uOttawa
Faculté de droit
Faculty of Law
Section de common law
Common Law Section

Paul Daly
Associate Professor and University Research Chair in Administrative Law & Governance
[redacted]
26 October 2020

Codification, Creativity and Certainty: A Submission to the Independent Review of Administrative Law

I am an associate professor at the Faculty of Law, University of Ottawa, where I hold the University Research Chair in Administrative Law & Governance. Educated in Ireland, the United States and the United Kingdom (where I also taught administrative law) before settling in Canada, I have developed a comparative perspective on judicial review of administrative action. I have written on American, Australian, Canadian, English and Irish administrative law at various times. In this submission, I offer some thoughts on the potential for the codification of the contemporary English and Welsh law of judicial review of administrative action. As such, this submission responds to the first of the "specific areas for inquiry" listed in your Call for Evidence:

> *Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute.*

Based on a review of the evolution of Canadian administrative law, I note that codification statutes are creatures of their time; that codification does not prevent creative judicial development of the principles of administrative law; and that limiting or eliminating grounds of review raises rule of law concerns. As a result, I am not persuaded that codification would be appropriate.

Codification statutes are creatures of their time

<u>20th century reforms</u>

Most judicial review codification statutes date roughly from the 1970s, a period in which a wave of procedural reforms washed over the common law world. The historical context surrounding these reforms must be understood in order to appreciate whether they serve as useful precedents for reformers today. The goal at that time was to simplify an overly complex body of law.

For example, in Ontario, Chief Justice McRuer made detailed recommendations in respect of appeals and judicial review,[1] noting in particular the "vexatious technicalities"[2] of judicial review. Similarly, the Kerr Committee in Australia was concerned that the traditional means of judicial oversight of public administration – the prerogative writs of certiorari, prohibition, quo warranto and mandamus – were subject to too many "technical limitations"[3] to offer a "comprehensive means of review";[4] indeed, the Committee found the "complex pattern of rules as to appropriate courts, principles and remedies" to be

[1] *Royal Commission: Inquiry into Civil Rights, Report No. 1, Vol. 1* (Queen's Printer, Toronto, 1968), subsections 4 and 5.
[2] *Ibid.*, at pp. 146-319.
[3] *Report of the Commonwealth Administrative Review Committee, Parliamentary Paper No. 144 of 1971* (Commonwealth Government Printing Office, Canberra, 1971), at para. 21.
[4] *Ibid.*, at para. 17.

uOttawa
Faculté de droit
Faculty of Law
Section de common law
Common Law Section

Paul Daly
Associate Professor and University Research Chair in Administrative Law & Governance
[redacted]
26 October 2020

"both unwieldy and unnecessary".[5] The subsequent Ellicott Committee reported in more detail on judicial review,[6] with its recommendations leading to the adoption of the Administrative Decisions (Judicial Review) Act 1977.

Not all reformers attempted to codify the grounds of judicial review. Ontario[7] and New Zealand[8] were content to put the judicial review procedure on a statutory footing, but at the federal level Canada codified the grounds of review,[9] as did Australia.[10]

In the 1970s, the general principles relating to judicial review were relatively simple and easy to state. Decision-makers must direct themselves properly in law, take into account relevant factors, exclude irrelevant factors, use their powers for proper purposes, act in good faith on the basis of evidence, and respect the precepts of natural justice. Accordingly, codification was a fairly straightforward matter.

The contemporary law of judicial review of administrative action is much more complex. For example, it would be difficult to define the contemporary judicial approach to substantive review. Substantive review has three characteristics.[11] First, it treats the "classic judicial review investigation" as whether the impugned administrative decision "lay within the range of reasonable responses".[12] Second, it is "flexible",[13] "context-specific"[14] and "invariably fact dependent",[15] with a broader or narrower range of reasonable responses depending on the interplay of a variety of factors.[16] Third, the concept of

