Administrative Law in the Welfare State:
Addressing the Accountability Gap in Executive Social Policy-Making

by

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ABSTRACT

With the rise of the welfare state, democratic, common law governments undertook a new proactive role as social welfare manager; allocating limited health, education, and social services benefits among competing public priorities. In spite of the important impact of this role on the lives of citizens, the various political, managerial, and legal mechanisms designed to hold executive social policy-makers accountable to the legislature have largely broken down. In this dissertation, I argue that our constitutional democracy permits courts to fill this accountability gap by acting as an accountability mechanism of last resort. I propose a new doctrine of administrative review for social policy and programs in which deference is based on evidence of accountability achieved within the policy-making process. Administrative review for accountability would allow courts to evaluate the legitimacy of the process by which social policy is created rather than interfering in the substance of social policy. My dissertation seeks to develop this administrative review doctrine within existing constitutional constraints including the separation of powers.
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INTRODUCTION

“[V]irtue itself has need of limits.” -
Charles de Montesquieu, The Spirit of Laws, Book XI

The scope of the courts’ role in protecting against the abuse of government power has been a classic problem of administrative law ever since the reality of the administrative state first clashed with Dicey’s conception of the rule of law a century ago.¹ Over the years, a sophisticated doctrine of judicial review has evolved for those administrative agencies charged with making legal determinations about rights and freedoms. However, less attention has been given to the courts’ role in supervising government’s allocation of social benefits among its citizens. These policy decisions involve the exercise of discretion, rather than the application of law, and are closely tied to the social and economic policy platforms of the government of the day. Courts are not constitutionally entitled nor institutionally equipped to determine the complex, polycentric issues involved in maximizing social welfare on a limited budget. Therefore, the traditional approach of administrative law to the involvement of courts in social policy is short and simple – absent a constitutional violation, there is to be none.²

Courts declining to review executive resource allocation decisions have traditionally taken comfort in the theory that alternative methods exist for holding the executive

² Consistent with the traditional position that administrative law has no role to play unless rights or freedoms are at stake, textbooks often give the social welfare role of government short shrift. One Canadian textbook covers this entire topic in one paragraph: “The government makes many decisions of general application without express statutory authority. Often they involve spending government money on policy initiatives and special projects. These are very common in health care and social welfare. Like any private philanthropist, the Crown has the capacity to establish programs for public benefit and to define or restrict the distribution of benefits. These programs are not regulations and neither the creation nor the cancellation of these programs gives rise to legal rights. There are few restrictions on the government...”: Sara Blake, Administrative Law in Canada, 4th ed., (LexisNexis, 2006) at 147.
accountable for social policy. Legislative committees scrutinize regulations and budgetary appropriations and the principle of ministerial responsibility ensures that our democratically elected officials remain in control of the executive branch. These accountability mechanisms are further bolstered by independent officers such as ombudsmen and auditors-general. But there is overwhelming evidence that these traditional extra-judicial accountability mechanisms are inadequate to legitimate many significant policy decisions allocating scarce social resources among citizens. Courts may no longer rely on the fact that someone else is “minding the shop”. My thesis is that, given the fundamental impact that these decisions have on the lives of citizens, our constitutional system of democracy allows courts to act as an accountability mechanism of last resort.

The foundational principles of administrative law were developed at the turn of the twentieth century at a time when public governance bore little resemblance to the way our mature social welfare state operates today. I argue that administrative law has failed to keep pace with this evolution in government and, accordingly, is not currently equipped to address the burgeoning accountability gap in executive social policy-making. In my view, a new doctrine of administrative review, in which the courts supervise the accountability of executive social policy-making, is necessary to protect against unprincipled resource allocation. My goal in this dissertation is three-fold: first to establish that the accountability gap in social policy-making exists in fact; second to explain why this accountability gap is not adequately addressed by public law theory and doctrine as it now stands; and third, to develop, as a partial solution, an administrative review doctrine applicable to executive social policy decisions that would promote accountability while respecting the separation of powers doctrine and other constitutional limits.

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3 Colin Turpin and Adam Tomkins, British Government and the Constitution, 6th ed., (Cambridge: Cambridge University Press, 2007) at 134. A Canadian example is Marceau J.’s comment in the trial decision in Inuit Tapirisat et al. v. Canada (A.G.) that a duty of procedural fairness on executive law-makers is “inconsistent” with “the responsibility and accountability of the Ministers of the Crown to the House of Commons”: [1979] 1 F.C. 213 (T.D.) at 221-222. It is important to note that I am referring here to policy decisions made by the executive branch of government rather than policies enshrined in legislation. For an example of the latter, see Authorson v. Canada (A.G.), [2003] 2 S.C.R. 40.
The paper is divided into five chapters. In Chapter 1, I introduce the problem of the accountability gap in social policy-making at a descriptive level. I discuss the rise of executive social policy-making in the welfare state and its inherent problems with reference to my own case study of a particular Ontario social program.

In Chapter 2, I offer theoretical context for the concept of government accountability drawn from both administrative law and public administration scholarship. I develop a blended concept of accountability that refocuses administrative law theory within a broader public governance framework. From this perspective, the courts are one of many accountability forums within a larger accountability framework that may supervise government conduct in relation to a myriad of both legal and extra-legal accountability standards. Courts are unique in that, in contrast to legislative or executive accountability forums, they are constitutionally prohibited from creating their own accountability standards. Their role is to identify and supervise the application of accountability standards created by the legislature or, through authority delegated by the legislature. Therefore, the accountability function of administrative review is a procedural rather than substantive concept, and courts fulfilling this role remain firmly bound by the doctrine of parliamentary sovereignty. I propose a new administrative review doctrine that would allow courts to act as an accountability mechanism of last resort, supervising the primary accountability mechanisms operating in relation to all delegated governmental action, including executive social policy-making.

At first glance, my proposal might strike public lawyers as both radical and incompatible with conventional public law theory and doctrine. For that reason, I devote Chapters 3 and 4 to a defence of my proposal within judicial review theory and administrative law doctrine, respectively. In Chapter 3, I examine judicial review theory. I argue that the accountability function of administrative review, bounded by the doctrine of parliamentary sovereignty, continues to exist in spite of the unified public law theory according to which both constitutional and administrative review are primarily concerned with protecting individual rights against abuses of public power. In Chapter 4, I turn to administrative law doctrine and argue that the current prohibition
against administrative review of policy decisions is untenable given the impossibility of categorically distinguishing between law and policy. Nor is there any other constitutional or institutional reason for prohibiting courts from reviewing social policy in accordance with my proposal.

In Chapter 5, I return to a more detailed discussion of my proposed doctrine of administrative review for accountability. I look to analogies elsewhere in public law doctrine indicating that courts would be capable of undertaking this new jurisdiction. Finally, I provide some initial thoughts on how the doctrine would operate in practice and I illustrate by reference to the case study introduced in Chapter 1.

I have chosen to pursue my thesis primarily through a doctrinal, rather than theoretical, methodology. My goal is to develop a doctrine of administrative review for accountability that harmonizes as closely as possible with administrative law at its current stage of evolution. I rely extensively on case law for different purposes at different stages of my thesis. In Chapter 1, court decisions describing social program development and administration provide a reliable means of authenticating the existence of the accountability gap in social policy-making. For this purpose, my focus is not the legal reasoning behind particular court decisions but, rather, the facts as established by the court. This evidence has survived the civil procedure process and, I suggest, is sufficiently reliable that the exercise of gathering my own primary data through interviews or ethnography is unnecessary.

In Chapters 3 and 4, I rely on case analysis to demonstrate the failure of conventional administrative law theory and doctrine to adequately address the accountability gap in social policy-making. For this purpose, I look to the legal reasoning employed by Canadian courts in social benefits decisions decided both under administrative law principles and Charter principles. I argue that, although these decisions may be correct in law, the result is, nonetheless, unacceptable since a large segment of government activity affecting the lives of Canadians in significant and intimate ways, remains unstructured and unsupervised.
Finally, throughout the thesis, I rely on the legal reasoning adopted in authoritative court decisions as an expression of the common law currently governing Canada. My proposed salve to the accountability gap in executive social policy-making integrates this existing law as much as possible, but benefits from a broader accountability focus in order to arrive at a proposed doctrine of administrative review for accountability that respects both constitutional and institutional limits.
CHAPTER ONE
“Paved With Good Intentions” – The Illegitimacy of Executive Social Policy-Making in the Welfare State

“It’s great to have a law…but it doesn’t make it happen.” Norm Forman, author of Exceptional Children – Ordinary Schools: Getting the Education You Want for Your Special Needs Child, as quoted in the National Post, May 16, 2005, p.A7

1. An Introduction To The Accountability Problem in Executive Social Policy-Making

Canada is admired internationally as one of only a few nations committed to redistributing wealth fairly and compassionately to the most vulnerable of its citizens, and Canadians are justifiably proud of social welfare policies such as universal health care, public education, and our social safety net. Not only do these programs figure prominently in the Canadian psyche, but they have a significant impact on the day-to-day lives of even the most fortunate of us. Of the many roles played by modern government – crime-stopper, defender of the borders, economic watchdog, health and safety risk-manager – government’s role of distributing social benefits affects our lives most directly and intimately.

It is primarily the provincial governments that act as social welfare managers. Although the federal government continues to play an influential role in funding social programs through the Canada Health and Social Transfer, most social programs fall within provincial jurisdiction.1 J. Patrick Boyer has argued convincingly that the increasing overlap of provincial and federal involvement in government programs is a significant reason for the erosion of government accountability.2 However, the specific resource allocation trade-offs that I address in this paper occur primarily at the

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1 The funding conditions contained in the previous Canada Assistance Plan have been largely removed in the Canada Health and Social Transfer. However, the federal government partners with provincial governments to coordinate social policy nationally through the Social Union Framework Agreement.

2 J. Patrick Boyer, “Just Trust Us”: The Erosion of Accountability in Canada (Toronto: Dundurn, 2003), ch.3.
provincial level, and provincial programs form the focus of most of the discussion that follows.

In spite of the budget cuts and privatization of the last two decades, this governmental role of social welfare manager still plays a crucial role in the lives of citizens and will continue to do so. As Michael Taggart has stated, “The state is not really doing less; it is doing it differently and often less visibly.” Government policies allocating benefits under health care, education, and social assistance programs have become just as significant to individuals as are regulatory policies which, in contrast, tend to restrict traditional legal rights and freedoms. Given the importance of social welfare programs in the lives of Canadian citizens, it is surprising the extent to which the policy trade-offs involved in developing these programs fall below the public radar screen.

Of course social policy is hotly debated at the macro level. In Ontario, Mike Harris’s “common sense revolution” introduced several controversial social policies, such as workfare, which were fully aired in the legislature and the media. And there is no end to debate about the appropriate level of funding for public education and health care in both national and provincial forums. But, these debates generally do not extend to the more detailed policy decisions required to make these broad-brush policy goals a reality. On the contrary, the cases discussed in this paper illustrate that many significant social policy decisions are made behind closed doors without the checks and balances provided by legislative and public scrutiny.

By social policy decisions, I refer both to the broad strokes policy decisions made by public servants involved in the development of social programs under the auspices of social services ministries, as well as the “street-level” implementation decisions made by the officials who administer social programs. Although it has been common in the literature to distinguish between top-level and street-level decisions, it is well accepted

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4 For the distinction between government’s redistributory role and its regulatory role, see Anthony Ogus, Regulation: Legal Form and Economic Theory (Oxford: Hart, 2004).
that both may contain a significant degree of policy content and there is no reason to observe the distinction for the purpose of my study of accountability. 5

It is not difficult to find descriptive and empirical accounts of a lack of accountability in social program development and implementation in Canada, Britain, and the United States. 6 Sometimes, these have been expressed as concerns about the degree of discretion exercised by street-level bureaucrats making eligibility determinations. 7 Although the problem may be labeled discretion, rather than lack of accountability, the underlying concern is the same. The street-level implementation decisions being made by bureaucrats administering a social program do not necessarily bear any logical relationship to an overarching policy contained in democratically accountable form such as legislation or regulations. The result is arbitrariness and inconsistency in implementation, uncertainty and insecurity for applicants, and, arguably, the failure to integrate fundamental social values into the administrative machinery. 8

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7 See, for example, des Rosiers & Feldthusen, “Discretion in Social Assistance Legislation”, ibid. (these authors take pains to adopt a neutral attitude to their study of discretion, commenting that discretion involves human judgment – an valuable aspect of our humanity), and Bouchard & Wake Carroll, “Policy-Making and Administrative Discretion”, ibid. (these authors take pains to adopt a neutral attitude to their study of discretion, commenting that discretion involves human judgment – an valuable aspect of our humanity).

8 See, for example, Lorne Sossin, “Discretion and the Culture of Justice” (2006) Singapore J. of L.S. 356.
In fact, the extent to which social policy actually exists in coherent, consistent form is debatable. In *Judging Social Security*, the authors note that social security reform in Britain tends not to follow any coherent approach. Rather:

The Social Security Act, like the Finance Act, has become an annual ritual in Parliament, comprising a number of piecemeal measures to achieve limited objectives. The frequent amendments to the statutory instruments governing the detailed benefit rules are likewise characterized both by their narrow objectives and by their obscure drafting. All too often further statutory amendments are necessary as inadequacies and inconsistencies in earlier legislation become evident.⁹

The issue is not whether or not executive social policy-making is sufficiently accountable to our democratic institutions. It is clearly not. Rather, the issue is how to promote accountability in executive social policy-making while recognizing the necessity for and, indeed, the value of, maintaining a strong discretionary component to these policy decisions.

Why is social policy created under such secretive, or at least informal, conditions? There are at least two closely related reasons. First, although government assumes a general obligation to provide health care, education and social services, in most cases individuals have no legal right to receive these benefits.¹⁰ In allocating social resources among the needy, government acts in a redistributive role in contrast to its more traditional regulatory role (*i.e.*, prohibiting or restricting socially undesirable behaviour). This has important implications for the accountability of these programs. Where government is perceived to be acting in a beneficent capacity, there seems to be less concern for structuring or supervising its conduct. A social program charged with dispensing benefits among eligible applicants does not typically affect legal rights (as that term is usually used), nor does it involve legal sanctions. Although executive policies about how best to allocate benefits have a crucial impact on the lives of

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¹⁰ Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20 at para. 117-119 (Ont.Div.Ct.), leave to appeal refused [1996] O.J. 1526 (C.A.), leave to appeal refused [1996] S.C.C.A. 373. The Supreme Court of Canada has thus far refused to interpret s.7 of the *Charter* to require the state to provide a minimum level of social assistance. However, this view is not unanimous as can be seen in Madame Justice Arbour’s dissent in *Gosselin v. Québec* 2002 SCC 84.
applicants, as a result of the nature of the government activity involved, these policies are not subject to the same degree of scrutiny as regulatory policies tend to be.

Second, as the welfare state has expanded and social programs have become more complex, more of the necessary policy trade-offs have been delegated down the legislative chain of command. It is increasingly the case that social legislation contains only a vague statement of general purposes to be achieved and the entire content of social programs is left to be created by the executive branch of government. The Cabinet delegates responsibility for particular programs to its ministers who, in turn, delegate the design of these programs to a large staff of unelected public servants. These public servants are required to make discretionary decisions at every stage of envisioning, designing, developing, coordinating, documenting, implementing, monitoring and evaluating social programs.

For example, the Ontario Ministry of Children and Youth Services ("MCYS") is responsible for a plethora of social programs aimed at children under the authority of the Child and Family Services Act.\(^{11}\) The paramount purpose of this legislation as set out in s.1 is to promote the best interests, protection and well-being of children. This purpose must be fulfilled on a limited Ministry budget so that crucial policy decisions must be made about how to get the best “bang” for the Ministry’s “buck”. These policy decisions sit along a spectrum of generality. What child interests should be targeted? What programs will best address those interests? How should the programs be defined in order to best promote child welfare? Which subcategory of children should benefit and at the expense of whom?

At one end of the spectrum, the legislature has provided some direction by mandating the creation of certain programs under the Act in varying degrees of detail. For example, Part III of the Act provides for an extensive child protection program. Many of the important determinants of this program are contained within the Act itself. Subsection 37(2) of the Act is a detailed definition of what it means for a child to be “in

\(^{11}\) R.S.O. 1990, ch.C.11.
need of protection”. Subsection 37(3) goes on to set out specific factors to be considered in determining the “best interests” of a child in need of protection.

At the other end of the spectrum, the Act leaves the creation of additional programs to the discretion of the Ministry. Part I of the Act is subtitled Flexible Services and ss. 7(1)(a) provides simply that the Minister “may provide services and establish, operate and maintain facilities for the provision of services”. The only statutory restriction on the Minister’s discretion in this regard is adherence to the stated purposes of the Act.

Why are some social programs created through legislation and others left to the discretion of the executive? The choice of government tool certainly does not correspond to the financial significance of the interests at stake. A substantial portion of MCYS’s budget is allocated to these so-called flexible services. Nor does the choice necessarily correspond to the importance of these programs for the lives of the citizens affected by them. Whatever the answer to this dilemma, the reality is that the choice of structuring social programs through legislation or delegating discretion for appropriate programs to the executive determines the degree to which these programs may be said to be legally accountable. Where the content of social programs is left to be developed by the executive, the direct legislative scrutiny contemplated by our parliamentary democracy does not take place.

Where no meaningful legislative framework exists to structure the creation of social programs, the executive has two choices. First, where statutory authority exists, the executive may choose to enact regulations governing the program. Regulations and other forms of delegated legislation are legal instruments and are enforceable in court.

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12 For example, Ontario’s Autism Intervention Program is authorized under s.7 of the Child and Family Services Act, ibid. In 2008-2009, MCYS committed $150 million in funding for this program: Ontario Results-Based Plan Briefing Book 2008-2009, Ministry of Children and Youth Services at 12. Regrettably, it is difficult to measure the relative significance of the programs authorized under different parts of the Act. This is because Ministry policy documents tend not to indicate the legislative authority pursuant to which various programs have been established. This fact, in itself, arguably emphasizes the lack of legal accountability in the development and operation of these programs.

13 In contrast, where social policy choices are clearly and explicitly enshrined in legislation, my view accords with that of the Supreme Court of Canada. Absent constitutional violation, accountability is achieved through our democratic process and the courts have no jurisdiction to intervene no matter how unfair the process for making those choices may seem: Authorson v. Canada (Attorney General), [2003] 2 S.C.R. 40 at paras. 37-41.
Although created without legislative input, regulations are subject to legislative scrutiny and thereby attain some measure of accountability.14

However, there is generally no obligation on the executive to enact delegated legislation.15 The alternative is for the executive to bypass the use of delegated legislation and to create social programs through informal rules contained within internal codes or policy guidelines. These informal rules are known as “soft law” or “quasi-legislation”.16 Soft law varies in its formality from relatively detailed written codes such as guidelines and circulars to the unspoken practices of government departments. In most cases, soft law is created by Ministry staff in the shadows of government through a process that rarely garners public attention. Soft law instruments are not subject to legislative scrutiny. Legally speaking, they are not binding but are mere factors to be taken into account in exercising administrative discretion.17 Practically speaking, however, soft law instruments are often the primary framework for administering social programs and, as such, have immense power to affect individual interests.

There is a wide gulf between the great influence of soft law and the few legal safeguards available to check its power. This accountability gap has led Lorne Sossin and colleagues to warn against the exercise of public authority “according to internal and sometimes secret principles and policies, not subject to a fair and accountable process of development or meaningful forms of public review”.18 Although the

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14 I describe existing accountability mechanisms applied to delegated legislation in Chapter 2, Part 3, below in the subsection “Accountability for Law”.
16 This label was adapted from public international law by Lorne Sossin (see his article “Discretion Unbound: Reconciling the Charter and Soft Law” (2002) 45 Can. Pub. Admin. 465 [Sossin, “Discretion Unbound”]) and has since been picked up by others writing in this area: Taggart, “From ‘Parliamentary Powers’ to Privatization”, supra note 3.
17 Query whether this long-standing principle has been overturned by the Court’s recent decision in Greater Vancouver Transportation Authority v. Canadian Federation of Students, [2009] 2 S.C.R. 295.
executive has responded with internal accountability mechanisms such as program evaluations and performance reviews designed to bridge this gap, I argue that these tools are insufficient to protect against unaccountable government.\textsuperscript{19} When in rare cases, the circumstances of social program development are revealed, it becomes apparent that many such programs are developed by the executive on a highly discretionary basis with few safeguards to prevent unprincipled decision-making other than the professionalism and good will of the decision-maker.\textsuperscript{20}

The beneficent posture assumed by governments allocating social benefits does not lessen the need for effective accountability mechanisms. This was recognized by Herman Finer in his contribution to the classic U.S. debate on the relative importance of accountability and moral responsibility for democratic governance.\textsuperscript{21} Finer quotes Montesquieu, “virtue itself has need of limits”, and argues:

\begin{quote}
We in public administration must beware of the too good man as well as the too bad; each in his own way may give the public what it doesn’t want. … A system which gives the “good” man freedom of action, in the expectation of benefiting from all the “good” he has in him, must sooner or later (since no man is without faults) cause his faults to be loaded on to the public also.\textsuperscript{22}
\end{quote}

In fact, there is perhaps more reason to be particularly concerned for the accountability of social policy-making. Social policy-makers are faced with scarce public resources, competing social needs, and a plethora of other government departments and

\textsuperscript{19} I discuss the inadequacy of existing accountability mechanisms applied to soft law in Chapter 2, Part 3, in the subsection “Accountability for Policy”.

\textsuperscript{20} John Willis famously argued that the personal qualities of civil servants were undervalued as accountability mechanisms. He numbered among these “a built-in sense of professional responsibility, a wholesome respect for ‘the traditions’ of the board or department, a watchful awareness of the critical eyes of their colleagues there, an instinct for ‘keeping the minister out of trouble’, a fear of unnecessarily irritating the newspapers, plain ordinary common sense and decency…”: John Willis, “Canadian Administrative Law in Retrospect” (1974) 24 U.T.L.J. 225 at 237. Also see John Willis, “Three Approaches to Administrative Law: The Judicial, The Conceptual, and the Functional” (1935) 1 U.T.L.J. 53 at 79. I heartily concur with Willis’ admiration of the civil service and I do not intend anything in this paper to be read as criticism of the profession. My point in succeeding chapters will be that, no matter how excellent are the individuals making up our civil service, the need for external accountability mechanisms remains.

\textsuperscript{21} Herman Finer, “Administrative Responsibility in Democratic Government” (1941) 1 Pub. Admin. Rev. 335

\textsuperscript{22} Ibid. at 338.
actors all with their own conflicting visions of the public interest. Most significantly, those stakeholders whose interests are affected by social programs are often those who are least likely to have the resources and the “voice” to call social policy-makers to account. This is in stark contrast to the regulatory world where powerful stakeholders insist on sophisticated accountability mechanisms in the form of “notice and comment” procedures, wide participation in decision-making and reason-giving requirements.23

Then there is the inherent complexity of social welfare policy trade-offs. As Genevieve Bouchard and Barbara Wake Carroll have remarked in the context of immigration policy, complex social policy areas characterized by “a high and emotive content” are less likely to be challenged in open policy debates so that important policy decisions are often quietly made by bureaucrats “by default”.24

My decision to focus my thesis on social welfare policy was partly a matter of personal interest and partly because social policy tends to offer particularly egregious illustrations of the lack of accountability in government’s allocation of public resources. However, accountability problems also arise in government’s allocation of economic benefits such as financial incentives offered to private business interests.25 As will become apparent, there is no reason why my project might not be applied more broadly to encompass this form of executive policy-making.

In what follows, I sometimes refer to “law-making” and at other times to “policy-making”. Law-making refers to legally binding rules contained in legislation or delegated legislation. Policy-making refers to rules contained within soft law instruments or created through the ad hoc exercise of discretion. The distinction between

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23 See, for example, the rules governing the Canadian Radio-television and Telecommunications Commission, online: http://www.crtc.gc.ca/, and those of the Ontario Securities Commission, online: http://www.osc.gov.on.ca/.

24 The authors explain that these forms of social policy are more likely to challenge the broader framework of accepted social values. It is simply easier for politicians to duck the issue: Bouchard & Wake Carroll, “Policy-Making and Administrative Discretion”, supra note 6.

law-making and policy-making has traditionally been an “all or nothing” divide with legislative and judicial accountability mechanisms applying only in the case of law-making. However, the reality of our modern social welfare state is that both legislative and soft law forms of social resource allocation have an equally important impact on the interests of the individuals affected. The increasing tendency of the executive to bypass law and govern social programs through soft law means that the executive may easily side-step legislative accountability and administrative law constraints. Therefore, a basic proposition underlying this paper is that there is no longer any relevant distinction between executive law-making and executive policy-making and that administrative law must be allowed to evolve so that equally robust forms of legal accountability apply to both.

2. Do Courts Have A Role In Addressing The Accountability Problem in Executive Social Policy-Making?

Courts’ administrative review jurisdiction operates as a mechanism for holding those members of the executive exercising administrative functions accountable for their compliance with legislative direction and common law legal standards. However, courts are reluctant to interfere with the policy function of the executive, particularly where budgetary constraints are pleaded. They are precluded by the doctrines of responsible government and the separation of powers from second-guessing government’s social policy and, in any event, are structurally ill-suited to do so. This deferential attitude prevents review of even the preliminary decision as to whether a social program is to be structured through legislation or through soft law. However, the restriction on judicial interference with policy-making has not prevented courts from expressing concern about the accountability of social programs in less direct ways. The

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26 See Chapter 2, Part 3, below for a discussion of legislative accountability mechanisms and Chapter 2, Part 4, below for a discussion of administrative review as an accountability mechanism.
27 See Chapter 2, Part 4, below.
28 I challenge these limitations in the effectiveness of administrative review as an accountability mechanism for executive social policy-making in Chapter 4, below.
29 Little Sisters, supra note 15.
30 Mary Liston argues that the Supreme Court’s recent expansion of the administrator’s duty to give reasons is one manifestation of the courts’ concern for accountability: Mary Liston, Honest Counsel: Institutional
opposite is also true. Courts sometimes rely on evidence of accountability in refusing to interfere with executive social policy decisions.  

There is much judicial and academic controversy over the advisability of permitting courts an increased role in supervising the policy-making role of government. Many scholars support a continuing limited role for the courts; arguing that executive policy-making gains legitimacy through the functional public administration process of “persuasion and compromise, consultation and consensus seeking, conferral of benefits and withholding of favors”. Others have argued for a more active role for the courts in protecting an expanded version of the rule of law. Still others argue that administrative law has a role to play beyond the classic judicial review model. For example, Lorne Sossin and Charles W. Smith have argued for the development of general procedural and substantive criteria to be applied to the creation of soft law in order to enhance the goals of accountability, impartiality and fairness. Elsewhere, Sossin has argued that administrative law norms such as independence, fairness, and trust have a place in the front-line process of discretionary decision making.

\[\text{Dialogue and the Canadian Rule of Law (2009) Manuscript Workshop, Centre for Ethics, University of Toronto [unpublished, archived in the personal files of Susan L. Gratton.] [Liston, Honest Counsel]}.\]

\[\text{31 For example, in R. v. Ministry of Defence ex p. Smith, [1996] 1 All E.R. 257 (C.A.), the Court of Appeal refused to interfere with the government’s policy of prohibiting homosexuals from serving in the armed forces. In finding that the government’s policy was not irrational, the Court relied in part on the fact that the policy had been approved by both Houses of Parliament as well as by the Ministry’s professional advisors.}\]


\[\text{34 Sossin & Smith, “Hard Choices and Soft Law”, supra note 18 at 892-893; Also see Pottie & Sossin, “Demystifying the Boundaries”, supra note 5 at 180-182; Sossin, “Boldly Going”, supra note 5 at 408-413, and Sossin, “Discretion Unbound”, supra note 16.}\]

The introduction of the Charter has led to a recalibration of this debate from one about judicial deference and the separation of powers to one about the distinction between social policy and social rights. It has become increasingly common for those claiming social or economic resources under a discretionary social program to ignore administrative law doctrine altogether and, instead, to seek intervention from the courts by invoking Charter rights and, most particularly, the right to equality under s.15.

My project forges a new path within the middle ground of this literature. I argue that the accountability gap in executive social policy-making is an administrative law problem in need of an administrative law solution. I seek to integrate public administration tools for bridging the accountability gap but I place them within a judicial review framework. And yet, by basing judicial review on the formal concept of accountability, I seek to avoid the problems inherent in giving substantive content to the rule of law.

In the next section of this chapter, I place the discussion in context by examining the particular social programs that formed the subject of the Wynberg case. Roderick Macdonald has stated, “it is impossible to write about administrative law without anchoring the discussion in real aspirations and real problems”. Ontario’s autism policy and the two social programs through which this policy was implemented illustrate the legal accountability gap in action and the serious impact that unaccountable policy decisions may have on the interests of vulnerable social groups.

3. Illustrating the Accountability Problem in Executive Social Policy-Making: A Case Study

Introduction


I provide a theoretical discussion of these problems in Chapter 3.

Macdonald, “Call-Centre Government”, supra note 32 at 453.
Ontario’s autism policy is primarily administered through two social programs. Pre-school children with autism may be eligible for a program now known as the Autism Intervention Program but originally labelled the Intensive Early Intervention Program ("IEIP"). The IEIP provides these children with a particular autism treatment known as Intensive Behavioural Intervention ("IBI"). School age children with autism are eligible for services under Ontario’s special education program ("SEP"). The SEP provides a variety of services but does not offer IBI to these children.

These programs became the subject of judicial scrutiny when a group of families of older children with autism brought a Charter challenge alleging that the failure to offer IBI treatment to school age children was discriminatory. At trial, Kiteley J. allowed the action, holding that both the IEIP and SEP violated s.15 of the Charter and were not justified under s.1. On appeal, a unanimous decision of the Court of Appeal overturned her decision on almost all grounds. Although the legal tests to be applied under s.15 and s.1 were not contentious either at trial or on appeal, the two sets of reasons display widely differing views of the process by which government allocates social resources among competing groups and the degree of deference to be shown by the judiciary to this process.

In my view, the Court of Appeal decision in Wynberg is clearly the correct one in law. But how do we explain the very different perspective of Kiteley J. at trial? I will suggest below that Kiteley J.’s decision was influenced by her concern for the lack of accountability displayed by government in developing and implementing these particular social programs. The Court of Appeal, in contrast, adopted a stricter Charter analysis and made a particular point of showing deference to the trade-offs that government determined were appropriate in developing the programs. My eventual conclusion will be that a rights-based analysis under the Charter does not properly concern itself with the accountability of government policy-makers, and that Kiteley J.

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40 I will refer to the program as the IEIP for the sake of consistency.
41 Wynberg (Ont.S.C.), supra note 37.
was mistaken in allowing her *Charter* analysis to be muddied with what is properly an administrative law issue.

But before examining how Kiteley J.’s reasoning was influenced by the legal accountability gap in the IEIP and SEP, it is important to first establish the existence of this accountability gap. In my view, the evidence in *Wynberg* detailing the development and operation of the IEIP and SEP provides a rare and valuable illustration of how the executive branch of government may make important social policy trade-offs with no legislative guidance and no internal checks sufficient to protect legal accountability. But before examining how Kiteley J.’s reasoning was influenced by the legal accountability gap in the IEIP and SEP, it is important to first establish the existence of this accountability gap. In my view, the evidence in *Wynberg* detailing the development and operation of the IEIP and SEP provides a rare and valuable illustration of how the executive branch of government may make important social policy trade-offs with no legislative guidance and no internal checks sufficient to protect legal accountability.42 Therefore, setting aside the *Charter* issues for the time being, it is useful to look at the IEIP and SEP as a case study in executive social policy-making. Later in the paper, I will return to the decision in *Wynberg* as an example of the role played by the *Charter* in response to this legal accountability gap.

**The Story of the IEIP and SEP**

Ontario’s IEIP was created in 1999 by the Ministry of Community and Social Services (“MCSS”) in order to fund IBI for children with autism aged two to five years.43 Ontario’s SEP is administered by school boards under the direction of the Ministry of Education (“MEd”) to provide educational services for “exceptional” children including school-aged children with autism. The government intended that these two programs would operate in tandem. IBI therapy would be offered only within the IEIP program. Once a child turned six years old, she would transition from the IEIP into the school system where she would receive non-IBI services through the SEP. Seamless service would be provided to permit children with autism to meet their educational potential.

Despite the best intentions of the program designers, both programs quickly began to run into problems. Insufficient resources were devoted to the IEIP so that the majority of pre-school children eligible for the program “aged-out” before services

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42 I say “rare” because government policy-making normally occurs behind closed doors with the details protected by cabinet privilege.

43 The name of the ministry charged with administering the IEIP has changed several times over the past few years. The current name is the Ministry of Children and Youth Services. For simplicity sake, I will refer to the relevant Ministry in all its manifestations as MCSS.
became available to them. Furthermore, the SEP did not provide appropriate services for these children once they entered into the school system. Both programs were operated inefficiently and non-transparently. At the end of the day, in spite of hundreds of millions of dollars and the best intentions of a plethora of civil servants, committees, and expert advisors, Ontario’s autism policy failed both children with autism and their families.

In many respects, the story of the IEIP and SEP is a story of committed public servants identifying and responding to the needs of a group of highly vulnerable children in a proactive and creative way. Where did things go wrong? Certainly not in the intentions of the individuals involved. This is not a story of government mismanagement or bad faith. Rather, it is one of failings at a structural level: a legislature that abdicates its responsibility for social policy by delegating its role to the executive wholesale without any meaningful legislative or regulatory framework; a well-meaning but undisciplined executive that creates and administers social programs without internal mechanisms for evaluating and monitoring those programs; and numerous government departments operating in vertical silos with little or no incentive to coordinate social programs that depend on one another for their success.

**Improvising an Autism Policy**

In the case of both the IEIP and SEP, the legislature failed to provide the executive with any meaningful direction as to the policy goals that were to be achieved with the budgets at the Ministries’ disposal. Each of these programs was created almost entirely through discretionary executive action.

The legislative foundation for the IEIP was s.7 of the *Child and Family Services Act* which provided the Minister with broad discretion to “provide services” and “make payments for those services...out of legislative appropriations”. The only statutory constraint on the Minister’s discretion under s.7 was the requirement that such services accord with the purposes of the Act, including its paramount purpose “to promote the

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44 *Wynberg, supra* note 37 at para. 57; *Child and Family Service Act, supra* note 11.
best interests, protection and well being of children”.45 Although s.214 of the Act authorized the Lieutenant Governor in Council to make regulations “governing the provision of approved services”, no regulations relating to the IEIP were ever promulgated.46 Guidelines governing the IEIP were developed by an ad hoc committee but, as will be seen, the process of approving the Guidelines was geared primarily to addressing budgetary considerations and the policy decision to adopt the six year cut-off was not meaningfully tested through discussion, debate or consultation. In any event, the program as implemented diverged from the Guidelines in several important respects.

Similarly, the SEP under the Education Act was also a highly discretionary program.47 Unlike s.7 of the Child and Family Services Act, s. 8(3) of the Education Act did impose a positive duty on the Minister to ensure that all exceptional children in Ontario were provided with “appropriate” special education programs and services. The term “appropriate” was not defined in the legislation. Although subject to this mandatory statutory duty and empowered to make regulations under ss. 11(1) par.5, the government chose not to make substantive regulations governing the provision of special education programs.48 Instead, the content of the SEP was left to discretionary government action. Unlike the IEIP, however, MEd did not provide even informal guidelines on what would be deemed to be “appropriate” special education programs or services in particular situations.49 The Ministry delegated this issue to individual school

45 Ibid. at para. 57. Other purposes of the Act included providing services in a manner that “respects children’s needs for continuity of care and for stable family relationships”, and “takes into account physical and mental developmental differences among children”: Child and Family Services Act, ss. 1(2) para.3, supra note 11 [subsequently expanded through amendment: S.O. 2006, c.5, s.1].
46 Ibid. at para. 570.
47 R.S.O. 1990, c.E.2, ss. 8(3).
48 The only regulation governing special education programs and services, Reg. 306, was procedural in nature and did not set out requirements for substantive special education programming: Wynberg, supra note 37 at para. 495. O. Reg. 181/98 provides for the identification and placement of exceptional students but does not regulate the provision of programs or services. For a discussion of the regulatory framework for identification and placement decisions, see Wynberg, supra note 37 at paras. 341-345.
49 Although the Ministry occasionally published Policy and Program Memoranda (PPM) on other issues, no PPM was issued with respect to special education: ibid. at paras. 496-497. The Ministry did create a proposed program standard for autism but this deliberately did not identify specific interventions or techniques but instead included a “general direction around strategies”: ibid. at para. 369. Nor did it include any minimum
boards who, in turn, delegated the matter to the discretion of individual school principals.\textsuperscript{50} Just as in the case of the IEIP, the Ministry approached the issue of what were “appropriate” special education programs and services as a budgetary matter rather than a substantive policy matter.\textsuperscript{51} As the plaintiff Wynberg argued in the factum at trial, “the Ministry ha[d] completely devolved program and service decision-making to the school boards (and even principals) with no oversight protocols or procedures put in place to monitor the use of that discretion”.\textsuperscript{52}

Because neither the IEIP nor the SEP was enshrined in regulation, neither program was subject to review by the Ontario legislature’s Standing Committee on Regulations. Nor was there any \textit{ex ante} mechanism for ensuring that the program was in line with the collective intentions of the Ontario legislature.\textsuperscript{53}

\textbf{The Evolution of the IEIP}

In the absence of any legislative or regulatory guidance, the IEIP was created through an informal process by a committee made up of civil servants and autism experts. The IEIP originated from a binder of material submitted to MCSS, MEd, and the Ministry of Health by Brenda Deskin, the parent of a child with autism. Ms. Deskin’s binder, sent in June 1998, made the case for IBI as the only effective treatment for children with autism. She asked all three Ministries to collaborate on a program to provide IBI treatment for her child and other Ontario children with autism. Ms. Deskin stated in her letter that her requests for funding had thus far been bounced from

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\textsuperscript{50} Kiteley J. held that boards had “considerable flexibility” in how they used a set funding formula to provide “appropriate” special education programs and services: \textit{ibid.} at para. 359. The trial judge heard evidence that it was up to school principals to ensure that appropriate individual education plans were provided and implemented for their exceptional students: \textit{ibid.} at para. 363. Also see \textit{ibid.} at paras. 383, 420, 423, 428.

\textsuperscript{51} \textit{Ibid.} at paras. 353-370.


\textsuperscript{53} I discuss below several provincial auditor reports and a public accounts committee report that evaluated the IEIP and SEP after problems with the programs began to surface. These reports were highly critical of the programs but had little impact on government behaviour. Later, I will suggest that the futility of these internal efforts at accountability influenced Kiteley J. in her trial decision.
Ministry to Ministry with each Ministry telling her that IBI treatment fell within the mandate of another.\textsuperscript{54}

Mrs. Deskin’s binder was reviewed by Jessica Hill, MCSS’s Assistant Deputy Minister and part of the Office of Integrated Services for Children (OISC).\textsuperscript{55} Hill familiarized herself with autism and its treatment, visited the Deskin home, established contact with the autism experts referred to in the binder, and toured one of the few centres in Ontario in which IBI was being offered. Hill became convinced of the merit of an IBI treatment program and began the process of gathering support for such a program within the Ministry and, ultimately, from Cabinet.\textsuperscript{56}

Hill assembled an internal taskforce composed of public servants and medical professionals to advise on the development of the program. A proposal took shape which was approved by the Minister and was eventually included in MCSS’s 2000 Business Plan submitted to the Management Board of Cabinet. It was assumed by the taskforce at the outset that the IEIP would be targeted at pre-school children and this assumption was included in the proposal submitted to Cabinet as well as in each subsequent version of the program as it developed. This assumption was influenced by several factors, including: (1) advice by medical experts that IBI was most effective in the early years; (2) MCSS’s existing policy focus on services for pre-school children; and (3) the assumption that appropriate services for school-aged children would be provided by MEd.\textsuperscript{57}

In April 1999, the Management Board approved the Ministry’s initiative and placed a hold-back on funds subject to the Ministry’s preparation of an implementation plan. The taskforce proceeded with the creation of an “MB20” document which laid out the

\textsuperscript{54} \textit{Wynberg, supra} note 37 at para. 69.
\textsuperscript{55} The OISC was a collective project of the Ministry of Health and MCSS, mandated with developing integrated social policy for children under 8 years of age.
\textsuperscript{56} The eventual creation of the IEIP was, in large measure, due to the vision and tenacity of Hill who saw an effective way by which government could help in “changing the trajectory for children”: \textit{Wynberg, supra} note 37 at para. 73. Hill spearheaded the IEIP and managed to have it approved despite the “fierce competition for the resources that exist in government”: \textit{Wynberg, supra} note 37 at para. 78 The fact that the IEIP was eventually found wanting does not change the considerable credit due to her and the other civil servants involved in the creation of a worthy social program.
\textsuperscript{57} \textit{Ibid.} at paras. 128, 148.
framework for the program. At this stage, the policymakers made particular mention of the importance of transition-planning for children entering into school. The framework also included reference to a detailed plan for program monitoring/quality assurance/and evaluation. Kiteley J. found as a fact that the policy-makers assumed that all essential aspects of the IEIP would be subject to monitoring and evaluation.

In August 1999, the IEIP framework was approved by the Management Board and the funds released from holdback. Program development proceeded in earnest with the creation of draft policy guidelines. The taskforce sought input from MEd officials who provided comments on the draft guidelines at various stages. However, MEd officials largely distanced themselves from the program by relying on the different statutory regime under which they operated.

Preliminary Guidelines were released in November 1999 and revised Guidelines including a section on transition to school were released in September 2000. By early 2000, implementation of the program had commenced. Clinical directors were hired in each of nine regional offices and the Clinical Directors Network was created to “operationalize” the Guidelines. In September 2000, the first children began to receive services.

The Failings of the IEIP and SEP

By June 2001, it was apparent that the assumptions behind the IEIP age cut-off had not been borne out. Most children were aging out before accessing services. Moreover, the education system was not responding to the needs of school-aged children with autism. Nor was MEd cooperating with MCSS on a collaborative approach to services for children with autism. The Transition to School Guidelines had had little impact. The school boards appeared to have a bias against IBI services and MEd had not ensured

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58 Ibid. at paras. 135-141, 144, 146, 148.
59 Ibid. at para. 128.
60 Ibid. at paras. 159-160.
61 Ibid. at paras. 162-176.
that school boards had special education plans to deal with school-aged children with autism. Finally, no monitoring or evaluation of the IEIP had ever taken place.

In spite of MCSS’s early assumption that MEd would provide appropriate special education programs to children with autism entering into the school system, MCSS and MEd were, to a large extent, working at cross-purposes.\textsuperscript{62} The trial judge noted that:

\textit{…notwithstanding the efforts by officials in MCSS and MCFCS to collaborate, officials in the Ministry of Education were operating in a silo, without seeking the input of those involved in the IEIP.}\textsuperscript{63}

For example, Kiteley J. heard evidence that the MEd unit responsible for developing program standards for special education did not interface with MCSS with respect to their work on services for school-aged children with autism. Instead, coordination of services was the responsibility of another unit within MEd.\textsuperscript{64}

The successful implementation of the IEIP required cooperation between MCSS and MEd. This was recognized by MCSS and mandated by Cabinet. And yet, MEd was unwilling to provide meaningful input into the program, possibly for fear that participation would lead to additional responsibility without a commensurate increase in its departmental budget.

Nor was the IEIP operating efficiently. For example, annual program expenditures were found to be less than the amounts budgeted even while increasing numbers of children were placed on the waiting list.\textsuperscript{65} Furthermore, for those children actually receiving services, the evidence was that they tended to receive significantly fewer hours of therapy than was recommended by their individual service plans.\textsuperscript{66}

Certainly, the IEIP was not operating transparently. The complete lack of any internal government monitoring or evaluation of the programs was a far cry from

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\textsuperscript{62} \textit{Ibid.} at para. 128.
\textsuperscript{63} \textit{Ibid.} at para. 256(d).
\textsuperscript{64} \textit{Ibid.} at para. 423.
\textsuperscript{66} \textit{Ibid.} at 16-17.
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government’s original intentions expressed in the documents on which Cabinet approval had been based. Kiteley J. found that, as of October 2002:

…none of the essential aspects of the program had been monitored or evaluated, only rudimentary data collection had been provided, and key performance measures had not been analyzed.

**Legislative Officers Investigate**

Both the Ombudsman and the Provincial Auditor of Ontario conducted separate reviews of the IEIP in 2003 and 2004. Both legislative officers were highly critical of MCSS’s implemention of the IEIP.

The Office of the Ombudsman criticized the MCSS in a 2004 Report. It noted that, although the IEIP was discretionary, the government had created expectations of service that it was unable to fulfill and that it was “unconscionable” that hundreds of autistic children “age out” without ever receiving service, some after waiting for over 18 months. The Ombudsmen specifically recommended that MCSS take steps to analyze information regarding the impact of service delays on children who age out.

Between November 2002 and March 2003, the Provincial Auditor of Ontario audited the children’s mental health services provided by MCSS and reported on its findings in its 2003 Annual Report. The IEIP represented 11% of children’s mental health expenditures over that period. The Provincial Auditor found that the Ministry “was not adequately monitoring and assessing the quality of the services provided by agencies” and, as a result, could not be assured that “vulnerable children in need are receiving the care and assistance they require”. This conclusion was all the more damning because a similar conclusion had been drawn in the Provincial Auditor’s previous 1997 audit. Although MCSS had agreed with the recommendations of that earlier audit, its progress...
in setting service standards and monitoring outcomes was found to be “less than satisfactory”.

The Provincial Auditor’s report was referred to the Legislature’s Standing Committee on Public Accounts which held its own hearings and issued its own report in July 2004. The Committee endorsed the Auditor’s report and made its own recommendations presumably aimed at lighting a fire under MCSS officials. The Committee expressed its own concern over the Ministry’s lack of reliable data and the lack outcome measures for services being provided. The Committee also instructed the Provincial Auditor to conduct a full examination of the IEIP.

The Provincial Auditor reported in November, 2004 and concluded that the MCSS still did not have adequate oversight procedures in place. For example, the Report concluded that many children were receiving far fewer hours of program services than their individual service plans called for. The Report also commented on the “questionable accuracy” and insufficient detail of the information about the IEIP provided by the Ministry. In one case, the Report noted that the MCSS had hired a consultant to review a particular service agency. The consultant had recommended certain measures to enhance agency governance and accountability but the Provincial Auditor found that the Ministry had not followed up to determine whether these recommendations had been acted upon. The Provincial Auditor also found that there was no way for the Ministry to determine whether the services provided by the IEIP were effective in providing the desired outcomes for children with autism. Although the MCSS had developed a data tool called the “Integrated Services for Children Information System” (ISCIS), no assessment of this information was ever carried out and, in fact, the Ministry’s regional office staff did not even have access to the

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72 2003 IEIP Report, supra note 70 at 55.
74 2004 IEIP Report, supra note 65 at 5.
75 Ibid. at 4.
76 Ibid. at 18.
information. In one telling passage, the Report even questioned the basic parameters under which the IEIP was operating:

...we were advised by staff at some of the service providers we visited that the Program would be most successful with young children having a mild to moderate level of autism even though eligibility for program services is restricted to children at the more severe end of the autism spectrum disorder continuum.

Regardless of whether or not eligibility for the IEIP was, in fact, misdirected, this possibility underlines why oversight of the program was so critical. One of the three key recommendations made in the Report was that the MCSS “develop effectiveness performance measures…to enable informed policy decisions on how funding for autism services can best be spent”.

In 2005, the Provincial Auditor conducted another follow up to its 2003 VFM Audit in which it concluded that, although the MCSS was making progress towards its earlier recommendations, progress continued to be “slower than expected”. As of February 16, 2006, the Ministry’s creation of a policy framework addressing children’s mental health services remained in the drafting stage.

The Provincial Auditor has also criticized MEd for a lack of accountability in respect of the SEP. The Provincial Auditor engaged in a detailed review of SEP procedures as part of its 2001 Annual Report. Just as in the case of the IEIP, the Provincial Auditor concluded that the SEP did not incorporate processes necessary to determine whether special education services were being delivered effectively, efficiently, and in compliance with policy goals. Furthermore, the framework under which the SEP was operating did not comply with applicable regulations nor even with internal MEd

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77 Ibid. at 19.
78 Ibid.
79 Ibid. at 6, 24.
81 online: http://www.ontla.on.ca/hansard/committee_debates/38_parl/session2/accounts/P002.htm.
82 2001 Annual Report of the Provincial Auditor of Ontario, VFM Section 3.06, Special Education Grants to School Boards [“2001 SEP Report”].
83 Ibid. at 126.
Neither quality assurance processes nor measurable performance targets existed to ensure that exceptional students were receiving appropriate services as mandated by the *Education Act*. Instead, the quality of services received depended heavily on the approach taken by individual principals at particular schools and on the extent of parental advocacy. To the extent that service standards existed, the Provincial Auditor found that “the focus is more on what is being done than on what is to be achieved”. Nor was this a new problem. The Provincial Auditor and the Standing Committee on Public Accounts had each called for processes to monitor the effectiveness of the SEP and better coordination of special education services in a similar audit seven years earlier. These recommendations had never been implemented. The Provincial Auditor noted:

Ministry personnel and educators made the point that it is difficult to determine how much service to provide to students with special needs, since there is always something more that could be done. Consequently, there is a need for guidelines that would assist educators in making such judgments and thereby reduce the risk that the allocation of finite resources is influenced more by advocacy than by relative need.

In 2003, the Provincial Auditor conducted a follow-up audit to report on MEd’s progress since the 2001 audit. The Provincial Auditor concluded that, although the Ministry had made significant progress towards complying with its recommendations, the completion of several initiatives currently underway was necessary to assure the accountability of the SEP. The Provincial Auditor expressed particular concern that there were not yet any procedures for ensuring that school boards complied with

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84 Ibid. at 126-127.
85 Ibid. at 127, 131.
86 Ibid. at 131-132.
87 Ibid. at 140.
88 Ibid., Appendix, at 149-150.
89 Ibid. at 127.
90 Ibid. at 132. This statement can be applied to executive social policy-making generally and articulates one of the basic themes underlying my dissertation.
92 Ibid. at 301.
legislation, regulations, and policies.\textsuperscript{93} Furthermore, little progress had been made in
establishing procedures to evaluate the progress and outcomes of students with special
needs.\textsuperscript{94}

Although the Provincial Auditor reports on the SEP had been issued by the time
that Kiteley J. heard evidence in the \textit{Wynberg} case (in the spring and summer of 2004),
she found that none of the special education programs and services had been
evaluated.\textsuperscript{95} The MEd essentially admitted its lack of evaluation and undertook to
address the problem in a funding announcement in August 2004.\textsuperscript{96} The trial judge
found that, although the Minister has broad duties to oversee the work of school boards,
“there is little systemic accountability imposed by the Minister, other than collection of
data”. The Ministry did not evaluate the efficacy of programs and services provided to
children with autism and did not require school boards to conduct their own
evaluation.\textsuperscript{97} In particular, Kiteley J. traced the evolution of program standards for the
special education of children with autism. She noted that MEd had been working
towards program standards and had established an Autism Standards Pilot Project in
the summer of 2003. However, as of April 2004, there was no commitment by the
Ministry to implement program standards.\textsuperscript{98} Kiteley J. also noted a new initiative of
MEd announced on August 4, 2004 involving the establishment of an Effectiveness and
Efficiency Office as follows:

There have already been many studies and task forces on special education.
Instead of further reviews, a permanent office would serve as an ongoing source
of accountability and support a higher level of cooperation on effective practices
between the ministry and school boards. The efficiency section would conduct
periodic audits, including classroom visits to verify with other ministries, such as
Health, and Children’s and Youth Services, which make important contributions

\textsuperscript{93} Ibid. at 301-302.
\textsuperscript{94} Ibid. at 305.
\textsuperscript{95} \textit{Wynberg}, supra note 37 at paras. 385, 529-530.
\textsuperscript{96} Ibid. at para. 385.
\textsuperscript{97} Ibid. at paras. 507, 508.
\textsuperscript{98} Ibid. at paras. 366-370.
to supporting children with disabilities. This office would eventually work with school boards on the full range of grants.\footnote{MEd Announcement, August 4, 2004, quoted in \textit{Wynberg}, \textit{ibid.} at para. 386}

It is encouraging that, subsequent to these various reports and the \textit{Wynberg} trial decision, both MCSS and MEd have continued work towards improving the accountability of the IEIP and SEP. In particular, a Working Table on Special Education was established by MEd in May 2005 to examine ways of ensuring that special education policy, funding and accountability all promote the government’s overall strategic goals. The Working Table’s Report was released in June 2006.\footnote{Ontario, \textit{Working Table on Special Education, Special Education Transformation, The Report of the Co-Chairs with the Recommendations of the Working Table on Special Education, May 2006}, online: \url{http://www.edu.gov.on.ca/eng/document/reports/speced/transformation/transformation.pdf}.} Not surprisingly, it recommends improved monitoring of the SEP and the creation of outcome targets against which the program may be evaluated. However, no mention is made of the Provincial Auditor reports making these same recommendations some five years earlier. Nor is there any mention of program standards for the special education of children with autism. Finally, there is no discussion of the work of the Effectiveness and Efficiency Office. Instead, we have yet another of the “many studies and task forces on special education”.\footnote{MEd Announcement, August 4, 2004 as quoted in \textit{Wynberg, supra} note 37 at para. 386.} It is fair to conclude that, as of the end of 2006, both the IEIP and the SEP were clear examples of government’s “dismal” record of program evaluation.\footnote{Donald J. Savoie, \textit{Breaking the Bargain: Public Servants, Ministers and Parliament} (Toronto: University of Toronto Press) at 161. A brief search in June 2010 did not reveal any significant changes to Ontario’s autism funding program itself. The 2007 Program Guidelines remain in force according to the current Ministry of Children and Youth Services website, online: \url{http://www.children.gov.on.ca}. However, there does appear to be an increased focus on coordination with MEd. The Ministry’s 2009-2010 Results-based Briefing Book indicates that a current project with MEd to facilitate the transition of children with autism to the public school system will be expanded: Ontario, Ministry of Children and Youth Services, 2009-2010 Results-based Plan Briefing Book at 13. For its part, in 2007, MEd published Policy/Program Memorandum No. 140 titled, “Incorporating Methods of Applied Behaviour Analysis (ABA) Into Programs For Students with Autism Spectrum Disorders (ASD)” available on the Ministry website, online: \url{http://www.edu.gov.on.ca}. More recently, MEd has developed a “Connections for Students” model which requires school boards to develop transition teams to assist children transitioning from IBI services to the public school system: Ontario, Ministry of Education, 2009 -2010 Accessibility Plan, at 23-24. The transition program is described in an autism newsletter issued in Spring 2010 jointly by the two ministries and available at both ministry websites.}
The Accountability Gap in the IEIP and SEP

All agree that the IEIP and the SEP were laudable policy initiatives. Very importantly, the Ontario Court of Appeal has determined not only that the programs are constitutionally sound but also that the policy choices made by government to extend benefits to some and not to others were reasonable and appropriate ones.\textsuperscript{103} I do not take issue with either of these conclusions. But this is not the end of the story. These conclusions do not address the significant accountability failures evident in the development and implementation of these programs.

In my view, the problems experienced under the IEIP and the SEP are due in large part to the absence of any legislative or regulatory guidance on autism policy from the Ontario legislature as well as the lack of internal measures monitoring the efficacy and outcomes of these programs. The policy trade-offs necessary in settling on a complex social benefits program, including the most controversial decision to provide IBI therapy only for pre-school children with autism, were made behind closed doors by unelected civil servants. These decisions were not reviewed by the legislature nor were they ever codified in regulatory form. Although parents and autism experts were given input into the process, some key policy trade-offs were made without their involvement. In fact, the age cut-off was not even debated internally but was a matter of assumption at the very outset of program development.\textsuperscript{104} Guidelines were created in the case of the IEIP but were not faithfully followed. Contrary to the Guidelines, children did not always receive the full services to which they were entitled. In the case of the SEP, no guidelines existed so that decision-making was left to individual school boards and principals with no process to protect against unprincipled, inconsistent policy choices.\textsuperscript{105} And since neither program was effectively monitored or evaluated, there was no way to

\textsuperscript{103} Wynberg (Ont.C.A.), supra note 37 at paras. 163, 167, 176, 179, 189.

\textsuperscript{104} Similarly, a subsequent initiative by MCSS to develop effective interventions for school-age children with autism was restricted at the outset to non-IBI services even before autism experts were invited to assist in designing the program: Wynberg, supra note 37 at para. 262.

\textsuperscript{105} In this respect, the use of the term “eclectic” by one MEd official to describe the Ministry’s policy regarding school children with autism may be seen as a euphemism for arbitrary, inconsistent decision-making: ibid. at para. 420.
determine whether or not they were operating as intended. In other words, the important policy decisions underlying the IEIP and SEP were made in an entirely unaccountable fashion.

Certainly, the doctrine of ministerial responsibility did not have any practical impact in preventing or responding to the problems in the IEIP and SEP. Criticism of the programs by the media, legislative audits, and even in Kiteley J.’s trial decision, was directed at the MCSS and MEd as institutions rather than at the individual ministers heading these institutions. Although the October, 2003 Ontario election resulted in a change of government from the Progressive Conservative Party to Dalton McGuinty’s Liberals, Ontario’s autism policy did not play a significant role in the election campaign, nor were the problems associated with the IEIP or SEP significantly ameliorated under the new government. It is far-fetched to suggest that the failure of P.C. Ministers of Education (Janet Ecker) and Community, Family and Children’s Services (Brenda Elliott) to retain their seats in the Legislature was a result of their work on the autism file. In fact, Elizabeth Witmer, who succeeded Ecker as Minister for Education in 2002, was re-elected in the 2003 and 2007 elections and currently sits in opposition.

Far from acting as an accountability mechanism, cabinet shuffles and other changes to ministries may, in some cases, have assisted the government in deflecting responsibility for policy-making. For example, in November 2003, when the new Liberal government transferred responsibility for children’s mental health services from MCSS to the new Ministry of Children and Youth Services, the new ministry was able to distance itself from the actions of its predecessors and plea for more time to implement the longstanding recommendations of the Provincial Auditor. In the Standing Committee on Public Accounts Report on Children’s Mental Health Services in July 2004, Ministry staff told the Committee that, although many of the Auditor’s 1997 recommendations had not yet been implemented, “[t]hey felt their ability to fully
respond stood an improved chance because of the new ministry”.106 The Committee was not impressed and responded:

The Committee appreciates the Ministry’s optimism about the future and its ability to implement all of the Provincial Auditor’s 1997 recommendations. It also remembers that the Ministry of Community and Social Services agreed with a number of similar recommendations at the time of the 1997 audit and said it would introduce the necessary action.107

The various Provincial Auditor, Public Accounts Committee, and Ombudsman reports investigating the IEIP and SEP are examples of another legal accountability mechanism often relied on to legitimize executive social policy-making. Again, these proved to be of little value in the case of the IEIP and SEP. They are not legally enforceable and the repeated failure of MCSS and MEd to implement many of the recommendations in these reports demonstrates that they also had little practical force.108 It is also fair to question whether the IEIP would have been as carefully scrutinized by these legislative officers if the court proceedings (of which the government was aware as early as spring 2001) had not made the issue into a political “hot potato”.109 It is interesting that, in this vein, some of the key data relied on by the Provincial Auditor in evaluating the IEIP was gathered only for the purpose of the court case.110

Kiteley J. addressed the problems with the IEIP and SEP extensively in her trial decision and this is an isolated instance in which legal accountability was eventually achieved through judicial review. The media was also effective in bringing the matter into the public sphere. However, these measures were too little, too late for many families of children with autism in Ontario. And, in any event, I will argue in Chapter 3 that it was inappropriate for Kiteley J. to attempt to bring accountability to these programs within the framework of a Charter challenge.

106 Standing Committee Report on Children’s Mental Health Services, supra note 73.
107 Ibid. at 4.
109 Wynberg, supra note 37 at para. 196.
110 2004 IEIP Report, supra note 65 at 5, 8-9, 12.
Chapter 1 – Introducing the Problem

The unfortunate lesson of the IEIP and SEP is that inadequate legislative or internal executive mechanisms exist for holding executive social policy-makers legally accountable to the legislature and, ultimately, to the public. In these two social programs, we see a microcosm of the overarching accountability gap in executive social policy-making. Important policy trade-offs are made without legislative or regulatory guidance and without the rigour of internal monitoring or evaluation. The executive has little incentive to ensure that social policy is effective, efficient, and coordinated among different ministries. The doctrine of ministerial responsibility is a theoretical construct with little practical significance. Even legislative audits seem to be easily ignored by the ministries affected.

Conclusion to Chapter 1

Government power has shifted away from legislatures and towards the executive as a result of the different nature of government’s role as social welfare manager. As one constitutional author explains:

Government during the nineteenth century largely acted as a referee in the social, political and economic life of the nation, and its responsibilities were, accordingly, of a negative or restrictive type. It was thus relatively easy for the courts and Parliament to stand aside from the economic life of the community and draw a few prohibitory boundaries to human behaviour. The courts successfully resolved most of the disputes which arose out of economic and other matters, relying for the most part on the concepts of the common law. Popular demands, however, upon the state began to mount. For example, it readily became apparent in Canada that private industry alone could not build a powerful nation. It was accordingly necessary for the government to begin playing a role in building within Canada the paraphernalia of a modern nation... Another of the chief influences bringing about recent social, political and administrative change has been the demand, by large parts of the population, for a greater share in the wealth of the national community. This is coupled with the demand that there should be a minimum standard of living beneath which no one should fall, and that the state should pass legislation and set up machinery to achieve this objective. Thus, we have witnessed, in recent years, a variety of means for redistributing wealth, and to some extent the various schemes such as unemployment insurance, workmen’s compensation, and medical-health schemes, are illustrations of the implementation of that principle...
Every time the state has met a social need, the establishment of additional
government machinery has usually been required. This has, accordingly, meant a
shift away from Parliament and the courts towards other areas of decision-
Hill Ryerson, 1976) at 51-52, 55, 56.}

The Law Reform Commission of Canada also has acknowledged that modern
government plays a new, very different role in the welfare state and that this role has
changed the nature of executive law-making and policy-making. The Commission
referred to this role for government as the “benefit-granting function” and it indicated
that this shift has impacted on relationship between individuals and the State “with the
purely administrative aspect predominating”.\footnote{Law Reform Commission of Canada, The Legal Status of the Federal Administration, Working Paper No. 40,
1985, at 52-53.}

As Kiteley J. seems to have recognized in \textit{Wynberg}, the manner in which
government chooses to structure social programs impacts the legitimacy of the decisions
made in implementing the program. When government creates a funding program
directly through legislation, our political system provides a mechanism to hold
government accountable. The legislation is debated and submitted to a vote in the
legislature. This very public process is the cornerstone of a democratic political system.
In contrast, when government promulgates regulations there is less accountability.
Regulations may be promulgated or modified by Order-in-Council with no notice and
little attendant publicity. At the other end of the spectrum, the executive may dispense
with regulations altogether and rely, instead, on increasingly informal instruments such
as policy directives, practice guidelines, and discretionary decision-making. Soft law
instruments are created by administrative officials and may fall well below the public’s
radar screen.

In subsequent chapters, I will argue that these varying degrees of extra-judicial
accountability achieved in relation to social programs should be relevant in regulating
the availability of administrative review. Where legislative or other accountability
mechanisms exist to structure the exercise of discretion in allocating resources, then
courts may defer to these mechanisms in keeping with our constitutional democracy. However, where no such checks have been imposed by the legislature or voluntarily imposed by the executive on themselves, then I will argue that it is necessary for the court to step in as a last resort to ensure that the delicate balance of power between legislature and executive is maintained.\footnote{I recognize that my proposal is a secondary means of achieving the ultimate objective. Ideally, we should be considering improving legislative accountability mechanisms in a proactive fashion, rather than waiting for particular cases of discretionary abuse to work their way up to the courts. However, absent legislative will to strengthen the legislative/executive link more directly, my view is that the courts may act as a necessary and valuable “back-up” accountability mechanism. I discuss this further in Chapter 2.}

The growing accountability gap for executive social policy decisions requires a greater appreciation for, and integration of, areas of commonality between public law and public administration. Public lawyers, for the most part, continue to attempt to apply lawyer’s values to a world that is simply no longer suited to it.\footnote{Mary Liston also decries the “silo and fragmenting of academic disciplines” such as public law, political science and public administration: Liston \textit{Honest Counsel}, supra note 30 at 87.} In my view, the purpose of administrative law is, at its very heart, to hold government to account. In our increasingly complex welfare state, I suggest that administrative law must embrace the public administration concept of accountability more directly and look to extra-judicial methods of accountability in determining whether, and the extent to which, administrative review of executive social policy decisions is appropriate. This will be the topic of Chapter 2.
CHAPTER TWO
The Concept of Accountability - A Broader Perspective on the Legitimacy of Executive Social Policy-Making

Introduction

Accountability has become a pervasive concept in the study of government from all angles – political science, political theory, public administration, regulation and public law. It is said to be a universally desired value, like fairness and equity.1 Citizens want it, governments promise it, and the media decries its absence. In the past decade, there has been a proliferation of government reports, policies, and legislation, all aimed at achieving accountability. These have issued from governments on both sides of the Atlantic and increasingly from international organizations.2

Not to be outdone, the Harper government in Canada was elected in the wake of the sponsorship scandal on a platform of improved accountability in government. It followed through with the Federal Accountability Act which became law on December 12, 2006.3 Also in 2006, the Gomery Commission released its second report on the sponsorship program entitled Restoring Accountability in which it makes

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recommendations for addressing the power imbalance between the legislative and executive branches of government.4

Both the *Federal Accountability Act* and the Gomery report are broadly aimed at addressing abuses of power and conflicts of interest within government, *i.e.*, cases in which public servants act in bad faith or outside their scope of authority.5 Paul Thomas has referred to this as the “integrity, ethics and morality” context of accountability, as opposed to its “legal, political, organizational context”.6 The latter is not concerned with wrongdoing so much as with evaluating the day-to-day performance of government in relation to legislative goals. In practice, these two aspects of accountability will overlap to a greater or lesser extent. However, my thesis focuses primarily on accountability in the second sense, *i.e.* in its legal or organizational context.7

Governments, the media, and the public all tend to focus attention on ethics accountability while avoiding, for the most part, the more complex notion of legal accountability.8 And yet, I suggest that it is legal accountability, rather than ethics accountability, that has suffered more markedly as a result of the growth in executive governance over the twentieth century. The legislative void resulting from the expansion in executive governance has not necessarily caused a decline in ethical standards so much as it has required public servants to step into the breach and use their best efforts to create policy “on the fly”.9

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5 I will use the term “public servant” throughout this Chapter to refer to any member of the executive branch of government whether from the political or civil service ranks.


7 The labels I use here to distinguish between these two contexts of accountability are not standard within the literature. What I refer to as legal accountability is elsewhere called by any number of names including: “political accountability”, “democratic accountability”, “hierarchical accountability”, etc. Because no standard typology of accountability has yet developed within the literature, in this chapter I will most often simply refer to “accountability”.

8 Thomas, “Swirling Meanings”, *supra* note 1 at 41.

In any event, accountability in both these contexts is one of the most important principles being debated in the field of public administration today. The popularity of accountability initiatives and debate over the last few decades has been ascribed to several factors including: the exponential increase in government programs and services over the twentieth century; the heightened expectations of a more educated and sophisticated public; the informational capacity of the internet; and, most importantly, the devolution of policy-making and service delivery to lower levels of government as a result of the revolution in public administration known as New Public Management.10

Behind the united front calling for increased government accountability lies a great deal of controversy over what accountability means and how it is best achieved. In this chapter, I examine the concept of accountability as developed within the public administration literature, and then situate this concept within the constitutional framework grounding administrative law. In my view, accountability is a bridging concept shared by both disciplines. Both administrative law and public administration address the same problem – the legitimacy of executive action - but have developed largely in isolation from one another. By adopting a broader public governance perspective, I hope to marry the best insights from both fields with the goal of rationalizing and promoting accountable government within our mature welfare state.

This chapter has four parts. In part one, I introduce the concept of accountability as currently understood within administrative law and public administration respectively. In part two, I broaden my focus to encompass both disciplines and sketch out my vision of modern government as a complex web of political and administrative accountability relationships. In part three, I examine the myriad of accountability mechanisms that currently exist to legitimate executive social policy-making, with particular emphasis on their shortcomings. In part four, I examine the role that courts currently play as an accountability mechanism of last resort and I demonstrate how courts may play an

expanded role in holding government accountable for its executive social policy-making role.

At the outset, it is necessary to explain a significant restriction in the scope of my accountability analysis. Although I seek in this chapter to expand the traditional administrative law approach to accountability, I have restricted my discussion to a narrow segment of government activity: policy-making within social service ministries and other central government departments. This is in direct contrast to much of the accountability literature which tends to focus on government actors lying furthest from the centre of power\textsuperscript{11}, or outside government altogether.\textsuperscript{12} Although the accountability gap existing within the central executive may be less evident, covered as it is by the platitude of ministerial responsibility, it represents just as pressing a problem for the legitimacy of government action. The proliferation of quangos, privatization, and outsourcing may be viewed as exacerbated instances of this pre-existing accountability gap. Before tackling these problems caused by the fragmentation of the public sector, I have found it useful to address the problem at its root and, thereby, hope to generate an approach to the problem that is adaptable to other contexts in future work.


