

Nota

2/2017



This work is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/)

CANADIAN ADMINISTRATIVE LAW AND GOOD GOVERNANCE

Léonid Sirota*

Auckland University of Technology Law School

* I am grateful to Juli Ponce for the kind invitation to present this paper at the TransJus Institute; to Xavier Arbós for connecting us; and to the participants in the TransJus discussion. I am also much indebted to my colleague Vernon Rive for allowing me to sit in on his lectures on administrative law in New Zealand, and thereby gain a perspective on Canadian law that I could not have developed otherwise, and to Justice David Stratas, of Canada's Federal Court of Appeal, for the overview of Canadian administrative law (*infra*, note 3) that he has compiled and made available online, which has been an invaluable resource in preparing this paper, and will be similarly invaluable to anyone interested in Canadian administrative law.

— I —

Can administrative law foster good governance? Some argue that it not only can but must do so; that fostering good governance is its *raison d'être*. Professor Juli Ponce has argued that “[a]dministrative Law... is concerned with good decisions, with good administration. It is important that Public Administration makes both the legal and the right decisions because people demand good decisions, together with proper reasons to back them, and they want to be heard and to have a say in the matter.”¹ Others too believe that to “stimulate better decision making” by public bodies “is a core goal of administrative law”,² and that it is central to “good government”.³

I do not intend to dispute these statements; I do not disagree with them, so far as they go. However, I will seek to add a warning to these claims about administrative law and good governance. Although good governance is important, and although administrative law—understood here, as it usually is in Canada, as the law of judicial review of administrative action—can and does contribute to it in ways that I will describe, one must be careful about how one goes about pursuing this goal, lest the pursuit become self-defeating.

Needless to say, good governance is a complex concept. We can, and do, disagree about what it involves or requires. Is good governance about the efficiency of administrative processes? Their fairness? Is it about policy outcomes meeting some substantive criterion (whether increased economic welfare, equality, or respect for fundamental individual rights)? Administrative law must settle these disagreements to some extent, but—as in other areas of the law—the settlements can only be provisional and contested, and can differ from one jurisdiction to another. While some of the differences caused by time and place might be too bound up with contingent historical, political, or other circumstances to be more than objects of curiosity, others present lessons that we can learn by comparing the administrative law of different jurisdictions.

In this essay, I present four aspects of good governance, introducing them in what I tentatively think is an order of increasing difficulty for administrative law and its integration with the broader legal landscape—at least, within the Canadian legal system. They are, first, efficient decision-making; second, the quality of the decision-making process; third, the substantive quality of administrative decisions; and fourth, their legality and constitutionality. For each of these facets of good governance, after a brief explanation of its nature, I briefly

¹ Juli Ponce, “The Right to Good Administration and the role of Administrative Law in promoting good government”, online: <<http://ssrn.com/abstract=2737538>> at 2.

² John McMillan, “Can Administrative Law Foster Good Governance?” Whitmore Lecture 2009, Sydney, September 16, 2009.

³ Hon David Stratas, “The Canadian Law of Judicial Review: Some Doctrine and Cases”, October 21, 2017, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924049> at 4. (Note that Justice Stratas periodically updates this document; the version currently available may not be the one to which I am referring here.)

present the ways in which administrative law can support it, and also the limits of its ability to do so. I focus on Canadian law, but sometimes contrast it with that of New Zealand or the United Kingdom (to whose legal system that of New Zealand is still strongly, although no longer fully, attuned). The Canadian experience, I will argue, should be taken as a warning about the dangers of a simplistic commitment to one aspect of good governance—namely, the substantive quality of administrative decisions—at the expense of others.

— II —

That governance needs to be efficient (in the colloquial sense of the word, not necessarily the economic one) is, I expect, uncontroversial. Dilatory or disorganized administration is incompatible with good governance. When administrative procedures are not carried out in a timely fashion, laws are not enforced, policies are not implemented—and lives are sometimes wrecked in the process.⁴ Unsurprisingly, administrative law has some means at its disposal to incentivize, or even to force, the administration to act with due dispatch. Indeed, these mechanisms are among its oldest tools.

One such ancient mechanism is the old prerogative writ of *mandamus*, and the remedies “in the nature of *mandamus*” that have succeeded it with the abolition of the prerogative writs and their replacement with applications for judicial review. This remedy is an order, issued by a court to an official in the executive branch or administrative decision-maker, to perform a statutory duty. In Canadian law, the criteria that must be met before such an order will be issued are that the decision-maker owes the applicant a clear duty to act; that the applicant has satisfied any conditions precedent to the performance of that duty and, moreover, demanded that the duty be performed, allowed a reasonable time for its performance, and received an express or implicit refusal (which can be inferred from the decision-maker’s silence or delay); that the remedy in the nature of *mandamus*, and no other, will be effective; and that the court is satisfied that relief in the nature of *mandamus* should be granted (taking into account the “balance of convenience” and other considerations that can sometimes impel a court to deny administrative law remedies, which are generally discretionary).⁵ These are demanding criteria, reflecting the courts’ reluctance to order the executive to act in a particular way. However, in those cases when they are met, *mandamus* allows the courts to put an end to administrative neglect or obstruction, even in the absence of specific legally-prescribed time limits for the performance of administrative duties.⁶

⁴ *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, at para 154 (Lebel J, dissenting, but not on this point) (“[a]busive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing”).

⁵ *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742, 51 CPR (3d) 339 (aff’d by *Apotex Inc v Canada (Attorney General)*, [1994] 3 SCR 1100).

