

**Colleen Flood et al., eds., *Administrative Law in Context*
(Toronto: Emond Montgomery, 2008), pp. 439.**

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Colleen Flood et al., eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2008), pp. 439.

Administrative Law in Context is one of the latest hardcover teaching tools released by Emond Montgomery.¹ The text is sure to add yet more colour (this edition baby blue) to the rainbow of similar Montgomery publications already on the bookshelves of Canadian law students. Pedagogically, *Administrative Law* is a mixed blessing. The book is composed entirely of secondary sources. Key cases are accessible through a supplementary website. This focused approach is a welcome departure from the form of many other administrative law textbooks. The timing of *Administrative Law*'s publication, however, meant that critical analysis of the Supreme Court of Canada's recent *Dunsmuir v. New Brunswick* decision could not be incorporated.²

Administrative Law is more accurately described as a lawyer's guide to "judicial review of administrative action" as opposed to a work on administrative law "in context" or on the administrative process. The book's consideration of judicial review is thorough. But in their overall failure to critically consider the role of administrative agencies and agents, the editors miss a golden opportunity to truly contextualize the subject matter.

Pedagogical Utility

Administrative Law stands apart from many similar publications in the editors' reliance upon secondary source materials for the entirety of the text.³ The contributing authors provide analyses of key cases in the field including *Baker v. Canada (Minister of Citizenship and Immigration)*⁴ and *Suresh v. Canada (Minister of Citizenship and Immigration)*,⁵ both of which are examined in several chapters. Montgomery supplements the text with a companion website that makes all the major cited cases available for download free of charge. This is an innovative way of helping to condense and structure inherently difficult material. *Administrative Law* should serve as a model for other teaching tools in less case-focused areas of the law, such as remedies, civil procedure, and criminal procedure.

Whereas the book's aforementioned organization is commendable, the apparent decision not to delay publication following the *Dunsmuir* ruling is problematic. It came at an especially inopportune time for Professor Audrey Macklin, the author of "Standard of Review: The Pragmatic and Functional Test" (Chapter 8). *Dunsmuir* is

¹ (Toronto: Emond Montgomery, 2008) [*Administrative Law*].

² 2008 SCC 9, [2008] 1 S.C.R. 190, 291 D.L.R. (4th) 577 [*Dunsmuir*].

³ Compare e.g. David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001); David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 4th ed. (Scarborough, Ont.: Thomson/Carswell, 2004).

⁴ [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.

⁵ 2002 SCC 1, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1.

most notable for replacing the pragmatic and functional approach with the new standard of review analysis, streamlining the number of standards of review (from three to two). It is unfortunate that Macklin, and other affected authors, did not have an opportunity to fully integrate the decision into their contributions.

Nevertheless, in spite of *Dunsmuir*'s absence, Macklin's chapter does provide a fruitful account of the evolution of the Court's explanation of standards of review. Moreover, the SCC (in *Dunsmuir*) was divided on the best approach going forward. The cases Macklin considers, and the analysis she provides, should thus continue to be relevant for critically assessing and understanding future standard of review developments.⁶

Administrative Agents and Agencies

The text does not expressly address the relationship between administrative law, policy, and practice. In particular, the editors devote inadequate attention to the role of administrative agents and agencies. This is a serious shortcoming.

Administrative Law engages the reader's interest in two opening chapters describing the structure of the administrative state. But an explanation of the day-to-day operations of administrative agents is markedly absent. The reader, for example, gains little understanding of how or why people go about obtaining liquor or broadcasting licenses, or business development grants or subsidies. Thus, while the opening chapters provide a thorough account of the historical debates between critics (such as Albert Venn Dicey) and proponents (such as John Willis) of the administrative state, these chapters present little historical background on the rise of the modern administrative state.⁷

A lawyer cannot engage an administrative agent on behalf of a client without a confident understanding of how that agency is empowered to operate. The structure of the administrative state is established primarily by statute. One of the key tasks for any lawyer who practises administrative law is to understand how to navigate administrative bureaucracy by locating sources of authority and discretion within enabling pieces of legislation, many of which are lengthy and complex.⁸ Enabling legislation sets out the mandate of the enabled agency, the hierarchical structure of its decision makers, its policy objectives, the powers and duties of its agents, and sanctions for non-compliance.