---

[5] *Ibid.*, at para. 58.
[6] *Report of the Committee of Review of Prerogative Writ Procedure, Parliamentary Paper No. 56 of 1973* (Commonwealth Government Printing Office, Canberra, 1973).
[7] *Judicial Review Procedure Act*, RSO 1990, c J.1.
[8] Judicature Amendment Act 1972.
[9] *Federal Courts Act*, RSC 1985, c. F-7.
[10] Administrative Decisions (Judicial Review) Act 1977 (Cth).
[11] Paul Daly, "Substantive Review in the Common Law World: *AAA v Minister for Justice* in Comparative Perspective" [2019] *Irish Supreme Court Review* 105.
[12] *Michalak v General Medical Council* [2017] UKSC 71; [2017] 1 WLR 4193 [21-22]. See similarly *Refugee Council of New Zealand v Attorney-General (No 1)* [2002] NZAR 717 [111], *per* Baragwanath J; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 375 *per* Gageler J; *Catalyst Paper Corp v North Cowichan (District)* 2012 SCC 2 (hereafter *Catalyst Paper Corp v North Cowichan (District)*); [2012] 1 SCR 5 [18] *per* McLachlin CJ; *YY v Minister for Justice and Equality* [2017] IESC 61 [70] *per* O'Donnell J.
[13] *Pham v Home Secretary* [2015] UKSC 19; [2015] 1 WLR 1591 [60] *per* Lord Carnwath. See similarly *NM (DRC) v Minister for Justice, Equality and Law Reform* (n 138) [37], *per* Hogan J.
[14] *Minister for Immigration and Border Protection v SZVWF* [2018] HCA 30 [52] *per* Gageler J.
[15] *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1 [42].
[16] See *e.g. Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154 [53-54], *per* Keith J; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 363-364, *per* Hayne, Kiefel and Bell JJ; *Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha* 2014 FCA 56; [2015] 2 FCR 1006 [88-91], per Stratas JA; *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6 [169], *per* Lord Carnwath; *Pham v Home Secretary* [2015] UKSC 19; [2015] 1 WLR 1591 [107], *per* Lord Sumption; *Canada (Citizenship and Immigration) v Vavilov* [105-138].

uOttawa
Faculté de droit
Faculty of Law
Section de common law
Common Law Section

Paul Daly
Associate Professor and University Research Chair in Administrative Law & Governance
[redacted]
26 October 2020

proportionality is relevant to determining whether an impugned decision falls inside or outside the range of possible, acceptable outcomes.[17] Capturing these characteristics in legislative form would be very difficult. (I address below the difficulties with legislating so as to narrow or simplify the contemporary law.)

More recent reforms

The Canadian province of British Columbia codified the law of judicial review of administrative action in the early 2000s. Sections 58 and 59 of the *Administrative Tribunals Act* set out the standards of review of various administrative tribunals in the province.[18] This reform effort has, broadly speaking, been well received and provided a stable framework for judicial review in British Columbia. The Supreme Court of Canada was careful to leave it untouched in its recent reformulation of Canadian administrative law.[19]

The *Administrative Tribunals Act* is, again, a creature of its time. To begin with, the *Act* was adopted as part of a major reform of administrative justice in the province.[20] Indeed, the judicial review sections of the *Act* are only a very small piece of a larger legislative edifice.[21] Moreover, the Canadian law of judicial review was in a state of serious flux at the time. The uncertainties as to the state of the law were well documented in 2003 by a Supreme Court of Canada judge in a set of concurring reasons.[22]

In short, the drafters in British Columbia found themselves drawing on a blank canvas at a point in time when any artistry at all would have been well received by the legal community. Their success can only be understood against this historical backdrop.

Summary

Accordingly, I doubt that historic efforts to codify judicial review are of much relevance to the practicality of contemporary codification.

Codification does not oust judicial creativity

---

[17] See *e.g. Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606, 636, *per* Tipping J; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, 407-408, *per* Thomas J; *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, 723, *per* Murray CJ; *PO and SO v Minister for Justice and Equality* [2015] 3 IR 164, 204, *per* Charleton J; *McCloy v New South Wales* [2015] HCA 34; (2015) 325 ALR 15, 19 *per* French CJ, Kiefel, Bell and Keane JJ; *Law Society of British Columbia v Trinity Western University* 2018 SCC 32; [2018] 2 SCR 293 [57-59], per Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ. See also *Kim v Minister of Justice* [2019] NZCA 209 [45-47].
[18] SBC 2004, c 45.
[19] *Canada (Citizenship and Immigration) v Vavilov* 2019 SCC 65, at paras. 34-35.
[20] Geoff Plant, "The Administrative Justice Project in B.C. or Do Governments Take Tribunals Seriously?" (2002-2003) 16 *Canadian Journal of Administrative Law & Practice* 1.
[21] *On Balance: Guiding Principles for Administrative Justice Reform in British Columbia* (Administrative Justice Project, 2002).
[22] *Toronto (City) v C.U.P.E., Local 79* 2003 SCC 63; [2003] 3 SCR 77 [60-134], *per* LeBel J.

uOttawa
Faculté de droit
Faculty of Law
Section de common law
Common Law Section

Paul Daly
Associate Professor and University Research Chair in Administrative Law & Governance
[redacted]
26 October 2020

Codification of the law of judicial review does not prevent judges from creatively developing the law.