⁶ See e.g. *Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 FCR 33; *Shahid v Canada (Citizenship and Immigration)*, 2010 FC 405 at para 21 (observing that “the absence of any statutory limits on

The other mechanism that can contribute to, or at least incentivize, efficient decision-making and the timely carrying out of administrative duties is the doctrine of abuse of process. As the Supreme Court of Canada has explained, “[i]n order to find an abuse of process, the court must be satisfied that, ‘the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted’”.⁷ Such a finding may result from administrative delay, especially if the delay has the effect of compromising the fairness of a hearing or a party’s ability to make his or her case to the administrative decision-maker. However, exceptionally,

unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person’s reputation, such that the [administrative] system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process.⁸

If the court finds that the administrative proceeding has become an abuse of process, that the abuse will be perpetuated if the proceeding is allowed to continue, and if there is no adequate alternative remedy, it can order the proceeding to be stayed.⁹ Here again, the threshold an applicant must cross before being granted the remedy is high. Courts are understandably reticent to conclude that the law should not be enforced, even if its enforcement has become problematic in some sense, or even has caused some prejudice to individuals subject to it. Yet sometimes unjustified, “inordinate and indeed unconscionable” delay resulting from “bureaucratic indolence and failure to give the matter the attention it deserved given the rights and interests at stake”¹⁰ may prompt a court to put an end to the proceedings that it has affected.

Of course, a stay entered in a given case does not make for efficient administration, or even rescue a faulty administrative process on a better-late-than-never basis, in the way relief in the nature of *mandamus* might. It must be hoped that administrators will take an interest in judicial decisions putting an end to their proceedings and mend their ways to avoid similar interventions in the future. To what extent this actually happens is difficult to say. However, the fact that similar problems arise time and again in connection with the operation of the

the length of an investigation ... can serve as a convenient excuse for indefinite delay, which the Court will not accept”).

⁷ *Blencoe*, *supra* note 4, at para 120, quoting Donald JM Brown and John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998 (loose-leaf)), at 9-68.

⁸ *Ibid*, at para 115.

⁹ See *Canada (Minister of Citizenship and Immigration) v Tobias*, [1997] 3 SCR 391 at paras 89-91.

¹⁰ *Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692, [2012] 1 FCR 169.

same administrative bodies suggests that judicial decisions reproving their conduct are not as effective at fostering good governance as one might wish.

— III —

Beyond mere efficiency, administrative law can help ensure that administrative decisions are made in ways that are, in principle, likely to ensure their quality. Even when it is not directly concerned with the substantive rightness of these decisions (whether understood in terms of correctness or some form of reasonableness)—something to which I will turn in the next section—administrative law is interested in aspects of administrative decision-making processes that can be presumed to affect the rightness of its results. If the decision-maker makes sure to properly gather and analyse relevant evidence and submissions while avoiding irrelevant ones, he or she will, one may reasonably hope, come to better informed answers.

Note that I speak of “processes” rather than “procedures”. That is because a defect in the decision-making process that can cause a court to interfere with a decision resulting from that process may be classified not only as an instance of “procedural unfairness”, but also as one of substantive “unreasonableness” (in Canada), or “illegality” (in the United Kingdom and New Zealand). Indeed, as Justice Stratas observes, “[d]istinctions between procedure and substance are sometimes difficult to make”,¹¹ and this may especially be so with respect precisely to the rules I am considering in this section. Below, I consider both procedural and substantive rules that bear on the administrative decision-making process.

As a general matter, “[t]he fact that a decision is administrative”—as rather than legislative in nature—“and affects ‘the rights, privileges or interests of an individual’ is sufficient to trigger the application of [a] duty of fairness”¹² incumbent on the decision-maker. The content of that duty in any given case will depend on a number of factors, which include (but are not limited to) the nature of the decision-maker, the relevant law—including constitutional and “quasi-constitutional” law¹³—and practice, as well as the importance of the decision to the

¹¹ Stratas, *supra* note 3, at 96.

¹² *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 20.

¹³ The most important constitutional provision here is the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, [the *Charter*] s 7 (providing that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”). Note that the procedural safeguards of s 11, which include notably the right to the presumption of innocence, the right to a fair hearing, and the protection against self-incrimination, are only available to persons “charged with an offence”, and the courts have interpreted this phrase as excluding persons subject to administrative proceedings unless they face “true penal consequences”—of which even a substantial fine is not one: see, most recently *Guindon v Canada*, 2015 SCC 41, [2015] 3 SCR 3; *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 SCR 250; see also Steven Penney, “‘Chartering’ in the Shadow of *Lochner*: *Guindon*, *Goodwin* and the Criminal-Administrative Distinction at the Supreme Court of Canada”, (2016) 76 SCLR (2d) 307. The best-known quasi-constitutional instrument relevant here is the *Canadian Bill of Rights*, SC 1960, c 44, para 2(e) (protecting a person’s “right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations”); the *Canadian Bill of Rights* only applies to matters subject to the

person affected by it, and any legitimate expectations that person might have that a particular procedure would be followed.¹⁴

Specific duties of administrative decision-makers falling under the general heading of procedural fairness can notably include a duty to receive submissions and evidence, sometimes in writing but, in those cases where credibility is a significant issue, by hearing witnesses in person;¹⁵ a duty to appraise persons affected by a decision of evidence prejudicial to them, the decision-maker's concerns, or generally the "case to meet";¹⁶ and a duty to decide impartially, without bias, or indeed even an appearance of bias, provided that "reasonably well-informed persons could properly have" a "reasonable apprehension" of such appearance.¹⁷

As already mentioned, these procedural rules are supplemented by those applied under the headings of "substantive" or "illegality" review, which ought to remind administrative decision-makers that, in the words of Justice Rand in a foundational Supreme Court decision, *Roncarelli v Duplessis*, "there is always a perspective within which a statute is intended to operate".¹⁸ As Justice Rand pointed out,

[i]n public regulation ... there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.¹⁹

A decision based on irrelevant considerations, or one that fails to take into account prescribed considerations, or made in pursuance of an improper purpose,²⁰ or one that frustrates the

legislative powers of Parliament, but, in some provinces, similar legislation applies in the provincial sphere; on the notion of quasi-constitutional legislation in Canada see especially Vanessa MacDonnell, "A Theory of Quasi-Constitutional Legislation" (2016) 53(2) OHLJ 507; Léonid Sirota, "Erasing Constitutional White Spots", *Double Aspect* (blog), December 13, 2016, online: <<https://doubleaspect.blog/2016/12/13/erasing-constitutional-white-spots/>>; and Maxime St-Hilaire, "'Quasi Constitutional' Status as *Not* Implying a Form Requirement", I-CONnect (Blog), August 8, 2017, online: <<http://www.iconnectblog.com/2017/08/quasi-constitutional-status-as-not-implying-a-form-requirement/>>.

