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Book Review: Administrative Law and Practice, by Robert F. Reid

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Book Review



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Abstract

ADMINISTRATIVE LAW AND PRACTICE. BY ROBERT F. REID, Q.C.

Toronto: Butterworths. 1971. Pp. xxix, 468. (\$42.50)

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ADMINISTRATIVE LAW AND PRACTICE. BY ROBERT F. REID, Q.C.
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This is the first text in English (there is one in French) on Canadian administrative law. It is concerned mainly with judicial review of the decisions of administrative agencies. It does not deal with the administrative process, except as it comes before the courts. And it does not deal with such non-judicial institutions as the ombudsman, although that official has been established in several Canadian provinces. The author has deliberately confined his terms of reference (p. xii), and he can hardly be blamed for doing so; after all, a book on judicial review is a mighty undertaking on its own.

The book is in fact an indictment of Canadian judicial review. The dense footnotes emphasize the volume of the Canadian case-law, and in the text the author repeatedly points out the inconsistencies in the decisions and the lack of clear doctrine. The author does not, however, (speaking generally) see his task as one of synthesizing, detecting trends, and selecting the best from conflicting doctrines. His philosophy is made explicit on p. 40 where, dealing with the thorny issue of the right to be heard, he says:

It is tedious to have to observe again what has been said so many times throughout this study, that the decisions are sometimes unsatisfactory, often unconvincing and frequently contradictory. Their comparative recentness of course makes any attempt at rationalization difficult. It is hard to stand back far enough for a general view and a more extensive analysis is out of place in a work of this type.

Of course, the author is right in his statement of fact: the decisions are unsatisfactory and rationalization is difficult. But I think it is a pity that the author did not impose more coherence on the material by identifying and elaborating those doctrines which seem to him to be satisfactory and by criticising those which seem to him to be unsatisfactory. On the question when an agency is under a duty to afford a hearing, for example, Lord Reid's judgment in *Ridge v. Baldwin* [1964] A.C. 40 attempts with considerable success to reconcile a large number of apparently conflicting authorities, at the same time as it exposes the question-begging nature of the search for a "super-added duty to act judicially." My own opinion is that Lord Reid's analysis is also helpful to an understanding of the Canadian cases, but whether or not one agrees with this opinion it is a fact that the task of synthesis and rationalization has been begun and could be continued.

One reason why the cases are in such apparent disarray is the reluctance of Canadian courts to articulate the policy considerations which bear on their decisions. In administrative law the "rules" (which the courts do articulate) speak at a very high level of abstraction: "natural justice", "jurisdiction", "ultra vires", "error of law on the face of the record", "bad faith", "delegation" and "extraneous considerations" are concepts which in many situations do not speak specifically enough to compel one result rather than another. The author is undoubtedly right in asserting that "subjectivity" marks the decision-making process (p. 13), but this conclusion tells us only that the decisions are governed

by considerations which have not been articulated. In administrative law, nearly every decided case presents a fascinating tug-of-war between the court, an agency, and the legislature which established the agency. Which institution is best fitted to decide the question in issue in the light of Canadian constitutional understandings? There are considerations of constitutional law and policy which, if they do not provide answers, do assist in the answering of this question. It seems to me that it is helpful to consider the reasons for establishing the agency (e.g., speed, informality, cheapness, expertise), and the competence of the agency to decide matters in which it is expert and experienced. When a court reviews an agency finding without paying attention to these considerations, what the court may describe as "checking administrative excess" may in truth be a judicial usurpation of power which is best left with the agency. Cases to which I would apply this comment include *Toronto Newspaper Guild v. Globe Printing Co.* [1953] 5 D.L.R. 561; *Jarvis v. Associated Medical Services* (1964) 44 D.L.R. (2d) 407; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers* (1970) 11 D.L.R. (3d) 336 and *Bell v. Ontario Human Rights Commission* (1971) 18 D.L.R. (3d) 1; criticised in (1971) 9 O.H.L.J. 203. Now there is obviously room for difference of opinion on the correctness of these decisions, but the author's account of the problem which they raise (pp. 188-192) simply points out that the case-law is inconsistent. So it is, but it would be more help to the lawyer who is trying to find his way through the maze if the policy issues were identified and analyzed, and an attempt was made to evaluate the cases in the light of the analysis.

The same tug-of-war occurs when the courts have to interpret privative clauses. The author tells us correctly that the cases are inconsistent, and that the result depends on the "approach" of the court (pp. 203-206). But this conclusion left at least one reader with the desire to know whether the author believed one approach to be preferable to another. In fact the Australian courts have for some years been interpreting privative clauses in a way which gives some effect to the obvious legislative intention to exclude judicial review, and which yet leaves the door open to judicial review in cases where the agency's decision is not "reasonably capable of reference to the power given" to it. This compromise, which is explained by Judson J. in his dissenting judgment in *Jarvis v. Associated Medical Services* (1964) 44 D.L.R. (2d) 407, 417 and by R. Anderson in a comment in (1952) 30 Can. B.R. 933, goes some of the way towards resolving the dilemma posed by the author at pp. 204-205.