1. Defining the Concept of Accountability

The term “accountability” has been so over-used that some might argue it has lost credibility as a concept around which to structure a legal analysis of executive social-policy making. However, I suggest that the ubiquity of accountability within the public administration and governance literature is an important reason why lawyers should pay more attention to it. By reconnecting with the legal origins of the accountability concept and re-appropriating the term for use within legal as well as public administration contexts, we may be able to better coordinate traditional and modern accountability mechanisms with the administrative judicial review function. The goal is to develop a blended concept of accountability integrating the best of both public administrative and legal approaches to the legitimacy problem plaguing executive social policy-making. With this in mind, I turn to a discussion of the concept of accountability as developed in the legal literature and the public administration literature respectively.

Accountability in Legal Literature

Accountability is a foundational legal concept linking constitutional theory and administrative law. Accountability in this sense (often termed “democratic accountability”) addresses the legitimacy of government action or “the necessity for authorization for the exercise of state power that affects the people”. The requirements of democratic accountability pervade the intricate web of relationships existing among the legislative, executive and judicial branches of government. It is by addressing these

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14 The practical implications of this new integrated approach to administrative review are explored in Chapter 5 below.
requirements within each strand in this web that the Canadian constitutional democracy has been successful in maintaining a delicate but stable balance of power.

Since the advent of the Charter, one particular strand of this web has dominated public law discourse. This is the accountability relationship existing between the policy branches of government (the legislature and executive combined) and the judiciary. My thesis is concerned, instead, with another strand of the web: the accountability relationship existing within the policy branches, i.e., between the legislature, on the one hand, and the executive, on the other hand. Here, the key accountability relationship is the accountability of the executive to the legislature. Although the focus of this thesis is judicial review, the role of courts in this accountability relationship is an indirect one. Administrative judicial review operates as a subsidiary mechanism for holding the executive accountable to the legislature. It is important to emphasize at the outset my position that this role for courts is distinct from their direct role in holding the policy branches of government accountable for compliance with constitutional standards.

The term “accountability” is not employed in public law theory as often as is its cousin, “responsibility”. The doctrine of ministerial responsibility was traditionally the conceptual linchpin linking the goals of the legislature with their implementation by members of the executive. The reality of further delegation, from the ministerial level down through the departmental chain of command, involved that “other”, the public service, and was, accordingly, not a concern for public law. However, the term “accountability” was occasionally invoked in referring to the doctrine of procedural

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17 See, for example, Mary Liston’s argument for the metaphor of institutional dialogue as a means of promoting accountability between the legislature and the judiciary: Mary Liston, Honest Counsel: Institutional Dialogue and the Canadian Rule of Law (2009), Manuscript Workshop, Centre for Ethics, University of Toronto [unpublished, archived in the personal files of Susan L. Gratton] [Liston, Honest Counsel].

18 The distinction I draw here between constitutional and administrative review is discussed in more detail in Chapter 3.

19 I refer here to the Anglo-Canadian tradition. In the different constitutional framework of the United States, more attention has been paid to the concept of accountability: see, for example, Jerry L. Mashaw, “Structuring a ‘Dense Complexity’: Accountability and the Project of Administrative Law”, [2005] Issues in Legal Scholarship 1

fairness, where procedural fairness was understood as a rough legal analogue to accountability in administrative governance.\(^{21}\)

More recently, administrative law scholarship has recognized the value of a more holistic approach to the legal issues surrounding government.\(^{22}\) Attention to the concept of accountability has increased as legal scholars have expanded their interest beyond the administrative functions of government to encompass quasi-legislative functions and the legitimacy of public policy generally.\(^{23}\) Commensurate with this trend has been the increasing appearance of the term “accountability” in legal literature. For example, the most recent 6\(^{th}\) edition of the British treatise, *The Changing Constitution*, lists accountability among the values making up the rule of law. Earlier editions make little mention of the concept.\(^{24}\) British administrative law scholars Carol Harlow and Dawn Oliver have been pioneers in examining administrative law from an accountability perspective.\(^{25}\)

The concept of accountability has not been quite as prevalent in Canadian administrative law literature. David Mullan was among the first to raise concerns about

\(^{21}\) “[A]s administration grew and representative political mechanisms provided only a formal method of accountability, the formal approach of courts was increasingly perceived to be producing unsatisfactory outcomes and resulted in pressure on the courts to abandon formal classification in favour of a functional approach embodied in the notion of procedural fairness”: Martin Loughlin, “Procedural Fairness: A Study of the Crisis in Administrative Law Theory” (1978) 28 U.T.L.J. 215 at 240.


\(^{23}\) I adopt the same definition of “legislative functions” as earlier writers in this area: government decisions that are “general” and “policy-based”: see Geneviève Cartier, “Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?” (2003) 53 U.T.L.J. 217 at 220-221 [Cartier, “Procedural Fairness”]. It is important to note that “legislative” decisions in this context are decisions made by government officials exercising delegated authority. This is a crucial restriction in the scope of my study – true legislative decisions, made by legislatures, are legitimized through the electoral system and legislative procedures or, to the extent they are not, this is a problem for political science rather than administrative law.


the accountability of government policy-making, and to posit a role for administrative law in fashioning a solution. In his 1979 paper written for the Ontario Commission on Freedom of Information and Individual Privacy, Mullan recommended the adoption of a general “notice and comment” requirement for rule-making and policy-making in Ontario, stating:

…the concept of ministerial responsibility, in which McRuer places so much trust, is completely inadequate in these days of incredibly complex government as the major, between elections, locus of political accountability. What are needed are supplementary forms of responsibility for government action and a recognition that democracy must be established in those highly significant areas outside of the legislature where laws and policies are fashioned.26

Later, in a 1993 article, Mullan raised “serious doubts…about the extent to which the national executive is accountable to the citizenry in the context of individualized grievances”.27 Mullan foreshadowed my own thesis by arguing that judicial review may be an appropriate “surrogate accountability vehicle” in certain circumstances where traditional accountability mechanisms have failed.28 Relying on similar arguments made by Australian and U.S. scholars, Mullan suggested, in particular, that structural flaws in executive decision-making processes, such the absence of “any central or coordinating authority that has thought the matter through as an integrated whole”, may merit a “harder judicial look”.29

Mullan took this position again in a 1999 article written for the Canadian Institute for the Administration of Justice collection on The Judiciary as Third Branch of Government.30 After surveying the existing limited scope for judicial review of policy-making, Mullan briefly considered various options for expanding judicial intervention

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28 Ibid. at 159, 163.
29 Ibid. at 176.
in these decisions. Mullan echoed my own concern that individual rights not become the sole sluice gate regulating the availability of administrative review.\textsuperscript{31} Instead, he invoked David Dyzenhaus’ argument that judicial deference must be earned through “justification” or providing a reasoned basis for the making of decisions and the taking of actions.\textsuperscript{32} Mullan suggested that the principle of justification might require courts to act more aggressively in ensuring transparency in policy-making processes. Mullan did not develop this argument or provide examples of how a relative lack of justification might operate to trigger administrative review. However, he concluded with the need for “new modalities of democratic accountability” in order to preserve and enhance democratic institutions where these “atrophy or fail to fulfill optimally their constitutional role”.\textsuperscript{33}

More recently, Lorne Sossin and colleagues have taken up the call for improved accountability of policy-making, particularly in the social welfare sphere:

In our view, to permit public authority to be exercised according to internal and sometimes secret principles and policies, not subject to a fair and accountable process of development or meaningful forms of public review, undermines both the integrity of public administration and the rule of law.\textsuperscript{34}

Sossin argues that part of the solution is to subject policy guidelines to judicial review. Sossin also calls for legislatures or cabinets to create central standards for the development and application of policy guidelines.\textsuperscript{35}

\textsuperscript{31} The dichotomy between individual rights and the collective public interest as social goals, and the implications for judicial review, are addressed in Chapters 3 and 4.

\textsuperscript{32} Mullan, “The Role of the Judiciary”, supra note 30 at 374.

\textsuperscript{33} Ibid. at 375.


\textsuperscript{35} Sossin & Smith, “Hard Choices and Soft Law”, ibid.
Genevieve Cartier employs the concept of accountability in her call for the extension of the duty of procedural fairness to the legislative functions of government.\textsuperscript{36} She shares the concern that executive authority is growing “at the cost of parliamentary accountability” and that “judges seem unwilling to participate in the development of accountability mechanisms”.\textsuperscript{37} The result is a significant “democratic deficit” in executive policy-making:

At a time when the Governor in Council held limited powers, it might have been enough to count on its being accountable to Parliament. But nowadays, this form of control has become either ‘a dangerous myth or a dangerous reality’ and could, therefore, hardly sustain any substantial argument of accountability. At a time when the range of powers delegated to the executive is considerable, the need for parliamentary accountability is even more pressing. Yet the existing means of control make it look as though the executive has been given a free hand.\textsuperscript{38}

Certain English administrative law scholars have delved a bit further into the definition and boundaries of the concept of accountability.\textsuperscript{39} In particular, Jeff King at the University of Oxford has invoked the concept of accountability in his argument for greater judicial intrusion into the government’s allocation of scarce public resources. King’s work bears important similarities as well as differences to my own. King also argues that judicial review is an appropriate accountability mechanism for supervising social benefit decisions given the limitations of existing extra-judicial accountability mechanisms. However, his work focuses primarily on front-line social benefit decisions, what he refers to as “individuated justice”, rather than collective social policy-making as is my primary focus.\textsuperscript{40} As a result, King’s discussion of the broader extra-judicial


\textsuperscript{37} Cartier, ibid. at 218.

\textsuperscript{38} Cartier, ibid. at 243 (also see 246-247).


\textsuperscript{40} King, ibid. at 3.
accountability network governing these decisions is correspondingly limited to adjudicative bodies. Furthermore, King adopts a social rights model of administrative review. He proposes that courts should take into account the “substantive justice” or merits of government decisions in exercising their review role. This contrasts sharply with the procedural vision of accountability review that I will develop below.

The increasing appearance of the term, accountability, and discussion of the underlying problem in the administrative law literature indicates, first, that the legal academy has recognized the need to develop new forms of democratic control that are responsive to modes of public governance in the 21st century and, second, that several scholars see a role for the courts here. The remaining question is not whether but how this is best achieved.

**Accountability in Public Administration Literature**

More rigorous development of accountability at the conceptual level is provided in the public administration literature. The literature is replete with calls for improved government accountability. By this is often meant financial accountability – i.e., ensuring that taxpayers are receiving value for money in the provision of government services. But it also encompasses the broader notion of protecting public values within government. Even in this broader sense, accountability conveys both the “legal political, organizational” and “integrity, ethics and morality” meanings introduced above. Yet another popular way of dividing the concept is to distinguish among accountability for finances, accountability for fairness (procedural), and accountability for performance (results).

Frequently the accountability debate is framed by asking whether the doctrine of ministerial responsibility remains sufficient to hold government accountable in the

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43 See, for example, Christopher Dunn, “The Quest for Accountability in Newfoundland and Labrador” (2004) 47 Canadian Public Administration 187.
44 Thomas, “The Swirling Meanings”, *supra* note 1 at 41.
modern administrative state. The doctrine of ministerial responsibility assumes the existence of a single chain of authority running unbroken from the legislature to cabinet to individual ministers and, through ministers, down the hierarchical management structure existing within government departments to the lowest level officials responsible for policy matters. Most scholars argue that ministerial responsibility is no longer viable, and many argue that modern accountability mechanisms borrowed from business practices are necessary in order to respond to increased delegation of authority down through the public service ranks.

Other scholars frame their discussion in terms of the classic “W” questions. Who is accountable? To whom? For what? And how? Still others apply an economic analysis to the problem of holding agents accountable for delegated authority. Some authors have identified the need for some rationalization or ranking of the array of different accountability mechanisms applied to public servants. The blended concept of accountability that I articulate below would serve this purpose.

The concept of accountability is understood differently in the American literature and the Commonwealth/European literature. In the U.S., accountability is primarily used as a normative concept referring to a set of standards for the evaluation of public conduct. In the Commonwealth/European literature, accountability tends to be used as a descriptive concept referring to the institutional arrangement whereby an actor is held to account by a forum. I adopt this latter understanding of accountability which is more consistent with my focus on the legal, rather than ethics, context of accountability.

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47 Stone, ibid. at 505.
48 Mulgan, Holding Power to Account, supra note 10.
50 See, for example, Mulgan, Holding Power to Account, supra note 10 at 222.
Within the Commonwealth/European literature, a tentative consensus on the definition of accountability is emerging among a core group of scholars. Several authors, including Mark Bovens from the Netherlands, have written of the need to rescue the concept from being expanded into a “dustbin filled with good intentions, loosely defined concepts and vague images of good governance”.  

Bovens, Richard Mulgan in Australia, and Paul Thomas in Canada, have all argued for a narrower, back-to-basics definition of accountability involving an obligation to explain and justify one’s conduct to an authority. This core definition is also adopted by legal scholars Dawn Oliver and Carol Harlow in the United Kingdom.  

Bovens phrases his definition as follows:

Accountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.

Mulgan’s definition of accountability in his treatise, *Holding Power to Account*, involves the same elements. However, Mulgan’s definition is slightly narrower since he assumes the existence of a principal-agent relationship. For him, accountability is the combination of the agent’s obligation to explain and justify his or her actions on behalf of a principal, as well as the principal’s right to seek information and explanations and to impose remedies and sanctions.

In Canada, Peter Aucoin and Mark D. Jarvis define accountability in their study of government accountability written for the Canadian School of Public Service, *Modernizing Government Accountability: A Framework for Reform*. Their definition is substantively similar:

Accountability in democratic governance and public administration requires that those who exercise public authority be subject to scrutiny and evaluation by a

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55 Bovens, “Analysing and Assessing”, *supra* note 1 at 450; Bovens et al., “Public Accountability”, *supra* note 52.
56 Mulgan, *Holding Power to Account*, *supra* note 10 at 10.
superior public official or public body. Accountability imposes obligations: those who exercise authority must render accounts to superiors, and superiors must extract accounts and pass judgment on them. When this judgment is negative, superiors take corrective action or apply sanctions, as they deem required.  

Fellow Canadian scholar Paul Thomas adopts a similar definition again and fleshes out the accountability relationship definition by including five “process” components: delegation or negotiation of responsibilities; provision of authority and resources for fulfillment of responsibilities; obligation to answer for performance of responsibilities; duty to monitor performance and correct when problems arise; and bestowal of rewards and penalties based on performance.

From these definitions, we can see a central definition of accountability beginning to coalesce within the public administration literature. Accountability is a relationship existing between a public servant and a superior or other forum with authority. On the one hand, the public servant is obligated to provide information, explanations and justifications for his or her conduct and, on the other hand, the accountability forum has the right to seek information and explanations from the public servant, and to impose remedies or sanctions. Mulgan describes the process of accountability in three stages: the information-gathering stage involving initial reporting and investigation; the discussion stage involving justification and critical debate; and the rectification stage, involving the imposition of remedies and sanctions. Different accountability relationships may emphasize different stages of the process.

Under this central definition of accountability, four key attributes of accountability appear to have been more or less settled. First, accountability requires a relationship of authority. This definition excludes the notion of internal accountability, i.e., accountability to one’s self. Mulgan reserves the term “responsibility” for this internal sense of duty, thereby contrasting the two classic forms of administrative control.

57 Peter Aucoin & Mark D. Jarvis, Modernizing Government Accountability: A Framework for Reform (Canadian School of Public Service, 2005) at 7 [Aucoin & Jarvis, Modernizing Government].

58 Thomas, “The Swirling Meanings” supra note 1 at 37; Aucoin & Jarvis include a similar list of attributes in Modernizing Government Accountability: ibid. at 29.

59 Mulgan, Holding Power to Account, supra note 10 at 30.
debated by Herman Finer and Carl J. Friedrich. The attribute of authority has two implications for the concept of accountability. Accountability requires an external means of scrutiny in order to be effective. In addition, the concept does not encompass situations of voluntary “grace and favour” reporting that may lead to transparency but do not qualify as accountability mechanisms.

Second, most authors seem to agree that accountability requires the possibility of consequences being imposed in the event of misconduct. However, it is not necessary that the accountability forum itself has the power to impose these consequences. It is sufficient if indirect consequences result from the accounting exercise. Therefore, consequences may range from formal sanctions (or, less often, rewards) to publicity garnered through media attention.

Third, an important attribute of accountability implicit in its definition, although not often articulated, is evaluation of the public servant’s conduct by the accountability forum. Between the explanation/justification stage and the passing judgment/rectification stage, the accountability forum must evaluate the public servant’s conduct in order for judgment to be meaningful. It may be that evaluation is subsumed within the notion of passing judgment but, it is useful to make this explicit because it leads to the fourth attribute of accountability: evaluation by means of a set of standards.

This fourth attribute, the requirement for standards against which the public servant’s conduct is measured, is also less frequently discussed in the literature. Again,

60 Finer argued that administrative responsibility required external control, whereas Friedrich emphasized the importance of personal responsibility in democratic governance: Herman Finer, “Administrative Responsibility in Democratic Government” (1941) 1 Public Administration Review 335, responding to several earlier articles by Carl J. Friedrich.


62 Mulgan, ibid. at 11.

63 Mark Philp disagrees, arguing that the power to sanction is not a necessary attribute of an accountability relationship: Mark Philp, “Delimiting Democratic Accountability” (2008) Political Studies 1 [Philp, “Delimiting Democratic Accountability”].

64 Bovens “Analysing and Assessing”, supra note 1 at 452; Mulgan, Holding Power to Account, supra note 10 at 10.

65 See the tables in Bovens, Schillemans and Hart, “Public Accountability”, supra note 52, in which the authors differentiate among the evaluative roles of accountability mechanisms existing for different purposes.
however, it is implicit in the very definition of accountability. Dawn Oliver has stated that “accountability cannot be effectively imposed if the criteria against which conduct is to be measured in the process of calling to account are not made clear”.66 Carol Harlow agrees and describes “standards, values, and principles” as an “essential aspect” of accountability, “setting in place the framework against which political and administrative actors are judged.”67

It is important, then, to distinguish the concept of accountability from the standards which are employed in its pursuit. Accountability operates as an institutional structure or set of procedures flowing simultaneously in both directions; upwards from the public servant and downwards from the accountability forum. Different accountability mechanisms may use different standards in evaluating conduct for different purposes. Although the term “accountability” is often employed as a euphemism for good government, this is to confuse the mechanism of accountability with particular accountability standards applied by certain accountability forums – i.e. values of good governance such as transparency, participation, responsiveness, and answerability.68 For example, answerability implies a duty to provide information and explanations for events but it omits the imposition of consequences for mistakes or non-performance.69 Responsiveness refers to the inclination and capacity of a public servant to meet the expectations of others but does not convey any sense of obligation or authority.

The challenge of choosing widely acceptable standards against which public conduct may be evaluated is a crucial one in any accountability relationship. In an early, influential work on accountability, the authors explain that accountability requires both “a shared set of expectations and a common currency of justifications”.70 Agreeing upon accountability standards was not so difficult when the financial audit was the main accountability mechanism employed in evaluating government. Financial audits

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68 Mulgan, Holding Power to Account, supra note 10 at 21; Thomas, “Swirling Meanings”, supra note 1 at 39-40.
69 Thomas, ibid. at 39-40.
involve the “language of arithmetic”. This is a relatively neutral, technical exercise: “It is about keeping true and accurate accounts in a realm where there is agreement about the currency: money”. However, standards for service delivery within the welfare state are more complex and less easily agreed upon. Day and Klein trace this problem back to the 1834 Poor Law in England. The law was to be supervised by a Board of Commissioners pursuant to “well-defined objects” and “clear rules” created by Parliament. This vision was never fully achieved, in part because it did not anticipate the ability of those implementing the law to substitute their own objectives and rules. In other words, agreement as to the applicable accountability standards was incompatible with the reality of administrative discretion. Day and Klein’s historical discussion illuminates the extent to which the modern accountability gap in executive social policy-making is really a problem of setting agreed-upon accountability standards within an ambiguous policy context:

…it is apparent that political processes do not necessarily generate the kind of clear-cut objectives and criteria required if audit is to be a neutral, value-free exercise: the dividing line between political and managerial accountability is, inevitably, blurred as objectives and criteria are generated at all levels in the hierarchy.

Those who criticize the proliferation of accountability mechanisms in modern government tend to focus on the number of forums that exist to which public servants may be held accountable and decry the absence of any ranking or rationalization of these forums. I suggest that the accountability gap in executive social policy-making is better understood in terms of the relative absence of accountability standards for evaluating social policy-making. The elements of justification and evaluation inherent in the concept of accountability cannot be meaningful except in relation to agreed-upon standards.

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71 Ibid. at 8.
72 “[P]olitical accountability is about giving persuasive accounts in a realm where there may be disagreement about the currency: the criteria for judging actions or policies to be right or justified”: ibid. at 8.
73 Ibid. at 17-18.
74 Ibid. at 28.
75 See, for example, Mulgan, Holding Power to Account, supra note 10.
Beyond the four key attributes of accountability, the types of accountability at play within modern government and their relative role in legitimizing government remain matters of debate. Various labels have been proposed, including: constitutional, legal/judicial, political, institutional/hierarchical, professional/managerial, contractual, financial, performance-based, and customer/client-focused. An example of a political accountability mechanism is the practice of Question Period in the House of Commons and provincial legislatures. Institutional/hierarchical accountability mechanisms include annual performance reviews of public servants. A concern for customer/client-focused accountability explains the growing trend for government departments to order public opinion polls in support of policy initiatives.

It is apparent from the various typologies proposed that a clear distinction has not yet been drawn in the literature between the forum to whom a public servant is accountable and the standards of conduct in relation to which the public servant is accountable. For example, a reference to “political” accountability tends to mean one or more political forums to which a public official may be accountable. These might include the electorate and the legislature. In contrast, a reference to “financial” accountability tends to refer to financial standards employed in evaluating the performance of a public official regardless of the forum carrying out the evaluation. One barrier to the development of the concept of accountability thus far may be this failure to carefully distinguish between the questions: to whom the duty of accountability is owed, and in relation to what.

Nevertheless, the continuing debate offers some valuable insights into the role of accountability in legitimizing government. Several authors draw a distinction between accountability as a means of allocating blame and accountability as a learning tool. Peter Aucoin and Ralph Heintzman offer an expanded dialectic in which they distinguish between accountability as control, accountability as assurance, and

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76 Thomas, “Swirling Meanings”, supra, note 1 at 37.
77 Bovens, “Public Accountability” supra note 1.
78 Mulgan employs this distinction throughout his study: Mulgan, Holding Power to Account, supra note 10. Also see Bovens, ibid. at 186.
79 Thomas, “Swirling Meanings”, supra note 1 at 59.
accountability as continuous improvement.80 This is important because the emphasis on accountability in its ethical context has led to a tendency to associate accountability with negative judgments and blame. But this is not a necessary consequence of an accountability relationship. Accountability may equally be employed as a positive means of learning and improving government practices.81 My inquiry is primarily directed towards accountability as “assurance”, i.e., a democratic means of ensuring that public officials are fulfilling their responsibilities as intended, rather than accountability as “blame” which is more closely associated with abuses of power or wrongdoing.82 However, this does not exclude the value of accountability as a learning tool for improved public service.83

In the next section of the chapter, I merge these attributes of accountability, as appreciated from the particular viewpoints of public law and public administration, into a blended concept of accountability applicable to public governance writ large.

2. A Blended Concept of Accountability – Government as a Web of Accountability Relationships

From the administrative law and public administration literature, it is possible to distil a blended concept of accountability applicable to the particular form of government conduct at issue in this thesis - that is, social policy-making by central government officials, – and one which operates within the constitutional framework mandated by our representative democracy. This constitutional framework dictates both the forum to which public servants are ultimately accountable, as well as the ultimate responsibility for defining appropriate accountability standards.

80 Aucoin & Heintzman, “Dialectics of Accountability”, supra note 6. Also see Aucoin & Jarvis, Modernizing Government, supra note 57 at 9.
82 Aucoin & Heintzman, ibid. at 49; Bovens, Schillemans, Hart, ibid. at 230.
83 Bovens, Schillemans and Hart argue for an integrated assessment tool, presupposing that particular accountability mechanisms combine different functions to some extent: ibid.
The Central Accountability Framework

Our representative democracy may be viewed as a complex web or framework of political and administrative accountability relationships with the legislature sitting at the apex of this hierarchical structure. Each of these accountability mechanisms may be an appropriate means of legitimating executive social policy-making so long as the necessary attributes for achieving meaningful accountability are in place. These attributes include: an accountability forum with delegated legislative authority to require information and seek explanations and justifications from public servants about public conduct; a corresponding obligation on the part of the public servant to provide information and explain and justify the conduct; the definition of standards in accordance with legislative intent by which the conduct may be justified by the public servant and evaluated by the accountability forum; meaningful evaluation in relation to those standards; and the possibility of consequences. Accountability has more than one function to fill within society and different stages of the accountability exercise (information gathering, explanation and justification, and evaluation and remediation) are emphasized for different purposes.

The legislature is the forum ultimately responsible for holding executive social policy-makers accountable at all levels within the public service and political hierarchy. However, the complexity of public governance requires widespread delegation of the legislature’s accountability duties, either down the chain of command into the public service, or elsewhere. As a result of this delegation, there may exist several different subordinate forums for holding executive social policy-makers to account. For example, a mid-level public servant working within the policy branch of a government ministry will be primarily accountable to her line manager and, through this hierarchy, to the deputy-minister of the department. She will also be accountable to one or more central government officers such as information and integrity commissioners, a public service commission and, of course, the courts.\(^\text{84}\) The deputy minister responsible for the public servant’s conduct will, in turn, be accountable to the minister of the department, the

\(^{84}\) See, for example, the Public Service of Ontario Act, S.O. 2006, c.35.
premier, ministries of finance, and central cabinet agencies such as the Management Board of Cabinet in Ontario.85

A key condition of effective accountability in a representative democracy is that all these subordinate accountability forums ultimately receive their authority from the legislature (i.e. they act under delegated legislative authority). However, many of these accountability forums are internal to government and, therefore, do not hold the necessary authority for true accountability in a representative democracy. Besides the legislature itself, only courts and legislative officers who are independent of government operate as true, external accountability forums. This is a significant point. No matter how ubiquitous managerial accountability mechanisms may be in modern government, they remain internal to government and, therefore, cannot, in themselves, result in effective accountability in a representative democracy.

Responsibility for defining the accountability standards employed in evaluating executive social policy-making follows a slightly different trail of delegation down through the political and public service hierarchy. At the top of the chain of command, the legislature is ultimately responsible for defining these standards. Where it does so, it “speaks” through legislation and these standards become law. To the extent that the legislature is unable or unwilling to create these standards explicitly, delegated legislation and, ultimately, discretion fills the gaps.86 Executive forums exercising the delegated task of holding executive social policy-makers to account must first look to law for the applicable standards but, where law does not govern, standards appropriate for the accounting exercise may be created through the exercise of discretion in accordance with the presumption of legislative intent.

It is important to understand the breadth of the concept of accountability standards here. Just as accountability itself is a broad concept encompassing administrative review


as one particular accountability mechanism; so too, the concept of accountability standards is a broad concept encompassing public law as one source of accountability standards. Accountability standards may be legal or ethical, financial, or managerial. They may be substantive in that they define the outcome of a task delegated to a public servant, or procedural in that they provide norms for how the task is to be carried out. A statutory provision mandating that exceptional children in Ontario receive appropriate special education services is an accountability standard, just as are the federal Treasury Board’s Management Accountability Framework indicators.

However, in order for accountability standards to be meaningful, they must be intended to be binding on the public servant. Purely aspirational standards can not result in accountability as defined above since they do not obligate the public servant to justify his or her conduct nor do they provide grounds for the imposition of remedies or sanctions.

**Accountability Forums: Executive Policy-Makers are Accountable to the Legislature**

The central accountability framework operates according to the constitutional ideal of democratic accountability – the accountability of government to its citizens through their elected representatives. Each and every public servant who participates in the exercise of statutory authority is accountable to their minister who is then accountable to Parliament. Parliament, in turn, is accountable to the electorate. This constitutional ideal animates the fields of public administration and public law equally. The main difference between the disciplines is one of perspective. Public law has tended to focus on the accountability link between government and the legislature, while the public

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87 For example, one prominent accountability standard provided by public law is the duty to give reasons: see Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 [Baker], and the discussion in Liston, Honest Counsel, supra note 17.

88 These are described at the Treasury Board website, online: [http://www.tbs-sct.gc.ca/maf-crg/index-eng.asp](http://www.tbs-sct.gc.ca/maf-crg/index-eng.asp).

89 In reality, these accountability relationships are not so simple. I review these in the next part of this chapter.
administration literature has focused on managerial accountability within the hierarchical structure of government itself.

Notwithstanding this difference in perspective, both bodies of literature affirm that, in achieving democratic accountability, the legislature is the forum ultimately responsible for holding executive policy-makers to account. The emphasis of the public administration literature on managerial accountability techniques rests on the underlying assumption that these techniques have been developed to assist the legislature in this role. Paul Thomas makes this point best:

…the ultimate goal of accountability processes is to make governments, their agencies, and their officials answerable to citizens, not customers. In a democratic society, accountability depends ultimately on the political process; therefore, all accountability roads must lead back to Parliament. Managerial accountability can supplement and complement accountability to Parliament but it is not an appropriate or adequate substitute.90

Therefore, accountability for executive social policy-making must ultimately lie to the legislature. It is somewhat misleading to suggest that the doctrine of ministerial responsibility has been largely replaced by managerial accountability techniques.91 This may be true as a matter of descriptive fact but it should not be accepted as a normative conclusion. To imply that the possibility exists for choosing among the myriad forms of accountability discussed in the literature suggests that they each fulfill the same or a similar function. But this is to compare apples and oranges and “effectively breaks down the circle of accountability”.92 The core meaning of accountability in a representative democracy must be the accountability of public servants through their minister to the elected representatives in the legislature for the exercise of statutory authority. This is the constitutional imperative reflected in the doctrine of ministerial responsibility. It may be that managerial accountability mechanisms assist in achieving accountability to the legislature. For example, subordinate accountability forums might include a public servant’s line manager, the Management Board, the minister of the

90 Thomas, “The Swirling Meanings”, supra note 1 at 58.
91 Stone “Administrative Accountability”, supra note 46.
92 Day & Klein, Accountabilities, supra note 70 at 19.
department, members of the public, an ombudsman, and the courts. But, as I describe below, these forums remain subordinate to, and operate in the service of, the legislature.

There are two important points to notice about this constitutionally-mandated accountability framework. First, accountability is, necessarily a hierarchical relationship. Accountability flows upward. Those who suggest that accountability may flow in other directions, either horizontally or downwards, or even to oneself, are taking what are otherwise helpful analogies to corporate management, public relations, and professional ethics too far.93 For example, Robert Behn would address the “accountability dilemma” in modern government by imposing “360 degree” accountability in which all public servants are accountable to one another for their performance. Behn uses the example of public servants holding legislators accountable “for assigning vague and contradictory missions to their agencies”.94 Although this is an attractive idea, it is simply inconsistent with our constitutional structure.

Similarly, the idea behind the “service-delivery state”, that government should be accountable to the individual clients it serves, may provide indirect evidence of accountability in some circumstances (if, for example, user-satisfaction is one of the accountability standards presumably imposed by the legislature), but it cannot replace legislative accountability. User satisfaction or dissatisfaction with a government program is merely one factor to be weighed in the balance among the set of accountability standards defined by the legislature collectively representing the public interest.

Second, debates about the effectiveness of particular accountability mechanisms do not affect this constitutionally mandated accountability framework. Ministerial responsibility may no longer be effective but it still exists as a structural element of the framework. However, where direct legislative accountability does not exist, then evidence of accountability achieved through subordinate forums may be presumed to stand-in for legislative accountability. It is through this indirect, evidentiary role that

93 Behn, Rethinking Democratic Accountability, supra note 45 at 196.
94 Ibid. at 200.
modern managerial accountability mechanisms fit into the broader accountability framework. For example, evidence that a particular policy initiative was approved by interest groups consulted during its development might provide indirect evidence of accountability in circumstances where no direct evidence of legislative accountability exists. Similarly, customer accountability, as promoted in a “service-delivery state”, operates as indirect evidence that the government service is functioning as intended by the legislature. The necessary inference here - the presumption (or fiction) of legislative intent - is well established (although much maligned) in administrative law. That is, in the absence of evidence to the contrary, the legislature intended to delegate its accountability duties to the public or some other subordinate accountability forum, or at least acquiesced in this delegation after the fact.95

Accountability Standards: Defined by the Legislature or its Executive Delegates

Thus far, I have been discussing to whom public servants may be held to account in a representative democracy. The definition of the accountability standards by which their policy-making role is evaluated is a related but distinct issue.

In modern government practice, the conduct of public servants is evaluated in reference to many different standards devised by different forums for different purposes. Public servants may be subject to legal standards (both substantive and procedural), ethical standards, financial standards, and performance standards all in relation to the same conduct.96 The various standards for evaluating public conduct do not always correspond to a single accountability forum, and vice versa. Some forums may hold public servants accountable in relation to more than one set of standards. Line

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95 In Chapter 3, I discuss the central role that the presumption of legislative intent plays in grounding administrative review jurisdiction.

96 Taking a broader accountability perspective accommodates the reality that all types of accountability standards, whether legal or extra-legal, may be equally important in the day-to-day evaluation of government conduct. Sossin and Smith have similarly argued that codes of ethics and policy guidelines both belong to the same “umbrella of administrative constraints which shape the exercise of legislative authority”: Sossin & Smith, “Hard Choices and Soft Law”, supra note 34 at 870.
managers, for example, may look to both performance standards and financial standards in evaluating a particular government program.

An integral step in any accountability relationship is setting the standards against which the public servant’s conduct is to be judged. The formality of the standard-setting process may vary. The standards to which a minister is subjected by Parliament are likely to be relatively vague as compared to the standards set out in an internal government contract. Oliver and Drewry observe that one of the key difficulties in modern accountability frameworks is the absence of clear standards against which ministers are held accountable to legislatures.

Whatever accountability standards may be applied in practice, in a representative democracy they all emanate, theoretically at least, from a single source. All accountability standards, legal or otherwise, are subject to the same presumption of legislative intent; i.e., that the authority for their creation has been delegated either expressly or implicitly by the legislature as the constitutionally responsible accountability forum. In other words, the standards must be defined either directly by the legislature or by its executive delegates acting under legislative authority. Accountability standards created directly by the legislature may be entrenched in legislation or may be more informally defined by members of the legislature in the course of reviewing government policies in committee for example. However, as social welfare legislation becomes broader and less structured, there are fewer explicit standards contained within legislation and the creative role of delegates in defining accountability standards increases. The legislature more often delegates, not only its responsibility as accountability forum, but also its responsibility to define the accountability standards applied in subordinate accountability relationships.

In the absence of any direct legislative accountability standards, subordinate accountability forums are required to substitute their own view as to the appropriate standards for evaluating social policy-making. There is no reason why forums existing

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98 Oliver & Drewry, Public Service Reforms, supra note 25 at 3, 135.
within the executive branch of government may not do so. Managerial, financial, or other standards of conduct may well be employed for the purpose of establishing accountability, always subject, of course, to whatever direct measures of legislative accountability may exist in legislation or elsewhere. Accountability standards created through delegated legislative authority may include regulations, policy guidelines, other soft law instruments, ethical codes of conduct, financial indicators, performance measures, etc. All executive social policy-making is essentially the creation of accountability standards by public servants exercising delegated authority from the legislature.99

All standards against which executive social policy-makers are held to account, whether created in law or through the exercise of discretion, whether the traditional concern of administration law or public administration, are, nevertheless, subject to the fiction that they reflect legislative intent. This presumption of legislative intent applies to public accountability standards ranging from key substantive soft law standards governing the implementation of particular social programs, to procedural standards applying across government such as codes of ethics, to managerial standards as informal as courtesy within the workplace. Although the concept of discretion and the fiction of legislative intent are not commonly extended into the public administration field, how can it be otherwise?100 As Mark Bovens explains, public accountability is the sine qua non for democratic governance:

Modern representative democracy can be analysed as a series of principal-agent relations... Citizens, the primary principals in a democracy, transfer their sovereignty to political representatives who, in turn (at least in parliamentary systems) confide their trust in a cabinet. Cabinet ministers delegate or mandate

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99 In The Executive in the Constitution, Terence Daintith and Alan Page introduce a concept very similar to this idea of delegated accountability standards. They argue that the executive is held to account (or “controlled”) more effectively through “internal controls” than through the external controls provided by Parliament and the courts. Internal controls are not limited to formal legal rules but include any “stable rules” created by the executive and followed out of a sense of obligation. According to Daintith and Page, constitutional scholarship has not paid sufficient attention to the importance of internal executive controls in achieving democratic accountability: Daintith and Page, The Executive in the Constitution, supra note 20 at 5-22.

100 Some administrative law scholars argue that legislative intent no longer grounds the courts’ administrative review jurisdiction. I disagree and challenge this position in Chapter 3.
most of their power to the thousands of civil servants at the ministry, which in its
turn, transfers many powers to more or less independent bodies and public
bodies. The agencies and civil servants at the end of the line spend billions of
taxpayer’s money, use their discretionary powers to grant permits and benefits,
they execute public policies, impose fines, and lock people up.101

The legislature holds the sovereignty of its citizens in trust. The conduct of
government, from the highest-level policy decisions to the most mundane daily
transactions, takes place as a result of these principal/agent relationships all directed to
the fulfillment of legislative goals. Therefore, it is a constitutional imperative that public
service standards are presumed to be consistent with legislative intent; whether the
fiction is that the legislature has somehow suggested these standards ahead of time or,
more plausibly, that it acquiesces in them after the fact.

It is the fiction of legislative intent, then, that provides the legitimacy for modern
managerial accountability standards applied by subordinate accountability forums. Although it is well understood that the legislature exercises no direct supervision or
control over the development and implementation of most social policies and programs,
the presumption is maintained that the legislature intends that social programs be
evaluated against the standards developed by their executive delegates. Accountability
is achieved to the extent that a subordinate accountability forum exists to hold particular
policy-makers accountable in relation to standards developed in accordance with
legislative intent. The accountability gap is greatest where: no accountability forum
exists to supervise a particular policy-maker; no standards have been defined; or there is
some evidence that the applied standards do not comply with legislative intent.

The problem with the legislature delegating its authority to define accountability
standards for executive social policy-making is that these are not subject to a common
language as are, for example, financial standards or even some regulatory standards.102

102 Day and Klein contrast the relatively concrete standards applied by British water authorities with the
diffuse and controversial standards applied by social service agencies: Day & Klein, Accountabilities, supra
note 70 at 232-233.
The most that can be said is that all accountability standards ultimately seek to achieve the same goal: the public interest. Day and Klein comment:

Again, measuring performance is far from being a neutral, technical exercise. Not for nothing has accounting in the strictest technical sense been called the creation of the socially significant: ‘Those with the power to determine what enters into organizational accounts have the means to articulate and diffuse their values and concerns, and subsequently to monitor, observe and regulate the actions of those that are not accounted for’.

Social policy is simply too complex to be evaluated by objective outcome measures since its assessment requires judgment about social and political values. But how can social policy be evaluated and accountability achieved without a clear and common definition of the applicable accountability standards? I will argue below that the disciplines of administrative law and public administration respond to this dilemma similarly, i.e., by choosing process-oriented standards over outcome standards. Administrative law emphasizes procedural review over substantive review in relation to policy-laden decision-making. Public administrators more often choose process standards over outcome standards in evaluating social policy. The similarity of this problem as experienced in the administrative law context (where the subordinate accountability forums are judicial) and as experienced in the public administration context (where the subordinate accountability forums are executive) furthers my argument that administrative review is usefully understood as one tool within the larger central accountability framework.

The role of courts in the central accountability framework will be the focus of part four of this chapter. But, first, having developed a blended concept of accountability for executive social policy-making within a representative democracy, it is necessary to assess how successful existing extra-judicial accountability mechanisms are at achieving accountability for executive social policy-making.

103 “[T]he public interest is the ultimate legitimating justification for government, and accountability should promote this”: Oliver, Constitutional Reform, supra note 25 at 48.
104 Day & Klein, Accountabilities, supra note 70 at 51.
105 See Chapter 4.
106 See part 4 of this chapter.
3. “Cafeteria-Style” Accountability: Existing Legislative and Executive Accountability Mechanisms

The accountability mechanisms available to check government power vary according to the type of government function being exercised: legislative; executive/administrative; or judicial.107 Social policy may involve any one or a combination of these powers. My focus is on executive social policy-making which limits the inquiry in two ways. First, my concern is for social policy that is not enshrined in legislation or regulation but is created by government officials in the form of soft law through the exercise of legislative discretion.108 This form of social policy is not subject to the powerful accountability mechanisms that legitimize legislation and regulations. Second, I target the creation of general rules for organizing social programs as opposed to individual decisions in the implementation of an existing program. This collective expression of social policy is largely exempt from the accountability mechanism of administrative review. Before turning to the accountability mechanisms that do operate to legitimize executive social policy-making, it is important to make note of these valuable accountability mechanisms avoided when government chooses not to enact legislation or even regulations. The reality that government may effectively avoid key accountability mechanisms contemplated by our Westminster style of government (and regularly does so) through its unilateral choice of governing instrument is important evidence itself of the existence of the accountability gap in executive social policy-making.109

Accountability for Law

At the most basic level, government policy choices are enshrined in laws made by elected representatives of the people. Accountability is provided by our electoral system as well as through the parliamentary process. New legislation is debated in the

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107 David P. Jones and Anne S. de Villars, Principles of Administrative Law, 2d ed. (Toronto: Carswell, 1994) at 71 [Jones & de Villars, Administrative Law].
108 See Chapter 1 where I discuss the creation of social policy through soft law.
legislature and must be approved by a majority of elected representatives. Citizens may hold their representatives to account for their decisions at election time.\textsuperscript{110} In addition to this \textit{ex ante} form of accountability, political accountability also involves a notion of answerability for the consequences of laws after the fact. Regardless of how much debate precedes the enactment of legislation, once it is passed and carried out, the electorate continues to have the right to evaluate it and, if dissatisfied, to withdraw their support from the government at the next election.

In order for political accountability to operate, it is necessary that elected representatives do, indeed, make the laws and that the executive’s role is limited to implementing those laws. Of course, this is not possible in practice and it has long been held legitimate for the legislature to enact a legislative scheme in outline only and to delegate to the executive the power to make law on matters of detail.\textsuperscript{111}

Delegated legislation (statutory instruments or regulations) is a reality not only for the practical reason that the sheer bulk of decisions to be made in governing our modern state far outstrips the capacity of our elected representatives, but also because the executive has the advantage of developing expertise in particular fields and delegation provides the flexibility to tailor a legislative scheme to specific circumstances.\textsuperscript{112} Of course, delegated legislation may also have a “dark side”:

“Regrettably, there is another reason for subordinate legislation – political expediency. This arises because the government of the day has not thought through how it will implement a legislative proposal...Nor is it unknown for regulations to contain a particularly unpalatable provision which, if included in the parent Act, would have created a storm of protest in Parliament or a legislature.”\textsuperscript{113}

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\textsuperscript{110} “The normal legislative process ensures that advance publicity is given to proposals to change the law and that there is opportunity for public discussion and for persons whose rights may be affected to make themselves heard. It is essential that when new laws are passed and made effective that those governed by them should know what they are.”: Ontario, \textit{Royal Commission Inquiry into Civil Rights: Report No. 1}, Honourable J.C. McRuer, Commissioner (Toronto: Queen’s Printer, 1968), vol. 1 at 361 [McRuer Commission].
\textsuperscript{113} Jones & de Villars, \textit{Administrative Law}, supra note 107 at 83-84.
\end{flushleft}
Although delegation of the “details” of legislative schemes to civil servants is both necessary and desirable, the fact remains that civil servants are unelected so that other forms of accountability are necessary to provide a check on their law-making power. The McRuer Commission articulated this concern as follows:

Although it is recognized that it is necessary for effective modern government to confer the power to legislate in proper cases, there should be constant vigilance to retain adequate control by the representative Legislature and practical and effective safeguards against abuse of the subordinate power. Where the Legislature unnecessarily gives up control and fails to provide proper safeguards for the rights of the individual there is the possibility of an “unjustified encroachment” on those rights.114

An accountability mechanism for delegated law-making was introduced in 1969 in the form of legislative standing committees.115 Standing committees were given the power to scrutinize regulations on six criteria, including: whether they are authorized by the terms of the enabling statute; and whether they make some unusual or unexpected use of the powers conferred by the statute.116 The mandate of these scrutiny committees has been expanded slightly over the years but they have consistently been denied the power to review regulations on policy grounds.117

Scrutiny committees are widely recognized as doing valuable work in enhancing the accountability of delegated legislation. However, as the welfare state has matured, the use of delegated legislation has increased many times over. One of the practical

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114 McRuer Commission, supra note 110 at 37. Note that the concern of the Commission in this passage was on the curtailment of right and freedoms. In the modern welfare state, executive law-makers are charged not only with affecting individual rights but with distributing benefits. The traditional approach to accountability in law-making did not accommodate this redistributive role of government.

115 Legislative standing committees to review regulations were introduced as a result of the Third Report of the Special Committee on Statutory Instruments. The Committee noted the tendency by Parliament to enact statutes “in skeleton form” and its use of “sweeping or subjective terms” in legislation in order to exclude the possibility of judicial review. The Committee warned against “the danger that civil servants may be transformed into our masters”: MacGuigan Report, supra note 112 at 5.

116 The federal Standing Joint Committee for the Scrutiny of Regulations was created in 1971 pursuant to the Statutory Instruments Act, S.C. 1970-71-72, c.38, s.26. The Ontario Legislative Assembly has a Standing Committee on Regulations and Private Bills. Its Terms of Reference are contained in Standing Order 106(h), see http://www.ontla.on.ca/committees/regulations.html. For other provinces, see John Mark Keyes, Executive Branch Legislation: Delegated Law-Making by the Executive (Markham: Butterworths, 1992), chapter 6.

drawbacks to committee scrutiny is the time lag between the enactment of a new regulation and the completion of any report by the committee. More significantly, delegated legislation is no longer used merely to fill in the details of legislative schemes but, instead, as a vehicle for major policy formation. According to Michael Taggart, delegating law-making to the executive is a necessity in the modern state and lawyers and administrators must simply adapt to this reality as best as they can. In Taggart’s words, “the battle for the legitimacy of delegating legislative power was fought and won” in the first half of the century and the second half has been devoted to “enhanc[ing] parliamentary safeguards against potential and actual abuse”. Taggart largely accepts the prevailing view that delegated legislation is desirable as well as necessary. However, he shares the concern that the accountability mechanisms developed over the years to address delegated legislation remain inadequate.

Taggart’s discussion of the flaws in regulatory scrutiny as an accountability mechanism demonstrates that delegated law-making has expanded beyond the abilities of the tools traditionally available to supervise it. However, this has been a well-recognized problem in administrative law since the 1920s when Lord Hewart published his controversial book *The New Despotism*. My concern is with a relatively modern twist to this classic problem – the rising trend for the executive to bypass delegated legislation altogether and to develop social programs purely through non-binding policy instruments. This problem challenges the traditional divide between executive law-making and executive policy-making.

Accountability mechanisms for primary and delegated legislation were designed on the assumption that legal standards, either legislative or regulatory, existed against which social policy might be evaluated. This assumption was uncritically accepted by the McRuer Commission which repeatedly recommended in its Report that the

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119 Taggart, “Parliamentary Powers”, *supra* note 16.
120 Ibid.
121 Ibid.
legislature should provide “as much detail as is practicable” and should confer “power to complete the statutory schemes by making regulations which have the force of law”.\textsuperscript{123} The Commission explicitly warned against delegating power to make regulations on subjective grounds or allowing the executive to define by regulation the meaning of terms used in an Act.\textsuperscript{124} In the Commission words:

“Such delegation of legislative power provokes the comment that the Legislature was not sure what it meant so to avoid making up its mind it delegated the power to decide to another body.”\textsuperscript{125}

Certainly, the McRuer Commission never anticipated that the executive might effectively govern without the use of either legislation or delegated legislation.\textsuperscript{126} The phenomenon of social programs developed and administered entirely through soft law, as occurred in Ontario’s autism programs, is a uniquely modern problem.\textsuperscript{127}

**Accountability for Policy**

In the absence of legislation or delegated legislation, there are still multiple controls for executive social policy-making at work within our parliamentary democracy, both internal and external to government. In addition to the traditional accountability mechanisms contemplated by the designers of Westminster government, new mechanisms have sprung up to respond to the growth of executive power over the last century. Thus far, these new accountability mechanisms have developed in an *ad hoc* manner with the philosophy that more is better. They operate “cafeteria-style” with no institutional structure to filter and evaluate them or otherwise assess their sufficiency.\textsuperscript{128}

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\textsuperscript{123} McRuer Commission, supra note 110 at 335-336.
\textsuperscript{124} Ibid. at 343, 348.
\textsuperscript{125} Ibid. at 348.
\textsuperscript{126} Of course, the McRuer Commission would not have considered soft law as part of their mandate in any event since policy guidelines fell within the “administration” branch of government power rather than “law-making”. The strict divide understood to exist between law-making and policy-making meant that any programs governed through soft law in the 1960s would have been viewed solely as a public administration matter rather than a legal matter: Ibid.
\textsuperscript{127} See Chapter 1 above.
\textsuperscript{128} Savoie, Court Government, supra note 46 at 171.
In this section, I briefly describe the main accountability mechanisms operating in respect of executive social policy-making today.\(^{129}\)

**Legislative Accountability and the Doctrine of Ministerial Responsibility**

Accountability to the legislature for executive social policy-making traditionally operated through the doctrine of ministerial responsibility. Ministers are elected members of the legislature and are held singularly responsible to the legislature for the actions of their department.\(^{130}\) As of 1968, the principle of ministerial responsibility appeared to be alive and well. The McRuer Commission found that ministers exercised “very real day-to-day control over action taken on behalf of their departments” and concluded that there was no basis for depreciating the value of the doctrine as a mode of controlling the public service operating within their departments.\(^{131}\)

In its ideal form, the principle of ministerial responsibility is widely understood to mean that, where staff are found to be engaged in egregious misconduct or maladministration, the responsible minister should resign. This is not borne out in practice.\(^{132}\) Peter Hogg states that ministerial resignations for departmental sins simply do not occur in Canada and that this convention does not properly form part of the doctrine of ministerial responsibility.\(^{133}\) In fact, the ongoing existence of the doctrine in today’s government seems to be very much in doubt. In reality, no individual Minister

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\(^{129}\) There are a number of valuable studies examining the limitations of existing accountability mechanisms in government and I cannot hope to be comprehensive here. See, for example, Thomas, “Swirling Meanings”, supra note 1, and Aucoin & Jarvis, Modernizing Government, supra note 57. Almost all of the Canadian literature focuses on the federal government with little examination of specific provincial accountability practices. For present purposes, I assume that accountability practices are similar within Ontario and other provinces: see Sancton, “Provincial and Local Public Administration” supra note 12.

\(^{130}\) McRuer Commission, supra note 110 at 44: “Each Minister is held to be responsible and accountable for anything done within the segment of the public business under his control and direction, be it the ordinary business operations of government or the exercise of statutory powers conferred on him or on subordinates under his control and direction.” Also see Hogg, Constitutional Law, supra note 111 at para. 9.3(d). My focus is on individual ministerial responsibility (i.e. responsibility of individual ministers for their departments) rather than collective ministerial responsibility (i.e. responsibility of the government as a whole).

\(^{131}\) McRuer Commission, ibid. at 44-45; 356. The Commission did warn of cases in which Ministers effectively abdicated control to boards, commissions and corporations outside the normal hierarchy of public servants but this is not relevant for the scope of the present paper.

\(^{132}\) C.E.S. Franks, Ministerial and Deputy Ministerial Responsibility and Accountability in Canada, submission to the Public Accounts Committee of the House of Commons of Canada, 11 January 2005.

\(^{133}\) Hogg, Constitutional Law, supra note 111 at para. 9.3(d). Also see Stanbury, Accountability to Citizens, supra note 118 at 7.
can be expected to be responsible for each and every decision made under the wide umbrella of social welfare mandates. Even where the minister is given the final say over a policy initiative, his public servants can “easily manipulate” the outcome by the options they present.\footnote{Thomas, “Parliament and the Public Service”, supra note 9 at 344.} Lorne Sossin has acknowledged: “Ministers no longer exercise any meaningful supervision over the affairs of government, nor do they take responsibility very often for the errors of government”.\footnote{Lorne Sossin, “The Ambivalence of Executive Power in Canada” in Paul Craig and Adam Tomkins, eds., The Executive and Public Law: Power and Accountability in Comparative Perspective (New York: Oxford University Press, 2006) at 60 [Sossin, “Ambivalence of Executive Power”].} Donald Savoie describes the increasing obsolescence of the doctrine of ministerial responsibility in Breaking the Bargain:

“Our common language about conduct and performance was defined when government was small, when either a major part of the work of departments was performed directly by ministers or they were able to keep a close watch on it. Public servants had a very limited role in policy formation, their ministers knew them by name, and their responsibilities and duties were imposed on them by law… The broad outline of Canada’s accountability regime has remained pretty well intact over the years. But everything else has changed… Because of the growing complexity of making policy and decisions, the ‘true locus of government activity’ has shifted from institutions and departments that were formal and visible (and thus occupying a distinct ‘space’) to those that ‘are diffuse and obscure’.\footnote{Donald J. Savoie, Breaking the Bargain: Public Servants, Ministers and Parliament (Toronto: University of Toronto Press, 2003) at 251 [Savoie, Breaking the Bargain].}”

Savoie concludes that the doctrine of ministerial responsibility is inadequate in this new style of government and he prescribes a larger role for Parliament in ensuring that executive policy-making is just.\footnote{Ibid. at 265.}

Michael Taggart expresses this same concern in relation to soft law which he refers to as “quasi-legislation”:

The concerns – what Baldwin calls ‘problems of legitimation’ – about quasi-legislation exceed on every measure those that arise in relation to delegated legislation proper. There is no thread of authorization to Parliament; parliamentary scrutiny of any sort is non-existent; judicial control is even more
attenuated; quasi-legislation is often inexpertly drafted; no requirement of
consultation or even conventional guidance exists; and there is no guarantee of
accessibility through adoption of uniform processes of publication and
distribution. Indeed, therein lies much of the attraction of quasi-legislation. The
maintenance of flexibility is a key feature, but this puts enormous power in the
hands of the decision maker.\textsuperscript{138}

Even to the extent that the doctrine continues to operate, it tends to prioritize ethical
accountability (cases of bad faith, conflicts of interest, or clear abuses of power such as
were involved in the sponsorship scandal) over legal accountability. The doctrine is too
blunt an instrument to apply to the more nuanced situation of earnest civil servants
simply failing to remain faithful to legislative goals in developing and administering
social programs.\textsuperscript{139}

The accountability mechanisms operating to support ministerial responsibility both
within and outside the legislature are correspondingly limited in their effectiveness.

The Legislature - The legislature is the forum ultimately responsible for enforcing
ministerial responsibility, thereby holding executive social policy-makers to account.
There are several accountability mechanisms built into legislatures allowing members to
directly scrutinize government. First, opposition members may question the
government on controversial policies during Question Period. Second, legislatures
create a number of committees made of up both government and opposition members
that review the operation of government ministries. Third, a relatively recent innovation
designed to improve legislative scrutiny is the obligation of ministries to table
performance reports and spending estimates in the legislature.

These mechanisms are limited by the prevailing political culture and by information
overload, hampering their effectiveness as accountability mechanisms.\textsuperscript{140} Performance
reports tend to be self-serving and, in any event, few members of the legislature have the

\textsuperscript{138} Taggart, “Parliamentary Powers”, supra note 16.
\textsuperscript{139} Thomas, “Swirling Meanings”, supra, note 1 at 43-44.
\textsuperscript{140} Liston, Honest Counsel, supra note 17 at 40-42, 136-138. In fact, Jane Schacter has argued that the legislature
itself is no longer accountable to its electorate for analogous reasons: Jane S. Schacter, “Political
Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures”, chapter 3 in The Least
Examined Branch: The Role of Legislatures in the Constitutional State, Richard Bauman and Tsvi Kahana, eds.,
(Cambridge: CUP, 2006).
expertise, resources or incentive to review and make sense of these reports. The problem is exacerbated by horizontal policy networks. Even if the spending estimates of one department are successfully deciphered, they may mean little in the context of a policy initiative engaging a number of different departments.

Even where members of the legislature are able to gather and assimilate the necessary information to exercise their scrutiny function, most are not at liberty to do so. As a result of the strong culture of party discipline in Canadian politics, only opposition members are permitted to take a critical position in relation to government policy. With a history of strong majority governments, opposition members rarely have this opportunity and, instead, Parliament operates primarily as “a permanent election campaign”. As a result, the accountability capacity of legislatures is partisan-based.

Even legislative committees, including public accounts committees, are controlled by the government of the day. The politicization of government has also invaded the public service ranks within government departments. At the federal level, public administration scholars have criticized the improper influence wielded by partisan staff members of the Prime Minister’s Office over members of the public service. Provincial legislatures also face “political and procedural obstacles” in holding ministers and public servants to account on an ongoing basis. Thomas argues that “Parliament deals with the ‘tip of the iceberg’ and leaves untouched in its scrutiny efforts the wide

141 Aucoin & Jarvis recommend that the current departmental practice of self-reporting should be supplemented by independent, external performance reviews undertaken by professional public service “experts” and supervised by a new parliamentary agency: Aucoin & Jarvis, Modernizing Government, supra note 57 at 11.
142 Savoie, Court Government, supra note 46 at 273-282.
143 Thomas, “Swirling Practices”, supra note 1 at 50.
144 “Outside of Question Period, ministers of a single party majority government face little serious political pressure from their parliamentary Opposition. Their tenure as government is not threatened, and there are no obstacles to having their budgets passed. They control the committees, even when they do not chair them, such as in the case of the Public Accounts Committee. And there has not been a tradition or culture that legitimizes, even promotes, the public value of government MPs cooperating with Opposition MPs in a non-partisan manner in committee in holding ministers and officials to account.”: Aucoin & Jarvis, Modernizing Government Accountability, supra note 57 at 45, 73.
145 Ibid. at 27.
147 Thomas, “Parliament and the Public Service”, supra note 9 at 343.
expanse of past policies and the huge submerged lower levels of policy making by public servants based on delegated law-making authority.”

Stephen Harper’s first act in government was to create a new direct accountability mechanism modeled after one that has been long used in Britain. There, the limitations of the doctrine of ministerial responsibility led to the appointment of key public servants as “accounting officers”, accountable to Parliament for the administration of their departments. In Canada, Harper’s Federal Accountability Act designates deputy ministers to play this role. There is some controversy as to whether this development amounts to an unjustifiable incursion into the convention of public servant neutrality. There are also more practical concerns about deputy ministers being able to properly serve two masters. There is even confusion within the federal government as to how the concept operates in practice.

Legislative Officers - Because of these limitations in the legislature’s ability to hold the executive directly accountable for social policy-making, the legislature has delegated its accountability duties to others. For example, auditors-general have become an increasingly important additional mechanism for protecting the accountability of policy-making. Where their function was once mainly financial accounting, they now take on a more policy-oriented role through their mandate to ensure “value for money”. Other legislative officers providing checks on executive policy-making include ombudsmen, ethics commissioners and privacy and information commissioners. These legislative officers are independent of government and so operate as true external

148 Thomas, “Swirling Meanings”, supra note 1 at 46. Thomas lists some of the impediments to effective legislative scrutiny: party discipline, government control over committees, lack of media attention to scrutiny efforts, concern for publicity by members to support re-election, lack of knowledge among inexperienced members, inadequate time, restrictions on access to information, and shortage of professional staff: (at 47). Also see Aucoin & Jarvis, Modernizing Government, supra note 57 at 24-25.
150 Savoie, Court Government, supra note 46 at 55-59.
151 Savoie, Breaking the Bargain, supra note 136 at 248.
152 For example, the Auditor-General Act, R.S.O. 1990, c.A.35, s.12(2)(f), mandates Ontario’s Auditor-General to report on the extent to which public money is expended without authority or without due regard to economy and efficiency and on programs operating without effective performance measures.
accountability forums. However, the mandates of each of these legislative officers are limited by their enabling legislation and they provide, at best, a partial solution to the accountability gap.\footnote{Sossin, “Boldly Going”, supra note 34 at 410-413. “[A]ccountability goes well beyond compliance with accounting rules and management principles”: Thomas, “Swirling Meanings, supra note 1 at 57.} Auditors-general remain focused on financial accountability and do not necessarily evaluate the performance of government in relation to the broader legislative goals intended to be achieved by social programs.\footnote{See the first part of this Chapter where the distinction between different forms of accountability is discussed.} Complaints to ombudsmen tend to relate to individual decisions rather than broader policy issues.\footnote{Sossin, “Boldly Going”, supra note 34 at 410. Ombudsmen’s jurisdiction is typically defined to cover government action affecting claimants in their “personal capacity”: see, for example, Ombudsman Act, R.S.O. 1990, c.O.6, s.14.} And the mandates of ethics and privacy and information commissioners are similarly restricted to their particular areas of concern.\footnote{See, for example, the jurisdiction of Ontario’s Integrity Commissioner as defined in the Members’ Integrity Act, 1994, S.O. 1994, c. 38, as amended by S.O. 2010, c.5.} Even where legislative officers undertake to review executive social policy-making, their reports are not necessarily read or acted on by legislatures.\footnote{Thomas gives the example of the Information Commissioner who complained that not once in 16 years had the Standing Committee on Justice held a hearing to consider his annual report: Thomas, “Parliament and the Public Service”, supra note 9 at 359.} The autism funding case study examined in Chapter 1 is a compelling illustration here. Highly critical reports from the Ombudsman and the Provincial Auditor of Ontario were largely ignored by the Ontario government.\footnote{See Chapter 1, Part 3, under the subheading “Legislative Officers Investigate”.}

Nevertheless, legislative officers are the most effective accountability mechanisms currently available to check executive social policy-making. Jeff King emphasizes the importance of ombudsmen in fulfilling this role.\footnote{King, “Accountability”, supra note 39.} Their proactive mandate and procedural flexibility are particularly appropriate given the polycentric nature of resource allocation decisions, and they are certainly more accessible to impecunious social benefits claimants than are courts.\footnote{Ibid. at 24-27.} King concludes that ombudsmen and courts work most effectively in tandem with the former focusing on maladministration and the
other on legality.162 I agree. My proposal that the courts assume the role of reviewing social policy decisions on grounds of accountability is intended to add an additional, residual layer of accountability to the central accountability framework, rather than detracting from the important role of legislative officers. The optimal solution to the accountability gap is a combination of “diverse control techniques”, benefiting from the advantages and counteracting the disadvantages of each individual mechanism.163

Cabinet and Central Government Agencies - The work of cabinet in deliberating on policy proposals put forward by the ministries offers an internal method of protecting accountability, as do other central control agencies such as ministries of finance and public service commissions.164 However, these bodies qualify as effective accountability mechanisms only to the extent that their members are held externally accountable to the legislature in turn.

At the federal level, it is increasingly the case that the prime minister bypasses cabinet and central government departments in formulating key policy initiatives. This is the message of Savoie’s latest book, Court Government and the Collapse of Accountability in Canada and the United Kingdom.165 Savoie argues that accountability has suffered, not only due to the demise of the doctrine of ministerial responsibility, but also due to the concentration of political power into ever-smaller circles:

> We now make policy by announcements, and we manage government operations by adjusting administrative and financial requirements to the circumstances of the day… Decisions over coffee and a willingness to pick and choose initiatives to deal with the political pressure of the day and to respond to the media invariably promote an undisciplined process.”166

162 Ibid. at 27.
163 Ibid. at 33.
164 In Ontario, see the Financial Administration Act, R.S.O. 1990, c.F.12, and the Public Service of Ontario Act, S.O. 2006, c.35. At the federal level, the accountability role played by the Treasury Board and Public Service Commission is described in Aucoin & Jarvis, Modernizing Government, supra note 57. The Treasury Board has recently developed a Management Accountability Framework through which it evaluates the management performance of senior public servants according to a detailed list of both process and outcome-oriented measures.
165 Savoie, Court Government, supra note 46.
166 Ibid. at 16, 158-159.
Savoie defines “court government” as the reality that effective political power rests with the prime minister and a small group of courtiers and decisions are increasingly made through informal processes involving only a handful of key actors. According to Savoie, cabinet has been relegated to reviewing “minor” policy issues. Savvy politicians are able to bypass the entire public management and political superstructures and their accountability mechanisms altogether.

Another trend in central government is for political members to push accountability obligations down from the minister to the civil service; in other words, to deny or at least redefine ministerial responsibility. This was best illustrated during the federal sponsorship scandal. The Harper government’s solution was to strengthen accountability mechanisms geared to the civil service. No effort was made to strengthen ministerial responsibility.

Savoie attributes the cause of the accountability gap to the decreasing ability to locate the power behind the policies. Power is concentrated in the hands of the prime minister and his or her courtiers. These individual members of the executive are visible enough that the media plays a relatively effective role in holding them to account. But beyond these individuals, there is no clear means of identifying the power (and, therefore, the responsibility) for executive policy-making in Canada. This is partly due to increasingly blurred boundaries between the public and private sectors, the political and bureaucratic arenas, and departmental relations and responsibilities. It is exacerbated by the complexity of government, the predominance of informal policy-making processes and the disinclination to commit decision-making to paper. Whatever the effective cause of the problem, the result is the virtual impotence of the traditional accountability mechanisms contemplated by our parliamentary democracy. Savoie concludes that the Canadian and U.K. constitutions have been effectively “dismantled”.

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167 Ibid. at 237.
168 Ibid., chapter 12.
169 Ibid. at 334.
The Media - The powerful role of the media in influencing public opinion has further complicated legislative and central government accountability. It has been argued that the entire business of government has been re-oriented in order to optimize “news management”.170 The media are perceived to be less deferential to political authority and more subjective than in earlier days, and their influence over citizens has increased exponentially with the rise of television and, more recently, the internet. However, the media’s mandate is a narrow one – to report stories of interest to their subscribers. This creates a distinct bias in favour of critical and sensationalist reports, or what Savoie calls “exploding hand grenades”.171 Media reports of more subtle issues of day-to-day public management are rare. Savoie states that “[t]he media, especially the electronic media, prefer to focus first on individuals, next on a process, and later on a complex policy issue.”172 Members of the legislature, as elected officers, are necessarily sensitive to media attention in carrying out their scrutiny function. This tends to warp legislative accountability by emphasizing media-worthy issues.173

The result is that there is, at present, insufficient direct and meaningful supervision by the legislature for the policy choices of the executive branch of government. Most discouraging is the absence of any real reform efforts directed at the legislative level. Aucoin & Jarvis conclude:

In the absence of major changes to the electoral system, however, there is little reason to assume that the parliamentary scrutiny function will be dramatically improved in the near future.174

The reality is that the legislature delegates much of its accountability role to the very institution being held to account – the executive branch of government. Even more problematic is the tendency for the legislature to also delegate its duty to define the standards for which the executive is held accountable. The managerial accountability mechanisms, discussed below, operate within the executive itself with little or no

170 Ibid. at 157-160.
171 Ibid.
172 Ibid. at 265.
173 Thomas, “Swirling Meanings”, supra note 1 at 40.
174 Aucoin & Jarvis, Modernizing Government, supra note 57 at 77.
supervision by the legislature. As such they promote personal or professional responsibility, rather than our blended concept of accountability as defined above. Nonetheless, managerial accountability mechanisms are increasingly relied on as a matter of practical necessity in modern governance. How is it that these mechanisms achieve legitimacy in a representative democracy in the absence of direct legislative supervision or control? We will see that, in and of themselves, they currently do not. At best, these mechanisms may provide indirect evidence of the legislature’s intent to delegate its accountability responsibilities to the managers in issue. What is missing is an external body tasked with supervising these primary accountability mechanisms. Mulgan, acknowledging the proliferation of managerial mechanisms for holding government to account, asks: “How well are the guardians themselves being guarded?” This question underlies the following discussion of the limitations implicit in managerial accountability mechanisms.

**Managerial Accountability**

In the last several decades, attention in both public law and public administration has shifted from the role of ministerial responsibility in establishing direct legislative accountability to managerial accountability mechanisms operating lower down the chain of authority; within the public service itself.

