I. Introduction .................................................................................................................. 25
II. The Tools of Legal Intervention: The Regulatory Mix .................................... 27
   A. From Soft Intervention to the Heaviest Machinery of the State ........... 27
   B. Is Litigation a Tool? ................................................ ........................................... 28
   C. An Example of Legal Intervention and of the Regulatory Mix:
       The Suppression of Smoking ................................................................. 29
III. The Tools of the Administrative State .............................................................. 31
    A. Introduction ................................................................................................. 31
    B. The Administrative State and Its Many Areas of Regulation ........... 31
    C. Agencies, Government Departments, and Other Institutions ........ 32
    D. Tools and Administrative Actors: Some General Points ............... 34
    E. The Mix of Tools and Administrative Actors: An Illustration—
       Regulating Lawyers ................................................................................. 35
    F. Discretion: The “Übertool”? ................................................................. 36
IV. Tools and the “New” Governance ................................................................. 36
    A. Is There a New Governance? ................................................................. 36
    B. The Changing Emphasis: Some Examples ....................................... 39
V. Assessing Tools and the Administrative State ................................................ 40
    A. Introduction ................................................................................................. 40
    B. Five Criteria ................................................................................................. 41
Suggested Additional Readings ................................................................................. 43

I. INTRODUCTION

This chapter examines the various “tools” of the administrative state as part of our understanding of administrative law. The administrative state performs a host of functions: from regulating the environment to assuring minimum levels of income protection; from regulating professions to enforcing security measures in a post-9/11 world. In performing these many and varied tasks, administrative actors can be provided with a range of “tools” (“instruments,” “mechanisms”). This chapter focuses on what these tools are, how they are
employed, and some of the more important issues that arise regarding their use. The discussion casts lawyers primarily in the role of architects as they design and implement the many, varied aspects of regulation. The analysis is divided into four sections.

Section II contains a brief survey of legal intervention in general as the larger context in which the administrative state functions. Legal intervention with regard to a set of issues can take many forms. It can range from “soft” tools, such as legislatively authorized educational initiatives, through to the most drastic tool of law, criminal sanctions, and can use various aspects of the administrative state. This section also asks to what extent litigation should be considered a tool. It also illustrates the discussion of the many kinds of legal tools and complexities regarding their employment by reference to an issue familiar to all: the suppression of smoking.

Section III focuses on the administrative state and the tools that it employs. As part of the repertoire of legal interventions, legislatures can provide through legislation the power to some designated administrative actor to regulate the various issues that are the subject of intervention. Administrative actors themselves can also vary enormously: from independent tribunals to Cabinet ministers and government departments to, in some circumstances, other institutions such as universities and municipalities. The power that is granted usually specifies a variety of tools that the administrative actor can employ to realize legislative objectives. Moreover, the administrative actor is usually given discretion to judge the manner and circumstances in which the various tools are used. The exercise of such discretion can give rise to many issues that are briefly discussed and that will be pursued in subsequent chapters.

Section IV examines the notions of tools and “new” governance. There is a widely held view that, over the last few decades, there has been a paradigm shift in terms of how government, including the administrative state, is functioning. The “old” governance focused on “command and control,” with legislatures and administrative bodies essentially imposing regulation in a myriad of areas and sanctioning any non-conforming behaviour. The new governance is about more effective and efficient government open to achieving its goals in a variety of ways by using the best mix of tools to accomplish the designated goals. This section investigates this view of two different paradigms. It suggests that differences between the two are often exaggerated and, in fact, there has been a large degree of continuity in how government and the administrative state have functioned over the last few decades. Nevertheless, there has been an important shift in emphasis. This shift is illustrated by discussing two prominent examples in the administrative state.

The final section of this chapter discusses how various tools might be evaluated. Judicial review of administrative action has long been a prime method that the legally trained have had to resort to in order to achieve accountability and transparency regarding decisions made by administrative actors. Various aspects of judicial review are discussed throughout the book.\(^1\) Nevertheless, the role of judicial review is constrained in important ways. Thus the last section of the chapter discusses another framework for assessing the administrative state, focusing on five criteria for doing so.

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1 See, for example, the chapters by Evan Fox-Decent, Audrey Macklin, and Sheila Wildeman (chapters 7, 8, and 9, respectively) in this book.
II. THE TOOLS OF LEGAL INTERVENTION: THE REGULATORY MIX

A. From Soft Intervention to the Heaviest Machinery of the State

There can, of course, be intense debate regarding any form of legal intervention with regard to any set of issues; for example, think of the arguments regarding whether and how the Internet should be regulated. However, once the decision has been made to intervene legally (that is, once the whether has been decided), policy-makers need to decide what kinds of legal intervention—tools—should be invoked in order to achieve the particular regulatory goals (that is, they need to decide the how). This section is a brief, general discussion of the tools of legal intervention. Thereafter, we will concentrate on the administrative state and the tools that it employs as a more particular but also pervasive instance of legal intervention.

Questions arise not only with regard to which tools should be used, but also the ways in which they should be employed in combination—the “mix”—in order to maximize the likelihood of realizing the ends sought to be achieved. Achieving the best mix that is possible in the circumstances raises many challenges. We will illustrate such challenges by discussing efforts to suppress smoking.

