THE CONTRIBUTION OF LORD COOKE TO SCOPE OF REVIEW DOCTRINE IN ADMINISTRATIVE LAW: A COMPARATIVE COMMON LAW PERSPECTIVE

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In the mansion of law, the room marked “administrative law”, one gathers, holds a special place in the heart and mind of Lord Cooke. It was the subject on which he wrote his Yorke Prize winning doctoral dissertation,¹ and at the bar he argued many of the leading administrative law cases of the day. On the bench, administrative law is one of the areas - arguably the area - he has made his own: witness his leading judgments in a long string of administrative law cases, augmented in important respects by his extra-judicial writings - no less a sign of leadership than his judicial contributions, and often more revealing.

In this paper I will examine one aspect of administrative law which illuminates some aspects of Lord Cooke’s philosophy. It is surprisingly difficult to encapsulate the area in a pithy phrase, especially as the terminological ground has shifted markedly in the last fifteen years or so. Less than a generation ago it was called “jurisdictional error”, but in New Zealand and elsewhere² the concept of jurisdiction has been replaced by that of error of law. A helpful Americanism, scope of review, is invoked here to describe judicial review of statutory interpretation by administrative authorities.

The movement from jurisdictional error to error of law is part of what I will describe here. It will show Lord Cooke in the vanguard with Lords Denning and Diplock in simplifying and updating the law of judicial review. This case law reveals, however, that little attention has been given to the extent that courts should or must defer to “inferior” decision-makers’ interpretations of statutes. In this respect, I will argue, Lord Cooke’s approach is much closer to that of the much maligned Albert Venn Dicey,³ than Lord Cooke’s posture on so many public law

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² “Elsewhere” includes England and Malaysia. In this comparative common law survey I have not devoted a separate section to English law for several reasons: (1) limits of time and space; (2) the abundance of English literature on the subject; and (3) the focus of the conference being on developments in New Zealand law during the ‘Cooke era’. As Cooke P. observed in Budget Rent A Car Ltd. v Auckland Regional Authority[1985] 2 NZLR 414, 418, New Zealand administrative law is now "significantly indigenous".
issues would otherwise suggest. This strand of Diceyanism can be seen most clearly in the light of Canadian and United States administrative law on scope of review.

The Road to Bulk Gas

The New Zealand case in which the shift from jurisdictional error to error of law occurred was Bulk Gas Users Group v Attorney-General, but the origins of the underlying scepticism as to the utility of “jurisdiction” as an organising principle in administrative law can be traced to the young R.B. Cooke’s doctoral research on that topic in the early 1950s. Some of that work concerned the “vexing problem of working out viable principles” to distinguish jurisdictional from non-jurisdictional errors, and exposed the difficulty of rationalising conflicting case law across a range of subject-matter.

Much later, as a trial judge, Cooke J. referred to the conflict in the authorities and “perplexity among commentators” as to what was meant by jurisdictional error, but he resisted “any temptation to add a gratuitous contribution to the theory of [the] ... subject ...”. The exposition of the law that he did give in that case, however, was accepted by both sides on appeal and was quoted with apparent approval by the Court of Appeal, even though Cooke J.’s decision at first instance was overturned.

Drawing on the “landmark” case of Anisminic Ltd v Foreign Compensation Commission, which he accepted as authoritative in New Zealand, Cooke J. said:

“Provisions such as s.164 [of the Transport Act 1962] are variously called privative, ouster or no certiorari clauses. If an Act plainly empowers an Authority or other tribunal to decide a question of law conclusively (such as a given question of statutory interpretation) or if in exercising its true jurisdiction the tribunal decides a purely incidental question of law, I am disposed to think that such a clause [as s.164] makes the decision immune from challenge, even though an error of law may be apparent on the record.... So the view on which I propose to act for the purposes of this case is that unless the

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5 Supra at n. 1.
7 Car Haulaways (NZ) Ltd v McCarthy & Attorney-General for New Zealand, unreported High Court (Auckland), A.B/73, 8 August 1973, pp. 35-6.
8 Attorney-General v Car Haulaways (NZ) Ltd. [1974] 2 NZLR 331. See Bay of Islands Timber Company Ltd. v Transport Licensing Appeal Authority, unreported High Court (Auckland), A.1569/75, 1 April 1977, p.14 where Barker J. said the Court of Appeal in Car Haulaways “did not question Cooke J.’s application of the Anisminic decision to s.164 [of the Transport Act 1962] although it took a different view of the facts”. On appeal, the Court of Appeal did not address this aspect of the case: Attorney-General v Bay of Islands Timber Co. Ltd. [1979] 2 NZLR 511, 515, per Cooke J. (CA).
9 [1969] 2 AC 147 (hereafter referred to as Anisminic ). Justice Cooke early on perceived the importance of the Anisminic decision. It was another seven years before Lord Diplock judicially proclaimed Anisminic a “legal landmark” (in In re Racal Communications Ltd.[1981] AC 374, 382), although he had spoken in similar terms extrajudicially much earlier. See infra at n. 17.
10 Supra at n. 7, pp. 36-7. It is relevant to later discussion to note that s. 164 was a privative clause in so-called modern form, which preserved judicial review "on the ground of lack of jurisdiction".
errors contended for by the plaintiff go to jurisdiction, they are not redressible; although strictly speaking it is unnecessary for me to decide the point. A fortiori findings of fact on the very question which the tribunal is set up to decide, and conclusions based on an evaluation of the evidence bearing on such questions, would be immune ....”

Thus, was laid in Car Haulaways one of the corner stones for Justice Cooke’s reformulation of reviewable error in Bulk Gas nearly a decade later.

Another glimpse of the foundations to be built on in Bulk Gas is provided in New Zealand Engineering, Coach Building, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration. 11 In this case, a challenge to a decision of the Court of Arbitration failed on the facts and so the issue of whether Anisminic expanded the types of errors reviewable by a superior court did not fall for decision. All three judges made some comment, however. After noting the “widening field of review” Anisminic was generally thought to promote, McCarthy P. questioned whether that case justified any expansion of the types of errors reviewable in the light of the longstanding interpretation of the privative clause in the Court of Arbitration’s constitutive legislation. 12 Richmond J. had difficulty in accepting that some of the alleged errors went to jurisdiction but noted “it is often difficult to draw a clear line between jurisdictional errors and errors within ... jurisdiction”, 13 and went on to show that the Court of Arbitration had not erred.

Having the last word, as is the privilege of the most junior appellate judge, the recently elevated Cooke J. said: 14

“my present opinion is that if Anisminic ... widened the field of jurisdictional review for jurisdictional error, it did so in the sense of preferring one of two long-competing lines of reasoning and authority to the other .... I think the courts of general jurisdiction should be slow to hold that when establishing a court or tribunal of limited jurisdiction Parliament meant it to have authority to determine conclusively for the purpose of any given case the meaning of provisions in the Act by which it is constituted and under which it operates. Questions of fact or discretion are in a different category”.

This oft-repeated view that the judges in Anisminic had a choice between two competing and equally well supported lines of authority, 15 can be traced back also to Cooke’s doctoral research, much of which was consigned to the dustbin of history by the “liberating” choice made by the majority in Anisminic. The importance of that case to the development of modern administrative law was recounted recently by

11 [1976] 2 NZLR 283 (CA).
12 Ibid., 285. The echo of this view can be heard in Bulk Gas, where Sir Thaddeus McCarthy sat as the third, supernumerary judge, and gave a brief judgment. See infra at n. 27.
13 Ibid., 295.
14 Ibid., 301.
Lord Cooke in his fourth Hamlyn Lecture delivered at All Souls College. There Lord Cooke told of Lord Diplock’s U-turn on scope of review doctrine.

After the majority of the House of Lords in Anisminic rejected Diplock L.J.’s highly analytical exposition of the narrow view of jurisdictional error in the court below, Lord Diplock (as he soon became) took up the expansive view of jurisdictional error with the zeal of the newly converted. Lord Diplock perceived that the breadth of the language used in Anisminic, taken to its logical extreme, meant that virtually any error of law could go to jurisdiction. In two judgments in quick succession in the early 1980s Lord Diplock put forward this view of Anisminic, and, despite criticism in some quarters, it has become orthodoxy in the United Kingdom. Extracts from these judgments were cut-and-pasted to good effect into Justice Cooke’s reasons in Bulk Gas.

Before turning to Bulk Gas, it should be noted that what most unites Lords Diplock and Cooke on scope of review is a profound, shared belief that it is the constitutional role of the superior courts to interpret the laws enacted by Parliament. In other words, it is ultimately for the judges to say conclusively what statutory language means. In his doctoral dissertation, Cooke wrote: “this assumption ... that final authority to expound the law is vested in the courts of general jurisdiction” is regarded “as the fundamental legal norm of the English constitution”. It was said to be so fundamental as to antedate recognition of parliamentary sovereignty. This is a constant in Lord Cooke’s philosophy of administrative law as it has evolved over five decades.