*New Public Management* - Starting in the 1960s with the Glassco report, the federal government has embraced a long succession of initiatives designed to improve public management. These efforts have been part of a much larger public administration trend among Anglo-American governments known as New Public Management or “NPM”. The rise of NPM in the 1960s and 1970s resulted in the privatization of some government services and contracting out other government services to the private

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175 See part 1 of this chapter and the discussion of the distinction between responsibility and accountability.
176 Mulgan, *Holding Power to Account*, supra note 10 at 229.
sector. For those services remaining wholly public, new management practices modeled after private sector practices were developed as a means of securing greater economy and efficiency. Canada lagged behind Britain and the United States in adopting NPM practices, but there is no doubt that NPM has had a profound influence on both the theory and practice of public administration in Canada.  

In the 1990s, a new public administration trend was added to the mix. Labelled New Public Governance or “NPG” by Peter Aucoin, it emphasized improved service delivery through results-based management and horizontal collaboration among various government departments.

NPM, NPG and the resulting management reforms, have had a dramatic impact on traditional accountability mechanisms operating in Canadian governments. They promote “empowerment” or more discretion for lower-level public servants and more participation by citizens. The hierarchical management structure of government, necessary for the effective operation of the doctrine of ministerial responsibility, has been largely replaced with a looser, more collaborative management style. Aucoin notes:

Hierarchy may be necessary for certain purposes, such as accountability; but for other critical dimensions of management, including achieving results, hierarchy must give way to power sharing, both vertical and horizontal.

Empowerment involves a shift away from accountability as defined above towards “increased emphasis on psychological or personal responsibility, in the sense of loyalty to, or identification with, organizations goals.” For the purpose of democratic legitimacy (accountability as assurance), this is not accountability at all.

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178 Aucoin, ibid.

179 Ibid.

180 For a discussion of the trend to greater public participation in government, see Lorne Sossin, “Democratic Administration”, chapter 5 in Christopher Dunn, ed., The Handbook of Canadian Public Administration (Don Mills, Ont: Oxford University Press, 2002). Sossin notes that democratic administration has different implications for policy-development than it does in the service delivery context (at 91).


Horizontal Policy Networks - Empowerment has led, in turn, to the phenomenon of horizontal policy-making. When the Weberian hierarchical structure of government was first set up, responsibility for policy-making was allocated to and remained within single government departments, each led by a minister. Policy decisions were attributed to one or another of these departments and the applicable minister held to account. The minister was able to trace internal responsibility for the policy through the deputy-minister, down a hierarchical line of departmental officials, creating a single vertical chain of accountability. As Savoie notes:

hierarchy enables a minister, who is ‘blameable’ for both policy and administration under the principles of ministerial responsibility, to reach down into the bureaucracy to secure an explanation for and to find a solution to problems.\(^{183}\)

This has long since ceased to reflect government practice. Now, wide-ranging coordination of policy-initiatives among different government departments and agencies, as well as external policy advisors and public stakeholders, has become a mainstay of modern policy-making.\(^{184}\) Under this collaborative model of policy-making, no one individual or department can be said to be responsible for the end result. The problem is exacerbated by the high degree of outsourcing occurring, particularly in the social policy context.\(^{185}\)

Horizontal policy-making has been encouraged by recent public management reforms on the basis that it enhances values such as participation, transparency and accessibility. However, these values are gained at the expense of accountability.\(^{186}\) Very often, horizontal policy networks are sufficiently complex that it is impossible to identify, let alone attribute responsibility among the various participants. This

\(^{183}\) Savoie, Court Government, supra note 46 at 150.

\(^{184}\) Kernaghan et al. New Public Organization, supra note 182 at 252-256. Savoie cites a study indicating that deputy ministers spend over 30% of their time on consultation and interdepartmental work: Donald J. Savoie, “Searching for Accountability in a Government Without Boundaries” (2008) 47 Canadian Public Administration 1 at 18 [Savoie, “Searching for Accountability”].

\(^{185}\) Panet & Trebilcock, “Contracting-Out”, supra note 12.

\(^{186}\) The trend of “policy by compromise” may also have been gained at the expense of quality: Savoie, Court Government, supra note 46.
phenomenon has been referred to as “organized irresponsibility” in the sense that the decision-making process may involve inputs and judgments by so many participants that irresponsible behaviour cannot be attributed to any one individual or department.\footnote{Kernaghan & Siegel, Public Administration, supra note 61 at 346.} Some have attempted to legitimate the trend by describing it as a form of contractual accountability, although this analogy only holds to the extent that the participants in the policy network are known.\footnote{Aucoin & Jarvis, Modern Government, supra note 57 at 32.}

The phenomenon of horizontal policy networks has led some accountability scholars to argue that the doctrine of ministerial responsibility should be replaced with an accountability regime in which individual public servants at every stage of delegated power are each held accountable for their own conduct.\footnote{Savoie, “Searching for Accountability”, supra note 184 at 20; Savoie, Court Government, supra note 46; Behn, Rethinking Democratic Accountability, supra note 45.} In my view, this proposal would so fragment the lines of accountability as to render accountability meaningless.

Program Evaluations and Performance Measures - Champions of NPM have attempted to strengthen managerial accountability mechanisms by redefining the standards against which social policy is evaluated. Emphasis has shifted from the administration of processes and procedures to the management of resources and, correspondingly, evaluation has shifted from the assessment of inputs and procedures to the assessment of outcomes. New results-based accountability tools such as internal evaluations and performance measures have been proposed as an alternative means of keeping tabs on performance.

Program evaluations and performance measures suffer from serious flaws as accountability mechanisms for social policy-making. First of all, they quite often simply do not take place. The executive is under no legal obligation to institute program evaluations. Donald Savoie has called the record of program evaluation in government “dismal”.\footnote{Savoie, Breaking the Bargain, supra note 136 at 161.} In Wynberg we saw an example of two important social programs where

\footnotesize{\begin{itemize}
  \item \footnotesize{Kernaghan & Siegel, Public Administration, supra note 61 at 346.}
  \item \footnotesize{Aucoin & Jarvis, Modern Government, supra note 57 at 32.}
  \item \footnotesize{Savoie, “Searching for Accountability”, supra note 184 at 20; Savoie, Court Government, supra note 46; Behn, Rethinking Democratic Accountability, supra note 45.}
  \item \footnotesize{Savoie, Breaking the Bargain, supra note 136 at 161.}
\end{itemize}}
evaluations were never conducted in spite of policy planning documents requiring them.\textsuperscript{191}

Second, performance standards are notoriously difficult to define for social policies. The goals, values and objectives that inform the policy-making process are frequently not capable of being articulated, let alone ranked in a pluralistic society.\textsuperscript{192} Furthermore, social policy often emerges incrementally through marginal improvements to the status quo. It is difficult to evaluate a moving target. Savoie rejects the private-sector model of performance evaluation for this reason:

\begin{quote}
It is nothing less than a leap of faith on the part of political leaders to think that they can impose a private sector management model on government without revisiting basic arrangements for accountability. Accountability in the private sector is a relatively straightforward affair – leaving aside transparency requirements, it can be summed up in a handful of phrases – profit margin, market forces, market share, return on investment, bottom line, and beating the competition. It only takes a moment’s reflection to appreciate that these phrases can never resonate in the government.\textsuperscript{193}
\end{quote}

Aucoin & Jarvis agree:

\begin{quote}
Public accountability for the effectiveness of public policies cannot be turned completely into a professional management process. The matters at issue are almost always questions of public governance and thus involve conflict over values and priorities; they are rarely technical matters that can be delegated to experts for resolution.\textsuperscript{194}
\end{quote}

The difficulty in developing meaningful outcome standards for social policy is one reason that accountability is increasingly being viewed as a learning tool rather than an assessment tool. Focusing on the first stage of the accountability process, information-gathering, shifts the emphasis back from outcome standards to process standards. Michael Howlett explains that policy goals are less often measured in terms of success or

\begin{footnotesize}
\textsuperscript{191} See Chapter 1, Part 3.
\textsuperscript{192} Kernaghan & Siegel, \textit{Public Administration}, \textit{supra} note 61 at 130, 184-185. Also see part 1 of this Chapter above.
\textsuperscript{193} Savoie, \textit{Court Government}, \textit{supra} note 46 at 89. Also see Michael J. Trebilcock, \textit{The Prospects for Reinventing Government} (Toronto: C.D. Howe Institute, 1994) at 63: “Profitability in the private sector has no close analogue in the public sector.”
\textsuperscript{194} Aucoin & Jarvis, \textit{Modernizing Government}, \textit{supra} note 57 at 68.
\end{footnotesize}
failure, and more by the degree to which policy-makers are able to learn from formal and informal evaluations. This learning function is, in turn, assessed by process variables such as the capacity of the department to absorb new information, be receptive to it and disseminate it.195

A third and related weakness of program evaluations as accountability mechanisms is that the new information is not always reviewed by those for whom it is prepared.196 Internally generated reports are unerringly self-serving and the vague outcome measures necessarily adopted to evaluate public service delivery programs are susceptible to manipulation. This reduces the likelihood that internal reports are read or assimilated. Externally generated reports are also often ignored.197 And even those reports that are reviewed may not be made public. Accountability as a learning tool cannot be effective if information is not absorbed and no lessons are learned.

Finally, and most significantly, even where policy and program measures are effective for their stated purpose of evaluating government, they cannot be successful accountability mechanisms in a representative democracy without ultimate supervision and control by the legislature. As Thomas points out, program evaluations are typically horizontal mechanisms, promoting internal responsibility rather than vertical accountability to the legislature.198

Public Management Proposals for Accountability Reform

Traditional tools for protecting the accountability of law-making are hampered by the increasingly outdated presumption that the executive governs through legal instruments. The more modern public administrative tools developed to protect policy performance are hampered by their mandate and by their effectiveness in practice. The resulting accountability gap undermines the legitimacy of executive social policy-making.

196 Thomas, “Swirling Meanings”, supra note 1 at 55.
197 Savoie, Court Government, supra note 46 at 216-220.
198 Thomas, “Swirling Meanings”, supra note 1 at 58.
If the problem is extreme, so too must be the solution. Some public administration scholars have developed detailed proposals for reform. For example, Donald Savoie argues that the traditional accountability mechanisms are no longer effective because they rely on institutions and formal processes. Power has shifted away from institutions onto individuals and accountability mechanisms must be revised accordingly. Therefore, the time has come to express in “binding and enforceable legal norms the basis for organizing and controlling political and administrative power”.\textsuperscript{199} According to Savoie, this will require statutory reform: defining the role of the prime minister; establishing a distinct personality for the civil service; resolving confusion between accountability, responsibility, and answerability; creating a distinction within the civil service between the upper policy ranks and the lower program delivery ranks; and creating a public process for protecting financial accountability through review of spending estimates. Enforcement of these legal norms will be through external means. For politicians, evaluation will continue to take place within the political environment. For civil servants, evaluation will take place through some form of external peer assessment such as occasionally takes place within universities. The result will be the loosening of the doctrine of ministerial responsibility and the loss of civil service anonymity but, according to Savoie, this is a small price to pay for re-establishing effective accountability within government:

\begin{quote}
If conflicts over a management decision between politicians on the government side and civil servants should become public, so be it... It is far more democratic to have this done in the open for all to see than to have it hidden behind the doctrine of ministerial responsibility.\textsuperscript{200}
\end{quote}

In their study, \textit{Modernizing Government Accountability}, Aucoin and Jarvis propose a somewhat more modest accountability reform. In addition to appointing deputy ministers as accounting officers, which has already occurred under the Harper government, Aucoin and Jarvis recommend the creation of a new parliamentary agency tasked with conducting independent performance reviews of government departments.

\begin{flushright}
\textsuperscript{199} Savoie, \textit{Court Government}, supra note 46 at 338.
\textsuperscript{200} Ibid. at 343.
\end{flushright}
and agencies.\textsuperscript{201} This new agency would necessarily be free from government influence and provided sufficient public management expertise and resources to carry out its mandate effectively.\textsuperscript{202}

These recommendations come from leading scholars of Canadian public administration and they illustrate the severity of the accountability gap in executive social policy-making. However, they both rely on legislative will to make the necessary statutory and public management reforms and there is little evidence of this at present. Absent the necessary legislative will to strengthen both direct and subordinate accountability mechanisms existing with the legislative and executive branches of government, I argue in the next section that courts are uniquely positioned to fill this need. This becomes apparent once the role of courts as one forum for supervising government conduct is situated within a broader accountability framework.

\textbf{4. The Accountability Function of Administrative Law}

Courts enjoy certain institutional advantages over extra-judicial accountability mechanisms in the supervision of government action. Jeff King lists five of these: constitutional authority, rule interpretation, procedural fairness, publicity and accessibility.\textsuperscript{203} Constitutional authority is a reference to the relatively high degree of public respect accorded judicial decision-making. This is due, in part, to the reputation of judges as being truly independent from government, highly intelligent, and generalist in their perspective. Furthermore, judges have expertise in interpreting rules, including understanding the repercussions flowing from certain interpretations, and avoiding interpretations geared to the self-interest of executive officials. Judges are also expert at determining the appropriate scope of procedural fairness in a variety of decision-making contexts. This is not to say that the exercise of these functions is unproblematic, but merely that these are areas of relative judicial competency. Fourth, judicial decisions

\textsuperscript{201} The agency’s mandate would go beyond that of the Office of the Auditor-General and would extend to merit review.
\textsuperscript{202} Aucoin & Jarvis, Modernizing Government, supra note 57 at 84-86.
\textsuperscript{203} King, “Accountability”, supra note 39 at 6.
tend to be widely publicized and critically scrutinized. Over time, this produces decisions of relatively high quality. Finally, courts are reasonably accessible, at least in regard to the liberal rules governing public interest standing and interventions.\textsuperscript{204} King does not suggest that courts should be preferred to other accountability mechanisms supervising resource allocation decisions, but he does argue that these institutional advantages support a coordinated role for courts in combination with other accountability mechanisms.

To these institutional advantages enjoyed by courts, I add another reason that courts are uniquely suited to act as accountability mechanisms of last resort. This is the accountability function underlying courts’ existing administrative review jurisdiction.

**The Accountability Function of Administrative Law Currently**

Courts rarely adopt the term “accountability” to describe their role in judicially reviewing administrative action. Nonetheless, administrative review is well-recognized as an accountability mechanism operating in relation to a restricted segment of government activity (quasi-judicial or administrative functions) and in relation to a limited set of accountability standards (legal standards).

The Supreme Court acknowledged the accountability function of administrative review explicitly in the *Reference re Secession of Québec* decision in 1998:

> To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution...
> As we noted in the *Patriation Reference*, “[t]he ‘rule of law’ is a highly textured expression, importing many things...conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority”\textsuperscript{205}

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\textsuperscript{204} *Ibid.* at 6-10.

\textsuperscript{205} *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 at 256-257 [*Secession Reference*]. Also see *Reference re Renumeration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 10. Most recently, the majority of the Court in *Dunsmuir v. New Brunswick* explained that judicial review protects legislative supremacy, in addition to the rule of law, “because determining the applicable standard of
Chapter 2 – Concept of Accountability

It is important to note here that, in describing the rule of law in terms of executive accountability to legal authority, the Court does not refer to any restriction in the type of functions with respect to which the executive will be accountable, nor in the types of interests that may be at stake. The Court does not speak of “arbitrary state action affecting legal rights” or “arbitrary quasi-judicial or administrative state action”. To the extent that any such restrictions exist in the scope of administrative review, their pedigree is doctrinal rather than constitutional.

Accountability attracts less scholarly attention as a foundational principle grounding administrative law than does the rule of law doctrine. And the rule of law has so often been invoked as a justification for judicial activism, that it may seem difficult to reconcile the doctrine with my more formalist concept of accountability.206 But whatever content the rule of law may or may not additionally contain, it should not be controversial that it operates at a minimum to promote the accountability of government to the legislature.207

Much of the scholarly literature on the scope of administrative review is concerned with defining the point at which the judiciary exceeds its jurisdiction to review government decisions. But this is only one side of the coin. Why do courts have this jurisdiction in the first place? Why was the responsibility to supervise administrative action not left entirely to the legislature?208

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206 I address the debate over the content of the rule of law in Chapter 3.
207 Once this is acknowledged, my argument is a modest one. As a result of the expanding functions of government in the social welfare state, this accountability function is now being thwarted by our tendency to define the rule of law in contradistinction to policy. The reality is that law and policy necessarily overlap in their execution. This is not to say that the rule of law encompasses policy, but merely that the dividing line between law and policy for the purpose of restricting administrative review jurisdiction is indeterminate. Nor is it necessary to attempt to preserve this artificial distinction in order to prevent courts from overstepping constitutional boundaries. This argument is developed in Chapter 4.
208 This balance between, on the one hand, the duty of courts to scrutinize the accountability of executive action and, on the other hand, their duty not to exceed their jurisdiction in doing so, has ebbed and flowed over the years with one or the other of these duties achieving prominence in the literature at different stages: see Paul Craig, “Dicey: Unitary, Self-Correcting Democracy and Public Law” (1990) 106 L.Q.R. 105.
Administrative review developed gradually from the theory that the Court of King’s Bench acted on behalf of the King in enforcing the King’s prerogative of justice.\textsuperscript{209} The foundation behind this jurisdiction is one of protecting parliamentary sovereignty from encroachment by the executive. The principle has been expressed thus:

\textit{…Anglo-American courts should accept the proposition that they have by historic warrant and general consent a valuable and indispensable role in the administrative process. If they should not be arrogant neither should they be defeatist nor irrelevantly modest. Their task is to contain administrative activity within the bounds of delegated power: to apply to administrative action the test of “legality”. The role of the court is related to a general theory of democratic action. The large outlines of policy – and, of course, whatever details the legislature chooses to fix – are to be settled by the most representative organ. The administrative is to make the choices necessary to effectuate the policy. Two conclusions are thereby implied, the one that the administrative has a power of choice, the other that there are limits to its power. To permit interference with its power of choice would reduce the administrative to impotence. To permit persistent violation of limits would substitute the executive for the legislative, bureaucratic will for the broader based consent.\textsuperscript{210}}

Dicey also emphasized the link between the court’s administrative review jurisdiction and the protection of parliamentary sovereignty. Dicey found the linkage in the principle that Parliament may speak only through legislation. Since it is the role of the judiciary to interpret legislation, it falls to the judiciary to ensure that those purporting to act pursuant to legislation actually do so.\textsuperscript{211} In doing so, the courts are not undermining parliamentary sovereignty but, to the contrary, are seeking to uphold it:

Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.\textsuperscript{212}

Recent literature appears to assume the underlying accountability function of administrative law almost as a given.\textsuperscript{213} My point here is to simply reinforce this basic


\textsuperscript{210} \textit{Ibid.} at 346.


\textsuperscript{212} \textit{Secession Reference, supra} note 205 at 261.
principle in order that it not be lost amidst countervailing pressures, on the one hand, to constrain the judiciary within its proper realm and, on the other hand, to expand judicial review to protect constitutional rights.

Notwithstanding the accountability function underlying the theory of administrative law, administrative law doctrine has thus far restricted courts to supervising a limited segment of government conduct (quasi-judicial or administrative conduct), in relation to a limited set of accountability standards (legal standards). This restricted role for courts has been premised on the belief that effective accountability for quasi-legislative government conduct in relation to extra-legal standards is achieved elsewhere within the central accountability framework.

However, we have seen above that a significant accountability gap has opened up in this accountability framework in relation to executive social policy-making – a means of governance that is of increasing importance in the modern welfare state. Modifications to the accountability framework are necessary to fill this accountability gap. In the next section of this chapter, I argue that, from this accountability perspective, courts are uniquely suited for this role. Courts are well placed to act as a secondary, external accountability forum supervising the operation of primary, executive accountability mechanisms in relation to social policy. In Chapters 3 and 4, I will revert back to the perspectives of judicial review theory and administrative law doctrine, respectively, in order to argue that the restrictions placed on the accountability role of courts by those disciplines are artificial and unnecessary. There are no constitutional or institutional barriers to courts acting as secondary, supervisory accountability forums in relation to the full spectrum of government conduct, and in relation to the full range of accountability standards, so long as the responsibility for defining extra-legal standards.

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213 The Honourable Mr. Justice Louis LeBel, “Some Properly Deferential Thoughts on Deference” (2008) 21 C.J.A.L.P. 1 at 3-4. Also see Liston, Honest Counsel, supra note 17 at 222: “Courts act as essential supports for responsible government by supplementing the weaknesses of other institutional checks and filling institutional gaps in the oversight of executive action”.

214 I introduced the limited role that courts currently play in reviewing executive social policy-making in Chapter 1, Part 2, above. Chapter 4 below is devoted to challenging the doctrinal presumptions that underlie this limited review role.

215 See my description of the central accountability framework above in part 2 of this chapter.
accountability standards remains within the legislative and executive branches of
government.

The Accountability Function of Administrative Law Fully Realized

The blended concept of accountability developed in the first section of the chapter
allows us to place the role of courts in addressing the accountability gap in executive
social policy-making within a broader accountability perspective – one that
acknowledges the reality of, and continuing need for, executive governance in the 21st
century but, at the same time, situates the problem within the constitutional framework
of our representative democracy. Although courts are among many subordinate
accountability forums charged with protecting legislative intent, they must be
distinguished from accountability forums in the executive branch of government in two
important respects. First, courts are a purely supervisory accountability forum – unlike
members of the executive, courts are constitutionally prohibited from creating their own
accountability standards, i.e., adding policy content to legislative goals.216 Therefore, the
courts’ accountability function is procedural, rather than substantive, in nature. Second,
courts act as a secondary, external accountability forum – their role is triggered only after
the opportunity for accountability has already arisen through legislative or executive
channels. I suggest that each of these unique attributes is relevant in defining the scope
of administrative review jurisdiction and I will discuss each of them in turn.

Courts as Purely Supervisory Accountability Forums

In the first part of this chapter, I described how subordinate accountability forums
within the executive branch of government may have the delegated authority to create
their own accountability standards, always assuming that these reflect legislative intent.
For example, a minister is expected to employ her own values and standards, and those
of her government, in evaluating the policies developed by the public servants within
her department. This overlap in function is probably why the public administration

216 Certain legal standards such as the doctrine of procedural fairness have been created by courts. But these
are procedural in nature – they do not purport to add substantive content to legislative goals and, for the
purposes of my argument, do not cause courts to exceed their purely supervisory role.
literature is not always careful to differentiate between accountability forums and accountability standards. Very often, it is the same individual or institution that, both, acts as accountability forum and develops the applicable accountability standards.

However, it is not always the case that accountability forums will also have authority to create their own accountability standards. Only subordinate accountability forums located within the executive branch of government may do so. This is because the executive plays an additional agency role in relation to its principal, the legislature. The executive’s primary responsibility is to implement legislative goals – its “doing” role. The delegated responsibility to hold itself to account for implementing these goals – its internal “supervisory” role – is secondary.

In contrast, the judicial branch of government is not tasked with the direct implementation of legislative goals. In administrative law, at least, courts have no “doing” role but are responsible exclusively for the supervisory role of assisting the legislature in its accountability duties. Therefore, courts must look elsewhere for the accountability standards they are to employ in exercising their accountability function. Although courts are required to interpret those standards and some creativity necessarily comes into play here, the goal is for courts to restrict their role to a supervisory one rather than a substantive one. This is a crucial limitation on the courts’ role as a subordinate accountability forum. A central problem of administrative law has been, and continues to be, how courts may identify the accountability standards applicable in holding government to account without undertaking a creative role in their interpretation or application.

Where, then, do courts look in identifying the accountability standards applicable in supervising government conduct? Thus far in the evolution of administrative law, courts have restricted themselves to so-called “legal” standards. Legal standards, or “law”, are a category of accountability standards that have their source in the legislature or implicitly flow from the legislature through common law techniques of statutory

\[\text{217Courts have additional responsibilities in constitutional law but these are distinguishable from their administrative review role. This distinction is the subject of Chapter 3.}\]
interpretation and the doctrine of legislative intent. Courts arguably do assume a
creative role in the development of common law legal standards but the doctrine of
parliamentary sovereignty requires that these amplify rather than replace legislative
intent. Since these legal standards either emanate from the legislature, or are acquiesced
in after the fact, courts do not exceed their purely supervisory mandate in applying
them to the supervision of government conduct. Thus far, though, courts have looked
only to the legislature, and not to the executive, in identifying applicable accountability
standards.

I argue that courts may expand their review role to take into account extra-legal
accountability standards, i.e., those created directly by the executive for the evaluation of
social policy. Since 1979 with the Supreme Court’s decision in CUPE v. New Brunswick
Liquor, administrative law doctrine has taken great strides in recognizing the legitimacy
of the executive branch of government as the sole branch of government tasked with
implementing legislative goals – i.e., its “doing” role. My proposal is the next logical
step in this evolution. There is no longer any reason to preclude courts from looking
directly to executive accountability forums in identifying the accountability standards
applied in supervising government conduct. Accountability standards created by the
executive, whether these consist of formal regulations or departmental practice, may be
equally legitimate as measures for evaluating government conduct. This is because such
accountability standards, so long as they are consistent with legislative intent, also
reflect delegated legislative authority. The legislature has delegated to executive
accountability forums the power to create and apply these accountability standards.

If, as I propose, courts’ review role is expanded to allow for the supervision of
government conduct in relation to executive accountability standards (policy) as well as
legal standards (law), what will prevent courts from assuming a creative role in defining

218 I elaborate on the inherent limitations in the doctrine of legislative intent as the foundation of
administrative review jurisdiction in Chapter 3.
is discussed below in part 4 of this Chapter.
220 Of course, these executive accountability forums remain directly accountable to the legislature for both
their “doing” role and their internal supervisory role.
these standards, thereby second-guessing government policy? The goal of maintaining a supervisory review role without sliding into a substantive review of government conduct would arguably be exacerbated by allowing courts to examine policy standards. I argue that it is the procedural nature of courts’ accountability function that operates as the true limit to courts’ administrative review jurisdiction. Instead of relying on a categorical distinction between law and policy, the boundary of administrative review is more usefully defined in relation to a functional distinction between procedural and substantive review. Therefore, where some judicial imagination is necessary to fill gaps in legislative or delegated legislative intent, courts may, nonetheless, protect against exceeding their supervisory role by focusing on process-oriented accountability standards rather than outcome standards.\textsuperscript{221} How courts might develop this procedural review role in relation to the supervision of social policy remains to be fully worked out. I provide some preliminary suggestions below. At this stage, though, I argue that, consistent with the purely supervisory nature of accountability review, it is the standards chosen by legislative \textit{and} executive accountability forums that should relevant to court’s administrative review exercise, rather than standards created by the courts themselves. By orienting administrative review jurisdiction around a procedural notion of accountability, I suggest that we are able to dispense with the artificial distinction between legal and executive accountability standards (otherwise known as law and policy), so that courts may operate as a supervisory accountability forum in relation to the full spectrum of delegated government activity while still observing constitutional and institutional limitations.

\textit{Courts as Secondary Accountability Forums}

There is another unique attribute of courts that distinguishes them from executive accountability forums. The immediacy of executive accountability forums is such that courts come into play as accountability mechanisms only in a secondary capacity, \textit{i.e.}

\textsuperscript{221}This distinction between the creative role of the legislature and executive in adopting accountability standards in contrast to the supervisory role of courts in enforcing those standards is reflected in legal terms in the tension between the substantive versus procedural aspects of administrative review. I address this substance/process distinction below under the subheading “Acknowledging the Procedural Nature of Accountability”.
particular social policies or programs have been developed by executive policy-makers and after the opportunity for achieving accountability through legislative or executive channels has either resulted in effective accountability or not. When a matter reaches the courts, there will always be some institutional context already in existence in which accountability either has or has not been achieved in relation to particular executive social policies or programs.

This secondary placement of courts within the central accountability framework is also crucial in remodeling their administrative review jurisdiction. Courts are in the unique position of being able to assess whether accountability has been achieved by primary accountability mechanisms without actively re-evaluating the policy itself. In this sense, courts act as accountability forums once removed. In legal parlance, this secondary role is achieved through the concept of deference. Courts should defer to the primary accountability forums tasked with creating and applying accountability standards to social policy, just as courts currently defer to administrative tribunals in their interpretation and application of legal standards.

I suggest that focusing the administrative review exercise on the supervision of primary accountability mechanisms would allow courts the necessary analytical distance and perspective to prevent them from engaging with the substance of social policy. Courts would act as an accountability mechanism of last resort, thereby serving as an additional mechanism for “guarding” the “guardians”.222

Accountability of Executive Social Policy as an Additional Ground for Administrative Review

When we step back from the traditional, blinkered view of administrative law as a means of enforcing legal standards in relation to a limited sphere of government conduct, and broaden our perspective to examine public governance within a broader accountability framework, we see that there are many different accountability standards, legal and otherwise, by which government is held to account within our society. These standards are increasingly created through policy rather than law and are applied by

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222 Mulgan, *Holding Power to Account*, supra note 10 at 229.
numerous different accountability forums of which courts are just one, and a secondary one at that. In contrast to executive accountability forums, courts have no authority to define these extra-legal accountability standards.

The unique position of courts within the central accountability framework, as secondary, supervisory accountability forums, is valuable since it would allow for the expansion of administrative review jurisdiction to encompass executive social policy-making while preserving constitutional and institutional constraints. In current administrative review doctrine, where legislative intent does not provide clear legal standards in relation to which courts may exercise their supervisory role, it is the procedural nature of this role which properly provides a functional limit to administrative review jurisdiction. I suggest that the procedural nature of accountability review might equally develop to constrain administrative review jurisdiction in relation to social policy.

A doctrine of accountability review for executive social policy-making would benefit from incremental development through common law. At this early conceptual stage, I can provide only tentative thoughts on how this doctrine might operate in practice. I suggest that a claim of a lack of accountability in relation to a social policy or program would be reviewable by the courts in accordance with existing principles of public interest standing. Courts would examine available evidence about the development and implementation of the policy or program to determine if accountability has been achieved through the operation of one or more primary accountability mechanisms. The relevant government department or other institution would bear the evidentiary onus. So long as courts restricted their focus to the supervision of primary accountability mechanisms operating in respect of the policy or program, rather than the success or failure of the policy or program, courts would remain within their constitutional mandate.

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223 I explain in Chapter 4 why it is no longer appropriate for administrative law to draw a strict distinction between law and policy thereby restricting its attention to the former. Similarly, there is no reason why courts exercising their accountability function must restrict their gaze to accountability standards having legal status.
How might courts assess the success or failure of primary accountability mechanisms? The attributes of accountability as developed by the public administration literature would be useful here. Court would examine the institutional context in which the program or policy was designed and implemented to determine whether the attributes for effective accountability existed, *i.e.*: a primary accountability forum with delegated legislative authority to require information and seek explanations and justifications from public servants about the policy or program; a corresponding obligation on the part of the public servant to provide information and explain and justify the policy or program; the definition of standards by which the policy or program may be justified by the public servant and evaluated by the accountability forum; meaningful evaluation by the accountability forum in relation to those standards; and the possibility of consequences as a result of that evaluation.

Commensurate with the procedural nature of courts’ accountability function, as well as prevailing practice within social services ministries, courts would focus their attention on the evaluation of the policy or program in relation to process-oriented standards rather than outcome standards. Process-oriented standards might include an internal memo from a ministry line manager outlining the criteria to be applied in developing a policy, as well as publicly-accessible policy guidelines. The courts’ task would be to determine whether the program or policy had been meaningfully evaluated by a primary accountability forum in relation to these standards. In making this determination, courts would defer to the conclusions reached by the primary accountability forum. However, this is not to say that the courts’ review role would become hollow. Courts would be permitted to disregard the conclusions of primary accountability forums where these were found to be unreasonable on the evidence. Certainly, accountability is not achieved where an institutional culture has developed to undermine it.224

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224 The debacle of the *Little Sisters* decision and its aftermath is a case in point. I suggest that administrative review for the accountability of customs practices relating to the importation of homosexual materials would have allowed the courts to address the accountability deficiencies of the customs department in a
Therefore, I suggest that courts may operate as a purely supervisory, secondary accountability forum for assessing whether accountability for social policy or programs has been achieved through the operation of primary accountability mechanisms. The accountability of social policy or programs would be accepted as an appropriate ground for administrative review by the courts. The operative limit on the courts’ jurisdiction would be the procedural nature of courts’ accountability function. Courts would attempt to remain faithful to this procedural role, both, by focusing on process-oriented executive accountability standards rather than outcome standards, and by deferring to the conclusions of primary accountability mechanisms.

Identifying Accountability Standards and Assessing the Success or Failure of Primary Accountability Mechanisms

Current administrative law doctrine would continue to play a significant role in courts’ identification of accountability standards governing a particular policy or program. For example, current administrative law doctrine ranks legal standards according to their legislative pedigree. Express constitutional standards stand first in this hierarchy, followed by legal standards explicitly dictated by the legislature, legal standards contained in delegated legislation, and, finally, common law legal standards.\(^{225}\) This hierarchy is already based on the relative degree of accountability associated with each form of legal standard. Similarly, in identifying relevant accountability standards for a program or policy, courts would look first to enabling legislation to determine whether meaningful statutory standards exist.\(^{226}\) Standards contained within regulations or other forms of delegated legislation would be ranked next since these are subject to relatively robust forms of legislative accountability. Thereafter, courts would look to implicit legal standards derived at through the principles of statutory interpretation and the presumption of legislative intent.

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\(^{225}\) This principle was reaffirmed in Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), [2001] 2 S.C.R. 781.

\(^{226}\) See, for example, ss. 37(2) of the Child and Family Services Act which sets out a detailed definition of what it means for a child to be “in need of protection”: R.S.O. 1990, ch.C.11.
Beyond the identification of legal accountability standards, courts would for the first time be able to recognize the relevance of accountability standards created by executive accountability forums and, in particular, process-oriented standards. These might include everything from managerial standards applied by departmental line managers (such as effective performance standards) to professional standards applied by central government agencies such as the Treasury Board. The absence of any accountability standards developed by the legislature or executive for the evaluation of a social policy or program would be conclusive evidence that the policy or program was not accountable.

Once any accountability standards created by the legislature or the executive had been identified, courts would move to a review of primary accountability forums in their application of those standards to the policy or program. Again, current administrative law doctrine would be of assistance here. The principle of deference, honoured post-Dunsmuir through a reasonableness standard of review would presumably continue to apply.227 In other words, courts would assume a deferential posture by accepting the evaluation of the program reached by primary accountability forums in the absence of particular evidence that their evaluation was unreasonable. In Dunsmuir, the Supreme Court held that reasonableness was “concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process”. Such factors would similarly apply in reviewing primary accountability mechanisms.228

The crucial challenge for courts would be in assessing the accountability of a social policy or program without slipping into a substantive review of the policy itself. For example, how could courts assess whether accountability had been achieved in respect of vague or imprecise accountability standards without imposing their own judgment on what constitute appropriate accountability standards? Maintaining this distinction is

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227 Dunsmuir, supra note 205.
228 The Court in Dunsmuir went on to include “acceptable outcomes” for a decision as another relevant factor in assessing reasonableness. I argue below that the outcome of a decision is not an accountability value and should not be relevant for the purpose of administrative review.
critical to my proposal that administrative review may expand into the policy arena without violating the separation of powers. If social policy is to be justiciable, it is only the procedural nature of the review function that protects against judicial values infiltrating the substance of the policy. And yet the difficulty (some would say impossibility) of maintaining this procedure/substance distinction has plagued administrative law from its conception. Critics of administrative review may point to the doctrine of statutory interpretation, the *ultra vires* doctrine, the standard of review doctrine, and review for abuse of discretion, as all providing the judiciary with ample opportunities to second-guess government choices.\(^{229}\) In this sense, my proposal would address one set of problems (the accountability gap in executive social policy-making and the indeterminacy of the law/policy distinction) only to exacerbate this age-old problem of defining appropriate limits to administrative review jurisdiction.

This is a significant challenge but it is not a new challenge. The evolution of administrative law has been animated by incremental doctrinal innovations designed to demarcate a review jurisdiction that is purely supervisory rather than substantive. In the next part of this chapter and in subsequent chapters, I argue that these innovations are gradually culminating in a procedural orientation to administrative review on both procedural and substantive grounds. In my view, this procedure/substance distinction, while not solving the problem outright, offers the most functional and doctrinally consistent framework for approaching the problem. So, in assessing the sufficiency of executive accountability standards, it is the procedural nature of the review exercise (rather than the legal status of those standards) that would be the relevant boundary limiting courts to a supervisory (rather than substantive) role. The goal would be for courts to remain faithful to the procedural nature of their task by, first, focusing on process-oriented standards rather than outcome standards, and, second, by deferring to the conclusions reached by the primary accountability forum.

\(^{229}\) A reviewing court’s task of “discovering” legal standards becomes increasingly difficult as fewer “clues” are provided by the legislature and the link to direct legislative control becomes more tenuous. As legal standards become less certain, the danger that courts may assume a creative role in defining them increases. Current doctrinal approaches to this danger are discussed in Chapters 3 and 4.
Maintaining a procedural focus to accountability review would be facilitated by a focus on accountability standards that are, themselves, procedural in nature. And executive accountability forums tend to substitute process standards for outcome standards in evaluating social policy due to the inherent difficulty of designing concrete and measurable outcome standards for social policy. Mulgan emphasizes this point in his chapter on public sector accountability in *Holding Power to Account*. He describes the goals of public sector agencies as “typically imprecise and unarticulated” in contrast to private sector management with “clear and quantifiable ‘bottom line’ objectives.” The problem is exacerbated by the fluid nature of public policy-making:

In the public sector… objectives tend to be politically contested and policy-making is more a matter of ongoing negotiation and adjustment between competing values than the setting of clear targets with unambiguous criteria of success. Most government agencies are required to react to complex and shifting political imperatives which makes their objectives impossible to specify in advance, except in very vague and imprecise terms, such as ‘furthering the nation’s health’ or ‘protecting the environment’.

This has an unavoidable impact on public sector accountability. Without clear objectives, it is impossible to develop measures of successful performance. Although quantifiable outcome measures are often substituted for quality measures (such as the length of hospital wait-lists for example), these fail as successful accountability standards and can lead to “goal displacement and perverse incentives”. The unsuitability of outcome measures as a means of holding executive social policy-makers to account is echoed elsewhere within the public administration literature.

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230 Mulgan, *Holding Power to Account*, supra note 10 at 151.
232 Mulgan asks: “What is to count as good quality health care? Indeed, whose opinion should be sought, the patient’s or the health professional’s?: ibid.
234 Aucoin & Jarvis state in relation to results-based reporting, “[t]he matters at issue are almost always questions of public governance and thus involve conflict over values and priorities: they are rarely technical matters that can be delegated to experts for resolution.”: Aucoin & Jarvis, *Modernizing Government*, supra note 57 at 68 Also see Kernaghan & Siegel, *Public Administration*, supra note 61 at 184-185.
In the absence of substantive measures for evaluating social policy, accountability is largely achieved through process standards. Mulgan explains that this is not only current practice, but is also a necessary attribute of effective accountability in this context:

[W]here objectives are imprecise and contested, decision-makers need to be kept on a shorter rein and exposed to continuing scrutiny and debate by those to whom they are accountable. Open processes of decision-making become more important as mechanisms of securing accountability and decision-makers need to be held more accountable for consulting widely and following due process...

[D]ue process is necessary to provide adequate public debate and discussion over the outcomes of government actions.

Mulgan also points out that stakeholders must understand the accountability framework in order for process standards to be effective:

People need to know how to seek information and ask questions. Accountability agencies need to monitor processes and enforce compliance with agreed procedures. Clarity of process, and consequent ease of accountability for process, can thus help to compensate for imprecision of objectives and the relative difficulty of accounting for objectives.

The work of public administration scholars on the relationship between process standards and outcome standards in evaluating social policy is another untapped but potentially rich source of public governance knowledge valuable for an interdisciplinary approach to administrative law. It offers a public administrative analogue to the position taken by many administrative law scholars that the doctrine of procedural fairness may and should be adapted for the purpose of administratively reviewing social policy. But my immediate point is that the procedural focus to accountability review would be reinforced in the case of social programs subjected to process-oriented accountability standards and this would further attenuate the danger of courts intruding into the substance of social policy.

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235 Mulgan, Holding Power to Account, supra note 10 at 185-186.
236 Ibid. at 235.
237 Ibid.
I elaborate on the procedural nature of accountability review further on in this chapter. The difficulty for courts in maintaining a procedural orientation to administrative review without slipping into an assessment of the underlying policy or program is a theme that I will return to frequently.

**Getting From Here To There: Integrating A Broader Accountability Perspective into Current Administrative Law Doctrine**

Current administrative law theory offers a "micro" perspective on accountability in government seen through the narrow lens of what John Willis referred to as "lawyers' values" as opposed to "civil servants' values". My proposal for reconceptualizing administrative review in terms of accountability is not an attempt to substitute a new doctrine for the old, but an attempt to broaden the focus to encompass the "macro" governance environment in which traditional administrative law doctrine operates – *i.e.*, to find the commonality underlying both lawyers' and civil servants' values.

These two perspectives largely overlay one another. For example, whereas administrative review is currently concerned with upholding the rule of law (*i.e.* legal standards defined in accordance with legislative intent), review for accountability would be concerned with upholding accountability standards developed by the legislature and the executive branches of government (both of which have constitutional authority to do so). Courts shore up the central accountability framework existing between the executive and the legislature. In this sense, most traditional grounds for triggering administrative review, such as illegality, procedural unfairness, and unreasonableness, are subsumed within the broader concept of accountability. These are examples of particular legal standards applied by courts in evaluating that portion of government conduct traditionally subject to administrative review.

Therefore, to a large extent, my thesis incorporates traditional administrative law doctrine. There are, however, several points at which the two perspectives diverge. I discuss these here.

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Approaching Accountability as a Shared Responsibility

One point of divergence from conventional administrative law doctrine is my assertion that all three branches of government, the legislature, the executive, and the judiciary, share the responsibility for supervising the accountability of government action in our state. Administrative law doctrine currently presumes that this responsibility lies solely with the legislature (with a secondary role to the courts), to the exclusion of the executive branch of government. This presumption is reflected in the Canadian standard of review doctrine. In deciding to what degree they are entitled to scrutinize an administrative tribunal’s decision, courts frame the issue around whether or not the legislature intended for the matter to be left to the tribunal. They maintain the fiction that legislatures have necessarily spoken on all issues, rather than directly addressing the problem of accountability in those situations where the legislature has clearly remained silent.

Genevieve Cartier has made a compelling argument that this presumption is faulty. Legislatures do not speak on all issues. Where they remain silent, the administrative state creates its own policy but the “integrity of the legislative process” is no longer available to legitimize this delegated function. Therefore, Cartier argues that a duty of procedural fairness on executive policy-making is necessary in order to legitimize policy decisions:

Courts view administrative decision makers as instruments in the hands of Parliament, and they base the legitimacy of legislative decisions taken by those decision makers on the legitimacy of Parliament itself. Courts should recognize that when statutes delegate legislative functions to the administrative state, the legislature gives up to a certain extent its monopoly on law-making. Courts should go beyond the preoccupation of preserving the integrity of the legislative process and fully recognize the legitimacy of the administrative state by

240 Approaching the issue of shared responsibility for accountability from the opposite perspective, Mary Liston states: “[I]n a modern complex state, the rule of law is too big a job for the courts to manage alone. To ensure that citizens benefit from responsible government, accountability must be shared amongst a family of institutions, each of which seeks to oversee, uphold, and enforce democratic systemically non-arbitrary, and responsive behaviour”: Liston, Honest Counsel supra note 17 at 71.
241 See, for example, Pushpanathan v. Canada (Minister of Employment and Immigration), [1998] 1 S.C.R. 982 at paras. 26-38.
242 Cartier, “Procedural Fairness”, supra note 23.
adopting a hands-on approach to procedural fairness in the field of legislative
decisions taken by the administrative state and a hands-off approach to the
substance of these decisions.243

I suggest that this same argument applies when the problem is examined through
the broader lens of accountability. Although the legislature is ultimately responsible for
protecting the accountability of government conduct, it does not (and can not) always
fulfill this function personally but, instead, delegates it to the executive. The
accountability standards created as a result do not emanate from the legislature but from
the executive itself. Where the legislature abdicates its direct role in supervising
government conduct in relation to these standards, the courts may step in to fill this gap.
The tool used by courts to fill this function may be understood in narrow terms as
procedural fairness, or in broader terms as protecting accountability, but the argument is
the same.

Furthermore, just as Cartier recommends in relation to procedural fairness, my
proposal recognizes that the executive holds primary responsibility for achieving
accountability with the courts playing a secondary role in supervising primary
accountability forums. In the language of conventional administrative law doctrine, this
requires courts to extend a deferential attitude to the conclusions of those primary
accountability forums.244 Again, the argument is the same.245

Other scholars have also argued that the executive plays a larger role in regulating
accountability than has been hitherto acknowledged in administrative law. Sossin and
Smith argue for the legal recognition of executive-made soft law. Their definition of soft
law as “any written or unwritten rule which has the purpose of influencing bureaucratic
decision-making in a non-trivial fashion” approximates my concept of accountability

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243 Ibid. at 238 (also see 243-244).
244 Ibid. at 257.
245 Cartier’s article offers a powerful justification for my proposal that courts play an expanded role in
relation to executive policy-making, albeit in terms of supervising accountability rather than procedural
fairness. I take issue only with one element of Cartier’s proposal and that is her suggestion that the extent to
which individual interests are affected by a policy decision be relevant in determining the content of
procedural fairness required in the circumstances: ibid. at 261. I argue below that a focus on individual
interests is generally inconsistent with the accountability function underlying administrative review and
would be inappropriate particularly in the review of social policy.
standards. The authors suggest certain preliminary standards against which courts might evaluate soft law, including principles of accessibility and consistency in application. Although the authors do not elaborate here, it appears that they would preserve for courts a substantive role in the creation of these accountability standards. To the extent that this is so, it marks a point of departure from my own thesis.

Sossin and Smith also underline the importance of building a concern for accountability into executive social policy-making itself. They argue that executive policy-makers should be under a positive mandate to create soft law structuring the exercise of discretion. I agree with Sossin and Smith that a broad concept of accountability, encompassing both political institutions and public administrative institutions, is desirable. For example, it may be that managerial accountability mechanisms geared to sound financial management, efficiency or efficacy of social programs may fulfill the minimum requirements necessary for accountability in certain cases and, if so, it is time for administrative law to recognize the legal legitimacy of these tools. However, responsibility for accountability should not stop there. The primary role of executive accountability forums in creating and applying their own accountability standards must always be subject to external supervision, either by direct legislative accountability mechanisms or, where that does not take place, through administrative review for accountability.

A merged legislative, executive, and judicial approach to protecting the accountability of government conduct not only better reflects modern governance practices, but I suggest that it is an effective means of responding to the accountability gap in executive social policy-making.

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247 Ibid.
248 Of course, the converse is also true. It is equally possible that detailed legislation establishes a social program that is not financially sound and is inefficient and ineffective. Although such a program would clearly not be in the public interest, this does not necessarily detract from accountability. Parliament must have the freedom to make bad law. I explore this point further in Chapter 3.
Acknowledging the Procedural Nature of Administrative Review

My proposal also diverges from the view held by many administrative law scholars that courts’ administrative review jurisdiction allows them to evaluate government conduct in relation to substantive values such as fairness in outcome.249 I argue, instead, for a procedural conception of administrative law that restricts courts to evaluating accountability on the basis of accountability standards pre-defined by the legislature or the executive. The proper focus of courts is not on the outcome of particular government decisions but, rather, on the legitimacy of the decision-maker as assessed by reference to these pre-existing accountability standards.250 This procedural orientation to administrative review is an important pre-requisite to my proposal that administrative review jurisdiction may expand to encompass the policy arena. Accepting that the limitations in the doctrine of legislative intent will unavoidably require some judicial creativity in identifying and assessing accountability standards, it is the procedural nature of this role that protects courts from intruding into the substance of social policy.

This procedural vision of administrative review is implicit within the traditional notion of administrative review. Jurisdiction means authority to decide.251 It is the authority of the decision-maker, rather than the resulting decision, that lies at the center of administrative review. Under current administrative law doctrine, review is procedural in one of two ways. One way that courts traditionally assess the accountability of an administrative decision-maker is in relation to legislative intent. Courts ascertain legislative intent in accordance with the principles of statutory interpretation and compare this intent with the decision in issue to ensure that they correlate. This inquiry might involve an examination of the administrative decision in issue but only in relation to the decision-maker’s scope of jurisdiction. Unlike the case in constitutional law, courts are not tasked with assessing the legality of the decision

249 I discuss this literature in Chapter 3
250 Or, to the extent that focus is placed on the decision, it is on the legislative pedigree of the decision rather than on its content.
This is procedural because the inquiry is directed at the existence of this correlation rather than at the content of the decision. The content of the legislature’s instructions and the outcome of the decision are only indirectly relevant.

Second, courts may scrutinize the process by which the decision-maker reaches the decision for evidence that the decision-maker acted in an accountable manner. This second method of scrutinizing accountability is known either as the doctrine of procedural fairness, or review for abuse of discretion. D.J. Galligan has referred to these as “principles of good administration” and he describes them as follows:

Broadly speaking these principles are of two kinds: those requiring certain procedures, e.g., natural justice, and those that place constraints on the reasoning process whereby officials reach decisions, e.g. the no-fettering rule, the no-evidence rule, irrelevant considerations, improper motives, unreasonableness. These principles are concerned with what happens within the limits and only indirectly with the limits themselves. They do not stipulate the conclusionary reasons upon which any decision is to be based, but form a system of procedures and reason-guiding constraints on the process of decision-making.

In my view, these are exactly the type of procedural considerations appropriate to protecting accountability in relation to the limited sphere of administrative decisions traditionally reviewed by courts. Courts may have difficulty refraining from re-assessing the substance of the underlying decision, but this is certainly the goal of their review exercise.

Galligan goes on to argue that a commitment to accountability (or rationality as he also calls it) as an ordering principle of administrative review does require some commitment to underlying social values. But these underlying values are also procedural in nature. In Galligan’s view, they include notions of consistency, even-handedness, generality and continuity and, perhaps, even the more basic idea of

252 The 6th edition of De Smith’s Judicial Review argues that the ultra vires principle has now been replaced by the principles of lawful administration as the foundation of judicial review: ibid. at 4:042. In Chapter 3, I argue against this conclusion. However, whichever theory ultimately prevails, both the ultra vires doctrine and the principles of lawful administration are accountability measures. The principles of good administration (legality, procedural propriety, rationality, etc.) are simply procedural means of measuring accountability where statutory direction is not provided.

equality.254 I take issue with Galligan on the inclusion of equality in this list which, I suggest, has too much substantive content to be a concern in administrative law. But, in any event, as Galligan acknowledges, the values that tend to be implicit in the idea of accountability are not absolute but assumptions only. They are rebuttable through the operation of justification. There may be a rational policy reason for deviating from consistency and the decision-maker is required only to articulate this.255

The point here is that the accountability function of administrative review is inherently procedural in nature and, in order to remain faithful to this accountability role, administrative law doctrine must evolve along procedural lines – maintaining its focus on the legitimacy of the decision-making process, as evaluated by reference to legislative or executive accountability standards, rather than slipping into substantive scrutiny of the outcome of administrative decision-making.

Redefining the Outer Boundary of Administrative Review Jurisdiction

A related point is that my proposal would require the outer boundary of courts’ administrative review jurisdiction to be redrawn in functional, rather than categorical, terms. This boundary was traditionally defined in relation to the category of accountability standards at issue. Legal standards (implemented by quasi-judicial or administrative decision-makers) were subject to administrative review. Policy (created by those exercising delegated legislative functions) was not. We will see in Chapter 4 that this boundary has become increasingly irrational and has been largely rejected by the courts. In the resulting vacuum, the boundary is often defined by reference to the quantity of interests affected by the government decision at issue. Decisions affecting individuals are subject to administrative review. Polycentric or collective decisions are not. When administrative review is understood as an accountability mechanism of last resort, supervising the larger accountability framework, this boundary no longer makes sense either. Instead, I argue that a functional boundary presents itself as the most

254 Ibid. at 272.
255 Galligan also discusses the concept of participation as separate ordering principle to be developed within administrative judicial review: ibid. In my view, participation as a value is highly variable depending on the type of power being exercised and, for this reason, I view it as one element that might be relevant as part of an accountability analysis rather than a self-standing value to be necessarily promoted.
logical and appropriate means of limiting the scope of administrative review. Instead of
drawing a categorical distinction between law and policy, I suggest that courts exercise
their accountability function with respect to all types of accountability standards
restricted only by the principle that the review exercise remains a supervisory one, i.e.,
accountability is evaluated on the basis of standards created by the legislature or
executive rather than those created by courts. To the extent that legislative or
executive accountability standards are unclear and courts are required to amplify
legislative intent, it is the procedural nature of the courts’ accountability function that
protects against courts overstepping their supervisory role.

This proposed redefinition of the outer boundary of administrative review would
result in an expansion of the courts’ jurisdiction in certain respects, and its possible
contraction in other respects. Jurisdiction would be expanded in the sense that all
government conduct delegated from the legislature would be subject to administrative
review and courts would be tasked with assessing the accountability of that conduct in
relation to all relevant accountability standards. However, jurisdiction might contract in
the sense that courts would accept the prohibition against creating their own legal
standards in assessing the sufficiency of accountability achieved.

This last point is a contentious one. It is not clear in contemporary administrative
law theory whether the courts are, indeed, constitutionally entitled play a creative role
in reviewing administrative conduct, or whether they are restricted to amplifying
legislative intent. I review the ongoing debate over the constitutional foundations of
administrative review jurisdiction in detail in Chapter 3. For present purposes, I merely
assert my position that courts remain bound by the doctrine of parliamentary
sovereignty. This is inherent in the accountability function of administrative review; i.e.,
that of protecting executive accountability to the legislature. Although the doctrine of
parliamentary sovereignty has been interpreted flexibly to allow courts significant

256 In this way, the goal articulated by Sossin and Smith in their article “Hard Choices and Soft Law” is
arguably accomplished. The “legal regulation of discretion” proceeds “not from technical exercises in
jurisdictional line-drawing and categorizing, but from a practical and contextual analysis of the factors that
actually shape and guide decision-making.”: Sossin & Smith, “Hard Choices and Soft Law”, supra note 34 at
869.
leeway in elucidating legislative intent, our constitution does not permit them to ignore it. This principle, updated to reflect the legitimacy of accountability standards created by the executive, would act as the outer boundary of courts’ administrative review jurisdiction. To the extent that courts currently operate beyond this boundary by applying legal standards of their own creation, my proposal would result in a contraction of administrative review jurisdiction.

Administrative review has always been vulnerable to the danger that the limitations in the doctrine of legislative intent might lure courts into an excessively creative role in reviewing executive social policy. Unfortunately, my proposal to re-orient administrative review around the concept of accountability does not offer a complete solution to this problem. However, I do suggest that it offers a stronger conceptual framework for approaching the problem than is currently offered by the law/policy distinction. There are several reasons for this. First, orienting the boundaries of administrative review along a procedural/substance axis rather than a law/policy axis is conceptually more consistent with the trajectory of recent innovations in administrative law. Second, it is arguable that courts have had more success maintaining a functional distinction between procedural and substantive review, than they have had in maintaining the categorical distinction between law and policy. Third, under my proposal, courts might be less tempted to assume a creative role in supervising policies or programs because they would have available a much larger pool of pre-defined accountability standards from which to draw. No longer would courts be limited to applying standards having legal status. For the first time, they would be entitled to consider whether executive social policy-makers are following their own rules. Therefore, to the extent that the difficulty maintaining the procedure/substance distinction delegitimitizes administrative review jurisdiction currently, my proposal would at least go some way towards minimizing this problem rather than exacerbating it. This third proposition is reasonably self-evident. However, I elaborate on the first two propositions in the following two subsections.

257 In other words, soft law would be given legal status as argued for by Sossin and Smith: ibid.
Current Administrative Review Doctrine Is Increasingly Procedurally-Oriented

Redefining the boundaries of administrative review jurisdiction along a procedural/substance axis would be in keeping with the trend in administrative law generally. Administrative review doctrine on both substantive and procedural grounds already largely reflects the procedural nature of its underlying accountability function. In Chapter 4, I will explain how the duty of procedural fairness has evolved as one measure of accountability applicable in the case of some government functions. And, since the Supreme Court’s decision in CUPE v. New Brunswick Liquor, administrative review on substantive grounds has generally developed along the same lines – as a measure of the decision-maker’s legitimacy rather than the content of the decision.258 Administrative lawyers have labeled this re-orientation of substantive review “deference”, but it may equally be understood as a shift towards a procedural vision of administrative review. Both the standard of review analysis by which the court chooses what degree of scrutiny to use in examining an administrative decision, and the application of the standard to the decision has increasingly focused on the legitimacy of the decision-making process over outcome. In this sense, I argue that “substantive” review is, in fact, largely procedural.259

The C.U.P.E. decision signaled this profound shift in the philosophy behind substantive review. The Court effectively accepted the legitimacy of the administrative state and, in so doing, shifted its inquiry from an examination of the soundness of the underlying decision, towards an examination of the procedural legitimacy of the decision. The lower court in C.U.P.E. had applied the prevailing “preliminary or collateral matters” analysis and characterized the issue before it as one of legality – i.e., in the individual circumstances before it, was the employer’s conduct in replacing striking unionized employees with management employees lawful under the governing legislation?260 In contrast, the Supreme Court focused on the legitimacy of the Public

258 New Brunswick Liquor, supra note 219.
259 Although the Supreme Court continues to refer to substantive review “on the merits”, this is a misnomer which unnecessarily confuses the exercise of administrative review: Dunsmuir, supra note 205 at para. 26.
Service Labour Relations Board’s determination of that question generally. The Court refrained from examining the individual circumstances which had brought the issue to court. There was no reference to the specific parties or even to the relative interests of unionized employees versus employers as groups. Instead of focusing on the interests affected by the decision, the Court’s attention was on the decision-maker, i.e. the Board and its authority to make the decision.

Post *CUPE*, the Courts developed the pragmatic and functional test as a means of offering an appropriate degree of judicial deference to the decision-maker at first instance. The goal underlying the pragmatic and functional test was to determine the legislator’s intent as to who should ultimately make the impugned decision: the administrator or the courts. Of the four factors that made up the pragmatic and functional test, three of them engaged the circumstances under which the decision was made, rather than the content of the decision. The presence or absence of a privative clause in the enabling legislation, the expertise of the administrator, and the purpose of the legislation each signaled an attribute of the administrative decision-maker that safeguarded the legitimacy of the administrative decision-making process. Only the fourth factor, the nature of the problem, directly engaged the substantive problem under review. And the factor that drove so much of the analysis was the most clearly procedural of the four: the relative institutional expertise of the tribunal. Under this factor, courts have taken into account procedural considerations such as the composition

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261 The landmark decisions by which the Supreme Court arrived at the pragmatic and functional test include: U.E.S., Local 298 v. Bibeault, 1988 2 S.C.R. 1048; Canada (Combines Investigation Branch, Director of Investigation and Research) v. Southam Inc., 1997 1 S.C.R. 748 [Southam]; Baker, supra note 87, and Dr. Q v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19 [Dr. Q].

262 “In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.”: Dr Q, *ibid.* at para.26.

263 Iacobucci J. has stated that expertise is the most important consideration in determining standard of review: Southam, *supra* note 261.
and structure of the tribunal, as well as its expertise and the procedural tools available to it.264

The application of a reasonableness standard of review has also tended to turn on how administrative decisions are made rather than their outcome. For example, in Baker, L’Heureux-Dubé J. applied the reasonableness standard to the Minister’s exercise of discretion by focusing on the “manner in which the decision was made and the approach taken” by the Minister. The relevant question was whether the Minister was “alert, alive and sensitive” to the children’s best interests in making her decision, not whether those interests were reflected in the eventual decision itself.265 Although substantive considerations might be smuggled into these inquiries, the framework is intended to be procedural in nature.

In Dunsmuir, the Supreme Court rejected the pragmatic and functional terminology and attempted to clarify the goals underlying the concept of deference in so-called substantive judicial review. It described a new reasonableness standard of review that is, again, defined largely (but not entirely) in terms of the legitimacy of the decision-making process:

In judicial review, 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.266

Justification, transparency, and intelligibility are all process values. However, the reference to “acceptable outcomes” is not. To the extent that this consideration allows the Court to impose its own substantive values in evaluating the outcome of the decision, the Court has exceeded its constitutional limits. A focus on the outcome of an administrative decision blurs the functional distinction between constitutional and administrative review and ultimately violates the doctrine of parliamentary

264 National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 SCR 1324 per Wilson J.
265 Baker, supra note 87 at paras. 74-75.
266 Dunsmuir, supra note 205 at para. 47.
sovereignty. In spite of these hints of substantive review in Dunsmuir, the general thrust of administrative review has been moving steadily in a procedural direction.

Administrative review on traditional nominate grounds for abuse of discretion is also intended to be procedural in nature. Review of government action on grounds of improper purposes does not mean “improper” in the sense that the action violates judicially-created norms, but “improper” in the sense that the purpose is incongruent with legislative intent (as interpreted by the judiciary). In Roncarelli, for example, Rand J.’s reasoning was premised on incongruency between the purpose behind the revocation of Roncarelli’s licence and the purpose of the liquor licensing scheme, rather than on a substantive notion of illegitimacy. Rand J. indicated that public officers owe a duty of good faith to those that they regulate but he defined the scope of this duty in relation to statutory intent and purpose, not any moral notion of good faith. Of course, the reality is that legislative intent is necessarily indeterminate in grants of discretion and judicial values are unavoidably influential in the inquiry. But the goal, at least, is for courts to remain as neutral as possible. Allowing courts to expand their inquiry by taking into consideration accountability standards created by the executive would help to fill the vacuum left by the legislature and would further this goal of judicial neutrality.

Even the application of a correctness standard of review to “true questions of jurisdiction” is arguably procedural in nature. Correctness for the purpose of administrative review does not mean the correct outcome in any absolute sense.

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267 In adopting and applying a reasonableness standard to the labour adjudicator’s decision in Dunsmuir, the majority purported to focus on the reasoning “process” behind the decision: ibid. at para. 72. However, the analysis applied by the Court in finding the decision to be unreasonable is really substantive in scope. The Court’s expressed aim of clarity was not, in this respect at least, realized.


269 I discuss Roncarelli in more detail in Chapter 3.

270 In this, I suppose I am one of those “fervent proponents of formalism” who recognizes that while “only a degree of rigidity is attainable in practice, the rigid doctrine [of separation of powers] remains the benchmark for which judges should strive”: David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) 27 Queen’s L.J. 445 at 450. However, in contrast to Dyzenhaus, my view is that the existing “incoherence and instability” in administrative law stems not from formalism but from the continued application of a categorical law/policy distinction as the boundary line of administrative review and the failure to remain faithful to its accountability function.

271 Dunsmuir, supra note 205 at para. 59.
Instead, the decision-maker must be correct in interpreting the legislature’s instructions. The distinction between courts’ mandate in administrative review and their mandate in constitutional review is crucial here. In constitutional law, correctness is absolute in the sense that the courts are the final arbiters of compliance with legal values. But in administrative law, correctness must be assessed in relation to the legislature’s instructions. It is this formal correlation that allows the court to determine that the decision-maker has acted correctly, i.e., within its scope of authority.

The most recent example of the evolution towards a procedural conception of substantive review is the similar attention devoted in procedural review and substantive review, respectively, to the assessment of reasons for decision. In procedural review, the duty to give reasons was recognized in Baker as a general attribute of procedural fairness. Post-Baker, courts acknowledged that this duty requires that reasons be meaningful and sufficient for their purpose. This development led reviewing courts into an inquiry into the sufficiency of reasons under the procedural review branch of their analysis. In substantive review, the sufficiency of reasons is similarly in play since the Court in Dunsmuir placed new emphasis on the existence of justification, transparency, and intelligibility within the decision-making process. In conducting this inquiry, courts are focused on eliciting evidence of those attributes from the reasons for decision. Therefore, to this extent, procedural review and substantive review have seemingly converged.

Of course, there are bound to be transitional glitches along this evolutionary path. Procedural review is conducted on a correctness standard in contrast to substantive review which generally requires deference to the decision-maker. These different standards become nonsensical where the court’s inquiry is essentially the same in both cases. The Ontario Court of Appeal attempted to alleviate this concern in its recent

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272 Ibid.
273 Baker, supra note 87.
275 Dunsmuir, supra note 205.
decision in *Clifford v. OMERS*. In *Clifford*, the Court acknowledged the analytical overlap in the relevance of reasons for both substantive and procedural review, but it rejected the argument that this resulted in a merged analysis. Instead, the Court held that the sufficiency of reasons in procedural review should be assessed functionally and the scrutiny of those same reasons as support for the outcome of the decision should be assessed substantively. How subsequent courts can possibly make sense of this distinction given the differing standards of review remains unclear, and this is a doctrinal glitch that remains to be resolved.

In spite of these transitional hurdles, substantive review post-*C.U.P.E.*, is, for the most part, evolving consistently with its underlying accountability function. The doctrine of deference and the focus on institutional factors as evidence of procedural legitimacy in decision-making have developed as mechanisms for protecting accountability. To the extent that *Dunsmuir* signals a continued interest in the outcome of administrative decision-making, it merely indicates that administrative review has not yet arrived at what I argue is its logical destination. My proposal to reject the law/policy distinction and, instead, define the boundaries of administrative review jurisdiction along the procedural/substance distinction inherent in accountability review is conceptually consistent with this trend.

**Courts Maintain a Functional Distinction Between Procedure and Substance**

Although the analytical frameworks applied to procedural and substantive review may be gradually merging into a single procedural vision of administrative review, a conceptual overlap between the substantive nature of executive policy-making and the procedural nature of courts’ supervisory mandate will necessarily remain. This conceptual overlap makes it impossible to maintain a strict distinction between procedural review and a substantive evaluation of the policy or program in issue. David Dyzenhaus and Evan Fox-Decent point out several substantive implications of

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277 *Ibid.* at paras. 31-32.
278 Incidentally, accountability review would do away with this inconsistency. There would no longer be a relevant distinction between the two tracks of review and courts would uniformly be required to defer to the conclusions of the primary accountability forum.
procedural review in their article “Rethinking the Process/Substance Distinction: Baker v. Canada”.279 Important among these is the undeniable reality that the imposition of fair procedures will constrain to some degree the range of substantive outcomes available to an administrative decision-maker. In a particularly prescient statement, the authors note that, “the move into the era of fairness has significant substantive implications – it limits the scope of what can count as a substantive reason”.280

In spite of this conceptual tension, a functional distinction between process and substance is well-established in the jurisprudence and seems to operate, if not successfully in practice, than at least more successfully than does the law/policy distinction.281 Australian scholar Chris Finn makes a similar point in his argument that the non-justiciability of policy decisions is a redundant concept.282 Finn argues that the most complex and polycentric of administrative decisions is amenable to judicial supervision so long as courts respect the distinction between the legalities of the decision-making process and the merits of the substantive outcome.283 Finn also acknowledges the difficulty in maintaining this distinction but points to the conceptual clarity to be gained:

It is undoubtedly true that the legality/merits distinction is a difficult one. But it is submitted that it is the correct distinction. It is derived directly from the constitutional separation between the roles of the executive in making administrative decisions and the judiciary in supervising that administrative process. The distinction is not clear in all situations, but is nevertheless fundamental. A renewed focus on this distinction, no longer obscured by formalist and increasingly unjustifiable notions of non-justiciability may well

280 Ibid. at 212. Along the same line, the authors argue: “the reasons-giving requirement affects at the same time the content of the duty of fairness and the content of the actual decision… If there were no limits to what counts as a good reason, so that arbitrary reasons were permitted, then the rational for demanding reasons and a hearing would be subverted.” (at 217). This is prescient in light of the subsequent case law addressing the sufficiency of reasons, discussed above.
281 See for example, the Supreme Court’s jurisprudence limiting the legitimate expectations doctrine to procedural rather than substantive relief, as reviewed by Binnie J. in Mount Sinai Hospital Center v. Québec (Minister of Health and Social Services), [2001] 2 S.C.R. 281 at paras. 22 – 38. In contrast is the incoherence of the jurisprudence relying on the law/policy distinction which I discuss in Chapter 4.
283 Ibid. at 244.
lead to a gradually sharper delineation of the contours of this great constitutional divide.284

My thesis is not that the process/substance distinction offers a “cut and dried” answer to the perennial problem of the boundaries of administrative review. No such easy answer exists. However, I do suggest that the process/substance distinction offers a more functional basis on which to approach the problem than does the current law/policy distinction. Maintaining a distinction between process and substance so as to prevent courts from creating their own accountability standards in reviewing social policy-making would continue to be an important challenge in an administrative review doctrine based on accountability.

