The Principle of *Stare Decisis* in Canadian Administrative Law

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Le principe du *stare decisis* en droit administratif canadien

El principio de *stare decisis* en el derecho administrativo canadiense

O princípio *stare decisis* em direito administrativo canadense

加拿大行政法中的遵循先例原则

Résumé

L'approche canadienne au principe de *stare decisis* en droit administratif s'avère nuancée. Elle s'est développée de façon à donner aux décideurs administratifs la flexibilité nécessaire pour répondre aux changements rapides dans leurs domaines de réglementation, tout en préservant le contrôle judiciaire de la rationalité du processus administratif. Qui plus est, l'approche canadienne ressemble à celle favorisée par les cours de common law avant l'émergence d'un système hiérarchique de tribunaux de justice à la fin du XIX[e] siècle ; elle a donc des antécédents historiques respectables. Pourtant, l'auteur démontre l'existence

Abstract

The Canadian approach to *stare decisis* in administrative law is nuanced, designed to give administrative decision-makers the regulatory flexibility necessary to address changed circumstances but also to preserve judicial oversight of the rationality of the administrative process. Moreover, the current Canadian approach is consistent with the approach favoured by common law courts prior to the emergence of a hierarchical system of judicial tribunals in the late 19th century and thus has a respectable historical pedigree. However, there are three points at which the *status quo* comes under attack. These may be defined as the problems of

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de trois endroits où cette approche est vulnérable, ce que l'auteur nomme les problèmes 1) de clarté, où les juges imposent une seule interprétation d'une disposition législative, 2) de constance, où les juges harmonisent des tendances décisionnelles dites divergentes, et 3) de cohérence, où les juges tendent à enlever le raisonnement problématique du processus administratif. L'auteur prétend que l'intervention des juges afin d'imposer clarté, constance et cohérence n'est pas appropriée, parce qu'elle met en péril l'approche canadienne nuancée au principe de *stare decisis* en droit administratif.

1) clarity, where judges carve one interpretation of law in stone, 2) consistency, where judges harmonize inconsistent lines of administrative decisions, and 3) coherence, where judges seek to remove flawed logic from the administrative jurisprudence. The author argues that judicial intervention to ensure clarity, consistency, or coherence is inappropriate, because it upsets the delicate balance struck by the nuanced Canadian approach to *stare decisis* in administrative law.

Resumen

El enfoque canadiense al principio de *stare decisis* u obligatoriedad del precedente en derecho administrativo es matizado, desarrollado para proporcionar a los responsables de la toma de decisiones administrativas la flexibilidad necesaria para responder a los rápidos cambios en sus campos de reglamentación, pero también para preservar el control judicial de la racionalidad del proceso administrativo. Lo que es más, el enfoque canadiense se asemeja al privilegiado por los tribunales de *common law* antes de la aparición de un sistema jerárquico de tribunales de justicia a finales del siglo 19. Sin embargo, el autor demuestra la existencia de tres aspectos en los que este enfoque se muestra vulnerable, los que el autor denomina problemas de 1) claridad, en cuanto los jueces imponen una sola interpretación para una disposición legal, 2) consistencia, en cuanto los jueces armonizan las tendencias que se presentan en las decisiones administrativas cuando son divergentes,

Resumo

A abordagem canadense do princípio do *stare decisis* no direito administrativo se mostra nuançada. Foi desenhada de modo a dar aos tomadores de decisão administrativa a flexibilidade necessária para enfrentar mudanças rápidas em suas esferas, preservando, porém, o controle judiciário da racionalidade dos processo administrativo. Mais ainda, a abordagem canadense se assemelha àquela favorecida pelas cortes de *common law* antes do surgimento de um sistema hierárquico de tribunais de justiça no final do século XIX, tendo assim respeitável ancestralidade. No entanto, o autor demonstra que há três pontos em que esse abordagem é vulnerável. Podem ser definidos como os problemas de 1) clareza, quando os juízes impõem uma só interpretação da lei; 2) constância, quando os juízes harmonizam linhas divergentes de decisões administrativas; e 3) coerência, quando os juízes tentam remover uma lógica falha da jurisprudência administrativa. O autor argumenta que a intervenção judi-

y 3) coherencia, en cuanto los jueces tienden a eliminar el razonamiento problemático del proceso administrativo. El autor afirma que la intervención de los jueces en orden a imponer claridad, consistencia y coherencia no es adecuado, ya que pone en peligro el matiz del enfoque canadiense del principio de *stare decisis* en el derecho administrativo.

cial para garantir a clareza, constância e coerência é inapropriada, porque coloca em risco o delicado equilíbrio alcançado pela matizada abordagem canadense ao princípio do *stare decisis* em direito administrativo.