Three Canadian examples illustrate the point.

Federal Courts Act

First, s. 18.1(4) of Canada's *Federal Courts Act* set out a codified scheme of grounds of review as part of the 20th century reform efforts.

> The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> > (*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
> >
> > (*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
> >
> > (*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
> >
> > (*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
> >
> > (*e*) acted, or failed to act, by reason of fraud or perjured evidence; or
> >
> > (*f*) acted in any other way that was contrary to law.

However, the Canadian law of judicial review evolved without any reference to these grounds of review. Most notably, the Supreme Court of Canada developed a doctrine of deference to administrative interpretations of law. This doctrine was squarely in conflict with subsection (c) of s. 18.1(4), which provided that an error of law was a ground for judicial intervention.

In *Khosa v. Canada (Citizenship and Immigration)*,[23] the Supreme Court of Canada considered the conflict between the common law and s. 18.1(4). The common law prevailed.

Writing the majority reasons, Binnie J acknowledged that reference to s. 18.1(4) should be the "first order of business",[24] but noted that "most if not all judicial review statutes are drafted against the background of the common law of judicial review".[25] It is impossible to understand a framework statute like the

[23] 2009 SCC 12; [2009] 1 SCR 339 [19].
[24] *Ibid.* [18].
[25] *Ibid.* [19].

uOttawa
Faculté de droit
Faculty of Law
Section de common law
Common Law Section

Paul Daly
Associate Professor and University Research Chair in Administrative Law & Governance
[redacted]
26 October 2020

Federal Courts Act without an appreciation of curial approaches to judicial review. The language of s. 18.1(4) is not self-executing: it requires interpretation. To put it in Binnie J.'s terms, the language of s. 18.1(4) is "open textured" and has to be "supplemented by the common law".[26]

Binnie J. distinguished between *grounds* and *standards* of judicial review. This move permitted him to justify a deferential approach to questions of law, even in the face of s. 18.1(4). As he explained, "para. (c) provides a *ground* of intervention, but the common law will stay the hand of the judge(s) in certain cases if the interpretation is by an expert adjudicator interpreting his or her home statute or a closely related statute".[27]

The upshot was that the common law of deference on administrative interpretations of law prevailed over the 1970s-era ground of review of error of law.

Viewed from a theoretical perspective, the Supreme Court of Canada grappled in *Khosa* with the role of what American scholars have called "administrative common law".[28] One leading American theorist of "administrative common law" has explained that judicial review doctrines have "a judge-made character",[29] "plasticity" and "amenability to judicial refinement".[30] A focus on "institutional relationships and the general shape of judicial review…"[31] allows courts to supplement framework statutes, such as the United States' *Administrative Procedure Act*.

<u>*Administrative Tribunals Act*</u>

When British Columbia codified judicial review in the *Administrative Tribunals Act*, it codified the "patent unreasonableness" standard of review which was then part of the common law of judicial review, albeit its meaning was unclear. The courts of British Columbia had to creatively give meaning to a standard which had been shrouded in obscurity. This they did by drawing on their own precedents and those of the Supreme Court of Canada.[32]

Furthermore, the codification of the standard did not eliminate judicial creativity: "the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large

[26] *Ibid.* [44].
[27] *Ibid.* [44]. Emphasis original.
[28] See *e.g.* Gillian Metzger, "Foreword: Embracing Administrative Common Law" (2012) 80 *George Washington Law Review* 1293.
[29] *Ibid.*, 1310.
[30] *Ibid.*, 1336.
[31] *Ibid.*, 1314.
[32] *Speckling v British Columbia (Workers' Compensation Board)* 2005 BCCA 80 [33].