¹⁴ *Baker*, *supra* note 12, at paras 22-28.

¹⁵ *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177.

¹⁶ *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809.

¹⁷ *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 391.

¹⁸ *Roncarelli v Duplessis*, [1959] SCR 121 at 140.

¹⁹ *Ibid.*

²⁰ See *Stratas*, *supra* note 3, at 60 (arguing, with reference i.a. to *Roncarelli*, "that the pursuit of unauthorized purposes renders a decision unacceptable or indefensible", and therefore unreasonable, as that term was defined in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47); *Roncarelli* itself, however, did not use the language of reasonableness, and indeed was not strictly speaking an administrative law case at all, although it concerned the abuse of discretionary powers by an administrative decision-maker.

purpose of the applicable legislation,²¹ will accordingly be invalid, on the grounds of unreasonableness in Canada, and of illegality in the UK or New Zealand. However, administrative decision-makers must exercise what discretionary powers they are given—not “fetter” or abdicate their discretion by binding themselves to pre-ordained policies.²²

Finally, as suggested above, a number of administrative law rules and principles sit at the boundary between procedure and substance or illegality. This is perhaps most notably the case of the duty to provide reasons for decision. In Canadian law, the duty to provide *some* reasons is considered to be a matter of procedural fairness, while the *adequacy* of the reasons given is regarded as a substantive matter, bearing on whether the decision under review was reasonable.²³

Whether ostensibly procedural, substantive, or both, these rules or principles are meant to ensure that administrative decisions are the result of an impartial pursuit of the purposes and objectives set out by the relevant legislation, and are based on a fair consideration of the relevant evidence and submissions on those issues that the legislation prescribes, while avoiding those that the legislation excludes. Quite apart from any assessment of the true substance of an administrative decision, courts are thus able to steer administrative decision-makers into exercising their powers in a manner that comports with the standards of good governance.

— IV —

Decision-making processes are, in themselves, of limited value; what matters, from the perspective of good governance, is that administrative decisions be substantively sound, and not merely be reached in the right way.²⁴ An administrative system that somehow managed to follow proper processes and yet to reach consistently perverse conclusions—unlikely though the idea seems—would not be anyone’s idea of good administration. And, unsurprisingly, administrative law takes an interest in the substance of the administration’s decisions, as well as in their timeliness and the processes used to make them. However, courts looking to ensure that administrative decisions that they review are sound proceed cautiously. Judicial review of the *merits* of administrative decisions, as opposed to that of the process followed in

²¹ See e.g. *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 SCR 108.

²² *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 at 6-7; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 24 (“[a] decision that is the product of a fettered discretion must *per se* be unreasonable”).

²³ See *Fashoranti v College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 25, 356 NSR (2d) 350 at para 30.

²⁴ But see Jeremy Waldron, “The Rule of Law and the Importance of Procedure”, in James E Fleming (ed) *Nomos L: Getting to the Rule of Law* (NYU Press, New York, 2011) 3 (highlighting the importance of procedural rights in the determination of a person’s rights and obligations, and their relationship to human dignity; these concerns are of course very important, but external to the good governance perspective I am adopting here, except insofar as they are reflected in basic statutory and constitutional commitments).

reaching them (considered in the previous section)²⁵ or their consistency with the norms of ordinary or constitutional law (considered next), is invariably deferential, both in Canada and in New Zealand—at least to some degree.

The notion of a “standard of review” is very important here. In Justice Stratas’ words, to “[d]etermine the proper standard of review” means to ask “[j]ust how ‘fussy’ should the court be”.²⁶ At the very least, a court might be deferential to an administrative decision-maker, or not. Perhaps there are various degrees of deference; perhaps there is a spectrum of deference without precise gradations. For better or for worse, issues related to the standard of review probably consume most of the intellectual oxygen in Canadian administrative law (and a smaller but still appreciable fraction in New Zealand).

The general approach to issues of deference—whether there are a limited number of fixed standards of review or a more fluid “variable intensity of review” is debated. If fixed standards are favoured—as they ostensibly are by the Supreme Courts in both Canada and New Zealand—, the number of deferential standards and their meaning must be settled. If a “variable intensity” approach is preferred, it is necessary to determine the factors that are going to suggest greater or lesser deference. And of course, even if these questions are given agreed upon answers, the precise amount of deference owed to a given administrative decision-maker can still be a matter of dispute. It would not be possible for me to even begin describing these controversies in any detail. I will only briefly sketch out the current state of the law in Canada, and then consider the reasons for judicial deference to administrative decision-makers in the course of merits review, which will lead me into the final part of this overview.

The standard of review for the merits of administrative decisions in Canada is currently described as “reasonableness”.²⁷ It is, the Supreme Court’s leading precedent says,

a deferential standard animated by the principle that ... certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. ... In judicial review,

²⁵ As noted in the previous section, in Canada, the review of process-related issues classified as substantive now adopts the language of “reasonableness”, which appears deferential, yet process failures can cause a decision to be treated as unreasonable *per se*, making deference something of a pretense. In New Zealand, by contrast, these issues are treated under the heading of “illegality”, and review is not deferential. As for review of those issues that are classified as procedural, Justice Stratas observes that the Supreme Court of Canada “is all over the map” when it comes to deciding whether any deference is owed to administrative decision-makers: Stratas, *supra* note 3, at 91.

²⁶ Stratas, *ibid.*, at 33.