摘要

加拿大行政法上的遵循先例颇为微妙，旨在赋予行政决策者必要的管理弹性以应对变化的情势，同时又保留司法权对行政程序合理性的监督审查。此外，当前加拿大所采用的方法与十九世纪晚期法院等级制度诞生之前普通法法院所支持的方法一致，从而具有值得尊敬的历史谱系。可是，行政法的现状正受到三点质疑，可概括为（1）清晰性问题，即法官对法律条文只做一种解释；（2）协调性问题，即法官让不一致的行政决定归于一致；（3）一致性问题，即法官设法除去行政裁判中的逻辑瑕疵。作者认为为确保清晰性、协调性和一致性而进行司法干预不妥，因为它打破了加拿大行政法中遵循先例原则的微妙。

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"When the facts change, I change my opinion," John Maynard Keynes once tartly replied to the suggestion that he had altered his position on a matter of public importance, before adding, witheringly: "What do you do, sir? "

How to deal with changed circumstances is the central topic of this paper. When the facts change, should decision-makers alter their point of view accordingly? Subsequently, mindful of judicial review's perennial presence in Canada, should decision-makers' point of view *be allowed* to change with them?

In section I, I briefly review the development of *stare decisis* in common law, followed by section II, where the Canadian approach to *stare decisis* in the administrative context is outlined. From there I assess three points at which the *status quo* comes under pressure, what I call the problems of clarity (section III), consistency (section IV) and coherence (section V).

By way of a brief summary: *stare decisis* is not at all the judicial straitjacket it is sometimes imagined to be and so the very flexible approach to precedent taken by administrative decision-makers is not only defensible but laudable. Mischief results when judges declare statutory provisions to be 'clear', insist on consistency, or orchestrate coherence from on high.

I add an important caveat. Empirical evidence about the functioning of administrative decision-makers is sorely lacking[1]. Most of the present analysis is theoretical, conducted at one remove from the administrative fray. Ultimately, little concrete information exists on the topics that I will discuss: whether heavy-handed judicial intervention induces regulatory stasis, whether administrative decision-makers genuinely try to promote consistent decision-making and whether they have the ability to achieve coherent decision-making over time.

My prescriptions are grounded in theory and common sense rather than in fact. But I am not dogmatic. Just like Keynes, I am open to changing my mind if the facts do not fit my preferred theory. As Justice Jackson quite rightly put it, "I see no reason why I should be consciously

[1] See Peter A Gall, "Problems with a Faith-Based Approach to Judicial Review" (2014) 69: 2d SCL Rev 183.

wrong today because I was unconsciously wrong yesterday"[2]. Until such time as I am proven wrong, however, my preference is for a deferential approach to judicial review of administrative action[3].

I. *Stare Decisis* in Common Law

Lawyers schooled in the principle of *stare decisis* and thus alert to the need to 'stand by what was decided' are perhaps less likely to resort to the famous Keynesian retort. I doubt, however, that sophisticated lawyers truly believe in stringent and strident adherence to past decisions.

By common law standards, the doctrine of *stare decisis* is a recent invention and though it may well be an "indispensable foundation" that "provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules",[4] it does not in the slightest resemble the rigid form it is sometimes imagined to take: "Of course, the doctrine of *stare decisis* is no longer completely inflexible"[5].

For instance, *Mirehouse* v *Rennell*[6] is sometimes identified as the *locus classicus* of the principle. It is true that Baron Parke there said that courts should follow previous decisions even if these decisions were not "as convenient and reasonable as we ourselves could have devised", but he also noted that courts are not bound to follow decisions that are "plainly unreasonable and inconvenient"[7]. As a leading English legal historian put it, "The duty of repeating errors is a modern innovation", one which most likely resulted from the "hierarchical system of appellate courts" created by the *Judicature Acts*[8].

That is not to say that precedents were ignored or casually tossed aside in earlier times. Consistent decision-making exercised the minds of judges

2 *Massachusetts v United States*, 333 US 611 at 639–640 (1948).

3 See generally Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012).

4 *Practice Statement (Judicial Precedent)*, [1966] 1 WLR 1234.

5 *Canada (AG) v Confédération des syndicats nationaux*, [2014] 2 SCR 477 at para 24.

6 (1833) 1 Cl & Fin 527, 6 ER 1015.

7 *Mirehouse v Rennell*, (1833) 1 Cl & Fin 527 at 546, 6 ER 1015.

8 John Hamilton Baker, *An Introduction to English Legal History*, 3rd ed (London, UK: Butterworths, 1990) at 229.

long before the development of the modern rule of *stare decisis*. As Lord Mansfield observed in the eighteenth century, "if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering to it, than if it were to be overturned"[9]. In earlier eras of common law, "[a] single case was not a binding authority, but a well-established custom (proved by a more or less casual citing of cases) was undoubtedly regarded as strongly persuasive"[10]. For centuries, common law courts adhered to a practice of *stare decisis* that acknowledged the wisdom of consistent decision-making without turning it into a rigid rule of law.

Even today, *stare decisis* is not a judicial straitjacket. Their own previous decisions are not absolutely binding on lower courts and may be discarded if "there is some indication that [the] decisions were given without consideration of the appropriate statute or that they failed to consider some relevant case law"[11]. Intermediate appellate courts are not bound to follow previous decisions that are no longer consistent with edicts delivered from the high court[12]. Indeed, an intermediate appellate court may overrule one of its decisions "if it is satisfied that the error should be corrected after considering the advantages and disadvantages of correcting the error":

> The rule of *stare decisis* is not absolute. There comes a point at which the values of certainty and predictability must yield to allow the law to purge itself of past errors or decisions that no longer serve the interests of justice. Moreover, decisions that rest on an unstable foundation tend to undermine the very values of certainty and predictability that *stare decisis* is meant to foster.[13]

And, of course, high courts can "depart from [their] previous decisions "when it appears right to do so"[14], though only "after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances"[15] – whatever this may mean.