⁶ In fact, the Court cited Professor Macklin's chapter in the post-*Dunsmuir* ruling *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paras. 80, 92.

⁷ Compare William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996). See also Derek Fraser, *The Evolution of the British Welfare State: A History of Social Policy Since the Industrial Revolution*, 3d ed. (New York: Palgrave Macmillan, 2003); J.E. Hodgetts, *From Arm's Length to Hands-On: The Formative Years of Ontario's Public Service, 1867-1940* (Toronto: University of Toronto Press, 1995).

⁸ See e.g. *Human Rights Code*, R.S.O. 1990, c. H.19; *Broadcasting Act*, S.C. 1991, c. 11.

A number of Canada's most powerful and important administrative agents and agencies receive little or no treatment. Little space is devoted to the role of ombudsmen or freedom of information commissioners: intermediaries between administrative agents and the public who use influence and non-adversarial strategies to resolve conflicts. There is no discussion of how Crown corporations—some of the country's largest, most well-funded, and most complex administrative agencies—work. Nor does the text explore future growth areas of the administrative state, such as public-private partnerships. By contrast, the editors devote significant space to the procedures for obtaining remedies against unlawful exercises of authority by members of administrative tribunals.

The editors also fail to include a discussion of one of the more pressing issues in administrative law today: the competition for authority among administrative agencies. Nowhere has that issue been more evident than in the recent case of *Tranchemontagne v. Ontario (Director, Disability Support Program)*.⁹ Despite a provision in the Social Benefit Tribunal's enabling legislation¹⁰ which prohibits the Tribunal from applying the *Canadian Charter of Rights and Freedoms*¹¹ in its interpretation of its enabling legislation, the majority of the Supreme Court of Canada held that the Tribunal could apply the Ontario *Human Rights Code*¹² when deciding questions of law. Similar examples of this problem can be seen in disputes between the Canadian Radio and Television Commission (CRTC) and the Canadian Broadcasting Corporation (CBC),¹³ and between public authorities publishing official marks and the Registrar of Trade-marks.¹⁴

Conclusion

Administrative Law is characteristic of what Harry Whitmore would call the over-legalization of the administrative process.¹⁵ Although administrative agents can exceed or abuse their authority and have a real impact on people's livelihoods—as seen in the seminal Quebec case of *Roncarelli v. Duplessis*,¹⁶ discussed at length in the book—lawyers can also fail to understand or appreciate the informalities of the administrative process. This text (unwittingly) demonstrates that legal scholars may suffer a similar fate.

⁹ 2006 SCC 14, [2006] 1 S.C.R. 513, 266 D.L.R. (4th) 287.

¹⁰ *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sch. A, s. 67(2).

¹¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹² *Supra* note 8.

¹³ *Order declining to set aside or to refer back to the CRTC Decisions CRTC 99-109 to CRTC 99-112*, P.C. 1999-1453, C. Gaz. 1999.II.2153. See also "Petition to the Governor in Council Regarding CRTC Decisions 99-109 to 99-112 Issued on May 21, 1999" *CBC/Radio-Canada* (5 July 1999), online: CBC/Radio-Canada <<http://www.cbc.radio-canada.ca/submissions/crtc/408.shtml>>.

¹⁴ *FileNet v. Canada (Registrar of Trade-Marks)*, 2002 FCA 418, 22 C.P.R. (4th) 328, 297 N.R. 178.

¹⁵ "The Role of the Lawyer in Administrative Justice" (1970) 33 Mod. L. Rev. 481.

¹⁶ [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

By focusing on the judicial and adversarial aspects of the administrative process, the editors of *Administrative Law* have missed a wonderful opportunity to address other formal and informal kinds of interaction with administrative agents. Even the chapter dedicated to public inquiries spends considerable time discussing fairness issues related to independence and bias, standing, representation, and notice. These issues are of paramount concern to lawyers who file judicial review applications as a part of their daily practices.

The non-judicial and non-adversarial forms of interaction are at the core of what administrative law and the administrative process are all about. Ultimately, it is only when relationships between administrative agents and citizens break down and all other remedial options are exhausted, that recourse to judicial review may become appropriate. The reader is left with a teaching tool constructed around a court-centred approach to administrative law, while the “context” promised in its title is more or less invisible.

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