²⁷ Previously, two deferential standards of review existed: “patent unreasonableness” and “reasonableness *simpliciter*”. *Dunsmuir*, *supra* note 20, merged them.

reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.²⁸

The Court added that “[d]eference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers.”²⁹

The “determinations” to which courts are required to “give due consideration” and defer are the results of the administrative process, not the reasoning that the decision-maker followed. Indeed, courts are required to defer “even if the reasons in fact given do not seem wholly adequate to support the decision”,³⁰ or indeed if no reasons were given at all.³¹ Deference, in such cases is due to “the reasons which *could* be offered in support of” the impugned decision.³² Elsewhere, I described the process of deferring to reasons that could be, but were not, in fact, offered, and which have to be made up by the reviewing court, as the judge “playing chess with herself, and contriving to have one side deliberately lose to the other”.³³

Courts defer to administrative decision-makers for a number of overlapping reasons. One might be that, as Richard Posner has suggested, deference to administrative decision-makers is a time- and effort-economizing device that helps judges avoid the burdensome responsibility of having to “understand the activity from which a case before them has arisen”.³⁴ To the extent that this accusation is well-founded, it does not speak well of the courts’ commitment to good governance—or to anything else other the judges’ leisure.

Respect for Parliamentary supremacy, which, subject in Canada to significant constitutional constraints, ought to mean that if legislation provides for decisions of a particular sort to be made by the administration instead of the courts, the legislation must be applied, is another reason for judicial deference to administrative decisions.³⁵ While respect for the wishes of the

²⁸ *Dunsmuir*, *ibid.*, at para 47.

²⁹ *Ibid.*, at para 49.

³⁰ David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997) 279 at 304, cited with approval in *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708.

³¹ *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 SCR 293 [*Edmonton East*].

³² *Ibid.*, at para 40 (emphasis in the original).

³³ Leonid Sirota, “Law in La-La-Land”, *Double Aspect* (blog), December 4, 2016, online: <<https://doubleaspect.blog/2016/12/04/law-in-la-la-land>> [Sirota, “La-La-Land”]; see also Paul Daly, “Which Way Forward for Canadian Administrative Law? *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47”, *Administrative Law Matters* (blog), November 14, 2016, online: <<http://www.administrativelawmatters.com/blog/2016/11/14/which-way-forward-edmonton-city-v-edmonton-east-capilano-shopping-centres-ltd-2016-scc-47/>> (describing the Supreme Court’s majority’s reasoning as “frankly ... quite bizarre”) [Daly, “Way Forward”].

³⁴ Richard Posner, *Reflection on Judging* (Cambridge, MA: Harvard University Press, 2013) at 85-86.

³⁵ See *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation*, [1979] 2 SCR 227 at 236 [*NB Liquor*]; *Dunsmuir*, *supra* note 20, at paras 48-49; *Edmonton East*, *supra* note 31, at para 33.

legislative branch might not appear to be directly related to good governance either, insofar as the legislature was motivated by the belief that making an administrative body responsible for the enforcement of legislation, deference to its wishes furthers these beliefs.

Finally, the courts themselves may believe that administrative decision-makers will be more likely than the courts to reach the best decisions in those cases which legislation assigns to their determination. (This argument typically goes together with that based on the legislative decision to confer the matter to an administrative decision-maker,³⁶ but it is analytically a distinct one, and courts tend to express themselves as sharing and endorsing the legislation's policy.) Administrative decision-makers may reach better decisions than courts because the matters within their purview require peculiar expertise, or involve policy judgments that administrators are more apt to make than courts, or both. In the foundational case that set Canadian courts on the deferential course which they are still navigating, albeit changing tack from time to time, a unanimous Supreme Court insisted that the legislation at issue, which governed labour relations in the public sector, "call[ed] for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise ... is all the more required if the twin purposes of the legislation are to be met."³⁷ This, needless to say, is a concern with good governance, and it plays a very important role in shaping administrative law—albeit pushing it in a non-interventionist direction.

But is the courts' belief in the administrative decision-makers' superior expertise or policy-making skill justified? Judge Posner, as he then was, pointedly observed that many of the administrative decision-makers to whom courts may defer due to their presumed expertise "are poorly trained, horribly overworked, highly politicized, or all these things at once".³⁸ Deference is due to all sorts of administrative decision-makers, from the specialized labour arbitrators of the sort involved in *NB Liquor* to government ministers. Judge Posner's skepticism is doubtless more apposite in some cases than in others. A forceful dissent in the recent *Edmonton East* case observed that while it is sometimes true that administrative decision-makers are experts due to their qualifications or experience, even this expertise does not necessarily extend to all questions that these decision-makers may be called upon to address.³⁹ The dissenting judges' view was that "[c]ourts must not infer from the mere creation of an administrative tribunal that it necessarily possesses greater relative expertise in all matters it decides, *especially on questions of law*."⁴⁰ As the emphasized words suggest, it is with respect to legal issues, to which I next turn, that deference to administrative decision-makers is most likely to be problematic. As for more fact-bound issues, the idea that judicial

³⁶ See *ibid.*

³⁷ *NB Liquor*, *ibid.*

³⁸ Posner, *supra* note 34, at 86.

³⁹ *Edmonton East*, *supra* note 31, at para 83 (Brown and Côté JJ, dissenting).

⁴⁰ *Ibid.*, at para 85 (emphasis added).

deference to administrative decision-makers is more conducive to good governance seems more plausible, although the *Edmonton East* dissenters' warning against "transforming the presumption of deference into an irrebuttable rule"⁴¹ is still apposite.

— V —

The final component of good governance that I would like to discuss is the compliance of administrative decision-making with legal norms other than those of administrative law itself—notably with the statutory frameworks within which the decisions are made and with constitutional law. I will refer to this facet of good governance as legality in a narrow sense (to distinguish it from the broader notion of legality in UK and New Zealand law which, as we have seen, encompasses important aspects of the decision-making process). Now, whether legality in this narrow sense ought to be considered an element of good governance is perhaps debatable. Prof. Ponce contrasts "[t]raditional Administrative Law", which "is not interested in good administrative decisions but just in the judicial review of illegal decisions", with "a new viewpoint ... concerned with the quality of decisions".⁴² In my view, however, this contrast should not be exaggerated.