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9 *Hodgson v Ambrose* (1780), 1 Doug KB 371 at 373, 99 ER 216.

10 Theodore Plucknett, *A Concise History of the Common Law*, 5th ed (London, UK: Butterworths, 1956) at 347.

11 *Holmes v Jarrett* (1993), 68 OR (3d) 667 at 676-677, 1993 CanLII 8479 (ON SC).

12 *Young v Bristol Aeroplane Co Ltd*, [1944] KB 718 at 729-730 (CA).

13 *Fernandes v Araujo*, 2015 ONCA 571 at paras 46-47.

14 *Practice Statement (Judicial Precedent)*, *supra* note 4.

15 *Queensland v Commonwealth*, [1977] HCA 60, 139 CLR 585 at 599, Gibbs J.

Moreover, in the area of the *Charter of Rights and Freedoms*, lower courts have significant latitude to revisit settled law, "if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate"[16] – again, whatever this may mean.

It is true that in all other areas a lower court may not overrule a binding precedent but must instead wait for a higher court to wield the axe[17]. Nonetheless, lower courts have a margin of appreciation in determining the scope of the utterances of their superiors. A precedent is binding only if it "concerns *the entire dispute* that [the court] should normally resolve, and that it provides a *complete, certain and final* solution to the dispute"[18]. Indeed, only the *ratio decidendi* has the force of law, not those statements characterized as *obiter dicta*[19]. Judges can exploit this malleable distinction: "The rule is quite simple: If you agree with the other bloke you say it is part of the ratio; if you don't you say it is obiter dictum, with the implication that he is a congenial idiot"[20]. Lower courts required to interpret judicial decisions have "an indispensable element of choice"[21]:

> [W]e all know that no two legal treatises state the law in the same terms, there being a law of torts according to Street, and Heuston, and Jolowich and James and the contributors to Clerk and Lindsell, and we buy them all because they are all different. And what is true of the academics is true perhaps even more dramatically of the judges, who are forever disagreeing, often at inordinate length. When, after long and expensive argument the Law Lords deliver themselves *ex cathedra* of their opinions – and this is the best we can

16 *Canada (AG) v Bedford*, [2013] 3 SCR 1101 at para 42.

17 *Canada v Craig*, [2012] 2 SCR 489.

18 *Canada (AG) v Confédération des syndicats nationaux*, *supra* note 5 at para 27. Emphasis original.

19 *Harrison v Carswell*, [1976] 2 SCR 200 at 206, Laskin CJC, dissenting:

> What is important, however, is not whether we have a previous decision involving a "brown horse" by which to judge a pending appeal involving a "brown horse", but rather what were the principles and, indeed the facts, upon which the previous case, now urged as conclusive, was decided.

20 Lord Asquith, "Some Aspects of the Work of the Court of Appeal" (1950) 1 Journal of the Society of Public Teachers of Law 350 at 359.

21 H Wade McLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984) 8 Dal LJ 435 at 440.

> do – they either confine themselves to laconic agreement or *all say different things, and this even when they claim to be in complete agreement.*[22]

This blurred line has, moreover, received a clear imprimatur from the Supreme Court of Canada[23]. In summary, even common law courts are not subject to a rigid doctrine of *stare decisis*. Standing by what has already been decided is always desirable and sometimes mandatory but is not a complete fetter on judicial discretion.

II. *Stare Decisis* in Canadian Administrative Law

Canadian administrative law is organized around two core principles: democracy, which manifests itself in decisional autonomy for administrative decision-makers, and the rule of law, which manifests itself in judicial oversight of the administrative process to ensure legality. In *Dunsmuir* v *New Brunswick*, LeBel and Bastarache JJ. explained how these principles interrelate:

> Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.[24]

Legislative choices to vest decisional authority in administrative bodies ought to be respected, but the limits of that authority are to be policed

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22 AWB Simpson, "The Common Law and Legal Theory" in AWB Simpson, ed, *Oxford Essays in Jurisprudence*, 2nd series (Oxford, UK: Clarendon Press, 1973) 77 at 89-90, emphasis original.

23 See *R v Henry*, [2005] 3 SCR 609 at para 57: "The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience."

24 [2008] 1 SCR 190 at para 27 [Hereafter: *Dunsmuir*]. I would add that *Dunsmuir* recognizes a concern for good administration – that specialized decision-makers should generally be allowed significant regulatory autonomy the better to achieve statutory objectives – and for the separation of powers, in its assignment of distinct roles to the judicial and executive branches.

by the courts. Canadian courts have long adopted a legal pluralistic view of the administrative process,[25] allowing decision-makers to tailor their procedures to better meet their statutory objectives in regulatory environments that often change rapidly. Administrative decision-makers are, in short, "masters in their own house"[26].

