive development towards the modernization of Canadian administrative law,

provided that the judicial intervention is not exercised in a misguided, heavy-handed way which would disregard the imperatives of the Administrative State now existing in this country. Until recently the State could essentially operate without justifying its actions to the courts. With the introduction of the *Charter*, as demonstrated by the *Hunter v. Southam* case ([1984] 2 S.C.R. 145), there must now be a balancing of interests by way of an assessment of the State's interests and those of society, with the courts as final arbiter. Minimum control of the ordering function is being replaced by a more encompassing judicial surveillance of government action. This has the potential to become the starting-point for articulation of a body of administrative law of the sort which we suggest. Through the new approach to administrative law advocated in this paper, the courts may be guided and influenced in a positive and constructive way in the exercise of their surveillance function. For such guidance to be of any value, it is of pressing importance that research be directed towards a clear exposition of the nature and function of the Administration and the relationships which exist between the Administration and individuals.

### C. Democratization

Ironically the traditional approach to administrative law, which on the one hand is dedicated to the protection of the liberties of the individual against excessive State intervention, is strangely silent, on the other hand, with regard to the right of individuals to have some input in the administrative processes which affect their lives. Because the traditional approach is blind to the existence of the Administration as a distinct legal entity, it fails to address the basic problems which arise because of the inherent economic and legal inferiority of individuals in their relationships with the State.

As noted earlier, administrative law should be a fundamental manifestation of democracy in our society. But democracy implies more for individuals than the mere capacity to invoke the law to protect oneself against abuses perpetrated by government. It also implies a positive right to influence the policies and actions of government.

In substantive terms, these affirmative elements of democratization may include, among other things, a right to proper notice of proposed administrative initiatives and a right to comment on the probable effects of governmental initiatives before action is taken. The Administration might be subject to a number of obligations in relation to individuals, including obligations to provide reasons and to reach decisions in an open and accountable manner. In general, we suggest that it is important to improve the simplicity and efficiency of the administrative process as well as to reduce costs of participation for individuals.

To some extent this function of administrative law is addressed by the rules of natural justice and the requirement for fairness in administrative action. However, under the present system, fairness or other requirements are enforced primarily through the process of judicial review which is prohibitively costly for most individuals. Even when

an aggrieved party seeks redress in the courts, the complete disequilibrium between the parties and the complexity of privileges and immunities available to the Administration work to stack the process against the individual. In the area of substantive law, where damage is sustained as a result of administrative action undertaken in the interests of the community as a whole, the disequilibrium between the State and individuals may call for compensation based on a rational allocation of burdens within society rather than on notions of fault imported from private law.



## CHAPTER THREE

### A Conceptual Approach

We suggest that future study might be organized around four unifying themes. To facilitate a more cohesive approach to the subject, we have organized administrative law into four broad areas already found in German, American and French law, namely: the legal status of the Administration; processes, procedures and instruments of administrative action; administrative structures and organization; and internal and external controls. These four themes are discussed in more detail below.

This way of organizing the field is not intended to pre-empt multidisciplinary approaches. For instance, economic analysis of government tortious liability would be highly valuable, as would a sociological approach to administrative relationships. Our approach, however, allows us to bring order to a diffuse subject-matter.

#### I. Themes

##### A. The Legal Status of the Administration

The various components of the federal Administration in Canada lack a coherent legal status congruent with the different functions they actually perform. Rather than looking at the Administration as a collection of institutions designed to carry out particular tasks that are required in a modern Nation-State, our legal theory equates the Administration with the "Crown." This is a conceptual monolith inherited from medieval England which does not reflect the modern Canadian situation. The Crown is not the same thing as the State, nor does it embrace all administrative activity since there are many government bodies such as regulatory agencies, public enterprises and others which are not part of the State apparatus co-terminous with the "Crown."