Bulk Gas and All That

The facts in Bulk Gas Users Group v Attorney-General can be briefly stated. In the early 1980s the price of natural gas was the subject of price restraint. Subordinate legislation provided that the supplier of natural gas, Natural Gas Corporation, could apply to the Secretary of Energy for approval of a price increase. In reaching a decision on any such application the Secretary had to observe certain statutory...
duties; one of which was to ensure that the applicant and “such other persons as in [the Secretary’s] ... opinion had a direct interest in the matter” had a reasonable opportunity to be heard. The applicant, Bulk Gas Users Group - which, as its name suggests, comprised bulk natural gas users in the Auckland region - claimed to have a “direct interest” in the Corporation’s application. Bulk Gas Users did not buy natural gas direct from the Corporation but bought at one remove from the Auckland Gas Company. The Group’s claim to a “direct interest” was that any price rise approved by the Secretary would almost inevitably be passed down the chain of distribution to it. The Secretary of Energy, in a reasoned letter, denied the Group standing under the statutory “direct interest” test on the ground that it was not a direct customer of the Corporation. The Group sought judicial review.

At first instance before Davison C.J. attention focused upon the privative clause in s.97 of the (then) Commerce Act 1975. This clause is in the modern form, expressly preserving challenge “on the ground of lack of jurisdiction” but otherwise purporting to insulate decisions of the Secretary from challenge or review in any court. (This merely puts into statutory form what was until Bulk Gas the common law position). The Chief Justice noted the recent attempts by Lords Denning and Diplock to discard the distinction between jurisdictional and non-jurisdictional error but rightly felt bound to follow South East Asia Firebricks v Non-Metallic Mineral Products Manufacturing Employees Union. A decision of the Privy Council which explicitly rejected the view of Lord Denning and reaffirmed the jurisdictional approach. The question then was whether the Secretary of Energy had made a jurisdictional error in his interpretation of “direct interest in the matter”? Davison C.J. held that, looking at the statutory language in the context of the Act as a whole, Parliament had intended to leave the Secretary the power to interpret the words “direct interest”. The interpretation adopted was “certainly a possible one” and, even if the Secretary had interpreted the words wrongly, it was still only an error of law within jurisdiction and as such was protected by the privative clause. At the end of the judgment the Chief Justice indicated his view that the interpretation given by the Secretary was correct.

The case went on appeal and the Court of Appeal upheld the Secretary’s interpretation. But the real importance of the case lies in the reasoning of Cooke J.

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23 See, e.g., Anisminic, supra at n.9.
24 See supra at n. 18 and Pearlman v Keepers and Governors of Harrow School [1979] QB 56, 70, per Lord Denning MR (CA). For whatever reason, Lord Diplock avoids attributing the idea to Lord Denning, and indeed goes out of his way to criticise Lord Denning’s application of the principle in Pearlman: In re Racial Communications Ltd., supra at n. 9, 383. The fact that Lord Diplock, in effect, found Lord Denning M.R. to be “half-right” was not lost on the Master of the Rolls: see R v Chief Immigration Officer, Gatwick Airport, ex parte Kharrari [1980] 1 WLR 1396, 1403 (CA). For a treatment that puts Lords Denning and Diplock in different “camps” as far as judicial review is concerned, and highlights their many judicial differences of opinion, see J. L. Jowell, “Administrative Law”, in J. L. Jowell and J. P. W. B. McAslan (eds), Lord Denning: The Judge & the Law (Sweet & Maxwell, London, 1984) 209.
26 As counsel in the South East Asia Firebricks case put it: “[the] nub of the case is that if Lord Denning MR was right in Pearlman ..., the company wins, and if Geoffrey Lane L.J. was right, the [employees] win”: ibid., 367-8.
in a judgment concurred in by Somers J., and followed ever since by the Court of Appeal. Bulk Gas is undoubtedly the law of New Zealand.

It is impossible to do justice to the reasoning within a short compass, but two things should be noted at the outset. First of all, it is a carefully crafted decision - an intricate exercise in persuasion. The late Professor Heuston of Tort textbook fame said a few years ago that "the common law judge in writing his judgment is really exercising the art of advocacy raised to a higher power"; and that is especially true of this judgment. Second, partly because of the intricacy of the reasoning and partly due to the subject-matter, it is a difficult judgment to grasp fully on a first, or even a second, reading - understanding of it comes from careful study. Perhaps this explains why Bulk Gas is so seldom analysed. Discussion of the case at High Court level is uncommon. This is a great pity for the issues raised in Bulk Gas lie at the very heart of judicial review of administrative action.

Broadly speaking, in Bulk Gas Cooke J. followed the lead of Lord Diplock (and, though he does not mention him there, Lord Denning) in rejecting the concept of jurisdiction (and with it the distinction between jurisdictional and non-jurisdictional error). The concept of jurisdiction is described in the judgment as "a rather elusive thing", "vague and probably undefinable" and, in the header atmosphere of extra-judicial discourse, Justice Cooke gave "jurisdiction" as an example of "superfluous complications of principle", "arcane concepts, in the nature of catchwords or half truths", "shibboleths" detracting attention from the true question.

The true question is whose interpretation of statute law should prevail - that of the judge or that of the administrative decision-maker? The answer given by Justice Cooke (and that of Lord Diplock) is that the courts, "in fulfilment of their constitutional

27 Sir Thaddeus McCarthy wrote a short concurring judgment expressly leaving for future consideration the "important questions of judicial policy relating to the proper boundaries of judicial and legislative functions within the state" raised by Lord Diplock's approach: supra at n.4, 139.
28 New Plymouth Waterfront Workers Union v New Zealand Engineering Union [1985] BCL 454 (CA); Mobil Oil New Zealand Ltd v Motor Spirits Licensing Appeal Authority (1985) 5 NZAR 412 (CA); McMenamin v Attorney-General [1985] 2 NZLR 274, 276, per Somers J. (CA); Broadcasting Corporation of New Zealand v Broadcasting Tribunal[1986] 2 NZLR 620, 636, per Somers J. (CA); CIB NZ Ltd v Badger Chiyoda[1989] 2 NZLR 669, 674, per Cooke P. (CA).
31 See Martin v Ryan [1990] 2 NZLR 209, 225, per Fisher J. (HC) and O'Regan v Lousich: Proprietors of Mawhera v Maori Land Court [1995] 2 NZLR 620, 626-7, per Tipping J. (HC).
32 Lord Denning's influence in this regard, however, was acknowledged by Lord Cooke recently in the Hamlyn Lectures. Sir Robin Cooke's earlier description of Lord Denning's "extremism... paving the way for acceptability of the less obtrusive creativeness of great judges like Lord Reid and Lord Wilberforce" ("The Courts and Public Controversy" (1983) 5 Otago LR 359, 366), although not used in relation to scope of review, might well have been. Certainly Lord Denning's View in Pearlman was too extreme for the Privy Council in South East Asia Firebricks, supra at n. 25.
33 Supra at n.4, 135-6. See also Commissioner of Inland Revenue v Lemmington Holdings Ltd, [1982] 1 NZLR 517, 528, per Cooke J. (dissenting) (CA) and R v Bedwelly Justices, ex parte Williams[1996] 3 WLR 361, 367, per Lord Cooke (HL). One is reminded of Justice Frankfurter's condemnations of the concept of jurisdiction: "one of the most deceptive of legal pitfalls" (City of Yonkers v U.S., 320 U.S. 685, 695 (1944)): "a verbal coat of too many colours" (U.S. v L.A. Tucker Truck Lines, 344 U.S. 33, 39 (1952)).
role as interpreters of the written law," have the function of interpreting Acts of Parliament and the duty to correct any errors of law made. While Parliament may empower an administrative decision-maker to have the final word on a question of law, the courts will “be slow” to conclude that this was Parliament’s intention: there is, as Lord Diplock said, a presumption against it, which can only be rebutted by clearly expressed words or by clearly necessary implication. A generally worded privative clause like that in s. 97 of the Commerce Act 1975 was not considered to rebut the presumption in this case. So, Bulk Gas replaced the concept of jurisdiction with an error of law standard.