Accordingly, administrative decision-makers are permitted to take rules from the general law and modify them to the needs of a particular regulatory setting. As Fish J explained in a case involving labour relations, arbitrators "may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized"[27].

So it is with *stare decisis*: "Courts must decide cases according to the law and are bound by *stare decisis*. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate"[28]. Simply put – and putting aside the misleading idea that *stare decisis* is a straitjacket worn beneath judicial robes – "an administrative tribunal is not bound by its previous decisions or the decisions of its predecessor"[29]. As a result, administrative decision-makers have significant flexibility in responding to changes in regulatory context and may change policies to better suit changed circumstances[30]. Previous decisions – especially previous decisions

25 See generally Harry Arthurs, *Without the Law: Administrative Justice and Administrative Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985).

26 *Prasad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at 568-569.

27 *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, [2011] 3 SCR 616 at para 45. It is worth mentioning, however, that the application of legal concepts by administrative decision-makers is often reviewed quite strictly, on the basis that the range of possible, acceptable outcomes is relatively restrained in such contexts. See generally *Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha*, 2014 FCA 56.

28 *Weber v Ontario Hydro*, [1995] 2 SCR 929 at para 14, Iacobucci J, dissenting. See also *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282.

29 *Altus Group Limited v Calgary (City of)*, 2015 ABCA 86 at para 20.

30 *Thompson Brothers (Construction) Ltd v Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2012 ABCA 78 at para 39.

following a consistent line of thought – "reveal […] where the law has been and where it may be headed"[31] and may accordingly provide "a valuable benchmark" against which to assess the [reasonableness of a] decision"[32]. *Stare decisis* in the administrative realm bears strong similarities with the judicial approach to prior cases before the emergence of a hierarchy of courts in the late nineteenth century.

A subtle approach to *stare decisis* has the additional benefit of facilitating access to administrative justice, for if an administrative decision-maker "is to be constrained by technical legal rules and a growing mass of binding precedents, its ability to serve will be jeopardized and its purpose…will be compromised"[33]. If detailed arguments must be made about how to read relevant precedents, individuals may need to call on the services of lawyers and the administrative decision-maker itself will need to spend more time in deliberations – thereby compromising cost-effective access to swift decisions. Focusing on the facts at hand rather than on synthesizing a new case and previous decisions may make it easier for individuals to interact with administrative decision-makers.

Consistency is doubtlessly a good thing in administrative decision-making: "If the facts as found are not to be distinguished in some material aspect from those in an earlier case, the result should be the same"[34]. Of course, sorting the material from the immaterial inevitably requires decision-makers to exercise judgement, a judgement that might be different depending on the nature of the administrative decision-maker, with more latitude being given to regulatory bodies vested with policy-making functions than to those more akin to courts. In general, however, there is a "strong case for branding as reviewable those cases where statutory

31 *Joey's Delivery Service v New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2001 NBCA 17, 201 DLR (4th) 450 at para 39.

32 *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34, [2013] 2 SCR 458 at para 6.

33 *Medicine Hat College v Alberta (Public Service Employee Service Relations Board)* (1987), 80 AR 358 at para 30.

34 *Danakas v Canada (War Veterans' Board)* (1985), 10 Admin LR 110 at 114. See also Denis Lemieux, " La cohérence décisionnelle" (2010) 23 Can J Admin L Prac 227 at 230: "Un peu comme des athlètes vont répéter inlassablement les mêmes gestes ou des artisans qui suivent de mêmes modes de fabrication, l'on s'attend des tribunaux administratifs à ce qu'ils développent des lignes directrices dans leurs décisions".

authorities inexplicably fail to act consistently"[35]. It follows that where a decision-maker departs from a previous decision, the departure must generally be accompanied by an explanation justifying the departure[36]; the previous decision provides a "direct contextual comparison against which" the reasonableness of the new decision can be assessed[37]. Once this criterion is met, however, the departure will be upheld as a reasonable decision[38]. Indeed, administrative decision-makers are not even bound by a judicial conclusion that a previous decision was reasonable; they remain free in future cases to adopt an alternative position[39].

This subtle approach recalls Emerson's advice that "a *foolish* consistency is the hobgoblin of the mediocre mind", strikes a balance between the competing demands of the rule of law and the democratic imperative outlined in *Dunsmuir* and has respectable historical pedigree. There are, however, several points at which this position comes under threat.

III. The Clarity Problem

Canadian courts have recently embraced the view that, sometimes, a statutory provision has one 'clear' meaning that a reviewing court must insist upon[40]. Put another way, the range of reasonable outcomes will be so

35 David J Mullan, "Natural Justice and Fairness – Substantive as well as Procedural Standards for the Review of Administrative Decision-Making? " (1982) 27 McGill LJ 250 at 286.

36 *J.D. Irving Ltd v I.L.A., Local 273*, 2003 FCA 266, 228 DLR (4th) 620.

37 *Altus Group Limited v Calgary (City of)*, *supra* note 30 at para 32.

38 *Syndicat de l'enseignement de la région de Laval c Commission scolaire de Laval*, 2012 QCCA 827 at paras 56-61.