The Irrelevance of Individual Interests

Finally, my proposal diverges from conventional administrative review doctrine in another important respect. This is in the significance ascribed by conventional doctrine to the interests of individuals affected by administrative decisions. In procedural review, the extent to which an administrative decision affects individual interests is one factor to be considered by courts in determining the scope of the duty of procedural fairness.285 In substantive review, the law/policy distinction as a determinant of the suitability of a decision for judicial intervention turns on the degree to which the decision is directed at individuals.286 This tendency by courts and scholars to gravitate towards individual interests as a defining element of administrative law has perhaps been influenced by broader conceptions of justice underlying constitutional law.287 Or it may be an attempt to fill the doctrinal vacuum created by the gradual increase in governance through discretionary power, and the corresponding absence of clear legislative direction to guide courts in their administrative review role. Faced with this

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284 Ibid. at 263.
285 See, for example, the Supreme Court’s discussion of procedural fairness in Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, and in Baker, supra note 87 at para. 28.
286 For example, in Baker, L’Heureux-Dubé J. justified her decision to intervene in the Minister’s exercise of her deportation power partly on the basis that the power “…relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them”: ibid. at para. 60.
287 In Chapter 3, I observe that the concern for individual interests is very much at the heart of scholarly efforts to unify public law.
vacuum, courts have, perhaps, turned to those tools with which they are most familiar. Individual interests are a long-established criterion for the protection of legal rights in private law and constitutional law. However, private law and constitutional law both involve courts acting as the decision-maker at first instance. In my view, a direct concern for individual interests is inherently ill-suited to the distinct supervisory function of administrative review.288

For example, it has been observed that the courts’ administrative review function is often confused with its appellate function. But the distinction is a fundamental one:

In principle, a motion for judicial review involves the allegation of a lack of jurisdiction...which is to say that it involves an indirect attack on the substance of the decision, through a direct challenge to the power of the decision-maker to act as he did. Unlike appeals, review implies that for some formal reason the decision-maker had no authority to decide, not that his decision was wrong on its merits.289 (emphasis added)

The direct goal of administrative review is to protect accountability in government conduct and accountability is a collective notion geared to achieving executive legitimacy. The ultimate goal of the constitutional arrangement whereby courts partner with legislatures in promoting accountability may ultimately be the protection of individuals and, indeed, this seems likely. But this does not mean that the protection of individuals may or should directly concern the courts in exercising their accountability function.290

Accountability in a representative democracy necessarily flows upwards to the legislature as the body holding the sovereignty of its citizens in trust. Therefore, a concern for accountability is incompatible with a concern for individual interests which flows in the opposite direction. Administrative review is subject to statutory direction from Parliament in which courts stand in for Parliament as an accountability mechanism.

288 In Chapter 4, I will examine the extent to which this focus on individual interests has contributed to the incoherence of the law/policy distinction as the current boundary of administrative review jurisdiction.
290 This is not to say that individual interests may not be engaged in executive social policy-making, but rather that the courts’ review function should not defined in relation to individual interests.
of last resort. Although individuals are necessary to bring matters to court and to provide a factual context for evidentiary purposes, courts are only indirectly acting on behalf of those individuals. In direct terms, they are acting to ensure that the legislature’s intention, as expressed in statute or elsewhere, is faithfully carried out. Whether or not that intent happens to coincide with the interests of the individual bringing the claim is beside the point.

My argument that administrative law is not directly concerned with individual interests is not entirely unprecedented. As long ago as 1980, Rod Macdonald observed that procedural fairness review “while phrased in the narrow legal language of a *lis inter partes*” actually speaks to “the institutional procedures by which decisions are made”. The immediate interests of the parties before the court were, in fact, “connected to bureaucratic, non-legal concerns.” Therefore:

> …in cases involving the allegation of procedural impropriety, the usual rationale for permitting individuals to seek judicial review, which is to supervise the legality of specific administrative acts so as to redress legitimate grievances when necessary, is generally no more cogent that the subsidiary rationale, that is, to review the structures and processes employed by statutory decision-makers to ensure that agency policy is developed in an orderly and reasonable fashion.291

Individual interests may be indirectly relevant to the accountability function of administrative review. So, for example, the doctrine of procedural fairness is one measure of accountability developed by courts in order to supervise executive decisions made in an adjudicative context. This doctrine concerns itself with individual interests in defining the scope of procedural fairness to be applied in different circumstances. As I will discuss in Chapter 4, the doctrine of procedural fairness has worked fairly successfully in the context of adjudicative decision-making and I certainly do not propose to “throw the baby out with the bathwater”. However, procedural fairness as a method of ensuring accountability will not be appropriate in many cases of social policy-

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291 R.A. Macdonald, “Judicial Review: II”, *supra* note 289 at 5-6. Macdonald also argues that procedural review allows for the integration of legal and bureaucratic values; the coming together of law and policy: “Recourse to implied procedural review may thus harmonize major decision-making institutions of government: bureaucratic attention can be directed to means as well to ends [through procedural review]; while judicial attention must be directed to ends as well as means.”
making where individual interests cannot be examined in isolation without unfairly distorting the polycentric issues at play.\(^{292}\) Therefore, accountability cannot be achieved simply by applying the trappings of our current doctrine of procedural fairness to the decisions of policy-makers, although this would be a step in the right direction.\(^{293}\)

**Conclusion To Chapter 2**

In this chapter, I offer a blended concept of accountability as a means of reuniting public law and public administration approaches to the problem of the accountability gap in executive social policy-making. From the broader perspective of the central accountability framework in modern public governance, I suggest that courts are uniquely situated as accountability forums of last resort to supervise primary accountability mechanisms in their evaluation of executive social policy and programs. Courts are well placed to fulfill this function since they are, both, secondary and supervisory accountability mechanisms.

Review for accountability would have the advantage of rationalizing what Savoie has referred to as the “cafeteria-style” array of “voices” through which citizens currently hold government accountable.\(^{294}\) Savoie argues that Parliament has largely abdicated its accountability role to a myriad of parliamentary officers in addition to other “voices” such as the media. Although independent and, therefore, presumably above the political fray, these voices communicate as a “cacophony” rather than a choir. They have been created incrementally and no attempt has been made to clarify how they fit into the existing constitutional framework. Furthermore, they tend to speak to individual issues rather than collective purposes.\(^{295}\) In the absence of more effective legislative means for distilling a single message from these many, isolated voices, the

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\(^{292}\) The problem of polycentricity is discussed further in Chapter 4.

\(^{293}\) Although I generally agree with Cartier’s argument in favour of imposing procedural obligations on decision-makers exercising a legislative function, her proposal would maintain this link between judicial intervention and the extent to which decisions affect particular individuals. I suggest that her proposal would ultimately fail as an accountability mechanism for this reason: Cartier, “Procedural Fairness”, *supra* note 23 at 253, 258.

\(^{294}\) Savoie, *Court Government*, *supra* note 46 at 171.

\(^{295}\) *Ibid.*
courts are best suited to fill this role. The courts’ role here would be analytical – instead of adding their own voice to the mix, they would act to harmonize the existing voices in order to draw a general conclusion about the accountability of a particular policy.

Currently, the courts hold government accountable only for quasi-judicial or administrative conduct and only in relation to so-called “legal” accountability standards. My proposal would allow courts a secondary role in holding government accountable also for its policy-making function. Commensurately, courts would evaluate this type of government conduct in relation to a broader set of accountability standards, but standards defined exclusively by the legislature or its executive delegates. So long as courts restrict their role to the application of accountability standards defined by the legislature or its executive delegates, and consistently with the procedural nature of accountability, courts may function as an accountability mechanism of last resort for executive social policy-making while remaining true to their constitutional mandate and institutional expertise.

Administrative review for accountability would be fully compatible with the rule of law and would operate within the framework of parliamentary sovereignty. In this sense, review for accountability would be procedural rather than substantive in nature. Accountability review would assess accountability in relation to accountability standards already laid down by the legislature or the executive. Courts would be required to refrain from assuming a creative role in re-assessing the standards chosen by the political branches of government. One way courts might maintain this purely supervisory role would be to review the evaluation of the policy or program in relation to process-oriented accountability standards rather than outcome standards. Although perpetually problematic in practice, maintaining this procedural/substance distinction is inherent in the supervisory function of administrative review. I suggest that it is a more conceptually coherent framework around which to define the jurisdictional boundaries of administrative review than is the current law/policy distinction.

My proposal is mainly consistent with developments in administrative law doctrine, although it would require the redefinition of the boundaries of administrative
review along functional rather than categorical lines. This would require first, that courts acknowledge and make explicit the underlying accountability function of administrative review; and, second, that courts overcome the blinkered preoccupation with traditional legal standards of government conduct, in favour of a broader appreciation for the full range of accountability standards actually available to legitimate government conduct.

Finally, and perhaps most controversially, the court’s role in protecting executive accountability to the legislature would not be directly defined in relation to the individual interests at play in a social policy or program. Accountability is concerned, first and foremost, with the institutional integrity of government rather than the consequences of an executive decision for particular individuals. This is one aspect of the administrative review function that seems to have been forgotten in the current public law preoccupation with individual rights. Although constitutional review is an important and laudable means of protecting individual interests, the accountability function of courts remains distinct and necessary to maintain the complex web of accountability relationships that maintain the balance of governmental power in Canada.

In the following two chapters, I shift from my chosen accountability perspective temporarily in order to examine the accountability gap in executive social policy-making from two more conventional legal perspectives: judicial review theory in Chapter 3, and administrative law doctrine in Chapter 4. I argue that neither discipline precludes the re-orientation of administrative review jurisdiction that I suggest is necessary to fully realize the accountability function of administrative law.
CHAPTER THREE
Administrative Review As An Accountability Mechanism - From The Perspective Of Judicial Review Theory

Introduction

In Chapter 1, I introduced the problem of a serious lack of legitimacy in Canadian governance. Increasingly, social policy is created and implemented by public servants within the executive branch of government without any meaningful input from legislatures. In Chapter 2, I developed a concept of accountability, blending both legal and public administration perspectives, and argued that the accountability gap in executive social policy-making is an administrative law problem in need of an administrative law solution. I described administrative review as an accountability mechanism designed to ensure that all delegated decision-making, including social policy-making, is exercised in a manner that keeps faith with the intentions, explicit or presumed, of the legislature. I also argued for a procedural vision of administrative review in which courts’ focus is on the legitimacy of the policy-making process in relation to accountability standards created by both the legislature and executive, rather than on the substance of the policy.

In this chapter, I orient this vision of administrative review as an accountability mechanism within the larger body of judicial review theory. This vision deviates from the way that many courts and scholars in Canada and the U.K. have come to understand administrative law in the modern era. Therefore, a large part of this chapter will be devoted to articulating my theory and situating it within this literature. I argue that the popular view of a unified public law, in which both constitutional and administrative review are primarily concerned with protecting individual rights from abuses of public power, fails to account for the potential and purpose of administrative review to ensure the accountability of executive decision-making whether or not constitutional rights are engaged and whether or not the interests at play are particularly individual in scope. This
distinct, accountability function of administrative review has, unfortunately, been neglected while public law scholars and courts have been otherwise preoccupied exploring the heady, remedial power of constitutional review. I applaud these developments in constitutional review and I do not take issue with the unity of public law thesis as such. However, in my view, this thesis does not account for the entire scope of administrative review jurisdiction. I argue that, despite a unified public law concern for protecting fundamental social values, there remains a functionally distinct branch of administrative review devoted to the formal purpose of promoting accountability within government. Maintaining this branch of administrative review is crucial to allowing judicial supervision of a large segment of government decision-making, the allocation of scarce social resources, that may not engage individual rights directly but has fundamental significance to society as a whole.

This branch of administrative review, in turn, requires the continued existence of parliamentary sovereignty as a hard limit to the courts’ jurisdiction in administrative review. Parliamentary sovereignty provides the constitutional foundation for the accountability function of administrative review that, I argue, is crucial to bridging the accountability gap in executive social policy-making. As we saw in Chapter 2, it is parliamentary sovereignty that allows courts to supervise the accountability of executive social policy-makers, while prohibiting them from defining the accountability standards applied in legitimating that policy. The “doing” branches of government, the legislature and its executive delegates, are exclusively responsible for creating these standards. Courts stand apart from this function and, instead, exercise a secondary, purely supervisory role; scrutinizing the sufficiency of accountability achieved in the course of the executive policy-making and policy implementation process.

Although the introduction of the Canadian Charter of Rights and Freedoms has created a large area of overlap between constitutional review and administrative review where constitutional values are in play, I argue that this unification is not complete.¹ There remains a role for a formal vision of administrative review devoted, not to the protection

¹ Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 [Charter].
of individual rights, but to strengthening the accountability link between our democratically legitimate legislatures and their executive delegates.

In the last part of the chapter, I will address the role that Charter review plays in this two-pronged vision of public law. I discuss the accountability gap in the context of recent Charter decisions involving allegations of discrimination in government social benefit programs. I argue that a rights-based Charter analysis is not always an appropriate framework for addressing what is essentially a concern for unaccountable government action and I draw a distinction between the value-laden “accountability” concerns appropriate to Charter analysis and the formal accountability concerns that, I argue, are the province of administrative review. I query whether the absence of an administrative law response to the accountability gap in executive social policy-making has influenced courts to address the gap using the legal tools available to them under section 15 of the Charter. I conclude that, on the whole, courts have properly restricted themselves to rights-analyses appropriate to the Charter. However, the result is that evidence of significant accountability concerns in social policy-making remains ignored and unaddressed by the courts. In my view, the solution is not to expand the Charter but, instead, to develop a direct administrative law solution bridging the accountability gap in executive social policy-making.

1. Untangling The Administrative and Constitutional Threads of Judicial Review Theory

The Functional Distinction Between Administrative and Constitutional Review

The current generation of public law scholars has come of age during an unprecedented, world-wide human rights revolution.² Throughout the developed world, individual rights talk has tended to overshadow collective goals and values in

² In the international sphere, the rule of law has been embraced as a rallying cry for human rights reforms and economic and institutional development: Michael J. Trebilcock and Ronald J. Daniels, Rule of Law Reform and Development: Charting the Fragile Path of Progress (Cheltingham: Edward Elgar, 2008), chapter 1 [Trebilcock & Daniels, Rule of Law]; Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge, Cambridge University Press, 2004), chapter 10.
many social spheres. In Canada, the charismatic presence of the Charter, and the accompanying scholarly enthusiasm for the untapped potential for constitutional rights (both written and unwritten) to solve social ills, has dominated political and legal discourse since its enactment in 1982.³

Although the rights revolution has inspired great advances in social justice, it has had the unfortunate side-effect of obscuring the valuable role that administrative law plays in our legal order. The pull of constitutional review has been so strong that administrative review has almost ceased to have independent existence. The sixth edition of the venerable administrative law classic, De Smith’s Judicial Review, describes this dramatic shift occurring in the relationship between these primary branches of public law.⁴ In chapter I, the authors state:

A distinction which is now less clear than it was is between administrative law and constitutional law… We… contend that both the exercise of judicial review and the principles enunciated through judicial review are constitutionally based. The constitution shapes administrative law and is shaped by it… In recent years, it is increasingly being realized that in a constitutional democracy the role of judicial review is to guard the rights of the individual against the abuse of official power.⁵

In Canada, Mary Liston has described administrative law as “an important pre-Charter vehicle to challenge government policy and secure rule of law restraints on discretionary decision-making in social and economic policy”.⁶ Her implication seems to be that the Charter has now assumed this supervisory function.

In this section, I argue against this tendency to subsume the whole of administrative review within constitutional review. There is no doubt that administrative review has

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⁵ Ibid. at 1-007, 1-010.

been enriched by constitutional values. However, there remain important reasons to preserve a formal branch of administrative review that operates independently of a substantive conception of the rule of law. It is this formal vision of administrative review, bounded by the doctrine of parliamentary sovereignty, which may be employed in protecting the accountability of executive social policy-making.

Administrative review and constitutional review play different roles in managing the complex balance of power among the three branches of government: legislature, executive, and judiciary. In both cases, the role for the judiciary within this triad is classically described as upholding the rule of law. But the rule of law encompasses many different ideas.7 I argue that it is important to distinguish between the rule of law as applied in administrative judicial review from its application in constitutional judicial review. The purpose of the judicial review exercise is very different in each case.

Constitutional review is concerned with ensuring that government complies with the principles enshrined either explicitly or implicitly within the constitution.8 All three branches of government, the legislature, executive, and judiciary, are equally bound by the constitution and it does not matter for the purpose of identifying constitutional violations whether the impugned decision or action is attributed to one government actor or another, nor what form the decision or action takes. Whether it is a law or government decision at issue is irrelevant – the institutional separation between the legislature and executive is not germane to the courts’ role. In both cases, courts wield the extreme power to remedy constitutional violations by striking down the law or decision.9 In this sense, constitutional review sets the judiciary above the legislature

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7 See, for example, Trebilcock & Daniels, Rule of Law, supra, note 2. Professor Paul Craig begins a recent paper on the rule of law with a “health warning” for anyone undertaking to review the prodigious amount of material discussing the legal concept of the rule of law: House of Lords Select Committee on the Constitution, Relations Between the Executive, the Judiciary and Parliament, Appendix 5 (London: Stationary Office, 2007). I address the meaning and scope of the rule of law doctrine below.

8 There is great debate over the legitimacy of unwritten constitutional values as self-standing causes of action. I address this debate further below.

and/or executive for the limited purpose of upholding the constitution. The constitution operates beyond the triad of government actors and, in exercising their constitutional review jurisdiction, courts step outside the triad in order to enforce its provisions. So, in Charkaoui v. Canada, for example, the Supreme Court applied the Charter to hold that parts of a federal statute, the Immigration and Refugee Protection Act, were unconstitutional and, therefore, of no force and effect. This decision was a direct restriction of Parliament’s sovereignty, although the Court did suspend its judgment in order to give Parliament time to amend its law.

In contrast, administrative review has everything to do with the relationship between the branches of government and the form of government action in play. Here, courts operate within the triad to supervise the balance of power between the other two branches of government by ensuring that the executive carries out legislative intent. The relationship between the judiciary and the legislature is one of cooperation rather than conflict. This necessarily follows from the principle of parliamentary sovereignty which, although qualified in constitutional law, remains supreme in administrative law. As such, the courts’ remedial power is correspondingly constrained. In administrative law, courts are limited to remedies that effect legislative intent, rather than overriding it. The role of the judiciary is to protect the accountability of executive decision-makers to the legislature.

The only limit to the legislature’s supremacy in administrative review is the constitutional principle that the legislature cannot purport to remove the courts’ judicial review jurisdiction altogether. As a constitutional principle, this remains inviolable. But the legislature may restrict the scope of administrative review, not as a means of

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11 “Within the boundaries of the Constitution, legislatures can set the law as they see fit.”: B.C. v. Imperial Tobacco, [2005] 2 S.C.R. 473 at 495 [Imperial Tobacco]; “It is well within the power of the legislature to enact law, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.” Babcock v. Canada (A.G.), [2002] 3 S.C.R. 3 at para. 57. For a historical and theoretical defence of the doctrine of parliamentary sovereignty, see Jeffrey Goldsworthy, The Sovereignty of Parliament: History and Philosophy (Oxford: Clarendon Press, 1999).
12 Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190 [Dunsmuir].
removing courts from the picture altogether, but as a means of expressing its intent to rely on the statutory decision-maker’s capabilities and expertise for the task at hand.\(^\text{14}\)

So, for example, \textit{Baker} was decided on administrative law grounds, not constitutional law grounds. This is not to say that \textit{Baker} could not have been decided on \textit{Charter} grounds, and certainly \textit{Charter} arguments were raised by the appellants.\(^\text{15}\) However, I suggest that in proceeding as it did, the Supreme Court made a conscious choice to reason on the basis of administrative law values rather than human rights values and, in doing so, adopted certain analytical tools that are distinct from those wielded in a \textit{Charter} decision.\(^\text{16}\) In \textit{Baker}, the Court was acting in cooperation with Parliament in order to carry out the legislative intent expressed within the \textit{Immigration Act}. In contrast to \textit{Charkaoui}, there was no suggestion in \textit{Baker} that the Court might be deviating from legislative values or instructions.

Constitutional and administrative review also differ in the type of scrutiny that they bring to bear on government action. In constitutional review, the role of the judiciary is unabashedly substantive. Courts scrutinize the content of the law or government decision in issue in order to ensure that both the legislature and executive comply with the rights and freedoms enshrined in the \textit{Charter}, as well as with other substantive values that are determined to have constitutional status. For this purpose, the rule of law is often invoked as a substantive concept in order to enhance settled constitutional values or even to add to these values.\(^\text{17}\) In contrast, in administrative review, courts

\(^{14}\) In this sense, privative clauses need not be understood by courts negatively, as limitations of their own jurisdiction, but may be interpreted positively, as an indication of legislative confidence in the suitability of the statutory decision-maker for the delegated task.

\(^{15}\) \textit{Baker v. Canada (Minister for Citizenship & Immigration)}, [1999] 2 S.C.R. 817 at para. 11 [\textit{Baker}].

\(^{16}\) I do not address the difficult question of whether the Court should have found that \textit{Charter} rights were engaged in \textit{Baker} and applied a \textit{Charter} analysis accordingly. Audrey Macklin illustrates several inconsistencies between the Court’s administrative law analysis in \textit{Baker} and its s.7 \textit{Charter} analysis in other deportation cases: Audrey Macklin, “The State of Law’s Borders and the Law of States’ Borders”, chapter 7 in David Dyzenhaus, ed., \textit{The Unity of Public Law} (Oxford: Hart, 2004) [Macklin, “The State of Law’s Borders”].

scrutinize and evaluate the relationship between an executive decision and its legislative antecedent to ensure that these correspond. This is essentially a formal mandate; the content of the decision is not directly relevant to the court’s function.18 Lon L. Fuller describes the procedural nature of this task as assessing “congruence between official action and the law”.19 Nor do constitutional rights enter into the administrative judicial review exercise, except where they are imported into legislative intent through presumptions developed by the courts to assist with their interpretive role.20 But once constitutional rights are engaged, the judicial review exercise necessarily turns from an administrative exercise enforcing legislative intent, to a constitutional exercise addressing the scope of those rights.21

Having drawn this functional distinction between constitutional and administrative review, I next examine how these analytical tasks have become tangled in both the jurisprudence and public law literature. This confusion has occurred as a side-effect of the human rights revolution and the resulting overlap now involved in the judicial review exercise. There is no doubt that constitutional values inform administrative review and vice versa.22 However, I suggest that a complete merger of constitutional and administrative review should be avoided and the accountability function of the latter discipline preserved.

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18 I introduced the procedural nature of administrative review in Chapter 2.
19 This is the eighth of Fuller’s principles for the internal morality of law: Lon L. Fuller, The Morality of Law, rev. ed., (New Haven: Yale University Press, 1969) at 81 [Fuller, Morality of Law]. Fuller goes on to deal with the problem of indeterminate legislative intent by drawing an analogy to an incomplete invention. He explains that the interpretive role of courts is unavoidably creative but that this does not render judicial review illegitimate (85-87). Furthermore, the cooperative relationship between courts and legislature requires that the legislature not impose on courts “senseless tasks”, but that it assumes responsibility for anticipating “rational and relatively stable modes of interpretation” (at 91).
Four Strands of Contemporary Judicial Review Theory and Their Contribution to the Tangle

There is surprisingly little scholarly recognition of the functional distinction existing between administrative and constitutional review. To the contrary, most contemporary public law scholars have either ignored the distinction by discussing judicial review as a singular concept, or they have expressly rejected the distinction in favour of a unified public law theory. In this section I consider possible reasons for the former – why the distinct functions of judicial review may have been obscured in recent literature. In the next section, I will discuss the latter – the position of those scholars who have expressly rejected the distinct functions of administrative and constitutional judicial review.

There seem to be at least four different strands of public law doctrine that have contributed to the recent focus on judicial review as a singular concept. Two of these are properly constitutional law developments and two are matters of administrative law. All invoke the rule of law in support of a range of different positions and, at their heart, they all engage the same fundamental debate about the relationship between the doctrine of parliamentary sovereignty and courts’ judicial review jurisdiction. From the accountability perspective that I assert in this paper, the relationship between the legislature and the courts is straightforward. Quite simply, parliamentary sovereignty trumps judicial review jurisdiction in administrative review and the reverse is the case in constitutional review. However, this delicate balance of power has been indirectly subverted by these four areas of debate. I will briefly outline each of these debates here for the purpose of describing how the confusion between constitutional and administrative review has arisen.

i. Constitutional Law Developments in the U.K.

The entire field of public law in England is currently undergoing a dramatic transformation as its common law traditions attempt to accommodate the civil law

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traditions of the European Union.\textsuperscript{24} The passage of the Human Rights Act, 1998 inspired the creation of an entirely new constitutional review doctrine developed primarily through common law principles. In contrast to Canada’s written constitution, the U.K. constitution is statutorily-based, with correspondingly limited remedial force.\textsuperscript{25} As such, the relevance of the functional distinction between administrative and constitutional review is significantly diminished. Whether U.K. courts are applying common law principles in the course of administrative review or constitutional review, they remain, hypothetically at least, subject to clear statutory direction.\textsuperscript{26} For public law scholars working within this common law constitutional culture, there has been little practical reason for continuing to observe the distinction between these two forms of judicial review.\textsuperscript{27} Without delving into the nuances of this literature, it is sufficient to point out that the flood of recent U.K. literature on judicial review has limited applicability in the Canadian context where our entrenched constitution necessarily leads to a functional distinction between administrative and constitutional review.

\textit{ii. Renewed Attention to Unwritten Constitutional Principles in Canada}

Second, the U.K. focus on common law constitutional principles inspired a similar, albeit much more modest development in Canada. Canadian courts and public law scholars have engaged in a wide-ranging debate as to whether constitutional review protects unwritten constitutional values that are fundamental within our society, or these values are merely interpretive devices that courts may refer to in upholding the

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\item \textsuperscript{25} This is a simplistic summary of complex legislation. For a more precise discussion, see Anthony Lester Q.C. and Kate Beattie, “Human Rights and the British Constitution”, chapter 3 in Jeffrey Jowell and Dawn Oliver, eds., The Changing Constitution, 6\textsuperscript{th} ed. (Oxford: Oxford University Press, 2007).
\item \textsuperscript{26} This is the orthodox position articulated by Christopher Forsyth and Mark Elliott in several articles including “The Legitimacy of Judicial Review”, [2003] P.L. 286 [Forsyth & Elliott, “Legitimacy of Judicial Review”]. There has been a great deal of debate over the continuing supremacy of parliamentary sovereignty in the United Kingdom and even some \textit{obiter} suggestions by the House of Lords that it has been eradicated: see Jackson \textit{v. Attorney General}, [2006] 1 A.C. 262 (H.L.); Jeffrey Jowell Q.C., “Parliamentary Sovereignty under the New Constitutional Hypothesis”, [2006] P.L. 562.
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written provisions of the constitution. Those who take the former view tend to have a
natural law proclivity and rely on a substantive conception of the rule of law as
grounding this jurisdiction.\footnote{See, for example, Rt. Hon. Beverley McLachlin, “Unwritten
Constitutional Principles: What is Going On?” (2006) 4 N.Z.J.P.I.L. 147; David Dyzenhaus,
“The Unwritten Constitution and the Rule of Law” (2004) 23 S.C.L.R. (2d) 383; David Mullan,
[Mullan, “Underlying Constitutional Principles”]; and Mark D. Walters, “The
Common Law Constitution in Canada: Return of Lex non Scripta as Fundamental Law” (2001) 51
U.T.L.J. 91.} This position was fueled by the Supreme Court of Canada
in several decisions referring to fundamental and organizing principles of the
Constitution that, although unwritten, were invested with “a powerful normative
force”.\footnote{See, for example, Peter W. Hogg and Cara F. Zwibel, “The Rule of
Sovereignty in Constitutional Theory and Litigation” (2005) 16 N.J.C.L. 175
[Newman, “Principles of the Rule of Law”].} Those who take the latter view tend to have a positivist proclivity and rely on a
formalist conception of the rule of law that precludes the guarantee of social values.\footnote{Imperial
Tobacco, supra note 11 at paras. 57 et seq.; Charkaoui, supra note 10 at paras. 133-137.}
The latter position seems to have won out for the time being. The dalliance with the
notion of employing unwritten constitutional values to fill perceived gaps in the Charter
has been put to rest by the Supreme Court in subsequent case law.\footnote{See, for example, Mary Liston,
“Governments in Miniature” supra note 6.} However, a
residual effect of that debate seems to be a tendency, even in Canada, to focus on the
commonality of the common law principles underlying both administrative and
constitutional review, without recalling the functionally distinct purposes for which they
are employed in each case.\footnote{The debate is briefly described in DeSmith’s Judicial Review (supra note 4 at 1-011), and is the subject of the articles collected in Christopher Forsyth, ed., Judicial Review and the Constitution (Oxford: Hart, 2000). The three positions have been labeled: the ultra vires or orthodox approach, the common law approach, and the

\hspace{1cm} iii. The Ultra Vires Debate

Third, there is a long-standing strand of administrative judicial review theory that
seems to have contributed to the conceptual tangle. This is the enduring and, at times,
vitriolic debate in the U.K. over the constitutional foundation of administrative review.\footnote{The debate is briefly described in DeSmith’s Judicial Review (supra note 4 at 1-011), and is the subject of the articles collected in Christopher Forsyth, ed., Judicial Review and the Constitution (Oxford: Hart, 2000). The three positions have been labeled: the ultra vires or orthodox approach, the common law approach, and the

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\hspace{1cm} ultra vires or orthodox approach, the common law approach, and the
This debate is carried on independently of the human rights context that I noted above, and it seems to have influenced Canadian literature. The orthodox theory attempted to explain the entire body of administrative law as dictated by real legislative intent.\textsuperscript{34} This theory has been largely rejected in favour of the modified version of the \textit{ultra vires} doctrine which recognizes that legislative intent is, at times, a fictional construct but a necessary one in grounding administrative review jurisdiction.\textsuperscript{35} In contrast, those adopting the common law theory argue that the common law interpretive principles, supposedly designed to amplify legislative intent, have the actual effect of drowning out what authentic legislative intent may or may not exist and replacing this with judicial intent. They suggest that the fiction of legislative intent be shed, and that the common law principles actually governing administrative review be acknowledged as preeminent.\textsuperscript{36} Of course, the fatal problem with the common law theory is that it violates the principle of parliamentary sovereignty, a linchpin in maintaining the delicate balance among the different branches of government.

The debate seems to stem from a superficial similarity between administrative and constitutional review. Courts engaged in both forms of review necessarily have regard to common law principles in carrying out their function. However, in administrative review, these principles have been designed to fill gaps in legislative intent – never to override it. This functional distinction is increasingly obscured as the gaps in legislative

\textsuperscript{34} The most important articulation of this orthodox view is by Christopher Forsyth in, “Of Fig Leaves and Fairy Tales: The Ultra Viros Doctrine, the Sovereignty of Parliament and Judicial Review”, (1996) 55 Camb.L.J. 122 [Forsyth, “Of Fig Leaves”].


intent increase and the “boundary between amendment and interpretation” is blurred.\textsuperscript{37} Taken to its logical extension, the distinction between constitutional and administrative review falls away so that, in both cases, judicial review may override legislative intent rather than merely giving it effect.

The accountability function of administrative review does not rely on the orthodox \textit{ultra vires} doctrine. Whether or not administrative law principles, such as procedural fairness and the grounds for reviewing abuse of discretion, have their origin in implied legislative intent or in common law, the significant point for my purposes is that they flow from, \textit{and are limited by}, the principle of parliamentary sovereignty which underlies the constitution.\textsuperscript{38} Parliamentary sovereignty is the bedrock of administrative review jurisdiction, onto which is overlaid the accountability rationale underlying administrative review.

Therefore, my understanding of the constitutional foundation of administrative review jurisdiction proceeds as follows. Parliamentary sovereignty is the constitutional grundnorm of administrative law. The jurisdiction of the courts is premised on supporting parliamentary sovereignty by ensuring that the executive remains accountable to the legislature. The concept of legislative intent only takes the courts so far in completing this task. Where gaps exist in legislative intent, the courts’ jurisdiction is defined in relation to the accountability function underlying their mandate. In this sense, the legislature and the courts may be seen as working in \textit{partnership} to achieve executive accountability. This is opposed to the case of constitutional review where the courts and the legislature are potentially in conflict.\textsuperscript{39}

\textsuperscript{37} Forsyth, “Showing the Fly the Way Out”, \textit{supra} note 35 at 343.

\textsuperscript{38} Parliamentary sovereignty is only circumscribed to the extent of the courts’ jurisdiction to engage in constitutional review. This is where substantive constitutional principles may come into play. However, this has no bearing on the courts’ jurisdiction in administrative law which remains squarely subject to express legislative direction.

\textsuperscript{39} My understanding of administrative review as involving a partnership between the legislature and courts is similar to Forsyth’s attempted reconciliation of the orthodox interpretation of the \textit{ultra vires} principle with the “weak” criticism of the principle. Forsyth justifies the common law origin of administrative law principles as resulting from a legislative “imprimatur” to judges to develop the law in this area: Forsyth, “Of Fig Leaves”, \textit{supra} note 34 at 41.
It is also important to explain how privative clauses fit into this picture since these legislative “hands-off” signals have commonly been cited by scholars as evidence of an inherent tension or conflict between the doctrines of parliamentary sovereignty and the rule of law. In my view, privative clauses are not a repudiation of the rule of law but a manifestation of it. The operable scope of administrative review is defined first and foremost by the legislature and a privative clause is a perfectly legitimate way of doing so – one that must be respected by the courts subject only to applicable interpretive doctrines.

iv. The Constitutional Guarantee of Administrative Review

A fourth contributing factor to the tangle between constitutional and administrative review is the Supreme Court of Canada’s recognition that administrative review is guaranteed by Canada’s constitution. This constitutional principle remained contentious for much of the twentieth century. It was only in the late 1980s that it was accepted as a settled principle of constitutional law. Proponents of a unified theory of public law argue that this development is evidence that administrative review jurisdiction exists independent of the legislature. Accordingly, in the event of a conflict between legislative intent and the fundamental values protected through common law, courts are ultimately governed by the latter. Again, the effect of this position is to negate much of the distinction between constitutional and administrative review.

The development of this position was probably facilitated by the surface similarity of judicial review in the constitutional and administrative contexts. But the constitutional origin of administrative review jurisdiction does not mean that administrative review is necessarily constitutional. Except for constitutional protection

41 My view that privative clauses should be given full effect according to their language is different than that held by certain other proponents of the modified ultra vires doctrine who assume that they should be respected in name but not action: see Forsyth, “Of Fig Leaves”, supra note 34.
42 Although Crevier is most commonly cited in support of this principle, it was only in the years after Crevier was decided that the Supreme Court acknowledged that Crevier had this effect: supra note 13.
of the courts’ bare judicial review jurisdiction, the courts remain ultimately bound by legislative intent. The constitutional guarantee protects administrative review as a theoretical construct - necessarily available to regulate the relationship between legislature and executive, but infinitely variable in scope. Just as in calculus, a limit may forever approach zero without ever reaching it, the scope of administrative review may be ever reduced by the legislature without completely extinguishing it.

Now that the constitutional foundation of administrative law has been settled, there is no longer any need for courts to continually re-examine limits to their own jurisdiction. Instead, the focus in administrative judicial review should be on how best to ensure that executive decision-makers comply with legislative goals – particularly where these goals are not expressed in any legislative instrument. I argue that the concept of accountability provides the means to do so.

All four strands of debate have tended to obscure the underlying functional distinction between constitutional and administrative review, without necessarily repudiating it. These trends may explain why the distinction is not often acknowledged in the literature. However, this does not mean that the distinction does not exist. All four strands of debate are consistent with the functionally distinct relationship that I argue exists between administrative and constitutional review. However, it is crucial to address one important theoretical position that does call into question my argument for a functionally distinct relationship between administrative and constitutional review. This is the movement towards a unified theory of public law.

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44 In Dunsmuir, the majority suggested that the constitutional foundation of judicial review was the only aspect of administrative law that is settled: "Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution … the present system has proven to be difficult to implement … The time has arrived to … develop a principled framework that is more coherent and workable.": *supra* note 12 at para. 32.

45 The Supreme Court, on the other hand, has been mostly consistent in acknowledging the functional distinction between constitutional and administrative review: see *Multani*, *supra* note 21.
2. The Unity of Public Law?

In this section, I briefly introduce the theory of a unified body of public law as articulated by two theorists, David Dyzenhaus and Evan Fox-Decent, and examine the implications of this theory for my own position that a formalist version of administrative review may be employed to respond to the accountability gap in executive social policy-making. I argue that, although the unified public law theory may well support a large overlap in the fields of constitutional and administrative review, insofar as both are engaged in protecting fundamental social values, this does not mean that administrative review has been entirely subsumed within constitutional review. Rather, the accountability function of administrative review, grounded as it is in the doctrine of parliamentary sovereignty, remains necessary and operable to protect collective social goals as articulated by the legislature. Furthermore, Supreme Court jurisprudence, including the Court’s decisions in *Baker* and *Roncarelli v. Duplessis* is consistent with the continued existence of a formalist doctrine of administrative review.46

I do not reject the unified theory of public law as such. For the most part, there is no contradiction between these two approaches to public law. In a constitutional state such as Canada, it is to be expected that constitutional values will enrich administrative review. As I discussed above, the constitution operates outside the web of power regulating the three branches of government and is applicable to all government action, including the court’s role in shoring up the accountability relationship between the legislature and executive through administrative review. Therefore, constitutional values are employed in interpreting legislative direction in both constitutional and administrative review, and it is rare that the doctrine of parliamentary sovereignty as a hard limit to courts’ administrative review jurisdiction would be tested. The only time that a contradiction would arise is in the hypothetical case of “bad law”, *i.e.*, where the legislature has mandated in clear and unambiguous language that the executive act contrary to fundamental social values that are not otherwise protected by the constitution. The question here is whether, absent constitutional engagement, courts

would be entitled to rely on the common law rule of law to protect those social values in the face of legislative intent. In this hypothetical instance, my view, developed below, is that the doctrine of parliamentary sovereignty must govern to protect the legislatures’ right to make democratically legitimate law – bad or good is not for the courts to judge.

The Theorists

According to many public law scholars, recent developments in both constitutional and administrative law have had the welcome effect of transforming public law into a unified system based on the protection of fundamental social values. These fundamental values may be expressed in different ways but they exist independently of legislation, and even independently of our written constitution. An influential theorist asserting this position is David Dyzenhaus and an important contribution to this point of view is the collection of essays he edited in The Unity of Public Law.\(^{47}\) In his introduction to the collection, Dyzenhaus contrasts the traditional views of the “positivist judge” with those of the “human rights judge”.\(^{48}\) The positivist judge may accept the notion of universal human rights but believes that, in order for these rights to have legal status, they must have been imported into domestic law through legislation or explicit inclusion within a bill of rights. This results in a dualistic understanding of public law. There is, on the one hand, positive law which has legal force in the legal system and, on the other hand, those legal principles which may be understood to exist only in the “soft” or moral sense.

In contrast, Dyzenhaus describes the views of the human rights judge who accepts that the same set of fundamental values underlies both constitutional and administrative law even where they are not explicitly articulated in legislation or a bill of rights. As such, the human rights judge accepts that other actors share the right to articulate what these values are. This last point has important implications for what Dyzenhaus refers to as “the legitimacy of the administrative state”. In an earlier article, Dyzenhaus argues

\(^{47}\) Dyzenhaus, *The Unity of Public Law*, supra note 23.

\(^{48}\) David Dyzenhaus, “*Baker: The Unity of Public Law?*”, *ibid.* at 3-5 [Dyzenhaus, “*Baker*”].
that this view (referred to there as “democratic constitutionalism”) has prevailed in administrative law, such that the executive may now interpret these fundamental values so as to bind citizens even without legislative authorization.\textsuperscript{49} This view not only empowers the executive but also the courts. Courts engaged in reviewing exercises of public power also have a legitimate role in safeguarding and upholding these values whether or not they have been articulated in written form and whether or not the legislature agrees.\textsuperscript{50} As Dyzenhaus recognizes, this view implies that these substantive values are embodied within the rule of law and that the rule of law is legally enforceable by the courts independent of its legislative expression.\textsuperscript{51}

This view of a unified public law departs from my own so-called “formalist” understanding of the different purposes of constitutional and administrative judicial review. Dyzenhaus employs the rule of fundamental values as a backdrop to constitutional and administrative judicial review equally. He takes an “all or nothing” approach in assuming that resort to these fundamental values must occur consistently in both cases. In my view, there is no doubt that the rule of fundamental values is influential in interpreting legislature intent and, to this extent, constitutional and administrative review may overlap to a significant degree in a constitutional state. My main qualification to this thesis is that the doctrine of parliamentary sovereignty continues to operate in administrative law and, therefore, for the purpose of administrative review (in contrast to constitutional review), fundamental values cannot prevail over clear legislative direction.

Constitutional law governs all branches of government including the legislature. It is not startling that our constitution may be interpreted to have both written and unwritten components. In so finding, the courts are not tampering with the separation of powers. However, in administrative law, the principle of parliamentary sovereignty governs. The legislature stands above the principles of administrative law and clear statutory direction ultimately trumps the common law. The idea that fundamental

\textsuperscript{49} Dyzenhaus, “Constituting the Rule of Law”, \textit{supra} note 43.

\textsuperscript{50} Dyzenhaus, “Baker”, \textit{supra} note 48 at 4-5.

\textsuperscript{51} \textit{Ibid.} at 2.
values may exist beyond the reach of the legislature is a radical reversal of the constitutional principles underlying administrative law. Nor is it clear that an acknowledgement of the existence of unwritten constitutional principles logically leads to a common law theory of administrative review jurisdiction. There is no principle to prevent a judge from wearing a human rights hat for the purpose of constitutional review and a positivist hat for the purpose of administrative review.

Although my insistence on the continued application of the doctrine of parliamentary sovereignty in administrative review may deviate from Dyzenhaus’ thesis, our ultimate aims are strikingly similar. Dyzenhaus is also concerned to promote the accountability of government action. He describes this concept as a “legal culture of justification”. Although his theory has a substantive aspect (equality before the law) in addition to a formal aspect (justification for public actions), his theory shares a kindred concern for the legitimacy of the welfare state. The difference between Dyzenhaus’ unified concept of public law and my own approach for expanding administrative review to rationalize social policy-making, is ultimately one of means rather than ends.

For example, in his chapter “Recrafting the Rule of Law”, Dyzenhaus argues that the expansion of the executive branch of government in the modern era is one reason for recognizing the ideals of participation and accountability as part of a common law theory of judicial review. He explains that, unlike the days of Bentham and Hobbes, legislation is no longer the primary effective means of governance. Administrative officials no longer merely implement the law, they make laws:

“For a democrat, this change in the form of law might seem to require, at the least, that opportunities for participation be build into legal institutions. The process of legislation, completed now only at the points when the administration develops enduring and legally binding policy, must be one which affords opportunities to those whose rights and interests will be affected and determined by that policy to participate in policy-making.”

52 Dyzenhaus, “Politics of Deference”, supra note 40 at 302.
53 Ibid. at 305-307.
I too am convinced that courts are required to protect justificatory ideals in carrying out their supervision of government action. My disagreement with Dyzenhaus is over the legal form through which these ideals are enforced. I argue that these ideals are part and parcel of the accountability function of administrative law, enforceable through a more modern understanding of the *ultra vires* doctrine. They cannot exist independently of legislative acquiescence and must be subject to the possibility of a clear legislative override. This is because of the continuing supremacy of parliamentary sovereignty in administrative law. In my view, the doctrine of parliamentary sovereignty is not merely a concession to legal orthodoxy, but is a crucial element of the balance of governmental power. This balance of power is necessary in order to maintain a corresponding balance between the protection of individual rights and collective values within our government. The ultimate problem with a unified theory of public law is that it prioritizes the protection of individual rights (through judicial review) over the achievement of broader social priorities (through legislative action). A social welfare state cannot operate effectively where justification (or accountability) is protected in individual terms at the expense of collective goals.

Dyzenhaus’ focus on participation as one type of justification to be supervised through judicial review is a case in point. Participation is primarily an individual value and is not necessarily an appropriate means of achieving justification (or accountability) in the polycentric realm of social welfare. I discuss polycentricity in more detail in Chapter 4. For now, I simply note the similarities as well as the differences between the theory of a unified public law and my own insistence on the endurance of parliamentary sovereignty in administrative law and the functional distinction between administrative and constitutional review.

Evan Fox-Decent supports the Dyzenhausian conception of a substantive rule of law protected through a merged body of public law. In his contribution to *The Unity of Public Law*, he describes a substantive rule of law as made up of certain principles he

calls “the internal morality of administration” which, together, may be used to justify administrative decision-making. Fox-Decent adopts a “rights-oriented approach” to this exercise, the starting point of which is a careful characterization of the right or interest potentially affected by the decision-maker’s discretion.\footnote{Ibid. at 152.} The decision-maker then proceeds through a consideration of various principles that resemble in several respects the test used to justify rights violations under s.1 of the Charter.\footnote{Ibid. at 164.} Therefore, although Fox-Decent supports a measure of judicial deference to legislative intent, it seems that this is deference in the same sense as used in constitutional review. One might conclude from this that courts, and not legislatures, are to have the final say as to whether or not a particular decision is justifiable in light of the individual interests affected. This is not clear, however, since in the next section Fox-Decent sets out a number of constraints aimed at allaying fears that this new administrative review exercise will collapse into an illegitimate review of the merits of a decision. He explains:

Fifthly, if the legislature wishes to infringe on fundamental and common law values the courts have protected, generally it can do so through legislation that uses clear and express language. Parliament is sovereign in this respect, but it must be clear that it intends to trump entitlements that have found recognition in the courts.\footnote{Ibid. at 167.}

Although Fox-Decent has crafted a careful blending of elements from administrative and constitutional review that might well improve the administrative review process, this exercise cannot be successful without a clear answer to the ultimate question “who decides”? Under s.1 of the Charter, although the courts may choose to defer to the legislative policy resulting in a rights violation, it is clearly the courts who have the final say.\footnote{This is subject of course to the potential for legislative amendment or legislative override.} In contrast, in administrative review, although the courts may play a creative interpretive role, the doctrine of parliamentary sovereignty requires that the final say rests with the legislature. There can be no compromise between these ultimate positions.
This dichotomy implicit in Fox-Decent’s internal morality model might lie dormant for the most part. Practically speaking, how often does a judicial review exercise require the courts to resolve the question of final say? This occurs only in the case of clear statutory language expressly violating fundamental social norms, *i.e.*, instances of “bad law”. In Canada’s version of democratic constitutionalism, our entrenched *Charter* addresses most such instances and the question of final say is resolved under constitutional principles.

But it appears from Fox-Decent’s discussion that the problem of who has the final say pervades the entire justificatory process. As in *Charter* review, Fox-Decent’s model views the individual applicant as front and center to the inquiry. The decision-maker starts from the premise that his or her discretion should be exercised in favour of the individual and it is only if there are compelling reasons against this outcome that the decision-maker may find otherwise.60 Fox-Decent explains the goal as follows:

> When these practices manifest themselves in a transparent structure of justification, they let the affected individual know that public authority is not indifferent to her, and that such authority will be used to her detriment only if there are compelling reasons to justify it.61

Although this approach may be merited in the rights-oriented context of *Charter* review, it would frankly be disastrous in public administration at large. This central focus on the interests of the individual applicant would unduly skew the inquiry away from all the other collective interests at play in a polycentric world. These interests are just as legitimate and important for governance in a social welfare state but are much more difficult to evaluate in a court system organized by rules of civil procedure. Of course, this is a key reason why courts have traditionally declined to judicially review policy decisions. In Chapter 4 I will review the reasons for this abstinence and will argue that the accountability function of administrative law provides a judicial means of addressing the legitimacy of collective social goals.

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60 *Ibid.* at 152.

Ultimately, I am content to accept Dyzenhaus’ contention that the rule of fundamental values enriches administrative review just as it does constitutional review, and that this has led to a significant overlap in these review exercises. However, in my view, the goals underlying administrative review remain distinct from those underlying constitutional review. The protection of fundamental values is a direct, substantive goal in constitutional review. However, it plays a secondary, interpretive role in administrative review. Here, the direct goal is the accountability of the executive to the legislature. Fundamental values are employed in the service of legislative intent and these values must ultimately give way to the clear instructions of the legislature. It is this principle of parliamentary sovereignty which requires the maintenance of a functional distinction between constitutional and administrative review.

In addition to the theoretical arguments for the unity of public law, there is also a strong line of argument that this concept has been implicitly, if not yet expressly, approved by the Supreme Court of Canada. In the next two sections, I examine the two key decisions invoked in support of a unified concept of public law. I argue that both decisions are consistent with my position that there remains a functionally distinct role for administrative review in protecting the accountability of executive action.

**Does Baker Signal the Fusion of Constitutional and Administrative Review?**

Dyzenhaus and several other Canadian commentators have interpreted the *Baker* decision as supporting the merger of administrative law and constitutional law doctrine.\(^62\) In fact, *The Unity of Public Law* collection was inspired by the *Baker* decision as an expression of this theme.\(^63\) Several of the commentators in this volume argue that *Baker* represents the evolutionary turning point for administrative law from its original formalist focus on legislative intent, to a more progressive concern with the protection of

\(^62\) In addition to *The Unity of Public Law* collection discussed here, see David Dyzenhaus and Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001) 51 U.T.L.J. 193 [Dyzenhaus & Fox-Decent, “Rethinking”].

fundamental values implicit in the rule of law. They point to L’Heureux-Dubé J.’s famous statement that “discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter”. They also point to her decision to give weight to international human rights principles even where these have not been adopted into Canadian law.

Geneviève Cartier’s contribution to the collection offers this ambitious interpretation of Baker. She views the decision as launching a new cross-fertilization between the Charter and administrative law, with both branches of public law henceforth being devoted to protecting fundamental values whether articulated in statutory or constitutional form. Thus far, this is a fair but not entirely novel point. The use of statutory interpretation principles to draw the underlying values out of frequently meagre statutory language is a long-established and central aim of administrative law. In fact, as Sullivan and Driedger on the Construction of Statutes tells us, it is implicit within the modern rule of statutory interpretation:

Presumed intention embraces the entire body of evolving legal norms which contribute to the legal context in which official interpretation occurs. These norms are found in Constitution Acts, in constitutional and quasi-constitutional legislation and in international law, both customary and conventional. Their primary source, however, is the common law. Over the centuries courts have identified certain values that are deserving of legal protection and these have become the basis for strict and liberal construction doctrine and the presumptions of legislation intent. These norms are an important part of the context in which legislation is made and read.

So long as Cartier is suggesting that these fundamental values may be located (through application of the modern rule) either within the legislation governing the

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64 Baker, supra note 15 at para. 56.
65 Ibid. at paras. 69-71.
67 Ibid. at 77.
68 Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Butterworths, 2002) at 2. Also see chapter 14. Driedger’s famous statement of the “modern rule” is quoted at 1: “Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”
exercise of discretionary authority or in constitutional form, then she is merely observing an undeniable similarity in administrative and Charter review. However, Cartier goes further and supports Dyzenhaus’ argument that such values are enforceable as part of the rule of law even where they have not been legislatively approved. This is a much more significant point than merely acknowledging the creative role that courts undertake in modern statutory interpretation. Cartier argues:

So Baker reminds us that the common law of administrative law inherently requires the consideration of values, and that this is not dependent upon legislative authorization.”

Cartier seems to be asserting that courts are no longer limited to reading values into their interpretation of legislation, but that they may enforce these values in spite of legislation. Although Cartier tempers her position by pointing out that not just courts but all branches of government have a role to play in articulating these values, her argument seems to be a repudiation of parliamentary sovereignty in administrative law. However, Cartier’s argument is premised on what she calls the “hierarchical” relationship between the Charter and administrative law existing pre-Baker, in which administrative law was relegated to the subsidiary “formal, value-free” role of determining statutory authority. And yet, perhaps it is not the Supreme Court who has articulated an “impoverished” view of administrative law, but Cartier herself. In contrast, I view the development of the principles of statutory interpretation over the last century, overlaid with the more recent emergence of the principle of deference, as an extremely powerful and flexible doctrine for controlling most forms of executive power, with only one hard limit – the supremacy of legislative intent. Subject to this underlying limit, I suggest that the beneficial elements that Cartier attributes to the Baker decision, (i.e. the acknowledgment that fundamental values inform administrative judicial review and the cross-fertilization between the Charter and administrative review) already existed pre-

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69 Cartier, “The Baker Effect”, supra note 63 at 79.
70 Although Cartier is not explicit on this point: ibid. at 80.
However, in my view, this hard limit, the doctrine of parliamentary sovereignty, illustrates the continued functional distinction between constitution and administrative review. This distinction is not only necessary within our constitutional balance of power but, as I argue below, also valuable in allowing administrative review to fulfill an important accountability function that lies beyond the reach of constitutional review. Furthermore, I argue that Baker is at least as consistent (if not more so) with my vision of administrative review as ultimately operating within the service of legislative intent.

Baker involved the exercise of discretion by immigration officials (on behalf of the Minister of Citizenship and Immigration) to deny Mrs. Baker’s application to stay in Canada on humanitarian and compassionate grounds. The application was brought under regulations pursuant to s. 114(2) of the Immigration Act granting the Minister broad, unstructured discretion to determine whether humanitarian and compassionate considerations existed in particular cases. The Ministry had created Guidelines outlining the factors to be considered in exercising this discretion and one of these factors was family dependency. Officers were directed to consider the hardship that would be experienced by close family members, including children, on being forced to leave Canada. In Mrs. Baker’s case, the evidence indicated that the immigration officer had been biased in his consideration of her circumstances. In particular, he indicated in his notes that he viewed Mrs. Baker’s four Canadian born children as evidence weighing against her application rather than in favour of it.

The Supreme Court determined the appeal on administrative law principles. It overturned the Minister’s decision on grounds of bias but also responded to a number of other administrative law arguments and discussed how these impacted the decision. L’Heureux-Dubé J., for the majority, took the opportunity to make a number of advances in administrative law doctrine. She held for the first time that administrative decision-makers generally have a duty to provide reasons for their decisions. Also significant was her decision to give weight to international human rights instruments in interpreting the scope of the Minister’s discretion. The analytical climax of the Court’s decision was its new approach to the administrative review of discretionary decision-
making. The Court rejected the traditional bright-line distinction between legal decisions and discretionary decisions and held that the tool used to regulate the degree of judicial deference to legal decisions (the pragmatic and functional test) should henceforth be applied also to discretionary decisions.

There is no doubt that, as expressed by several of the authors in the *The Unity of Public Law* collection, the *Baker* decision was ground-breaking for all these reasons and more.71 However, in my view, the decision was ground-breaking purely from an administrative law doctrine perspective. The Court did not purport to discuss or affect the relationship between administrative and constitutional law, nor such foundational principles as the scope of the rule of law or the principle of parliamentary sovereignty. It is stretching the decision beyond reasonable limits to suggest that it caused the constitutional balance of power between the legislative and judicial branches of government to shift towards the latter.

The Court in *Baker* heard *Charter* arguments from the parties and, therefore, was equipped to undertake a human rights analysis as well as a discussion about the relationship between constitutional and administrative law if so inclined. However, L’Heureux-Dubé J. expressly declined to do so, holding that this was “unnecessary”.72 Instead L’Heureux-Dubé J.’s reasons proceed very much along classic administrative law analytical lines, with frequent references to the statutory scheme governing the Minister’s exercise of discretion and the legislative intent underlying this scheme. The first substantive section of her analysis was devoted to the statutory scheme and the nature of the Minister’s decision within this scheme.73 She then referred back to the statute several times throughout the course of her analysis on, first, procedural and,

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72 *Baker*, *supra* note 15 at para. 11.

then, substantive grounds.\textsuperscript{74} In fact, L’Heureux-Dubé J.’s application of the pragmatic and functional test to the Minister’s decision is itself an indicator that she remained concerned, first and foremost, with legislative intent. She explained:

The spectrum of standards of review can incorporate the principle that, in certain cases, \textit{the legislature has demonstrated its intention} to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power \textit{accorded by Parliament}. (emphasis added)\textsuperscript{75}

L’Heureux-Dubé J. was attempting to strike the ever-necessary balance between judicial deference and administrative review. It is in this context that her famous reference to fundamental social values and \textit{Charter} principles, quoted above, must be understood.\textsuperscript{76} Immediately before this reference, she had been making the point that the more discretion granted by the legislature, the more deference is presumed to have been intended. But the grant of discretion in s. 114(2) of the \textit{Immigration Act} was extremely broad and L’Heureux-Dubé J. did not want to leave the impression that administrative review could be precluded completely. And yet, she had already explained that there was very little express language in the \textit{Act} to indicate to the Court where the natural boundaries of the Minister’s jurisdiction might be. So her statement that discretion must be exercised in accordance with the rule of law, administrative law, fundamental social values and the \textit{Charter}, was intended as a counterpoint to her preceding statement about deference.\textsuperscript{77} When read in context, there is no inkling that L’Heureux-Dubé J. was contemplating a version of the rule of law that would prevail over clear legislative intent.\textsuperscript{78}

\textsuperscript{74} \textit{Ibid.} at paras. 24, 53, 55, 58, 60, 66, 68, 74.
\textsuperscript{75} \textit{Ibid.} at para. 55.
\textsuperscript{76} \textit{Ibid.} at para. 56.
\textsuperscript{77} Mullan agrees that L’Heureux-Dubé J. intended for deference to be taken seriously as a constraint on the administrative review of the Minister’s discretion, stating, “...I tend to take a conservative position in the sense of not seeing \textit{Baker} as authorizing a complete re-evaluation of the overall decision on a reasonableness basis or a straight re-weighting by the reviewing court of all the various factors relevant to the discretion.”: Mullan, “Deference from \textit{Baker to Suresh}”, supra note 71 at 25 and 55.
\textsuperscript{78} This is not to say that L’Heureux-Dubé J. was, herself, appropriately deferential in to the Minister’s decision in \textit{Baker}. Grant Huscroft suggests that the Court's decision to import the pragmatic and functional test into the world of discretionary decision-making has resulted in unduly interventionist decisions in \textit{Baker}.
L’Heureux-Dubé J.’s references to the rule of law, fundamental values of Canadian society, and the principles of the Charter in Baker are best understood as an application of well-established statutory interpretation principles. She was indicating that, in the absence of clear legislative intent to the contrary, the statutory language “compassionate and humanitarian considerations” was presumed to incorporate these values and principles and, in particular, the best interests of children. The only slightly novel interpretive twist here is that L’Heureux-Dubé J. included international human rights principles within this category of interpretive presumptions. But even in this respect, it is clear that she was operating within the familiar framework of legislative intent. She acknowledged that international law is not binding in Canada unless incorporated into domestic law by the legislature.\(^79\) And, she quoted a passage from Driedger on the Construction of Statutes, to support the principle that “the legislature is presumed to respect the values and principles enshrined in international law”.\(^80\)

At the end of the day, there are solid conventional administrative law reasons why L’Heureux-Dubé J. held it appropriate to refer to social values and human rights in her interpretive analysis. First, the statute that she was interpreting granted to the Minister an extremely broad degree of discretion so that there was little express language on which to rely in determining the boundaries of the grant.\(^81\) Second, and most significantly, the little statutory direction included within the Act amounted to an express reference to fundamental social values. For what else can “compassionate and humanitarian considerations” mean other than an appeal to social values and human rights, including the universal value placed on children’s best interests? My point is not to deride the importance of these values and key role that they play in Canadian administrative law, but merely to emphasize that, in administrative law at least, they

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\(^80\) Baker, ibid. at para. 70.

\(^81\) L’Heureux-Dubé J. did note that her interpretation of ss.114(2) of the Immigration Act was consistent with one of the objectives of the Act in s.3(c) of reuniting Canadians with close relative from abroad: ibid. at para. 68.
remain subject to the constitutional principle of parliamentary sovereignty and its doctrinal cousin, legislative intent. As such, Baker is strongly supportive of my argument that a functional distinction between administrative and constitutional review persists in the post-Charter era.82

**Roncarelli – The Brightest Star in the Unified Public Law Galaxy**

The preceding discussion of Baker may have raised the question in some readers’ minds: “Well, then, what about Roncarelli v. Duplessis?83 If Baker did not confirm that a rule of law imbued with fundamental values underpins Canadian administrative law, then surely Mr. Justice Rand’s decision in Roncarelli did so. Here again, I find that I must swim against the prevailing scholarly tide, and this time the tide is so strong as to amount to a flood.84 Before the Baker decision in 1999, the jurisprudential foundation for the theory that administrative review protects fundamental values independently of legislative intent rested almost entirely on the shoulders of the Roncarelli decision. Again, however, I argue that this decision is best interpreted as an affirmation of administrative review as bounded by the doctrine of parliamentary sovereignty.

In Roncarelli, the majority of the Supreme Court held that the Premier of Québec, Duplessis, was liable for causing the manager of the Québec Liquor Commission to improperly cancel Roncarelli’s liquor licence. Rand J. started his famous judgment by describing some of the evidence which made the cancellation of Roncarelli’s licence so unusual: the restaurant was “of a superior class”; it had been continually licensed for 34 years; and Roncarelli had a good reputation. Added to this was the startling fact that

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82 The Court’s subsequent decision in Suresh v. Canada (Minister of Citizenship and Immigration), ([2002] 1 S.C.R. 3 [Suresh]), although difficult to justify on its facts, corroborates the conclusion that the Court remains firmly committed to deference and, through deference, the principle of parliamentary sovereignty: see Mullan, “Deference from Baker to Suresh”, supra note 71. Also see Bell ExpressVu Ltd. Partnership v. Rex where the Court stated, “…to the extent that this Court has recognized a “Charter values” interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e. where a statutory provision is subject to differing, but equally plausible, interpretations.”: 2002 SCC 42 at para. 62.

83 Roncarelli, supra note 46.

the Premier, himself, had told Roncarelli that he would never receive a licence again. Furthermore, there was clear evidence linking the cancellation of Roncarelli’s licence with the movement by provincial authorities to suppress the Jehovah Witnesses. This led Rand J. to comment:

It is then wholly as a private citizen, an adherent of a religious group, holding a liquor licence and furnishing bail to arrested persons for no other purpose than to enable them to be released from detention..., and with no other relevant considerations to be taken into account, that he is involved in the issues of this controversy.85

Rand J. remarked on Roncarelli’s religious affiliation and the extreme discrimination to which he was subjected. However, there is nothing in his reasons to suggest that Rand J. believed the discrimination to be actionable, or that he based his decision on constitutional principles. Instead, his reasoning turns on an interpretation of the scope of powers delegated to the executive under the governing liquor licensing legislation. Rand J. expressed this rationale in the following passage:

In these circumstances, when the de facto power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting? This calls for an examination of the statutory provisions governing the issue, renewal and revocation of liquor licences and the scope of authority entrusted by law to the Attorney-General and the government in relation to the administration of the Act.86

This is the passage that prefaces the analytical portion of Rand J.’s decision. In the first sentence, he set up the legal problem as he viewed it, and in the next sentence he described the methodology to be applied in answering the problem. This is classic administrative law reasoning. It is significant, in my view, that there is nothing in this passage about religious discrimination or constitutional values. If Rand J. was truly engaged in the enforcement of a self-standing constitutional mandate against discrimination, the wording of the liquor licensing scheme would not have been front and centre in his analysis.

85 Roncarelli, supra note 46 at 133.
86 Ibid. at 137.
In the next three pages of his reasons, Rand J. described the statutory scheme in detail, the unlimited discretion granted to the manager to cancel liquor licences, and the practical necessity of a liquor licence to the successful operation of a superior restaurant. Again, his focus was on the statute, its purpose, and its implied limits. There is nothing in his analysis to suggest that his reasoning was influenced by the discriminatory motive behind the cancellation. Nor is there any hint that his decision would have been different if the cancellation had not been due to discrimination but for some other arbitrary, non-constitutional reason.

In one of two famous passages from the decision, Rand J. articulated a concern to prevent “fraud”, “corruption”, “bad faith” and the exercise of “unlimited arbitrary power” but there is no mention of a concern to prevent discrimination. Instead, Rand J. referred repeatedly to the governing legislation and even suggested that arbitrary action may be justifiable in the event of “express language”. A constitutionally protected value could not be so legislatively mandated. The examples chosen in this passage to illustrate arbitrary conduct are also significant. Neither the colour of one’s hair nor the province of one’s birth is typically a basis for discrimination or other forms of unconstitutional behaviour. The omission of religious or other common forms of discrimination as an example of arbitrary conduct suggests that Rand J. intentionally chose to restrict his reasoning to traditional administrative law principles.

It is true that the Premier, the named Respondent in the action, did not exercise direct authority under the liquor licensing legislation. This authority was delegated to the manager who was statutorily immune from liability for his actions. Roncarelli presumably brought the action against the Premier in order to avoid this statutory immunity. And indeed, the necessary link between the Premier’s advice to the manager and the cancellation of Roncarelli’s licence was a hotly contested fact in the litigation. The majority of the Supreme Court held that this fact was established so that the Premier was properly liable for the manager’s actions.

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87 Ibid. at 140.
88 Grant Huscroft finds significance in Rand J.’s choice of examples here in his similarly conservative reading of Roncarelli: Huscroft, “Judicial Review”, supra note 78 at 304-305.
Proponents of *Roncarelli* as a decision enforcing unwritten constitutional principles have relied on these unusual circumstances to argue that the Premier’s liability was grounded in common law, rather than in the statutory regime to which he was not subject. This is strictly accurate. However, Rand J.’s reliance on the statutory regime and his reasoning overall suggests that he found the Premier vicariously liable for the actions of his agent under the statutory regime, rather than directly liable under constitutional principles. Or, alternatively, Rand J. defined the scope of the common law principles governing the Premier’s actions in relation to the statutory regime. Rand J. stated that the Premier’s act was “through the instrumentality of the Commission” and was “wholly irrelevant to the statute”.89 The upshot was that the technical distinction between Duplessis and the manager was not significant for Rand J. and he would not allow it to defeat a finding of liability. However, this does not mean that his reasoning was based on constitutional principles.

In the second famous passage of his reasons, Rand J. found additional support for his decision in the rule of law:

That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.90

Proponents of the unity of public law view this passage as evidence of a substantive rule of law pre-existing the *Charter* and enforced through administrative review. In my view, this is no more than a reference to Dicey’s formal conception of the rule of law against arbitrary government and, as such, is part and parcel of classic administrative law doctrine.91

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89 *Roncarelli*, supra note 46 at 141.
90 *Ibid.* at 142.
The concurring majority judgments by Kerwin C.J., Martland J. and Abott J. similarly reflect orthodox administrative law principles. In my view, *Roncarelli* is the foundational Supreme Court precedent for administrative law abuse of discretion doctrine but nothing more.

A strong articulation of the position that *Roncarelli* has constitutional significance is provided by David Dyzenhaus in his article “The Deep Structure of *Roncarelli* v. *Duplessis*”.\(^2\) Dyzenhaus discusses *Roncarelli* as one of a series of early constitutional law cases known as the “implied rights cases”.\(^3\) According to Dyzenhaus, these decisions were all signals of “judicial commitment to the rule of law or legality and as an elaboration of the content of the idea of legality”.\(^4\) The distinction between *Roncarelli* and these other decisions, acknowledged by Dyzenhaus, is that *Roncarelli* was decided on administrative law grounds while the others were decided on the basis of the division of powers in the constitution. Dyzenhaus rejects the significance of this distinction and argues that judicial review is based on fundamental constitutional values on a continuum. At one end is administrative law through which judges rely on the idea of an unwritten constitution. Dyzenhaus reviews the constitutional aspects of the situation that arose in *Roncarelli* and argues that Rand J.’s decision turned on factors other than the official’s abuse of discretion. Rand J. was influenced by the egregious instances of discrimination based on religion and violation of free speech and his decision gives recognition to these implied rights.

Dyzenhaus concedes that Peter Hogg and Bora Laskin both understood the *Roncarelli* decision on narrower grounds. These scholars describe the decision as turning on the finding that Duplessis acted beyond his jurisdiction as Premier in ordering the cancellation of Roncarelli’s liquor licence (the manager authorized to do so simply followed Duplessis’ order).\(^5\) Dyzenhaus rejects this interpretation of the decision for

\(^2\) Dyzenhaus, “The Deep Structure”, *supra* note 84.
\(^4\) Dyzenhaus, “The Deep Structure” *supra* note 84 at 113.
two reasons. First, he argues, it is not clear on the evidence that Duplessis’ advice was an order as such – the Court was divided on this point. Second, even if the official had revoked the licence without Duplessis’ advice, this action would still have been illegitimate. Therefore, according to Dyzenhaus, Hogg and Laskin’s interpretation offers a view of the rule of law that is substantively empty. Dyzenhaus describes this “formal” view of the rule of law as one “…maintained by judges seeing to it that the administration does not act outside the limits which Parliament set.” Under this view, “[j]udicial review is legitimate not because it protects moral and political values, but because it maintains the integrity of the separation of powers, as formally understood.”

I suggest that Dyzenhaus is adopting an overly polarized approach to the rule of law here. Either one accepts a narrow version of the rule of law relying on a strict interpretation of the ultra vires doctrine, or one accepts Dyzenhaus’ view that the rule of law imports common law constitutional values. However, what is missing from this choice is the middle-ground option favoured by those administrative law scholars who have not adopted a common law theory of administrative law (or a unified conception of public law). This option understands Roncarelli to have found that either Duplessis or the official (it matters not who), acted beyond his authority in violating implied conditions within the statute. The revocation was an abuse of discretion because it was issued for purposes unrelated to the scheme of the legislation. In other words, it went against general legislative intent if not specific legislative intent. This interpretation is a straightforward application of the abuse of discretion doctrine of irrelevant considerations or improper purposes and is squarely consistent with modern Supreme Court jurisprudence.