Legal status implies certain rights and obligations which will vary according to the status of the entity concerned. When status is ascribed according to historical criteria that have little relevance in relation to the modern administrative apparatus of the State, how it is structured and what its various components actually do, the status accorded to the Administration may actually frustrate the development and use of administrative law to frame and structure administrative action. If administrative institutions are effectively to perform the tasks which society expects of them, then their legal status, including the privileges and immunities which they enjoy, must be brought into line with the functional needs of these institutions.

The question of the status of the federal Administration in Canada cannot be understood without identifying the real beneficiaries of Crown immunities and privileges and without a clear picture of the practical consequences of these privileges and immunities in the context of administrative action. Our present approach to administrative law fails to provide us with means to determine what institutions and functions can properly be identified as comprising the federal Administration. Yet this uncertainly defined federal Administration enjoys a variety of privileges and immunities which often apply unevenly and without apparent logic in a manner that undermines public respect for the system. Administrative law ought to provide criteria for identifying particular institutions as part of the federal Administration, and for defining privileges and immunities which are appropriate to the functions which these institutions serve. Both aspects must be addressed in the modernization of our administrative law.

## B. Processes, Procedures and Instruments of Administrative Action

In general, what kind of substantive and procedural rules govern administrative decisions? Should these rules be uniform? These questions draw attention to a more fundamental issue about the role of law. Assuming that law is an organizing device, how, in respect of substance, procedure and framework, does law relate to deciding?

An age-old question concerns the correct balance between law or rules, and discretion. This does not imply an opposition between law and discretion, as a more simplistic view would hold. The dilemma is not between subjecting administrative action to a formal legal control of some kind, and just leaving that action to the discretion of administrators. The goal is to find the proper mix of law and discretion in given situations.

In addition, attention must be paid to the ways by which the federal government carries out its functions, and to the links between decision making and procedure. A decision is characterized primarily by its substance or content, that is, what is decided. Decision making involves a process of choosing a course of action. Decisions include but are not limited to individualized acts; in fact, they are generally made for the creation and application of law. A decision is derived from the exercise of a legal will or power to act. The nature of administrative decisions and the procedural requirements regarding administrative decision making are not adequately addressed under the traditional approach to administrative law. What criteria are appropriate for determining when an administrative decision should be subjected to judicial-like decision making processes and when decisions should be governed by different processes? Where non-judicial procedures are appropriate, what specific formalities are necessary to meet the requirements of fairness and efficiency in different fact situations?

The federal government carries out its functions through a wide range of instruments. Policies and decisions are implemented through a variety of processes and are subject to myriad procedures. Coercive instruments such as command-penalty offences and licencing arrangements have to this point attracted the lion's share of

judicial, legislative and administrative (not to mention public) attention. However, the expanding role of the State as provider has meant increasing reliance on non-coercive instruments, including grants, tax subsidies, low interest or interest-free loans, and persuasion. With respect to these non-coercive means of "getting things done," legislators, judges and administrators have given insufficient attention to many practical situations. The result has been a hodgepodge of judicial pronouncements, unclear conceptual analysis and the adoption of *ad hoc* processes and procedures.

Underlying these ways and means of government action are some very basic issues, many of which remain unresolved. How well do current concepts comprehend the use of both coercive and non-coercive measures? Should analogies be drawn from decisions respecting coercive measures to explain and structure use of non-coercive measures? What rights and obligations should attach to coercive and non-coercive measures? Should so-called "regulatory" offences be the subject of separate procedures and "adjudication" by specialized bodies? How well does the legal regime deal with the ongoing nature of relations between administrators and the subjects of government action that characterize much of the policy implementation process?