39 See e.g. *Canada (Minister for Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237 at para 87; *FWS Joint Sports Claimants Inc. v Border Broadcasters Inc.*, 2001 FCA 336, para. 14

40 See variously, *British Columbia Hydro and Power Authority v Workers' Compensation Board of British Columbia*, 2014 BCCA 353; *Ontario (Alcohol and Gaming Commission) v 751809 Ontario Inc. (Famous Flesh Gordon's)*, 2013 ONCA 157; *Qin v Canada (Citizenship and Immigration)*, 2013 FCA 263, 451 NR 336; *Small v New Brunswick Liquor Corporation*, 2012 NBCA 53, 390 NBR (2d) 203, but see also *Frères Maristes (Iberville) c Laval (Ville de)*, 2014 QCCA 1176 at para 9:

> En ce sens, parler en matière de révision judiciaire d'une « erreur déraisonnable » risque de créer une fâcheuse confusion des genres. Il ne peut pas y avoir plusieurs réponses à la question 2 + 2 = ? Il n'y en a qu'une seule, toutes les autres sont erronées, aucune d'entre elles n'est « raisonnable » et qualifier les unes ou les

limited that only one possible, acceptable interpretation exists[41]. This puts strain on the administrative-law approach to *stare decisis*.

Setting a judicial interpretation of a statutory provision in aspic threatens to compromise regulatory flexibility over time. The Canadian approach to *stare decisis* allows administrative decision-makers to change their positions in accordance with changing circumstances: "if a court has merely upheld an earlier tribunal interpretation of the provision as reasonable, the tribunal need not follow that interpretation if it prefers another interpretation that is also reasonable"[42]. Yet if a court carves the only possible, acceptable interpretation into a tablet of stone this flexibility is eliminated as future administrative decision-makers are forever encumbered by the judicial edict[43].

Accordingly, the 'clear' meaning of a statutory provision, once announced by a court, would be invariable over time. The phrase "common-law spouse"[44], which may have meant a partner of the opposite sex at the time it was enshrined in law, would continue to mean a partner of the opposite sex today and into the future – even though circumstances have changed so dramatically that the old meaning is dangerously anachronistic – until such time as a court sees fit to revise the initial interpretation. But judicial revision of 'clear' interpretations seems most unlikely, for reasons of substance and procedure.

autres de « déraisonnables » n'ajoute strictement rien à la compréhension des choses. Mais en matière d'interprétation juridique et de révision judiciaire, on est loin de l'arithmétique élémentaire. Et en l'absence d'une décision ou d'une interprétation déraisonnable, la réponse à privilégier est celle donnée par le tribunal administratif que le législateur a désigné comme le décideur dont ce genre de litige est la spécialité…

41 *McLean v British Columbia (Securities Commission)*, [2013] 3 SCR 895 at para 38; *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 SCR 300.

42 Sara Blake, *Administrative Law in Canada*, 5th ed (Markham: LexisNexis, 2011) at 140-141. See e.g. *Dominion Stores Ltd v Retail, Wholesale and Department Store Union* (1981), 128 DLR (3d) 262 (Ont CA).

43 See, by analogy, *Régie des rentes du Québec v Canada Bread Company Ltd*, [2013] 3 SCR 125.

44 *Canada (AG) v Mossop*, [1993] 1 SCR 554. I am indebted to Audrey Macklin for suggesting this example.

Substantively, Canadian courts do not give administrative decision-makers much room to manœuvre when interpreting judicial precedent[45]. Procedurally, any judicial review proceeding brought to enforce an updated understanding of the 'clear' interpretation at issue would be conducted while following a deferential standard, in which case there would be a heavy burden on any applicant arguing that the context has changed so significantly as to render the initial judicial edict unreasonable. While a court tasked with interpreting the phrase "common-law spouse" at two different points in time could rely on contextual changes to justify a different interpretation, administrative law erects substantive and procedural hurdles on this path.

There is another problem with embracing 'clarity'. Reams of decided cases contain interpretations of law given by Canadian courts on a standard of correctness. Nowadays, however, with the "black hole" of the presumption of deferential review for interpretations of decision-makers' home states sucking the light from the correctness categories[46], reasonableness is almost always the standard of review. But 'correct' is not a synonym for 'clear'. A court applying the principles of statutory interpretation will identify the 'best' interpretation of a provision, but not necessarily the 'only' possible interpretation.

The Americans have had this problem. In *National Cable & Telecommunications Assn. v Brand X Internet Services*[47], a majority of the Supreme Court of the United States concluded that a "prior judicial construction of a statute trumps an agency construction otherwise entitled to…deference *only* if the prior court decision holds that its construction follows from the unambiguous terms of the statute"[48]. But as Scalia J pointed out several

45 See e.g. *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345 at para 37: "Because the Board's finding of unfairness was based on what was, in my respectful view, a misapplication of the *CCH* factors, its outcome was rendered unreasonable". Compare a commendable recent decision of the Federal Court of Appeal, taking a different view: *Adamson v Canada (Human Rights Commission)*, 2015 FCA 153 at para 63, Trudel JA: "Said differently, *Vilven FC* was not a comprehensive code that, when properly interpreted, would determine the outcome of the complaints. In my respectful view, taking this approach led the Judge away from the task of assessing the reasonableness of the Tribunal's decision on its own merits".