Legislation and, *a fortiori*, constitutional law represent the considered view, at least for the time being, of the polity's representatives, about what good governance means or requires. They may also embody commitments to fundamental values, or an allocation of and limitations on public powers that are arguably no less important. In Canada, this is of course especially true of formally constitutional or quasi-constitutional law. But, even in the Canadian context, "ordinary" law can have constitutional or otherwise considerable significance; think, for instance, of electoral legislation,⁴³ or of that governing citizenship.⁴⁴ In New Zealand, all legislation is formally equal,⁴⁵ but some statutes can be described as being of constitutional significance, and, as in Canada, they are not the only ones that embody important values. Good governance, I would argue, must at least be consistent with such commitments,⁴⁶ as well as with the views of democratic majorities about what good governance actually requires.

⁴¹ *Ibid.*

⁴² Ponce, *supra* note 1, at 2.

⁴³ *Canada Elections Act*, SC 2000 c 9, and its provincial counterparts.

⁴⁴ *Citizenship Act*, RSC 1985 c C-29.

⁴⁵ The only, limited, exceptions to this occurs in the Electoral Act 1993 (NZ), s 268, which "reserves", or entrenches, a number of provisions of electoral law by providing that they can only be amended by a Parliamentary super-majority or a referendum, and in the New Zealand Bill of Rights Act 1990 (NZ), s 4, which effectively makes that Act inferior to prior legislation, by providing that it does not impliedly repeal any prior inconsistent provisions, contrary to rule applicable to ordinary statutes.

⁴⁶ See *Ernst v Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 SCR 3 at para 169 (McLachlin CJ and Moldaver and Brown JJ, dissenting) (arguing that "*Charter* compliance is itself a foundational principle of good governance").

Now, one might think that administrative law is vigilant in its handling of this aspect of good governance, since it is within its “traditional” remit, and since, more broadly, the determination of questions of law is a long-standing core function of the courts.⁴⁷ In New Zealand, this expectation is fulfilled. Questions of jurisdiction and of statutory interpretation are resolved by the courts under the heading of “illegality”—a form of review that is not deferential. The administrative decision-makers have to “get the law right”. In Canada, however, matters are rather more complicated.

As Canadian administrative law now stands, most administrative interpretations of law are ostensibly entitled to judicial deference, being reviewable on the reasonableness standard. This is particularly the case where the administrative decision-maker “is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity”.⁴⁸ This principle “applies to administrative decision makers generally”,⁴⁹ at least when they are acting in an adjudicative capacity—regardless of whether these decision-makers, for example, have legal expertise and (some) adjudicative independence. It applies to labour arbitrators,⁵⁰ who are normally experts in labour law and policy; but also to boards charged with assessing municipal taxes,⁵¹ whose expertise lies in “complex matters of valuation of property” rather than in “legal interpretation going to jurisdiction”;⁵² to officials acting on behalf of the Minister of Citizenship and Immigration in disposing of applications for permanent residency based on “humanitarian and compassionate considerations”;⁵³ and to such political actors Ministers and the Governor-in-Council (which in practice means the federal cabinet).⁵⁴ The principle applies, moreover, regardless of whether a court re-examines an administrative decision on judicial review or pursuant to a right of appeal created by statute,⁵⁵ or of the fact that the administrative decision is jurisdictional, in the sense of

⁴⁷ *Prohibitions del Roy* (1607) 12 Co Rep 63, at 63-64, 77 ER 1342 (“any case, either criminal ... or betwixt party and party ... ought to be determined and adjudged in some Court of Justice, according to the law and custom of England”); *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 754 (rejecting a suggestion that constitutional rights might be politically enforced as “entirely inconsistent with the judiciary’s duty to uphold the Constitution”); *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 546 (insisting that “only a court can authoritatively resolve a legal question”); *New Zealand Maori Council v Attorney-General*, [1987] 1 NZLR 641 (CA) at 658 (Cooke J) (“[i]n the end it must be the province of the Court to determine what the Act means and whether it has been complied with”); *Attorney-General v Taylor*, [2017] NZCA 215, [2017] 3 NZLR 24 at paras 47 and 54.

⁴⁸ *Dunsmuir*, *supra* note 20, at para 54.

⁴⁹ *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40, [2014] 2 SCR 135 at para 54 [CNR].

⁵⁰ *NB Liquor*, *supra* note 35; *Dunsmuir*, *supra* note 20.

⁵¹ *Edmonton East*, *supra* note 31.

⁵² *Ibid*, at para 87 (Côté and Brown JJ, dissenting).

⁵³ *Kanhasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanhasamy*]; but see Paul Daly, “Can This Be Correct? *Kanhasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61”, *Administrative Law Matters* (blog), December 11, 2015, online:

<<http://www.administrativelawmatters.com/blog/2015/12/11/can-this-be-correct-kanhasamy-v-canada-citizenship-and-immigration-2015-scc-61/>> (criticizing the majority opinion in *Kanhasamy*).

⁵⁴ *CNR*, *supra* note 49.

⁵⁵ *Edmonton East*, *supra* note 31, at paras 27-31.

answering the question of whether the decision-maker had the power to act (in the way it did) at all.