Legal intervention can involve a variety of kinds of regulation: from the most drastic (for example, prohibition by criminalizing an activity) to those that are minimally interventionist (for example, encouraging or discouraging certain behaviours through authorized programs to educate the public).\(^2\) Most would agree that the criminal law has a role in sanctioning violent crime. All manner of other interventions might be employed to educate people regarding the harm of violence and to encourage peaceful resolution of disputes. However, when violence does occur, most would agree that the perpetrator should face criminal sanctions.

In contrast, we would be appalled at the suggestion that a person should be subject to the criminal process for being obese. At the same time, many support the idea of intervention regarding obesity, at least in terms of publicly funded programs educating people about the importance of nutritious eating and physical exercise. Others would go further and urge the invoking of other tools, such as taxation, to discourage marketing and consumption of “junk” foods and to encourage the marketing and consumption of such wholesome staples as multi-grains and fruits and vegetables.

Various forms of legal intervention—tools—such as taxation, restrictions upon advertising, self-regulation, and constraints upon how, where, and when an activity may take place can also be used to achieve policy goals.\(^3\) Consider taxation. It has many uses as a tool of policy-making. Taxes can be employed to provide incentives for and to impose disincentives on myriad activities: investing in Canadian equities, saving for retirement, discouraging smoking, and so forth. The progressive system of taxation itself reflects our acknowledgment


that employing notions of equity can be appropriate in achieving societal goals: those who earn more pay proportionately more tax. The overarching question that needs to be asked regarding legal intervention in any area is, What is the best mix of various forms of regulation that is likely to result in actually attaining the policy objective? That question leads to related and complex questions concerning issues such as the role of deterrence, the potential of incentives, the effects of litigation in achieving various policies, and the relationship between law and shifting social norms in altering behaviour.

In terms of the last point, the relationship between law and shifting norms, lawyers do well to remember that there are many forms of regulation in diverse settings, including the effect of social norms in guiding various aspects of human behaviour. Legal regulation is but one form, albeit a very important one, that is backed by the power of the state. Thus Hood et al. offer an expansive definition of regulation that includes legal forms but that goes beyond them, in the following terms: “the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information gathering and behaviour-modification.”

The discussion of the suppression of smoking, below, illustrates many aspects of legal regulation and its complicated relationship to other forms of regulation, including social norms.

Let’s look at this brief general discussion of the tools of legal intervention from another angle, by examining a phenomenon closely associated with lawyers and by asking, Is litigation a tool?

B. Is Litigation a Tool?

Litigation has not been much considered in the traditional literature on tools. Yet, in the age of the Canadian Charter of Rights and Freedoms (the Charter) and related developments, the role of litigation is increasing. Lawsuits can produce a variety of effects that do have policy consequences even if those effects and consequences are not always easily ascertained.

II. The Tools of Legal Intervention: The Regulatory Mix

There are two main reasons for the hesitancy to consider litigation as a tool: first, lawsuits are usually initiated at the behest of “private” actors (not the government) and, second, government is often subjected to litigation as a defendant. The first reason simply underscores the error of the claim that only governments make policy. Courts clearly do as well, and their role needs to be taken into account in terms of tools analyses. The second reason highlights the fact that, while governments are the source of policy-making and legal intervention, their actions can also be scrutinized and altered through litigation in the courts. Such questioning may occur for several reasons, including the allegation that in acting (or sometimes in failing to act), government has infringed Charter rights—for example, the right to equality. Thus, when legally intervening in a situation, governments need to assess, as accurately as they can, the kinds of issues that might give rise to litigation and, therefore, to judicial modification of such legal intervention.

There is a third point: governments themselves sometimes create rights of action in legislation, either for themselves or for private litigants, as part of the enforcement mechanism of the regulatory scheme. An example of the creation of a right of action is the anti-smoking legislation, discussed in the next section, that provides a right of recovery for governmental costs incurred in the treatment and care of diseased smokers. In these instances, lawsuits are viewed as a means to compensate those harmed by the legislatively proscribed activity and to deter such wrongful action. In such instances litigation is being invoked in ways that even traditional analyses should have taken into account: it is a tool and is part of the regulatory “mix” that is intended to achieve the goals of the specific enactments.

There are, of course, many issues regarding the employment of litigation as a tool. Questions arise regarding the actual effects of litigation, access to the courts (including the costs associated with lawsuits), institutional arrangements between courts and legislatures, and so forth. Such questions make assessments of the likely outcomes produced by litigation in any area especially complex. Nevertheless, policy-makers need to take into account, as precisely as possible, the role litigation can and should play in any area where legal intervention is contemplated. Throughout this book there will be opportunities to reflect upon the role of judicial review of administrative action and the extent to which it is a tool that shapes the boundaries of the administrative state.