Non-contentious guarantees in favour of individuals have not been systematically studied. The notion of non-adjudicative administrative procedure is not recognized in "administrative law" as classically defined. A statutory charter for users of public services might be a practical basis for reform of the law in this area. In the absence of comprehensive attention to issues of this nature, the existing framework will remain inadequate and unrealistic, unable to respond to the needs of administrators and the public. This may lead administrators and affected individuals to turn to informal *ad hoc* practices, so that dealing with the Administration becomes a question of who knows the real unstated rules and how to apply them. Such practices bring administrative activity into disrepute and retard development of a coherent, open and fair system of governing. They may also retard recognition of the importance of law as an organizing device.

### C. Administrative Structures and Organization

We take as a given that governmental organization ought to be in accord with the functional requirements of a good administration. Government institutions and their powers are broadly framed by legislation and the ordinary law, but there is much work to be done to bring the day-to-day activities of public administrators within rules of law.

Government performs many functions on behalf of society. These functions can be grouped broadly into general categories. From one perspective, State functions include ordering and providing. Ordering means law making and law application, as well as the provision of mechanisms for resolving legal disputes (for example, the courts). Government also provides goods and services. From a different perspective, government functions may be divided under the headings of policy formulation and policy

implementation. Each of these functions of government can be assessed in terms of conventional criteria. For administrative law, "fairness" and "effectiveness" are main criteria for analyzing the "goodness" of administrative actions.

"Fairness" has received much treatment in the literature, especially in respect of the ways in which courts assess administrative decision making, be it by tribunals, public servants, or government agencies. "Effectiveness" should be addressed more comprehensively. It implies accountability for results, since it indicates the degree to which objectives are achieved. In the organization of government, issues both large and small give rise to important questions of effectiveness. Broadly speaking, these relate to the choice of institutions, and consequently processes and actions required to discharge particular functions or roles. More specifically, they relate to the choice between a department, a public enterprise, or an independent administrative agency to execute a given task. For example, what kinds of institutions should be selected for performing particular classes of administrative actions? What policy implementation functions can be performed by private parties or only by governmental institutions? How should governmental institutions organize themselves for the correct exercise of legal powers?

In turn, where decisions are made that affect private rights and obligations, a choice is involved as to the types of required process and procedure. This procedural choice is tied to the type of institution initially selected. Indeed, one question is whether some basic patterns and models exist in these matters *vis-à-vis* the organization of government. For instance, an adjudication function for resolving legal disputes generally tends to be entrusted to some kind of tribunal or judge, rather than to a commercial enterprise.

Now let us consider delegation of authority and internal rules of government institutions. Upon delegation, authority must be passed to private parties, to government institutions and to public servants within the institution itself. Can such delegation be accomplished without legal instruments, without pre-conditions (for example, certification), or without training or other qualifications? Should delegation be made to specific individuals or to a supervising authority?

Internal rules governing the actions of public institutions also pose issues for reform. These rules affect private individuals and firms in their relations with government, since they prescribe conditions for the exercise of legal powers and for discretionary decision making. In some institutions such rules are sketchy, while others show Byzantine detail. Thorough investigation is necessary to make fair and effective the many administrative regimes of government, and to better frame them by rules of law.

#### D. Internal and External Controls

The subject-matter of controls can be conveniently divided into external and internal controls. Judicial review has been the traditional avenue for the legal control of administrative action. This avenue represents a form of external control. An emphasis

on getting the job done correctly in the first instance and a reassignment of judicial review as a control point at the end of a process, mean that a greater importance ought to be given to internal control mechanisms *within* the Administration. Three major elements should be addressed in this context. First, reconsideration of a decision must be envisaged as an efficient second-look technique for correcting errors, at the disposal of both individuals and administrators. Second, internal appeals, that is, appeals heard at a tier different from the initial decision-maker, may provide an internal and fair review mechanism. Other techniques such as the supervisory function of a superior over subordinates must also be assessed as methods of correcting errors and of redress to individuals. Indeed, the importance of well-designed internal remedies or control points is emphasized by the doctrine of exhaustion prior to judicial review. Effective internal controls would complement the limited ambit of judicial review, and would accord with the proper ambit of external controls. At present, insufficient attention has been paid to the creation of appropriate and effective internal controls.