Canadian courts still require administrative decision-makers to answer some questions of law correctly—notably those questions “of general law ‘that [are] both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise’”.⁵⁶ Which questions will be deemed important enough to warrant correctness review—and whether importance alone is enough, or something more is required⁵⁷—is, at present, not easy to predict; at any rate such questions “are rare”.⁵⁸ But while one might be tempted to think that constitutional issues fit the criteria of centrality and foreignness to administrative decision-makers’ expertise, and while the Supreme Court once indicated that “constitutional issues, are necessarily subject to correctness review because of the unique role of [superior] courts as interpreters of the Constitution”,⁵⁹ here again things are not so simple. Although correctness remains the standard of review for “decisions on constitutional entitlements and constitutional validity”,⁶⁰ the compliance of discretionary administrative decisions with the *Charter* was at least briefly, and may still be, reviewed on the reasonableness standard.⁶¹

Now, whether review of administrative dispositions of legal and constitutional questions is as deferential as the foregoing discussion suggests is actually questionable. In statutory interpretation cases, in Justice Stratas’ words, “disguised correctness review”, meaning that

⁵⁶ *Dunsmuir*, *supra* note 20, at para 60, quoting *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77, at para 62. Occasionally, there are other circumstances that trigger correctness review: see *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 (a court and an administrative tribunal having concurrent jurisdiction over question of law arising out of a statutory scheme); *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161 (the tribunal’s decision being subject to a statutory right of appeal on a question of law); but query whether *Tervita* holding is consistent with, and can stand in light of, *Edmonton East*, *supra* note 31—in *Edmonton East*, the majority distinguished *Tervita* on the basis of the peculiarities of the relevant statutory language, but it is questionable whether the distinction is a meaningful one.

⁵⁷ See *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3 at para 51 (stating that correctness review was justified not only because the question was of central importance to the legal system, but also because there was concurrent jurisdiction between the administrative decision-maker and the courts) [*Saguenay*]; see also Paul Daly, “I Don’t Know: Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16”, *Administrative Law Matters* (blog), April 16, 2015, online: <<http://www.administrativelawmatters.com/blog/2015/04/16/i-dont-know-mouvement-laique-quebecois-v-saguenay-city-2015-scc-16/>> (criticizing the court’s reasoning as “confusing”).

⁵⁸ Stratas, *supra* note 3, at 42.

⁵⁹ *Dunsmuir*, *supra* note 20, at para 58.

⁶⁰ Stratas, *supra* note 3, at 43.

⁶¹ *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*] set the reasonableness standard; *Saugenay*, *supra* note 57, applied a correctness standard on what seemed like an exceptional basis; however, two recent decisions, *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa*] and *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55 applied what appears to be correctness review to administrative decisions regarding the scope of *Charter* rights, without any explanation; a concurring opinion in *Ktunaxa* applied what purported to be the *Doré* approach to the question of justification of a *prima facie* infringement of a *Charter* right. In short, it is difficult to say where the Supreme Court now stands on this important issue.

“[t]he reviewing court starts with its own view of the matter, in effect creating a yardstick” by which it then measures the administrative decision, “seems to happen all the time when the SCC conducts ‘deferential’ reasonableness review”, including in some of the cases to which I have been referring (*Kanthasamy and Edmonton East*).⁶² Justice Stratas adds that “[d]isguised correctness is particularly virulent in recent SCC decisions dealing with the interpretation of immigration provisions”⁶³ and, in a recent opinion for the Federal Court of Appeal, has observed that “it has been a while since the Supreme Court has afforded a decision-maker in the immigration context much of a margin of appreciation on statutory interpretation issues”.⁶⁴ Similarly, when it comes to the application of the *Doré* framework for reviewing the consistency of administrative decisions with the *Charter*, it is not obvious that the level of scrutiny is meaningfully different from what it would have been if the courts avowedly engaged in correctness review.⁶⁵

Be that as it may, Canadian courts justify deference (if any) to administrative interpretations of law on the same grounds as they do deference on issues of fact and policy. (Indeed, as we have already observed, Canadian administrative law does not distinguish “reasonableness” and “illegality” review; the theoretical framework applicable to both is, in principle, virtually the same.) As noted above, respect for the legislative decision to make administrative decision-makers for addressing certain types of issues, and for the decision-makers’ expertise, are said to require the courts to defer. Yet, perhaps especially in the realm of questions of law, one might wonder how strongly committed the courts are to respecting legislative choices. Even legislative indications of an intent to have (at least some) questions of law that might in the first instance arise before administrative decision-makers settled by the courts, such as the creation of a statutory right of appeal on such questions, can be

⁶² Stratas, *supra* note 3, at 52-53; see also, most recently *Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 (holding that the standard of review is reasonableness, but showing no apparent deference to the administrative decision-maker, despite that fact that it had squarely addressed the statutory interpretation issue).

⁶³ *Ibid.*

⁶⁴ *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 37; the Supreme Court’s most recent immigration law decision, *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, fits the pattern described by Justice Stratas.

⁶⁵ See *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613 at para 37 and 38 (Abella J) (holding that “[i]n the context of decisions that implicate the *Charter*, to be defensible, a decision must accord with the fundamental values protected by the *Charter*”, and indeed that “in contexts where *Charter* rights are engaged, reasonableness requires proportionality”) and 113 (McLachlin CJ and Moldaver J, concurring) (dispensing with the *Doré* analysis altogether, on the basis that “[t]he *Charter* requirement that limits on rights be reasonable and demonstrably justified may be expressed in different ways in different contexts, but the basic constitutional requirement remains the same”); see also Leonid Sirota, “Splitting a Baby”, *Double Aspect* (blog), March 19, 2015, online: <https://doubleaspect.blog/2015/03/19/splitting-a-baby/> (arguing that “[t]he pretense of deference under *Doré* is useless if there really is no difference between ‘reasonableness’ and ‘proportionality’ as the majority suggests”) and Paul Daly, “Reasonableness, Proportionality and Religious Freedom: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12”, *Administrative Law Matters* (blog), March 19, 2015, online: <http://www.administrativelawmatters.com/blog/2015/03/19/reasonableness-proportionality-and-religious-freedom-loyola-high-school-v-quebec-attorney-general-2015-scc-12/> (wondering “why not simply call a proportionality test a proportionality test?”).

ignored to give effect to a “presumption of reasonableness” justified by the administrative decision-maker’s alleged expertise.⁶⁶