46 Paul Daly, "Unreasonable Interpretations of Law" (2014) 66: 2d SCLR 233.

47 545 US 967 (2005).

48 *National Cable & Telecommunications Assn. v Brand X Internet Services,* 545 US 967 at 982 (2005) (emphasis added).

years later, this approach creates a problem that has yet to receive a convincing answer:

> In cases decided pre-Brand X, the Court had no inkling that it must utter the magic words "ambiguous" or "unambiguous" in order to (poof!) expand or abridge executive power, and (poof!) enable or disable administrative contradiction of the Supreme Court. Indeed, the Court was unaware of even the utility (much less the necessity) of making the ambiguous/nonambiguous determination in cases decided pre-Chevron, before that opinion made the so-called "Step 1" determination of ambiguity *vel non* a customary (though hardly mandatory) part of judicial review analysis. For many of those earlier cases, therefore, it will be incredibly difficult to determine whether the decision purported to be giving meaning to an ambiguous, or rather an unambiguous, statute.[49]

In other words, it is not obvious when the term 'correct' should be understood to mean 'clear'. This is yet another reason that Canadian courts should shut their ears to the plaintive cries of the clarity sirens and concentrate on their role of reviewing for reasonableness (and occasionally correctness) on a case-by-case basis[50]. A judicial conclusion declaring that a particular decision was reasonable or unreasonable does not immobilize an administrative decision-maker, but rather leaves them greater liberty in the future. Even the conclusion that, *on the facts of a particular case*, there was only one possible, acceptable outcome, leaves an administrative decision-maker relatively unencumbered.

IV. The Consistency Problem

The administrative-law approach to *stare decisis* comes under stress where there is a temptation for courts to harmonize inconsistent lines of administrative decisions.

Some inconsistencies are worse than others. A "true operational conflict", where an individual is faced with two conflicting orders from different bodies, can only be resolved by a higher body, usually a reviewing court[51]. But true operational conflict is not a challenge to the subtle

49 *United States v Home Concrete & Supply, LLC*, 132 S Ct 1836 at 1846-1847 (2012).

50 See also Daly, "Unreasonable Interpretations of Law", *supra* note 46.

51 *British Columbia Telephone Co v Shaw Cable Systems (B.C.) Ltd*, [1995] 2 SCR 739 at 768.

application of *stare decisis* in administrative law. The conflict can be resolved by determining which of the two decisions should prevail, an inquiry which does not invite a reviewing court to answer any question of interpretation *de novo*: it can remain above the fray by deducing from the relevant statutory provisions which interpretation should prevail[52].

Pressure is really exerted when two panels or two members of the same decision-making body interpret the law differently, or (to a much lesser extent) when the same legal concept is treated differently in different regulatory settings. Some 'core' cases may arise – especially in the former category – in which most lawyers would instinctively agree that judicial intervention would be appropriate. It would surely be a reviewable error for a decision-maker to treat two parties in identical situations differently. From there, but a small leap is required to conclude that differential treatment by two decision-makers is also a reviewable error: for if the decision to grant a permit or issue a benefit depends on which door an individual decides to knock on when he arrives for a hearing, the outcome of the administrative process might as well depend on the flip of a coin[53].

Even if there is no "true operational conflict" in these situations, there is nonetheless a problem: "it seems incompatible with the rule of law that two contradictory interpretations of the same provision of a public statute, by which citizens order their lives, could both be accepted as reasonable"[54]. Indeed, "a public statute that applies equally to all affected citizens should have a universally accepted interpretation"[55]. Otherwise, the outcome depends on "luck or lack of luck depending [on] which [decision-maker] is assigned to hear the case"[56]. It has been said, therefore, that these situations require either judicial intervention, because the inconsistency

52 *Ibid.*

53 Not that this would *always* be unreasonable, as Adrian Vermeule has persuasively argued: "Rationally Arbitrary Decisions (in Administrative Law)", (2013) Harvard Law School, Public Law & Legal Theory Research Paper Series.

54 *Abdoulrab v Ontario (Labour Relations Board)*, 2009 ONCA 491 at para 48.

55 *Taub v Investment Dealers Association of Canada*, 2009 ONCA 628 at para 67.

56 *Martinez-Caro v Canada (Citizenship and Immigration)*, 2011 FC 640, 98 Imm LR (3d) 288 at para 49.

raises a question of law central to the administration of justice[57], or strict judicial scrutiny[58].

This pressure should generally be resisted. It is not for courts to impose consistency from on high, thereby compromising "the decision-making freedom and independence" of administrative decision-makers; rather, these bodies "have the power to resolve such conflicts themselves"[59]. Administrative decision-makers should be permitted to work inconsistencies pure. It is up to them, "par concertation interne ou autrement, de résoudre la difficulté et de préserver une cohérence suffisante dans ses processus de décision"[60]. The rule of law is not a trump card to be played when there is judicial disquiet about inconsistent administrative decision-making.