C. An Example of Legal Intervention and of the Regulatory Mix: The Suppression of Smoking

Legal intervention to suppress smoking is a story of such intervention interacting with shifting public attitudes and social norms regarding cigarettes. In four decades or so smoking has gone from a glamorous, sophisticated pastime to a filthy, dangerous addiction in the minds of most of the public. The shifting public attitudes and social norms have been both the cause of and the effect of legal intervention: as more people came to view smoking as unhealthy, expensive, and disgusting, support grew for regulatory intervention aimed at

12 See, in this book, Cristie Ford, chapter 3; Evan Fox-Decent, chapter 7; Audrey Macklin, chapter 8; and Sheila Wildeman, chapter 9.
further curtailment; as regulation intensified, more people accepted, in terms of their own views and behaviour, the obnoxiousness of cigarettes.

Legal intervention to suppress smoking is also an excellent illustration of the regulatory mix as governments resorted to a range of tools in order to achieve the policy goal of curtailing the use of tobacco. The full spectrum of tools was employed: from educating the public regarding the dangers of smoking to criminal prohibitions regarding the sale of cigarettes to children and smoking in public places. In addition, legislative restrictions were placed on the advertising of cigarettes, legislative requirements mandated ever more graphic and explicit warnings on packaging regarding the dangers of smoking, taxation on cigarettes was increased, and various attempts were made to use litigation to compensate for the harm done by tobacco and deter cigarette companies from peddling their poisons.

It is by no means the case that all legal strategies produced the effects hoped for. The tax hikes on tobacco imposed by the federal government in the late 1980s and 1990s essentially backfired. These increases resulted in the unintended consequence of promoting the smuggling of cigarettes from American states with relatively low taxes on tobacco. Estimates suggest that, at its height, black-market traffic in cigarettes constituted 20 percent of the market. After several manoeuvres, the Canadian government decided that it had no other choice and substantially lowered taxes to undercut sales on the black market.13

Lawsuits involving tobacco provide a good illustration of “litigation as a tool” and how complicated its use and the effects produced may be. Tort litigation in the United States against cigarette manufacturers on behalf of smokers and of governments paying the costs of care of smokers has been protracted and has, at best, produced mixed results regarding compensation.14 In Canada, litigation was used as a defensive measure by tobacco companies. They launched successful Charter attacks on some of the restrictions on advertising.15 However, litigation attacking subsequent legislation restricting advertising was not successful; the validity of the enactment was upheld by the Supreme Court.16 In the early 2000s some of the provinces passed legislation conferring on their governments causes of action to sue tobacco companies to recover the costs of health and other care for smokers.17 The Supreme Court of Canada upheld the constitutional validity of the legislation, thus permitting related actions to proceed.18 The results of all such litigation, including in terms of actually suppressing further rates of smoking, remain to be seen.

13 Bogart, Consequences, supra note 6 at 195-96 and 213-14.
14 Ibid. at 197-203.
17 See, for example, Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30 and Tobacco Damages and Health-Care Costs Recovery Act, S.N.S. 2005, c. 46.
III. THE TOOLS OF THE ADMINISTRATIVE STATE

A. Introduction

The discussion to this point indicates that when legislatures determine to intervene in any given area, they can do so in any number of ways and can use a range of tools. Throughout the 20th century, a chief method was to confer the power to act on the Cabinet, some administrative tribunal, a government department or official, or some other institution. We will refer to all of these as “administrative actors.” The core idea was that the legislature wanted to regulate some area but wished someone else, an administrative actor, to carry out the regulation for reasons of expertise, expediency, access, independence from the political process, and so forth.

This section focuses on the administrative state and emphasizes the many areas of activity that it regulates in various ways. The section serves as an introduction to many aspects of the administrative state that are analyzed in detail in subsequent chapters. It describes administrative actors—that is, who they are and what they do. The section then looks at the variety of tools that administrative actors can be given and how these powers are employed. In particular, we examine the overarching importance of discretion and how it often guides the employment of various tools and how those tools are used in diverse settings.

Such discretion gives rise to many issues, including transparency and accountability. These issues will be analyzed in depth in subsequent chapters. There are many other difficult legal issues confronting the administrative state in Canada that will be addressed throughout this book. Yet, at the outset, it is also important to emphasize that the administrative state in this society is capable of functioning at a high level:

The quality of [Canada’s] regulatory governance is almost certainly a key contributor to its successes in terms of both economic performance and the achievement of its social goals.

Let’s begin by surveying the wide scope of the administrative state in Canada.

B. The Administrative State and Its Many Areas of Regulation

In an attempt to convey the range of areas addressed by the administrative state and by various administrative actors, Mullan compiled a non-exhaustive list. The following is a summary of his efforts. It is simply an indication of the vast workings of the administrative state:

19 For example, Lorne Sossin, chapter 15.
20 See Geneviève Cartier, chapter 10, and Craig Forcese, chapter 11.
21 OECD, Regulatory Reform in Canada, supra note 2 at 6. In referring to the Organisation for Economic Co-operation and Development (OECD), it is important to keep in mind that the OECD has a particular perspective on what constitutes effective regulation. This is not to discredit the accuracy of the above quote, which underscores the potential of the Canadian administrative state. However, one must consider the OECD’s current praise for Canada within a specific and established historical context. For a further critique of the OECD’s general stance, see S. Wood, “Voluntary Environmental Codes and Sustainability” in B. Richardson & S. Wood, eds., Environmental Law for Sustainability (Oxford: Hart Publishing, 2006) 229.
• Employment: The employment relationship can be extensively regulated by statute and through the exercise of various functions by administrative actors. For example, under legislation addressing collective bargaining, employees are given the right to be represented by unions; the relationship between the union and the employer is extensively regulated; and relevant issues are addressed by labour relation tribunals. Further examples of regulation of employment are legislative provisions dealing with minimum wage, holiday entitlement, workers’ compensation for job-related injuries, vacation pay, and maximum hours of work.