This curial power to “correct” administrative interpretations of law, however, does not extend to all questions of law. Justice Cooke stresses in several places in his judgment that this constitutional duty to correct erroneous interpretations of statutes by the administration is limited to situations where the statutory language poses a “definite” or “ascertainable” test or a so-called “pure question of statutory interpretation” is involved. Cooke J. went on to say this:

“To the extent that there remains legitimate room for judgment in applying the [correct] test, the Secretary’s opinion is made the statutory criterion. If he addresses himself to the correct test and the relevant facts ... his decision will stand unless it can be put in the extreme category of a decision at which no reasonable authority in his position could have arrived.”

In other words, where the statutory provision presents a “definite” or “ascertainable” test then it is ultimately for the court to say what the provision means, but, having done that, application of that correct test to the facts lies with the administrator and will only be corrected on the grounds of mistake of fact or Wednesbury unreasonableness. Inferentially, and I stress it is only a matter of inference, it seems that where the statute does not present a definite or ascertainable tests or involve a pure question of interpretation, the “correctness” test is replaced by the less intrusive Wednesbury unreasonableness standard.

A distinction between administrative tribunals and inferior courts was drawn for the first time by Lord Diplock in In re Racal Communications Ltd. At an earlier point in time I thought it might be significant that this part of the analysis was not repeated by Lord Diplock in O'Reilly v Mackman where his obiter remarks about the

35 In re Racal Communications Ltd., supra at n. 9, 383, quoted with approval by Cooke J. in Bulk Gas, supra at n. 4, 133.
36 Bulk Gas, supra at n. 4, 136. Cooke J. entered the reservation that there may be some limits on Parliament’s power to empower a tribunal to determine conclusively some questions of law but he did not explore that (idem.), and nor will I.
38 Bulk Gas, supra at n. 4, 136.
39 Idem. I have always taken Cooke J.’s reference to judgment to include law-application or mixed questions of fact and law. For a remarkably similar view in an American context, see R. Levin, “Identifying Questions of Law in Administrative Law” (1985) 74 Geo LJ 23-26.
40 Cf. Smillie, supra at n. 37, 558.
41 Supra at n. 9.
effect of Anisminic were arguably approved of by the rest of the House of Lords, but this has not proved to be the case. According to Lord Diplock, there is no presumption that Parliament did not intend to confer upon an inferior court power to decide questions of law. It all depends on the construction of the particular statute whether this power is given. And where the statute contains a privative clause, Lord Diplock suggests the subtle and confusing distinction between jurisdictional and non-jurisdictional error might still survive in the inferior court context. What he appears to be saying is that inferior courts may be subject to less extensive judicial review on questions of law than administrative tribunals and authorities. This seems to be based on the notion that those who know most about the law should be given the most latitude to go wrong! Much could be said about the legitimacy and utility of this new separation of "inferior" bodies into administrative tribunals and courts for the purpose of scope of review, but this is not the occasion. For present purposes it is only necessary to point out that the somewhat elastic court/tribunal distinction does provide some room for curial deference within the area where the statute poses a definite or ascertainable test. I say "somewhat elastic" because the terms "court" and "tribunal" are not legal terms of art, and in Bulk Gas it was recognised that in New Zealand at least the line between tribunal and court is not a bright one.

In Bulk Gas the Secretary of Energy in performing price fixing functions was held to be "almost par excellence" an administrative authority rather than a court; so the presumption applied. Some further indication of how our courts are likely to draw the line between administrative tribunals and inferior courts was given in Mobil Oil New Zealand Ltd v Motor Spirits Licensing Appeal Authority. Judicial review was sought of a decision by the Motor Spirits Licensing Appeal Authority. A preliminary point was taken as to whether the High Court had jurisdiction to review the decision in light of a privative clause (which was not materially different from the one present in Bulk Gas). Counsel for the Appeal Authority appears to have argued that the Motor Spirits Licensing Appeal Authority was not a quintessential administrative officer, as the Secretary of Energy was held to be in Bulk Gas. Appointment to the Appeal Authority required qualifications similar to those necessary for appointment to the High Court. Moreover, counsel pointed out that the Appeal Authority had expertise in a specialised field.

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42 Cooke J.'s view in Bulk Gas, supra at n. 4, 133-4 that Lord Diplock's speech in O'Reilly v Mackman, supra at n. 18, "was agreed with by all the other four members of the House of Lords who sat in that case...", in supported now by the House of Lords' decision in R v Lord President of the Privy Council, ex parte Page [1993] AC 682, 701, per Lord Browne-Wilkinson (hereafter referred to as Page). I beg to differ and doubt very much that a general concurrence means the concurring judge agrees with every word in the leading judgment. This is particularly so, in a case like O'Reilly v Mackman, where Lord Diplock's brilliant magisterial view of developments in judicial review in the previous 30 years was all obiter, providing only background to the resolution of the adjectival question before the House.

43 The administrative tribunal/court distinction seems to have been approved of in Page, ibid. Cf. R v Bedwelnty Justices, ex parte Williams, supra at n. 33, 367, per Lord Cooke.

44 In re Racial Communications Ltd., supra at n. 9, 383. See also Auckland District Court v Attorney-General [1993] 2 NZLR 129, 136, per Thomas J. (CA) ("error of jurisdictional law in the District Court").

45 See the criticism of Smillie, "Privative Clauses and Judicial Review" [1981] NZLJ 274, 277-8 and the approach in Martin v Ryan, supra at n. 31, 225, per Fisher J.

46 Supra at n. 4, 133.

47 Ibid.

48 (1983) 4 NZAR 128 (HC); (1985) 5 NZAR 412 (CA) (hereafter referred to as Mobil Oil).
In the High Court Roper J. was prepared to take the legal qualifications of the Appeal Authority into account in considering whether the Authority was closer to a court than an administrative authority, but disregarded the expertise of the Authority. The judge said this:\footnote{49}

"[Counsel] also made the point that the Appeal Authority had expertise in a specialised field, but I do not see that as relevant. We are concerned simply with the interpretation of a provision in a statute."

So, on this view, expertise is not relevant to the characterisation of the Appeal Authority as a court or tribunal; nor is it relevant to the issue of what the words mean. What this suggests to me is that the tribunal/court dichotomy is not a reliable means of ensuring that the decision-maker best suited to make the conclusive determination does so.\footnote{50}

Roper J in \textit{Mobil Oil} held the court had jurisdiction to review the decision but agreed with the interpretation of the Appeal Authority.\footnote{51} On further appeal, the Court of Appeal agreed with the trial judge on both issues. Cooke P., with whom the other judges agreed on this point, reasoned as follows: nothing in the Act conferred an express power for the Authority to determine the particular issue conclusively (the privative clause was not mentioned in this regard); what was in issue was a "pure question of statutory interpretation"; while the requirement of legal qualifications is not to be overlooked in determining the scope of the Authority’s powers such is not inconsistent with the Authority having limited powers over questions of law.\footnote{52}

Cooke P. concluded:\footnote{53}

"The Motor Spirits Licensing Appeal Authority is a specialised tribunal dealing essentially with economic and commercial issues in a limited field. I do not consider that it has implied power to determine questions of the interpretation of its constituting Act conclusively".

This assumes that questions of statutory interpretation (that is, law) can be separated clearly from the economic, commercial or other contexts in which they arise. I do not believe that "law" and policy can be so neatly cleaved.

The sentiment in \textit{Mobil Oil} would, I suggest, extend to all administrative tribunals in New Zealand, whatever the qualifications of their members or their specialisms. It may not be stretching things too far to see this attitude as a piece with what

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\item \footnote{49} (1983) 4 NZAR, 128, 131.
\item \footnote{50} P. Craig, \textit{Administrative Law} (Sweet & Maxwell, London, 3rd ed. 1994), 375.
\item \footnote{51} Roper J. said any other interpretation would do violence to the express terms of the Act: supra at n.49, 135.
\item \footnote{52} (1985) 5 NZAR 412, 416 per Cooke P. (CA): “But of course persons required to have legal qualifications and acting as judicial authorities may nevertheless have limited powers. In \textit{Anisminic} ... the Commission comprised ten lawyers appointed by the Lord Chancellor, with a Queen’s Counsel as chairman, but this was not treated by the House of Lords as excluding review on the question of law there in issue ...”.
\item \footnote{53} Ibid., 417.
\end{itemize}}
occurred in the *Car Haulaways* case, mentioned earlier. In that case Cooke J. (then a puine judge) was overruled by the Court of Appeal, on the ground that he had not shown sufficient deference to the expertise of the Transport Licensing Appeal Authority; a position occupied by a highly experienced retired Stipendiary Magistrate. The Court of Appeal emphasised that “[b]oth licensing and appeal authorities acquire expertise in the specialised field of transport and in weighing testimony ... can properly reach conclusions with the aid of their peculiar knowledge”. That court placed importance also on the “long and varied experience” the lawyer/judge Appeal Authority brought to the task.