With respect to the argument that "persistent discord" between decision-makers on the correct interpretation of a statutory provision requires resort to the superior courts as 'tie-breakers'[61], L'Heureux-Dubé J. made a memorable response:

> [L]imiting this type of review to serious and unquestionable jurisprudential conflicts would not, by itself, remove all difficulty. There are undoubtedly clear cases of inconsistency where the dictates of equality and consistency in the application of the law will have full effect. I am far from certain, however, that only those cases will come before the courts…[I]s the fact that two bodies interpret the same legislative provision differently, but in the particular context of the jurisdiction of each, one in a penal and the other in an administrative matter, a "conflict in decisions"? What about an isolated decision conflicting with a consistent line of authority? Must a jurisprudential conflict

57 *Canada (AG) v Mowat*, 2009 FCA 309 at para 47; *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at paras 54-56.

58 *Altus Group Limited v Calgary (City of)*, supra note 29 at paras 31-33.

59 *Domtar Inc. v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 at 801.

60 *Commission de la santé et de la sécurité du travail c Société Terminaux Montréal Gateway*, 2015 QCCA 542 at para 28. See generally Bryan Finlay & Richard Ogden, "Consistency in Tribunal Decision-making" (2012) 25 Can J Admin L Prac 277; Lemieux, *supra* note 34.

61 *Wilson v Atomic Energy of Canada Limited*, *supra* note 57 at paras 54-55. See also McLauchlan, *supra* note 21 at 472: "It is arguable that there is a need for supervisory courts to perform a system-coordinating function in reviewing administrative interpretations of law".

> "continue" before being brought to the attention of the courts? If so, how is the quantitative and temporal threshold to be determined? [62]

Where administrative decisions are so variable that an applicant for benefits might as well buy a lottery ticket as attend his hearing, the case for judicial intervention is strong. Most of the time, however, courts are several steps removed from the core of the case for judicial review for inconsistency. The further one moves into the penumbra of more doubtful cases, the weaker the argument for intervention, because the court will generally be involve "in making judgments as to whether A's situation was sufficiently dissimilar to B's to make their differential treatment justifiable"[63]. There are inevitably "quantitative" – how much of an inconsistency? on matters of law/interpretation or those of fact/policy – and "temporal" – how far apart in time are the inconsistent decisions? – aspects to the difficult judgement calls on whether intervention is appropriate[64]. This is an open invitation made to judges to correct administrative decisions they find aberrant but could not qualify as unreasonable. An additional difficulty is that judicial intervention may actually generate further inconsistency. Due to the familiar procedural restrictions of judicial review[65], courts are not well-placed to anticipate all the consequences of their decisions on the administrative process or to monitor their implementation by administrative decision-makers.

Accordingly, it is better to look for objective indicators showing that judicial intervention is justifiable than to rely on the subjective views of individual judges. Where the legislature has provided for an appeal to the

62 *Domtar Inc. v Quebec*, *supra* note 59 at 797.

63 Mullan, *supra* note 35 at 282.

64 *Domtar Inc. v Quebec*, *supra* note 59 at 783.

65 See generally John WF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* revised ed (Cambridge: Cambridge University Press, 2000); *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.

courts[66], or where the decision-maker itself asks for additional help[67], judicial intervention may be appropriate[68]. For instance, the certified question procedure Parliament has provided in the immigration area is a strong indication that the legislature intended for the Federal Court of Appeal and the Supreme Court of Canada to play an active role in resolving inconsistent interpretations by "providing the definitive answer to a certified question on a point of statutory interpretation"[69]. These provide objective indicators that more readily justify a resort to the courts than when judicial intuition suggests that a particular conflict must be resolved – though, of course, judges should guard against carving their interpretations on tablets of stone.

A more moderate judicial response to administrative inconsistency is to restrict the range of reasonable outcomes. For instance, in *Altus Group Limited* v *Calgary (City of)*, the municipality had changed its interpretation of a tax provision, which prompted the Alberta Court of Appeal to emphasize the need for "coherence" in the context of taxation, thereby reducing the range of reasonable outcomes[70]. In other words, the initial choice not to tax commercial parking spaces could not be reversed lightly.

66 See e.g. *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161. See also *contra*: *Mouvement laïque québécois v Saguenay (City of)*, 2015 SCC 16, [2015] 2 SCR 3, where the Supreme Court of Canada refused to apply this logic to a clause providing for an appeal from an administrative tribunal on questions of law *with leave* of the Quebec Court of Appeal, a decision that makes it very difficult for a legislature to successfully manifest a desire for authoritative judicial resolution of questions of general principle.

67 See e.g. *Federal Courts Act*, RSC 1985, c F-7, s 18.3(1): "A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination". A recent example from Ontario is *Waste Management of Canada (Re)* (2015), 2015 CanLII 68073 (ON ARB). See also the rather unusual plea for judicial intervention in *Ferme Alain Dufresne Inc. v Canada (Food Inspection Agency)*, 2015 CART 6 at paras 41-49 (Bruce La Rochelle, Member).

68 It is also theoretically possible that an administrative decision-maker might, during judicial review of its own decision, argue that the standard of correctness should be applied in order to have the benefit of authoritative judicial resolution of an important question of principle. Though this is unlikely in practice, the increased scope for administrative decision-makers to participate in judicial review proceedings heralded by *Ontario (Energy Board) v Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 SCR 147, makes it at least possible.