The affirmations of the belief in administrative decision-makers’ expertise over interpretive issues abound in Canadian case law. In *NB Liquor*, the Supreme Court held that the issue of statutory interpretation on which the case turned “would seem to lie logically at the heart of the specialized jurisdiction confided to the Board. In that case, not only would the Board not be required to be ‘correct’ in its interpretation, but one would think that the Board was entitled to err”, so long as its interpretation was not “patently unreasonable”.⁶⁷ (The “patent unreasonableness” standard was subsequently abolished, or merged into that of reasonableness, in *Dunsmuir*.) A later concurring opinion by Justice Wilson, since quoted with approval in majority opinions, explained, that “[c]ourts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency’s constitutive statute that make sense given the broad policy context within which that agency must work”.⁶⁸ Expertise was a significant part of the rationale for the re-affirmation of the appropriateness of deferential review of administrative interpretations of law in *Dunsmuir*.⁶⁹ Indeed, the dissenters in *Edmonton East* “acknowledge[d] that the notion of ‘expertise’ has become a catch-all trigger for deferential review in this Court’s jurisprudence, since an administrative decision maker is simply presumed to be an expert in matters regarding the application of its home statute”, and warned that “in strengthening the presumption by ignoring or explaining away any factors that might rebut it, the majority risks making this presumption irrebuttable”.⁷⁰ The warning, one is inclined to say, is coming too late; the risk appears to already have materialized.

Yet here again, and indeed even more than in the case of the review of factual or policy determinations by administrative decision-makers, it is necessary to ask whether the Supreme Court’s approach is the right one. Part of the reason for this is that judicial deference to administrative interpretations of law may be “unlawful” or inconsistent with the principle of the Rule of Law⁷¹ or, in some cases at least, a denial of constitutional justice⁷² or even

⁶⁶ See *Edmonton East*, *supra* note 31, at paras 75-80 (Brown and Côté JJ, dissenting) (analysing the applicable legislation to show that its intent was to make the administrative tribunal’s decisions (some) legal questions subject to correctness review); see also Sirota, “La-La-Land”, *supra* note 33 (arguing that “[f]or all its show of deference to the legislature, the [*Edmonton East*] majority only cares about its own views about how administrative law should operate”).

⁶⁷ *NB Liquor*, *supra* note 35, at 236-37.

⁶⁸ *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1336; quoted with approval in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 at para 31, and *Edmonton East*, *supra* note 31, at para 33.

⁶⁹ See *Dunsmuir*, *supra* note 20, at para 49.

⁷⁰ *Edmonton East*, *supra* note 31, at para 82 (Brown and Côté JJ, dissenting).

⁷¹ See generally Philip Hamburger, *Is Administrative Law Unlawful* (Chicago: University of Chicago Press, 2014).

⁷² Maxime St-Hilaire, “‘Dé-Doré’ son blason: le déni de justice constitutionnelle par la Cour suprême du Canada”, *À qui de droit* (blog), March 12, 2016, online :

unconstitutional as a matter of positive law.⁷³ But even setting these issues, as tremendously important as they are, aside, and remaining within the confines of this essay's subject, one can question whether the deference to administrative decision-makers when it comes to statutory and constitutional issues is conducive to good governance.

Once again, Judge Posner's concerns about the lack of competence, resources and, especially, impartiality of administrative decision-makers are relevant. When it comes to competence, as the *Edmonton East* dissent pointed out, even administrators with undoubted expertise in complex factual or policy issues within their remit may not be experts in legal issues.⁷⁴ Administrative decision-makers are not necessarily appointed on the basis of legal expertise and may not be called upon to develop any in the exercise of their primarily fact- and policy-centred role. Moreover, as also pointed out in the *Edmonton East* dissent, it may well be the case that, in some areas, even the real expertise of administrative decision-makers is matched or surpassed by that of the courts.⁷⁵ Regarding resources, suffice it to note that, for various reasons, legal and constitutional issues may not even be raised, or may be poorly argued, before administrative decision-makers. As for politicization, not only are some administrative decision-makers to whose legal interpretation deference is due under the Supreme Court's approach explicitly political actors,⁷⁶ but even ostensibly non-political decision-makers are not entitled to constitutional protections for their independence,⁷⁷ and can be subject to political pressure, up to and including wholesale removal by an incoming government that disagrees with their policy views.⁷⁸

In light of these concerns, the trend towards across-the-board deference to administrative decision-makers' interpretations of law is, in my view, indefensible from a good governance perspective. The question of what should replace it. Paul Daly has suggested that "the only way to move the law forward within the existing framework without starting again from scratch is to apply reasonableness review across the board, with the important caveat (borne out ... by the decisions on the merits in *Kanthisamy* and *Saguenay*) that the range of reasonable outcomes will be narrower in cases featuring an appeal clause."⁷⁹ That, of course, leaves open the question of whether the existing framework is worth preserving at all, and whether it would not be better to, indeed, start again from scratch. Justice Stratas argues for

<<https://blogueaquidedroit.wordpress.com/2016/03/12/de-dore-son-blason-le-deni-de-justice-constitutionnelle-de-la-cour-supreme-du-canada/>>.

⁷³ See Paul Daly, "Is Deference Constitutional (in Canada)?", *Administrative Law Matters* (blog), October 12, 2017, online: <<http://www.administrativelawmatters.com/blog/2017/10/12/is-deference-constitutional-in-canada/>>.

⁷⁴ *Edmonton East*, *supra* note 31, at para 83 (Brown and Côté JJ, dissenting).

⁷⁵ *Ibid*, at para 84.

⁷⁶ See note 54, above, and accompanying text.

⁷⁷ *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781.

⁷⁸ See *Saskatchewan Federation of Labour v Government of Saskatchewan*, 2013 SKCA 61, 417 Sask R 50.

⁷⁹ Daly, "Way Forward", *supra* note 33; Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness", (2016) 62:2 McGill LJ 527.