uOttawa
Faculté de droit
Faculty of Law
Section de common law
Common Law Section

Paul Daly
Associate Professor and University Research Chair in Administrative Law & Governance
[redacted]
26 October 2020

provincial administration, will necessarily continue to be calibrated according to general principles of administrative law".[33]

Subsequently, the Supreme Court of Canada eliminated the patent unreasonableness standard of review.[34] This required the British Columbia courts to respond to arguments that the law in British Columbia should evolve to take account of evolution in the common law. The British Columbia Court of Appeal heard argument on the point on several occasions and held that there had been "no change" in the meaning of patent unreasonableness on account of the Supreme Court of Canada's elimination of patent unreasonableness.[35]

The Supreme Court of Canada's recent reformulation of administrative law has prompted further uncertainty. In *College of New Caledonia v Faculty Association of the College of New Caledonia*,[36] the petitioner argued that the rearticulation of reasonableness review by the Supreme Court of Canada should inform the application of patent unreasonableness in British Columbia. This argument was rejected. But in *Guevara v Louie*[37] the same argument succeeded. The Court of Appeal will have to resolve this disagreement. There is certainly room for judicial creativity in determining the meaning of "patent unreasonableness" as codified in the *Administrative Tribunals Act*.

Scope of judicial review

A similar pattern can be observed in the provincial judicial review statutes.

At the time of the procedural reforms, the prerogative writ of certiorari applied only to decisions with a statutory basis. As a result, the provincial judicial review statutes refer to "statutory power"[38] in determining which bodies are subject to the principles of administrative law. This amounted to a codification of the scope of review (or, if one prefers, an attempt to limit the scope of review by statute).

These provisions have triggered considerable litigation.[39] In determining whether a "statutory power" has been exercised Canadian courts have relied on a variety of contextual factors, such as the character of the matter for which review is sought; the nature of the decision-maker and its responsibilities; the extent to which a decision is founded in and shaped by law as opposed to private discretion; the body's relationship

[33] *Canada (Citizenship and Immigration) v Khosa* 2009 SCC 12; [2009] 1 SCR 339 [19], *per* Binnie J. Emphasis original.
[34] *Dunsmuir v New Brunswick* 2008 SCC 9; [2008] 1 SCR 190.
[35] *Pacific Newspaper Group Inc. v Communications, Energy and Paperworkers Union of Canada, Local 2000* 2014 BCCA 496 [48]. See also *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v Auyeung* 2011 BCCA 527.
[36] 2020 BCSC 384.
[37] 2020 BCSC 380 [48].
[38] See *e.g. Judicial Review Procedure Act*, RSBC 1996, c 241, s. 2(2)(b); *Judicial Review Procedure Act*, RSO 1990, c J1, s. 2(1)2.
[39] See *e.g. Paine v University of Toronto et al* (1982) 34 OR (2d) 770.

uOttawa
Faculté de droit
Faculty of Law
Section de common law
Common Law Section

Paul Daly
Associate Professor and University Research Chair in Administrative Law & Governance
[redacted]
26 October 2020

to other statutory schemes or other parts of government; the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity; the suitability of public law remedies; and the existence of a compulsory power.[40] These factors are not found in the parsimonious provisions of the provincial judicial review statutes. They are pure creatures of the common law and they are living happy lives in Canadian administrative law.

Summary

I would suggest that "administrative common law" is unavoidable. Given that judges will inevitably be called upon to interpret codification statutes, any attempt to codify contemporary administrative law to eliminate or limit judicial creativity is likely to fail.

Moreover, codification is likely to lead to litigation over the relationship between codified administrative law and the common law of judicial review of administrative action. It is difficult to say that codification has led to certainty in Canadian administrative law. In fact, codification has created uncertainty in some respects.

Limiting grounds of review raises rule of law concerns

For the most part, Canadian legislation does not seek to limit or eliminate grounds or standards of judicial review.

One exception is s. 34(1) of the *Federal Public Sector Labour Relations and Employment Board Act*,[41] which excludes several of the grounds of review set out in the *Federal Courts Act*, most notably error of law.