In both *Bulk Gas* and *Mobil Oil* short shrift was given to the privative clauses in “determining, as a matter of statutory interpretation, what questions of law, if any, have been remitted to the conclusive decision of the tribunal”. This is in line with Lord Cooke’s frequently expressed view that privative clauses are ineffectual, useless and best repealed. As he said on one occasion, “[t]heir disuse by legislative draftsmen would be a further advance in the struggle for simplicity.” This is a view shared by Professor Ken Keith (as he then was) who believed that use of privative clauses could not be justified, except in unusual cases. The “proper distribution of functions between court and tribunal”, Keith said, “should be based at bottom on their comparative expertise - the former should be concerned with questions of law (and of procedure), the latter with matters of fact, discretion and policy. A tribunal should not be able to violate the law with impunity”.

But privative clauses are not “boiler plate” in New Zealand; that is, they are not unthinkingly inserted in all or even most pieces of legislation. That fact alone suggests Parliament does want to send a message to the courts. To say that the courts should hear the message is not to say that they must invariably heed it. The strong constitutional rule protecting access to the courts - a constitutional “fundamental” to Lord Cooke - comes into play. But if the courts are genuinely determining, as a matter of statutory interpretation, what (if any) questions of law are remitted to the conclusive determination of a tribunal, as *Bulk Gas* says they are, then it seems illogical to dismiss privative clauses out of hand. As Professor John Smillie has observed:

“The only real, practical significance of a privative clause is that it provides an indication that Parliament intended the courts to give the tribunal a fair amount of latitude in interpreting and applying its statutory mandate .... [T]he true and proper significance of a privative clause is that it should be

54 Supra at n. 8, 335, per Haslam J.
55 Ibid., 337, per Haslam J.
56 *Bulk Gas*, supra at n. 4, 134.
57 See e.g. Justice Cooke, “Administrative Law: The Vanishing Sphinx”, supra at n. 15, 530.
58 Cooke, supra at n. 34, 8.
60 Idem.
62 *Bulk Gas*, supra at n. 4, 133.
63 Smillie, supra at n. 4, 434.
considered, along with all other indications of Parliamentary intent when the reviewing court considers how closely it should scrutinise the exercise of the statutory function in question."

As we shall see shortly, the contrast with the Canadian approach could not be more stark.

The other leading scope of review case in the ‘Cooke era’ is *Hawkins v Minister of Justice*.\(^{64}\) It involved an unsuccessful challenge to the placing of certain companies under statutory management. Notwithstanding the fact that the corporate executive officers had implored the government to put the companies under statutory management, some time later a judicial review proceeding was launched to invalidate this order in respect of one group of companies. (It went without saying that, no matter how churlish, the executive officers’ behaviour could not waive any jurisdictional error.) The ground of challenge was that the decision-makers had not correctly determined the existence of certain “jurisdictional facts”, whose correctness were conditions precedent to the decision-makers’ jurisdiction, and that the court was duty-bound to ascertain independently the existence or otherwise of those facts.

This was a plausible interpretation of the statutory provision which set out two criteria that seemingly had to be satisfied before an order could be made. However, the criteria were laced with fuzzy words like “desirable”, “public interest”, “adequately”, and the statute provided a safeguard against precipitate and inexpert executive action in the form of a requirement that the “expert” Securities Commission recommend that the order be made.

The three judgments reveal subtle but nonetheless important differences in approach.

Cooke P. did not view the statute as conferring power on the decision-makers to determine conclusively the true interpretation of the criteria.\(^{65}\) There would appear to be an issue whether the criteria posed any ascertainable test or presented any pure question of law, as *Bulk Gas* seemed to require, but Cooke P. did not see the fuzziness of drafting as rebutting the courts’ monopoly over binding interpretation. Nonetheless, Cooke P. simply said that he could see no trace of any misinterpretation of the Act\(^{66}\) and quickly moved on to find the decision-makers’ exercise of judgment (the domain of fact and discretion) to be well within the bounds of reasonableness. While it is fair to say that there was no evidence of misinterpretation of the statutory criteria, the other side of the coin is that there was really no evidence that the decision-makers had kept the criteria firmly in mind either.

Cooke P. observed:\(^{67}\)

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\(^{64}\) [1991] 2 NZLR 530 (CA).
\(^{65}\) Ibid., 534.
\(^{66}\) Idem.
\(^{67}\) Idem.
"The expression 'jurisdictional fact' is probably not of much help in modern administrative law, at least when what is in issue is an order made by an administrative authority under statutory powers. Unusually the issue reduces simply to the extent of the discretion conferred, in the light of the presumption that power to determine questions of law conclusively is not conferred on administrative authorities".

Richardson J. agreed it was an issue of statutory interpretation. Although often cast in the terminology of jurisdiction, he said, the question whether the legislature has implicitly entrusted the decision-maker with jurisdiction to determine conclusively the fulfilment of the statutory criteria, was one of statutory interpretation. Importantly, however, there is no mention by Richardson J. of any presumption against such a construction. It is simply a question of statutory interpretation taking into account the policy content, the nature and subject matter of the decision, and the role performed by the decision-maker in our system of government. Whereas, for Cooke P., there is a rebuttable presumption against such power been given, and a very strong one at that.

Although at one point Richardson J. said the decision-makers had to ask themselves the correct legal questions and address relevant facts, there was no examination of those issues and the overall impression given by the judgment is that Parliament entrusted the issue to the decision-makers and the order was not reviewable absent manifest unreasonableness.

Hardie Boys J. went further than the others in this respect. He saw fulfilment of the statutory criteria as entrusted by the legislature to the decision-makers and could only be challenged for unreasonableness. Hardie Boys J. alone did not pause to say that the correct legal tests had to be applied. In terms of Bulk Gas, he appears to say that the statutory language and context rebutted the presumption against administrative decision-makers determining conclusively questions of law.

Interestingly, there was no privative clause in the legislation considered in Hawkins, and great store was put on the (assumed or actual) expertise of the Securities Commission and its crucial role in the decision-making process.

The argument and judgments in Hawkins perhaps illustrate a central tenet of Lord Cooke's judicial philosophy in administrative law: that administrative law is a subject of broad principles, and in applying those principles to decide particular

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68 Ibid., 536.
69 Ibid.
70 Ibid., 538.
71 Ibid., 540.
72 I say this mindful that Hardie Boys J. did say that the issues of desirability and adequacy "must be addressed under the section": idem.
73 Richardson J. said “[it must be assumed that the Commission has the appropriate commercial expertise to make that judgment”: ibid, 537.
74 "Administrative law is essentially a law of broad principles ... Very often the courts have to decide concrete cases by applying such concepts [fairness, reasonableness, conformity with law] directly, rather than more detailed rules":
cases the facts and statutory interpretation issues are usually decisive. In a paper to an International Bar Association meeting entitled “Has Administrative Law Gone Too Far?”, Cooke P. said: 

“the subject [of administrative law] does not lend itself well to elaboration of principles. Statutory interpretation and the judicial attitude of mind are basically, in most instances, the governing factors. The crunch cases are not decided by text book principles; they are exercises in line-drawing”.

But in drawing those lines - at times an anxious job, and, as Lord Cooke has pointed out, it is one anxiety spared academic commentators - the public are entitled to expect open and honest explanation by the judges of what they are doing and why. That was the major reason for welcoming the supplanting of jurisdictional error by error of law: the expectation that by so doing the courts could move forward from the patent manipulation and ex post labelling to a more principled, realistic and hopefully more predictable approach to scope of review. It seems to me an essential part of this forward movement is the recognition and refinement of a doctrine or theory of deference. New Zealand law provides little space for such a development at the moment.

I should be clear as to what I am saying here. If you look at what judges do, as well as at what they say, there is a good deal of deference. As the broad principles of administrative law are applied to particular parts of the variegated administrative landscape, accommodations of various sorts are made. Ad hoc deference in this process is common. An English illustration is the reticence of Lord Denning to review decisions of welfare tribunals for anything less than fundamental error for fear that any other stance might turn the area into “the happy hunting-ground for lawyers”.


76 Paper presented to the International Bar Association, 25th Biennial Conference, held in October 1994, in Melbourne, Australia, p. 4.

77 It is through their reasons for judgment that judges are held accountable for their exercise of state power; just as the executive and administration are held accountable (amongst other ways) by judicial review.

78 I should admit here that, although I had doubts as to some of the reasoning in Bulk Gas, I have supported the end result for its potential as a step forward. See Taggart, supra at n. 22 and see also Smillie, supra at n. 4. This is not a view shared by all New Zealand administrative lawyers. See supra at n. 29.