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96 Dyzenhaus, “The Deep Structure”, supra note 84 at 126.
97 Ibid. at 127.
98 Ibid.
100 Forsyth & Elliott, ibid. at 287.
There are two benefits achieved by this middle-ground interpretation of *Roncarelli* that are not achieved by Dyzenhaus’ interpretation. First, the abuse of discretion interpretation does not require the recognition of unwritten constitutional principles. This prevents any need for concern about the unconstrained judicial supremacy that would result from dispensing with the doctrine of parliamentary sovereignty.102 Second, Dyzenhaus’ theory of unwritten constitutional principles would require that constitutional rights actually be engaged on the facts of the case. But the conundrum with social welfare policy is that it often concerns benefits rather than rights, and is directed at hypothetical groups of claimants rather than identifiable individuals. It is, therefore, excluded from the class of grievances that Dyzenhaus’ theory would address. In my view, this is an important reason to resist a full merger between administrative and constitutional law. It is only by maintaining the doctrine of parliamentary sovereignty as a hard limit to the scope of administrative review, that we may safely expand administrative review in accordance with its accountability function in order to legitimize the creation of social policy. In this sense, I suggest that my interpretation of *Roncarelli* is, in fact, more faithful to Rand J.’s presumed aim “that in an era when our lives have become increasingly subject to public regulation, such regulation should not be arbitrary”103. Too often, regulation does not engage constitutional rights and, when it does, Canada is fortunate to have an entrenched *Charter* for protection. In a developed social welfare state such as Canada, I suggest that injustice and social harm is more likely to be caused through arbitrarily created social policy than through legislation expressly devoted to injustice.104

**The Benefits of the Functional Distinction Between Constitutional and Administrative Review**

The danger of blurring the distinct functions of constitutional and administrative review is apparent in T.R.S. Allan’s challenge to the continued viability of administrative

102 Dyzenhaus acknowledges the existence of this concern but caricaturizes it with a sarcastic reference to Lord Hewart’s extreme version expressed in *The New Despotism: The Deep Structure*, supra note 84 at 130.
law as an independent legal doctrine.\textsuperscript{105} Allan argues that neither the \textit{ultra vires} doctrine, nor the common law theory of administrative law jurisdiction, is able to explain the scope or intensity of administrative review except in relation to the statutory context surrounding it. In other words, the debate about the constitutional foundation of administrative review has revealed that, in fact, administrative law has \textit{no} independent foundation. Administrative law is no more than the “detailed application of abstract conceptions of justice, grounded in constitutional theory”.\textsuperscript{106} The indeterminacy of administrative law is exacerbated given the huge variety of statutory contexts and government actors at which judicial review may be directed.

Allan’s argument that administrative law has essentially ceased to be is the unfortunate outcome of years of attempts to define administrative law exclusively in relation to constitutional review. In my view, regardless of the overlap in these two doctrines in applying constitutional principles, there are important reasons why they remain functionally distinct.\textsuperscript{107} Judicial supervision of the executive’s accountability to the legislature is the consistent rationalizing thread that ties together the myriad of social and political contexts in which administrative review is engaged. It is this accountability function underlying administrative review, and its ability to legitimize executive social-policy making, that necessitates the continued existence for a functional distinction between administrative and constitutional review.

There are at least two closely-related reasons why it is crucial to retain the significance of parliamentary sovereignty for administrative law and thereby maintain the functional distinction between constitutional and administrative review. First, I

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\textsuperscript{106} \textit{Ibid.} at 431.

\textsuperscript{107} Allan is exactly correct in arguing that current administrative law doctrine has failed in its attempt to restrict administrative review jurisdiction by relying on the distinction between law and policy: \textit{Ibid.} at 432, 435. However, in contrast to Allan, I argue that this is not a reason to dispense with administrative law entirely but, instead, to rediscover the underlying function of administrative review – judicial supervision of executive accountability to the legislature. It is through the concept of accountability that jurisdictional limits may be formally identified without “recourse to constitutional or political values”: \textit{ibid.} at 439. I address this point further in Chapter 4 by arguing that the law/policy distinction should be rejected in favour of accountability as the basis for determining the limits of administrative review jurisdiction.
believe that this is important in order to maintain the balance of power among the branches of government and to prevent unrestricted judicial supremacy. Second, this distinction allows for a tailored solution to the particular problem I address in this thesis – the accountability gap in executive social-policy making. In spite of twenty-five years of social activism, the Supreme Court has been largely consistent in its conclusion that the *Charter* does not protect socio-economic rights.\textsuperscript{108} Administrative review indirectly fills this gap in constitutional coverage. Accountability provides a means of legitimating social policy-making where rights are not engaged. Even if the *Charter* were to be interpreted more expansively in the future, I suggest that the accountability function of administrative law may occasionally be more suitable than *Charter* review as a means of legitimating social policy decisions. The formal aspect of administrative review for accountability would prevent the need for courts to take a substantive stand on the relative importance of competing social priorities.\textsuperscript{109}

Christopher Forsyth’s article arguing for the value of formalism in administrative law theory articulates both these concerns particularly eloquently.\textsuperscript{110} Forsyth argues for the continued supremacy of parliament in the absence of a written constitution and concludes as follows:

After all, what is the alternative? That administrative law as we know it should disappear to be replaced by a substantive debate between judges over the reach of fundamental rights? Something like this has been seriously suggested. That the judges should emerge as Platonic guardians imbued with some especial wisdom (known as substantive reasoning) that enables them to pronounce the final word on profound questions of liberty and social justice? That parliamentary supremacy would be at an end and the elected representatives of the people reduced to squeaking at the judicial heels? I do not find these possibilities attractive. Nor, I warrant, do the elected representatives of the people or the judiciary as a whole. But the crucial point is surely that such


\textsuperscript{109} I discuss this point further in the last part of this chapter below.

\textsuperscript{110} Forsyth, “Showing the Fly the Way Out”, supra note 35.
changes, whether they be wise or foolish, desirable or undesirable, touch the very fundamentals of our constitutional order. An unelected branch of government cannot remake the constitution on its own.111

Some may respond that, under Canada’s Charter, the judiciary has already taken over ultimate responsibility for social justice and there is no remaining reason to hold the courts back. There is no point in closing the barn door after the horse has already escaped. Even if the Charter were to be interpreted so broadly, it is both rash and contrary to the balance of power contemplated under our constitution to surrender to the courts such comprehensive control over social policy.

Having described the distinct functions underlying administrative and constitutional review, and argued for the retention of parliamentary sovereignty as a limit to courts’ administrative review jurisdiction, I now turn to an important theoretical implication of my argument. How does the rule of law fit within this two-pronged vision of public law?

3. The Rule of Law in Constitutional and Administrative Review

The argument in favour of a unified body of public law is a particular offshoot of an even more fundamental schism that has opened up throughout the Commonwealth public law community over the meaning of the rule of law and its significance in judicial review. The goal of judicial review is often described as upholding the rule of law. But what does the rule of law encompass? As a theoretical concept, the rule of law is a whole package of ideals, relatively few of which are actually enforceable through either constitutional or administrative review.112 First articulated in doctrinal form by Albert Venn Dicey, the rule of law was traditionally composed of three branches directed at: (1) regularity in the law; (2) formal equality before the law; and (3) an affirmation of the common law system.113 These principles were formalist rather than substantive in nature in that they addressed how law was formed, rather than whether the content of

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111 Ibid. at 346.
112 See, for example, Fuller, Morality of Law, supra note 19, and Trebilcock & Daniels, Rule of Law, supra, note 2.
113 Dicey, Law of the Constitution, supra note 91.
the law was desirable under prevailing moral and social norms.\textsuperscript{114} Since that time, Dicey’s vision has been widely discredited and several generations of public law theorists have developed their own conceptions of the rule of law doctrine.\textsuperscript{115} Some scholars, such as Peter Hogg and Cara Zwiebel, do not stray far from the Diceyian concept. They view the rule of law as an organizational principle underlying the creation and administration of law rather than as a substantive legal doctrine.\textsuperscript{116} Other scholars interpret the rule of law as a substantive theory of social justice, almost eclipsing the \textit{Charter} in significance. An extreme version is offered by T.R.S. Allan who argues that the rule of law encompasses fundamental values such as equality (which itself has a myriad of formal and substantive meanings – here used substantively) and human dignity.\textsuperscript{117} Most scholars profess a rule of law doctrine lying somewhere in the middle, mainly composed of formal elements but with some substantive implications. In Dyzenhaus’ view, for example, the rule of law invokes a culture of justification as well as a commitment to equality.\textsuperscript{118}

\textbf{Filtering Out Constitutional Applications of the Rule of Law}

This lack of consistency in the concept of the rule of law and the wide range of rule of law theories on offer may be due, in part, to the failure to recognize the functional distinction between constitutional and administrative review. Much of the debate centers on the scope of the rule of law as applied in the constitutional context and many of those arguing for a substantive version seem to be properly concerned with


\textsuperscript{115} For a recent critique of Dicey’s constitutional theory, see Lewans, “Rethinking”, supra note 40. Lewans argues that Dicey’s insistence on a binary conception of constitutional authority, composed of the rule of law and parliamentary sovereignty, led him to ignore the important role of administrative institutions in the constitutional landscape. For an earlier critique, see H.W. Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17 O.H.L.J. 1 [Arthurs, “Rethinking”].


\textsuperscript{118} Dyzenhaus, “Politics of Deference”, supra note 40.
constitutional review, although this is not always expressly acknowledged.\textsuperscript{119} For my purposes, the content of the rule of law in constitutional review is not significant. My analysis is directed at the rule of law exclusively from the perspective of administrative review. I argue that whatever content the rule of law may or may not contain in administrative law, it remains ultimately bound by the principle of parliamentary sovereignty. The rule of law may well add substantive value in interpreting the intentions of the legislature where these are unclear, but it cannot operate to override clear legislative direction.

This debate about the relationship between the doctrine of parliamentary sovereignty and the rule of law in administrative review is largely hypothetical. In most cases, these ideas operate cooperatively. The rule of law assists in amplifying legislative intent with regard to the values that are recognized within Canada’s constitutional democracy. Direct conflict between these values and clear legislative direction will be rare, although certainly plausible.\textsuperscript{120} However, in the event of a conflict, those who interpret the rule of law substantively argue that the rule of law is preeminent.\textsuperscript{121} Judges are required to protect fundamental moral principles within our society against even express legislative attempts to deny them. On the other hand are the so-called positivists who argue that parliamentary sovereignty remains paramount.\textsuperscript{122} However, the distance between these two positions quickly begins to diminish once arguments directed at constitutional review are filtered out.

For example, Dyzenhaus argues that the rule of law must have substantive content in order to justify the legitimacy of our public law regime over those regimes that we label as illegitimate such as apartheid in South Africa. In his article on John Willis, Dyzenhaus suggests that Willis’ functionalism failed since it was not grounded in

\textsuperscript{119} Much of the recent British literature is of this ilk given the rapid constitutional evolution underway in that jurisdiction. An example is the ongoing debate between T.R.S. Allan and Paul Craig over the relationship between the rule of law and parliamentary sovereignty: supra note 33.

\textsuperscript{120} See Dyzenhaus, “The Deep Structure”, supra note 84 at 138. Real states of emergency in jurisdictions such as South Africa under apartheid are the focus of Dyzenhaus’ book, Constitution of Law: Legality in a Time of Emergency (Cambridge, 2006).

\textsuperscript{121} Dyzenhaus, The Unity of Public Law, supra note 23.

underlying legal values but was merely a technical manual for governance in conditions of social complexity. As an illustration of his point, Dyzenhaus discusses the Reference re Persons of Japanese Race decision. Although Dyzenhaus does not distinguish between constitutional and administrative review, his concern for legitimacy is properly constitutional in nature and the Ref re Persons of Japanese Race decision turned on constitutional issues.

Ref re Persons of Japanese Race involved the government’s expulsion of Japanese Canadians under the authority of Orders-in-Council made under the War Measures Act. The Supreme Court held that the Orders-in-Council were intra vires government. Rinfret, C.J. reasoned, for the majority, that the legislation had been enacted because “it was deemed necessary or advisable for the security, defence, peace, order and welfare of Canada by reason of the existence of war”. In this particular context, the Governor in Council was the sole judge of the necessity or advisability of measures taken and it was not competent for the Court to canvass the considerations underlying these measures. Although Rinfret C.J. focused on the actions of the Governor in Council rather than Parliament, the executive and legislative branches of government were aligned on the facts of the case. The Orders-in-Council authorizing the expulsion had the force of law, and there was no doubt that the expulsion was carried out on behalf of Parliament. Statutory authority or executive accountability was not in issue. The constitutional nature of the case is made clearer from Lord Wright’s repeated reference to Parliament:

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\text{Under the British North America Act property and civil rights in the several Provinces are committed to the Provincial legislatures, but the Parliament of the Dominion in a sufficiently great emergency, such as that arising out of war, has power to deal adequately with that emergency for the safety of the Dominion as a whole. The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What those interests are the}
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125 Ibid. (S.C.C.) at 277.
Parliament of the Dominion must be left with considerable freedom to judge.”

Rand J. dissented in the result. Dyzenhaus has argued that Rand J.’s dissent reveals his contrasting substantive vision of the rule of law as a pre-Charter tool for protecting fundamental human rights. In any event, Dyzenhaus’ argument in this article is directed at the rule of law as applied in constitutional review. The issue in this case was really whether or not the legislation authorizing the expulsion was constitutionally sound. Whether or not the majority of the Court was correct in restricting itself to a formal version of the rule of law bound by parliamentary sovereignty in the circumstances of this case is a matter for constitutional theory. It says nothing about the scope of the rule of law for administrative review. This latter issue has been complicated by the failure to maintain the functional distinction between constitutional and administrative review.

The need to account for different applications of the rule of law in constitutional versus administrative review is implicit in Peter Hogg and Cara Zwibel’s article “The Rule of Law in the Supreme Court of Canada”. Hogg and Zwibel structure their discussion in separate sections addressing constitutional law cases, on the one hand, and administrative law cases, on the other hand. The authors use Roncarelli as the vehicle for their discussion of the rule of law in administrative law. They point out that, although Rand J. invoked the rule of law in his decision, the legal basis for the decision was ultimately the lack of legal authority for Premier Duplessis’ actions. So, although the rule of law and the administrative law principles applicable to abuse of discretion informed the Court’s analysis, the purpose of the judicial review exercise was to determine whether the Premier acted in accordance with legislative intent. With no

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126 Japanese Persons Reference (P.C.), supra note 124 at 101.
128 Hogg & Zwibel, “Rule of Law”, supra note 30
129 Ibid.
130 Ibid. at 725.
Charter claim before the Court, the rule of law had no constitutional component. In an administrative law case, parliamentary sovereignty trumps the rule of law.131

By contrast, the authors conclude that the purpose of judicial review in the constitutional context is to determine compliance with the constitution. The rule of law has a constitutional component and the issue is whether this is restricted to principles enshrined in the written constitution or whether it also extends to additional, unwritten constitutional values. In Charter cases such as the P.E.I. Judges Reference, the rule of law assists the Court in interpreting the language of the Charter to determine whether or not constitutional rights had been unjustifiably violated.132

The same phrase “rule of law” is used to describe two very different types of judicial inquiry – administrative review and constitutional review - and this is undeniably confusing. Attempted definitions of the rule of law remain highly ambiguous in this respect. For example, Hogg and Zwibel speak of “a culture of obedience to the law”.133 This can be understood either as:

- obedience by the executive to the legislature (and secondarily to the constitution since all government, including the legislature, is bound by the constitution); or
- obedience by the government as a whole (the executive, legislature and judiciary) to the constitution.

This first meaning is the usage employed in administrative law claims and the second meaning is employed in constitutional law claims.

The Supreme Court made a useful effort to distinguish between these two versions of the rule of law in the Québec Secession Reference.134 It described the rule of law as a broad principle encompassing both meanings and then contrasted the principle of constitutionalism as a narrower principle encompassing only the second meaning:

The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical... Simply put, the constitutionalism principle

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132 P.E.I. Judges Reference, supra note 17, discussed by Hogg & Zwibel, ibid. at 727-728.
133 Hogg & Zwibel, ibid. at 717.
134 Secession Reference, supra note 17.
requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution.  

This decision illustrates that the Supreme Court is steadily moving towards a sophisticated understanding of the rule of law concept and its different applications in constitutional and administrative review.

The Rule of Law in Administrative Review

Whether or not the rule of law may have some substantive content in administrative review, my position is that it remains subject to the doctrine of parliamentary sovereignty. In this sense, the rule of law retains some formalist attributes.

Paul Craig provides a useful review of the rule of law debate in his article, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework”. Craig describes formal conceptions of the rule of law as involving the manner in which law is created, its degree of clarity, and the timing of its application. Formal conceptions do not concern themselves with the content of the law. Law-making is evaluated through authorization, a concept closely aligned with accountability. The question is whether the law was promulgated by a “properly authorized person” in a properly authorized manner. Craig discusses, in particular, the work of Joseph Raz, a leading formalist whose approach is, perhaps, closest to my own.

Raz prefers to limit the concept of the rule of law to its formal attributes in order to prevent these attributes being subsumed within a broader, more controversial theory of social justice. What is the value of regularity in law-making, if a regularly promulgated law violates the rule of law anyway because it does not comply with particular political or social values? This position is essentially the theoretical equivalent of my concern for maintaining the distinction between administrative and constitutional judicial review. If judicial review is collapsed into a single doctrine, and courts routinely combine a rights

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135 Ibid. at 258.
136 Craig, “Formal and Substantive”, supra note 114.
137 Ibid. at 467.
analysis with an accountability analysis, then formal accountability norms will cease to have independent value.

A similar concern was articulated by the majority of the Supreme Court in *Multani*. There, the majority of the Supreme Court held that judicial review required a two-stage process. First, the court must ensure that the decision-maker acted according to statutory authority (an accountability norm) and then, so long as statutory authority is established, the court may turn to substantive constitutional values. Without this two-stage process, the distinct benefits of constitutional and administrative law risk being lost.

Craig also discusses, under the heading “A middle way?”, Raz’s argument that the formal rule of law requires that courts “faithfully” apply the law of the legislature in a “principled” way. The requirement of faithfulness seems to be akin to the accountability function that I suggest epitomizes administrative review. The additional requirement, that courts act in a principled manner, suggests that courts must integrate particular pieces of legislation with “underlying doctrines of the legal system”. These doctrines ensure “coherence of purpose within the law” and balance “the fruits of long-established traditions with the urgencies of short-term exigencies”. The key point here is that, for Raz, the application of principle is not something that the courts come up with themselves. Tradition means tradition within the legal system as a whole; either originating from the legislature or acquiesced to by the legislature. Raz is not undermining parliamentary sovereignty here but, instead, is advocating the modified *ultra vires* doctrine which I discussed above and which is helpful and consistent with my thesis.

It seems clear that, in a constitutional state such as Canada, the rule of law is applied in both constitutional and administrative review to further substantive values. As a result, the vast majority of judicial review cases may well apply overlapping

139 *Multani*, supra note 21 at para. 16. Charron J. for the majority expressed the same concern from the opposite perspective - that constitutional law standards may be dissolved into administrative law standards.


141 Craig, “Formal and Substantive”, supra note 114 at 484-485.
analyses regardless of whether they are based on constitutional or administrative law doctrine. However, we cannot allow the functional distinction between these judicial review exercises to be lost within this overlap. Parliamentary sovereignty continues to govern in the latter case and there remain benefits to protecting the formal elements of the rule of law as well. Rather than allowing the traditional principles, tenets and values of administrative law to fall victim to the prevailing focus on constitutional rights, we may choose to reinvigorate, reinvent, and revitalize administrative law values in the social welfare context by recalling the distinct but socially useful role those values play alongside constitutional rights.

What is advanced by allowing administrative law to be subsumed within constitutional analysis? It permits the application of rights-analysis to the decisions of administrative officials and, therefore, overcomes the accountability gap in social policy-making where such rights are engaged. However, so much of social policy does not engage legal rights. Ontario’s autism funding programs introduced in Chapter 1 provide one example. The Court of Appeal in Wynberg determined that no constitutional rights were violated in those circumstances. But this leaves no legal recourse for resolving the serious accountability problems of those programs observed by Kiteley J. at trial. And what of a government decision to refrain from creating a social program altogether? In Auton, the Supreme Court held that British Columbia’s decision not to fund any autism treatment failed to meet even the initial threshold for a constitutional challenge.142 It is in these situations where an alternative tool for legitimizing social policy is useful. The formal version of the rule of law applied in administrative review is unique in providing this.143 Each application of the rule of law (in constitutional and administrative law) serves a distinct function so that both versions may co-exist and, in fact, compliment each other. The formal rule of law achieves its purpose by grounding the accountability function that administrative review is intended to accomplish.


143 This is not to suggest that the accountability function of administrative review is valuable merely as a stand-in for constitutional review where legal rights are not engaged. Accountability concerns may equally exist in social policy cases alongside Charter rights violations and, in such cases, administrative review retains its separate function of addressing those concerns.
The same distinction between the formal elements of the rule of law applied in administrative review and the substantive elements applied in constitutional review is implicit in Craig’s discussion of Jowell’s theory of the rule of law. Jowell argues that the substantive aspect of the rule of law addresses the need to constrain the uninhibited exercise of governmental power. Administrative review achieves this through such concepts as Wednesbury reasonableness. However, Craig points out the conspicuous absence of constitutional law in this picture. Craig notes that “if [Jowell’s] argument is based on the need to constrain the uninhibited exercise of government power…then why should the “limits of the rule of law” be set so as to exclude constitutional constraints designed to serve the same end?” Craig is making an important point here. It is possible that Jowell is an administrative law theorist who has not given adequate attention to constitutional applications of the rule of law, just as it seems that some constitutional law theorists have not given adequate attention to administrative applications of the rule of law. This may be a problem of vertical silos of knowledge. Where doctrinal boundaries are overcome, it should be more apparent that both applications of the rule of law play complementary and compatible roles.

There is no need, then, to choose between the different applications of the rule of law, or to reject the formal role that the rule of law plays in promoting accountability in administrative law. Both versions of the rule of law may co-exist and we may build on the inherent accountability values in administrative law to address those situations where rights are not engaged or accountability concerns are otherwise raised. My contribution to this debate is to point out the value of maintaining a distinction between the formal and substantive components of the rule of law, so that each may be given

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145 Wednesbury reasonableness is a U.K. doctrine that arguably allows courts to apply a substantive analysis in the administrative review of discretionary decisions.

146 Craig, “Formal and Substantive”, supra note 114 at 486.

147 Nor do those advocating for a substantive component to the rule of law purport to do so. They adopt substantive values in addition to formal values. Craig notes: “Those who espouse substantive conceptions of the rule of law … accept that the rule of law has the formal attributes mentioned above [including proper authorization for the law], but they wish to take the doctrine further.”: ibid. at 467.
voice through the appropriate judicial review exercise. In this way, Raz’s concern for protecting the formal components of the rule of law may be achieved through the accountability function of administrative review.

4. Putting the Charter in Its Place – The Different Role of Constitutional Review in Canadian Public Law

Assuming that the Charter must solve every legal problem would be a recipe for freezing and sterilizing the natural and necessary evolution of the common law and of the civil law in this country. In the present appeal, the absence of a Charter remedy does not mean that administrative law remedies could not have been identified and applied… LeBel J., partially dissenting in Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307 at para. 189.

Introduction

In this section, I consider the relationship between administrative and constitutional review from the opposite perspective – the distinct, albeit crucial, role of the Charter in protecting the substantive values that inhere in Canadian public law. Although the Charter has had the effect of transforming Canada’s government from “a system of Parliamentary supremacy to one of constitutional supremacy”, and although the executive is subject to the Charter just as are the other branches of government, I argue that this was not intended to change the basic nature of administrative law. Nor, has it meant that administrative law is now fully subsumed within constitutional law.

The introduction of the Charter in 1982 meant that, for the first time, the judiciary was given an express role in scrutinizing legislative and executive policy choices. Ever since, the Charter has exerted a powerful pull over any case that calls into question those choices. But judicial review under the Charter fulfills a very different function than judicial review in administrative law. The resolution of a claim of rights violations does not resolve the distinct issue of whether the government action in question has remained faithful to legislative goals. The Charter was entrenched in order to protect the

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148 Secession Reference, supra note 17 at 258.
fundamental social values shared by Canadians. The focus of section 15, in particular, was described in these lofty terms by the Supreme Court in *Vriend v. Alberta*:

The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all. It is the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation.149

In contrast, the goal of judicial review in administrative law is to protect the faithfulness with which legislative directions (whether these involve fundamental human rights or the most trivial matter of record-keeping) are translated from their legislative context through to their application by the institutions of government.

We have seen in previous chapters that, at least in the social welfare context, modern government has expanded beyond the ability of traditional administrative law doctrine to provide an effective check on unaccountable government action. At the same time, the more charismatic presence of the *Charter* may tend to obscure these holes in administrative law. While administrative law has lain fallow, the right to equality in section 15 of the *Charter* has provided fertile soil for recent legal challenges to executive social programs. The purpose of this section is to examine this section 15 case law from the perspective of the accountability gap in executive social policy-making. I argue that contrary to proposals by some scholars, the *Charter* is not an appropriate tool for addressing this accountability gap. Rather, it is incumbent on administrative law to develop a direct solution to the problem of supervising the redistributive role of government.

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This is not to say that the social benefits cases I will discuss were not properly dealt with as section 15 cases. There is no doubt that the right to equality does and should apply to discretionary government action just as it does to legislative action. Nor do I wish to detract from the important rights-based analysis carried out by the courts in these cases. However, I do argue that the issue of rights violations is not the only issue raised by these cases and that the Charter analysis has tended to overshadow the problem of legal accountability in the government’s design of social welfare programs. I conclude that, although the result of these decisions may be legally correct, they are ultimately unsatisfactory in failing to address the accountability gap. They demand the creation of a solution in administrative law.

The Different Analysis Applied to Charter Claims and Administrative Law Claims

The tendency for courts to blur the functional distinction between constitutional and administrative review is exacerbated where (as is common) a dispute raises both administrative and constitutional law issues. The different analytical focus of the Charter and administrative law in cases where these overlap has not yet been fully worked out by the Supreme Court of Canada. However, in my view, the majority of the Court got it right in Multani. The case involved a school board’s discretionary decision to prohibit a Sikh student from wearing his kirpan to school. The decision was based on

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150 See Lorne Sossin, “Discretion Unbound: Reconciling the Charter and Soft Law” (2002) 45 Canadian Public Administration 465. More recently, see Multani, supra note 21, in which the majority confirmed that, where both Charter issues and administrative law issues are raised, the Charter analysis should take precedence.


153 Multani, supra note 21. The majority decision was written by Charron J. and adopted by McLachlin C.J., Bastarache, Binnie and Fish JJ. Deschamps, Abella, and LeBel JJ. agreed with the result but wrote two separate minority reasons. Deschamps and Abella JJ. would have applied an administrative law analysis to reach the same decision. LeBel J. essentially agreed with the majority that a constitutional analysis was appropriate but would have tweaked the Oakes test slightly in cases involving administrative decisions.
the school’s code of conduct which prohibited the carrying of weapons and dangerous objects. Multani and his family argued that the prohibition infringed his freedom of religion. A preliminary issue for the Court was whether the board’s decision should be reviewed directly under the *Charter* or, alternatively, using an administrative law analysis informed by *Charter* values. The five member majority held that a *Charter* analysis was appropriate. Although the school board’s decision was discretionary in nature, there was no allegation that the board had acted outside its statutory authority. The only allegation was that the board’s decision violated the student’s freedom of religion. Administrative law concerns simply did not arise on the facts. As Charron J. for the majority stated:

> With respect, it is of little importance to Gurbaj Singh – who wants to exercise his freedom of religion – whether the absolute prohibition against wearing a kirpan in his school derives from the actual wording of a normative rule or merely from the application of such a rule.\(^\text{154}\)

Earlier cases had raised the possibility that *Charter* challenges involving discretionary government action would not be subject to justification under s.1 of the *Charter* since such actions were not “prescribed by law” for the purposes of s.1.\(^\text{155}\) The majority in *Multani* put this argument to rest, holding that, so long as a discretionary decision is made in accordance with its enabling legislation (no matter how broad that legislation may be), if the decision infringes a right or freedom, it should be subjected to the test in s.1.

I agree with the majority in *Multani* that the distinction between a legislative rule prohibiting kirpans and an administrative decision applying neutral enabling legislation to the same effect should not be relevant to the application of the fundamental social values enshrined in the *Charter*. However, I note that such a distinction would be central to an administrative review exercise. In the case of a clear legislative rule, no administrative law claim can lie. In the case of an administrative decision, the issue would be whether, on an appropriate standard of review, the decision was justified

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under its enabling legislation. By refusing to allow its Charter analysis to be constrained by such distinctions, the Court recognized the different goals underlying constitutional and administrative review. The relative legitimacy of social policy choices enshrined in legislation and those made in Ministry hallways is not to be questioned through Charter analysis. Instead, it falls properly within the province of administrative law.

Two minority judges in Multani (Deschamps and Abella JJ.) persisted in their view that the case was more appropriately decided pursuant to an administrative law framework informed by Charter values. They would have applied a direct Charter analysis only to those cases involving norms of general application such as statutes or regulations. In cases involving decisions of an administrative body, they would have preferred the application of analytical tools developed specifically for administrative law. Since the legislature may not direct its delegates to act unconstitutionally, any administrative decision that violates the Charter must also be ultra vires. Deschamps and Abella JJ. would have applied the ultra vires doctrine by first choosing an appropriate standard of review and then determining on that standard of review whether the decision was justified. Nor would the standard of review for such decisions necessarily be that of correctness. On the facts in Multani, they reasoned that some deference to the school board was appropriate and they would have chosen a reasonableness standard.

In my view, the approach of Deschamps and Abella JJ. ascribes a rather picayune role to the Charter in a case engaging a value as important to Canadian society as freedom of religion. However, a more fundamental problem with their approach arises on examining their description of the difference between laws and decisions:

An administrative body determines an individual’s rights in relation to a particular issue. A decision or order made by such a body is not a law or regulation, but is instead the result of a process provided for by statute and by the principles of administrative law in a given case. A law or regulation, on the other hand, is enacted or made by the legislature or by a body to which powers are delegated. The norm so established is not limited to a specific case. It is general in scope.

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156 Multani, supra note 21 at para. 85.
157 Ibid. at para. 112.
This statement is a surprisingly simplistic description of our modern administrative state and it ignores completely the growing phenomenon of governance through soft law. I have argued elsewhere that it is no longer tenable in administrative law to draw a neat, bilateral distinction between rules and their application.\(^{158}\) At least in the social welfare context, discretionary decisions are not necessarily adjudicative as that term was once understood. They have an important impact on other social welfare claims and, in that sense, have a collective or polycentric character. Where such decisions are made pursuant to soft law, there is no general legislation or regulation to be challenged. Deschamps and Abella JJ.s’ description of administrative law as “microcosmic” and limited to the needs of individual parties creates an arbitrary division between collective government action and individual government action, where only the former is subjected to an analysis directly engaging the fundamental values called into question in Charter disputes. Their conception of administrative law is an impoverished one and their approach fails to provide for the burgeoning grey area between law and decisions.\(^{159}\)

Although I agree with Deschamps and Abella JJ. that there exists an important distinction between the principles of constitutional justification and the principles of administrative law, I suggest that this distinction does not turn on the difference between rules and their application – or, in administrative law parlance, the difference between bodies exercising a legislative function and those exercising an adjudicative function. Instead, the relevant difference is between an examination of the content of a decision (or rule) to determine its compliance with fundamental values, and an examination of the relationship that the decision (or rule) has to democratically accountable legislative authority. The crux of administrative law is not the form of the decision being challenged but, rather, the necessary link between that decision and its legislative genesis.


\(^{159}\) Multani, supra note 21 at para. 132.
The approach taken by Deschamps and Abella J. might also result in incongruous discrepancies in otherwise similar cases. On their reasoning, legislation subject to a Charter claim would be tested for correctness on a full Charter analysis. Only after a violation was established would the matter of deference to the legislature be considered under section 1. In such a case, although the violation might ultimately be justified under s.1, this would not eradicate the earlier finding that the Charter had, in fact, been infringed. Yet, in the case of a discretionary decision having exactly the same impact, Deschamps and Abella JJ. would reverse this process. Depending on the administrative standard of review chosen, the decision may be accorded some deference up front, thereby preventing a finding of infringement from ever being made. From the perspective of democratic accountability, legislation is clearly more worthy of judicial deference than is the exercise of administrative discretion. But under Deschamps and Abella JJ.’s model, there would be no way to compare or contrast the degree of deference to be applied in cases involving legislation and those involving the exercise of discretion. Given the different analyses applied to Charter claims and administrative law claims, it is feasible that more deference would be paid to a discretionary decision in one case than was paid to a similar legislative provision in another case.

The different concerns of administrative law and the Charter are also illustrated by looking more closely at the legal tests applicable in a section 15 Charter challenge. The issue whether a social program has a discriminatory purpose or effect for the purpose of s.15 does not engage the question of the accountability of government decision-makers in developing and implementing the program. Nor is accountability relevant to the issue of whether the program is a reasonable limit under section 1 (at least once the threshold “prescribed by law” requirement has been met). Accountability looks to the mechanisms by which government ensures that its conduct complies with legislative policy goals. If those mechanisms are legitimate, then the substantive policies that represent the outcome of those mechanisms are not questioned. Accountability might be achieved through legislative guidance, the involvement of legislative officers such as auditors and ombudsmen, input from the public or concerned stakeholders, or evidence
of transparency, efficiency and efficacy in developing the program.\textsuperscript{160} In contrast, the concern in a section 15 case is the purpose and effect of the substantive policy decision under challenge. The process by which that decision was reached is relevant only insofar as it reveals something about the purpose or effect of the decision itself. For example, whether or not the legislature has spoken on a particular policy issue is irrelevant to the result in a section 15 case. Legislative action may be discriminatory just as easily as may executive action. Whether or not the public or other stakeholders have been involved in the policy process is equally irrelevant although their advice may tell the court something about the purpose of the eventual impugned decision. Certainly efficiency concerns are irrelevant. An inefficient government program may be constitutionally sound whereas a streamlined, well-managed government program may violate Charter rights highly efficiently.

The Use of the Term “Accountability” in Charter Cases

I have argued that at the core of administrative law is a concern for democratic accountability. This is not to say that Charter analysis does not address important concerns about accountability. In a very real respect, the Charter is all about accountability – accountability of the legislature to the courts and vice versa. The Supreme Court recognized this in an oft-quoted statement by Iacobucci J. in Vriend v. Alberta:

To my mind, a great value of judicial review and this dialogue among the branches [of government] is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the Charter). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it... Democratic values and principles under the Charter demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate...\textsuperscript{161}

\textsuperscript{160}See Chapter 2 above.
\textsuperscript{161}Vriend, supra note 149 at paras. 139, 142.
However, the concept of accountability is used in two distinct senses in these contexts. The purpose of administrative law is to hold decision-makers operating under delegated authority accountable to the legislature. The tension is between the legislative and executive branches of government. In contrast, the purpose of constitutional law is to hold both legislative and executive decision-makers equally accountable to the Charter. The distinction is between the Charter concern for macro-accountability, that is, accountability between government as a whole and the constitution, versus the administrative law concern for accountability in the link between legislative goals and executive action.

Sujit Choudhry and Kent Roach have argued that the Charter should be interpreted and applied to promote democratic accountability. For example, they propose that where discriminatory action is taken by police officers acting under vague but benign statutory authority, the statutory provision itself should be struck down under subsection 52(1) of the Charter rather than an isolated remedial order being made under section 24 of the Charter. The authors’ view is that only in this way can government be forced to enact clear legislative provisions that prohibit discriminatory action on the part of its delegates. The authors support their argument that this is the proper function of the Charter by pointing to earlier Charter decisions and a passage from Oakes in which Chief Justice Dickson held that section 1 is to be interpreted consistently with the values and principles essential in a democratic society including “faith in social and political institutions which enhance the participation of individuals and groups in society”.

I share Choudhry and Roach’s ultimate concern to prevent a situation where governments may “go underground’ and implement many of their constitutionally controversial measures through discretionary decision making, out of sight of the

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162 For example, in the Patration Reference, the Supreme Court described the rule of law as requiring “executive accountability to legal authority”: Reference re a Resolution to Amend the Constitution, [1981] 1 S.C.R. 753. This encompasses both administrative law and constitutional law values. In the administrative law context, accountability is to the legislature. In the Charter context, accountability is to the legal values contained in the Charter.


167 Multani, supra note 2 at para. 16.
168 (1996) 34 Osgoode Hall L. J. 661 [Jackman, “Protecting Rights”].
Parliament was not appropriate in the circumstances and it concluded that the legislation should be struck down as an unjustifiable limit on freedom of expression. Although divided in their result on section 1, both majority and dissenting judges focused in detail on the legislative context in which the policy decision was made. In determining the degree of deference to be applied, the judges looked to factors such as the extent of legislative deliberation that took place before the policy became law and the degree of input received from the public and different interests groups. Jackman applauds the *R.J.R. MacDonald* approach to section 1 as one that replaces “unprincipled deference” with a “rigorous and contextualized process” that requires governments to demonstrate how a violation of individual rights promotes, rather than undermines democratic principles.

Jackman makes an excellent point insofar as she is referring to democratic values in the sense of the macro-accountability concerns relevant to the *Charter*. However, my concern is that Jackman does not adequately distinguish between *Charter* concerns and administrative law’s concern for the accountability of executive action. This is particularly evident in her comparison of the decisions in *Egan* and *Eldridge*. Although Jackman treats these two decisions together in her analysis, the accountability issues raised by each are dramatically different. *Egan* involved a clear legislative provision adopted by Parliament. Whether or not the circumstances of same-sex couples were directly or carefully considered in the legislative debates, the provision was passed and became law. *Eldridge*, on the other hand, involved a discretionary decision made by a ministry official without any legislative or regulatory framework and without sufficient regard for accountability. Jackman describes the decision-making process in *Eldridge* as follows:

> A briefing note on the medical interpretation issue was prepared by a senior health ministry official for consideration by the Executive Committee. The Committee spent only twenty minutes reviewing the briefing note before deciding to refuse funding. The explanation given for the Committee’s decision was that ‘it was felt [that] to fund this particular request would set a precedent that might be followed up by further requests from the ethnic communities where the language barrier might also be a factor.’ The Committee made its
decision in the absence of any information as to whether or not providing interpretation services for the Deaf would be cost-efficient; whether funding such services would in fact set a precedent for non-English speaking groups; and what the actual cost of providing interpretation for non-English speaking patients might be.”

In my view, these circumstances properly raise administrative law issues rather than Charter issues. They indicate a lack of accountability in the exercise of ministerial discretion vis-à-vis the legislature. Although in each of Egan and Eldridge, the decision-maker was exercising a legislative function, in the latter case, that function was a delegated one. In my view, this distinction must remain a significant one in order to prevent administrative law from atrophying and in order that the Charter avoid the fate of trying to be all things to all people.

Both the Choudhry & Roach article and the Jackman article illustrate how this fundamental distinction between the macro-accountability concerns of the Charter and the executive accountability concerns of administrative law may be confused to the detriment of both areas of law.

**Accountability Concerns Are (Properly) Ignored in Charter Decisions**

I have argued that it is administrative law, rather than the Charter, that properly concerns itself with the degree of accountability achieved in the creation or implementation of social programs. That being said, several Charter decisions engaging the s.15 right to equality have involved executive social policy-making raising significant accountability concerns. In this section, I examine the extent to which the evidence of a lack of accountability in the social programs at issue has played a role in the analysis adopted or the result reached in those cases. Have courts taken Martha Jackman’s approach to section 1 to heart and chosen to incorporate evidence of a lack of accountability into their Charter analysis? Or, even more unfortunately, have accountability concerns been ignored altogether in favour of the bigger “punch” packed by a rights-based analysis? I conclude that, with the exception of the trial decision in

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Wynberg, the latter appears to be the case. The Supreme Court of Canada has remained (properly) focused on a substantive rights analysis in developing an approach to social and economic rights under the equality guarantee. Unfortunately, this means that there continues to be no legal avenue for addressing the accountability gap evident in these cases.

Before examining the case law, there is an important distinction to be drawn between social benefits decisions involving clear legislative policy choices set out in legislation and, therefore, subject to democratic accountability mechanisms and those decisions involving social programs created entirely through executive action. Only the latter give rise to a concern for the accountability gap in executive social policy-making.

Newfoundland (Treasury Board) v. N.A.P.E. and Chaoulli v. Québec (Attorney General) are both examples of the former. In N.A.P.E., the Newfoundland government’s decision to renege on its pay equity agreement with female health sector employees was approved by the provincial legislature in the form of targeted legislation titled the Public Sector Restraint Act. And in Chaoulli, the Québec government’s policy of prohibiting private health insurance for services covered under the province’s public health care plan was plainly set out in provisions contained in the provincial Health Insurance Act and Hospital Insurance Act. There is no doubt that these cases were “pure” section 15 cases with no administrative law elements.

Other recent decisions have involved social policy programs developed through soft law or ad hoc discretion where few accountability mechanisms have existed. A prime example is Wynberg involving Ontario’s autism treatment programs. Also falling within this category is Eldridge involving a discretionary decision by the Executive Committee of the Ministry of Health not to fund sign language interpreters

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for deaf patients receiving medical treatment.\textsuperscript{172} And \textit{Auton}, like \textit{Wynberg}, involved a discretionary decision by the government not to fund IBI treatment for autism.\textsuperscript{173}

Falling somewhere on the accountability spectrum between clear law-making as in \textit{N.A.P.E.} and executive social policy-making as in \textit{Wynberg}, lies \textit{Gosselin v. Québec (Attorney General)} which involved delegated legislation providing for different levels of welfare benefits for recipients based on their age.\textsuperscript{174}

In spite of the lack of accountability demonstrated by the executive in several of these cases, courts have largely ignored this accountability gap in their legal analysis. In particular, there is no apparent correlation between the degree of deference shown by courts in their section 1 analysis and the level of accountability evident in the creation or administration of the social program at issue.

\textit{i. Wynberg v. Ontario}

This was the \textit{Charter} challenge to Ontario’s IEIP and SEP programs that I discussed in detail in Chapter 1. In her decision at trial, Kiteley J. was clearly struck by the abundant evidence of a lack of accountability on the record and this appears to have directly influenced her finding of discrimination. However, the Ontario Court of Appeal overturned Kiteley J.’s decision on all grounds and the Court expressly rejected her reasoning on the relevance of accountability concerns.

Looking first at Kiteley J.’s trial decision, she spent a significant portion of her decision discussing program development before turning to her \textit{Charter} analysis. References to accountability and the “unusual” nature of the process followed in developing Ontario’s autism policy appear throughout Kiteley J.’s reasons.\textsuperscript{175} She also made a special point of evidence highlighting the importance of a coordinated approach by the relevant ministries (MCSS and MEd) to the autism initiative, as well as evidence indicating their eventual failure in coordination.\textsuperscript{176}

\textsuperscript{172} \textit{Eldridge} (S.C.C.), \textit{supra} note 168.
\textsuperscript{173} \textit{Auton}, \textit{supra} note 142.
\textsuperscript{174} \textit{Gosselin}, \textit{supra} note 108.
\textsuperscript{175} See, for example, \textit{Wynberg}, \textit{supra} note 171 at paras. 62, 66, 74.
\textsuperscript{176} \textit{Ibid.} at paras. 128(l), 136-141.
At times, her decision is highly reminiscent of an administrative law case although administrative law claims were not before her. It was significant for Kiteley J. that the government’s continuing commitment to the age cut-off in spite of the problems that had surfaced was made without re-assessment or analysis. Similar was her finding that MEd officials took the position that IBI treatment was not within their mandate without making any effort to explore what IBI involved and whether IBI was an appropriate teaching strategy in an education setting. Kiteley J.’s reasoning in both instances suggests that it was not so much the substance of these policy choices that concerned her but the process employed by government in making them.

It is difficult to say to what extent Kiteley J. was influenced by these concerns in reaching her conclusion on the Charter issues. Much of the evidence of administrative failures in the autism funding programs (the IEIP and SEP) reviewed by Kiteley J. in the first part of her judgment did not appear to play a part in her Charter analysis that followed. In this sense, the evidence was benign. However, other evidence of a lack of accountability became instrumental to Kiteley J.’s finding of discrimination and her reasoning in this respect was expressly overturned by the Ontario Court of Appeal.

For example, Kiteley J. was very critical of the government’s failure to monitor or evaluate the programs in spite of her acknowledgement that the government has no constitutional duty to gather data. It is only through a rather oblique path that Kiteley J. linked the issue of evaluation to her eventual conclusion of discrimination. She held that the lack of any government data on whether services provided under the SEP were “appropriate” entitled her to draw an inference against the government in this respect. This inference was necessary for her conclusion that the MEd had failed to fulfill its statutory duty to provide appropriate services to school children with autism which, in turn, led to her conclusion that the SEP treated children with autism differently from children with other special needs. This conclusion related only to the SEP and not to the

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177 Ibid. at paras. 216c, 256a, e.
178 Ibid. at paras. 216e, 440.
179 Ibid. at paras. 440 (also see paras. 442-443).
180 Ibid. at paras. 126, 128, 516-536.
181 Ibid. at paras. 535-536.
IEIP. Interestingly, counsel for the defendant made the submission that evidence of a lack of evaluation of the IEIP was not properly relevant to her Charter analysis but this submission was expressly rejected by Kiteley J. 182

The link between Kiteley J.’s concern for accountability and her conclusion on the discrimination issue is more clearly evident in her focus on the timing of the government’s Charter violation. Kiteley J. found that, although the IEIP was launched in September 2000, the government’s administration of the IEIP and SEP did not result in discrimination until October 2002 when the actions of the government became “unreasonable” in light of growing evidence that more children were aging out than were being served. This emphasis on timing demonstrates that it was the administrative process behind the age cut-off, rather than the purpose or effect of that policy decision that impressed Kiteley J.

The Ontario Court of Appeal judgment ignored all evidence of the accountability gap in the development and implementation of the IEIP and SEP. The Court did not find it necessary to mention the process leading up to the issuance of the IEIP Guidelines, nor the lack of evaluation or monitoring of either the IEIP or SEP. Instead, the Court focused on the impact of the programs and it conducted a straightforward application of the Laws test under section 15 and the Oakes test under section 1. 183

At the outset, the Court of Appeal rejected Kiteley J.’s finding on the reasonableness of the government’s correlation of age with eligibility under the IEIP. The Court stated:

“The finding is that the differential treatment of the claimants based on age began only when it became unreasonable for eligibility to be limited to autistic children age two to five and the exclusion of those six and over. We agree with the respondents that the analysis called for in Law does not contemplate such a step in determining whether the claimants experienced differential treatment on an enumerated ground. Indeed, even at the discrimination stage, the assessment focuses on the impact of the differential treatment on the human dignity of the claimants rather than whether the government actors had good reason to do what they did.” 184

(emphasis added)

182 Ibid. at paras. 602-603.
184 Wynberg (Ont.C.A.), supra note 171 at para. 44.
This statement signaled the Court’s intent to steer away from Kiteley J.’s preoccupation with accountability concerns towards a more faithful Charter analysis. The process by which the age cut-off was determined was simply not relevant to the analysis so long as its outcome was rational. This is why the age cut-off could not be discriminatory at one stage of the IEIP but not at an earlier stage of the program (as Kiteley J. concluded).

In determining whether or not the age cut-off in the IEIP decision was discriminatory on the basis of age, the Law test required the Court to consider whether or not the program’s purpose or effect was to demean the human dignity of school-aged children with autism relative to pre-school children with autism. In answering this question, the Court looked to the four contextual factors: pre-existing vulnerability of older children with autism; correspondence between the claimants’ age as the basis for excluding them from the IEIP and their actual needs and circumstances; the ameliorative purpose or effect of the age cut-off; and the nature and scope of the claimants’ interests affected by the age cut-off. None of these factors properly addressed the legitimacy of the process through which the IEIP was developed. Instead, they focused on the substantive policy decisions that resulted from that process and this is where the Court’s analysis rested. For example, Kiteley J. had found that the ameliorative purpose of the IEIP was discriminatory since the government was mistaken in its assumption that school aged children with autism would have their needs met in the education system. This accountability concern was found by the Court of Appeal to be irrelevant to the Charter analysis.185 The third contextual factor in Law was properly concerned instead with any possible misconceptions by the government as to the personal traits of the claimants (i.e., as not being disadvantaged or not having special needs). Again, we see the Court of Appeal rejecting accountability considerations and bringing the analysis back to a substantive discussion of the purpose of the age cut-off and its effect on the claimants.

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185 Ibid. at paras. 68-71.
Turning to the discrimination claim under the SEP, a sharp contrast is evident between Kiteley J.’s critical examination of the way in which Ontario’s special education regime was administered and the Court of Appeal’s neutral description of the program. In particular, the Court of Appeal rejected the inference drawn by Kiteley J. against the government as a result of its failure to evaluate the SEP.\(^{186}\) The inference was found to amount to a reversal of the onus on the claimants to establish differential treatment. And without evidence, the Court of Appeal found that there was no basis to conclude that the MEd failed to provide appropriate services to school-aged children with autism. Accordingly, there was no evidence of differential treatment under the SEP. Therefore, not only was Kiteley J.’s focus on evaluation and monitoring not relevant to the Charter analysis, but it directly contributed to her incorrect finding that the SEP was discriminatory.

Turning to the section 1 analysis, it seems clear that the accountability concerns prevalent throughout Kiteley J.’s review of the evidence influenced her to apply a high degree of scrutiny to the government’s actions. Kiteley J. did accept the government’s argument that the government’s actions were “prescribed by law” for the purpose of engaging section 1. This was in spite of the plaintiff’s argument that the age cut-off was not protected by any traditional accountability mechanisms.\(^{187}\) Thereafter, however, the trial judge used expert economic evidence to essentially engage in a \textit{de novo} cost/benefit assessment of the age limit in the IEIP. In response to the government’s argument that she ought to take a skeptical view of the plaintiff’s economic evidence, Kiteley J. stated: “...it does not lie in the mouth of this defendant to challenge their analysis on the basis of faulty assumptions when this defendant chose not to conduct its own monitoring and evaluation”.\(^{188}\) Kiteley J. concluded that there was no rational connection between the age cut-off and the government’s objective of maximizing limited financial resources. She also found that the government had failed to meet the minimal impairment criterion, stating shortly that “…the IEIP did not reconcile the interests of competing

\(^{186}\) \textit{Ibid.} at paras. 132-137.  
\(^{187}\) \textit{Wynberg}, supra note 171 at paras. 625, 639-642.  
\(^{188}\) \textit{Ibid.} at para. 668.
groups”. Under the proportionality branch of the *Oakes* test, Kiteley J. essentially reasoned that the benefits of the age cut-off did not outweigh its detriment where more children were aging out of the IEIP than were being served.

In contrast, the Court of Appeal adopted a much more deferential view of the IEIP and SEP and its analysis reads in places like an apologia of the government. The Court highlighted the complexity of the balancing exercise that the government undertakes in providing services to needy children given limited resources:

The Supreme Court has held repeatedly that where the government has made a difficult policy choice regarding the claims of competing groups, or the evaluation of complex and conflicting research, or the distribution of public resources, or the promulgation of solutions which concurrently balance benefits and costs for many different parties, then the proper course of judicial conduct is deference...

...In our view, the policy choices made by the government when it established and developed the IEIP fell within the range of reasonable alternatives to provide an effective program across the province that balanced the needs of all autistic children. The age limit fits squarely within the framework of government action that mediates among competing interests and, accordingly, warrants deference by this court.

The Court found it significant that the plaintiffs did not put forward an alternative basis for limiting services under the IEIP in accordance with existing resources. Instead, their argument for eliminating the age cut-off was based on “an ideal situation where there were no limits on available resources”.

In contrast to the approach of the Ontario Court of Appeal in *Wynberg*, the trial judge’s misplaced preoccupation with accountability concerns appears to have affected the degree of deference with which she viewed the executive social policy decision at issue in that case. Her judgment demonstrates that without the accountability imposed by legislation, or even the scrutiny accorded to regulations by the legislative standing committee, the accompanying loss of legitimacy suffered by social program development may be sufficient to influence a court faced with *Charter* issues. Thus far,

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190 *Wynberg* (Ont.C.A.), *supra* note 171 at paras. 184-185.
191 *Ibid.* at paras. 179, 188.
higher courts have rejected this tendency. The Court of Appeal correctly focused on Charter issues in Wynberg. However, the end result is perhaps even more unfortunate. The egregious lack of accountability evident in the IEIP and SEP remains unaddressed.

In my view, the lesson to be drawn from Wynberg is that the accountability gap has attracted some judicial concern but that a faithful application of section 15 of the Charter does not provide the legal means to address it. Instead, we must look to administrative law to develop its own solution.

Like the Ontario Court of Appeal in Wynberg, the Supreme Court of Canada also appears to have avoided the incorporation of accountability concerns into its section 15 social and economic rights jurisprudence. Again, however, the result is that accountability concerns existing in many important social programs simply remain ignored and unaddressed by public law.

**ii. Gosselin v. Québec (Attorney General)**

Gosselin involved a Charter challenge to a regulation under Québec’s Social Aid Act. The Québec government overhauled its social assistance program in the late 1990s to provide reduced welfare benefits to recipients under age 30 unless they participated in work programs. McLachlin C.J., writing for a majority of the Court, accorded a high degree of deference to government in finding that the program was not discriminatory under s.15. However, McLachlin C.J. applied that deference in respect of the appropriateness of the policy choice itself rather than the process by which it was administered.

The stated purpose behind the government’s two-tiered benefits scheme was to assist young welfare recipients in gaining the training and experience necessary to successfully join the work force so to reduce long-term dependence on welfare. McLachlin C.J. accepted that this purpose was well-intentioned and socially beneficial and, therefore, not demeaning to the dignity of young recipients.

The claimant argued that, regardless of the purpose of the scheme, it did not have the effect of assisting young welfare recipients since there were not enough places

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192 Gosselin, supra note 108.
available in the training programs to meet the needs of recipients under the age of 30.  

In other words, administrative failures meant that the scheme did not correspond with the legislature’s intentions. McLachlin C.J. found that there was insufficient evidence on the record to support this argument. But in any event, her approach to the section 15 analysis would have accorded relatively little weight to accountability concerns. McLachlin C.J. chose to highlight legislative intent over administrative effect in determining that the social scheme did not result in a denial of human dignity. Although she acknowledged that the effect of the program was also critical, she stated:

…where the legislature is responding to certain concerns, and where those concerns appear to be well founded, it is legitimate to consider the legislature’s purpose as part of the overall contextual evaluation of a challenged distinction from the claimant’s perspective…

Given her conclusion that the program was well-intentioned with a socially beneficial purpose, McLachlin C.J. reasoned:

Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution. No matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable. The fact that some people may fall through a program’s cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected…

This majority decision in Gosselin indicates that the Supreme Court will not allow accountability concerns apparent in the implementation of a social policy decision to skew the Charter analysis, particularly in the face of a benevolent legislative purpose.

iii. Eldridge v. British Columbia (Attorney General)

Another decision involving the executive allocation of social benefits was Eldridge; one of the cases discussed by Martha Jackman in her paper on section 1 and democracy. To recapitulate, the B.C. Ministry of Health’s decision not to fund sign language interpreters for deaf patients receiving medical treatment was made by the
Executive Committee of the Ministry in response to a request by the Institute for the Deaf. The reason for the decision was set out in an internal memo:

…it was felt to fund this particular request would set a precedent that might be followed up by further requests from the ethnic communities where the language barrier might also be a factor.\(^{197}\)

This policy decision was made as a result of an internal government process. The legislation or regulations governing publicly funded health services did not provide any guidance on what services should or not should not be publicly funded. Rather, the Medical and Health Care Services Act created a statutory duty for the government to pay for “benefits” but the definition of benefits was, for the most part, left to the discretion of the Medical Services Commission.\(^{198}\)

The British Columbia Court of Appeal decision discussed by Jackman was overturned by the Supreme Court. LaForest J., writing for a unanimous court, held that the failure to fund sign language interpreters for deaf patients violated section 15 and was not justified under section 1. In reaching this decision, LaForest J. was highly interventionist in criticizing the government’s health policy. However, contrary to the approach recommended by Jackman in her article, LaForest J. paid little attention to the accountability concerns accompanying the decision not to fund sign language interpreters. Instead, his criticism was devoted exclusively to the content of the government’s policy choice.

In particular, La Forest J.’s conclusion that the government had discriminated against deaf patients was based on his own assessment that the need for effective communication was so integral to good medical services that it was part and parcel of the “medically necessary services” provided under the legislation.\(^{199}\) In his section 1 analysis, LaForest J. was similarly unabashed in second-guessing the government’s

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\(^{197}\) This is described in the trial decision: (1992), 75 B.C.L.R.(2d) 68 (S.C.) at 75.

\(^{198}\) It is interesting and perhaps significant that the decision whether or not to fund sign language interpreters in the instant case does not appear to have gone to the Medical Services Commission. In spite of the evidence at trial that the decision was made by the Executive Committee of the Ministry of Health, the Supreme Court of Canada’s analysis proceeded on the basis that the discretion was to be exercised by the Medical Services Commission and hospitals as contemplated by the statutory and regulatory framework.

\(^{199}\) Eldridge, supra note 168 at para. 72 et seq.
policy choice. He held that the decision not to fund sign-language interpreters did not result in a “minimal impairment” of the right to equality. Although he acknowledged that governments must be afforded wide latitude to determine the proper distribution of resources in society, deference was not due merely because the issue is a social one.\textsuperscript{200} He determined that the cost of providing sign-language interpreters was “relatively insignificant” ($150,000) in proportion to the provincial budget (.0025%) and concluded:

Viewed in this light, it is impossible to characterize the government’s decision not to fund sign language interpretation as one which “reasonably balances the competing social demands which our society must address…”\textsuperscript{201}

The accountability concerns so significant on the evidence in \textit{Eldridge} simply did not factor into La Forest J.’s decision.


\textit{Auton} involved a section 15 challenge to the B.C. government’s policy decision not to fund IBI treatment for autistic children under its provincial health insurance legislation.\textsuperscript{202} As was the case in Ontario, this decision was made under a highly discretionary legislative framework with no guidance on the policy trade-offs appropriate in funding health services within the province. However, unlike the case in Ontario, the B.C. government had flatly refused to fund any IBI treatment regardless of the age of the child. The Supreme Court dismissed the \textit{Charter} challenge on the preliminary ground that the funding of health care was not a benefit “provided by law” under section 15. The legislative scheme did not purport to fund all medically necessary treatment so that the government’s decision to exclude funding for this particular “non-core service” was unassailable.

Again, there is little or no evidence of accountability concerns influencing the courts in \textit{Auton}. Just as in the Ontario Court of Appeal decision in \textit{Wynberg}, the Court focused on the policy decision itself rather than the circumstances under which it was reached.

\textsuperscript{200} \textit{Ibid.} at para. 85.
\textsuperscript{201} \textit{Ibid.} at para. 93.
\textsuperscript{202} \textit{Auton}, \textit{supra} note 142.
In spite of the underdeveloped distinction between the substantive social values at play in Charter review and the accountability concerns of administrative law, it appears that courts have properly limited themselves to a rights analysis in applying section 15 to cases of executive social policy-making. However, the result is that the accountability concerns so evident in many modern social programs remain ignored by the courts. Choudhry, Roach, and Jackman propose that the Charter be interpreted to provide a solution to this problem. I disagree. In my view, the problem is one which is conceptually distinct from the rights-based analysis appropriate under the Charter. Instead, the solution to the problem properly lies within the boundaries of administrative law.

Finally, in a variation on the old adage, “be careful what you wish for”, Mark Tushnett has identified an additional danger implicit in constitutional rights review. Because constitutional legal rights are essentially individualistic, the long term consequence of winning victories in courts is to impede progressive change in the collective sphere of social policy. The result of attempting to have the Charter be all things to all people may, in the long term, be detrimental to the collective social values of which Canadians are so proud.

Conclusion to Chapter 3

As the Supreme Court recognized in Dunsmuir, the future of public law in Canada lies at a crucial cross-roads. Twenty-five years of Charter analysis and evolution, in the midst of a global rights revolution, has re-oriented public law towards an individualistic conception of social justice. This has had a dramatic impact on administrative law, causing some to prematurely announce its demise and many to call for its submission to a unified theory of public law. Meanwhile, Canadian legislatures have continued to delegate ever-broader discretionary powers for the creation and

204 Dunsmuir, supra note 12.
administration of social policy, leaving traditional administrative law tools developed in the era of adjudicative administrative action, relatively toothless. In the circumstances, it is natural for public law scholars to have called upon the Charter and unwritten constitutional values to step into the breach. But this not only extends the Charter beyond its natural boundaries, it also does a disservice to the valuable accountability function underlying administrative review. The first step to remedying this conceptual confusion is to recall the functional distinction existing between constitutional and administrative review and to restore each to its proper domain. The second step is to look anew at the accountability function underlying administrative review in order to consider how it may play a more effective role in legitimizing executive social policy-making. I suggest that the concept of accountability, with its emphasis on process over outcome, provides courts with a rational, functional basis for supervising executive policy-making even in the absence of clear statutory direction. Furthermore, it does so without leading courts into improper policy debates and without violating the doctrine of parliamentary sovereignty. The accountability function of administrative review is an important mechanism for legitimizing executive social policy-making where the Charter is ineffective – in the redistributive realm where legal rights are not necessarily engaged. Even if social-economic rights are someday recognized under the Charter, we must resist the temptation to allow individual rights to become the sole defining criteria for judicial review as a whole in order to prevent administrative law from descending “to the level of partisan, political and philosophical debate”.205

The accountability function of administrative review has not yet developed to address the accountability gap in executive social policy-making. In Chapter 4, I explain the doctrinal challenges that have thus far prevented administrative law from fulfilling this role and I argue that the time has come to reinvent administrative law accordingly.

CHAPTER FOUR
Administrative Review As An Accountability Mechanism - From The Perspective of Administrative Law Doctrine

The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.¹

…at a time when there has been a dilution in public confidence in the capacity of the traditional political process to exercise any democratic control over the operations of government, it is appropriate for administrative law, both through statutory reform and judicial review, to ensure procedural openness and enhance accountability in public administration.²

Introduction

In previous chapters, I have described the existence of a significant accountability gap in the formation and implementation of social policy in our modern welfare state. I have argued that, under our constitution, the courts have a role to play in closing this accountability gap, and administrative review, rather than constitutional review, is uniquely suited for this purpose. Our current doctrine of administrative review developed when the nascent administrative state required less in the way of supervision. Executive action was reliably grounded in traditional legal instruments. However, as the government has taken on the role of social welfare manager, the tenuous boundary between law and policy has become ever more elusive and administrative review must evolve accordingly. My proposed expansion of administrative review merely attempts to keep pace with this growth in government. In this chapter I explain why administrative law doctrine has not yet developed to respond to the accountability gap in executive social policy-making, and how it may do so while remaining faithful to constitutional and institutional boundaries.

¹ Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190 at para. 32 [Dunsmuir].
My proposed expansion of the doctrine of administrative review is controversial because, at the moment, there is a long-established and widely-held belief that courts should rarely, if ever, review social policy decisions.\(^3\) This presumption is most commonly articulated as a principle against the review of administrative action having a political, policy, or legislative nature. The classic Canadian exposition of the principle is found in \textit{Thorne’s Hardware Ltd. v. R.}, where the Supreme Court refused to intervene in a decision of the Governor-in-Council to expand the boundaries of a harbour since the issue was one of “economic policy and politics” rather than “jurisdiction or jurisprudence”.\(^4\) There is a wealth of subsequent decisions upholding this principle in the areas of municipal restructuring, health care funding, and in other cases involving the allocation of social resources.\(^5\) The Ontario Divisional Court has put the principle thus:

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\ldots \text{it is not for any court to oversee a Minister of the Crown in policy decisions or in the exercise of his or her discretion in the expenditure of public funds entrusted to his or her department by the legislature.}\(^6\)
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The caveat to the presumption, applicable in cases of egregious error or bad faith on the part of the decision-maker, is rarely invoked.

The presumption also appears throughout administrative law in other guises. In the area of substantive review, it has operated both as barrier to justiciability and as a

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\(^4\) \textit{Thorne’s Hardware Ltd. v. Canada}, [1983] 1 S.C.R. 106 at para. 18 [\textit{Thorne’s Hardware}].


\(^6\) \textit{Hamilton-Wentworth (Regional Municipality)}, \textit{ibid.} at para. 47.
basis for deference.\textsuperscript{7} It has been described in terms of the function carried out by the decision-maker (legislative rather than administrative or quasi-judicial), the nature of the power being exercised (discretionary rather than legal), and the type of interests being affected (privileges rather than rights).\textsuperscript{8} It is also reflected in the area of procedural review. The moratorium on imposing a duty of fairness on the legislative functions of executive government has remained even as the procedural review of administrative functions has burgeoned.\textsuperscript{9} Where the concern is bias on the part of executive decision-makers, the presumption is reflected in the higher standard of impartiality applied to decision-makers in adjudicative settings compared to those entrusted with political or legislative duties.\textsuperscript{10}

The presumption is so well-established that it has taken on the complexion of an irrefutable axiom of administrative law. This is the case notwithstanding the presence of significant tensions in its application, resulting in highly illogical and inconsistent pockets of jurisprudence in various areas of administrative law. And more importantly, this is the case notwithstanding the fact that the social policy decisions generated by executive decision-makers have just as great, if not greater, impact on the lives of individual citizens than do adjudicative decisions involving traditional legal rights.

\textsuperscript{7} Ref re Canada Assistance Plan, [1991] 2 S.C.R. 525 at 545 [Ref re CAP]; C.U.P.E. v. Canada (Minister of Health), supra note 5 (justiciability); and National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 (deference) [National Corn Growers].

\textsuperscript{8} The rights/privileges distinction has eroded over time but still persists in various forms. In Re Webb and Ontario Housing Corporation (1978), 93 D.L.R. (3d) 187 (Ont.C.A.) [Webb], the court distinguished between a decision to grant a benefit and a decision to withdraw the benefit once granted. A duty of fairness was applicable only in the case of the latter. Also see Re Sheehan and Criminal Injuries Compensation Board (1975), 52 D.L.R. (3d) 728 (Ont.C.A.) and, more recently, Black v. Canada (Prime Minister) (2001), 54 O.R.(3d) 215 (C.A.) [Black]. In Black, the rights/privilege distinction was applied in narrower terms: “The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake.”


\textsuperscript{10} Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170 [Old St. Boniface]. In an adjudicative setting, the test is whether circumstances give rise of a reasonable apprehension of bias on the part of the decision-maker, whereas, in a policy-making setting, the decision-maker need only be “amenable to persuasion.”
My task in this chapter is to re-visit the presumption against the administrative review of social policy decisions in order to tease out exactly what is precluded and why. By examining different applications of the presumption in doctrinal context, it becomes apparent that it has never been absolute in scope, nor consistently applied. Rather, it has functioned as a convenient short form for protecting two underlying constraints on the scope of administrative review. One of these constraints is constitutional in nature. Under the separation of powers doctrine, the judicial branch of government may not usurp the role of the legislative branch of government. The second constraint is institutional. Courts optimally operate under a bilateral, adversarial system that is ill-suited to polycentric policy determinations. Both of these are good reasons for limiting the review jurisdiction of courts to some extent. However, over the years, both have come to be significantly overstated. I will argue that the separation of powers doctrine does not operate as an absolute bar to the administrative review of policy decisions, but merely as a rationale for deference. And the theory that courts should not resolve polycentric problems is currently honoured more in its breach than in its application. Courts regularly resolve polycentric problems. Thus, we must dig deeper to determine what functional constraints properly exist on courts in reviewing executive social policy decisions.

I will conclude in this chapter that the current presumption in administrative law against the review of social policy decisions is obsolete and should be dispensed with in favour of a more sophisticated understanding of the constitutional and functional limits on courts in carrying out their supervisory function. My chosen methodology is a practical one. I will examine both substantive and procedural review case law on the philosophy that the better theory is one that actually works in practice; i.e., “a principled framework that is more coherent and workable”. I will show that, in spite of more than one hundred years of active jurisprudence, Canadian courts have been unable to

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11 Dunsmuir, supra note 1 at para. 32, quoted above. See my Introduction above in which I discuss my methodology in more general terms. My aim in relying on analysis of the jurisprudence is to devise a theory of administrative review for social policy decisions that is capable of implementation within our current common law system with as little disruption as possible to existing legal doctrine and legal practice.
develop a principled basis for distinguishing between law and policy as a means of setting predictable limits on the scope of administrative review. This is good reason for concluding that no such bright line distinction is possible and, therefore, that a new model for understanding the boundaries of administrative review is needed. My view is that the accountability function underlying administrative review, as developed in Chapters 2 and 3, provides this alternative, preferable basis for limiting the scope of administrative review. My proposed doctrine of administrative review on grounds of accountability will be developed in further detail in Chapter 5.

