

The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency

The Hon. Justice David Stratas*

Doctrinal incoherence and inconsistency plague the Canadian law of judicial review. This must stop.

Professor Emeritus David Mullan—the dean of the Canadian administrative law academy—has identified at least fifteen fundamental, unresolved problems in the law of judicial review.¹ For some time now, these have festered, and remain unaddressed. Other academic commentators highlight the growing pile of unanswered questions and doctrinal confusion.² One rising member of the academy opines that only a couple of Supreme Court cases in the last eight years contribute to the doctrine while the rest—tens of cases—do not and are best ignored.³

For a while now, judges attending judicial education conferences regularly have been expressing frustration. Some are now articulating it in their reasons.⁴

These judges are not alone. Now, even judges on the Supreme Court are openly registering dissatisfaction about the current state of administrative law and the manner in which their Court applies it.⁵

The administrative law of most other major Commonwealth countries does not seem to be in such turmoil. But ours is—and has been for far too long.

Our administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan. Roughly

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¹ David Mullan, “Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action—The Top Fifteen!” (2013) 42 *Advocates Quarterly* 1.

² See, e.g., Peter A. Gall, “Problems with a Faith-Based Approach to Judicial Review” (2014) 66 *S.C.L.R.* (2d) 183 at 223-231; Matthew Lewans, “Deference and Reasonableness Since Dunsmuir” (2012) 38:1 *Queen's L.J.* 59 at 82-92; Paul Daly, “Dunsmuir’s Flaws Exposed: Recent Decisions on Standard of Review” (2012) 58:2 *McGill L.J.* 483 at 485 and “The Scope and Meaning of Judicial Review” (2015) 52:4 *Alberta L. Rev.* 799.

³ Paul Daly, “The Signal and the Noise in the Supreme Court of Canada’s Administrative Law Jurisprudence” in his blog, *Administrative Law Matters* (online: <http://www.administrativelawmatters.com/blog/2015/12/20/the-signal-and-the-noise-in-the-supreme-court-of-canadas-administrative-law-jurisprudence/>). See also Daly, “Can This Be Correct?” in his blog (<http://www.administrativelawmatters.com/blog/2015/12/11/can-this-be-correct-kanthasamy-v-canada-citizenship-and-immigration-2015-scc-61/>).

⁴ See, e.g., *Canada (Public Safety and Emergency Preparedness) v. Tran*, 2015 FCA 237 at paras. 44-45; *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*, 2015 ABCA 85 at paras. 11; *Skyline Agriculture Financial Corp. v Farm Land Security Board*, 2015 SKQB 82 at paras. 35-37; *Corneil v. Canada (Transportation Appeal Tribunal)*, 2015 FC 755.

⁵ *Kanthisamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at para. 112 *per* Moldaver and Wagner JJ. (dissenting); *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 at paras. 185 and 190 *per* Abella J. (dissenting).

forty years ago, the Supreme Court told us to categorize decisions as judicial, quasi-judicial or administrative.⁶ Then, largely comprised of different members, the Court told us to follow a “pragmatic and functional” test.⁷ Then, with further changes in its composition, it added another category of review, reasonableness, to join patent unreasonableness and correctness.⁸ Then, with more turnover of judges, it told us to follow the principles and methodology in *Dunsmuir*.⁹ Now it appears that we may be on the brink of another revision: as we shall see, the Supreme Court—mysteriously—is often not deciding cases in accordance with the principles in *Dunsmuir* and other cases decided under it.

Administrative law matters. Resting at its heart is the standard of review, the body of law that tells us when the judiciary can legitimately interfere with decision-making by the executive—a matter fundamental to democratic order and good governance, a matter where objectivity, consistency and predictability is essential.

Interference with the executive by the non-elected judiciary can be controversial, particularly in the many politically-sensitive matters that arise. If the standard of review is well-defined and applied objectively in accordance with stable law, much of the controversy disappears. The appearance, and of course the reality, is that the judiciary is not playing politics; it is dispassionately and neutrally applying objective doctrine worked out years before. The executive is measured up against known legal rules, not something made up or manipulated by the judiciary on the fly. Predictability is maximized: governments can know their powers and limits and everyone can knowledgeably plan their affairs.

Right now, we are far from realizing these objectives. Confusion and uncertainty surround so many fundamental questions in administrative law, at least as far as Supreme Court cases are concerned.

Why this article? I have to work with this jurisprudence every day. I may soon be faced with another reconstruction of this area of law. I have worked for clarity, consistency, unity, and simplicity in this crucial area of law for much of my life. As well, as I have recently explained elsewhere,¹⁰ growing inattention to doctrine in public law on the part of the judiciary, the legal profession and the academy threatens our ability to address possible abuses by government in the future. We must pay more attention now to the settlement of the doctrine in this area of law before it is too late.

⁶ See, e.g., *Martineau and al. v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118, 74 D.L.R. (3d) 1.

⁷ *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 95 N.R. 161.

⁸ *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1.

⁹ *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

¹⁰ “Reflections on the Decline of Doctrine,” Speech to the Canadian Constitutional Foundation, January 8, 2016, Toronto, Ontario (online: <https://www.youtube.com/watch?v=UxTqMw5v6rg>).