• Regulated Industries: Certain industries are highly regulated. For example, television and radio are intensely regulated to, among other goals, foster Canadian content in the media. In a very different area, the securities industry is substantially regulated for a number of reasons, including protection of investors trading in bonds, equities, and certain other products.

• Economic Activities: Certain economic activities are regulated regardless of the particular industry in which they occur. For example, mergers and takeovers are scrutinized for possible adverse impact on competition. With regard to a very different activity, the development of land is regulated in the interests of community planning.

• Professions and Trades: The professions are granted statutory privileges to deliver services associated with the profession. In exchange, members of the professions are highly regulated by the appropriate professional body regarding the delivery of such services in terms of quality and protection of client/patient interests. Regulatory schemes operate for a wide range of trades and vocations: the selling, usually by licence, of cars, real estate, or insurance; various aspects of travel; and funeral arrangements.

• Social Control: A number of programs can restrict and otherwise regulate individual freedom of movement: the incarceration of the mentally ill, the detention and removal from the country of illegal immigrants, the placing of neglected children in foster care, and so forth.

• Human Rights: Human rights legislation specifically addresses the problem of discrimination in various areas: housing and employment, and, with regard to grounds of discrimination, sexual orientation, religion, disability, and so forth. Such legislation applies to individuals, corporations, and governments.

• Income Support: Various income support programs are established and regulated by the state: employment insurance, old age security, various forms of social assistance, and so forth.

• Public Services: Many areas of public services are regulated: health care, education, police protection, garbage collection, and so forth.

C. Agencies, Government Departments, and Other Institutions

When legislatures decide to create administrative powers they can confer them on a wide range of agencies, individuals (including specific Cabinet ministers and their government departments), and institutions such as municipalities, professional bodies, and universities. As indicated, we will refer to these agencies, departments, individuals, and institutions collectively as administrative actors. Administrative actors can exercise a wide variety of statutory powers—tools—for diverse regulatory purposes. The following is a brief sketch of
these administrative actors. We will describe the tools that they can be provided with in the next subsection.

1. Agencies

The common notion of administrative actors includes the various administrative agencies (also called tribunals and commissions) that function separately from government and the public service. At the federal level such agencies include the Canadian Radio-television and Telecommunications Commission (CRTC), the Canadian Human Rights Commission, and the access to information and privacy commissions. At the provincial level, such agencies include human rights commissions, municipal boards, environmental tribunals, and securities commissions.

What the agencies do and how they do it varies widely depending on the area regulated and the powers—the tools—conferred on each agency by the legislation that creates them. By way of introduction it is useful to summarize here four characteristics that they usually possess:

- They enjoy a measure of independence from the government department with overall responsibility for the policy area in which they operate (in terms of appointment of members of the tribunal, how decisions are made, etc.).
- They render decisions regarding the area that they regulate that can directly affect persons (that is, they have an adjudicatory role regarding disputes in the regulated area).
- They follow a more or less uniform decision-making process for resolving issues that directly affect persons (in terms of pre-hearing notice, admission of evidence, examination and cross-examination of witnesses, and so forth).
- They are specialized with regard to the area that they regulate (human rights, labour, immigration, etc.).

2. Cabinet Ministers and Government Departments

In a variety of settings legislation may confer powers on the entire Cabinet (the governor or lieutenant governor in council) to perform certain tasks regarding the issues being regulated: for example, the Cabinet is often empowered to make subordinate legislation or regulations to address, more specifically, aspects of the regulatory scheme. In certain situations there is a right of appeal, granted by the relevant statute, to the Cabinet from the decisions of agencies. For example, certain decisions of the CRTC can be appealed to the federal Cabinet.

Legislation may also authorize specific Cabinet ministers to make certain decisions. These decisions are usually made for the ministers by various government officials who are delegated such powers. For example, under applicable immigration legislation, the designated minister may allow someone to remain in Canada who is not otherwise eligible to do so; under the Ontario legislation addressing disability issues, the designated minister can enter into agreements with affected parties to provide incentives to deal with various barriers that people with disabilities encounter; environmental legislation provides powers

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23 See Laverne Jacobs, chapter 6.
25 See Andrew Green, chapter 13.
to designated ministers and other officials to set and enforce various standards—for example, to protect water quality.