However, in *Canada (Attorney General) v. Public Service Alliance of Canada*,[42] the Federal Court of Appeal refused to accept that the exclusion was effective, a refusal based in part on rule of law concerns. Giving effect to the exclusion "runs afoul of the rule of law concerns that provide the constitutional underpinning for judicial review of administrative action by the independent judicial branch".[43] The result would be that decisions of the Board would be "largely unreviewable": "This cannot be".[44]

Rather, the exclusion of several grounds of review indicated that decisions of the Board should be reviewed deferentially.[45] This solution was consistent with the approach of the Canadian common law of judicial review of administrative action to privative clauses: review is not ousted but "considerable deference" is accorded to decisions protected by privative clauses.[46] As in *Khosa*, administrative common

[40] *Setia v Appleby College* 2013 ONCA 753; 370 DLR (4th) 356 [34].
[41] SC 2013, c 40, s 365.
[42] 2019 FCA 41.
[43] 2019 FCA 41 [30].
[44] 2019 FCA 41 [31].
[45] 2019 FCA 41 [34].
[46] 2019 FCA 41 [34].

uOttawa
Faculté de droit
Faculty of Law
Section de common law
Common Law Section

Paul Daly
Associate Professor and University Research Chair in Administrative Law & Governance
[redacted]
26 October 2020

law – here, infused by the rule of law – informed the interpretation of a codified set of grounds of review. I would note that although judicial review in Canada has a constitutional minimum, the supervisory jurisdiction in England and Wales is no less a constitutional fundamental.

Summary

There may be a temptation to use a codification project to limit or eliminate grounds of review, in an attempt to reduce the burden of litigation on public bodies. Any such attempt should, of course, be justified in terms of the available empirical evidence. Due consideration should also be given to the rule of law concerns which it would provoke, as well as the uncertainty attendant upon the inevitable litigation about the effectiveness of any limitation or elimination of grounds of review.

Conclusion

The Canadian experience with codification does not suggest that the codification of grounds of review or the scope of judicial review would be a particularly worthwhile undertaking. It is unlikely to prevent judicial creativity. Rather, it is likely to cause uncertainty and provoke litigation.

I would like to make one final comment. I have proceeded on the premise that judicial creativity in administrative law should be cabined in some way. Even when one proceeds on this premise, the case for codification is – from a Canadian perspective – weak.

However, I reject this premise. My research suggests, on the contrary, that the contemporary law of judicial review of administrative action is best understood as structured by four values: individual self-realisation; good administration; electoral legitimacy; and decisional autonomy.

Consider the right to reasons for administrative decisions. The general rule that there is no general duty at common law to give reasons can be understood as a manifestation of the importance attached to effective and efficient public administration, inasmuch as imposing a duty to give reasons in all cases has the potential to gum up the works of public administration. Yet this general rule is subject to exceptions which can be understood in terms of the other values: where the legislature has afforded a right of appeal, reasons must be given, for otherwise the intention of the elected representatives making laws in the legislature would be set at naught; where a decision is of great importance to an individual's autonomy and dignity – where liberty is at stake, for instance – reasons will be required to be given; and where reasons are necessary to ensure that the decision-maker has acted lawfully – that is, to ensure that the court can fulfil its distinct function of reviewing the lawfulness of the impugned decision – then they will also be required.

These values are present throughout contemporary administrative law. Individual self-realisation ensures that individuals are treated with concern and respect by governmental decision-makers and are permitted to plan their affairs; good administration facilitates governmental decision-makers' achievement of their

uOttawa
Faculté de droit
Faculty of Law
Section de common law
Common Law Section

Paul Daly
Associate Professor and University Research Chair in Administrative Law & Governance
[redacted]
26 October 2020

objectives and thus allows them to serve their citizens; electoral legitimacy empowers representatives who have been chosen by voters; and decisional autonomy preserves distinct areas in which different decision-makers can do what they do best.

In my view, contemporary administrative law, as developed by judges, facilitates the flourishing of individuals, of public administration and of the liberal democratic system.[47] The needs of individuals are already balanced against the needs of public bodies and the public interest. Accordingly, there is no need for reform.

[47] Paul Daly, "Administrative Law: A Values-Based Approach" in John Bell, Mark Elliott, Jason Varuhas and Philip Murray eds., *Public Law Adjudication in the Common Law World: Process and Substance* (Hart Publishing, Oxford, 2016); Paul Daly, "Administrative Law: Characteristics, Legitimacy, Unity" in Mark Elliott, Jason Varuhas and Shona Stark eds., *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, Oxford, 2018); Paul Daly, *Understanding Administrative Law in the Common Law World* (forthcoming).