1. No Doctrinal Bar to the Administrative Review of Social Policy Decisions

A. The Separation of Powers Doctrine

The availability of administrative review is guaranteed by our constitution. But the scope of administrative review has always been circumscribed by the doctrine of the separation of powers, as well as by certain institutional limitations understood to exist in the judicial process. And the separation of powers doctrine, in particular, has had a strong influence in the evolution of the presumption against administrative review of social policy decisions. The Supreme Court of Canada has recognized the separation of powers as a “defining feature of our constitutional order.” McLachlin J. has explained that the doctrine “precludes the courts from trenching on the internal affairs of...
of the other branches of government”. One specific application of the doctrine has been the unwillingness of courts to interfere with prosecutorial discretion - an executive function. In R. v. Power, the majority of the Court stated:

It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive…

In this section I argue that, properly understood, this doctrine does not operate as a bar to the administrative review of social policy decisions, but merely signals a posture of judicial deference.

Unlike the United States, our constitution does not guarantee the separation of powers between the legislative, executive and judicial branches of government. There can be no strict separation of powers between the legislature and the executive in a responsible system of government, and even between the judicial and the two political branches, there is no strict division of functions. Instead, the doctrine in Canada exists as an informal understanding that each branch of government must respect the role of the others. As one early Canadian scholar wrote, the doctrine “embodies caution against tyranny in government through undue concentration of power”.

Practically speaking, a multiplicity of legislative, executive and quasi-judicial functions may exist within a single government body. Although ministers of the Crown are elected members of Parliament, they are also frequently delegated statutory power. The exercise of this power is clearly amenable to supervision through administrative review.

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19 Operation Dismantle, supra note 13 at para. 64; and Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607 at para. 37: “…where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government.”
It is important to distinguish the role that the separation of powers doctrine plays in administrative law with its more potent application in constitutional law. In constitutional law, the court’s role in reviewing government action is a direct intrusion into the legislative realm with the purpose of enforcing the division of powers, the Charter, or some other constitutional principle. Here, the separation of powers doctrine operates to prevent the court from overstepping its legal role and entering into the political forum. The power of the court to strike down unconstitutional law is extreme and the separation of powers doctrine acts to temper that power. But in constitutional cases, the two political branches of government are aligned. The executive is carrying out legislative direction or is acting under its prerogative powers.\(^{20}\)

In contrast, the focus in administrative law is on the relationship between the executive and legislative branches of government. The court’s role is to supervise this relationship to ensure that the executive does not exceed its delegated legislative authority. Here, the judiciary is not policing the legislative branch but the opposite – it is supporting the legislature by ensuring that the executive remains faithful to its legislative mandate. In this context, the separation of powers doctrine does not have the same force. The court’s jurisdiction is limited to upholding the dictates of the legislature rather than striking them down. The *ultra vires* doctrine already protects the political mandate of the legislature.

The separation of powers doctrine has been exaggerated from time to time. This arguably occurred during the early part of the 20th century when it was wielded against the executive branch of government as an attack on the legislative delegation of so-called “judicial” functions.\(^{21}\) Geneviève Cartier explains:

Historically, courts were *not* preoccupied with legislative attempts to delegate *legislative* functions to administrative decision makers and with the question of whether or not this affected the monopoly of the legislature on law-making functions. They were rather preoccupied with legislative attempts to delegate

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judicial functions to these decision makers, because this affected their traditional monopolcy on law-interpreting.\textsuperscript{22}

However, that outcry was gradually quelled as the complexity of modern governance became undeniable and courts recognized the practical need for the administrative state to assume these quasi-judicial functions.\textsuperscript{23}

In the 1980s, the introduction of the Charter caused a renaissance of the separation of powers doctrine, this time directed at criticizing the courts in their assumption of the power to review legislation for rights violations.\textsuperscript{24} The Supreme Court has been influenced by this recent surge of attention to the doctrine and has been respectful of the doctrine in developing its own role in applying the Charter.\textsuperscript{25} But even in the constitutional context, the issue has always been whether the courts “should” or “must” deal with so-called legislative or political matters, rather than whether they “can” do so.\textsuperscript{26}

The Supreme Court of Canada has refused to recognize a “political questions” doctrine along the lines debated in the United States.\textsuperscript{27} The justiciability issue is often assiduously avoided by Canadian courts but, where it has been tackled, courts have


\textsuperscript{25} Roach, \textit{ibid}. David Wiseman cites much of this jurisprudence in his article, “Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument” (2006) 51 McGill L.J. 503 [Wiseman, “Competence Concerns”]. Wiseman’s focus is on the courts’ institutional competence to resolve Charter problems, but he acknowledges the close link in the jurisprudence between competency and legitimacy concerns.

\textsuperscript{26} “[T]he separation of powers cannot be invoked to undermine the operation of a specific written provision of the Constitution like s. 1 of the Charter.”: \textit{N.A.P.E.}, \textit{supra} note 14 at para. 104: Also see \textit{Operation Dismantle}, \textit{supra} note 13 at paras. 54, 62.

\textsuperscript{27} “If an individual’s Charter right or freedom is violated by the state, it is no answer to say the violation was driven or is justified for political reasons.”: \textit{N.A.P.E.}, \textit{ibid}. at paras. 80-81. Also see Cowper & Sossin, “Political Questions”, \textit{supra} note 20.
taken a deferential but pragmatic approach to so-called political issues. In most cases, they have wisely refrained from interfering in these issues, leaving them to be determined by the legislative branch of government. But this has never been accepted as a foregone conclusion. Rather, the courts have engaged in a full and thoughtful inquiry as to which body of government is best able to determine the matter. This inquiry has unavoidably involved the application of “normative preferences” about the role of courts in social, political, and economic life.

A recent discussion by the Supreme Court of the separation of powers doctrine occurred in *N.A.P.E.*

Here, the Court refused the lower court’s suggestion that the s.1 *Oakes* analysis under the *Charter* be rewritten so as to pay greater attention to the doctrine and, thereby, accord more deference to legislative and executive choices. However, the Court did accept that the legislature must be given a “wide margin of appreciation” to make difficult financial choices in a crisis. In the case at hand, the Court found that the Newfoundland government’s decision to renege on their pay equity commitment to female hospital workers was justified by the scale of the financial crisis faced by the province.

*N.A.P.E.* involved a clearly worded, legislative instrument duly passed by the elected members of the provincial legislature. The power of the court under the *Charter* to review this legislation, and potentially to overturn it, was a compelling reason to invoke the separation of powers doctrine. Many of the other renowned examples of judicial abnegation have also concerned legislative action rather than delegated executive action. In *Operation Dismantle*, the challenge was to the federal Cabinet’s decision to allow cruise missiles to be tested in Canada but there was no suggestion that the Cabinet was not acting in accordance with the wishes of Parliament.

Similarly, in *Refre Canada Assistance Plan*, the challenge was to a federal bill by which the government

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31 *Operation Dismantle*, *supra* note 13.
would reduce its financial obligations under the Canada Assistance Plan.\textsuperscript{32} The bill was ultimately passed by Parliament and there is no question that the interests of the two political branches were aligned. In each of these cases, the Court understood its judicial review jurisdiction to be a direct supervision of the legislative branch of government and the separation of powers doctrine was invoked as an independent constitutional principle to assist the Court in delineating the boundaries of this role.\textsuperscript{33}

In contrast, in administrative law, the courts’ power is relatively constrained. Their review jurisdiction is indirect in the sense that they may supervise the executive branch of government only where there is some suggestion that the executive has deviated from its legislative mandate. Here, the issue of justiciability must ultimately turn on legislative intent. The separation of powers doctrine might play an indirect role in determining legislative intent but it does not directly operate to limit the jurisdiction of the courts. There is no need for it to do so since the \textit{ultra vires} doctrine plays this role. So, in \textit{Thorne’s Hardware}, the federal government’s decision to expand the boundaries of St. John’s Harbour was challenged as deviating from Parliament’s intent as expressed in the \textit{National Harbours Board Act}. The allegation that the Governor-in-Council was acting in bad faith turned on the purpose of that legislation, and the Court’s refusal to intervene ultimately turned on its finding that the government was acting for proper purposes (these being economic and political in nature).\textsuperscript{34} If the Court had heard evidence that the government’s decision was based on factors clearly extraneous to the purview of the legislation then, just as in \textit{Roncarelli v. Duplessis}, it would have had jurisdiction to intervene and the separation of powers doctrine would not have factored in the analysis.\textsuperscript{35}

\textsuperscript{32} \textit{Ref re CAP, supra, note 7.}

\textsuperscript{33} The separation of powers doctrine has not always restrained the Court from adopting a broad interpretation of its constitutional review jurisdiction. In \textit{Doucet-Boudreau v. Nova Scotia (Department of Education), 2003 SCC 62 [Doucet-Boudreau]}, the majority upheld a \textit{Charter} remedy allowing the trial judge to retain jurisdiction over the government’s building of French language schools. The minority protested that this remedy violated the separation of powers doctrine.

\textsuperscript{34} \textit{Thorne’s Hardware, supra note 4.}

\textsuperscript{35} See the discussion of \textit{Roncarelli v. Duplessis}, [1959], S.C.R. 121 [\textit{Roncarelli}] in Chapter 3 above.
Chapter 4 – Administrative Law Doctrine

The Supreme Court is well aware of this distinction between its review jurisdiction in constitutional law and in administrative law. In the Canada (Auditor-General) decision, the Court’s refusal to intervene in a dispute between the Auditor-General and the Governor-in-Council was based, not on the separation of powers doctrine, but on the Court’s interpretation of the relevant legislative instruments:

In the realm of Charter adjudication, s. 1 is "the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it" (Wilson J. in Operation Dismantle, supra, at p. 491). Ultimately, the Courts are constitutionally charged with drawing the boundaries of justiciability, except as qualified by s. 33. By way of contrast, in the residual area reserved for the principle of Parliamentary sovereignty in Canadian constitutional law, it is Parliament and the Legislatures, not the Courts, that have ultimate constitutional authority to draw the boundaries. It is the prerogative of a sovereign Parliament to make its intention known as to the role the Courts are to play in interpreting, applying and enforcing its statutes. While the Courts must determine the meaning of statutory provisions, they do so in the name of seeking out the intention or sovereign will of Parliament, however purposively, contextually or policy-oriented may be the interpretative methods used to attribute such meaning. 36

Review jurisdiction in constitutional law involves a balance of power between the judiciary and the legislature. In a constitutional law case, even if the impugned act has been carried out by a member of the executive, the executive is understood to be acting as a servant of the legislative branch of government. But in an administrative law case, the relevant axis is the balance of power between the judiciary and the executive. The legislature is recognized as sovereign. The political reality that the executive controls the legislature is not relevant. Nor could it be, since to recognize this would be to collapse the necessary fiction of parliamentary sovereignty. As the Court explained in Canada (Auditor General):

The Auditor General is acting on Parliament’s behalf carrying out a quintessentially Parliamentary function, namely, oversight of executive spending purpose to Parliamentary appropriations… It is of no avail to point to the fusion

36 Canada (Auditor General), supra note 28 at para. 52. The Court refused to intervene in a decision by the Governor-in-Council not to produce documents for inspection by the Auditor-General. This was an administrative law case dressed up by the applicant as a constitutional law case. The Court was astute enough not to be misled.
of powers which characterizes the Westminster system of government. That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament’s auditing function is not...constitutional cognizable by the judiciary. The grundnorm with which the courts must work in this context is that of the sovereignty of Parliament. The ministers of the Crown hold office with the grace of the House of Commons and any position taken by the majority must be taken to reflect the sovereign will of Parliament.37

Therefore, in the administrative law context, there has never been any constitutional hard limit to the court’s jurisdiction to supervise the executive, whether this function be policy-oriented or not. Any limitation on the scope of administrative review must emanate from the ultra vires doctrine.

B. The Ultra Vires Doctrine

The ultra vires doctrine is a necessary adjunct to the principle of parliamentary sovereignty. Courts may review executive action only to the extent necessary to ensure that the decision-maker does not exceed its jurisdiction as dictated by the legislature. The courts determine jurisdiction primarily by looking at the legislation governing the decision-maker. So long as the decision-maker complies with these legislative standards (and complies with the constitution and other implied standards such as the duty of procedural fairness), he or she acts within jurisdiction and the court will not interfere with the decision.38

Here is the real origin of the presumption against the administrative review of social policy. These express and implied legislative standards (also referred to as the rule of law although not in the full constitutional sense of the concept), delineate the full scope of the court’s review jurisdiction.39 And traditionally these express and implied legislative standards have been labeled “law” in contradistinction to “policy”. This evolved as convenient, definitional shorthand that allowed government action to be neatly categorized as legislative, administrative, or judicial. Legislative action involves

37 Ibid. at paras. 69-70.
38 Dunsmuir, supra note 1 at paras. 28-30, 59 per Bastarache and LeBel JJ. and paras. 128, 131 per Binnie J.
39 The tension between the ultra vires doctrine and the necessarily creative role played by courts in interpreting and amplifying legislative intent is discussed in Chapter 3 above.
policy, and administrative or judicial action involves law. The latter is reviewable, the former is not.

In reality, law and policy are not so easily distinguishable although courts have tied themselves in analytical knots in their attempts to preserve the distinction. A classic example is the distinction between ministerial policies setting quotas (non-justiciable) and ministerial decisions to deny a permit or licence pursuant to such a policy (justiciable). The Federal Court has warned against confusing these:

When examining an attack on an administrative action -- the granting of the licence -- a component of which is a legislative action -- the establishment of a quota policy -- reviewing courts should be careful not to apply to the legislative component the standard of review applicable to administrative functions. The line may be a fine one to draw but whenever an indirect attack on a quota policy is made through a direct attack on the granting of a licence, courts should isolate the former and apply to it the standards applicable to the review of legislative action as defined in Maple Lodge Farms.40

The reason for the court’s warning in this passage is the fact that law and policy are inextricably entwined in practice, and the rough and ready distinction drawn for the purpose of limiting the scope of administrative review is recognized to be somewhat artificial. Conceptually, law and policy exist at opposite ends of the spectrum of government activity but, practically speaking, they operate only in combination. Policy requires legal expression, and law without policy is arbitrary by definition. Just as courts have gradually recognized that there is no neat division to be drawn between law and discretion, so it is the case with law and policy.41 For what is policy but the content or "stuff" of discretionary decision-making?42

The reality of modern governance is that the concepts of law and policy overlap to a large degree. Although there must always be some legal instruction authorizing executive action, this skeletal legal authority is frequently given life only through the

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policy “flesh” added by executive decision-makers themselves. The resulting decision is as salient to those affected as are decisions fully grounded within a traditional legal instrument. In these circumstances, it is no longer meaningful to say that the legal component of the decision ends at the bones of the legislation.

Where, then, does administrative review doctrine draw the dividing line between law and policy? The boundary turns on legislative intent as interpreted by the judiciary. In other words, the justiciability of an issue is always malleable to the extent of the ambiguity of the words chosen by the legislature. In this sense, the constitution sets no hard and fast boundary between law and policy. It always remains up to the judiciary to determine where it is most appropriate to draw this boundary in any particular case. So, administrative review doctrine already recognizes that the distinction between law and policy is elusive. In these circumstances, a complete prohibition against the administrative review of policy would be nonsensical.

A categorical distinction between law and policy was perhaps sufficient for administrative law purposes at a time when legislatures reliably created law in order to implement policy. The role of the judiciary was easily understood as upholding the resulting law, rather than interfering with the underlying policy. However, as we saw in Chapters 1 and 2, it has long since ceased to be the case that most policy is implemented through legislation. Any reliable categorical distinction between law and policy has disappeared into the expanding grey area between the two. Therefore, the definitional shorthand that served administrative law in the past must now give way to a more realistic appreciation for the nuanced relationship existing between law and policy, and a more sophisticated understanding of administrative review jurisdiction.

I am not suggesting that the boundary between law and policy has been eradicated. Conceptually, it remains the basis for limiting the administrative review jurisdiction of courts under the ultra vires doctrine. However, practically speaking, the location of that boundary within a particular executive decision is frequently indeterminate. And, in

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43 Canada (Auditor General), supra note 28 at 90-91. Of course, it is always open to the legislature to clarify its intent through legislative amendment and, in this way, parliamentary sovereignty is preserved.
any event, there is no difference in the need for accountability in both legal and policy spheres. Therefore, we can no longer rely on mutually exclusive notions of law and policy as defining the limits of the court’s administrative review jurisdiction. We must find another way of determining those limits that pays equal respect to the separation of powers doctrine.

2. No Institutional Bar to the Administrative Review of Social Policy Decisions

Having cleared away the fallacy that there is any constitutional prohibition on the administrative review of social policy decisions, the next step is to re-examine the other key constraint said to underlie the presumption. This is the notion that courts lack the institutional capacity to resolve polycentric problems.

Courts are most comfortable with the adversarial, bilateral model of dispute resolution traditionally involved in private law rights determinations. One party wins and the other loses. This tendency to conceptualize the judicial role primarily in private law terms (what David Mullan has called the “private rights model of administrative law”), is an unfortunate historical anachronism.\(^\text{44}\) It developed by happenstance because courts were mainly occupied with private law disputes in the days when government played a less prominent role in the lives of its citizens. Therefore, in defining their administrative review jurisdiction, courts have tended to start from a private law model. They have been more willing to supervise government decision-makers who adjudicate similar types of disputes and who adopt similar, court-like procedures.

Out of this private law model of administrative law evolved the principle that courts are institutionally ill-equipped to determine broad polycentric issues such as are involved in social policy-making. The principle stems from a highly influential article by Lon Fuller first written in the late 1950s and early 1960s, “The Forms and Limits of

Adjudication”. Fuller’s purpose in this article was to develop a general analysis of adjudication as a form of social ordering, in contrast to other forms of social ordering such as contract and elections. He argued that each form of social ordering is best characterized by the type of participation it affords to affected parties. Adjudication is unique in allowing for participation by means of the presentation of proofs and reasoned arguments. Fuller used this means of participation as his starting premise in developing appropriate forms of adjudication and setting its limits. Therefore, he argued that adjudication is a suitable ordering mechanism for only those problems susceptible to resolution through the presentation of proofs and reasoned arguments. In this respect, adjudication assumes a “burden of rationality” not borne by other forms of social ordering.46

In order for participation in adjudication to be meaningful, the problem before the adjudicator must be converted into a claim of rights or an accusation of fault or guilt. If this is not possible, then the problem is not suitable for adjudication:

Adjudication is not a proper form of social ordering in those areas where the effectiveness of human association would be destroyed if it were organized about formally defined “rights” and “wrongs”... Wherever successful human association depends upon spontaneous and informal collaboration, shifting its forms with the task at hand, there adjudication is out of place except as it may declare certain ground rules applicable to a wide variety of activities.47

It was this point that led Fuller to his conclusion that adjudication is not a suitable form of social ordering for polycentric problems. But before turning to the concept of polycentricity, it is important to understand the limited meaning of formally defined rights and wrongs as the “natural” province of adjudication. Fuller was not referring here to a particular substantive conception of legal rights. This would have been a rather meagre description of our legal system even in the 1950s when Fuller was writing. It is not necessary to assert a legal right to ground a claim for judicial review. A legal

45 The article was only published much later as: Lon L. Fuller, “The Forms and Limits of Adjudication” (1978-1979), 92 Harv. L. Rev. 353 [Fuller, “Forms and Limits”].
46 Ibid. at 366.
47 Ibid. at 371.
“interest” will suffice. And it is well accepted that our legal system periodically recognizes and protects new interests where socially beneficial to do so.

Nor was there any reason for Fuller to limit his argument to legal rights. His premise of participation by proof and reasoned argument is equally protected by a wider category of problems convertible into claims based on legal principle (whether that principle is rights-based or otherwise). In fact, the descriptor “legal” might even be replaced by “neutral” here. Fuller’s argument was that participation by proof and reasoned argument is only meaningful when both parties are working from the same set of neutral principles. Fuller went on to discuss how legal doctrine develops and argued that a strong sense of community is necessary before development of a rule of law is possible. However, my point is that, for Fuller, meaningful participation in adjudication is not dependent on the content of a legal system but, rather, on its form, i.e. reference to a neutral set of principles that each party may attempt to establish or disprove in furtherance of his or her interest, and that the adjudicator relies on in reaching a determination.

Fuller then proceeded to introduce the concept of the polycentric task as one type of problem that was ill-suited to resolution by adjudication for the very reason that it was not susceptible to conversion into formally defined claims of right or wrong. Fuller described polycentricity as a “many centered” situation of “interacting points of influence”. Using a spider web as an analogy, Fuller explained that “[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole”. The examples that Fuller chose to illustrate the concept involved problems of resource allocation: distributing a collection of paintings between two galleries; setting wages and prices across different industries; assigning positions to players on a football team; and a pay equity program within a textile mill. Fuller’s point here was that, for such problems, there were often too many affected parties to allow each to participate

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48 Ibid. at 372-381.
49 Ibid.
50 Ibid.
and, more importantly, that the class of parties “affected” was itself indeterminate since it would depend on the eventual resolution of the problem.51

It is easy to see from Fuller’s discussion that matters of social policy will necessarily be polycentric in nature. In the world of scarce social resources, a decision to allocate resources to a particular individual affects the availability of resources for all other potential applicants. And the class of potential applicants is impossible to fix ahead of time. Therefore, any decision involving the distribution of social benefits, no matter at what stage of the policy process it is made, is properly construed as a polycentric decision. Fuller, himself, recognized this, stating: “[g]enerally speaking, it may be said that problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication”.52 Although I ultimately do not agree with Fuller’s pessimism over the ability of courts to supervise polycentric social policy problems, his characterization of social resource allocation as polycentric in nature is clear beyond peradventure.

Fuller’s thesis that polycentric problems are not suitable for adjudication has strongly influenced Canadian courts in defining their administrative review jurisdiction.53 One significant illustration of this is the decision of the Supreme Court in the Baker decision where the Court adopted a new approach to the administrative review of discretionary decisions.54 In a throw-back to traditional analysis, L’Heureux-Dubé J. persisted in relying on the adjudicative/polycentric distinction to justify her decision to intervene in what she characterized as an adjudicative problem. In this

51 Ibid.
52 Ibid. at 400. As Fuller indicates here, problems involving the distribution of economic resources may be equally polycentric in nature. Although my immediate focus is on social policy-making, it seems possible that a much wider category of executive policy-making would benefit from accountability review: see Chapter 1 above at note 25.
53 See, for example, Pushpanathan v. Canada (Minister of Employment & Immigration), [1998] 1 S.C.R. 982 (S.C.C.) at para. 36 per Bastarache J. [Pushpanathan]; Doucet-Boudreau, supra note 33 at para. 120; McKinney v. University of Guelph, [1990] 3 S.C.R. 229 (S.C.C.), at para. 71 [McKinney]; I.W.A. v. Consolidated-Bathurst Packaging Ltd.) [1990] 1 S.C.R. 282 at para. 91 [Consolidated-Bathurst]; and most relevantly for our purposes, the dispute among members of the Court as to whether the issue was polycentric or not in Barrie Public Utilities v. Canadian Cable Television Assn., 2003 SCC 28, [Barrie Public Utilities] (Bastarache J. dissenting in his opinion that the problem was a polycentric one).
54 Baker, supra note 41. The facts in Baker are discussed below at note 132.
respect, as Mullan has stated, “Baker is not, in fact, news”\(^55\). In the case of polycentric decisions, which encompass executive social policy-making, courts remain unwilling to interfere.

However, Canadian courts have less frequently examined the reasoning behind Fuller’s concept of polycentricity and its logical limitations in defining the scope of administrative review. There has been a great deal of subsequent scholarly literature, both supportive and critical, developing Fuller’s concept of polycentricity and more closely examining its impact on the institutional capacity of courts.\(^56\) Among these has been some pointed criticism of Fuller’s thesis as applicable to an earlier, simpler era before the rise of the modern administrative state.\(^57\) Other critics argue, as I do below, that the concept of polycentricity is simply too vague a concept to render certain forms of government decision-making unsuitable for judicial supervision. For example, John Allison argues that Fuller’s analysis underrates the potential of judicial expertise and investigation in supervising polycentric problems.\(^58\) Jeff King uses the example of tax jurisprudence to argue that the presumption against the review of polycentric decisions is honoured more in its breach than in its application.\(^59\)

\(^{55}\) Mullan, “Role of the Judiciary”, supra note 3 at 325.


\(^{57}\) Fiss, ibid. at 44.

\(^{58}\) Allison, “Fuller’s Analysis”, supra note 56 at 374.

\(^{59}\) King “Polycentricity”, supra note 56.
In this section, I suggest that the Canadian courts have relied too heavily on the concept of polycentricity as a deterrent to administrative review of executive social policy decisions. I make several points here. First, the concept of polycentricity is much broader than is commonly understood. Fuller himself acknowledged that the distinction is a “matter of degree”. Every public law issue reaching the courts is polycentric to some degree. Fuller’s thesis, if taken to its logical extreme, would remove the courts from the public law field altogether. Second, the distinction between legislative/polycentric decisions vs. judicial/adjudicative decisions is very often a matter of form (how the case happens to be presented to the court) and evidence (whether the executive has volunteered evidence on which courts may review it), rather than principle. Third, the presumption that courts are not institutionally competent to pronounce on polycentric problems is obsolete in practice. Canadian courts have long been determining polycentric problems in various contexts and have been developing the institutional expertise necessary to do so. I deal with each of these points in turn.

A. All Social Policy is Polycentric/No Social Policy is Adjudicative

Canadian courts have applied the concept of polycentricity as an arbitrary barrier to reviewing certain social policy decisions while, at the same time, routinely intervening in other polycentric decisions. It seems that Canadian administrative law doctrine has simply not yet developed a workable approach to the concept of polycentricity. Our courts are labouring under the vague notion that they are not competent to resolve polycentric cases without a clear idea of what this entails.

For example, in Baker, L’Heureux-Dubé J. justified her decision to intervene in the Minister’s exercise of her deportation power partly on the basis that Minister’s power:

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60 Fuller, “Forms and Limits”, supra note 45 at 397.
61 In fact, it seems that Fuller questioned the very existence of administrative law on the basis of its polycentric orientation: Allison, “Judicial Restraint”, supra note 56 at 462.
...relates directly to the rights and interests of an individual in relation to the
government, rather than balancing the interests of various constituencies or
mediating between them.62

This finding was presumably based on the fact that the only party before the Court
was Mrs. Baker. But this was partly a matter of circumstance. Officer Lorenz’s
judgment in his notes that “Canada can no longer afford to be so generous” was based
on his assessment of the cost of allowing refugees to stay in Canada on compassionate
grounds as well as his recognition that there existed many other competing claims for
this resource. If Mrs. Baker was the only individual potentially affected by his decision,
there would have been no need for Officer Caden to conserve these resources. Viewed
from this perspective, his decision involved an allocation of scarce resources and was,
therefore, properly a polycentric decision rather than an adjudicative one.

Nor has the Supreme Court fully articulated what it means by the concept of
polycentricity. The term was first used in a 1987 Charter decision as partial justification
for the conclusion that the Charter did not guarantee the right to strike as an incident of
collective bargaining.63 In early s.1 decisions, the Court appears to have equated
“polycentricity” with the allocation of scarce resources, noting that this type of
government decision would attract a degree of deference in the s.1 analysis.64 However,
the Court did not directly address the concept of polycentricity until its discussion of the
pragmatic and functional test in Pushpanathan:

Where the purposes of the statute and of the decision-maker are conceived not
primarily in terms of establishing rights as between parties, or as entitlements,
but rather as a delicate balancing between different constituencies, then the
appropriateness of court supervision diminishes... A "polycentric issue is one
which involves a large number of interlocking and interacting interests and
considerations"... While judicial procedure is premised on a bipolar opposition of
parties, interests, and factual discovery, some problems require the consideration
of numerous interests simultaneously, and the promulgation of solutions which
concurrently balance benefits and costs for many different parties. Where an

62 Baker, supra note 41 at para. 60.
63 Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 at para. 184 (McIntyre J., in a
concurring decision, quoting Professor Weiler on the unsuitability of courts resolving labour relations
disputes).
administrative structure more closely resembles this model, courts will exercise restraint….65

Here, the Court provided an excellent description of the idea of polycentricity but did not consider how broadly the label might apply or what it might mean for the scope of administrative review jurisdiction. Instead, in the case law following Pushpanathan, the Court has essentially used the concept of polycentricity as a “hook to hang its hat on”. Disputes are either polycentric or not, and the Court has chosen one label or the other in determining whether it considers deference to be appropriate. The issue has not been contentious in certain social policy cases.66 However, in regulatory cases, the Court has more frequently had difficulty identifying polycentric issues.67

The Supreme Court has failed to recognize what even Fuller acknowledged: that every dispute involving government policy will be polycentric to some degree, whether at the stage of creating policy to be applied generically or at the stage of applying settled policy to an individual. Fuller attempted to deal with this, somewhat unsatisfactorily, in his paper. He acknowledged that there are “polycentric elements in almost all problems submitted to adjudication” and that the doctrine of stare decisis itself renders all court cases polycentric to a degree.68 The key was to determine when the polycentric elements of a problem were so significant that “the proper limits of adjudication have been reached”.69 But Fuller offered no means for making this determination. And neither have Canadian courts. It is not adequate to articulate a doctrine of judicial deference based on the concept of polycentricity without coming to terms with the extent of that concept.

B. No Principled Distinction Between Rule-Making and Rule Application

65 Pushpanathan, supra note 53 at para. 36.
66 Trinity Western University v. College of Teachers (British Columbia), 2001 SCC 31.
67 The Court divided on whether the issue in dispute was polycentric or not in: ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4 at para. 30 (Bastarache J. for the four member majority held that the dispute was adjudicative and Binnie J. with two others dissented on this point); and Barrie Public Utilities, supra note 53 at para. 17 (Gonthier J. for the majority held that the dispute was adjudicative and Bastarache J. dissented on this point).
68 Fuller, “Forms and Limits”, supra note 45 at 397.
69 Ibid. at 398.
I have concluded that Canadian courts have failed to develop a full understanding of the concept of polycentricity and its implications for administrative review jurisdiction and that this has led them to apply the concept of polycentricity arbitrarily in refusing to review social policy decisions. But there is one basis on which courts have attempted to distinguish polycentric from non-polycentric disputes. This is the distinction that has been drawn between problems involving the creation of policy as a collective norm and those involving the application of settled policy to individual circumstances. In this section, I argue that this distinction is illusory. It does not provide a principled basis for defining the limits of courts’ review jurisdiction in administrative law.

The distinction between a rule and its application is relied on in several areas of Canadian administrative law doctrine. Most prominently, it is used in determining when a duty of procedural fairness may arise. Recently, this same distinction between the generic and the specific was proposed by a minority of the Supreme Court as the logical boundary between Charter law and administrative law. But how feasible is it to rely on this distinction? Just as the Supreme Court has recognized that there can be no categorical distinction between law and discretion, it is equally the case that there can be no categorical distinction between a rule and its application.

“It is trite to say that social policy cannot be divided into neat categories of rule-making and implementation and that front-line social program administrators are the policy-makers.” Decisions affecting individual interests will often have important policy consequences and polycentric, legislative-type decisions will necessarily affect

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70 For a discussion of the distinction in this context, see Geneviève Cartier, “Procedural Fairness”, supra note 22 at 232-233.

71 The minority judges in Multani reasoned that a school board’s decision to prohibit a Sikh student from wearing his kirpan should be analyzed under administrative law principles rather than Charter principles since the decision involved the application of a policy. In their view, Charter analysis should be reserved for legislation or other “norms of general application”: Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 [Multani].

72 The relationship between law and discretion is developed in Gratton, “Standing at the Divide”, supra note 42.

individuals. Whether a particular executive social policy decision is considered to fall into the general norm end of the spectrum or the specific application end of the spectrum is, I suggest, an arbitrary division depending on such random factors as how skilful litigators happen to be at framing the issue for the court.

For example, Mullan accepts the Court’s assessment in Baker that the dispute between Mrs. Baker and the Minister of Immigration was an adjudicative one. He suggests that the willingness of the Court to take a more interventionist stance in Baker flowed in part from “the absence of any polycentric dimensions in the regular exercise of this discretion...”. I disagree. Although Baker was framed as an adjudicative decision, involving only Mrs. Baker and the state, this seems to have been a result of the narrow constraints of existing administrative law doctrine rather than any inherent limitation in the scope of that dispute. The real problem, not dealt with in the Baker decision, was that Parliament had not provided meaningful standards by which the Ministry might be held accountable in its creation and application of the H&C policy. This is the underlying reason why the immigration officer in Baker was free to make the unjustified decision that he did. There is no reason to believe that his decision was an isolated incident. Although Mrs. Baker was fortunate to have her claim reach the courts, it is naïve to suggest that, in the absence of an adequate accountability framework, there were not many other nameless applicants who were equally disadvantaged by an unreasonable application of that policy. In fact, it was, in some respect, an accident that even Mrs. Baker’s claim proceeded to court, since it probably could not have done so if the Ministry had not made the ill-advised decision to disclose to Mrs. Baker’s lawyer the notes made by the immigration officer.75

Although our adversarial system of justice requires that administrative law disputes be heard by the court on a case by case basis, there is no good reason that the degree of judicial deference paid to the administrative decision-maker should turn on the

individual nature of the claim. Instead, a model of administrative review in which deference is tied to accountability would, while still respecting our bilateral trial process, directly address the underlying concern that the policy itself, rather than an isolated application of that policy, is illegitimate.

Even if it is presumed that the dispute in Baker was merely one between Mrs. Baker and the state, the decision in Baker certainly has broad implications for how subsequent H&C claims are likely to be determined. In our common law legal system and particularly in the arena of public law, every court decision contributes to a web of precedent with principles that extend far beyond the boundaries of the particular dispute in issue. Baker may have had an adjudicative origin but it had a polycentric outcome. Under our existing doctrine of administrative review, courts are asked to turn a blind eye to the broader consequences of their decisions and to focus merely on the parties that happen to have made their way to court.

Furthermore, the Supreme Court has recognized that the distinction between the general and the specific may be a matter of timing. A policy decision that does not engage a duty of fairness early in the policy-making process may well acquire that attribute at some stage further down the pipeline. Yet this matter of timing determines the existence of important legal rights.

The reality is that the courts’ concern for polycentricity is arbitrary and should not function as a stand-alone basis for prohibiting the administrative review of social policy decisions. Public law is polycentric by definition. But, fortunately, this has not often prevented the courts from exercising their administrative review function in many polycentric contexts – most often without any mention of a concern for polycentricity.

C. Courts Regularly Resolve Polycentric Problems in Other Contexts

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76 This point is the subject of Lorne Sossin’s contribution to The Unity of Public Law. In his article, Sossin traces in detail the dramatic impact the Baker decision has had within the immigration bureaucracy: Lorne Sossin, “The Rule of Policy: Baker and the Impact of Judicial Review on Administrative Discretion” in David Dyzenhaus, ed., The Unity of Public Law (Oxford: Hart, 2004).

The Charter

When freed from the artificial, adjudicative framework imposed by our current administrative review doctrine, challenges to social policy decisions may be framed more broadly as attacks on policy guidelines themselves or on the way in which they are collectively applied. This has occurred relatively successfully under the Charter where, although it is true that the courts’ judicial review mandate is entirely different, the institutional competence problem remains the same.78

For example, it is interesting to contrast the decision in Baker with the Supreme Court’s decision a few years later in Little Sisters.79 In Little Sisters, the applicant argued, in part, that the manner in which customs policy was implemented by officials violated the equality rights of homosexuals. An administrative practice had developed by customs officials of unfairly targeting and detaining gay literature and other materials being imported into the country. Presumably because this case was framed as a Charter challenge, there was little attention to the adjudicative aspects of the dispute. The focus of the court’s attention was not a particular determination made by customs officials, nor the impact of a determination on particular individuals, but, rather, the impugned administrative program as a whole.

A similar approach is evident in Eldridge.80 The focus of this Charter decision was the B.C. government’s policy not to fund sign language interpreters for deaf patients receiving medical treatment. There was little mention in the court’s decision of the circumstances of any particular application of this policy and its impact on any particular individual. The entire policy as it applied collectively was in issue and the court maintained a polycentric focus in its reasoning.

Of course, concerns about the courts’ competence to adjudicate Charter disputes were raised early and often after the introduction of the Charter and continue to be

raised today. But courts have gradually developed methods of responding to these concerns while upholding their responsibility to provide meaningful protection to the rights that the Charter guarantees. This evolution is described by David Wiseman in his article “Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument”. Wiseman has synthesized many years of Charter jurisprudence into a four part framework which, he argues, the Supreme Court has adopted in response to concerns about its institutional competence. According to Wiseman, the Court has chosen to address competence concerns either by: declining to resolve particular claims (injusticiability); deferring to the government in its analysis particularly under s.1 (deference); awarding a relatively non-intrusive remedy such as a declaration (remedial restraint); or modifying its process to meet the concerns (competence-building). Wiseman criticizes certain practices of the Court in recent case law, such as allowing the potential fiscal impact of claims to influence the competency issue. But he also compliments the creative efforts of the Court to build competence in other cases. The point for our purposes is that the courts have proved capable of developing new approaches to the resolution of polycentric problems that address limits to their institutional competence. There is no reason to suspect that the same is not possible in the administrative law field. In fact, I argue that this is already occurring within administrative law.


83 See, for example, N.A.P.E., where the Court recognized the fiscal impact of the government’s rights limitation as a pressing and substantive objective under s.1: N.A.P.E., supra note 14.

84 See, for example, the P.E.I. Judges Reference where the Court mandated a process for settling the issue of judicial remuneration and laid down general principles to govern the process but left detailed institutional design to be developed by the government (Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 [P.E.I. Judges Reference]; and Doucet-Boudreau where the Court upheld an order that the government to use “best efforts” to build five French language schools to comply with s.23 of the Charter, and mandated a process by which the government would remain accountable to the court for its progress (Doucet-Boudreau, supra note 33).
**Commercial Regulation**

Contrary to common belief, courts also regularly judicially review polycentric problems in administrative law – the difference seems to be that these problems tend to arise in the regulatory context rather than the redistributory context.

A leading administrative law decision of the Supreme Court provides a compelling case in point. I will examine the polycentric elements of *National Corn Growers Assn. v. Canada (Import Tribunal)* in some detail as just one illustration of my observation that the presumption against the administrative review of social policy decisions is regularly dispensed with by our courts. In examining *National Corn Growers*, it is useful to keep in mind Fuller’s argument motivating the courts’ concern for adjudicating polycentric disputes. Fuller used the example of industrial price regulation:

> …the forms of adjudication cannot encompass and take into account the complex repercussions that may result from any change in prices or wages. A rise in the price of aluminum may affect in varying degrees the demand for, and therefore the proper price of, thirty kinds of steel, twenty kinds of plastics, and infinitude of woods, other metals, etc. Each of these separate effects may have its own complex repercussions in the economy. In such a case it is simply impossible to afford each affected party a meaningful participation through proofs and arguments… [I]t is not merely a question of the huge number of possibly affected parties… A more fundamental point is that each of the various forms that award might take…would have a different set of repercussions and might require in each instance a redefinition of the “parties affected”.

There is undeniable truth in Fuller’s argument. This is one reason why governments have tended to allocate regulatory functions to administrative tribunals in the first place. However, this has not prevented administrative review of the decisions made by those tribunals. Instead, the concept of judicial deference has been developed to balance the respective roles played by tribunals and courts in resolving these

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85 *National Corn Growers, supra* note 7.
86 Fuller, “Forms and Limits”, *supra* note 45 at 395.
polycentric problems. My argument is that this same approach has not been applied to polycentric problems involving redistribution of social benefits. In such cases, the courts are much quicker to avoid their administrative review responsibility altogether by relying on the problem of polycentricity. This discrepancy is evident in examining the strong polycentric features in *National Corn Growers* – a commercial regulation case.

In *National Corn Growers*, corn producer associations from Ontario, Manitoba, and Québec complained to the Deputy Minister of National Revenue, Customs & Excise that U.S. government subsidies to U.S. corn producers were harming the domestic market by depressing prices. Under the *Special Import Measures Act*, the Deputy Minister made a preliminary determination that the domestic market was being harmed and imposed a countervailing duty on U.S. corn producers. The Canadian Import Tribunal then held an inquiry further to the Minister’s preliminary determination. The numerous parties appearing before the Tribunal represented a broad range of interests including: Canadian corn farmers in different provinces (each having distinct interests depending on the amount and types of corn being produced within the jurisdiction); U.S. corn farmers; U.S. farmers and ranchers; Canadian companies using corn for industrial purposes; Canadian distillers; Canadian potato chip and snack food manufacturers; Canadian feed producers; and Canadian exporters. The Tribunal’s task under s.42 of the *Act* was to determine if the subsidization of U.S. corn had caused, was causing or was likely to cause material injury to Canadian producers. A privative clause in the *Act* provided that the Tribunal’s determination was to be final and conclusive.

One of several issues before the Tribunal was whether a finding under s.42 required evidence of actual importation of subsidized goods, or whether it was sufficient that importation was likely to occur if domestic producers did not react by lowering their prices. The GATT Treaty, on which the *Act* was based, suggested the former but the *Act* itself suggested the latter. The Tribunal adopted the latter interpretation and held that material injury had occurred.

The Tribunal’s decision was judicially reviewed by the Federal Court of Appeal and ultimately made its way to the Supreme Court of Canada. The Supreme Court
unanimously held that, on a patent unreasonableness standard of review, it should not interfere with the Tribunal’s decision. However, this did not prevent the majority of the Court from delving into the substance of the problem in some detail.

First of all, the following 11 organizations were represented before the Court: American Farm Bureau Federation; St. Lawrence Starch Company Limited; Casco Company; Nacan Products Limited; King Grain (1985) Limited; Ontario Corn Producers’ Association; Manitoba Corn Growers’ Association Inc.; Federation des producteurs de cultures commerciales du Québec; British Columbia Division, Canadian Feed Industry; British Columbia Turkey Association; B.C. Chicken Growers Association. Just one of these organizations, the Ontario Corn Producers’ Association, itself represents 21,000 Ontario corn farmers.87 Certainly the Court attempted to allow for participation by a wide range of possibly affected parties – both those within the corn industry as well as from secondary industries. And, given that entities such as the B.C. Chicken Growers Association were granted standing, it is reasonable to assume that others having an interest in the outcome of the dispute could have participated as well had they requested it.

Once seized of the problem, the majority of the Court felt it necessary to fully examine the problem in order to reach a ruling. Gonthier J. stated:

…I do not understand how a conclusion can be reached as to the reasonableness of a tribunal’s interpretation of its enabling statute without considering the reasoning underlying it…88

In the process, the majority examined technical evidence such as the level of imports into Canada over the years (612 thousand tons of U.S. corn in 1984/85 and 416 thousand tons in 1985/86).89 And it made detailed findings about the evidence:

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87 This figure is from 2008: http://www.ontariocorn.org. I do not have the figure for 1990.
88 National Corn Growers, supra note 7 at 1383. Three members of the Court (Wilson J., Dickson C.J., and Lamer C.J.) strenuously disagreed with this approach and advocated a more “hands off” approach to the review exercise. But this reflects the natural ebb and flow of the deference debate in general. The fact remains that the problem was resolved, more or less successfully, through adjudication.
89 Ibid. at 1374.
Where, as in this case, the domestic price, because of the potential for a great influx of relatively cheap imports, is determined by that of actual imports, it was not unreasonable for the Tribunal to conclude that the GATT allowed it to consider the potential for the substantial loss of market share.90

National Corn Growers presented a quintessentially polycentric problem with ramifications far beyond the interests of the two main parties to the dispute. In fact, the strong polycentric features of the dispute are evident even in the style of cause. The Respondent before the Court was the Tribunal itself which, paradoxically, had no vested interest in the commercial outcome of the problem, is required to remain independent, and accordingly, did not present evidence or appear before the Court.91

This decision was not atypical. It is just one of hundreds of commercial regulatory disputes judicially reviewed each year.92 Yet, the concept of polycentricity or the institutional competence of the courts to review these cases is rarely mentioned. Instead, the opposite trend is evident. Standing rules continue to be liberalized and other procedural rules modified in order to facilitate these hearings.93 In the commercial regulation context, it seems that the concern for polycentricity has been successfully subsumed into the deference debate. That is, it no longer operates as a legitimate basis for limiting the jurisdiction of courts over these forms of economic policy decisions.

David Wiseman argues that the Supreme Court has more often relied on competence concerns to avoid adjudicating poverty claims under the Charter, than is the case with non-poverty claims.94 This is consistent with my point – that courts have been much more willing to resolve polycentric problems in the commercial regulatory context as contrasted with the social welfare context.

Institutional Fairness

90 Ibid. at 1377.
91 Ibid. at 1368.
92 There are innumerable other examples of courts adjudicating polycentric problems in the commercial regulation context. A more recent example in the area of internet regulation is S.O.C.A.N. v. C.A.I.P., [2004] 2 S.C.R. 427. Also see Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc., [2001] 2 S.C.R. 100 at para. 47 and Barrie Public Utilities, supra note 53 (involving a statutory appeal rather than judicial review).
93 See, for example, Carol Harlow, “Public Law”, supra note 56. In Canada, see, generally, Sossin, Boundaries, supra note 3, ch. 5.
94 Wiseman, “Competence Concerns” supra note 82 at 527-528, 531.
Since the publication of Fuller’s article and the introduction of the polycentricity problem, Canadian courts have also developed expertise in assessing procedural fairness from an institutional, rather than individual, perspective. Again, this development has led courts far beyond their historical adjudicative function. This caused concern early in the development of procedural fairness. Martin Loughlin questioned the legitimacy of courts exercising jurisdiction over the procedures adopted by administrative policy-makers. David Mullan, on the other hand, was more pragmatic in his suggestion that courts would develop the expertise that they needed to fulfill this new role. Thirty years later, it seems that Mullan’s pragmatism has won the day. Canadian courts increasingly define the scope of procedural fairness in part on the basis of the institutional legitimacy of the decision-maker. This jurisprudence has, by and large, been seen as successful. (Although, I will argue below that an important flaw in this jurisprudence is the Court’s refusal to extend the duty of fairness to statutory decision-makers exercising legislative functions).

In any event, the Court has increasingly proved willing to move beyond its adjudicative heritage to address procedural fairness within a broader institutional framework. This evolution began some time ago as courts considered how to accommodate the procedural rights of a large class of individuals affected by administrative decisions. In Re Hardy and Minister of Education, McLachlin J., then a

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95 “[T]he court would increasingly be tied to notions of instrumental rationality which, because that tends to destroy the idea of rule-governed behaviour, would then tend to destroy the basis for certainty, the distinctive nature of the adjudicative process, and thus destroy the symmetry of the traditional model [the rule of law]”: Martin Loughlin, “Procedural Fairness: A Study of The Crisis in Administrative Law Theory” (1978) 28 U.T.L.J. 215 at 237 [Loughlin, “Procedural Fairness”].

96 “Quite clearly it should be possible to develop principles that will assist the court in performing its function properly...”: D.J. Mullan, “Fairness: The New Natural Justice?” (1975) 25 U.T.L.J. 281 at 299, 301 [Mullan, “Fairness”].

97 Lorne Sossin and Colleen Flood contrast the difficulties the Supreme Court has had developing variable standards of substantive review with the “relative clarity and coherence” of its procedural fairness case law: Lorne Sossin and Colleen M. Flood, “The Contextual Turn: Iacobucci’s Legacy and the Standard of Review in Administrative Law” (2007) 57 U.T.L.J. 581 at 600.

98 According to Rod Macdonald, one of the three distinctive characteristics of procedural review is this concern with broader, bureaucratic concerns: “Consequently, the overwhelming majority of implied procedural review cases, while phrased in the narrow legal language of a lis inter partes, manifest a larger institutional problem”: Macdonald, “Judicial Review: II”, supra note 56 at 5.
British Columbia trial judge, applied common sense to the notice requirements appropriate for a school closing decision:

“It would be unreasonable to suggest that every resident in the school district must be personally apprised of the intention to close the school. What is required, it seems to me, is that the proposed closure be made known throughout the district generally so that it can reasonably be expected to come to the attention of interested persons, and that they be accorded sufficient time and opportunity to fairly present their side of the case before a final decision is taken.99

Similarly, in Innisfil (Township) v. Vespra (Township), the Supreme Court procedurally reviewed a municipal board proceeding involving the annexation of two municipalities – clearly a proceeding with strong polycentric features. The Court recognized even in 1981:

Where … the Board, by its legislative mandate or the nature of the subject-matter assigned to its administration, is more concerned with community interests at large, and with technical policy aspects of a specialized subject, one cannot expect the tribunal to function in the manner of the traditional Court.100

But this did not prevent the Court from resolving the problem before it. It interpreted the statutory framework governing the board and determined, on this basis, that the applicant had the right to cross-examine on a ministerial affidavit filed before the board.

An important development along the road from individual to institutional fairness was the decision in International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.101 The issue before the Court was whether the Ontario Labour Relations Board’s practice of holding full board meetings on matters of policy violated the principles of natural justice. The majority delved deeply into the institutional make-up and practices of the Board, and the benefits of institutional decision-making

100 Innisfil (Township) v. Vespra (Township), [1981] 2 S.C.R. 145 at para. 41.
generally, in holding that natural justice was sufficiently flexible to accommodate the practice:

…the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law.\footnote{102 \textit{Consolidated Bathurst}, \textit{ibid.} at para. 26.}

Particularly relevant for our purposes, was the majority’s acknowledgement that the policy-making role of the Board was polycentric in nature and that this fact justified some adaptation of traditional principles of procedural review:

Policy issues must be approached in a different manner because they have, by definition, an impact which goes beyond the resolution of the dispute between the parties. While they are adopted in a factual context, they are an expression of principle or standards akin to law. Since these issues involve the consideration of statutes, past decisions and perceived social needs, the impact of a policy decision by the Board is, to a certain extent, independent from the immediate interests of the parties even though it has an effect on the outcome of the complaint.\footnote{103 \textit{Ibid.} at para. 47.}

Nowhere in the Court’s reasoning was there any suggestion that these aspects of the issue rendered the matter unsuitable for administrative review. Instead, the Court felt itself competent to assess the institutional practices of the Board and to impose conditions on those practices in order to ensure procedural fairness.

In subsequent decisions, the Supreme Court has become bolder in assessing institutional fairness and moving beyond its adjudicative heritage to create new procedural norms for various forms of polycentric decision-making.\footnote{104 \textit{Tremblay v. Québec (Commission des affaires sociales)}, [1992] 1 S.C.R. 952; \textit{Ellis-Don Ltd. v. Ontario (Labour Relations Board)}, 2001 SCC 4; \textit{P.E.I. Judges Reference, supra note 84}; and \textit{Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges’ Assn. v. Ontario (Management Board); Bodner v. Alberta; Conference des juges du Québec v. Québec (Attorney General); Minc v. Québec (Attorney General)}, [2005] 2 S.C.R. 286 [\textit{Provincial Judges Compensation Appeals}]. The latter two decisions are analyzed in Lori Sterling and Sean Hanley, “Judicial Independence Revisited” (2006) 34 S.C.L.R. (2d) 57. I discuss the Court’s role in monitoring institutional fairness in more depth in Chapter 5.} The individual model of fairness of yesteryear has gradually given way to a more sophisticated,
variable model that responds to a variety of different decision-making processes. In this model, collective procedural norms such as consistency, predictability, and transparency, have attained precedence.105

D. Conclusion to Sections I and II

Thus far in this chapter, I have sought to establish that traditional constitutional, doctrinal, and institutional rationales for precluding the administrative review of social policy decisions have been significantly overstated and are increasingly irrational in their application. These rationales (the separation of powers doctrine, the ultra vires doctrine, and the concept of polycentricity) all rely to some extent on the ability to draw a bright line distinction between law and policy – with law falling inside the boundaries of administrative review and policy falling beyond those boundaries. But the nature of modern governance in the welfare state has blurred this distinction such that it has become an unstable and capricious basis for defining these boundaries. There exists an expanding “no man’s land” along these boundaries within which it is no longer clear whether and to what extent government action may be reviewed.

In the next section of this chapter, I illustrate how this instability in the boundaries of administrative review has been reflected in doctrinal developments. Then, in the last section of this chapter, I will argue that, from an accountability perspective, the widening category of executive social policy decisions currently falling through the cracks in administrative review doctrine deserves judicial protection. Furthermore, the doctrinal groundwork for extending administrative review to social policy decisions already exists. The task for Canadian administrative law is develop the accountability function of administrative review doctrine from this groundwork.

3. Doctrinal Problems with the Presumption Against Administrative Review of Social Policy Decisions

105 It is significant that the Supreme Court increasingly seems to be thinking of the entire doctrine of administrative review in primarily procedural terms. See my discussion in Chapter 2 of the accountability function of administrative review and its adaptation in Dunsmuir, supra note 1.
Judicial review in administrative law has traditionally been divided into procedural and substantive grounds of review, although there is growing recognition that this too is a naïve, categorical distinction that no longer accommodates the complexity of the modern state.\textsuperscript{106} However, in keeping with tradition, I will discuss each of these in turn.

A. Substantive Review of Executive Action – Collapse of the Law/Discretion Paradigm

Traditionally, statutory grants of authority were placed into two separate categories. Because of the perceived chasm between law and discretion, administrative law developed entirely different approaches to the review of administrative decisions made pursuant to legal authority, and those made pursuant to discretionary authority. These two pockets of administrative review were subject to different analyses and were (and continue to be) treated in separate sections of administrative law texts. Most cases were viewed as involving a grant of authority circumscribed by express legal standards. The court’s role was to use the principles of statutory interpretation to give meaning to the law and then to assess the decision to ensure that it fell within the boundaries of these legal standards. In contrast were those cases viewed as involving statutory grants of discretion. Discretion was considered the antithesis of law and, in the absence of any express legal standards, courts would not intervene in the resulting decision unless there was some clear violation of implied legal standards such as the duty to act in good faith. Although this paradigm was eventually rejected in the \textit{Baker} decision, it is a convenient means of illustrating the inherent limitations in the current doctrine of administrative review as applied to executive social policy decisions.\textsuperscript{107}

Under this paradigm, whether an executive social policy decision results from express legal standards or from a grant of discretion, the \textit{ultra vires} doctrine severely restricts the scope of judicial review. Courts will interfere with executive policy-making only where: (1) the policy-maker failed to adhere to the legislative standards governing


\textsuperscript{107} \textit{Baker}, supra note 41.
the program; or (2) the application of the policy is found, on an appropriate standard of review, to result in an abuse of discretion amounting to an excess of jurisdiction. The efficacy of administrative review as a legal accountability mechanism is significantly reduced in either case. There are several reasons for this – both doctrinal and procedural. For example, the very nature of the judicial process deters those having claims in such cases. Taggart explains:

...as delegated legislation is generally applicable legislation that usually affected a large number of people rather than a few disproportionately hard, there was often no one ‘long-pursed and short-tempered’ enough to embark on costly litigation to vindicate the rule of law.

This is particularly exacerbated in the context of social welfare programs where potential claimants are very likely to be those citizens without the resources or “voice” to pursue their claim in the courts. As a result, there are disproportionately few judicial review cases involving social programs that ever make it to court. But, procedural constraints aside, I focus on some significant doctrinal limitations to the traditional law/discretion paradigm as applied to social programs.

*The Problem of Statutory Interpretation (Vague Legislative Direction)*

Legislatures (which are typically controlled by the government they supervise) may avoid the administrative review of social policy decisions simply by using vague, open-ended language in the legislation authorizing the creation or implementation of social

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108 Mullan, “The Role of the Judiciary”, *supra* note 3 at 320-321. Delegated legislation may also be held to be *ultra vires* where it is so vague that it exceeds statutory authority. However, the administrative law doctrine of vagueness has been interpreted very narrowly in Canada: *R. v. Wonderland Gifts Ltd.* (1996), 45 Admin. L.R. (2d) 188 (Nfld.C.A.).


111 As was seen in Chapter 3, this trend has been reversed to some extent by the introduction of the Charter. Challenges to social programs that would, at one time, have been presented as administrative law cases are now often presented under the potentially more powerful framework of the Charter.
programs. This is clearly illustrated by the *Wynberg* decision. The requirement that services offered under the *Child and Family Services Act* promote the best interests of children is, except in the most egregious case of maladministration, simply too vague to be enforceable through administrative review.

Statutory interpretation is the mechanism through which the *ultra vires* doctrine operates to ensure that executive action remains true to legislative intent. In fact, the entire field of administrative law judicial review has been described as a special branch of statutory interpretation. The principle of parliamentary sovereignty requires that the court look to the language of the enabling statute to locate the scope of executive authority. This principle, in turn, requires legislative foresight which was more realistic in earlier days. This early Canadian administrative law landscape was described as follows:

Instead of such a flexible executive control and supervision as can be adjusted to special circumstances or to new needs suddenly discovered, we have relied upon parliament to lay down the rules in advance. We have believed that efficiency of administration is sufficiently secured by an ability in parliament to foresee and provide a rule for the various circumstances in which administrative authority will be required to be exercised.

The language of the statute provides the legal guidelines or standards against which the court holds the decision or act of the executive up for evaluation. Of course, the implicit assumption underlying this exercise is that legislative intent exists and must simply be ferreted out of the wording of the statute and surrounding context. Without the notion of legislative intent, the courts would have no reference point and this would raise the concern that the judiciary would be imposing their own standards of conduct,

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113 R.S.O. 1990, ch.C.11. See my discussion of *Wynberg* in Chapter 1 above.
thereby usurping the role of the legislature. The concern is to prevent judicial law-interpreters from becoming law-makers.\textsuperscript{116}

The problem is that legislation, like any language, is inherently imprecise. In interpreting legislation, courts must rely on the principles of statutory interpretation to resolve ambiguities and to “discover” the legislature’s intended meaning. The court analyzes the enabling provision in the abstract in order to “actualize” law.\textsuperscript{117} We have always understood the notion of legislative intent to be somewhat of a fiction.\textsuperscript{118} In modern governance, legislators often choose to use open-textured language in order to leave flexibility in the interpretation of the provision. To some extent, then, legislative intent is formed in the imagination of the reviewing court. John Willis described this problem in delightfully pragmatic terms in a paper in 1938:

If the court is following the ‘mischief rule’ and openly considers the question why the Act was passed…you should then conclude that the court’s reference to ‘the intent of the Legislature’ is a polite notice that it is about to speculate as to what it thinks is the social policy behind the Act.”\textsuperscript{119}

In the more modern governance context, William Eskridge has argued that statutory interpretation should be understood in dynamic terms:

[S]tatutory interpretation is multifaceted and evolutive rather than single-faceted and static, involves policy choices and discretion by the interpreter over time as she applies the statute to specific problems, and is responsive to the current as well as the historical political culture… Because they are aimed at big problems and must last a long time, statutory enactments are often general, abstract, and theoretical. Interpretation of a statute usually occurs in connection with a fact-specific problem (a case or an administrative record) which renders it relatively particular, concrete, and practical. As an exercise in practical rather than theoretical reasons, statutory interpretation will be dynamic.\textsuperscript{120}

\textsuperscript{116} Gwynne v. Burnell (1840) 6 Bing. (N.C.) 453 at 561.
\textsuperscript{118} “The intention of the legislature is a myth…”: Corry, “Administrative Law”, supra note 115 at 290.
\textsuperscript{120} William N. Eskridge, Jr., Dynamic Statutory Interpretation (Cambridge: Harvard University Press, 1994) at 48.
This problem is exacerbated in the case of social legislation which, as we have seen, tends to be formulated in particularly broad language. In such cases, the courts are given relatively few clues to direct them in their quest for legislative intent. The reality may be that the democratically accountable legislature has not turned its mind to the issue at all, but has left the policy itself to be created by the administrators “implementing” the legislation. This legislative vacuum then allows the government to assert before the court, without any means of contradiction, that the legislative intent is whatever it thinks it should be.

The result is to reduce the administrative review exercise to mere formality justifying the government’s status quo. A prime example is Masse v. Ontario (Ministry of Community and Social Services) in which the Ontario courts reviewed the regulations by which the Harris government’s 21.6% cut to welfare payments was implemented. The legislation under which these regulations were promulgated was vaguely worded to provide for “assistance” in cases of a "person in need" having a "deficit budgetary income" or experiencing “deficit budgetary requirements”. All of these terms and, in fact, the entire content of the assistance program were left to be defined by regulation. This vague language made it possible for the government to interpret the purpose of the statutory scheme ex post facto, i.e., in a manner consistent with its rate cuts. The government submitted that the purpose of the legislation was to: (i) provide last resort social assistance benefits at rates comparable with the rest of Canada and consistent with historic rates in Ontario; (ii) move the social assistance program from a passive income maintenance program to an active employment program; and (iii) reduce the deficit and debt in order to foster economic growth and employment. According to the government, the rate reduction was perfectly consistent with these goals.

The applicants argued that the purpose of the legislation was to provide a basic level of subsistence to those persons in Ontario unable to maintain themselves, and that

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122 Ibid. at para. 14.
this purpose required any rate reduction be made only after some meaningful consideration for "persons in need".

The imprecision of the statutory language used meant that the principles of statutory interpretation brought little objectivity to the process. The court’s role was essentially that of choosing among the result-oriented interpretations put forward by the parties. Given this choice, it seemed logical that the interpretation proffered by the delegate charged with implementing the legislation would be the more attractive choice and this is what transpired in Masse. The court held that the purpose of the legislation was to “provide assistance to those who qualify” – nothing more. The court relied on Thorne’s Hardware v. The Queen, holding that decisions by the government on matters of public convenience and general policy are final and are not reviewable in judicial proceedings. It concluded that any remedy in respect of the welfare rate cuts should be political, not legal.

Another example of the limited value of statutory interpretation in supervising executive social policy-making is found in Gray (Litigation Guardian of) v. Ontario. The Ontario Divisional Court refused to intervene in a decision by the Ministry of Community and Social Services to close the last remaining institutions operating under the Developmental Services Act as residential facilities for severely developmentally delayed adults. The Minister was given extremely broad powers under ss. 2(1) of the Act to “establish, operate and maintain one or more facilities” and “furnish such services and assistance as he or she considers necessary upon such terms and conditions as the Minister sees fit”. The Court held that the statutory power to establish the three facilities was necessarily accompanied by the power to close them. The reality was that the legislation afforded no independent means for the court to determine whether the legislature intended that these facilities continue to exist or not. Under the ultra vires doctrine, the court had little option but to accept the government’s interpretation.

123 Thorne’s Hardware, supra note 4.
Less often, courts have interpreted vague enabling provisions in social legislation to justify the protection of social benefits. In Lalonde the Ontario Court of Appeal held, among other things, that the Ontario Health Services Restructuring Commission had exceeded its statutory authority in downsizing the services offered at Montfort, a francophone hospital.\footnote{Lalonde v. Ontario (Health Restructuring Commission) (2001), 56 O.R. (3d) 505 (C.A.) [Lalonde].} According to the Court, the Commission had failed to comply with the French Language Services Act guaranteeing the right “to communicate in French with, and to receive available services in French from, any...government agency”. Montfort was designated as a government agency and the Commission was now reducing the services available at Montfort. Of course, the government argued that the intent of the legislation was to ensure that the services offered continued to be offered in French, rather than guaranteeing that certain services continued to be offered. Somewhat surprisingly, the Court rejected this argument, citing both the overall intent of the legislation and the constitutional principle of respect for and protection of minorities. On the face of the Act, there was little to justify the Court’s broad interpretation. The Act provided that the government shall ensure that “services” are provided in French. “Services” was defined to include “any service or procedure that is provided to the public by a government agency”. The Commission’s decision had simply reduced the services provided by Montfort. Therefore, these were no longer “services” under the Act. The Court acknowledged that the Act did not guarantee institutional bilingualism in the province. The services that continued to be offered at Montfort were offered in French. Therefore, the effect of the Court’s decision was to require that the government guarantee the continued provision of those health services traditionally offered at Montfort.

These decisions illustrate the limited usefulness of statutory interpretation principles in supervising executive action where the legislature has failed to use sufficiently precise language to articulate the standards they intend to be applied. Whether courts interpret these standards to extend or withhold social benefits, the fact is that these cases are determined very much in a legislative vacuum. The less direction
provided by the legislature in authorizing the creation or implementation of social programs, the more the notion of legislative intent becomes a myth and the more that executive ‘spin’ or judicial values may drive the result.

The traditional response to this problem has been to point to the *vagueness* of legislative direction as *itself* evidence of legislative intent. Courts refuse to intervene on the basis that broad language within the enabling legislation indicates an intent to leave the last word in the matter to the administrator. 126 This is the concept of judicial deference and, from it, has developed over thirty years of standards of review jurisprudence beginning with the Supreme Court’s decision in *CUPE* in 1979. 127 But where does the court’s responsibility to interpret the language of the statute end, and its responsibility to defer to the administrator begin? The inability of courts and administrative law scholars to articulate a principled solution to this problem has gradually reached crisis level, and some have forecast that this dilemma will ultimately sound the death knell of the *ultra vires* doctrine. 128 I will address this issue further below, but, for now, my purpose is merely to set out the problem – the principles of statutory interpretation on which courts have always relied to identify legislative intent fail in the case of vaguely worded or imprecise legislative standards. In such circumstances, the accountability function of administrative review is effectively thwarted.

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126 See, for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 85 [Suresh]: “We recognize that ‘danger to the security of Canada’ is difficult to define. We also accept that the determination of what constitutes a ‘danger to the security of Canada’ is highly fact-based and political in a general sense. All this suggests a broad and flexible approach to national security and, as discussed above, a deferential standard of judicial review. Provided the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister’s decision.”


128 See, for example, the comments of LeBel J. in *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63 at paras. 61-66. The most recent effort of the Supreme Court to respond to the crisis occurred in *Dunsmuir, supra* note 1. Here, the Court acknowledged that the existing system of judicial review has been “difficult to implement” and “requires repairs” (at paras. 32, 158). Binnie J. offered the plainest description of the problem, labeling our current system costly, arcane, and plagued by delay (at paras. 132-133) In three different opinions, the Court set about to re-examine the structure and characteristics of judicial review in Canada in order to develop a more “more coherent and workable” approach (at paras. 32-33, 120-121). The Court’s reach may be said to have exceeded its grasp in this instance since the scope of majority’s analysis in *Dunsmuir* was, in fact, relatively narrow.
Under the traditional law/discretion paradigm, there has been a separate category of administrative review cases involving express grants of discretion. The approach to the administrative review of discretion has also failed to protect the accountability of executive social policy decisions.

**The Problem of Discretion (No Legislative Direction)**

We have seen that judicial review in administrative law is circumscribed through the *ultra vires* doctrine. The role of courts is to ensure that the administrator does not exceed his or her authority *as defined by* the enabling statute or otherwise implied by common law. This made sense when the enabling statute actually purported to set out some framework against which courts could evaluate executive action. However, as legislatures have gradually delegated more policy-making authority to the executive, they have increasingly failed to provide even vaguely worded legislative direction. Instead, they have used language expressly granting discretion to the executive to create and implement social programs.

These statutory grants of express discretion have been a difficult fit in the theoretical framework of the *ultra vires* doctrine. The traditional approach was to interpret express grants of discretion as a delegation of full decision-making authority to the administrator, with a correspondingly constrained supervisory role for the court. In other words, legislative silence signals judicial deference. Administrative review was only available to ensure compliance with a few sundry implied common law standards. “Abuse of discretion” was organized into categories of error, such as failure to take into account relevant factors, or acting in bad faith. The classic judicial exposition of this approach was set out in the famous judgment of Rand J. in *Roncarelli v. Duplessis*:

“In public regulation of this sort there is no such thing as absolute and untrammeled “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

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129 “Though it is difficult to make pronouncements about legislative intent, it can be presumed that the legislature intended that more deference would be shown to bodies with broad powers than to bodies with highly circumscribed powers.”: *Canada (Attorney General) v. Mosop*, [1993] 1 S.C.R. 554 at para. 67, per L’Heureux-Dubé J.
arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute… [T]here is always a perspective within which a statute is intended to operate and any departure from its lines or objects is just as objectionable as fraud or corruption.”

In spite of the doctrinal elegance of this principle, there were few cases in the years following *Roncarelli* in which courts actually overturned the exercise of ministerial discretion. This was, at least in part, due to the presumption against the administrative review of policy decisions. Discretionary decision-making involving the allocation of scarce social or economic resources was viewed as especially political in nature. In 1997, the Supreme Court expressed this principle as follows:

It is my opinion that the Minister’s discretion under s. 7 to authorize the issuance of licences, like the Minister’s discretion to issue licences, is restricted only by the requirement of natural justice, no regulations currently being applicable. The Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith. The result is an administrative scheme based primarily on the discretion of the Minister… It is only after a licence has been issued that the Fisheries Act imposes limits upon the Minister’s discretion. No such limits are imposed upon the Minister’s authorization of a fishing licence and in the absence of any words or an indication of legislative intent to the contrary, none should be imposed.