I do not deny that vague notions of deference play a part in classifying issues or questions as ones of fact, mixed fact and law, and law. Nor can it be denied that the rival views as to what is a question of law mask different views as to the appropriate division of law-making authority between courts and public authorities. Lord Diplock’s chastisement of Lord Denning’s approach in *Pearlman* while adopting simultaneously the identical error of law approach, shows that clearly. But having said all that, the point remains that there is no commitment to nor principled articulation of “deference” at a theoretical or applied level in Anglo-New Zealand administrative law. As we will see, this contrasts starkly with the law on scope of review in Canada and the United States; and invites explanation.

Any attempt to simplify a complex idea runs the risk of caricature. There seems to me, however, a bundle of inter-related notions underpinning the view in *Bulk Gas* that pure questions of statutory interpretation are ultimately for the courts to determine conclusively without overt deference to the original decision-makers view:

1. That there is one right answer to questions of statutory interpretation.
2. That, as experienced and talented lawyers, the judiciary are the best placed persons to provide that answer.
3. That these questions of “law” are separate and distinguishable from policy, discretion and fact-finding.

Each of these notions is controversial, and together they have largely been rejected in Canadian and United States scope of review doctrine.

The Canadian Approach: Baulking at *Bulk Gas*

Dissatisfaction with the concept of jurisdiction has manifested itself in a different way in Canada. Rather than reject the concept altogether, in the last twenty years the Supreme Court of Canada has narrowed the range of jurisdictional errors and adopted a decidedly deferential attitude towards administrative interpretations of statutes. This commitment to judicial restraint or deference is symbolised by the oviferous decision of the Supreme Court of Canada in *CUPE v New Brunswick Liquor Corporation*, which has spawned a large case-law and literature.

Prior to *CUPE* the Supreme Court in the 1970s, under the influence of *Anisminic*, employed a “correctness” standard of review determining for itself “perfectly simple, short and neat” questions of law without deference to the agency’s interpretation.

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83 In re Racal Communications Ltd., supra at n. 9.
84 [1979] 2 SCR 227 (hereafter referred to as *CUPE*).
By the end of that decade the Supreme Court had seen the error of its ways and tried to mend them in *CUPE*. For our present purpose it is important to understand what triggered that switch in approach, from interventionist to deferential scope of review.\(^{87}\)

In common with the courts in New Zealand and England, the Canadian court recognised the conceptual impossibility of constructing "logically coherent doctrine for distinguishing those questions conclusively committed to the agency from those which the courts could decide for themselves".\(^{88}\) But this realisation did not lead the Supreme Court to abolish the distinction between jurisdictional and non-jurisdictional errors, and to treat all errors of law as if they went to jurisdiction, as the courts in New Zealand and England have done. These are essentially two reasons why this did not happen. First, the courts in Canada had been forced to rethink the relationship between themselves and administrative agencies. The Supreme Court was persuaded that these agencies "had indeed been given the primary statutory responsibility for implementing and elaborating the legislative mandate within their area of regulation".\(^{89}\) Second, this rethinking had implications for statutory interpretation and cast doubt upon the premise of their previously interventionist approach, that there was one uniquely correct meaning of the agencies' constitutive legislation to be provided by the judges. Madam Justice Wilson in the *Corn Growers* case quoted the following statement with approval:\(^{90}\)

"Interpreting a statute in a way that promotes effective public policy and administration may depend more upon the understanding and insights of the front line agency than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law. Administration and interpretation go hand in hand".

In other words, there is no bright line separating law from policy.\(^{91}\)

Although it sounds self-aggrandizing for an academic lawyer to say so, it appears that the Canadian Supreme Court in *CUPE* reacted principally to sustained and severe criticism that the Court was too interventionist and unprincipled in the area of judicial review.\(^{92}\) Much of the discontent stemmed from the Court's perceived lack of sympathy for organised labour but this "spotty record" in the labour relations area

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\(^{87}\) I rely here primarily on John Evans, “Developments in Administrative Law: The 1984-85 Term” (1986) 8 Supreme Ct LR 1, 26-29, which was quoted extensively and approvingly by Madam Justice Bertha Wilson in her wide-ranging and respected dissent in *National Corn Growers Assn v Canada (Import Tribunal)* [1990] 2 SCR 1324, 1337-8 (hereafter referred to as *Corn Growers*).

\(^{88}\) Idem.

\(^{89}\) Idem.

\(^{90}\) Supra at n. 86, quoting from Evans et al., supra at n. 85, 414 (3rd ed. 1989).


gave judicial review more generally a "bad name" in Canada.\textsuperscript{93} Unsurprisingly, the turn to deference came in a labour relations case.

The facts of \textit{CUPE} need not detain us longer than to say it involved an ultimately unsuccessful challenge to an interpretation of its constituent statute by the New Brunswick Public Service Labour Relations Board. The statutory provision in issue was said to be "very badly drafted" and "bristle[d] with ambiguities", such that, according to Justice Dickson (as he then was), no one interpretation could be said to be "right".\textsuperscript{94} The Court below viewed the issue as one of "collateral fact" or jurisdictional error, and overturned the Board's interpretation as incorrect, substituting its view of the correct interpretation. Speaking for a unanimous Supreme Court, Dickson J. preferred a "narrow" category of jurisdictional error and, after acknowledging the difficulty of determining what is and is not jurisdictional, he admonished the courts "not [to] be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".\textsuperscript{95} That amalgam of "jurisdiction in the narrow sense of authority to enter the inquiry" and judicial restraint, left many issues of statutory interpretation to the agency, whose view was to prevail unless "patently unreasonable".

Two reasons were given for ceding such a wide area of administrative law-making to the Board. First, the statute contained a "no certiorari" privative clause which was viewed as a "clear statutory direction" by the legislative that the courts were not to too readily intervene.\textsuperscript{96} Dickson J. observed:\textsuperscript{97}

\begin{quote}
"Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system ...and its labour relations sense acquired from accumulated experience in the area."
\end{quote}

This lead on to the second reason for the courts to defer to reasonable agency interpretations; the legislative delegation to the Board of broad powers to administer a system of collective bargaining which required "[c]onsiderable sensitivity and unique expertise" on the part of the Board.\textsuperscript{98} After carefully reading the Act, the Board's decision and that of the Court below, the Supreme Court could not brand the Board's decision as patently unreasonable,\textsuperscript{99} and so it stood.

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\textsuperscript{93} D. J. Mullan, "Judicial Restraints on Administrative Action: Effective or Illusory?" (1976) 17 Les Cahiers de Droit 913, 924.
\textsuperscript{94} Supra at n. 84, 230 & 237.
\textsuperscript{95} Ibid., 233.
\textsuperscript{96} Ibid., 235.
\textsuperscript{97} Ibid., 235-6.
\textsuperscript{98} Ibid., 236.
\textsuperscript{99} Ibid., 242.
\end{flushright}
The adoption in *CUPE* of a policy of judicial restraint towards the review of administrative agencies' determinations was seen by many as bringing "Canadian administrative law out from under the long shadow cast by Dicey". 100 *CUPE* has been followed in name by the Supreme Court ever since but the path of the Court’s jurisprudence has been anything but straight and smooth. Regular lapses back into a more aggressive jurisdictional approach have provoked allegations of departure from *CUPE*’s spirit.

In my view, the Supreme Court made a major mistake in *CUPE* in not rejecting the concept of jurisdiction altogether. 101 By seeking instead to refashion the concept narrowly, it entrenched the troublesome acrobatic distinction in Canadian scope of review doctrine. This has lead to no end of trouble and confusion but that is not directly relevant to this discussion.

What is relevant is the elaboration of the so-called “pragmatic and functional” approach, which builds on the foundations laid in *CUPE* and requires the court to examine, in addition to the wording of the statute, the statutory purpose(s), the reason for the tribunal’s existence, the area of expertise of its members and the nature of the problem. 102 This list of deference criteria can be further broken down and lengthened. 103 Deference is not automatic, and must be earned. 104 One matter should be highlighted in light of the earlier discussion, considerable attention is given to the presence and wording of privative clauses, with significance attaching to even slight differences in wording. 105

The aspirations of the Canadian Supreme Court are more laudable than the results reached in the dozens of cases - mostly labour - decided by that Court since *CUPE* and added to each year. As we will see in a moment, Canadian scope of review law has been influenced by earlier developments south of its border. In this Canada is a “natural meeting ground” 106 of the English and American administrative law traditions.