69 *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 35.

70 *Altus Group Limited v Calgary (City of)*, *supra* note 29 at para 33.

Even here, however, reviewing courts should be cautious. Restricting the range of reasonable outcomes too narrowly comes very close to creating substantive legitimate expectations – here, that the taxation by-law would not be modified – which is difficult to reconcile with Canadian abhorrence of fetters on administrative discretion[71].

V. The Coherence Problem

A final pressure point is that of incoherence: what about an administrative decision that provides for a reasonable resolution of a particular case but is reached by applying flawed logic? If the flawed logic is not condemned, it remains on the books and may influence future administrative decision-makers. Indeed, as we have seen, failing to follow a previous decision might subsequently form a basis for judicial intervention.

A good example is *Communications, Energy and Paperworkers Union of Canada, Local 30* v *Irving Pulp & Paper, Ltd.*[72], where the arbitration board had drawn a bizarre distinction between dangerous and ultra-dangerous workplaces: the paper mill in question was merely "dangerous" and imposing random mandatory alcohol testing of employees was impermissible, whereas similar testing would have been appropriate in an "ultra-dangerous" workplace such as a nuclear power plant – even though an accident at the mill could lead to both a human and environmental catastrophe. Although the ultimate outcome was reasonable – the evidence did not justify the imposition of mandatory testing – the underlying logic is surely flawed, because intoxicated employees can cause harm to themselves and others in both dangerous and ultra-dangerous workplaces. The distinction is unwarranted, but left alone it might infect arbitral decision-making for years to come[73]. I suspect that courts often intervene in just such instances because they are unwilling to sanction flawed logic.

71 See e.g. *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525; *Immeubles Jacques Robitaille inc. v Québec (City of)*, [2014] 1 SCR 784.

72 *supra* note 32.

73 One of the reasons cited by the Court of Appeal to justify its application of a correctness standard: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2011 NBCA 58 at para 5.

What is a court to do in such instances? Deference suggests that reviewing courts should wring their hands – and then wash them: the reasonable decision should be upheld and the flawed logic should be worked out through the administrative process. Administrative decision-makers are no less canny than courts in recognizing problematic decisions and distinguishing them – indeed, they may be more capable of doing so while also respecting the overall fabric of their own regulatory system. Flawed logic alone does not invite judicial intervention: "For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable"[74]. Accordingly, the reviewing court must focus "on the outcome reached by the administrative decision-maker with due regard to any significant problems in its reasoning"[75]. In short, the real problem here is the Supreme Court of Canada's continued insistence on distinguishing between the decision-making process and its outcome, treating both as independent bases for judicial intervention[76].

For the most part, errors in the reasoning process will infect the final decision. For example, a failure to take a relevant factor into account, or to analyze it appropriately, will occur in the reasoning process but will render the final decision unreasonable. Some errors in the decision-maker's reasons will naturally be determinative. If so, the decision should be quashed. On other occasions, it is possible that the decision-maker would have reached the same result even if the error had been brought to its attention and corrected. Determining whether to uphold the decision in light of such an error is not a matter for substantive analysis but for remedial discretion[77]. An important error in the reasoning process will often justify a reviewing court in quashing an impugned decision, but is not a

74 *Construction Labour Relations v Driver Iron Inc.*, [2012] 3 SCR 405 at para 3.

75 *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at para 62.

76 Matthew Lewans, "Deference and Reasonableness Since *Dunsmuir*" (2012) 38 Queen's Law Journal 59. See e.g. *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559 at paras 89-90.

77 *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 33.

stand-alone basis for judicial intervention[78]. The sirens' call of coherence is another to be resisted.

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Both courts and administrative decision-makers should treat *stare decisis* with nuance, a nuance that is entirely appropriate once the concept is properly understood. Courts should not insist on the rigid application of judicial principles of consistency to administrative decision-making; rather, they should take a more flexible approach, permitting decision-makers to find innovative means of ensuring consistency but also recognizing that when decision-makers go astray, it will generally be more efficient if corrections are made at an administrative level.

For their part, administrative decision-makers should not slavishly follow previous decisions and should remain relatively open to changing tack if the circumstances require it. Mutual adherence to nuance is necessary: administrative decision-makers should reassure courts that they respect the importance of consistency; and courts should reassure administrative decision-makers that they will not intervene to effect a change of course that may occur organically.

Above all else, judges should refrain from imposing their idealized views on the administrative process. Judicial clarion calls for 'clarity' echo down the history of the common law tradition. To my ear, they recall the zealous righteousness of Benthamites who deplored the common-law method and insisted that statutory codification should displace judicial ingenuity. Such zealotry has no place in a pluralistic legal environment that recognizes what valuable contributions administrative decision-makers can make[79].

78 *Libby, McNeill & Libby of Canada Ltd v United Automobile, Aerospace and Agricultural Implement Workers of America* (1978), 91 DLR (3d) 281 (Ont CA).

79 See e.g. Roderick A Macdonald, "On the Administration of Statutes" (1987) 12 Queen's Law Journal 488.