Two years later, the availability of administrative review for abuse of discretion was revitalized, at least theoretically, as a result of the *Baker* decision discussed earlier. *Baker* involved a discretionary decision by an immigration officer to refuse Baker’s application to remain in Canada. Mrs. Baker was a Jamaican woman who had lived illegally in Canada for thirteen years and had four Canadian-born children at the time she was ordered to be deported. She had worked as a domestic but had suffered psychiatric problems and went on welfare. Mrs. Baker made her application under the

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130 *Roncarelli*, supra note 35 at 140.
132 In addition, without a court-supervised duty on ministers to give reasons for their decisions, parties had no way of gathering evidence that the decision-maker had acted for improper purposes.
134 *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 at 25, 30 [*Comeau’s Sea Foods]*.
135 *Baker*, supra note 41.
Regulations to the Immigration Act which authorized the Minister to permit illegal immigrants to stay in Canada on “compassionate or humanitarian” grounds. This discretion was delegated to front-line immigration officers. There were no legal standards in the Act or the Regulations detailing what kind of considerations should go into making this decision. Instead, internal Ministry policy guidelines set out various factors to be taken into account. Guideline 9.07 instructed officers to consider whether "unusual, undeserved or disproportionate hardship would be caused to the person...if he or she had to leave Canada". The guidelines also required that officers consider the potential hardship that deportation would have on dependents or other close family members of the person. The immigration officer purported to apply these policy guidelines in exercising his discretion to deny Mrs. Baker’s application. The officer’s notes indicated that Canada “could no longer afford to be generous just because the applicant had four Canadian born children”.

The majority of the Supreme Court departed from their long tradition of deference to discretionary decision-making and overturned the officer’s decision. L’Heureux-Dubé J., for the majority, held that the officer had acted unreasonably in exercising his discretion since he had failed to give sufficient consideration to the interests of Baker’s children.

The Baker decision was an analytical first for the Supreme Court. It rejected the traditional categorical approach to abuse of discretion and held that alleged discretionary errors should be subject to administrative review just like legal errors; on the basis of an applicable standard of review through which the courts would show deference where warranted. L’Heureux-Dubé J. determined that the applicable standard of review was reasonableness and she held that this standard had been violated in the circumstances. Significantly, the Court relied on the policy guidelines in assessing that the officer’s decision was unreasonable. In this respect, the policy was given legal effect, at least informally, and the conceptual divide between law and policy became that much narrower.
Since *Baker*, some courts have used the opportunity provided by that decision to increase their scrutiny of social benefit programs. They have been surprisingly willing, in light of traditional constraints, to label decisions denying benefits unreasonable. Again, the problem of autism treatment has been a poster child for this expansion in the scope of judicial review. In *Dassonville-Trudel v. Halifax Regional School Board*, the Nova Scotia Court of Appeal held that the limited funding granted to a family caring for a severely autistic child was unreasonable. This was in spite of evidence before the Court that the funding program to which the family had applied was significantly over budget and the Court’s acknowledgement that:

Funding decisions under the Program involve the allocation of limited resources (public funds) in the face of seemingly unlimited demands on this benefits scheme. This is not a matter within the particular expertise of the courts. The specific issue before the Minister here was the level of financial assistance for one of the many families in need of support under the Program.\(^\text{137}\)

The complaint before the Court was not the Minister’s denial of funding under the Program but the amount of funding provided and the appeal turned on the Ministry’s application of the funding guidelines. The Ministry rejected funding for certain particulars on the basis that they were not covered by the guidelines. The Court held that this amounted to an unlawful failure by the Minister to exercise its discretion.

From the review of these two examples, it might seem that administrative review for abuse of discretion has been rehabilitated and its accountability function is now being achieved. But this is deceiving. In *Dassonville-Trudel*, as in *Baker*, the Court relied heavily on the wording of the guidelines and the letter sent out by the Ministry to conclude that the Minister had abused its discretion. In both cases, the immediate lesson for ministries may be to restrict their use of written guidelines and, in any event, to take more care in the wording of their reasons. The reality remains that, in the absence of

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\(^{136}\) *Dassonville-Trudel (Litigation Guardian of) v. Halifax Regional School Board* (2004), 224 N.S.R.(2d) 294 (C.A.) [Dassonville-Trudel].

any legislative direction, the courts have very little to work with in addressing accountability concerns.\textsuperscript{138}

The problem here is the traditional assumption that a broad grant of discretion indicates a legislative intent to delegate all decision-making responsibility to the executive decision-maker with little or no scope for administrative review. In other words, express grants of discretion operate as a form of privative clause purporting to remove the responsibility of courts to supervise the executive. The legislature may be sending a strong legislative signal that the executive decision-maker is to have exclusive authority over the merits of its decisions and the terms and conditions attached to them. But does the legislature really intend that the executive may make these decisions in largely unaccountable circumstances? There is no doubt that the legislature intends judicial deference where it has chosen to expressly indicate this in the form of a preclusive clause. But why should legislative silence be equated with express legislative direction?

The principle that legislative silence indicates a legislative intent that courts should not review the resulting decision is fallacious for several reasons. First, it suggests that the legislature could have and would have included express statutory constraints on the administrator if it had so intended. But, as we have seen, the legislature is not always institutionally capable of this kind of detailed direction even if it did want to include it. Government has outgrown the legislature’s ability to effectively control it – the difficulty in having even skeletal legislation passed into law is evidence of this. So, legislative silence is just as likely to be an acknowledgment of defeat as it is an indication of legislative intent. And if so, there is more reason for administrative review than ever.

Second, the principle is most often applied as a blanket prohibition of administrative review and does not distinguish between different forms of review. Even if we assume that the legislature does not intend courts to review the merits of a policy,\textsuperscript{138} Baker has been referred to as a high water mark in judicial activism in the review of discretion and the waters have since receded. See Mullan, “Defence”, supra note 74.
why would we also necessarily assume that the legislature did not intend the executive to remain accountable for their policy decisions through procedural review?

Third, it is sometimes difficult to determine whether a particular statutory provision is best understood as vaguely worded legislative direction or the absence of legislative direction, i.e., legislative silence. And yet, the analysis to be applied by the reviewing court depends on this determination. I address this problem in the following subsection.

**Vague Law or Discretion: Which is It?**

There is a serious dichotomy existing between the administrative review of legal authority (through the principles of statutory interpretation) and the administrative review of discretionary authority. This dichotomy lay dormant within administrative law theory before being brought to the surface in the *Baker* decision.

*Baker* advanced administrative law doctrine by recognizing the variable relationship between law and discretion and applying the same analytical framework to each. Now, all legislative grants of authority are understood to lie along a single spectrum from purely legal standards to pure discretion. The majority in *Baker* recognized that there is no “rigid dichotomy” existing between discretionary and non-discretionary decisions and no “easy distinction” to be drawn between interpretation and discretion.140 This advance gave legal recognition to what theorists already understood.141 Law and discretion cannot be reduced to conceptually distinct categories but must co-exist in combination. Practically speaking, this variable concept of discretion is reflected in the myriad of legislative provisions governing our modern administrative state. The degree of discretion granted by a particular provision may vary between almost no discretion and strong discretion depending on the nature, extent, and precision of the standards to

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139 Portions of the following discussion have been adapted from Gratton, “Standing at the Divide”, *supra* note 42.

140 *Baker*, *supra* note 41 at para. 54 per L’Heureux-Dubé J.

be applied and the particular facts in issue. Cases involving government action at either extreme of the spectrum (i.e., based on either a reasonably clear legal standard or wide discretionary power) are relatively easy to classify as one or the other. However, cases lying anywhere along the middle-ground of the spectrum are more difficult. I refer to these as cases of weak discretion. They involve broadly worded provisions that grant some degree of discretion to an administrative delegate to interpret his or her enabling provision, but fall short of a conferral of broad discretionary authority. The more scope for interpretation left to the delegate, the more his or her role in applying the provision begins to resemble administrative discretion. Now that the Baker decision has given legal recognition to this variable relationship between law and discretion, it is possible to see the entire body of standard of review cases for what they are – cases of weak discretion.142

For example, a holistic approach to the administrative review of weak discretion was adopted in Suresh v. Canada (Minister of Citizenship & Immigration), where the Court reviewed a deportation decision involving a complex blend of legal and discretionary elements.143 Subsection 53(1)(b) of the Immigration Act gave the Minister limited discretion to deport refugees in circumstances where they faced the possibility of torture. This discretionary power was subject to two preliminary statutory conditions. First, the provision operated only in respect of refugees whose “life or freedom would be threatened” if returned to their country. Second, it was necessary for the Minister to believe that the refugee constituted “a danger to the security of Canada”. Only where both these statutory conditions were met, was the ultimate balancing exercise, between the risk to the refugee versus the risk to Canadian security, left to the discretion of the Minister.144

Before the acceptance of a variable concept of discretion within administrative law, the different standards of review applicable to law and discretion would have required

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142 Mullan has described statutory interpretation as the exercise of “implicit discretion to elaborate unclear or incomplete legislative instructions”: Mullan, Administrative Law, supra note 2 at 950.
143 Suresh, supra note 126.
144 The provision also contained a further statutory condition that was not in issue on the facts in Suresh.
that the Minister’s decision in *Suresh* be judicially reviewed in a multi-staged process. The fulfillment of the two statutory conditions would have been viewed as preliminary issues of law reviewable on a standard of correctness. Only if the court determined that the two conditions were correctly applied by the Minister, would the court defer to the Minister’s discretion in making the final decision. But in *Suresh*, the Court refused to fragment the judicial review exercise in this manner and, applying *Baker*, held that the Minister was entitled to deference in her interpretation and application of the two statutory conditions to Suresh’s case.

The Court’s reasoning in *Suresh* was complicated by the fact that human rights were engaged by the facts of the case and the Court conducted a *Charter* analysis alongside its administrative review analysis. Nevertheless, the Court’s administrative law analysis is a more accurate reflection of how administrative decisions are made in practice. It is highly unlikely that the Minister in *Suresh* differentiated between the legal and the discretionary elements of her authority. Even if she attempted to do so, it is difficult to see how they could be untangled. In addition to the residual discretionary power expressly conferred by ss. 53(1)(b), the Minister was also required to exercise some discretion in interpreting the open-textured language of the two preliminary conditions. What does it mean for a refugee to be under threat? What circumstances amount to a “danger” to Canadian security? Each of these questions involves its own particular mix of law and discretion – the second question lying somewhat closer to the discretion end of the spectrum since, unlike the first question, it requires only a reasonable belief on the part of the Minister. Nor is there a clear demarcation between the preliminary matter of the conditions having been met and the eventual deportation decision. The strength of the Minister’s convictions on each of the two conditions would necessarily have impacted her ultimate exercise of discretion.146

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145 Scholars have criticized the Court’s deferential stance in *Suresh* in light of the fundamental rights engaged by the Minister’s decision: Mullan, “Deference”, *supra* note 74 at 21; and David W. Elliott, “*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?” (2002) 65 Sask. L. Rev. 469 at 495-496.

146 The Supreme Court clearly recognized this link between the statutory conditions and the Minister’s residual discretion. It quoted the following passage from a similar English House of Lords decision: “The question of whether the risk to national security is sufficient to justify the appellant’s deportation cannot be
As a whole, the provision at issue in Suresh was a classic example of weak discretion in which law and discretion are combined in one indivisible grant of authority. Just as administrative officials are unlikely to be able to segregate the legal and discretionary elements in such grants of authority, so too are courts unlikely to be successful in restricting their review to legal errors occurring in the resulting decisions. The decision in Suresh, like Baker before it, recognized the true complexity of this kind of administrative decision-making and rejected an artificial divide between law and discretion.

Most recently, the majority of the Supreme Court in Dunsmuir seems to have retreated from this holistic approach to administrative review in favour of a simpler test in which deference is, once again, based on the type of decision in issue.\(^\text{147}\) If so, then this is unfortunate. In my view, we cannot turn back the clock to a time when the administrative review of law and discretion proceeded along two distinct tracks. This is because these tracks ultimately merge in cases of weak discretion. And yet, the theories of legislative intent underlying, on the one hand, the principles of statutory interpretation applied to vague law and, on the other hand, the deferential review of administrative discretion are fundamentally incompatible.

In the case of a vaguely worded law, the court proceeds on the theory that the legislature intends to create meaningful standards for regulating conduct. Because language is inherently imprecise, the intended meaning of these standards may be lost when they are translated into legislative form. In other words, vague laws represent legislative failure and the court’s role is to apply the principles of statutory interpretation to discover that lost intent. The focus of this exercise is on giving the

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answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation of the deportee.”: Suresh, supra 126 at para. 77, quoting from Secretary of State for the Home Department v. Rehman, [2001] 3 W.L.R. 877 at para. 56 per Lord Hoffman.

\(^\text{147}\) Dunsmuir, supra note 1 at paras. 51-64. Also see Lévis (Ville) v. Côté, 2007 SCC 14 where the majority held that different standards of review may be applied to an administrative decision where it involves “clearly defined questions that engage different concerns” (per Bastarache J. at para. 19), although Abella J. took issue with this point (at paras. 106-117).
enabling provision a sensible construction in the abstract. In this sense, it is a forward-looking exercise. No consideration is given to how the law has been interpreted and applied by the administrator charged with its application.

On the other hand, when a court is faced with an express conferral of administrative discretion, the theory is that the legislature purposively left the provision open-ended. The legislature intended to leave some role in the creation of standards to the administrator; whether because of a desire for flexibility, technical expertise or some other reason. There is no legislative failure in this case but, rather, an intentional delegation and the role of the court is to determine the exact scope of the delegate’s authority. This will also involve an interpretive exercise but, this time, some degree of deference will be extended to the administrator’s preliminary decision. Furthermore, the law is interpreted in the specific context of the decision taken by the administrator. In other words, the court engages in a backward-looking exercise with the benefit of a real life example.

The concept of deference is, at its heart, an attempt to deal with this theoretical incompatibility. The less detail included in an enabling provision, the stronger is the legislative message that the courts should defer to the executive in its interpretation. The more detail included in the enabling provision, the more likely it will be deemed a legal standard, rather than a discretionary power. The court will apply a standard of correctness and engage in its own interpretation of the provision de novo. But the way in which courts approach vaguely worded legislation is exactly the opposite. The less detail included in a provision, the more that courts must rely on the common law tools of statutory interpretation to “discover” its meaning. In other words, the more active is the court’s role in its interpretation. Therefore, the concept of deference ultimately begs the question: when is a court to approach a statutory provision with a standard of review analysis, and when is it to apply a straight statutory interpretation? At some point, tightly constrained grants of discretion will shade into pure legal standards and the analytical approach of the court must be reversed. Unfortunately, the point at which this occurs is indeterminate.
The problem is not apparent so long as courts are careful to indicate which “category” of case they are dealing with. A case involving legal standards merits statutory interpretation and a case involving some degree of administrative expertise merits some level of deference. The Supreme Court has chosen to explain this categorical approach to interpreting statutory authority as one of determining who the legislators intended to make the final decision – the courts or the administrator. But in engaging in the preliminary exercise of choosing whether the case is one or the other, the courts have already taken control of the decision thereby undermining the notion of deference.

Again, the Suresh decision is a strong example of the difficulty courts face in choosing whether enabling provisions are legal standards subject to statutory interpretation, or a grant of discretion subject to the pragmatic and functional test. In Suresh, the Court purported to take both approaches simultaneously. On the one hand, the Court held it appropriate to accord deference to the Minister’s decision.148 On the other hand, by undertaking its own interpretation of the legislation in the abstract, the Court intruded into the Minister’s discretionary role in carrying out this interpretive exercise on an as-applied basis.149

This theoretical incompatibility in the administrative review of law versus discretion renders the presumption against the review of social policy decisions unworkable. Tied up with the principle that tribunals may be entitled to some deference in interpreting their enabling legislation is the acknowledgment that there may be more than one “correct” interpretation of a legal provision.150 The power of tribunals to choose among these possible interpretations is a form of discretion.151 Courts may extend deference in such cases but they accept their administrative review jurisdiction nonetheless. And yet, in the case of executive decision-makers exercising discretionary power to make social policy decisions, courts decline jurisdiction altogether. There is no

148 Suresh, supra note 126 at paras. 39, 41.
149 Ibid. at paras. 80-99.
150 This was acknowledged by the Court in National Corn Growers, supra note 7.
151 Galligan defines discretion as a choice among statutorily-authorized actions: Galligan, Discretionary Powers, supra note 141 at 291 et seq.
good reason why the availability of administrative review should depend on whether it happens to be a tribunal exercising discretion in interpreting its enabling legislation, or a government minister essentially doing the same.\footnote{152}

The result is that there is no consistent, logical means available in administrative law for distinguishing between statutory grants of discretion authorizing the creation of policy, and statutory provisions setting out legal standards. With no reliable way to distinguish between law and policy, there can be no absolute rule prohibiting the administrative review of social policy. The further result is that courts have, in spite of their protestations, often reviewed social policy without saying so.

Some pro-administration theorists (known as “functionalists”) have argued that the inability to distinguish between law and policy is good reason for courts to remove themselves from the judicial review business altogether.\footnote{153} I share Mullan’s concern in this respect:

…it seems to us that a functionalist approach tends to attach insufficient weight to considerations of democratic accountability and to fundamental rights and to the positive contributions that the courts can make to realizing these goals. Despite their well publicized shortcomings, courts seem to enjoy more public confidence than most other institutions of government... \footnote{154}

My proposal is not to do away with administrative review but, rather, to rationalize the review of executive action falling along this policy/law spectrum by shifting our focus away from an untenable categorical distinction between the two; and, instead, scrutinizing the accountability of the decision-making process. My proposal bears more

\footnote{152} This inconsistency is illustrated by the Supreme Court’s refusal to judicial review the minister’s decision in \textit{Comeau’s Sea Foods} on the basis that Parliament had intended for the Minister to have full discretion in managing the fisheries: \textit{supra} note 134. The scope of power allocated to the Minister in that case was no broader than that allocated to numerous regulatory tribunals such as the CRTC in managing other industries. These tribunals are regularly subject to administrative review. The only difference is that the decision-maker in \textit{Comeau’s Sea Foods} was a member of the executive branch of government. But the Court acknowledged in \textit{Inuit Tapirisat} (correctly in my view) that the status of the official exercising statutory decision-making power should not itself determine whether judicial review is available: “[I]n the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law”, \textit{Inuit Tapirisat}, \textit{supra} note 9 at 752.

\footnote{153} Mullan, \textit{Administrative Law, supra} note 2 at 28-31. The functionalist camp of administrative law theorists includes John Willis and Harry Arthurs: see note 23 above.

\footnote{154} Mullan, \textit{ibid.} at 31-32.
resemblance to our current doctrine of administrative review on procedural grounds and it is to this doctrine that I now turn.

B. Procedural Review of Executive Action: Collapse of the Legislative/Administrative Paradigm

The presumption against the administrative review of social policy decisions is also reflected in our current doctrine of procedural fairness. In this context, the presumption is expressed in terms of the different functions of government. The duty of procedural fairness is applied only to those executive decision-makers carrying out either a quasi-judicial or administrative function. It does not apply to decision-makers exercising a legislative function. The clearest statement of this principle was set out in the Bates v. Lord Hailsham decision and this passage, although old, continues to be relied on:

Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the sphere of the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. ... I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. (emphasis added)155

This passage highlights the key flaw in the traditional approach to procedural administrative review. Courts have traditionally failed to distinguish between the primary legislative process, which takes place within the legislature and culminates in a vote by elected representatives, and the delegated legislative process which may take place with no such procedural safeguards. The practice of defining the boundaries of

155 Bates, supra note 9 at 1024. This statement of the principle was relied on by the Supreme Court in Inuit Tapirisat, supra note 9, and more recently in Sunshine Coast Parents for French, v. Sunshine Coast (School District No. 46) (1990), 44 Admin. L.R. 252 (B.C.S.C.) [Sunshine Coast].
administrative review based on the function of the decision-maker has obscured this distinction since a legislative function may be exercised equally within the legislature and outside it. However, when we shift our focus away from the decision-maker’s function and look instead at the accountability of the decision-making process, as I argue we should, the distinction between primary and delegated legislation becomes a central feature in defining the scope of administrative review. The relevance of this distinction for procedural review has begun to find its way into the judicial consciousness. In a recent decision in England, the Court of Appeal remarked that Bates decision represented an earlier era in public law and took issue with this aspect of the judge’s reasoning:

What he says about primary legislation of course holds true: the preparation of Bills and the enactment of statutes carry no justiciable obligations of fairness to those affected or to the public at large. The controls are administrative and political. But, for reasons I have touched on above, there is no necessary or logical extension of this immunity to delegated legislation, much less to the Immigration Rules, and good reasons of constitutional principle for not extending it. If there are grounds for withholding an obligation to consult in relation to these, they have to be narrower.156

In spite of this acknowledgment, the Court refused to recognize a duty of consultation as part of the common law duty of fairness. I will discuss the Court’s reasoning further in the last section of this chapter. For now, it is sufficient to note that, at the end of the day, courts in both England and Canada continue to rely on the function of the decision-maker in defining the scope of procedural review.

Therefore, just as in the previous section on substantive review, the boundaries of review are defined in categorical terms.157 Here again, I will demonstrate that this


157 The distinction between the adjudicative role of courts and the policy role of the executive branch of government is also firmly entrenched in U.S. administrative law. John Hart Ely has described this as a distinction between “process writ large” and “process writ small”: John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard University Press, 1980) at 87. According to Ely, the U.S. Constitution charges the courts with “process writ small” – that is, procedural fairness in the resolution of individual disputes - and the legislatures with “process writ large” – that is, ensuring broad participation in the processes and distributions of government. Ely’s distinction has been embraced by the U.S. Supreme Court. According to a distinction drawn in two cases early in the last century, the executive engages in adjudication
categorical approach is no longer tenable in light of the increased incidence of executive policy-making and the vanishing distinction between law and policy.

The development of procedural fairness as a ground of administrative review is an ideal testing ground for my argument that the principle against review of social policy-decisions needs rethinking. The history of the doctrine is permeated with ill-fated attempts by courts to differentiate between the judicial or quasi-judicial, administrative, and legislative functions of government in order to prevent any incursion by courts into the latter. Here, as in the substantive review of policy decisions, the rationale behind prohibiting the review of social policy decisions has ultimately failed. The various functions of government have been defined and redefined so many times as to have become nonsensical, and we are left with the vaguest idea of a spectrum of functions with courts refraining from procedural review only at the extreme legislative end of this spectrum. The lesson, in my view, is that the goals of certainty and predictability, and ultimately fairness, are defeated by relying on government function as the ultimate variable for determining the availability of procedural review.

Judicial review for procedural fairness had its origin in the doctrine of natural justice. At its earliest inception, natural justice was defined not so much in terms of government function but in terms of the interests at stake. In Cooper v. Board of Works, the Court did not emphasize the function the Board of Works exercised in regulating the construction of buildings but, instead, emphasized the impact of the Board’s demolition order on the property owner. The, itself, indicates that the concept of government function as a restriction on the scope of natural justice was not fundamental to the doctrine but more a matter of convenience. Courts acknowledged the need to limit the scope of natural justice, and the type of function being exercised by the decision-maker when it makes a decision that affects an individual “on individual grounds” and it engages in rulemaking when it makes a decision that affects “more than a few people” on grounds unrelated to an individual: Londoner v. Denver, 210 U.S. 373 (1908); Bi-Metallic Investment Co. v. State Board of Education, 239 U.S. 441 (1915).

158 Cooper v. Board of Works (1863), 143 E.R. 414 (C.P.).
was a logical boundary line since it allowed courts the familiarity of restricting their
scrutiny to “court-like” bodies applying “court-like” procedures.159

By the early twentieth century, the distinction between tribunals acting judicially or
quasi-judicially and those acting administratively had become the key factor in
imposing the duty of natural justice.160  Natural justice was imposed only on tribunals
acting in the former capacity. However, it became apparent early on that courts were
often unable to decide upon a principled basis for the distinction. Some referred to the
judicial function as one affecting the rights of individuals in “single isolated cases”.161
So in Ridge v. Baldwin, Lord Reid felt comfortable applying the principles of natural
justice to the case of a constable dismissed without notice by the Watch Committee,
because the Committee was deciding how the Constable should be treated and this was
analogous to the role of a judge in imposing a penalty. However, even in this
straightforward adjudicative context, Lord Reid recognized that policy would always
have a role to play in the Committee’s decision “just as it might when a judge is
imposing a sentence”. Lord Reid contrasted the situation where a Minister was
exercising a legislative function, such as considering whether to make a scheme for a
new road. In such a case:

...his primary concern will not be with the damage which its construction will do
to the rights of individual owners of land. He will have to consider all manner of
questions of public interest and, it may be, a number of alternative schemes. He
cannot be prevented from attaching more importance to the fulfillment of his
policy than to the fate of individual objectors...162

For Lord Reid, the difference between adjudicative functions and legislative or
policy functions was not a bright line distinction but a matter of degree. And, in fact, his
reading of the earlier decision in Rex v. Electricity Commissioners was that natural justice

Church Assembly, [1928] 1 K.B. 411. The historical development of procedural review is traced in R.A.
Macdonald, ibid.
162 Ibid.
was applicable even in cases further removed from the adjudicative model. The application of natural justice in such cases was more difficult, but not impermissible:

I have already stated my view that it is more difficult for the courts to control an exercise of power on a large scale where the treatment to be meted out to a particular individual is only one of many matters to be considered. This [Rex. v. Electricity Commissioners] was a case of that kind, and, if Atkin, L.J. was prepared to infer a judicial element from the nature of the power in this case, he could hardly disapprove such an inference when the power relates solely to the treatment of a particular individual.163

Other courts defined the judicial or quasi-judicial function not so much in terms of the singular or isolated impact of the decision but, rather, by the fact that the decision impacted legal rights rather than other interests. In Dowhopoluk v. Martin, the Ontario High Court refused to review a Minister’s discretionary decision to refuse citizenship to the applicant on the basis that “the creation of rights must be either a purely legislative or an administrative or executive function, while the determination of rights is a judicial function.”164

But this was not consistent either. In Lazarov v. The Secretary of State of Canada, on very similar facts, the Federal Court of Appeal applied natural justice to the Minister’s discretionary decision to deny citizenship to the applicant.165 The Court stated:

With respect, I am unable to conclude that the discretion conferred by s.10 is merely to make a policy decision or that the distinction between a discretion to deal with established rights and one which is concerned with the granting of rights makes any critical difference.166

What is the distinction between a generic policy decision and an adjudicative decision? What is the relevant legal difference between a Minister making an informal policy decision to deny citizenship to any person whose last name begins with the letter J, and the Minister denying a particular citizenship application by Mr. Jones. At one time the relevant difference was that unjust laws such as the former were presumably

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163 Ibid. at 76, referring to Rex. v. Electricity Commissioners, [1924] 1 K.B. 171.
166 Ibid. at para. 15.
protected by other forms of accountability. But we have seen in chapters 1 and 2 that other forms of accountability are no longer sufficient in the context of social benefits. And we have seen in this chapter that the concept of polycentricity does not satisfactorily explain the difference. The reality is that no difference remains that justifies extending the protection of procedural review to one case but not the other.

The Supreme Court eventually gave partial recognition to the futility of restricting procedural review based on the type of government function in issue and the type of interests being affected. In *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, Laskin C.J.C. gave the Supreme Court’s stamp of approval to the concept of procedural fairness as a way of moving beyond the functional limitations of the duty of natural justice. In so doing, he recognized that government function was not easily classified, and he focused, instead, on the important consequences that government has on the lives of its citizens regardless of function:

What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

So the notion of government function was rejected as a boundary on the scope of procedural review, and shortly thereafter, the privileges/rights distinction was also rejected as an applicable boundary. In *Cardinal v. Director of Kent Institution*, the Court

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167 The Supreme Court of Canada relied on this reasoning in *Calgary Power*, supra note 160, in which it refused to impose procedural duties on a Minister determining an expropriation matter since the Minister would be held accountable in the legislature.

168 This is in spite of decisions like *Inuit Tapirisat* where the Court cited competency concerns as one reason for refusing to impose of duty of fairness on Cabinet in reviewing a CRTC rate decision. The Court noted that it would be “impractical” for the Cabinet to be required to give notice to all those subscribers affected by its decision: supra note 9.


agreed with LeDain J. in rejecting the notion that the scope of procedural review was limited to situations where legal rights were at stake.171

Although neither Nicholson nor Cardinal involved executive policy-making (or, in the language of procedural review, a legislative function), both decisions demonstrate that the scope of procedural review has never been limited by an absolute constitutional proscription. Rather, the matter has always been one of responding to the changing role of government within society. In fact, Lord Reid, expressly acknowledged as such in Ridge v. Baldwin:

We do not have a developed system of administrative law – perhaps because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases the courts have had to grope for solutions, and have found that old powers, rules and procedure are largely inapplicable to cases which they were never designed or intended to deal with.172

The modern approach to procedural fairness is to extend the duty widely but to define its content flexibly depending on such factors as: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme; the significance of the decision for the individuals affected; any legitimate expectations held by those individuals; and the procedures chosen by the decision-maker including any institutional constraints.173

In spite of these incremental attempts to rationalize the scope of procedural review, courts have always stopped short of recognizing a duty of fairness where government is acting in a purely legislative capacity. The leading statement of this limitation is found in L’Heureux-Dubé J.’s judgment in Knight v. Indian Head School Division, where she stated (in obiter):

…not all administrative bodies are under a duty to act fairly. Over the years, legislatures have transferred to administrative bodies some of the duties they have traditionally performed. Decisions of a legislative and general nature can be

171 Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643 [Cardinal]. However, the Court did re-assert the legislative/administrative distinction as a boundary for judicial review and also relied, again, on the individual/collective distinction.
172 Ridge v. Baldwin, supra note 161 at 72-73.
173 Baker, supra note 41.
distinguished in this respect from acts of a more administrative and specific nature, which do not entail such a duty.\textsuperscript{174}

Here, then, is the latest boundary line for the scope of procedural review. It remains essentially categorical although the Supreme Court has said otherwise.\textsuperscript{175} On one side of the line are decisions of a legislative and general nature. On the other side are decisions of an administrative and individual nature. Here we see the Court clinging to its traditional understanding of the theoretical constraints on the role of courts in administrative law.\textsuperscript{176} The legislative/administrative distinction reflects the courts’ concern for respecting the separation of powers. The general/individual distinction reflects the court’s concern for its own institutional limitations. However, in the 130 years since Cooper \textit{v. Board of Works} was decided, we have not advanced any further towards a reliable basis for distinguishing legislative from administrative, or general from individual.

Instead, courts have managed to avoid the problem for the most part by diverting their attention away from the issue of their jurisdiction to engage in procedural review and, instead, focusing on the content of fairness. The contextual test adopted in \textit{Baker} for defining the content of procedural fairness is tailor-made for extending the duty of fairness to the legislative sphere while ensuring that these executive actors continue to have the necessary flexibility to carry out their institutional mandate. Some recent

\textsuperscript{174} \textit{Knight}, supra note 9 at 670; \textit{Inuit Tapirisat}, supra note 9. In \textit{Dunsmuir}, the Court overruled \textit{Knight} on other grounds but seems to have upheld this particular principle: “…the majority opinion in \textit{Knight} properly recognized the important place of a general duty of fairness in administrative law...”: supra note 1 at para. 81.

\textsuperscript{175} See Dickson J.’s comments in \textit{Homex Realty and Development Co. Ltd. v. Wyoming (Village)}, [1980] 2 S.C.R. 1011 at 1051-1052 [\textit{Homex Realty}], where he explains that government functions are not subject to rigid classifications but, rather, lie on a continuum.

\textsuperscript{176} Cartier makes the excellent point that, in defining the duty of procedural fairness, courts were influenced by governance practices of the day. Courts were primarily concerned at that time for protecting their judicial function because this was type of function more commonly delegated by legislatures. Their concern was not for the distinction between legislative and administrative functions. Therefore, \textit{dicta} limiting the scope of judicial review to administrative, rather than legislative, functions were, at best, subsidiary to their reasoning. See Cartier, “Procedural Fairness”, \textit{supra} note 22 at 236.
decisions appear to have taken advantage of this and have applied procedural duties to those exercising legislative functions.177

Post-Baker case law continues to vacillate on where the line should be drawn between legislative and administrative functions. The Ontario Divisional Court held firmly to the traditional position in refusing to apply a duty of fairness to the Minister’s decision to close a francophone college in Gigliotti v. Conseil d’administration du College des Grands Lacs.178 The Court reasoned:

We reject the submission the Minister breached a duty of procedural fairness in her actions. The decision whether to open or close a college is a public policy decision and the powers exercised are legislative or ministerial in nature. Absent a statutory requirement, there is no obligation on a Minister to hold public hearings or direct consultations with the teachers or students prior to accepting the board’s recommendation to close the college. Such a decision is not rendered judicial or quasi-judicial because it is openly opposed. No adjudication took place.179

On the other hand, in spite of the continued existence of the rule against a duty of fairness applied to legislative functions, its scope has gradually been circumscribed by courts wishing to provide some remedy in cases of apparent injustice. For example, in N.(R.) (Litigation Guardian), the court was willing to find a breach of procedural fairness in a minister’s refusal to fund treatment for a child suffering from autism on the ground

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177 See, for example, Old St. Boniface, supra note 10, where the Court held that a municipal councillor was subject to a very narrowly defined duty of impartiality. Also see Imperial Oil Ltd. v. Québec (Minister of the Environment), [2003] 2 S.C.R. 624 where the Court held that the Minister was subject to a procedural framework set out in the governing legislation. The Court reasoned that these statutory duties defined the entire scope of the Minister’s procedural obligations given the political nature of his role. However, the Court’s decision seemed to turn more on the content of the duty, rather than its existence. Nowhere did the Court acknowledge that the Minister had no common law duty of procedural fairness. And see Mount Sinai, supra note 106 (particularly, Binnie J.’s minority opinion). The effect of the majority decision in Mount Sinai was also to extend a duty of procedural fairness to the Minister although the majority shied away from expressly stating as such. Finally, see C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539 where, again, the Court defined the content of the Minister’s duty of procedural fairness narrowly but did not suggest that the Minister was not subject to any such duty.


179 Gigliotti, ibid. at para. 62.
that the funding scheme was already in place and the Minister’s application of the scheme was quasi-judicial in nature.\(^{180}\)

Of course, the obvious distinction between Gigliotti and \(N.(R.)\) (Litigation Guardian) is that the former involved a general funding decision whereas the latter involved an individual application for funding. This presumed distinction between general and particular remains the most common basis for distinguishing legislative functions from those administrative functions subject to procedural fairness. Canadian courts often rely on the following description of the distinction from \textit{de Smith}:

\begin{quote}
The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.\(^{181}\)
\end{quote}

As the Court explained in \textit{Berg} with respect to a government ban on the importation of elk:

\begin{quote}
We accept the Crown’s proposition that on the facts all of the indicia of a legislative function exist. That is, the decision is general and not directed at a particular person; it is based on a broad consideration of public policy rather than facts pertaining to the individual; and it creates a policy rather than applying a policy to an individual situation.\(^{182}\)
\end{quote}

Although Berg was seeking judicial review of the individual decision to deny his application for a permit, the Court held that that decision was part of a general policy created for reasons non-specific to the applicant.

But this distinction between general and particular is itself indeterminable. The school closing cases are a valuable example of the wide grey area between the two. As a group, they illustrate that the legislative/administrative paradigm is no longer (if it ever


\(^{182}\) \textit{Berg, supra} note 178 at 221.
was) a reliable or principled doctrinal basis for constraining procedural review. Courts in jurisdictions across Canada have engaged in inventive doctrinal gymnastics attempting to rationalize the various precedents holding school closing decisions to be either legislative or administrative in nature on very similar facts. In *Sunshine Coast Parents for French v. Sunshine Coast (School District No. 46)*, the British Columbia Supreme Court came down on the legislative side of the boundary in respect of a school board’s decision to discontinue an early French Immersion program in a particular school district. The Court relied on dictionary definitions of legislative power and simply noted that the board’s power to offer programs in its schools was not mandatory. In *Elliott v. Burin Peninsula School District No. 7*, on the other hand, the Newfoundland Court of Appeal held the decision to close a particular school to be administrative in nature in spite of the “generalized impact of the decision on parents and others and the necessity for the board to consider broad policy questions”. The Court distinguished *Sunshine Coast* on the basis that the policy in the earlier case had applied generally to the school district rather than to a particular school. The Court relied on this distinction for its decision even though, elsewhere in its reasons, it essentially repudiated its own reasoning, stating:

...a school closure decision may not necessarily present itself initially as a stark choice between closing or continuing to operate a particular school. Whenever a board is presented with the realities of declining enrollment throughout the district, reduced teacher allocations and declining financial resources, it is necessary to attempt to rationalize, on a district-wide basis, the totality of resources and infrastructure available in a way which can best accomplish the statutory duties of the board. ... the targeting of a particular school or a number of schools as one of a number of solutions might surface only well into the process of rationalization, and considerations affecting the decision whether to adopt that particular solution may often extend beyond those having an impact on the students and parents in the school or schools in question.

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183 *Sunshine Coast, supra* note 155.
185 *Elliott, ibid.* at para. 17.
This is ultimately a distinction based entirely on semantics. A policy directed at a school “district” is general only in the sense that the drafters of the policy choose not to name the particular schools affected. And a policy directed at an individual school is particular only in the sense that no mention is made of the ramifications of the policy for other schools affected. The students at the closed school must attend school elsewhere, thereby increasing the demand for resources at the other unnamed school or schools.

In *Elliott*, the Court attempted to justify its choice that the board’s decision was particular, rather than general, in scope by observing that “there is a qualitative difference between the impact on parents of children in the closed school and those other parents who live in the district.” This statement is certainly accurate as far as it goes. The parents associated with the closed school will clearly have a different type of complaint than the parents associated with other schools in the district shouldering the surplus students. But how is this different character of interest relevant to whether or not procedural fairness should apply? As in most social policy decisions, it is impossible to say which group will have a quantitatively greater interest. One individual student at the closed school may have grandparents living close to the alternative school and may be minimally impacted by the closure. On the other hand, a marginal student at the alternative school may be placed in a larger class as a result of the closure, and this might mean the difference between passing and failing. A qualitative difference in interests cannot properly justify the extension of procedural fairness to one group over another.

The same rough Solomon’s justice is evident in decisions where the existence of a duty of procedural fairness has turned on the presumed distinction between a school’s reorganization and its closure. This is no way to assess whether the various interests involved are worthy of procedural protection.

These school closure cases are mere illustrations of the continuing deterioration of the traditional bright line boundaries defining administrative review jurisdiction, this

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time in the procedural context. This review of the case law is a valuable illustration that the doctrinal presumption against the review of social policy decisions, based on categorical labels such as legislative and administrative, has failed to allow courts to fulfill their accountability function. And, in fact, it has failed even in promoting the basic formal values of certainty and predictability on which our traditional doctrine has rested. Thus, the time has come to revisit these doctrinal boundaries in light of the welfare management role that government now plays in the 21st century.


We have seen that the current presumption against the administrative review of social policy decisions is highly unstable and arbitrary both in its substantive and procedural applications. But more importantly, I suggest that it is working a real injustice. Courts regularly review government policy decisions where these involve commercial regulation delegated to administrative tribunals. Rarely does the issue of justiciability arise in such cases. Instead, the principle of deference has been developed as a method of balancing the respective roles of the courts and the executive. Resistance to administrative review tends to occur primarily when the courts are faced with an issue of redistributive justice or social welfare. But these types of policy decisions may have a more immediate and intimate impact on the lives of individual citizens than do commercial regulatory developments. And the affected individuals are less likely to have the resources to pursue their own interests.

There is no denying the force of the underlying principles on which the presumption against administrative review of social policy has been based. Both the separation of powers and the institutional competence of courts require some limitation on the scope of administrative review. However, nowhere is it written in stone that the ultra vires doctrine and a prohibition against review of polycentric decisions are the only legitimate response to these constraints. So how to articulate a more principled boundary?
I propose that Canadian administrative law evolve to allow for administrative review of executive social policy decisions on grounds of accountability. I have argued above that there is no constitutional, doctrinal, or institutional basis to preclude this jurisdiction. The version of the separation of powers doctrine applicable in Canada is an interpretive principle rather than a constitutional prohibition. And, in any event, a strict categorization of government functions into legislative, administrative, and adjudicative has long been eroding and no longer makes sense for doctrinal purposes in the modern welfare state. Furthermore, concern about the courts’ institutional competence to fill this role has been significantly overstated.

However, there is an even stronger reason why none of these factors should concern the courts in accepting my proposal. As I discussed in Chapter 2, the accountability function of administrative review would require courts to maintain a purely supervisory role in scrutinizing executive action. Administrative review for accountability would involve a review of the process by which policy is created, rather than an assessment of the merits of the policy.

Given this accountability function underlying the courts’ administrative review jurisdiction, why should this role be circumscribed in the case of one of government’s most important tasks – the allocation of social benefits among its citizens? The traditional answer is that this task involves policy rather than law. But this response merely mimics an age-old understanding of the division between law and policy drawn in the days when policy was legislatively entrenched. If a core goal of the rule of law is to promote accountability, then law must be defined so to achieve this purpose. By focusing administrative review of policy decisions directly on accountability, this can be accomplished without immersing courts in the soup that is policy analysis.

This is not as drastic a proposal as it might seem. In a very real sense, I am merely suggesting that the doctrine of procedural fairness first developed during the 1970s in several groundbreaking articles, and ultimately adopted by the Court in Nicholson, be
extended to its logical conclusion. Procedural fairness developed as a targeted response to the problem of classifying government functions. We have since accepted that government functions cannot be neatly categorized, but rather lie on a spectrum. We accept that the spectrum ranges from quasi-legislative functions to quasi-judicial functions, with administrative functions combining elements of each. We accept that the content of the duty of fairness varies depending on where a statutory power of decision lies along this spectrum. Given the acceptance of each of these principles, the continued refusal to recognize some duty of fairness in respect of government decisions lying at the legislative end of the spectrum is bewildering.

It seems clear from a review of the 1970s fairness literature, that a crucial reason for the reluctance of courts to extend the duty of fairness to administrative functions was their discomfort with the traditional "court-like" content ascribed to natural justice. But administrative law was able to dispense with this model and it evolved a very different content applicable to those administrative functions subject to procedural fairness. Now that we have determined that the content of fairness may be modulated to respond to the circumstances of government decision-makers, there is no longer any logical barrier to the same type of evolution taking place in relation to delegated legislative functions.

We have long acknowledged that all statutory decision makers are subject to some basic duty of good faith or fair play. According to Mullan, this duty at the legislative end of the spectrum has simply been lacking any content. The full development of procedural fairness was arrested because of the presumption against the administrative review of policy decisions. But having rethought this presumption, it remains merely to find the mechanism for courts to enforce this pre-existing duty. A focus on accountability is, in this respect, proposed as a way of understanding the content of this

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188 Ibid.
189 Mullan, ibid.
procedural duty that allows for its judicial enforcement across the full spectrum of statutory decision-makers.

Courts must develop ways of assessing the accountability of the process engaged in by executive social policy-makers. Of course, the doctrine of procedural fairness was developed for just this purpose, but I suggest that it suffers from a focus on the individuals affected by the decision. I explained in Chapter 2 that this is one aspect of conventional administrative review doctrine that is incompatible with its underlying accountability function. This is why, for example, I cannot fully subscribe to Genevieve Cartier’s proposed administrative model of procedural fairness to be applied to the exercise of legislative functions.190 Cartier’s model emanates from L’Heureux-Dubé J.’s articulation in Baker of the fundamental values behind the duty to act fairly, including the need to be “responsive” to individuals concerned when discretion is exercised.191 Cartier draws a distinction between those legislative decisions in which “no specific consequences will flow from the exercise of the power” such that procedural fairness might be met with a “general notice and comment procedure”, and those legislative decisions having important consequences for individuals thereby necessitating more formal procedural protections.192

I wholeheartedly agree with Cartier’s underlying point that procedural review in administrative law should be extended to executive decision-makers carrying out a legislative function. However, in my view, her proposal for achieving this does not go far enough. By continuing to define the scope of procedural fairness in relation to the degree to which individual interests are affected, Cartier would ultimately perpetuate the categorical distinction between legislative and quasi-judicial functions that she seeks to reject. All laws or policies affect individual interests to some extent since that is the very role of our state. In the case of social policy where the distribution of social benefits is conditioned on limited resources, all individuals hypothetically eligible for those

190 Cartier, “Procedural Fairness”, supra note 22.
191 Ibid. at 259-261.
192 Ibid. at 261. As examples of the latter, Cartier cites Wiswell v. Metropolitan Winnipeg (Municipality), [1965] S.C.R. 512 and Homex Realty, supra note 175.
benefits are equally affected by policies addressing any individual or subgroup within that group. The polycentric nature of social policy ultimately renders Cartier’s proposal unworkable in practice. In contrast, a doctrine of administrative review linking judicial deference to the degree of accountability achieved by government policy-makers would view particular social policy decisions within their broader institutional context, thereby resolving the polycentricity problem.

But my more fundamental objection to Cartier’s proposal is that a focus on individual interests is inappropriate in an administrative review doctrine based on accountability. The nature of the decision and its impact on individuals are issues for the decision-maker at first instance, i.e. the primary accountability forum. Deference can only be achieved by leaving these issues to the decision-maker intended by the legislature. The proper focus of the courts is how accountable was the process chosen by that decision-maker in relation to the accountability standards chosen by the legislature or executive.

Another point of contrast between my proposal and the current doctrine of procedural fairness is in the deference that I argue should be accorded to primary accountability mechanisms in evaluating executive social policy-making. In current doctrine, quasi-legislative functions are exempted from the duty of procedural fairness altogether. However, in the case of administrative and quasi-judicial functions, the duty is engaged and courts review the fairness of the process on a correctness standard. This is an unduly polarized approach given the contextual nature of the duty of fairness recognized in Baker.\(^{193}\) My proposal would offer a middle ground between these options – on the one hand extending the duty of accountability to encompass all delegated statutory functions but, on the other hand, requiring courts to extend deference in assessing whether accountability had been achieved.

In U.K. administrative law, procedural fairness has developed substantive content and this has led many to challenge the continued relevance of a process/substance

\(^{193}\) Baker, supra note 41.
For example, the doctrine of legitimate expectations has been applied in the U.K. to promote values such as “regularity, predictability, and certainty in government’s dealings with the public”. Thus far, Canadian courts have resisted repeated attempts to extend the legitimate expectations doctrine in this direction. But, in any event, this is not the direction of my proposal. As I discussed in Chapter 2, I suggest that it is for the “doing” branches of government, the legislative and the executive, to determine the accountability standards that apply to a particular policy decision. For example, there may be good reasons why a minister chooses to follow an unpredictable process in reaching a particular policy decision. But the minister should be able to demonstrate that some thought has been given to the process adopted and, if there is reason for unpredictability, the minister should be able to articulate this reason for the court.

This secondary role for courts in scrutinizing executive action is not an unfamiliar one. This is how courts already approach the substantive review of executive decisions. In choosing a standard of review of reasonableness, courts are deferring to the decision-maker. My proposal essentially extends this idea of judicial deference to the realm of procedural review. So long as there has been some meaningful accountability mechanism applied in adopting a policy, then courts are not to second-guess whether that process lives up to free-standing judicial standards such as regularity, certainty or predictability. By focusing on accountability, the courts are leaving the content of the values to be protected in the process up to the legislature or the executive as the case may be. Of course, just as in the substantive review context, the very notion of deference at some point fades into substantive review. This will always be a conundrum but review for accountability would succeed in distancing courts one step from this dilemma.

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194 See Binnie J.’s discussion of the U.K. law in Mount Sinai, supra note 106.
195 De Smith et al., Judicial Review, supra note 181 at 417.
196 Mount Sinai, supra note 106.
197 What might amount to “meaningful” accountability is discussed in Chapter 2 above and Chapter 5 below.
Administrative review based on accountability would address the “slippery slopes” concern that has, thus far, held courts back from imposing procedural duties on executive policy-makers. The English Court of Appeal articulated this concern in *R. (on the application of Bapio Action Ltd.) v Secretary of State for the Home Department*:

It is not unthinkable that the common law could recognise a general duty of consultation in relation to proposed measures which are going to adversely affect an identifiable interest group or sector of society…But what are its implications? The Appellants have not been able to propose any limit to the generality of the duty. Their case must hold good for all such measures, of which the state at national and local level introduces certainly hundreds, possibly thousands, every year. If made good, such a duty would bring a host of litigable issues in its train: is the measure one which is actually going to injure particular interests sufficiently for fairness to require consultation? If so, who is entitled to be consulted? Are there interests which ought not to be consulted? How is the exercise to be publicised and conducted? Are the questions fairly framed? Have the responses been conscientiously taken into account? The consequent industry of legal challenges would generate in its turn defensive forms of public administration. All of this, I accept, will have to be lived with if the obligation exists; but it is at least a reason for being cautious.

The proposed duty is, as I have said, not unthinkable - indeed many people might consider it very desirable - but thinking about it makes it rapidly plain that if it is to be introduced it should be by Parliament and not by the courts. Parliament has the option, which the courts do not have, of extending and configuring an obligation to consult function by function. It can also abandon or modify obligations to consult which experience shows to be unnecessary or unworkable and extend those which seem to work well. The courts, which act on larger principles, can do none of these things.198

Administrative review on grounds of accountability is exactly the type of “larger principle” for which courts are suited. By focusing on accountability, the courts would be not be dictating specific procedures to the executive, but would be acting as an accountability mechanism of last resort. The configuration of accountability standards appropriate to specific functions would be left to the legislature or the executive. Courts would remain within their secondary, supervisory role – reviewing policy-making processes through the conclusions of primary accountability forums created to carry out that purpose at first instance.

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198 *Bapio*, supra note 156.
When the accountability function of administrative review is placed front and center, it becomes apparent that some elements of administrative review doctrine have developed completely backwards. For example, in cases of ministerial discretion, we have seen that courts tend to defer on the basis that these issues involve policy matters beyond the purview of the courts. And yet, in many of these cases, there is little or no evidence of an institutional process protecting the accountability of the minister or her staff members. The autism funding case study that I discussed in Chapter 1 is a compelling example of this. In contrast, we have seen that courts accord relatively less deference to administrative tribunals acting in a primarily adjudicative capacity. But many of our adjudicative tribunals have developed highly sophisticated institutional structures legitimizing their decision-making process. I suggest that, in the former case, absent evidence of procedural legitimacy, the exercise of ministerial discretion is worthy of less deference than is the adjudicative tribunal.

My concept of accountability as a basis for administrative review has been foreshadowed over the years by others seeking an alternative foundation for judicial review that is more respectful of the modern administrative state. One such proposal was put forward by Harry Arthurs in his classic essay, “Rethinking Administrative Law: A Slightly Dicey Business”. Arthurs picked up the functionalist mantle from John Willis and articulated a theory of pluralism that recognized the legitimacy of the distinctive legal systems created by tribunals and other administrators and strictly restricted the scope of administrative review. However, even in this context, Arthurs acknowledged the need for some external supervision of the administration, and this he defined in terms of accountability. The administration would account to the courts in respect of three functions: “ensuring that tribunals (and other bodies) perform tasks of the sort generically confided in them, protecting transcendent constitutional values, and enforcing fidelity to the distinctive ‘law’ of the tribunal.” Arthurs only begins to sketch out these functions but I suggest that they approximate my concept of

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199 Arthurs, “Rethinking”, supra note 23.
200 Ibid. at 42.
201 Ibid. at 44.
administrative review on grounds of accountability. For example, Arthurs argued that a reviewing court has fulfilled its role where it “holds the administration to the law it has chosen to define for itself”. Courts should defer to tribunals offering a “rational and *bona fide*” explanation of their conduct.\(^{202}\) This approaches my notion of procedural review for accountability.

Mullan also favours an administrative review doctrine based less on substantive review and more on the concept of “justification” which he has described in part by reference to a similar argument put forward by Hudson Janisch:

> …deference has to be earned and the principal way in which it is earned is by “justification” or providing reasoned bases for the making of decisions and the taking of actions.\(^{203}\)

It is noteworthy that Geneviève Cartier’s proposal to impose fairness on decision-makers’ exercising legislative functions is also procedural in focus. Although I do not agree with her suggestion that individual interests should be the basis on which this duty is modulated, the thrust of her argument is in the same spirit as my own. She too sees the courts playing a secondary role in protecting accountability:

> As a whole, involvement of the judiciary in the field of ‘legislative fairness’ would require courts and administrative decision makers to work together, on a complementary basis: the latter would be charged with the primary responsibility for establishing appropriate procedures and for ensuring proper justification for their choices, while the former would be charged with assessing the value of such a justification.\(^{204}\)

I suggest that what my proposal adds to this literature is a “larger principle” around which the concept of procedural review for legislative functions may coalesce – one which would prevent courts from dictating specific procedures to executive bodies, and one which is uniquely respectful of public administration because it springs out of the very culture and language of public administration.

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\(^{204}\) Cartier, “Procedural Fairness”, *supra* note 22 at 257.
Conclusion to Chapter 4

The fundamental shift in governance that has taken place with the emergence of the welfare state has blurred the boundaries between law and policy on which our traditional administrative review doctrine was built. The expanding overlap between law and policy has caused the presumption against the administrative review of social policy decisions to fail as a doctrinal device for limiting the scope of courts' jurisdiction. A preferable basis for administrative review is the level of accountability achieved by the decision-maker. Judicial deference should depend not on the content of individual social policy decisions, but rather on the extent to which the policy-maker is subject to democratic accountability controls.

The necessary doctrinal underpinning for the administrative review of executive social policy decisions already exists. It has developed incrementally over the course of the previous two centuries. However, this evolution is incomplete. The measured, cautious progress of the common law, although one of the great benefits of our legal system in other contexts, was long ago eclipsed by the dizzying speed at which executive governance has expanded.

It has become commonplace for courts and administrative law scholars to define the administrative review role without mention of the lingering exception in respect of decision-makers exercising legislative functions. In a recent article, Mr. Justice LeBel described this role, building on an earlier article by Chief Justice McLachlin:

[McLachlin] added further that “societies governed by the Rule of Law are marked by a certain ethos of justification”… An ethos of justification requires that exercises of public power be justified in terms of their rationality and fairness. This rich conception of the rule of law gives decision-making bodies other than the courts a role to play in maintaining it. Thus the courts oversee the preservation of the rule of law broadly, without micromanaging all the details of the system. The courts exercise an analysis power on the justifications and processes leading to a decision, rather than on its merits.205

There is no longer any need for an administrative review function described thus, in terms of process and rationality, to be excluded from an entire category of government activity, particularly one that intrudes so intimately in the lives of its citizens. In the next and final chapter, Chapter 5, I return to my proposed doctrine of administrative review for accountability and will sketch out how such a doctrine would function in practice.
V. CHAPTER FIVE
How Would It Work? – Practical Components of a Doctrine of Administrative Review for Accountability

Introduction

In the previous chapters, I have described the accountability gap in executive social policy-making and I have argued that there is a role for administrative law in responding to this accountability gap without violating constitutional principles and within the courts’ existing institutional structure. My underlying goal has been to develop an administrative law means of promoting accountability within executive social policy-making that is achievable in our current governmental and legal environment. In this chapter, I will build on the previous discussion, particularly the analysis in Chapter 2, and provide some initial thoughts on how administrative review for accountability might operate in practice.

I have argued that courts must have the ability to supervise executive decision-makers exercising delegated statutory power, no matter where their function falls along the legislative/administrative/quasi-judicial spectrum. Regardless of how broadly a conferral of statutory power might be described, it remains ancillary in nature; subject to boundaries based on the intentions of the legislature that created it. Although these boundaries may be difficult to determine, whether by intent (as in discretionary grants of power) or inadvertently (due to the imprecision of statutory language), they always exist. As a result, the exercise of this power must be susceptible to some ultimate form of accountability.

Why does this accountability lie to the courts? Of course, the legislature is master of the executive and so, first and foremost, the executive is accountable to the legislature who is, in turn, accountable to its citizens. But we have seen in Chapters 1 and 2 that the unprecedented growth in executive governance over the course of the twentieth century has meant that this form of accountability is no longer sufficient to ensure that
legislative intent is carried out. The most direct solution to this problem is to reinforce legislative accountability mechanisms.\(^1\) There have been many proposals along these lines and some promising initiatives, some of which I discussed in Chapter 2. However, effective legislative change requires political will and that has not, thus far at least, been forthcoming. But the absence of legislative concern for improved accountability does not do away with the problem. A concern for accountability is inherent in the constitutional balance of power among our three branches of government and is, in this sense, common to all.

We saw in Chapter 2 that the very reason that courts were given the power to administratively review executive action was to put into place within the constitutional power structure another back-up form of accountability. Therefore, the courts undeniably have a role to play in holding the executive accountable for the exercise of delegated power. The contentious issue is not whether this jurisdiction exists but how broadly it is to be defined.

The courts’ administrative review power has traditionally been defined in terms of the rule of law. And the rule of law has been distinguished from policy in order to provide a rough-and-ready check on the courts’ power. But we have seen in Chapter 4 that this bright-line distinction between law and policy is no longer doctrinally plausible given the type of executive governance that has evolved in our modern welfare state. The result is that courts are not effectively carrying out their supervisory role in respect of either “law” or “policy”. Therefore, I have argued that it is time to dispense with an artificial fixed boundary line between law and policy and the fiction that the scope of administrative review may be defined accordingly. In other words, the scope of administrative review should no longer depend on the type of function being carried out by an administrative official, or whether the resulting decision may be characterized as “legal” or “political”. In order to trigger the administrative review jurisdiction of the

\(^1\) Grant Huscroft has remarked, “[j]udicial review is no substitute for political accountability – no legitimate substitute, that is – however imperfect political accountability may appear”: Grant Huscroft, “Judicial Review from C.U.P.E. to C.U.P.E.: Less is Not Always More” in Grant Huscroft and Michael Taggart, eds., *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto Press, 2006) at 300.
courts, it ought to be sufficient that the power being exercised has been delegated from the legislature, *i.e.*, a statutory power of decision exists.\(^2\)

That being said, some limit on the courts’ administrative review jurisdiction remains necessary in order to maintain the separation of powers. It is clear that courts are neither constitutionally entitled nor institutionally competent to second-guess the executive or the legislature in their allocation of public resources. Nothing that I have written in the previous four chapters has been intended to suggest otherwise. Instead, in my view, the appropriate limit on the scope of administrative review is the intrinsically procedural nature of its underlying accountability function.

The most attractive feature of this limit to the scope of administrative review is that it builds incrementally on our existing understanding of administrative law. I have argued that the accountability function of administrative review jurisdiction has underpinned administrative law theory from the beginning. It is only relatively recently that some theorists have imbued the rule of law employed in administrative review with substantive attributes. This trend seems to have arisen around that same time that human rights protection became entrenched within our constitution. The creation and application of the *Charter* has had a profound impact on administrative law over the past twenty-five years, but nowhere more so than in the presumption that the rule of law operates equally in *Charter* review and administrative review. In Chapter 3, I explained that these two applications of the rule of law remain distinct, as does the scope of the courts’ jurisdiction under each.

In administrative law, I have advanced a formal vision of the rule of law. In Chapter 2, I outlined the accountability function of administrative review and explained how, in the absence of clear legislative intent, it requires a focus on the decision-making process rather than the outcome of particular decisions or those affected by them. I argued that this accountability function operates as a preferable limit on the scope of administrative review to that provided by the law/policy distinction. Courts avoid overstepping their

\(^2\) Administrative review is also extended to some forms of prerogative powers but these are not relevant to my focus on social policy-making.
role in reviewing executive social policy decisions by centering their review on the presence of effective accountability mechanisms governing the policy-making process.

Much of Anglo-Canadian administrative law doctrine is consistent with my approach. However, to the extent that current doctrine focuses on the individuals affected by administrative action, it is inconsistent with the procedural nature of accountability review and arguable usurps the role of the decision-maker at first instance. Unlike in private law and constitutional law, the courts’ function in administrative law ought to be understood as one step removed from this exercise. Their jurisdiction is limited to an examination of how well the decision-maker carried out its role – i.e. the process that the decision-maker applied. This process-based form of review has no more application where the stakes for particular individuals are great and no less application where the stakes for particular individuals are relatively minor.

My proposal would invite courts to develop ways of assessing the accountability of the process engaged in by executive social policy-makers. In Chapter 4, I discussed how administrative review for procedural fairness has evolved as a means of supervising the accountability of one type of executive policy-making: i.e., the policy decisions of administrative tribunals. Administrative review for procedural fairness may operate here as a prospective guide to structuring policy-making processes. Rod Macdonald, in analyzing the theory of procedural review, notes that court decisions, “if prospective, directed to institutional difficulties, and structured so as to provide guidelines for future conduct,... may improve the processes of public administration.”3 However, the current doctrine of procedural fairness ultimately suffers from a focus on the individuals affected by the outcome of a decision. Accountability review would refocus the courts’ attention onto the institutional legitimacy of a broader range of policy-makers and would, correspondingly, ignore whether the policy happens to be collective or individual in its scope.

Chapter 5 – How Would It Work?

Now that this theoretical and jurisprudential foundation has been laid, this chapter outlines how review for accountability in executive social policy-making might operate in practice. The chapter is divided into three parts. In the first part, I explain how a claim for administrative review for accountability might proceed before the courts. This discussion leads naturally to certain objections that might be leveled against my proposed doctrine. In the second part of the chapter, I identify five main objections and respond to each of them in turn. In part three of the chapter, with these objections (hopefully) out of the way, I turn back to my case study of Ontario’s autism programs; introduced in Chapter 1 as an illustration of the accountability gap currently existing in executive social policy-making. I examine in detail how administrative review for accountability might have operated to promote the accountability of these particular social programs.

1. Bringing a Claim for Administrative Review for Accountability

In addition to the theoretical and doctrinal issues raised by my proposed reform of administrative review doctrine, which I attempted to deal with in Chapters 3 and 4 above, several practical questions arise about how this new cause of action might operate. As in all areas of common law, this new doctrine would evolve incrementally, allowing courts to develop institutional expertise in the concept of accountability and the various primary accountability mechanisms at work within the world of public administration. At the same time, courts would be able to gradually develop the procedural principles governing such a claim. The eventual structure of the cause of action can only be roughed in at this early stage. However, I envision that a claim for administrative review based on lack of accountability in the executive social policy-making process might proceed as follows:

- An individual adversely affected by a policy decision would have standing to bring a claim for administrative review on the ground that the policy was made in unaccountable circumstances (as described in Chapter 2). Public interest groups would
also have standing to challenge the policy where they meet the governing criteria for establishing public interest standing.\(^4\)

- Where the government has chosen not to enshrine the policy decision in legislation or regulation (both of which are subject to relatively strong accountability mechanisms), the burden of proof would lie on the government to establish that the policy decision was made in accountable circumstances. This would protect the right of government to choose its own primary accountability framework but would provide an incentive for it to choose an adequate one.

- Government would lead evidence of circumstances lending accountability to the policy process. This would involve the existence of primary accountability forums evaluating the policy in relation to accountability standards chosen by the legislature or executive for this purpose. Evidence of accountability might include: legislative committee debates, consultation with public interest groups, consultation with other ministries, personal involvement by the Minister, or internal monitoring of the program and responsiveness to the results.

- Courts would not evaluate the wisdom of the policy nor government’s performance in response to the policy, but would focus on whether or not accountability had resulted from these primary accountability mechanisms. The necessary analytical distance between the substance of the policy and the courts’ supervisory role would be achieved through judicial deference to the conclusions drawn by these primary accountability mechanisms.

- If the policy were held to be unaccountable, the court would exercise its discretion in fashioning an appropriate remedy. Although the full range of administrative law remedies would be available, declaratory relief would be most in keeping with the courts’ secondary role as an accountability mechanism of last resort. In issuing a declaration, courts might recommend the policy for substantive review by the legislature (who may choose to delegate this task to a committee much as it does in the case of regulations).

- The impugned policy would typically continue to operate “as is” in the interim in order to prevent courts from effectively mandating one particular policy choice over another.

Having sketched out a hypothetical claim for administrative review of executive social policy decisions, several objections to such a claim may spring to mind. In the next part, I attempt to address the most major of these.

2. Preliminary Concerns in Expanding Administrative Review to the Supervision of Accountability

Fashioning an Appropriate Remedy – Balancing Deference with Efficacy

The matter of an appropriate remedy for unaccountable social policy-making is a difficult one and, again, would benefit from the incremental evolution of the common law. By analogy to the existing doctrine of procedural fairness, the logical remedy would be an order quashing the policy and sending it back to government to be made in accountable circumstances. Theoretically, the substance of the policy would remain within the exclusive control of the executive branch of government. Practically speaking, though, the delay and expense caused by such an order would have important substantive implications.⁵ The collective nature of the interests at stake in social policy means that withdrawal of the policy would affect a wide range of interests beyond those of the parties before the court. Even if the order was suspended so that the policy continued to operate in the interim, the order would result in more procedure. Increased procedural expense would correspondingly reduce the pool of resources allocated to fund the program. Of course, fair process always comes at a price and courts have been concerned to balance the duty of procedural fairness with the practical constraints experienced by different administrative decision-makers.⁶ Courts would presumably develop a similar sensitivity to the incremental expense of improved

accountability procedures. In this vein, though, courts may well be hesitant to adopt a remedy that so significantly constrains the policy-making process. Declaratory relief would minimize this impact and, for this reason, would likely be the preferable remedy in most cases. A declaration would act as judicial signal to government to improve the accountability mechanisms governing the social policy in issue. A declaration would also be an effective means of putting the problem in the public eye, thereby allowing electoral accountability mechanisms to take over.

By choosing a deferential remedy, courts would preserve for the political branches of government their control over social policy-making – both process and outcome. As the Supreme Court noted in Doucet-Boudreau:

…courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited.7

And in the Provincial Judges Compensation Appeals, the Court explained:

The limited nature of judicial review dictates the choice of remedies. The remedies must be consistent with the role of the court and the purpose of the commission process. The court must not encroach upon the commission’s role of reviewing the facts and making recommendations. Nor may it encroach upon the provincial legislature’s exclusive jurisdiction to allocate funds from the public purse and set judicial salaries unless that jurisdiction is delegated to the commission.8

The declaration is a particularly appropriate remedy for addressing the collective interests governed by social policy. In fact, Mary Liston notes that the use of the declaration in public law cases has been crafted specifically in order to come to grips

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7 Doucet-Boudreau v. Nova Scotia (Board of Education), [2003] 3 S.C.R. 3 at para. 34 [Doucet-Boudreau]. The majority in Doucet-Boudreau ultimately chose to combine a declaration with residual injunctive relief. According to the dissent, however, this blended remedy interfered in the management of public administration and upset the balance between executive, judiciary, and legislative.

8 Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges’ Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Québec (Attorney General); Minc v. Québec (Attorney General), [2005] 2 S.C.R. 286 at para. 42 [Provincial Judges Compensation Appeals]. Also see Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405 at para. 77: It is “not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government’s task to determine which approach it prefers.”
with the unique challenges facing courts confronted with polycentric issues. Unlike more intrusive remedies, a declaration effectively invites the political branches of government to design their own remedy to a situation tainted with illegality. This relatively circumscribed role for the court, in turn, requires less in the way of adjudicative facts.

On the other hand, where the court limits itself to declaratory relief, there is always the risk that government, whether intentionally or unintentionally, will ignore the order. This presents a heightened risk in cases where the declaration targets a complex web of government action rather than a single, isolated government decision. In Chapter 2, for example, I described the practice of horizontal policy-making in which a wide range of government departments and agencies, external policy advisors and public stakeholders all participate in policy-making. If it is difficult to identify a single government actor that is ultimately responsible for a particular social policy, it may be equally difficult to for government to coordinate a targeted response to a declaratory order by implementing improved accountability practices. Therefore, it would be important for courts to reserve the right to make more intrusive orders in appropriate circumstances. One possibility might be a directive order of the type chosen by the lower courts in Auton v. British Columbia. The trial judge, Allan J. declared that the government’s failure to fund IBI treatment for autism was contrary to s.15 of the Charter

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10 For example, in Corbière v. Canada, [1999] 2 S.C.R. 203, the Court issued a delayed declaration of invalidity in response to a finding that the Indian Act provisions regulating band elections were discriminatory. The Court chose a declaratory remedy in order to avoid the political role of redesigning a complex legislative scheme (para. 115). The Court stated: “In determining the appropriate remedy, a court should consider the effect of its order on the democratic process, understood in a broad way, and encourage that process.” (para. 116).


12 See Chapter 2, part 3, under the subheading “Managerial Accountability”.

and made an additional order directing that the Crown fund the treatment. The Court of Appeal upheld the declaration and noted that the trial judge was correct to avoid “particularizing details of the program that must be funded”. It also upheld the direction but modified it to add particular reference to the four applicants before the Court. Significantly, the Court affirmed the continuing jurisdiction of the Supreme Court to enforce the order.

It remains the case that courts most commonly choose declaratory relief where they seek to remedy government action having broad social impact. In any event, even where a declaration is not effective in remedying past wrongs, it may still be useful in signalling the need for accountability in future executive policy-making. It is hoped that the message of improved accountability within social policy-making would gradually become an accepted norm, increasingly influencing government actors to design policy-making processes with this in mind.