This Canadian effort to reconcile the rule of law with the modern state - and to put Dicey behind them - has aroused interest elsewhere in the Commonwealth. 107

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101 Taggart, supra at n. 92, 650-1.
102 U.E.S., Local 298 v Bibeault [1988] 2 SCR 1048, 1088, per Beetz J.
United States law on Scope of Review: Bulk Gas at the Chevron Station

The temptation at this point of the North American comparison is to stop. The American courts and commentators have wrestled with the “puzzle” of scope of review for over fifty years. The best administrative lawyers of each generation have gnawed at the subject. Like a dog with an old bone, judges and jurists are fascinated by the subject, unwilling to leave it alone, despite obvious evidence that there is nothing left from which sustenance can be gained. The literature is immense, and in recent times has been swelled further by the revival of scholarly interest in statutory interpretation. Moreover, the theoretical sophistication of the discourse provoked by the leading modern case, *Chevron, U.S.A., Inc. v Natural Resources Defence Council, Inc.*, is daunting. The very different constitutional, institutional and social conditions in the United States make appropriate comparisons difficult. All that said, however, I do not think United States law can or should be ignored. It has been a direct, if insufficiently acknowledged, influence on the Canadian law surveyed above, and, importantly, it illuminates also the underlying assumptions of the Anglo-New Zealand approach.

It has been said that there are “[t]wo competing traditions” in American law concerning the issue of the appropriate allocation of interpretative authority between administrative agencies and courts. The first, traceable back at least to the great case of *Marbury v Madison*, views matters of statutory interpretation as questions of “law” to be settled ultimately by the judiciary. The second tradition, usually sourced to the aftermath of the Depression and the New Deal, is one of a judicial “deference” to agencies’ interpretations of the statutes they administer. It has been said that these two traditions have “co-existed uneasily” since the 1940s.

The justifications for deference prior to *Chevron*, which often resulted in “reasonable” agency interpretations being upheld on review, were many and at various times courts laid emphasis on different factors; including the “expertise” of the agency, the inextricable linkage of interpretation with policy-making and advancing the legislative objects, congressional delegation, favouring contemporaneous, longstanding and consistent agency understandings of the legislation, and the thoroughness of the agencies treatment of the issue and its persuasiveness. These factors, and others, gave the courts a long list to take into

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109 467 U.S. 837 (1984) (hereafter referred to as *Chevron*). Note that the interpretation adopted by the agency had been through the “notice and comment” rule-making procedure. See generally Aronson and Dyer, supra at n. 107, 241-2.

110 The value of United States law has been acknowledged by Lord Cooke (“Has Administrative Law Gone Too Far?”, supra at n. 19, p.4) but it does not appear to have influenced his stance or that of the Court of Appeal on scope of review doctrine.

111 Taggart, supra at n. 92, 650.


113 5 U.S. (1. Cranch) 137, 177, per Marshall C.J. (1803): “It is, emphatically, the province and duty of the judicial department to say what the law is”.


115 Diver, supra at n. 113, 551. See also T. W. Merrill, “Judicial Deference to Executive Precedent” (1992) 101 Yale LJ 969.
account in deciding whether or not to defer to an agency's "reasonable" interpretation or to review the decision de novo on a "correctness" standard.

It hardly needs pointing out that deference is a slippery word. It can mean anything from "courteous regard" to "submission", with a good deal of room in between within which judges can move. The pre-Chevron law provides support for almost any position on this continuum. The variety of possible approaches can lead easily to the change of unprincipled manipulation and result orientation, similar to that levied against the jurisdictional/non-jurisdictional distinction in Anglo-Australian administrative law. The variety of possible approaches in American scope of review law does not diminish the most important point for my present purpose, namely, that deference has been a necessary and accepted part of the scope of review calculus in the United States for more than fifty years, in a way that it has not featured in the rest of the common law world.

Most of the justifications for deference come back to the notions of legislative intent and agency "expertise" in the broadest sense. More than any other factor, the thread of expertise, although frayed to breaking point in more recent times, legitimised the existence of administrative agencies in the United States - the so-called Fourth Branch - which had no constitutionally secure foothold. This is part-and-parcel of the domineering influence the independent regulatory agency model has had on federal administrative law. It is no coincidence, in my view, that the Canadians having belatedly followed the Americans down the independent regulatory agency path likewise have recognised the importance of "expertise". This may be a harbinger of things to come in the United Kingdom and other countries that have imported that regulatory agency model in the wake of public utility privatisation.

To return to the strain between the two traditions referred to above, a seemingly decisive turn in favour of deference was signalled by the Supreme Court in the Chevron case decided in 1984. There, the Supreme Court said that unless a reviewing court could show that "Congress has directly spoken to the precise question at issue", the court should defer to any reasonable construction of a regulatory statute made by the agency charged with the statute's administration, rather than preferring to reach its own conclusion on the correct meaning of the statute. Justice Stevens, speaking for the court, said "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute".122

116 See J. Beatson, supra at n. 82.
117 Except Canada, in recent times.
120 Chevron, supra at n. 109, 842.
121 This admirable summary is taken from T. Rakoff, "The Shape of the Law in the American Administrative State" (1992) 11 Tel Aviv University Studies in Law 9, 34.
122 Chevron, supra at n. 109, 843.
This was justified squarely on separation of power grounds. Reasonable interpretations of statutes by agencies are to be upheld, in the absence of Congress addressing the precise issue clearly, because Congress entrusted the task of policy-making to the agency, and in the discharge of that delegated function the agency is responsible to Congress not the judiciary. The *Chevron* court equated lack of clarity of intent or ambiguity with a deliberate delegation of law-making power to the agency.

*Chevron* (and its progeny) have given rise to ceaseless commentary and been subjected to a welter of criticisms. I want to focus here on some points relevant to understanding *Bulk Gas* and its implications.

One way of viewing *Chevron* is that it established a presumption of deference to reasonable agency interpretations unless congressional intent on the specific issue was clear. In other words, the presumption of deference is rebuttable by clear intent and specific words. This is the exact opposite of the presumption articulated by Lords Cooke and Diplock. Both presumptions operate as “default rules” in scope of review doctrine - operating in default of clear legislative intent being: *Chevron* upholding reasonable agency interpretations; *Bulk Gas* requiring substitution of the court’s interpretation.

As both operate as default rules, albeit opposing ones, it is not surprising that some of the criticisms of the *Chevron* presumption apply equally to the *Bulk Gas* presumption. As time is short I will focus here on the insightful - indeed prescient - critique of *Chevron* by Stephen Breyer; formerly a law teacher, at the time of writing in 1986 he was a judge of the Fifth Circuit Court of Appeals, and is now a Supreme Court Justice.

Despite *Chevron*’s attractive simplicity, for several reasons Judge Breyer thought it was unlikely to displace in the long run the more complex law it sought to discard. First, the diversity of statutes, goals, regulatory problems and agencies would defeat “a single simple verbal formula”. Second, the “congressional instruction hypothetically implied from silence” should be read, according to Breyer, as requiring the Court’s to pay particular regard to a reasonable agency interpretation, which put store on the persuasiveness of the agency’s stance, rather than on agency fiat. Third, Breyer thought it would be psychologically difficult for judges, who had examined the problem closely on review, to uphold an agency’s interpretation.

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124 Woolhandler, supra at n. 114, 242 (“a presumption of delegation of law-making power to agencies”). Because the Supreme Court in *Chevron* described the process as one involving two steps - (1) is the intent clear?; (2) if not, defer to reasonable agency interpretation - it is not common to describe the *Chevron* methodology as a presumption, but it is not incorrect to do so.
125 For proof of his prescience see the analyses of latter developments in Merrill, supra at n. 115 and R. L. Weaver, “Some Realism About *Chevron*” (1993) 58 Missouri LR 129.
127 Ibid., 53.
128 Idem.
which was in their view legally wrong but nonetheless reasonable. Judge Breyer concluded:

“Inevitably, one suspects, we will find the courts actually following more varied approaches, sometimes deferring to agency interpretations, sometimes not, depending on the statute, the question, the context, and what makes sense in the particular litigation, in light of the basic statute and its purposes. No single simple judicial formula can capture or take account of the varying responses called for by the different circumstances and needed to promote a proper, harmonious, effective, or workable agency/court relationship.”

Where the North Americans have the advantage over their common law cousins elsewhere, it seems to me, is in consciously thinking of scope of review in terms of the appropriate allocation of interpretive authority between agencies and courts. The failure of British lawyers to consider allocation of decision-making functions was said recently to be explained by their Diceyan suspicion of the bureaucracy. Certainly it is true to say that the Westminster-style parliamentary system, with the administration under the Executive has not given rise to the same legitimacy crisis as administrative agencies have in the United States. Moreover there seems to be less inclination in Anglo-Australasian administrative law to view judicial and administrative decision-making as distinct processes, with the latter “administering” policy by making and shaping it to effectuate legislative goals.