Another matter which the author is content to put as an unresolved dilemma is the effect on judicial review of s. 96 of the B.N.A. Act. There is a thin stream of authority and commentary to the effect that s. 96 impliedly prescribes that all agency decisions on points of law must be reviewable by a court constituted in conformity with the provisions of Part VII of the B.N.A. Act. If this view became established it would transform Canadian administrative law. It would render privative clauses ineffective to protect errors of law. And it would render the traditional distinction between jurisdictional (or collateral) questions and questions within jurisdiction unimportant. In place of this distinction, the distinction between questions of law and questions of fact or discretion, which is at present only occasionally relevant in Canadian administrative law, would presumably become crucial. This theory of s. 96 involves

such radical consequences for administrative law that I was surprised to find that the author, while recognizing the consequences, withholds his opinion on its correctness. The theory is treated as just another complication in the already unsatisfactory law of judicial review (pp. 303-306).

Chapter 4 is devoted to the classification of functions. The author doubts the usefulness of this approach to problems of administrative law, and he stigmatizes the law as "confused and illogical" (p. 111). But he is not deterred from proceeding to a long discussion of the classification of functions as important to the resolution of three problems: (1) the applicability of natural justice; (2) the review of discretionary decisions; and (3) the availability of certain remedies. Now the courts certainly talk as though the classification of a function as "judicial," "administrative" or "legislative" is often decisive. But every attempt to give content to these elusive concepts has been a failure, and their relevance to the issues of which they are supposed to be decisive is at best dubious. These points are familiar enough, and they certainly emerge clearly from the author's account of the cases. But again I regret that the author did not give more prominence to the decisions (such as *Ridge v. Baldwin*) and the commentary (such as that of Willis) which rejects the classification of functions in favour of a more functional approach.

What I have been trying to say in the previous paragraphs is that in my view the author goes too far in presenting an admittedly sombre scene as one of unrelieved darkness. There are shafts of light and they must be encouraged to illuminate more of the cases. The text-writer can assist these developments if he is willing to pass judgment on issues upon which the courts have differed, and impose more order on the data. The author is harsh in his criticism of the decisions, but it is fair to ask how the courts can be expected to stay on the track of consistent doctrine if the text-writer will not help to show the way.

This criticism — that the author does not give us enough of the benefit of his own evaluation of doctrine — applies to most of the text. One exception is the excellent discussion of the right to cross-examine (pp. 80-81). Other exceptions are chapter 22, "Recent and impending legislation", and chapter 23, "A summing up". In these chapters, as well as making some comments on the case-law as a whole, he discusses the recommendations of the McRuer commission (which had not been implemented at the time of his writing) and the changes enacted by the statute establishing the Federal Court of Canada, all of which tend to enlarge the scope of judicial review. These chapters display, if I may say so with respect, a thoughtful and well-balanced approach to judicial review. He points out (p. 465) that there is now a danger of "judicial overkill of the tribunals" and he urges a more moderate approach to review both of procedure and substance.

This brings me to another good feature of the book. It is certainly free of what Willis has called "constitutional theology". The chapters on the "rule of law" and the "separation of powers" which are usually deemed mandatory by writers on administrative law are absent with a corresponding reduction in the size but not the usefulness of the book. The book is written from a hard practical standpoint. What are the problems which actually come before the courts? How have they decided them? If, as I have argued, the author does

not often enough express his own opinion, that same attitude of restraint has preserved him from the more serious error of trying to fit the cases into a constitutional model which bears no relationship to a highly-regulated industrial state.

Indeed, in no respect has the author succumbed to the temptation to take the easy route and produce a work which is virtually a carbon copy of its English counterparts. The book is entirely original. Its arrangement of chapters is unorthodox, except for the final chapters which deal with each of the remedies in turn. The reader who is accustomed to the arrangement of other texts may find it difficult to find his way around this one; but familiarity will probably cure the difficulty. In addition to the usual index and table of cases, there is an unusual feature, a "case citator" which classifies under subject matter all the officials or agencies whose decisions have come before the courts, and which notes the cases in which a decision of each official or agency has been reviewed. Thus, if it is desired to find all the cases involving broadcasting, or all the cases involving the Canadian Broadcasting Corporation, the case citator immediately yields the answer. The case citator occupies a lot of space (73 pages), thereby considerably increasing the size and cost of the book, but it will also increase the usefulness of the book as a reference work.

It will be obvious from what has been said that this is a book for the practitioner rather than the student. Of course students and teachers will want to use it as a reference work, but the book is too massive and complex to be a teaching aid, and it is very expensive. The book will be indispensable to the practitioner with an administrative law problem, for it will lead him to all the relevant authorities and will suggest to him all the relevant arguments. If the problem is a hard one, the book will be less useful in suggesting a solution, or the likely outcome in the courts, but that defect is just a reflection of the present state of the case-law. In the long run this book will help Canadian administrative law to accommodate to the uniquely Canadian situation. It will no longer be excusable for counsel appearing in Canadian courts to fail to refer to Canadian cases or materials which are relevant. It will no longer be excusable for teachers to teach "warmed-over" English law (as Willis has described it). The criticism which I have made (which in any case reflects a personal opinion) is not intended to minimize the author's achievement. His book is a most welcome addition to Canadian legal literature.

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