Regardless of how far the administrative system can be improved internally, there will always be a major role for external controls. Courts will continue to play a role because judicial review is part of their inherent jurisdiction. Also, constitutional issues which may arise in the course of administrative decision making will have to be resolved by the courts. However, once the limitations of judicial review are recognized, it will take its place among a plurality of options. There are several other points concerning the external control of administrative action.

One non-curial external control could be provided by ombudsmen. Even though sectoral "ombudsmen" have been created to take care of specialized problems, there is still no general federal ombudsman. This institution is non-adversarial in nature and exemplifies the diverse avenues of redress for individuals, which, although non-judicial, can and do enjoy a high degree of independence.

Along the same lines, external appeals to tribunals or courts can offset the inherent limitations of judicial review. Although they are frequently heard by courts, appeals are different from judicial review. Appeals can allow for a substitution of opinion and a closer review of decisions on their merits. Their level of formality may depend on the nature of the interests involved.

Further, non-legal controls such as internal or external audits, are also important in the larger view of administrative law.

Control of administrative action is a function that can be shared among many institutions or types of decision-makers. Law and bodies entrusted with law application and creation are primary candidates for organizing control. However, a plurality of interdependent modes, bodies and procedural regimes that reflect the diverse nature of the control function, is called for. For instance, legal control can address jurisdiction only, or questions of law; control through an appeal can reach facts and the merits of a decision. Non-legal control bears not upon the legality of a decision, but upon its regularity, expediency or financial soundness.

A legal dispute may involve several parties, or simply an individual and a decision-maker. This we call a contentious procedure. It implies adversariness which is treated by following a trial-type procedure. The suitability of that model for all legal controls is questionable.

Overall, contentious procedure in judicial review has many gaps. For example, the multiplicity of remedial avenues and the absence of distinctions between public law and private law are sources of confusion, frustration and inequity. We must explore new solutions, especially the unification of curial remedies and the clarification of their fields of application in administrative law. As well, given the fundamental economic inequality between the parties and the extraordinary procedural privileges enjoyed by the Administration, the procedure which governs curial proceedings in contentious matters is manifestly ill-adapted to the special nature of litigation between the individual and the Administration.

## II. Proposed Topics for a Five-Year Plan

In the foregoing discussion, we have attempted to set forth issues which must be addressed to achieve needed modernization of federal administrative law. We propose that reform of administrative law must take into account the functions performed by government in its own right, and must look beyond the confusions, easy assumptions, and inflexible inelastic doctrines of the past.

In the past, administrative law was intended to protect the rights and freedoms of individuals and check the anti-libertarian tendencies of the State. Though still an important component of administrative law, this traditional approach is no longer capable of meeting broader challenges. If reforms succeed in bringing our system of administrative law into line with the realities of our modern Administrative State we will eliminate situations where administrative activities are not subjected to law and cannot be rationalized in terms of law.

We conclude with our recommendations for work which should be done to achieve needed reforms of Canada's administrative law. Our suggestions in this regard are not exhaustive. Rather they are to indicate the priorities of our Administrative Law Project over the next five years, bearing in mind the constraints of time and available human and financial resources. Our contribution towards reform is necessarily limited by these constraints. It is hoped, however, that our efforts will serve to stimulate new approaches and attitudes. At the applied level we hope that our efforts will influence Parliament to initiate some of the urgently needed basic reforms.

Division of topics along the range of short, medium and long term may seem arbitrary. This division largely reflects our current work and the fact that many studies, however urgent, cannot be undertaken immediately.

A balance is maintained between the practical and the theoretical, between the short and the long range, between strictly legal and multidisciplinary approaches, between exploration and the making of final recommendations, and between the two legal traditions in Canada. An enormous amount of work remains to be done. The subject-matter is vast. This plan only attempts to structure future studies; it does not claim to be exhaustive, since other topics could be added in the future to those listed here.