3. Other Institutions

Almost any institution may be considered an administrative actor, at least for limited purposes. The key to being considered an administrative actor is, usually, the exercise of some statutory power that has sufficient public and regulatory dimensions. For example, the prime purpose of professional bodies (of doctors, lawyers, etc.) is to regulate members. However, such powers come from statute, usually with a specific direction that such self-regulation is to be in the public interest. Thus, such bodies are considered to be administrative actors, for example, in terms of licensing and disciplining their members. Municipalities are viewed as administrative actors in the exercise of various statutory powers conferred on them—for example, the passing of municipal bylaws. Universities (and individual professors) in the exercise of various powers, usually traced to some statute, can be considered administrative actors. Even private organizations (such as churches, sport organizations, and commercial associations), existing without any statutory authorization, can sometimes be treated as administrative actors for limited purposes if it is established that some function they perform has a sufficiently public purpose.

D. Tools and Administrative Actors: Some General Points

Administrative actors can use a wide range of tools to perform their various tasks. This range of tools and their use in different contexts is one of the main reasons why the administrative state is so varied and not easily described or given an all-encompassing assessment. At the same time, a basic understanding of these tools is fundamental to coming to grips with the functioning of the administrative state.

There are a number of general points that can be made regarding the tools of administrative actors. First, the tools are almost always authorized by statute. The administrative actor must have statutory authorization to use a particular tool—for example, the creation of subordinate legislation or the power to conduct audits. Second, as with legal intervention generally, there is a vast range of tools that are potentially available to administrative actors, from those that potentially impose sanctions (the prosecution of regulatory offences) to educational programs that encourage or discourage various kinds of behaviour. A list of other tools potentially available would include investigation, mediation, adjudication, rule-making (including subordinate legislation), licensing (including the charging of fees), contracting, audits, taxation, incentives, and self-regulation.

Third, administrative actors are often given a substantial amount of discretion regarding when and how to use the various tools they have at their disposal to carry out their regulatory tasks—that is, what the appropriate regulatory mix will be. This point about discretion is an important one and will be returned to in the next section. The three points mentioned before lead to a fourth one: administrative actors are very different from civil courts. Courts focus on one tool: adjudication (with negotiated settlements and other alternative dispute

26 It will also be discussed in subsequent chapters: see, for example, Geneviève Cartier, chapter 10.
III. The Tools of the Administrative State

resolution [ADR] techniques used in ancillary ways). Administrative actors can sometimes adjudicate in ways that closely resemble a civil court trial. However, their array of tools, of which adjudication is only one, means that administrative actors often perform their many diverse functions differently from civil courts.

E. The Mix of Tools and Administrative Actors:
   An Illustration—Regulating Lawyers

This variety of tools and their employment can be illustrated by an example close to home: the regulation of lawyers. In Canada, lawyers derive their authority to self-regulate “in the public interest,” through their law societies, from enabling statutes in the various provinces. Law societies are charged, in the legislation, with regulating lawyers with regard to a number of issues, including stipulating conditions for admission to practice; assuring that lawyers’ services are delivered at a high level of quality; assuring ethical standards through rules of professional conduct and other means; and disciplining lawyers who breach various standards of the law societies.

In carrying out their regulatory mandate, law societies can use a variety of tools with which the enabling legislation equips them. The decision to use what tools in what circumstances to achieve the best regulatory mix is largely a matter of their discretion. For example, the enabling legislation authorizes law societies to make subordinate legislation with regard to professional conduct. As a result, the law societies have promulgated rules of professional conduct.

Law societies use their licensing powers to stipulate conditions for entry to the profession (a law degree from a recognized university, passing bar admission exams, etc.) and to impose fees so that the societies are self-funding. They can use their audit powers to ensure that lawyers are handling clients’ monies and other matters consistent with their professional duties. In their discretion, they can use their disciplinary powers in a variety of applicable circumstances—for example, regarding significant breaches of the rules of professional conduct. If the lawyer is found guilty there may also be discretion regarding the penalty that is imposed—for example, a reprimand, a suspension for a period of time, or, most drastically, disbarment.

More recently, many law societies have used their regulatory discretion to become more proactive regarding a number of issues. For example, to actively promote the delivery of quality services, some societies have introduced “quality assurance/practice review” programs that emphasize such strategies as continuing education, certification of specialties, and enhanced use of audit and monitoring powers. Disciplinary proceedings and lawsuits, as “after the fact” measures, to sanction substandard services are still available, but there is much more emphasis on avoiding delivery of substandard services in the first instance than on sanctioning them after they have occurred. To actively promote opportunities for women, visible minorities, and others who have historically been marginalized in the legal profession, some societies have created equity programs with a range of educational and enforcement devices.
F. Discretion: The “Übertool”?

The foregoing discussion of law societies and the authority to self-regulate illustrates the wide-ranging discretion that administrative actors may have to carry out their mandate. It is this discretion to decide when and how other tools will be utilized that leads to our description of discretion as the “übertool,” the overarching power that can control the use of other tools.

Such discretion is crucial to the work of administrative actors. It equips them with the flexibility to configure the regulatory program to what can be rapidly changing circumstances. What is more, generally speaking, it is impossible for legislatures to specify with any precision the circumstances in which various tools ought to be employed in combination or how a specific tool should be used and how, if at all, it should be enforced. There are some situations in which legislatures attempt to stipulate how discretion is to be exercised in very particular instances. However, generally, such stipulation is neither possible nor desirable: “discretion is the very lifeblood of the administrative state.”