**Developing Judicial Expertise in Accountability**

A critic of my proposed expansion to administrative review jurisdiction might argue that, while courts are familiar with the concept of procedural fairness in a quasi-adjudicative context, they have no experience addressing the much broader concept of accountability within the polycentric domain of social policy-making. What principles could courts possibly draw on in assessing managerial accountability mechanisms developed deep within the interstices of the bureaucracy?

This criticism hearkens back to the institutional competence concern that I examined and rejected in Chapter 4. There, I provided several examples of courts adapting their judicial review jurisdiction to the supervision of polycentric problems, including the creation of an institutional version of procedural fairness. But, in some situations, courts have gone even further towards developing a fledgling accountability focus to the

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14 *Auton* (C.A.), *ibid.* at para. 90.
supervision of government policy-making. In two recent Supreme Court decisions, the Court ordered the executive to improve certain accountability mechanisms governing policy-making processes. In *Haida Nation*, the Supreme Court of Canada imposed a duty on the Crown to consult with aboriginal groups having land claims before making decisions affecting their interests. And in the *P.E.I. Judges Reference* and *Provincial Judges Compensation Appeals*, the Supreme Court ordered the development of institutional means to protect the constitutional guarantee of judicial independence. In each case, the specific measures for improving accountability were left to be designed by the executive itself but, in both cases, the Court felt competent to provide guidelines addressing the types of measures that would be sufficient. In neither case, did the Court engage with the substance of the policy matter giving rise to the dispute. These decisions are important illustrations that that my proposed doctrine of administrative review for accountability could develop incrementally (as intended within common law legal systems) and, most importantly, that it need not deteriorate into substance review. Although both cases were instances of constitutional rather than administrative review, they illustrate the courts’ institutional competence to regulate this field of government activity. In my view, there is no reason why this template might not be adapted to the supervision of executive social policy-making.

**Haida Nation v. B.C. (Minister of Forests)**

*Haida Nation* involved the British Columbia government’s regulation of tree farming in the Queen Charlotte Islands (known to locals as Haida Gwaii). The Haida people claimed title to Haida Gwaii and were in the process of trying to prove their claim. Meanwhile, they argued that the government should consult them before tree farm licences were issued to forestry companies. The government refused to do so unless and until the Haida’s title to Haida Gwaii was legally recognized. A unanimous Court held

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17 *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida Nation*]. The Crown’s duty in *Haida Nation* also extended to the accommodation of aboriginal interests but, as I discuss below, it is the consultation component of this duty that is relevant for my purposes. Also see *Taku River Tlingit First Nation v. B.C.*, [2004] 3 S.C.R. 550 [*Taku River*].

that the government did have a duty to consult in the circumstances. This duty was
grounded in the principle of the honour of the Crown. The scope of the duty was
variable but it did not involve any obligation to reach agreement with the Haida people.
In other words, the duty was a procedural rather than substantive one.19

Although the Haida’s cause of action was framed in relation to a particular tree
licence (known as T.F.L. 39) issued to a particular forestry company (first McMillan
Bloedel and then Weyerhaeuser) in respect of a particular plot of land (known as Block
6), these details were provided in order to facilitate the litigation process. The Haida’s
claim was a much broader one. They claimed a general right to be consulted as part of
the government’s tree farm licensing process for all of Haida Gwaii. Thus, there were
strong polycentric aspects to the issue before the Court. As the government argued, the
case raised its “responsibility to manage the forest resource for the good of all British
Columbians”.20 And the Court treated the case as one of policy-making rather than
adjudication. The Chief Justice wrote:

> Our task is the modest one of establishing a general framework for the duty to
consult and accommodate, where indicated, before Aboriginal title or rights
claims have been decided. As this framework is applied, courts, in the age-old
tradition of the common law, will be called on to fill in the details of the duty to
consult and accommodate.21

David Mullan has also acknowledged the polycentric context in which the duty to
consult will arise:

> In contrast to the rules of procedural fairness, the principal bite of the duty to
consult comes in situations involving broad policy decisions about major projects
that affect First Nations collective rights and interests.

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19 The Court also acknowledged that, in certain circumstances, a further duty of accommodation would
arise. The duty to accommodate might entail that the Crown undertake some substantive action “to avoid
irreparable harm or to minimize the effects of infringement” *Haida Nation*, *supra* note 17 at para. 47. This
further duty is described by the Court as a self-standing concept separate and apart from the Crown’s prior
procedural duty of consultation. Therefore, it need not influence our examination of the procedural duty of
consultation as a prototype for an analogous doctrine in administrative law.


... the obligation exists as between the Crown and the First Nation, not as between the Crown and the affected person.22

Therefore, the effect of the Court’s decision in Haida Nation was to impose procedural constraints on an executive policy-making process. The type of procedural constraint in issue, the duty to consult, was appropriate in the circumstances because of the Crown’s unique relationship with aboriginal peoples. However, a duty to consult is really just one method of promoting accountability; in this case accountability to aboriginal peoples. As Mary Liston has pointed out, also in connection with the Haida Nation decision:

...the duty to consult injects rule of law procedural content into a discretionary decision-making area where the executive was traditionally and largely outside of legal and political routes to accountability.23

The Court in Haida Nation was willing to provide guidance on the kind of measures that the government might choose to fulfill its duty to consult. Depending on the strength of the land claim and the interests affected, the duty might range from: in a weak case, giving notice, disclosing information and discussing issues raised in response to the notice; to, in a strong case, deep consultation aimed at finding a satisfactory interim solution. In any event, it would be for the government to take the initial responsibility for designing an appropriate consultation mechanism:

It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.24

The Court’s emphasis on governments designing their own processes at first instance, rather than being dictated by the courts, was a necessary accommodation for maintaining the efficiency and flexibility of those regulatory schemes affected by the

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23 Liston, Honest Counsel, supra note 9 at 147.
24 Haida Nation, supra note 17 at 536.
duty. The review of these consultation processes would proceed on a standard of reasonableness, thereby according the government some degree of deference in its design of an appropriate scheme.

The Court indicated that aboriginal groups were not to be given a veto over their land interests pending final proof of a claim, but that a process should be developed for “balancing interests, of give and take”. The focus was to be on process rather than outcome. The duty of procedural fairness in administrative law would provide a foundation for future development of the duty although the two concepts were clearly intended to be independent of one another.

Interestingly, the government in *Haida Nation*, invoked the same institutional competence concern that might be expected from a critic of administrative review for accountability. The government argued that the recognition of a variable duty to consult would be impractical since parties would not be able to agree on the level of consultation appropriate to particular cases and courts or tribunals would be ill-equipped to resolve the matter. The Court made short work of this objection by finding that, while “challenging”, “difficulties associated with the absence of proof and definition of claims” would not defeat the existence of a duty to consult but would be relevant only to its scope. In other words, the Court felt comfortable leaving the content of the duty to be developed by courts on a case-by-case basis:

The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situation will be defined as the case law in this emerging area develops.

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25 Mullan encourages cooperation between Crown and aboriginal peoples in designing consultation mechanisms in order to prevent the perception that the duty to consult results in threats to “vital economic development” or “regulatory paralysis”: Mullan, “Duty to Consult”, supra note 22 at 131.
26 Ibid. at 129.
27 *Haida Nation*, supra note 17 at 535.
28 Mullan addresses the relationship between the duty to consult aboriginal peoples and the administrative law duty of procedural fairness in “Duty to Consult”, supra note 22 at 128.
29 *Haida Nation*, supra note 17 at 527.
30 Ibid. at 530.
31 Ibid. at 531.
The Court’s reasoning in *Haida Nation* is the kind of reasoning that might be appropriate in a claim for lack of accountability. The initial onus would rest on the government to design an appropriate accountability mechanism for a policy-making process, subject to the possibility of administrative review. Accountability measures appropriate in different circumstances would evolve incrementally on a case-by-case basis. In all cases, however, these measures would be procedural. The government would retain full control over the outcome of policy decisions arrived at through the process.

This last point was emphasized in the companion decision to *Haida Nation, Taku River Tlingit First Nation v. B.C.*\(^{32}\) Here, an aboriginal group, TRTFN, claimed title to lands subject to a mining proposal. An environmental assessment of the proposal was conducted under B.C.’s *Environmental Assessment Act*. The legislation mandated that a detailed consultation process take place and TRTFN had participated in the process. Although TRTFN was not satisfied with the eventual decision to approve the project, the Court held that the legislated consultation process was sufficient to meet the government’s duty to consult. The TRTFN had fully participated in the process, their concerns were understood and acknowledged, studies had been conducted, reports prepared, and steps taken to address some of their concerns. The government retained full discretion to make the ultimate decision.

The duty to consult developed in *Haida Nation* and *Taku River* provides a possible prototype for the similar development of an administrative review doctrine based on accountability. The ultimate aim in both cases was to promote the legitimacy of a particular type of executive policy-making and in both cases procedural means were employed in order to avoid undue judicial intrusion into the political sphere.

**P.E.I. Judges Reference and Provincial Judges Compensation Appeals**

Another prototype for a new administrative review doctrine based on the concept of accountability is offered by the *P.E.I. Judges Reference*. Again, the Court was engaged in

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\(^{32}\) *Taku River, supra* note 17.
the review of a strongly polycentric issue; in this case the reduction of judges’ salaries.\textsuperscript{33} This is a classic social policy issue requiring that public expenditures be balanced against all other priorities within the government’s budget. The Court was tasked with determining to what extent financial security for provincial courts judges was required to meet the guarantee of judicial independence in s.11 (d) of the Charter. The Court approached the issue as a matter of institutional design, \textit{i.e.}, the institutional arrangements that must be incorporated into the salary review process for the purpose of securing the collective financial security necessary for judicial independence. These arrangements were essentially procedural accountability mechanisms designed to bring legitimacy to the process without compromising the government’s power to determine the outcome of that process. As in \textit{Haida Nation}, this issue of the accountability of a particular executive policy-making process arose within a constitutional context but, again, there is no reason why the same analysis might not be adapted to judicial review proceedings based on administrative law principles.\textsuperscript{34}

In \textit{P.E.I. Judges Reference}, the Court held that institutional financial security for the courts has three components. First, although the government is entitled to reduce, increase, or freeze provincial judge salaries, any such changes must be reviewed by an independent commission. Although the commission’s recommendations are not binding on the government, the government’s departure from the recommendations must be justified in a court of law. Second, the judiciary may not engage in salary negotiations with members of the government. Third, there is a minimum level of remuneration below which provincial judge salaries may not go without eroding public confidence in the independence of the judiciary.

The Court held that so long as the government complied with these three principles, it was ultimately entitled to reduce judge salaries, at least to a constitutionally-

\textsuperscript{33} The majority of the Court noted at the outset of its reasons that the issue raised was the “collective or institutional dimension” of financial security for judges of provincial courts: \textit{P.E.I. Judges Reference}, supra note 18 at para. 3.

\textsuperscript{34} Since \textit{P.E.I. Judges Reference} was a constitutional challenge, the Court was addressing provincial court judges’ salaries as determined by \textit{either} the legislature or executive. In other words, the accountability of law-making as well as policy-making was in issue. In contrast, an administrative law claim for lack of accountability would target executive policies that are neither enshrined in law nor in regulations.
guaranteed minimum. Therefore, the first two principles were really procedural mechanisms imposed on the salary review process in order to depoliticize the process and, thereby, achieve accountability. The Court noted that the goal was not substantive fairness but procedural legitimacy:

The purpose of the collective or institutional dimension of financial security is not to guarantee a mechanism for the setting of judicial salaries which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.35

The Court was clearly sensitive to the importance of maintaining a distinction between the policy-making process (an acceptable territory for administrative review) and substantive policy generation (to be left to the government, at least within the range of constitutionally acceptable salaries). For example, the Court distinguished between the types of negotiations that might take place between the judiciary and the government. Although the second principle of institutional financial security prohibited these parties from engaging in salary negotiations, the Court encouraged negotiations over the framework to be applied to the salary review process.36

The Court went on to lay down some general guidelines for the operation of independent commissions reviewing provincial judge salaries. These commissions must be independent, objective, and effective – again, all procedural attributes designed to promote accountability without interfering in the substance of the commission’s recommendations. The Court recommended, without requiring, that legislation or regulations be enacted providing the commission with a list of relevant factors to guide its deliberations. Importantly, the Court held that the commission recommendations must have a “meaningful effect” on the determination of provincial judge salaries. In this way, the Court balanced the need for accountability with the need to leave the outcome of the salary decision with the government itself. Lamer C.J. explained:

35 Ibid. at para. 190.
36Ibid. at para. 192.
My starting point is that s.11 (d) does not require that the reports of the commission be binding, because decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive. The expenditure of public funds...is an inherently political matter.\textsuperscript{37}

On the other hand, Lamer C.J. went on:

The fact that the report need not be binding does not mean that the executive and the legislature should be free to ignore it...What judicial independence requires is that the executive or the legislature... must formally respond to the contents of the commission’s report within a specified amount of time.\textsuperscript{38}

Lamer C.J. went on to set out what this duty of responsiveness might require. The executive must issue a report explaining its response to the commission’s recommendations and, if it chooses not to adopt the recommendations, it must provide reasons for this decision. These reasons, if inadequate, might lead to a judicial finding of unconstitutionality. However, the standard on which the reasons might be judicially reviewed was held to be one of simple rationality. The government must merely articulate a “legitimate reason” for departing from the recommendations. This standard would ensure that courts remain outside the substantive reasons for the policy decision.

Although the Court was comfortable in imposing these broad-stroke accountability requirements onto the provincial court salary process, just as in \textit{Haida Nation}, the Court recognized the wisdom of leaving the details of the regime for the executive to design at first instance. Lamer C.J. wrote:

I do not wish to dictate the exact shape and powers of the independent commission here. These questions of detailed institutional design are better left to the executive and the legislature...\textsuperscript{39}

Here, then, is another example of the Court acting as an accountability mechanism of last resort in a strongly polycentric social policy arena. The Court recognized that accountability mechanisms are best designed by the executive at first instance.

\textsuperscript{37}\textit{Ibid.} at para. 176.
\textsuperscript{38}\textit{Ibid.} at para. 179.
\textsuperscript{39}\textit{Ibid.} at para. 167. Lamer C.J. noted that his guidelines were not set “in constitutional stone” and that future governments might find new institutional arrangements that are equally independent, effective, and objective (para. 185).
However, it also recognized its own institutional competence to: first, provide advice on the design of appropriate accountability mechanisms without intruding into the substance of the policy generated through these mechanisms; and, second, if necessary, administratively review how successful the chosen mechanisms are in protecting accountability.

Unfortunately, the compensation commission process set up by the Court in the *P.E.I. Judges Reference* was not immediately successful. Although the process may well have improved the accountability of the salary negotiations process, this was of little practical value where it failed to achieve a result acceptable to both parties and simply led to more litigation. In many cases, governments routinely dismissed compensation commission recommendations and judges’ associations responded by commencing litigation. Eventually, the matter came to the attention of the Supreme Court once more, culminating in the *Provincial Court Judges Compensation Appeals* decision. Here, the Court reiterated the principles developed in the *P.E.I. Judges Reference* but, this time, further clarified the government’s duty of responsiveness, as well as the standard of rationality to be applied by courts in administratively reviewing these decisions.

The Court in *Provincial Judges Compensation Appeals* noted, once again, that the government was not bound by commission recommendations but held that, where the government chooses to depart from them, it must provide a complete response. Its response must be tailored to the recommendations themselves and must provide legitimate reasons for departing from or varying them. These reasons must rely upon a reasonable factual foundation. Finally, courts should examine the government’s response to determine if the government had participated meaningfully with the commission process.

So long as these criteria were met, the Court held that the standard of review of rationality would require the reviewing court to uphold the government’s decision. This limited scope of administrative review is closely akin to my vision of how a

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40 *Provincial Court Judges Compensation Appeals*, supra note 8 at para. 24.
The reviewing court is not asked to determine the adequacy of judicial remuneration. Instead, it must focus on the government’s response and on whether the purpose of the commission process has been achieved. This is a deferential review which acknowledges both the government’s unique position and accumulated expertise and its constitutional responsibility for management of the province’s financial affairs.42

The Court looked back to its decision in the Anti-Inflation Reference as a model for the deferential attitude courts must take in reviewing government compensation decisions. In the Anti-Inflation Reference, Laskin C.J. had explained it thus:

In considering such material [i.e., the factual foundation on which the government relied in deciding to depart from compensation commission recommendations] and assessing its weight, the Court does not look at it in terms of whether it provides proof … as a matter of fact. The matter concerns social and economic policy and hence governmental and legislative judgment… the extrinsic material need go only so far as to persuade the Court that there is a rational basis for the legislation [i.e. compensation decision]…43

In this way, the Court in Provincial Judges Compensation Appeals attempted to further elucidate the limited role appropriate for courts in reviewing this particular type of social policy decision. Although the Court explained its goal in terms of assessing the government’s responsiveness to commission recommendations, I suggest that responsiveness is another means of measuring government accountability in the social policy-making context. Whether the court’s inquiry is described as responsiveness or accountability, the key to achieving legitimacy through administrative review without intruding into the government’s monopoly over substantive social policy, is for the court to focus on the process through which the decision was reached. The rationality standard of review ensures that the court’s role is meaningful but that the compensation decision ultimately remains with the executive branch of government.

42 Ibid.
The Court in *Provincial Judges Compensation Appeals* also cautioned that, in those cases where the rationality standard was not met and the process did not meet the constitutional guarantee of judicial independence, the reviewing court would be circumscribed in granting a remedy. Generally, the court should refer the matter back to either the government or the commission.

Unfortunately, even the Court’s clarifications in the 2005 *Provincial Judges Compensation Appeals* has not been uniformly successful in staving off litigation over judges’ salaries. In Ontario, the application of these principles to deputy judges of the Ontario Small Claims Court continued to be contentious even after a 2006 decision of the Ontario Court of Appeal addressed the matter.\(^4^4\) In some provinces, continuing disputes and increasing acrimony between governments and judges’ associations have led courts to impose more intrusive remedies in an effort to control the situation. For example, in Québec, egregious delays in setting judicial salaries caused the Court of Appeal to order the government to table a response to commission recommendations within a limited time frame, failing which the government would be obliged to implement the recommendations.\(^4^5\) In New Brunswick, the Court of Appeal recently held that the government failed to meet the standard of rationality in its response to commission recommendations and, instead of referring the matter back to the government to reconsider the matter, the Court ordered that the government implement the recommendations.\(^4^6\)

In my view, these orders by the Québec and New Brunswick courts were understandable as attempts to bring some finality to the ongoing disputes and increasing bitterness generated by the judges’ salaries issue in their respective provinces.

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\(^4^4\) In *Ontario Deputy Judges Association v. Ontario* (2006), 80 O.R.(3d) 481 (C.A.), the Court held that judicial independence required the government to establish an independent commission to review deputy judges’ salaries just as was necessary in the case of superior court and provincial court judges. Even after the commission was established, the Ontario government’s response to its recommendations was challenged by the Ontario Deputy Judges Association. In *Ontario Deputy Judges Association v. Ontario* 2009 canlii 34994, the Divisional Court dismissed the application, holding that the government response was sufficient on a standard of rationality.

\(^4^5\) Québec (Procureur général) c. Conférence des juges du Québec, 2007 QCCA 1250.

\(^4^6\) *Provincial Court Judges Ass’n v. New Brunswick*, 2009 NBCA 56.
Nevertheless, the orders did have the practical effect of imposing on the parties a particular salary package, thereby taking this ultimate choice out of government hands. This arguably resulted in some slippage from procedural review into substantive review. Although such remedial orders must be carefully controlled in the social policy sphere, they may occasionally be necessary in order to prevent a recalcitrant government from defying more deferential judicial orders.

There is no doubt that the continuing litigation over judges’ salaries raises the concern that governments and courts might have similar problems adapting to a new role reviewing policy-making on grounds of accountability. In my view, this litigation is best viewed as unavoidable growing pains that will eventually subside as courts better define their role.

The duty of governments to consult aboriginal peoples and the duty to implement commission processes to set judges’ salaries are both judicial review doctrines created by the Supreme Court to impose procedural legitimacy on specific areas of executive policy-making. As such, they each exemplify the constitutional and institutional competence of courts to develop means of supervising social policy processes generally. This is so whatever procedural standard is adopted in assessing the legitimacy of the process. In *Haida Nation*, the standard chosen by the Court was the sufficiency of consultation. In *P.E.I. Judges Reference*, the standard chosen was the degree of government responsiveness. My proposed administrative review doctrine would assess executive social policy-making on the basis of accountability – an equally manageable procedural measure and one which arguably encompasses the former two. There is no reason to doubt that courts would be capable of developing my proposed doctrine just as is taking place in other policy arenas. Most importantly, there is no reason to doubt that courts would be able to do so without degenerating into substantive policy review.

I offer the *Haida Nation* and *P.E.I. Judges’ Reference* decisions as illustrations of the potential for courts to develop a new administrative review doctrine based on a formal concept of accountability without degenerating into substantive review of social policy-making. But examining the issue from the other side of the coin, what about those
decisions which may suggest the opposite – i.e., that courts have been unsuccessful in restricting themselves to a purely procedural role in administrative review but, rather, have been guilty of imposing their own substantive values on policies better left to the political branches of government? Here, it is worthwhile to consider the Court’s decision in Chaoulli which has been cited as an example of the challenge involved in restricting administrative review to a supervisory rather than substantive exercise.47

Chaoulli was a constitutional challenge to Québec legislation that prohibited private health care insurance for services available under Québec’s public health care plan. The Court held that this prohibition, combined with the lengthy wait lists endemic in the public system, violated the individual right to personal inviolability under the Québec Charter. This violation was not justified by the need to maintain the integrity of the public system. As is the case under s.1 of the Canadian Charter, justification under the the Québec Charter required the Court to balance the government’s objective of preserving the public health care plan against the resulting violation to individual rights. A crucial question for the Court was whether the means chosen by the government to achieve its object (limiting the availability of private health care in the province) minimally impaired the rights in issue. In other words, was the continued vitality of the public program really dependent on the prohibition of private health care insurance? In considering this issue, the Court delved into various studies and expert reports on the likely impact of allowing Québécois to access private health care services in the province, as well as comparisons with the health care programs of other provinces and other OECD countries. In other words, the Court was engaged in scrutinizing some fundamental choices in Québec’s social policy planning.

The Court considered and rejected the argument that the court should be deferential to the legislature in examining this kind of social policy issue. Deschamps J. reasoned: “The courts have a duty to rise above political debate. They leave it to the legislatures to

develop social policy. But when such social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them.”

The issue here is whether the Court’s willingness to delve into the substantive social values at play in Chaouilli raises doubts generally about the institutional competence of courts to restrict their scrutiny to a formal accountability analysis. My response is that this analysis in Chaouilli simply highlights the distinct role of constitutional review versus administrative review. Judicial deference in a constitutional context involves a very different, and more complex, balancing act between the relative roles of legislatures and courts in upholding the constitution. In the Charter context, the accountability standards to be enforced by the courts are set in stone – they are the values entrenched in the Charter itself. The role of courts is to assess the evidence in relation to these substantive social values. As Deschamps J. stated in Chaouilli, “a court must show deference where the evidence establishes that the government has assigned proper weight to each of the competing interests.” The key word in this quote is “proper” – in constitutional review, the courts are tasked with applying legal principles to substantively assess what is proper in the circumstances given the constitutional values at stake.

In contrast, administrative review on grounds of accountability would not involve courts in this substantive balancing exercise. The “proper” weighting of competing social interests would be left for the legislature and/or the executive to define. The role of courts would be to ascertain whether this balancing exercise had taken place in accountable circumstances. In Chaouilli, for example, the Court cited a list of government commissions on the crisis in the public health care system as evidence that it had the necessary tools to evaluate the government’s measure so that deference was not indicated. On an accountability analysis, this same evidence would have the opposite effect. The existence of these commissions would be preliminary evidence, at least, that the Québec government had turned its mind to the trade-offs necessary in this

48 Chaouilli, ibid. at para. 89.
49 Ibid. at para. 95.
50 Ibid. at para. 96.
particular social program and, therefore, that accountability was being achieved. It would not be for the courts to assess the success or failure of the program in relation to independent legal values.

**An Avalanche of Administrative Review Applications?**

A third preliminary objection to a new administrative review doctrine for social policy decisions might be that it would lead to an avalanche of judicial review applications straining the resources of our court system. In my view, this is no more of a concern than it was in connection with the introduction of the Charter. It is equally possible that provincial governments would be motivated to undertake a general review of the accountability of their social programs in order to prevent possible court applications. In his book *Governing with the Charter*, James Kelly observes that this is exactly what happened when the Charter was introduced. The political executive acted proactively to integrate Charter values into the development of legislation and the policy-making process.51

Kelly’s point is echoed by Lori Sterling, former Assistant Deputy Attorney General, Legal Services Division for the Ontario Attorney General.52 Sterling argues that the main impact of the Charter is felt in the process leading up to legislation or, for our purposes, executive social policy-making. According to Sterling:

> The Charter is considered by: political parties who come to power on platforms that include rights-empowering policies; government lawyers and policy-makers who develop policy options and assess the constitutional risk associated with each option; by the Attorney General, in his or her capacity as Chief Law Officer of the Crown, in providing constitutional advice to Cabinet; and during the legislative process, where debates and motions on constitutional issues take place that can lead to amendments to proposed legislation.53

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53 Ibid. at 140.
My proposal would require that attention to accountability also take place at each of these stages in the policy-making process. In a constitutional democracy, this is surely not too rigorous a requirement to ask of our governing officials.

The Supreme Court has similarly suggested that a concern for procedural legitimacy may be incorporated within the policy-making process. In *Haida Nation* the Court encouraged the executive to take a proactive role in designing consultation procedures for policy-making affecting aboriginal interests in order to avoid judicial review applications. *Taku River* provides a solid legislative example of a government doing just that. The result is to minimize rather than exacerbate court applications:

In effect, the Court has provided guidance to the Crown on how to achieve both greater judicial deference and political legitimacy in the future. From the Court’s perspective, the Crown should realize that a key benefit of creating proper procedures will be a decrease in groups seeking recourse through the legal system, and an increase in judicial deference toward these practices if matters do go to court.54

It might be argued that this theory is countered by the ongoing litigation over judges’ salaries in spite of the two Supreme Court decisions designed to remove the matter from the courts. But I suggest that these are early days yet in the judicial supervision of salary commission processes. The Court pointed out in *Provincial Judges Compensation Appeals* that the commission process works well in several provinces. In provinces such as Québec and New Brunswick where litigation continues, courts are gradually fleshing out the detailed principles necessary to give effect to the overarching vision articulated in the two Supreme Court decisions. This is the way of the common law. As these principles are further developed, it is hopeful that they will begin to be internalized by governments, judges’ associations, and lower courts and this early spate of litigation will eventually tail off.

54 Liston, *Honest Counsel*, supra note 9 at 150.
The Inherent Limitations of Procedural Administrative Remedies

A fourth possible objection to my proposed expansion to administrative review jurisdiction is its failure to address substantive unfairness in policy-making. A doctrine of administrative review for accountability would share the inherent limitations of all administrative law doctrines aimed at the process of decision-making rather than the outcome of decisions. The duty of procedural fairness, for instance, does little to achieve what many argue to be the ultimate goal in a rule of law society - substantively fair decisions. To the contrary, a focus on procedural fairness may actually undermine substantive fairness. Lorne Sossin has pointed out the likelihood that the reasons requirement developed by the Supreme Court in Baker may have the perverse effect of encouraging policy-makers to develop “pat” formulistic reasons that are superficially acceptable in the event of administrative review but mask the real, and possibly illegitimate, motives for the decision.\(^55\) This same criticism may be advanced against a doctrine designed to promote accountability in executive social policy-making. Judicial attention to accountability practices may not eradicate unaccountable policy-making but, rather, may simply drive unaccountable practices underground.

In her manuscript, Honest Counsel, Mary Liston counters this critique and argues that courts are not satisfied with insincere attempts by decision-makers to meet procedural fairness requirements.\(^56\) For example, she argues that the reasons requirement developed in Baker has been interpreted by courts to require meaningful and adequate reasons.\(^57\) Just as courts are currently engaged in interpreting the reasons requirement so that it is meaningful, so too they may be expected to develop ways of ensuring that accountability practices exist in reality and not just in name. In any event, although the enforcement of accountability within the executive branch of government


\(^{56}\) Liston, Honest Counsel, supra note 9.

\(^{57}\) Ibid. at 204-210. Also see Clifford v. Ontario Municipal Employees Retirement System, 2009 ONCA 670; leave to appeal refused 2010 SCCA [Clifford].
cannot guarantee substantive social justice, I suggest that it is certainly a useful contribution towards that goal.\textsuperscript{58}

The criticism that a procedural focus to administrative review jurisdiction permits substantive injustice to persist in law has been illustrated by reference to the decision in \textit{Newfoundland (Treasury Board) v. N.A.P.E.}\textsuperscript{59} \textit{N.A.P.E.} involved systemic gender discrimination by the Newfoundland government in the form of collective agreements paying female workers less than was paid to male workers for work of equal value. It was clear on the facts that the government’s long-standing practice was discriminatory and violated s.15 of the \textit{Charter}. Therefore, the only real issue for the Court was whether provincial legislation entrenching this practice was justifiable under s.1 of the \textit{Charter} on the basis that it was a necessary response to the province’s budgetary deficit. At the heart of the issue was the extent to which courts should defer to government’s economic priorities in the face of clearly unconstitutional conduct. In this sense, \textit{N.A.P.E.} is an illustration of the unjust law scenario that I discussed in Chapter 3. The question that preoccupies public law scholars is: how can the rule of law function meaningfully in protecting individual rights in our constitutional state if it is vulnerable to being overridden at the whim of the political branches of government?

In \textit{N.A.P.E.}, this question was engaged on both substantive and procedural levels. At the substantive level, the issue was how much deference should be accorded to the government’s decision to prioritize the province’s credit rating over its commitment to pay equity. At the procedural level, the issue was how much deference should be accorded to the relatively sparse evidence introduced by the government to support its contention that the budgetary crisis was significant enough to justify reneging on its commitment to pay equity.

Binnie J., writing for a unanimous court, held that significant deference was appropriate on both substantive and procedural levels. At the evidentiary level, Binnie

\textsuperscript{58} Liston (\textit{ibid.} at 213) quotes from Schauer, “Giving Reasons” (1995) 47 Stanford L.R. 633 at 657: “...when institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisions makers to give reasons may counteract some of these tendencies.”

\textsuperscript{59} \textit{Newfoundland (Treasury Board) v. N.A.P.E.}, [2004] 3 S.C.R. 381 [\textit{N.A.P.E.}].
J. was willing to take judicial notice of a Hansard excerpt in which the Minister of Finance and the President of the Treasury Board described the serious nature of the budget crisis to the House of Assembly. Binnie J. reasoned: “What transpires in the budgetary process, of course, lies at the high end of Cabinet confidences, and here there was no need to precipitate a confrontation between the courts and government.”

At the substantive level, Binnie J. acknowledged that, in spite of the importance of the Charter, “[a]t some point, a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures taken have an adverse effect on a Charter right...” In other words, in some instances of what the Court referred to as the “dollars versus rights” controversy, dollars will come out on top.

N.A.P.E. involved constitutional review which, as I explained in Chapter 3, addresses different values than the formal accountability concerns underlying administrative review. This distinction removes N.A.P.E. from the class of cases with which I am concerned in this thesis. I do not purport to comment one way or another on the appropriate balance of power between courts and legislature in upholding the Charter. However, it is possible to comment on the decision in N.A.P.E. from the perspective of the accountability concerns at play in that case. The same question arises: how do I respond to a result that so clearly undermines the role of courts in protecting the rule of law?

From an accountability perspective, and leaving the constitutional issue aside, the Court in N.A.P.E. was entirely correct to defer to the sufficiency of the government’s proffered evidence in this case. And there is no issue as to the degree of deference appropriate at the substantive stage of the Court’s analysis since, on an accountability analysis, the substantive issue should not arise at all. The crucial fact is that N.A.P.E. involved decision-making in democratically accountable circumstances. N.A.P.E. did not involve the problem of executive social policy-making at all. As revealed by the

60 Ibid. at para. 57.
61 Ibid. at para. 64.
Hansard excerpt, the policy choices made by the executive were presented to the democratically elected House of Assembly. The House accepted these choices and decided to give them legislative form. This legislative process is the ultimate primary accountability mechanism and one that eradicates the need for courts to act as an accountability mechanism of last resort.

The result in N.A.P.E. may be considered unjust by some groups of society but other groups would presumably disagree. This is the complexity of the public interest. Binnie J. made the point in N.A.P.E. that, although financial considerations alone would rarely justify the violation of Charter rights, financial considerations “wrapped up with other public policy considerations” might well do so.62 In the same vein, he made the following statement:

The government in 1991 was not just debating rights versus dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare.63

Although this statement is more controversial in a Charter context, this is exactly the philosophy underlying my own concern to prevent courts from addressing substantive policy choices in administrative law. In the realm of social policy, financial restraint is never an end in itself. It is only necessary in order that government may achieve a wide range of other collective goals. The concern is to prevent individual interests asserted in the rarified environment of a judicial proceeding from being over-emphasized at the expense of these other unarticulated social goals. The very reason for maintaining the doctrine of parliamentary supremacy in administrative law is that the legislature is best placed to balance the collectivity of interests at play within society as a whole.

What if the Newfoundland government’s decision in N.A.P.E. had not been legislated but had been implemented at the Cabinet level? Of course, in that case, the

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62 Ibid. at paras. 69, 72.
63 Ibid. at para. 75. Also see para. 93: “The women hospital works were a disadvantaged group, but in reality were the medical patients who lost access to 360 beds, students of school boards whose transfers were frozen, and those who relied on other government programs that were reduced or eliminated (although it is true that in their case Charter rights were not implicated). As was pointed out in the House, ‘there was enough misery to go around’.”
government would have been subject to a claim for breach of its contractual obligations. But, here, an administrative law claim based on accountability might also be appropriate and the rationale for deference to government in leading evidence of accountability in its policy-making process would be much reduced. In such a scenario, the court might require strongly probative evidence that the executive gave meaningful attention to the budgetary implications of breaching its pay equity obligations. Relevant to this analysis would be evidence that the government had consulted with unions in an attempt to find less drastic means of addressing the financial crisis. However, again, in this scenario, the courts would not be competent to address the substance of the government’s decision, i.e., the relative value or weighting of fiscal constraints versus pay equity.

The Legitimacy of Unelected Judges Purporting to Evaluate the Policy Process

A fifth objection to my proposed doctrine of administrative review for accountability is one which I have attempted to address throughout this thesis. But it is worth reiterating here. This is the familiar complaint about unelected judges tinkering with social policy. Courts are not constitutionally competent to interfere with social policy and they certainly are not institutionally equipped to do so.

This same complaint has been leveled against Charter review, a point which I addressed in Chapter 4. But, since 1982, courts have adapted to their Charter review role. Both s.1 jurisprudence and Charter remedies have been designed to minimize the judicial impact on social policy-making to that absolutely necessary in the protection of individual rights and freedoms. Nevertheless, under the Charter, courts are given power to second-guess legislatures in certain circumstances. My proposal is not nearly as controversial.

My proposal would not give courts more power vis à vis the legislature. Instead it would have the opposite effect. It would use courts to strengthen the link between

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64 Ibid. at para. 91-92.

government and the electorate. In this sense, it would be protective of the legislature – courts would simply be acting as another mechanism to ensure that executive action is accountable. And this is really what administrative law ought to be about. Judicial supervision of executive accountability practices, like other forms of procedural review, would approach the relationship between the courts and the administrative state as a “co-operative one based on mutual or reciprocal recognition”, rather than a “‘policing one’ based on mutual suspicion, distrust and antagonism”.66

Ultimately, our constitution is based on a system of checks and balances. In her book Honest Counsel, Mary Liston argues that the constitutional relationship between the legislature and courts may be viewed as an institutional dialogue with neither party exercising supreme power. Liston notes the “simple structural and reciprocal need for an ‘external other’ in order to best ensure accountability”.67 She argues that the legislature and the courts each fulfill this role for one another. I agree. Fine-tuning the balance of power among the different branches of government is continually necessary in a constitutional democracy. My proposal is a relatively modest attempt to do so in order to bring much needed accountability to executive social-policy making.


Having laid out a blended concept of accountability as applied to executive social policy-making, and proposed a new doctrine of administrative review for accountability, we may now turn back to the case study of Ontario’s autism programs in Chapter 1, to consider how administrative review for accountability might be carried out in a particular policy context.68

We learned in Chapter 1 that the autism programs, the IEIP and SEP, came to the attention of the Ontario courts through the vehicle of a s.15 Charter challenge. And yet,

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66 Liston, Honest Counsel, supra note 9 at 215.
67 Ibid. at 62.
reading Kiteley J.’s decision at trial, it seems clear that her reasoning process was influenced as much by the accountability gaps evident in the design and development of these programs as by evidence of age discrimination resulting from their implementation. On appeal, the Ontario Court of Appeal was correct to restructure the issue as a conventional equality rights analysis, and the Court’s eventual dismissal of the challenge was undeniably the right result in Charter law. The Court of Appeal summed up the important distinction between these two approaches to the case early on in its reasons:

...Indeed, even at the discrimination stage, the [correct Charter] assessment focuses on the impact of the differential treatment on the human dignity of the claimants rather than whether the government actors had good reason to do what they did.69

Although the Court of Appeal held that the evidence did not result in harmful impact to the claimants’ human dignity, it seems clear from Kiteley J.’s reasons at trial that it did reveal an egregious, albeit well-intentioned, lack of accountability on the part of the government. And yet, under the Charter, there is no recourse for addressing this concern.70

Consider, instead, if a claim for administrative review on grounds of accountability had been available to the plaintiffs.71 No longer would the court’s inquiry center on the particular impact that the IEIP had on individual claimants and the net social benefit achieved by the program as a result. Nor would substantive evidence about the suffering of individual claimants and the policy trade-offs made by the government in structuring the IEIP be relevant to such a claim. There would be no need for the court to weigh complicated financial evidence about the relative size and depth of the government’s treasury. Instead, the legal issue would shift from the constitutional validity of the government’s policy decision to impose an age cut-off on eligibility under the IEIP, to the accountability of the process by which the program was designed and

69 Wynberg, (Ont.C.A.), ibid. at para. 44.
70 The lack of accountability of the IEIP and SEP is described in detail in Chapter 1.
71 This is not to suggest that the Charter claim was not perfectly appropriate. It might have proceeded alongside a claim for administrative review for accountability.
implemented. At issue would be whether a primary accountability forum had examined the matter of government’s compliance with its own policy guidelines and internal expectations surrounding the IEIP; *i.e.*, the extent to which the government had been asked to account for its conduct relative to the accountability standards *that it set for itself*. The inquiry would turn on evidence of the various accountability standards chosen by government to be appropriate for the purpose of evaluating the policy, as well as the extent to which these standards were actually applied by primary accountability forums in evaluating the policy. The inquiry would attempt to avoid a judicial reassessment of the government’s performance by deferring to the conclusions drawn by primary accountability forums.

The threshold question in an administrative review proceeding for accountability would be whether the basic elements of accountability existed in relation to the policy or program in issue. These basic elements were introduced in Chapter 2:

- a primary accountability forum with delegated legislative authority to require information and seek explanations and justifications from public servants about the policy or program;
- a corresponding obligation on the part of the public servant to provide information and explain and justify the policy or program;
- the definition of standards in accordance with legislative intent by which the policy or program may be justified by the public servant and evaluated by the accountability forum;
- evaluation by the accountability forum in relation to these standards; and
- the possibility of consequences.

By choosing to govern through policy rather than law (*i.e.* regulations having legal effect and a greater degree of legislative accountability), the government would undertake the initial onus of demonstrating accountability.

Assuming that each of these threshold elements existed so that at least one primary accountability mechanism was in place for the supervision of the policy or program, the court would then consider whether accountability had been achieved by reviewing the
conclusions reach by the primary accountability forum on a deferential standard of reasonableness. At this point, the court would be required to exercise care to refrain from re-evaluating the government’s performance anew. Its focus would be on the institutional legitimacy of the primary accountability mechanism and the extent to which evaluation against accountability standards had taken place, rather than on the substance of that evaluation. Just as in any administrative review proceeding, the court would defer to the primary accountability forum by accepting its evaluation of government and determining, instead, whether that evaluation had resulted in the two programs being accountable. Evidence that accountability standards were actively ignored by government or undermined would tend to indicate that the programs were not accountable. Again, the issue would not be the outcome or success of these standards in any absolute sense, but whether or not the institutional mechanisms existed, either internally within the executive or externally, to hold the government accountable for them.

A number of variables might be in play at this stage of the court’s analysis. One variable would be the institutional legitimacy of the primary accountability forum that had engaged in the evaluation. As we learned in Chapter 2, a legislative accountability forum operating independently of the executive, such as an auditor-general for example, has more democratic purchase and is, therefore, relatively more legitimate than are internal executive accountability forums.

A second variable might be the extent to which the evaluation of the policy or program was directed at the particular accountability standards governing the policy, the relative engagement of the primary forum in evaluating the policy against these standards, and the relative strength of the eventual conclusions.

A third variable might be the nature and relative precision of the accountability standards chosen by the executive to govern the policy. Because social policy is so difficult to evaluate, outcome-driven accountability standards are often written in
ambiguous and vague terms. Therefore, accountability standards intended to be binding on government are frequently procedural in nature. The reviewing court would focus on these standards in accordance with the procedural nature of its accountability function.

A fourth variable might be the outcome of the evaluation. A finding by the primary accountability forum that the program or policy had met the applicable accountability standards would tend to result in a judicial determination of accountability. An ideal situation would be where a program or policy had been subjected to meaningful evaluation by an established legislative office operating independently of the executive, and that office had determined that the government had successfully met the governing accountability standards.

Conversely, a finding by the primary accountability forum that the program or policy had failed to meet the applicable accountability standards would more likely result in a judicial determination that the program was not accountable, subject again to the reasonableness of this finding.

A fifth variable to be considered by the court might be the possibility of consequences accompanying a negative evaluation. Clearly, accountability cannot result where a primary accountability mechanism does not have the authority or motivation to impose consequences in the event that policy-makers fail to live up to their own accountability standards. Nor, at the other extreme, would it be feasible for harsh consequences to necessarily flow in every case where policy-makers fail to achieve these standards. We learned in Chapter 2 that the nature of social policy is ever-evolving and, for this reason, accountability often operates more as a learning tool than it does as a punitive measure. A court faced with evidence of a negative evaluation by a primary accountability forum would be required to consider to what extent sufficient accountability was, nonetheless, achieved as a result of some consequential behaviour flowing from the evaluation.

72 See Chapter 2 above.
73 See Chapter 2 above.
The above is merely an initial sketch of the kinds of factors that might be relevant to a court assessing accountability. The beauty of our common law system is that it evolves incrementally in response to new legal and social indicators. As has occurred with our Charter, the courts might be expected to gradually develop their expertise in accountability and social policy-making and to develop this new administrative review doctrine accordingly.

Having laid out the framework of an administrative review proceeding for accountability in relation to the IEIP and SEP, we may now return to the evidence in *Wynberg* and speculate as to how a court might approach the analysis in this case.

**Primary Accountability Forums Supervising the IEIP and SEP**

Starting with the first of the threshold elements of accountability, the existence of a primary accountability forum, it is clear from the trial judgment that both the IEIP and SEP were subject to several such forums in the course of their development and implementation. The key policy decisions resulting in the formulation of the IEIP were reviewed at different points in its development by: the Minister of MCSS; the Management Board of Cabinet; various inter-ministry and expert committees; and, ultimately, the Ontario Ombudsman, the Provincial Auditor, and the Legislature’s Standing Committee on Public Accounts. Similarly, the SEP was subject to various accountability forums including: an internal MEd unit responsible for developing province-wide program standards; inter-ministry committees; and, again, the Provincial Auditor and the Standing Committee on Public Accounts. Therefore, there were sufficient opportunities in the development of the IEIP and SEP for the key policy decisions making up these programs to be evaluated both by internal executive accountability forums and, most importantly, by external legislative accountability forums.

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74 This history is discussed in Chapter 1 above.
75 See Chapter 1 above.
Accountability Standards Governing the IEIP and SEP

We learned in Chapter 2 that accountability cannot be effective except in relation to particular agreed-upon accountability standards. Neither the IEIP nor the SEP was subject to accountability standards having legal status. The ministries’ enabling legislation granted the government extremely wide discretion to develop programs in the best interests of children.76 Nor were there any accountability standards having regulatory status since the government chose not to constrain its discretion by subjecting itself to regulations.77

Government must be discouraged from maintaining an informal, oral culture in social policy ministries in order to avoid being held accountable against clear legislative or regulatory standards. Administrative review for accountability would achieve this. The failure to structure broad grants of discretion for executive social policy-making, either through legislation or regulation, would factor against government since it would be indicative of a lack of accountability. This tendency would be the opposite of current administrative law doctrine in which unstructured grants of discretion are interpreted as a “judicial hands-off” signal, thereby providing government with an iron-clad strategy for avoiding scrutiny of its policy-making process.

This would not be the end of the inquiry however. There are many good reasons that government may wish social programs to remain highly discretionary and unstructured. Therefore, it would be imperative that courts consider, not only legal standards contained in legislation or regulations, but also extra-legal accountability standards created by government for the evaluation of these programs. In the case of the IEIP, several such standards existed. First and foremost, the ministry, MCSS, issued detailed Guidelines governing the IEIP. These written Guidelines would prima facie be accountability standards. However, the courts’ decision about what amounts to

76 Child and Family Services Act, R.S.O. 1990, ch.C.11, ss. 1, 7; Education Act, R.S.O. 1990, c.E.2, ss. 8(3).
77 Without more, these facts would strongly suggest a lack of meaningful accountability standards which, in turn, might suggest that both programs were unaccountable. However, I do not suggest that it would be appropriate for the court to adopt a segmented approach to the analysis and draw a rebuttable presumption at this stage. Given the importance of flexibility in social policy-making, it would be preferable for the court to apply a big-picture, contextual analysis of the accountability standards in play.
accountability standards would not be so formalistic. For example, policy-makers might attempt to shield themselves from the possibility of administrative review for accountability by drafting vague or self-serving guidelines. By setting very low expectations for themselves, good performance, and, ultimately, positive evaluations by primary accountability forums would be assured. But the courts would not be restricted to accepting at face-value vague accountability standards drafted for this purpose. On the contrary, vague standards would be highly suggestive of a lack of accountability having been achieved. Courts would also be entitled to look below the surface to consider whether other, informal accountability standards might exist for the program. Again, however, the scope of the courts’ examination would be restricted to the existence of meaningful accountability standards rather than their content.

In Wynberg, for example, in addition to the formal Guidelines issued for the IEIP, a key assumption underlying the government’s decision to impose the six year age cut off was the assumption that children with autism aged two to five years old would respond best to IBI treatment. In an administrative review proceeding on grounds of accountability, one issue might be whether this assumption also became an accountability standard in relation to which government accepted that its conduct could be evaluated by primary accountability forums. In other words, did the policy-makers undertake that this assumption would be borne out as the program unfolded? On the evidence, this seems unlikely. The Court of Appeal reviewed evidence that there was “only modest research” about the efficacy of IBI treatment for school-aged children with autism:

The most that could be said is that the available research did not indicate that it is not effective for this older group. The clinical experience, however, was that it

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78 An example was relayed to me by a quality assurance manager working in child welfare services. Dr. Deborah Goodman sits on an expert committee tasked with creating outcome expectations for child welfare programs. The difficulty of reaching a consensus has resulted in standards so vague as to be practically nonsensical. One standard is articulated as “attainment of adulthood”. We agreed between us that a child might receive no services at all and, yet, still attain this goal.

79 The logical analogy here is to the courts’ developing role in examining whether meaningful reasons exist for an administrative decision: see Clifford, supra note 57.

80 Wynberg (Ont. C.A.), supra note 68 at para. 29.
continues to be effective, albeit perhaps with less pronounced effect than for the younger age group.\textsuperscript{81}

With the evidence unclear on whether the two to five year age group was properly singled out as the appropriate target group for the IEIP, it seems unlikely that the policy-makers expected to be held accountable for this assumption. Instead, it seems more plausible that this was an area of uncertainty where the policy-makers were making best efforts but not expecting to be held to account on this basis. Such areas of uncertainty, unavoidable in any social policy arena, are the very reason that social policy-making must be subject to meaningful evaluation and incremental modification throughout the process. Here, then, is an example of accountability as a learning tool. The uncertainty surrounding the optimal target group for the IEIP means that it was not likely a standard against which the policy-makers expected their performance to be evaluated. However, this very uncertainty did likely contribute to the policy decision to make the IEIP subject to an internal review process. I suggest, below, that this latter policy decision did amount to an accountability standard against which the policy-makers expected to be evaluated.

The next logical question for the court in an administrative review proceeding would be what provisions of the Guidelines amounted to accountability standards? Much of the language in the Guidelines is clearly aspirational in tone: “Young children with autism in Ontario will be diagnosed as early as possible and given appropriate high quality services they need to function more effectively and lead richer lives.”\textsuperscript{82} This language indicates a broad government objective rather than a standard against which the policy-makers expected that their performance would be evaluated. Applying basic interpretive principles grounded in legislative intent, the court would recognize that such provisions do not qualify as accountability standards for the purpose of its task.

Other substantive provisions of the Guidelines might or might not amount to accountability standards. However, there would be no need for the court to dwell on

\textsuperscript{81} Ibid. at para. 33.

\textsuperscript{82} Wynberg, supra note 68 at para.179.
each and every policy provision pertaining to the IEIP and SEP. Regardless of whether or not any of the other substantive provisions in the Guidelines amounted to accountability standards, there are two process-oriented goals articulated in the Guidelines which, I suggest, would clearly constitute accountability standards against which the policy-makers expected to be evaluated.

First was the intention that MCSS and MEd would coordinate their planning and policy activities in order that clients might transition smoothly from services provided by the former to those provided by the latter. The policy-makers could not be expected to guarantee the outcome of this goal, i.e. that a smooth transition would always take place, but I suggest that they did undertake to cooperate to put into place the procedures necessary to make this goal achievable. Second was the clear intention that monitoring and evaluation of the IEIP and SEP would take place in order that these programs could be modified and adapted as necessary.

A review of the evidence contained in the trial judgment in *Wynberg* demonstrates that these two goals were treated by policy-makers as accountability standards governing their conduct in developing and implementing the IEIP and SEP. I will review the evidence in relation to each goal in turn.

**Inter-ministry coordination between MCSS and MEd**

The Program Guidelines issued in 2000 provided that the regional programs under the IEIP would:

> …include careful planning and support to help the child function in or make the transition to other settings, such as integrated child care or school…

It was understood by policy-makers right from the beginning of the IEIP initiative that the six year age cut-off would necessitate careful transition planning for children exiting the IEIP. This would be achieved through cooperation with MEd which was responsible for autism-related services offered to school age children through the SEP.83 In fact, the trial judge in *Wynberg* made an explicit finding of fact that the age cut-off was

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chosen by policy-makers on the assumption that “at the mandatory school age of 6 the education system would appropriately respond to the needs of children”.

Evidence that this expectation became an accountability standard appears throughout the trial decision. As early as 1996, the parent of a child with autism was invited to speak at a meeting of the Interministry Committee on Services to Children and Youth. This is evidence that the government had already embarked on a policy of coordinating these services among ministries. Then, in 1997, the Office of Integrated Services for Children (OISC) was created with a mandate to undertake “integrated policy development and service delivery” in health and social services with “links” to education and recreation. In April, 1997, MCSS issued a document emphasizing the “need for co-ordination between ministries and accountability” in order to use resources more effectively and improve services. Next, in spring 1998, the government’s Early Years Study was commissioned with a mandate of developing the “whole child”, and highlighting the “paramount importance” of a “comprehensive model of seamless supports and early interventions”. In July, 1999, once the IEIP initiative had been approved by Cabinet, an Internal Task Group was created to formulate guidelines for the program. This Task Group included representatives from MCSS and MEd as well as from other ministries. The Task Group identified the concern that services provided through the IEIP would increase demand for similar services available to school-aged children. Therefore, the Task Group reiterated the importance of effective transition planning. A framework document approved by Cabinet in August, 1999 promised that “[l]inkages to the education system will be established to ensure a smooth transition to school programs”. The same document included the following undertaking:

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84 Ibid. at paras. 128(i); 216(a).
85 Ibid. at para. 53.
86 Ibid. at para. 60.
87 Ibid. at para. 62.
88 Ibid. at para. 63.
89 Ibid. at para. 135.
90 Ibid. at paras. 137-141.
91 Ibid. at para. 146.
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...Inter-ministry Coordination
The initiative will be coordinated by the Office for Integrated Services for Children, which works jointly with the ministries of Community and Social Services, Health and Long Term Care, Citizenship, Culture and Recreation and Education and Training, and the Children’s Secretariat.92

Thereafter, MCSS and MEd collaborated on an additional transition-to-school section to be added to the 2000 Guidelines.93 In May 2001, the task group responsible for implementation of the IEIP, the Clinical Directors’ Network, met to discuss the philosophical differences between the MCSS and MEd with respect to IBI treatment and the problems that this might cause for children transitioning to school. The group concluded the meeting with an undertaking to take several specific steps to better integrate services under the IEIP and SEP.94

The trial judge in Wynberg heard evidence that the Premier, himself, directed MCSS, MEd, and the Ministry of the Attorney General to collaborate on solutions to the transition to school problem, and concluded as a result that “it was obvious to the government that collaboration between the key Ministries was essential to address the issues”.95

It is important to emphasize that the intention to coordinate policy and services aimed at children was articulated by government itself for the purpose of governing its own conduct. This was not an artificial or ill-suited legal standard that might be imposed by a court far removed from the day-to-day realities of social policy-making. Rather, this standard was the basis upon which the IEIP received funding from Cabinet.

**Monitoring and Evaluation of the IEIP and SEP**

Monitoring and evaluation of the IEIP was, similarly, identified as a priority by policy-makers from the very beginning of program development.96 The IEIP initiative was first presented to the Minister and then to the Management Board of Cabinet as part of MCSS’s 1999-2000 business plan. Even at this preliminary stage, the initiative

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92 Ibid. at para. 146.
93 Ibid. at para. 176.
94 Ibid. at para. 214.
95 Ibid. at para. 256(c)(vi).
96 The trial judge found this as a fact in her reasons: ibid. at paras. 128(i), 516, 517.
contained provision for the establishment of an expert panel to ensure the success of the program and develop an evaluation and monitoring program. Monitoring and evaluation was then included in successive iterations of the program up to and including the 2000 Guidelines. The Guidelines provided for detailed monitoring and evaluation of the IEIP consistent with the earlier framework document that had contemplated as follows:

Regional agencies will be monitored and accountable through usual mechanisms... The regional agencies will provide standardized reports to MCSS regional offices on services including: children referred, disposition of referrals, individualized service planning, linkages to broader service system, children’s level of functioning at entry to and exit from program, services provided.

A province-wide evaluation of services will provide data on child outcomes (e.g. average age of diagnosis; number of children showing improvement; number of children successfully integrated into regular classrooms).

The overall evaluation design will be developed and implemented through a research consortium selected through a RFP process. The evaluation will include, but not be limited to:
- compilation of baseline data on children receiving services (e.g. age of diagnosis, functional levels at entry to program);
- collection of detailed information on direct service interventions, how services are provided (direct funding/center based) and linkages to broader service system;
- parent/guardian satisfaction surveys;
- follow up research on children at grade one entry including functional levels and information on school placements (regular classrooms with or without support or specialized class placements), service utilization (education, health, social services) and costs.

In the first full year of operation of the program (2000-01) an information/reporting system will be developed for all regional agencies to collect baseline data for monitoring purposes and to establish benchmarks against which the progress of the program can be measured.

The policy-makers confirmed their intention to be bound by this accountability standard in a June 2001 submission to Management Board in which they made an explicit promise that an external evaluation of the IEIP would take place within five

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97 Ibid. at para. 126.
98 Excerpts from the framework for the IEIP approved by Cabinet on August 17, 1999 quoted in Wynberg, ibid. at para. 146. Although the language of the monitoring and evaluation portion of the eventual IEIP Guidelines is not excerpted in the trial decision, Kiteley J. noted in her reasons that the Guidelines were consistent in this respect with the earlier framework document: ibid. at para. 176.
years. This promise was one of the representations on the basis of which Management Board approved the release of $20 million in funding for the program.  

A similar accountability standard provided for the mandatory monitoring and evaluation of SEPs. This standard was created by the MEd in September 2000 and set up a bi-yearly process by which the Ministry evaluated the SEPs of all school boards. Then, in 2002, MEd extended this commitment specifically in relation to autism services for children exiting the IEIP. In a Cabinet proposal, MEd undertook to release and pilot autism program standards in special education, although no undertaking was made to implement them.

There is no reason why the policy-makers would not have considered themselves accountable for this standard. It was presumably included in the initiative specifically because the other criteria for the program were experimental and subject to change. One policy-maker testified at trial that the “whole idea was to monitor the program so it could be modified depending on what the data showed”, particularly since Ontario was the first jurisdiction to undertake a large scale autism treatment program initiative. Therefore, the evidence suggests that monitoring and evaluation of both the IEIP and SEP was set as an accountability standard for the very reason that program outputs were not predictable and therefore could not be subject to meaningful evaluation.

There are several indications that each of these two process standards (inter-ministry coordination and monitoring/evaluation) was considered by the policy-makers to be an accountability standard against which their performance would be evaluated. First, the degree of detail devoted to these two goals in the Guidelines and preceding documents indicates that these were highly developed expectations for the program rather than aspirational goals. Second, these standards were procedural rather than substantive and, therefore, more easily evaluated. For example, the Guidelines provided that transition-to-school planning would take place, not that transitions would

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99 Ibid. at paras. 199, 203-206.  
100 Ibid. at para. 182.  
101 Ibid. at paras. 250, 253, 370.  
102 Ibid. at para. 147.
necessarily be successful. As discussed in Chapter 2, successful accountability standards for social policy-making tend to be procedural rather than outcome-oriented simply because of the imprecision and contestability of substantive policy goals. Third, these standards underlay the assumptions on which the IEIP was based from the very beginning of program development.

Therefore, its seems that the threshold test would be met in an accountability review proceeding, i.e., two meaningful accountability standards were, indeed, created by the executive in order that the IEIP and SEP might be held to account in relation to standards deemed appropriate by the executive for their purposes.

**Evaluation of the IEIP and SEP Against These Standards**

Once the threshold elements of accountability were found to exist in relation to the IEIP and SEP, the court’s focus would shift to a deferential review of the evaluation of the programs by the primary accountability forums. Here, the court’s analysis might proceed along the lines of the variables outlined above.

**Accountability in Relation to Inter-ministry Coordination**

Was the government held to account in relation to its own goal of coordinating the policy and planning between the MCSS and MEd? The evidence at trial in the *Wynberg* case indicates that it was not.

Several primary accountability mechanisms did evaluate the coordination efforts of the policy-makers and these forums were consistent in their conclusion that the policy-makers had failed to meet this standard. Thus, for example, Cabinet is said to have devoted a great deal of attention to the IEIP and transition to school issues in September and October 2002. However, the fact is that coordination between MCSS and MEd remained a problem such that, in October 2002, Cabinet recommended “partnership” between MCSS and MEd in order to develop “improved transition services”.103 In fact, Kiteley J. made an explicit finding of fact at trial that, as of October, 2002, “it was apparent to Cabinet that the education system was not appropriately responding to the

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special needs of children with autism...”. Kiteley J. also drew her own conclusion on the evidence that MEd officials, in particular, were “operating in a silo, without seeking the input of those involved in the IEIP”.105

This finding by Kiteley J. would not be legitimate in an administrative review proceeding for accountability. It would not be for the court to reassess the government’s efforts to meet the relevant accountability standards. A posture of deference would require that the court focus, instead, on the conclusions drawn by primary accountability forums. In this case, the relevant point would be that Cabinet, a primary, internal accountability forum, had concluded that coordination was not taking place. This conclusion was corroborated by the findings of the external primary accountability forums. The court’s role would be to assess whether or not this conclusion was reasonable.

Therefore, the primary accountability forums found that the government had failed to meet its own coordination standard. And yet, again, these negative evaluations would not necessarily lead the court to conclude that the programs lacked accountability. However, another attribute of accountability seems to be missing in this case. So far as we are aware, no consequences followed as a result of these negative evaluations (that is, other than the consequences attributable to the eventual court challenge). Of course, in an action oriented around the issue of accountability, the government would be free to lead evidence establishing that consequences resulted from any demonstrable lack of accountability. Again, the court would defer to any such evidence of consequences.

**Accountability in Relation to Monitoring and Evaluation**

Cabinet’s review of the IEIP and SEP in the Fall of 2002 does not appear to have focused in any detail on whether progress had been made in respect of monitoring and evaluating the programs. Kiteley J. held that, as of this date, “none of the essential aspects of the program had been monitored or evaluated” and “[t]he focus on service

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104 Ibid. at para. 256(c).
105 Ibid. at para. 256(d).
delivery in a vacuum of monitoring and evaluation was no longer justified."\(^{106}\) Again, however, the court on accountability review would be tasked with reviewing the conclusions of the primary accountability forums on this point rather than assessing the government’s performance directly.

External primary accountability forums did evaluate the government in relation to the monitoring/evaluation standard. In 2002, the Office of the Ombudsman began to investigate the IEIP and concluded, in part, that MCSS had failed to analyze information regarding the impact of service delays on children who “age out”.\(^{107}\) Then, in 2004, the Provincial Auditor released a report on the IEIP, concluding that “the Ministry does not yet have adequate oversight procedures in place...” and that “the Ministry must obtain significantly better information on: whether or not services are delivered; exactly what services are being delivered; what these services cost; and whether or not corrective action is needed and/or being taken”.\(^{108}\)

MCSS also retained an expert in connection with problems it was having in collecting data under the IEIP. The expert reported that “the very structures responsible for program monitoring, reporting and accountability have been bypassed.”\(^{109}\) In the absence of other, more authoritative primary accountability mechanisms, such as the Provincial Auditor in this case, an expert report might well be useful evidence considered by a court assessing accountability.

With respect to the monitoring and evaluation of the SEP, the Provincial Auditor evaluated the government’s performance under the SEP in 2001 and concluded that, there too, adequate monitoring and evaluation had failed to take place. The Provincial Auditor concluded in part:

\(^{106}\) Ibid. at para. 256(b)(v).
\(^{107}\) Ibid. at para. 518.
\(^{108}\) Ibid. at para. 519.
\(^{109}\) Ibid. at paras. 522-524. Here, the court noted evidence of an important accountability gap occurring within government. Just as the literature canvassed in Chapter 2 suggests, program evaluations may take place and reports prepared, but this does not guarantee that these documents will be reviewed either by policymakers or by members of the legislature.
Ministry and school boards do not have the information and processes to determine whether special education services are delivered effectively, efficiently, and in compliance with requirements.\(^{110}\)

This was not an isolated finding. The trial judge reviewed the Provincial Auditor reports and noted that “since at least 1993, the Provincial Auditor has consistently reported on and made recommendations about the lack of evaluation and accountability” of the SEP.\(^{111}\) The same criticism has been leveled by an expert committee involved in reforming the SEP.\(^{112}\)

A court engaged in accountability review would view these findings by the Provincial Auditor as strong evidence of a lack of accountability of both the IEIP and SEP. This evidence would be all the more compelling coming from the Provincial Auditor, a legislative officer external to government, rather than Cabinet or some other internal executive accountability forum. This finding would not be conclusive on its own. However, the further evidence that no consequences flowed from this finding, might be expected to result in a judicial determination that the SEP, at least, was unaccountable.

The evidence in \textit{Wynberg} indicated no consequences followed or would follow the government’s failure to monitor and evaluate the SEP. This is convincingly established by the evidence that MEd had, as early as 1994, been advised to implement monitoring and evaluation procedures but this had not taken place over the seven years that followed.\(^{113}\) In other words, no consequences had been imposed on MEd over the interim to ensure that its own accountability standard would be met.

After the 2001 Provincial Auditor’s Report was released, a MEd committee resolved to better collaborate with MCSS and to invest in special education research in order to improve accountability.\(^{114}\) But again, a 2003 evaluation by the Provincial Auditor concluded that the MEd had \textit{still} not put into place the processes necessary to determine


\(^{111}\) \textit{Ibid.} at para. 530.

\(^{112}\) \textit{Ibid.} at para. 532.

\(^{113}\) \textit{Ibid.} at para. 229.

\(^{114}\) \textit{Ibid.} at paras. 237-238.
whether special education services were being delivered effectively, efficiently, and in compliance of the requirements”. The policy-makers were still not achieving their monitoring/evaluation accountability standard.

An ongoing failure of policy-makers to meet their own accountability standards for the SEP over a period of nine years would provide strong evidence that no meaningful consequences existed. On this evidence, a court reviewing the accountability of the SEP would be justified in reaching the conclusion that the program was insufficiently accountable.

My hypothetical review of Ontario’s autism programs on grounds of accountability is necessarily rudimentary. The common law cannot be developed in a vacuum. It requires the incremental process of many cases winding their way through the courts; each providing a factual context that allows for the development of principles that are realistic and workable over time. Nevertheless, this analysis hopefully illustrates that a doctrine of administrative review for accountability would be feasible and, most importantly, would directly target the accountability gap in social policy-making in a way that is currently not possible in public law.

Conclusion to Chapter 5

In this final chapter, I have attempted to allay fears that my proposed doctrine of administrative review for accountability marks a radical departure from accepted administrative law doctrine. I have argued, instead, that it is better viewed as the next step in the natural evolution of administrative law. Furthermore, it is a step that might develop quite naturally and logically from the first principles that I have offered in preceding chapters. Rather than an illegitimate conferral of power on the judiciary, administrative review for accountability would be a welcome accountability mechanism of last resort for encouraging executive social policy-makers to remain true to their legislative mandate. Ideally, the doctrine would operate preventively; as an incentive for executive social policy-makers to instill accountability practices at every stage of the

115 Ibid. at para. 385.
policy-making process, while still allowing for the flexibility to design processes effectively and efficiently in accordance with substantive policy goals. The doctrine would also operate remedially, by bringing unaccountable social policy processes to the attention of the courts and, through the courts, ultimately to the legislature. Finally, the doctrine would provide courts with the means to promote accountability in social policy-making processes, without permitting judicial intrusion into substantive policy issues. In sum, administrative review for accountability would do no more (and no less) than fine-tune the balance of power among the three branches of government in response to the realities of governance in the twenty-first century.
Bibliography

Statutes

Public Service of Ontario Act, S.O. 2006, c.35.

Cases

Bell ExpressVu Ltd. Partnership v. Rex, 2002 SCC 42.
Canada (Combines Investigation Branch, Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748.
Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc., [2001] 2 S.C.R. 100.
Bibliography

Clifford v. Ontario Municipal Employees Retirement System, 2009 ONCA 670; leave to appeal refused 2010 SCCA.
Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans), [1997] 1 S.C.R. 12.
Cooper v. Board of Works (1863), 143 E.R. 414 (C.P.).
Ellis-Don Ltd. v. Ontario (Labour Relations Board), 2001 SCC 4.
Gray (Litigation Guardian of) v. Ontario (2006), 207 O.A.C. 165 (Div.Ct.).
Hodge v. Queen (1883), 9 App. Cas. 117.
Imperial Oil Ltd. v. Québec (Minister of the Environment), [2003] 2 S.C.R. 624.
Lévis (Ville) v. Côté, 2007 SCC 14.
Lundale v. Vigfusson, 2003 MBQB 278.
Mount Sinai Hospital Center v. Québec (Minister of Health and Social Services), [2001] 2 S.C.R. 281.

Newfoundland (Treasury Board) v. N.A.P.E., 2004 SCC 66.
Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), [2001] 2 S.C.R. 781.
Québec (Procureur général) c. Conférence des juges du Québec, 2007 QCCA 1250.
Bibliography

Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63.
Trinity Western University v. College of Teachers (British Columbia), 2001 SCC 31.

Government Documents

House of Lords, Select Committee on the Constitution, Relations Between the Executive, the Judiciary and Parliament (London: Stationary Office, 2007) (Paul Craig, Appendix 5).


Books and Articles


Aucoin, Peter & Mark D. Jarvis, Modernizing Government Accountability: A Framework for Reform (Canadian School of Public Service, 2005).


Macklem, Patrick, Social Rights in Canada, University of Toronto Legal Studies Series, March 2006.


Mashaw, Jerry L., “Structuring a ‘Dense Complexity’: Accountability and the Project of Administrative Law”, [2005] Issues in Legal Scholarship 1


Roach, Kent, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue (Toronto: Irwin, 2001).
Savoie, Donald J., Breaking the Bargain: Public Servants, Ministers and Parliament (Toronto: University of Toronto Press, 2003).
Savoie, Donald J., Court Government and the Collapse of Accountability in Canada and the United Kingdom (Toronto: IPAC, 2008).
Trebilcock, Michael J. and Ronald J. Daniels, Rule of Law Reform and Development: Charting the Fragile Path of Progress (Cheltingham: Edward Elgar, 2008).
Willis, John, "Lawyers' Values and Civil Servants' Values" (1968) 18 U.T.L.J. 351.