“a more nuanced approach: reasonableness will apply only where legislative provisions expressly, impliedly or necessarily grant power to the administrative decision-maker to develop regulatory interpretations”.⁸⁰ He cautions, however, that “[t]he non-monolithic nature of this area also suggests that the adoption of an across-the-board presumption that the standard of review for questions of law is correctness is equally inappropriate”.⁸¹ For my part, I am uneasy at the idea of any judicial deference to administrative decision-makers on questions of law, although, as an example used by Justice Stratas suggests, there may be some room for it where statutory language calls for construction, as opposed to interpretation alone.⁸²

However, this hunch—just like Professor Daly’s and Justice Stratas’ better-developed views—is not solely based on good governance considerations, and this is not the place to elaborate on it. Suffice it to say, for the present, that, as it has developed from *NB Liquor* to *Dunsmuir* to, most recently, *Edmonton East*, Canadian administrative law has overvalued, and arguably fetishized, administrative expertise, to the detriment of an overall pursuit of good governance, which, properly understood, should embrace not only technocratic expertise, but also a commitment to legality.

— VI —

Good governance is one of the important values that administrative law serves, in Canada as well as in New Zealand and the United Kingdom. Across the common law world, courts provide remedies that may, or so one might hope, contribute to making public administration more efficient; its decision-making processes, more apt to take relevant information into account; and its ultimate decisions, more likely to be right. While they do not present these remedies as enforcing anything like a general right to good administration, common law courts may be just as effective as their counter-parts in those jurisdictions where such a right is recognized, in improving administrative decision-making.

I have suggested, however, that good governance should not exclude, indeed that it should embrace, the narrow, and some might say old-fashioned, sense of legality: administrative decision-making should comply with the law laid down by legislatures and with entrenched constitutional rules, if any. On this score, Canadian administrative law offers a cautionary tale. A single-minded pursuit of one aspect of good governance, understood too narrowly as governance by experts, has meant that Canadian courts have abandoned their responsibility to enforce the law.

⁸⁰ Stratas, *supra* note 3, at 79.

⁸¹ *Ibid.*, at 81.

⁸² *Ibid.*, at 80 (describing the application of the “nuanced approach” to a case involving a securities commission’s statutory “power to suspend trading privileges when ‘reasonable’ or when ‘in the public interest’ (both undefined in the legislation)”; for more on the interpretation-construction distinction see Lawrence B Solum, “The Interpretation-Construction Distinction” (2010) 27:1 Const Commentary 95.

Needless to say, the judicial responsibility to enforce the law is associated not only, and not primarily, with good governance (though, to repeat, it would be a mistake not to associate it with good governance at all), but also with the Rule of Law. This reminds us that good governance is not the only value that administrative law furthers. The Rule of Law and the dignitarian interests that it serves on either a formal or a procedural understanding are arguably as or more important, although this is doubtless a subjective assessment. Other values, notably democracy (and its corollary legislative supremacy), are important too. The structure and the detail of administrative law doctrine are shaped by a balancing of—and sometimes the resolution of conflicts among—these values. I have endeavoured to present an overview of administrative law in Canada through the lens of only one of its guiding values. If I have succeeded, such a perspective may be of some use, but it is far from being a complete one.

REFERENCES

Brown, Donald JM and Evans, John M “Judicial Review of Administrative Action”, Canada.

Daly, Paul “Can This Be Correct? *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61”, *Administrative Law Matters* (blog), December 11, 2015, online: <http://www.administrativelawmatters.com/blog/2015/12/11/can-this-be-correct-kanthasamy-v-canada-citizenship-and-immigration-2015-scc-61>

Daly, Paul “Is Deference Constitutional (in Canada)?”, *Administrative Law Matters* (blog), October 12, 2017, online: <http://www.administrativelawmatters.com/blog/2017/10/12/is-deference-constitutional-in-canada/>

Daly, Paul “Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness”, (2016) 62:2 *McGill LJ* 527.

Daly, Paul “Which Way Forward for Canadian Administrative Law? *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47”, *Administrative Law Matters* (blog), November 14, 2016, online: <http://www.administrativelawmatters.com/blog/2016/11/14/which-way-forward-edmonton-city-v-edmonton-east-capilano-shopping-centres-ltd-2016-scc-47/>

Dyzenhaus, David “The Politics of Deference: Judicial Review and Democracy”, in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997).

Hamburger, Philip “Is Administrative Law Unlawful?” (Chicago: University of Chicago Press, 2014).

MacDonnell, Vanessa “A Theory of Quasi-Constitutional Legislation” (2016) 53(2) OHLJ 507; Léonid Sirota, “Erasing Constitutional White Spots”, Double Aspect (blog), December 13, 2016, online: <https://doubleaspect.blog/2016/12/13/erasing-constitutional-white-spots/>

McMillan, John “Can Administrative Law Foster Good Governance?” Whitmore Lecture 2009, Sydney, September 16, 2009.

Ponce, Juli “The Right to Good Administration and the role of Administrative Law in promoting good government”, online: <http://ssrn.com/abstract=2737538>

Sirota, Leonid “Law in La-La-Land”, Double Aspect (blog), December 4, 2016, online: <https://doubleaspect.blog/2016/12/04/law-in-la-la-land>

Solum, Lawrence B “The Interpretation-Construction Distinction” (2010) 27:1 Const Commentary 95.

St-Hilaire, Maxime “‘Dé-Doré’ son blason: le déni de justice constitutionnelle par la Cour suprême du Canada”, À qui de droit (blog), March 12, 2016, online <https://blogueaquidedroit.wordpress.com/2016/03/12/de-dore-son-blason-le-deni-de-justice-constitutionnelle-de-la-cour-supreme-du-canada/>

St-Hilaire, Maxime “‘Quasi Constitutional’ Status as *Not* Implying a Form Requirement”, I-CONnect (Blog), August 8, 2017, online: <http://www.icconnectblog.com/2017/08/quasi-constitutional-status-as-not-implying-a-form-requirement/>

Stratas, Hon David “The Canadian Law of Judicial Review: Some Doctrine and Cases”, October 21, 2017, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924049

Waldron, Jeremy “The Rule of Law and the Importance of Procedure”, in James E Fleming (ed) *Nomos L: Getting to the Rule of Law* (NYU Press, New York, 2011).