At the same time, such discretion does give rise to a number of very significant issues. There are continuing concerns that such power may be abused in circumstances as different as matters of national security and issues regarding the delivery of health-care services. These concerns focus on matters such as the lack of rules bounding the exercise of discretion and of transparency and accountability in its use. This is by no means to suggest that the exercise of discretion is destined to commit such errors. It is to underscore the overarching role of discretion in the administrative state and to emphasize that it needs to be employed appropriately and to be subject to scrutiny in a variety of ways. Discretion is critical to the realization of regulatory goals; at the same time, discretion must be responsibly exercised within appropriate boundaries. These issues are of such importance that they will be pursued in subsequent chapters.

IV. TOOLS AND THE “NEW” GOVERNANCE

A. Is There a New Governance?

Even a casual observer senses that government and the administrative state do not function in the same way as they did, say, 25 years ago. Assumptions about powerful administrative tribunals carrying out policies of big government as a realization of the public good no longer hold. Such assumptions have changed. At least some morphed into accusations that “portray[ed] government agencies as tightly structured hierarchies insulated from market forces and from effective citizen pressure and therefore free to serve the personal and institutional interests of bureaucrats instead.”

27 Mullan, Administrative Law, supra note 22 at 948.
29 See Geneviève Cartier, chapter 10, and Craig Forcese, chapter 11.
New means of regulation are sometimes associated with two broad developments: the crisis and transformation of the modern welfare state and (relatedly) the emergence and growing prominence of forms of regulation “beyond” the state, both of which have potentially profound consequences for administrative law. For example, increasing delegation of rule-making and rule-enforcing authority to private industry associations or hybrid third parties (fair trade certificates, for example) increased reliance on economic instruments such as tradable pollution permits and the increased focus on new targets of regulation, including gatekeepers such as financial institutions.31

Traditional conceptions of government and its agencies have been questioned across the political spectrum: the right has focused on inefficiencies and government and agencies meddling in the market; the left has focused on unresponsiveness to the needs of the disadvantaged and exclusionary practices against the historically marginalized. As a result, governments and their agencies have been pushed “to be reinvented, downsized, privatized, devolved, decentralized, deregulated, delayed, subject to performance tests, and contracted out.”32

These demands that government and the administrative state function in substantially different ways have led to analyses regarding the extent of the alterations and how such changes might be characterized. Salamon does claim that there is a “new governance”: a shift in the paradigm of public programs. The “new governance” no longer has as its centrepiece agencies or programs but, rather, the tools used to realize the various goals of the “new governance.” This prominence of tools and how they should be employed has altered the very character of public management and of the administrative state:

Instead of command and control, it must emphasize negotiation and persuasion. In place of management skills, enablement skills are increasingly required instead. Far from simplifying the task of public problem solving, the proliferation of tools has importantly complicated it even while enlarging the range of options and the pool of resources potentially brought to bear.33

The claim here is not that Salamon’s assertions regarding a paradigmatic shift are completely accurate or that the shift, whatever its exact nature, applies equally to all aspects and areas of the administrative state in all post-industrial societies. The philosophical and political premises of government and the administrative state in Canada have been challenged in ways not fully addressed by Salamon’s depiction. Such forces as globalization and fundamental alterations to the social safety net are only two examples of influences that have produced effects that go beyond changes regarding the tools of legal intervention.34 At the


33 Ibid. at 18.

34 Regarding the globalization influence on Canadian society and government see D. Cameron & J. Gross Stein, “Street Protests and Fantasy Parks” in D. Cameron & J. Gross Stein, eds., Street Protests and Fantasy
same time, reacting to Salamon’s contentions about a “new governance” provides an excellent opportunity for coming to grips with the various transformations that have taken place and that continue to occur in the functioning of the administrative state.35

Let’s examine Salamon’s assertions further by looking at his claim that tools have become the centrepiece of the “new governance.” There is little doubt that there has been much more interest over the last decades in various tools, particularly those that promote flexibility in terms of the role of government, including allowing for a greater influence of the market in implementing policy goals. Thus certain tools, such as vouchers, privatization, self-regulation, incentives, and contracting out, have gained greater prominence and have been experimented with more extensively.

The ongoing efforts to reconfigure the generation and supply of electricity over the last 15 years represent a prominent and controversial example of the use of privatization to drastically modify the command and control model of government with regard to an essential commodity.36 The heated debate about underwriting the cost of private/independent schools and providing more choice in education provides a very current example of the increasing interest in vouchers. In Ontario the Conservatives provided such vouchers through the Equity in Education Tax Credit; that credit/voucher was repealed by the McGuinty Liberals.37 The Conservatives then shifted the debate in the 2007 election by promoting public funding of religious schools, but that party was unsuccessful in forming the government. The debate regarding the role for vouchers and for private/independent schools continues.