Perhaps administrative authorities are partly to blame for this state of affairs. It is incumbent on decision-makers to explain fully their reasons for preferring one interpretation over another - reasons of law, policy and practicality. Resort to the dictionary is insufficient. What one commentator has described as “the presence of an agency reader” should be felt. Administrative decision-makers, are not like Victorian children, to be seen and not heard. Close regard must be paid to the reasoning of the agency under *Chevron*. United States administrative law has a well developed requirement of reasoned elaboration, arising from common law and long since codified in the Administrative Procedure Act. The absence of a similar across-the-board requirement in the United Kingdom and elsewhere perplexes American observers.

**Dicey, Pluralism and Bath Water**

129 Idem.
130 Idem.
132 See, e.g., P. R. Verkuil, “Crosscurrents in Anglo-American Administrative Law” (1986) 27 William & Mary LR 685, 693: “… the fears raised in the United States about the legislative branch surrendering its powers to unelected bureaucrats are far less significant in England”.
134 See *Bulk Gas*, supra at n. 4, 137.
135 P. L. Strauss, “When the Judge is not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History” (1990) 66 Chicago-Kent LR 321, 325. See also *Chevron*, supra at n. 120, 843.
137 See, e.g., Verkuil, supra at n.132, 701-5.
Underlying the case law on scope of review is a tension between legal centralism and pluralism. The Victorians conceived of the law as "a whole, unified, integrated thing" with the courts at the top fully competent to administer the whole law. This is one of the premises upon which Dicey built his rule of law. This legacy is with us still, although the language has changed somewhat. Professor Ronald Dworkin speaks of "law as integrity", and another American scholar calls it "horizontal coherence". This pull towards coherence across the whole legal landscape is very strong. Recall it was the spectre of inconsistent interpretations given by different judges of the same statutory phrase which launched the "error of law" ship in the United Kingdom in 1979.

It is vital to remember, however, notwithstanding the potent symbolism of the "ordinary" courts at the top of the interpretative heap administering the "ordinary" law, that historically the courts never claimed to determine conclusively the meaning of all "law". The concept of jurisdiction operated as a saw cutting off those questions which the courts would subject to a "correctness" standard of review from those it left to the administrators. According to Professor Harry Arthurs, the concept of jurisdiction operated as a mediating principle; mediating between the ordinary law and the distinctive, special laws of the administration. Leaving room, within jurisdiction, for pluralism to survive, if not flourish. The recent interment of jurisdiction in Bulk Gas is a (re)turn towards centralism, just as the turn towards deference in Chevron emphasises agency autonomy and sectorial specialisation (in other words, pluralism). Extreme turns in either direction are misconceived, in my view, and likely to be short-lived or compromised by context, as Judge Breyer suggested.

It is the case, in my view (one shared by many others), that the concept of jurisdiction was too blunt an instrument to properly "saw off" or allocate interpretive authority between courts and administrative agencies, and was rightly abandoned. But, to change the metaphor, the baby should not be thrown out with the bath water. As Professor Paul Craig said recently.

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142 See the view of Peter Hogg that generalist courts are only justified in reviewing specialist administrative decision-makers when the latter infringe "general values fundamental to the legal order as a whole": "The Supreme Court of Canada and Administrative Law", 1949-1971" (1973) 11 Osgoode Hall LJ 187, 189 and "Judicial Review: How Much Do We Need?", in D. J. Baum (ed.), The Individual and the Bureaucracy (Carswell, Toronto, 1974) 81, 88.
143 Pearlman, supra at n. 24.
147 Rakoff, supra at n., laments the specialist sectorization of United States law, which Chevron fuels.

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"It is all too easy to reason from the unworkability of the collateral fact doctrine to the unquestioning acceptance of the idea that it is right and proper for the ordinary courts to substitute their judgment on any issue of law, and to give the word law a broad meaning with the result that any matter of statutory interpretation will signal judicial intervention. The proper balance of power between court and agency is still the central issue. The nature of this balance should be openly faced in its own terms, and the answer should not be assumed merely because one previous attempt to draw the balance has proven to be defective."

It is possible that in English law the “margin of appreciation” doctrine will slip over into the interpretation of statutes from the control of discretionary power field\(^{149}\) and provide some encouragement for developing the open calibration of deference Craig advocates. This will have little direct influence in New Zealand. In the ‘Cooke era’ the New Zealand courts have “ransacked the case law” of many jurisdictions, especially Canada and the United States, for assistance in interpreting the New Zealand Bill of Rights Act 1990\(^{150}\). Administrative law has not fared so well, comparative legally speaking. Raising the difficult question why the law in New Zealand is so dramatically different from that in Canada? I will return to that question after addressing briefly the position in Australia.

An Australian Aside: On the Brink of Bulk Gas

Mark Aronson and Bruce Dyer raised the alarm recently in their excellent textbook Judicial Review of Administrative Law, viewing some dicta in the recent High Court of Australia case of Craig v State of South Australia\(^{151}\) as taking Australian law to the brink of abolishing the distinction between jurisdiction and non-jurisdictional error in relation to administrative tribunals and a fortiori bureaucrats.\(^{152}\) In typically vigorous style the authors denounced any such move as “bad policy”, saying:\(^{153}\)

“In effect, it sets up 'error of law' as a guiding principle of judicial review, without any regard to its indeterminacy or to the consequence of such a massive expansion of the scope of judicial review”.

The news that the High Court is on the brink of Bulk Gas came as a surprise for two reasons. First, up till now the Australian courts have supported steadfastly the concept of jurisdiction and refused to explore what others have seen as the logical

\(^{149}\) See R. v Radio Authority, ex parte Bull, English Court of Appeal, 17 December 1996.
\(^{150}\) Sir Robin Cooke, “Brass Tacks and Bills of Rights”, Peter Allen Memorial Lecture delivered at the University of Hong Kong, October 1994, p. 21.
\(^{151}\) (1995) 131 ALR 595 (hereafter referred to as Craig).
\(^{153}\) Ibid., 988.
implications of the Anisminic approach. Second, I had just finished reading Lord Cooke’s fourth Hamlyn Lecture, towards the end of which he noted with sadness “an Australian deviation” from the English position in In re Racial Communications Ltd., O’Reilly v Mackman and Page. According to Lord Cooke, the High Court had unnecessarily muddied the waters in Craig’s case, approving of the jurisdictional/non-jurisdictional error distinction with all its “old difficulties”, and to boot adopted an exceedingly narrow concept of the record.

The point of common ground between Professor Aronson/Mr Dyer and Lord Cooke seems to be that whatever the High Court said about scope of review in Craig’s case was “unnecessary”; thereafter they emphasise different parts of the unanimous and joint judgment. On the one hand, the High Court for the first time affirms strongly the distinction between inferior courts and administrative tribunals, first introduced by Lord Diplock, as noted above, and adopted in Bulk Gas. The High Court went further than Lord Diplock in at least one respect. Lord Diplock had suggested somewhat unenthusiastically that the "subtle distinction" between jurisdictional and non-jurisdictional errors, which had done "so much to confuse ... administrative law before Anisminic", might survive in the inferior court context in the presence of a privative clause; but there was no privative clause present in Craig’s case. On the other hand, the High Court again for the first time endorsed strongly, in obiter, Lord Diplock’s rebuttable presumption that questions of law are ultimately for the conclusive determination of the courts, although the definition of legal error given seems narrower than that prevalent in New Zealand and England. In relation to the administrative tribunal side of the divide, the High Court of Australia does seem posed on the brink of either "liberation" (according to Lord Cooke) or an abyss (according to Professor Aronson and Mr Dyer). Only time will tell.

There is growing support in Australia for the development of a deference principle in scope of review doctrine. An early expression of this view is that of Kirby J. (as he then was) in Australian Broadcasting Commission Staff Association v Bonner. “Words being an imperfect vehicle for meaning, it is inevitable that administrators, seeking to give content to the language of legislation, will sometimes reach views as to the meaning of the words which differ from the views later reached by courts or indeed by other administrators. There are sound reasons of public policy why courts should exercise restraint in interfering in the process of interpreting legislation, so long as the administrator has not acted in bad faith and proceeds to give words a content which, though not in the court’s view preferable, was open to him or her .... The policy reasons for restraint by courts in reviewing decisions of this kind

154 See M. Allars, Introduction to Australian Administrative Law (Butterworths, Sydney, 1990) paras 5.126 to 5.131.
155 Supra at n. 16, pp. 19-21.
156 Idem.
157 In re Racial Communications Ltd., supra at n. 9, 383.
158 Craig, supra at n. 151, 602.