## A. Short-Term Research

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| (1) Towards a Modern Federal Administrative Law | General philosophy for reform of administrative law (with supporting papers).                                      |
| (2) Bringing the Crown under the Law            | Application of statutes to the Crown.  |
| (3) Procedure and Decision Making               | An introduction to decision making as a structured process: prerequisite to legislative reform.                    |
| (4) Federal Inspectorates                       | Legal powers, status, organization and control of "administrative policing."                                       |
| (5) Financial Incentives                        | The legal framework for administration of tax subsidies, grants, and so on.  |
| (6) Regulatory Offences                         | Examination of language, facts, evidence and procedure to develop law distinct from the criminal model.            |
| (7) Tort Liability of the Administration        | Proposed scheme of compensation for damage caused by federal administrative acts.                                  |
| (8) Australian Administrative Appeal Tribunal   | Study of the recent Australian consolidation of appeals in relation to the Canadian situation.                     |
| (9) Ombudsman                                   | Study of questions about, and proposals for, the creation of a federal ombudsman.                                  |
| (10) Administrative Appeals                     | Study of appeals as an alternative remedy with a view to restructuring the federal appeals system.                 |
| (11) <i>Ex Gratia</i> Payments                  | Study of an administrative system of compensation for federal damage (directly linked to research topic 7, above). |

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| (12) Limitation Periods                           | Proposals for the reform of special procedural privileges for the Crown.  |
| (13) Immigration Appeals                          | Study of current problems faced by the Immigration Appeal Board, with concrete procedural reform proposals.                                 |
| (14) Legal Status of Public Enterprises           | Proposed new legal status for business activities of the State.   |
| (15) Fiscal Privileges of the Administration      | Study of the relevance of special procedures regarding business dealings of the State.  |
| (16) Procedural Privileges and Immunities         | To propose a new coherent set of rules for litigation between the federal State and the individual.   |
| (17) The Nature of Administrative Acts            | An attempt to define the nature of administrative decisions and to clarify the differences between the "administrative" and the "judicial." |
| (18) Unification of Remedies of the Federal Court | Proposed reduction of overlaps among judicial remedies.   |

## B. Medium-Term Research

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| (19) Statute of Administrative Procedures              | (Based on research to be completed for topics 3 and 17, above).   |
| (20) Environmental Mediation                           | Administrative dispute resolution as an illustration of non-contentious procedure.  |
| (21) The Control and Regulatory Function of Government | Modernizing the classical theories about the coercive function of government.   |
| (22) The Dispute-Resolving Function of Government      | A study of the non-curial legal dispute solving function of the State and of its modes and procedures.                          |
| (23) Transformation of Institutions                    | The legal implications of institutional transformations such as from tribunal to court or from department to Crown corporation. |



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| (24) Administrative Dispute Resolution                    | A promotion of alternatives to the court dispute resolution model.   |
| (25) Delegation of Government Functions and Privatization | An examination of the legal implications and limitations of the delegation of government functions to private sector actors. |

### C. Long-Term Research

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| (26) Federal Court Procedure Reform                    |   |
| (27) Internal Legal Authority                          | A study of the nature and effects of vertical authority within administrative structures as an introduction to further research on internal ordering and internal legal remedies.   |
| (28) Methods of Internal Ordering                      | The legal status and effects of internal managerial acts, such as manuals and directives.   |
| (29) Internal Legal Remedies                           | The structure and organization of internal administrative remedies.   |
| (30) Administrative Secrecy and Information Disclosure | Access to information and openness of processes.  |
| (31) Administrative Evidence                           | A study of evidentiary practices and a search for unifying principles in administrative decision making.  |
| (32) Procurement Contracts                             | Examination of the use of procurement contracts as instruments for implementation of government policy with proposals for legal structuring of procurement contracting procedures (directly linked to research completed for topic 5, above). |