At the same time, it is important to recognize that the tools themselves are not new and that they have long been employed by the administrative state; a point also recognized by Salamon.38 Most provinces have long used vouchers to provide access and consumer choice in the legal aid system through the certificate system: qualified individuals, based on low income, are given a legal aid certificate (voucher) to hire a lawyer of their choice from a roster of participating counsel.

It may be most helpful to think not in terms of a paradigmatic shift but of a significant change in emphasis. The tools are not new; there are many examples of continuity in use. However, there is a movement away from “command and control”—government and its agencies mandating the regulatory regime and its detailed implementation. Instead, there is an openness to a variety of ways in which overall policy objectives can be achieved, including active involvement on the part of those subject to regulation. This flexibility, when it

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occurs, is largely achieved through employment of various tools in a number of ways driven by the particular context of the regulatory initiative.

B. The Changing Emphasis: Some Examples

There are many examples of this changing emphasis and the implications for how various tools are used by administrative actors. Here we will briefly discuss two overarching approaches that are illustrative: one by a very influential academic and the other by the Canadian federal government.

Braithwaite has, for some time, urged more flexible strategies in terms of enforcement of regulatory regimes. He has done this for a number of reasons, including the fact that a command and control/sanctions approach, especially with regard to corporate misbehaviour, has been demonstrated to be much less effective in achieving regulatory goals in a number of areas than advocates of that approach would claim. As a result, Braithwaite espouses the “regulatory pyramid.”\footnote{I. Ayres & J. Braithwaite, \textit{Responsive Regulation: Transcending the Deregulation Debate} (New York: Oxford University Press, 1992).} The basis of this approach consists of educational/persuasive strategies that encourage trust and discourage defensiveness. At the same time, escalating strategies are available to promote compliance should parties demonstrate reluctance. Punitive sanctions may be imposed but are reserved for situations where these other strategies have clearly failed. Throughout, Braithwaite speaks seriously of fostering “corporate virtue” to achieve compliance and to realize regulatory goals.\footnote{J. Braithwaite, “Responsive Business Regulatory Institutions” in C. Coady & C. Sampford, eds., \textit{Business Ethics and the Law} (Sydney: The Federation Press, 1993) 83.}

His approach does acknowledge that, while regulators should try to foster trust (and, therefore, achieve greater levels of compliance), they must be equipped to move to sanctions if efforts at building and maintaining trust founder.\footnote{J. Braithwaite & T. Makkai, “Trust and Compliance” (1994) 4 Policing & Soc’y 1.} Nonetheless, ideas that emphasize persuasion, trust, and attention to a range of motivations and the use of tools that reflect these ideas in order to achieve regulatory goals are at the forefront. Braithwaite’s ideas enjoy wide currency, including among government policy-makers with regard to invoking various tools. How successful this shift will actually be in terms of achieving regulatory goals remains to be established in many areas.\footnote{Public Management Committee (PUMA), \textit{Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance} (Paris: Organisation for Economic Co-operation and Development, 2000). Regarding a possible countertrend in the United Kingdom see R. Baldwin, “The New Punitive Regulation” (2004) 67 Mod. L. Rev. 351.} Nevertheless, as Braithwaite has recently observed, “[a]pproaches to regulation that seek to identify important problems and fix them work better and more humanely than approaches oriented to imposing the right punishment.”\footnote{J. Braithwaite, \textit{Restorative Justice and Responsive Regulation} (New York: Oxford University Press, 2002).}

The federal government, responding to the shift in emphasis regarding the workings of the administrative state, has recently devised the Smart Regulation Program.\footnote{Government of Canada, \textit{Smart Regulation: Report on Actions and Plans}, Fall 2005 update and ongoing initiatives, online: Government of Canada <http://www.regulation.gc.ca>.} Launched in
2005, Smart Regulation is an ambitious program for regulatory renewal. It has survived changes in government and is more than the initiative of any one political party. Smart Regulation is based on four principles:

- **Protecting the public interest**: Smart Regulation strives to find the right blend of policy instruments [tools] …
- **Extending the values of Canadian democracy**: Decision making on regulatory matters is conducted in an open and transparent manner …
- **Leveraging the best knowledge in Canada and worldwide**: Smart Regulation recognizes that knowledge and evidence form the basis of regulation …
- **Promoting effective co-operation, partnerships, and processes**: Smart Regulation strengthens co-operation with all levels of government …

Smart Regulation has many components to it, including devising a “framework for assessing, selecting, and implementing instruments [tools] for government action.” The fall 2005 report highlighted projects that have resulted in “a 33-percent increase in process efficiency concerning drug approvals, and a system that allows 233 types of businesses to access federal, provincial, and municipal permits from one Internet site.” The government has committed to reporting twice a year regarding the progress of this project so as “to be transparent with respect to areas of progress, as well as areas where delay has been experienced.” Whether Smart Regulation will implement its objectives and what it will achieve largely remains to be seen. At the same time, the very initiation of Smart Regulation exemplifies a shift in thinking regarding the structure and functioning of the administrative state and the employment of its tools.