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include (a) the inherent imperfection of language as an instrument for conveying meaning and the ambiguity of much statutory language, briefly expressed, requiring constant elucidation by administrators and courts; (b) the deference which courts should normally pay to the superior and more detailed managerial skills of administrators who will usually be more alive to legitimate and lawful policy considerations that are not or cannot be ventilated in relatively brief proceedings before the courts; and (c) the undesirability that courts, through the medium of judicial review, should become enmeshed in the minute decisions of administrators, substituting their judgments and assessments in detailed matters for those of the administrators themselves”.

More recently in Australia there have been extended discussions of deference, drawing heavily on the Canadian and American authorities. Some of this discussion would see deference principles overlaying the jurisdictional/non-jurisdictional distinction but in my view, which I suggest the Canadian experience supports, is that there is no alternative but to move to an error of law standard conditioned on deference.

Will *Bulk Gas* Ever Meet *CUPE*?

I have mentioned already the oddity that while the Canadian case law on the Charter has been plundered by New Zealand courts it has being ignored on scope of review doctrine in administrative law. Add to that the fact that the doyen of Canadian administrative law and author of the *CUPE* decision, the former Chief Justice of Canada Brian Dickson, is widely admired in this part of the world, and it seems even more curious.

Some years ago, Professor David Mullan ventured some tentative thoughts on this subject which I will draw on here. It has to be acknowledged at the outset that such comparisons are highly speculative. The constitutional and administrative laws of a particular country are uniquely products of that society’s history and culture, and these underlying differences may explain why some “borrowings” occur and others do not.

New Zealand law and lawyers are still more preoccupied with English law than their counterparts in Canada. There is more to this than our retention of the appeal to the Privy Council, anglophilism is part of the legal training and culture in New Zealand. And is reflected to in the almost unprecedented ennoblement of Lord Cooke of Thorndon, whose accomplishments we have come to honour. So does this explain why the Court in *Bulk Gas* followed the lead of Lords Denning and Diplock, rather than Chief Justice Dickson?

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160 See Bayne, supra at n. 107; Bayne, “Fuzzy drafting and the interpretation of statutes in the administrative state” (1992) 66 ALJ 523; Aronson and Dyer, supra at n. 152, ch. 4; Allars, supra at n. 154, paras 5.145 to 5.146.

161 In the International Bar Association paper referred to supra at n. 76, p. 7 Lord Cooke identified himself as an “unfeigned admirer” of Chief Justice Dickson’s constant adherence to basic principle.

162 Mullan, supra at n. 92, 293.

163 See M. Taggart, “The Province of Administrative Law Determined?”, in Taggart, supra at n. 86, 18.

164 Mullan, supra at n. 92, 302-3.
Even if it does, that does not explain why Lord Diplock’s view was preferred to that of Lord Wilberforce, who said in a neglected passage in *Anisminic*: 165

"The extent of the interpretatory power conferred upon the tribunal may sometimes be difficult to ascertain and argument may be possible whether this or that question of construction has been left to the tribunal, delimitation of the tribunal’s area by the legislature, it is reserved for decision by the courts. In one case it may be seen that the legislature, while stating general objectives, is prepared to concede a wide area to the authority it establishes: this will often be the case where the decision involves a degree of policy-making rather than fact-finding, especially if the authority is a department of government or the Minister at its head. I think that we have reached a stage in our administrative law when we can view this question quite objectively, without any necessary predisposition towards one that questions of law, or questions of construction, are necessarily for the courts. In the kind of case I have mentioned there is no need to make this assumption".

As noted above, it is in exactly that type of situation that the Canadian and United States courts have constructed deference principles.

Perhaps it is more a matter of size or scale. In these small isles at the bottom of the world—"Adam Smith’s isles” as the *Economist* fondly described New Zealand in the 1980s- in elite circles everyone does know everyone. Does this explain our reluctance to develop deference principles? It is certainly easier in small societies for commanding figures in the law, no less than in any other walk of life, to dominate in a way unknown in larger societies, especially federated ones. And the closeness of relations in a smaller society makes strong criticism, even if justified, rather awkward. Nor is there the same critical mass of critical administrative lawyers in New Zealand that there is in Canadian universities and elsewhere. The sustained trenchant criticism of the Supreme Court of Canada’s performance in administrative law by the legal academy in the 1960s and 1970s has no obvious parallel here.

Of course, as David Mullan points out, this may be because the New Zealand courts have done a better job over a longer period of time in the controversial field of labour relations than the Canadian courts. As Mullan said in 1988 the New Zealand courts read the privative clauses in labour relations legislation sympathetically and were not disposed to interventionism in the scrutiny of the former Court of Arbitration.166 Whether the same can be said for the tribunals and courts that have replaced it will not detain us.167 It is true that by and large the New Zealand judiciary has been spared the relentless class critique heaped on their counterparts in England and Canada,168 so there is not the same level of “guilt” about the acts and omissions

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165 Supra at n.9, 209.
166 Supra at n. 92, 305.
167 As Mullan pointed out, the Legislative regime is "now quite different" (ibid., 305, n. 50) and it has changed again since he wrote.
168 For reference to some of the Canadian literature, see Taggart, supra at n. 92, 650. For a sample from the large British literature, see J. Clark and Lord Wedderburn, "Modern Labour Law: Problems, Functions, and Politics", in Lord
of their judicial forbears in the labour relations field that evidently played on the minds of the Canadian judges.

In this regard I have a vivid recollection of a conference on the White Paper version of the Bill of Rights, held in the Legislative Council Chamber of Parliament Buildings on 10 May 1985. Dr Judy Reid, who gained her doctorate from the London School of Economics and Political Science, spoke to the impact of the proposed Bill of Rights on labour and made mention of the less than distinguished judicial record in such matters in the United Kingdom last century. When it was his turn to speak, Sir Robin Cooke put up, as he said, "a show of passive resistance"; pleading ignorance of the only New Zealand case mentioned by Dr Reid and implying that the New Zealand Court of Appeal does not inhabit the 19th century. This accords with what Cooke J. said extrajudicially in 1975: "I hope and believe that the days when the Courts could fairly be criticised for unduly restrictive statutory interpretation have passed".

Lord Cooke's commitment to "purposive" interpretation is well known. But it is not clear to me how well this sits with the Diceyan assumptions which underlie his "error of law" approach in administrative law, outlined earlier. As Wade MacLauchlan demonstrated convincingly a decade ago, the question of "how" statutes are interpreted is bound up with the question of "who" is to interpret them authoritatively.

Moreover, as intimated above, there has not been the same tradition in New Zealand of entrusting tasks to independent regulatory agencies, in contrast to the United States and latterly Canada. As David Mullan put it:

"relevant also is a range of attitudinal and cultural factors of considerable indeterminacy. There seems far less of the cult of the expert in New Zealand and much more scepticism about the civil servant who exercises so much administrative power either directly under statutes or regulations or by virtue of the necessary and extensive delegations of power that take place in the operations of government and extensive judiciary may be more trusted than their counterparts in Canada, a not surprising phenomenon given the widespread use in Canada of judicial appointments even at the High Court and

Court of Appeal levels as part of an over-extensive system of political spoils. This may well induce a far greater sense among New Zealanders of the judiciary as the neutral, apolitical arbitrators of complaints against the over-reaching of statutory authorities. There may also be a more prevalent attitude in New Zealand that questions of 'law' are for lawyers and judges, not the administrative arm of government, a belief that also explains the perpetuation of the Diceyan philosophy that in 'our' system, the law of the land is administered by the ordinary court to which all have access. 'Having one's day in court' means 'having one's day before a regular court of general jurisdiction', not some specialist court or administrative tribunal all of which are assumed to be staffed by second rate personnel who therefore dispense second rate law”.

Now, some years on, New Zealand seems to be overrun by experts; the “cult” has arrived with a vengeance, filling the vacuum left by the contracting state.

Mullan points also to the greater homogeneity of New Zealand society giving a greater sense of community and shared values which might make the job of judicial review more acceptable and easier here, but that stitching has been unravelling for some time.

These are some of the factors which may explain why New Zealand and Canadian law is so dramatically different despite their shared constitutional heritage. Lord Cooke has reminded us recently that the history of administrative law has been one of evolution. It might be that the administrative laws of the two countries are simply at different stages of evolution.

The End of the Road

This Cook’s Tour of comparative scope of review doctrine has to come to an end. There has not been time nor is this the occasion to go into the detail of what shape deference principles might take - whether a rebuttable presumption or a factorial balancing test, or the difficulties of what exceptions to make or factors to count. Its purpose has been to ventilate the general issues and, by way of friendly critique, to pay tribute to Lord Cooke of Thorndon, whose hand has left its indelible mark on this area of administrative law, as on so many others.

176 Ibid., 306.
177 Fourth Hamlyn Lecture, supra at n. 16, p.15.