**V. ASSESSING TOOLS AND THE ADMINISTRATIVE STATE**

**A. Introduction**

Assessing the effects of legal intervention is critical. At the same time, assessing the effects of any legal intervention is complicated. Such evaluation is even more difficult when the effort attempts to ascertain the impact of any one tool used in combination with several others in a mix. There may be substantial difficulties assessing the effects of the mix. There can be even greater complexities establishing the outcomes produced by any one tool within that mix. Nonetheless, a primary test for law is the extent to which legal intervention actually provides solutions to the underlying societal problems that are sought to be addressed. Complexities in assessment do not justify a failure to engage in that task.

There are a number of ways in which tools can be assessed. One of them is through judicial review of administrative action. Several of the subsequent chapters devote significant sections to analyzing this curial oversight of the administrative state. Judicial review has a significant role in bringing accountability and transparency to the actions of administra-

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46 See chapter 3, Cristie Ford; chapter 4, Mary Liston; chapter 5, Grant Huscroft; chapter 7, Evan Fox-Decent; chapter 8, Audrey Macklin; chapter 9, Sheila Wildeman; and chapter 13, Andrew Green.
tive actors. It also needs to be considered as a tool that is used by those dissatisfied with decisions of the administrative state in an attempt to challenge them and to reshape boundaries of various programs.47

However, as important as judicial review is, it is also limited in terms of assessing the functioning of the administrative state. Judicial review can be costly and slow. In addition, there are aspects of the administrative state that judges, rightly or not, decline to assess because, for example, they are said to involve political judgments, decisions regarding the spending power of government, or matters of expertise that courts are ill-suited to evaluate.48

**B. Five Criteria**

Another way to assess tools is by evaluating them using a generally applicable set of criteria that reflects good policy-making and implementation. Such an evaluation can be taken from within government or in the larger realm of public debate and can involve a variety of disciplines and professions. Salamon, in his analysis of the “new governance,” suggests five such generally applicable criteria for assessing tools.49

Applying such criteria can generate controversy in many contexts. The claim here is not that the criteria produce easy assessments or even that the five are an exhaustive inventory of all relevant considerations. However, they do assist in focusing debate regarding evaluation of regulatory strategies and in making comparisons of different tools in various contexts.

In summary, the criteria are:

1. **Effectiveness:** In some respects, this is the most basic criterion. Effectiveness assesses the extent to which a tool achieves its intended objective. There are a variety of ways to evaluate effectiveness using generally accepted social science and other methodologies.50 At the same time, gauging effectiveness can be problematic for several reasons. For example, a regulatory mix often involves several tools so that it may be difficult to establish the effectiveness of any one of them. Then, too, there can be heated debates about what “effectiveness” means in any particular context. Advocates of school vouchers are likely to argue that they are effective by the very fact that they provide choice in education. Critics of vouchers tend to look at the overall impact on quality of education as constituting effectiveness in this context.

2. **Efficiency:** This criterion takes account of both results and the costs entailed in their realization. The most efficient tool is the one that achieves the optimal balance between benefits and costs. Costs should include not only those to government but those to others as well, especially regulated parties. Thus there should be a “double balance sheet”: one focused on the costs to government alone and one focused on the costs to other social actors.

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47 See text above in part II.B, “Is Litigation a Tool?”
48 See Andrew Green, chapter 13.
There can be many debates about how to assess efficiency and the weight to accord it in any context. Nonetheless, discussions of this criterion can be very helpful, including differentiating between ends and means. Many in this society support gun control and its objectives; many are also concerned about the inefficiency of recent versions of the gun registry system. Problems with that system may, indeed, need to be addressed; those problems should not detract from the overarching goals associated with gun control.

3. Equity: This criterion is critical, including for those interested in social justice. Equity can have two meanings that should be considered.

The first focuses on basic fairness: the distribution of benefits and costs more or less evenly among those eligible. The second, and more controversial, focuses on the redistribution of benefits to those who have previously not had them or had them disproportionately less or, in other contexts, on concerns that burdens are being imposed disproportionately. Complaints that benefits, to be conferred on a per capita basis, are being distributed by some other standard would be an example where the first meaning of equity is engaged. Claims to have proactive employment equity programs to ensure that members of historically marginalized groups would be an example of the second meaning of equity in terms of benefits. Worries that deregulation of university tuition fees will create barriers for the economically disadvantaged could be an example of disproportionate imposition of burdens.

4. Manageability: This criterion usually focuses on issues of implementation. The more convoluted the tool and the more separate actors are involved, the more difficult it is to manage. Problems of manageability, in fact, can swamp theoretical claims regarding effectiveness, efficiency, and equity. Many would cite the electricity industry regarding issues of manageability. Whatever the theoretical claims regarding the benefits of privatization in this area, the reconfiguration of the electricity industry, at least over the short term, is giving rise to enormous manageability issues.

5. Legitimacy and Political Feasibility: No matter how otherwise effective, a program that cannot win political support cannot make headway. Some tools may seem to facilitate public accountability and participation—for example, self-regulation and privatization. In the political atmosphere of today, they will likely be used more in a variety of contexts. In contrast, experiments with a specific form of privatization, vouchers, particularly regarding education, remain very controversial. Whatever their merits, their political feasibility is very much in question.


SUGGESTED ADDITIONAL READINGS


