

The Supreme Court of Canada and Administrative Law, 1949-1971

P. W. Hogg

Osgoode Hall Law School of York University

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Article

Citation Information

Hogg, P. W. "The Supreme Court of Canada and Administrative Law, 1949-1971." *Osgoode Hall Law Journal* 11.2 (1973) : 187-223.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol11/iss2/1>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

OSGOODE HALL LAW JOURNAL

Vol. 11

No. 2

August 1973

THE SUPREME COURT OF CANADA AND ADMINISTRATIVE LAW, 1949-1971

By P. W. HOGG*

Scope of Study

This article reports the results of a reading of all the administrative law cases decided in the Supreme Court of Canada and reported in the Supreme Court Reports from 1949 to 1971 inclusive.¹

My definition of an "administrative law case" was a case in which the decision of an official or agency purporting to act under statutory authority was under review. In the term "review" I included statutory appeals as well as the prerogative writs, actions for declarations or injunctions, the various forms of collateral attack, and statutory applications to quash. I confined the cases to those in which decisions made or purporting to be made under statutory authority were under review. I would also have included cases in which decisions made under prerogative power were under review, but there were none of those. However, I excluded cases in which decisions made under essentially consensual authority, such as private arbitration awards or decisions of voluntary associations, were under review. I also excluded cases where, although the decision of an agency was technically under review, the Court's decision was completely devoted to the substantive law of taxation, assessment, expropriation, patents or some other field. In these excluded cases no issue concerning judicial review was presented. For the same reason cases completely

* Professor of Law, Osgoode Hall Law School of York University.

¹ My colleague, Professor Paul C. Weiler, has written several such studies: *The Supreme Court of Canada and the Doctrines of Mens Rea* (1971), 49 Can. B. R. 280; *Groping Towards a Canadian Tort Law: The Role of the Supreme Court of Canada* (1971), 21 U. of T. L. J. 267; *The 'Slippery Slope' of Judicial Intervention* (1971), 9 Osgoode Hall Law Journal 1; he has also prepared a study of the constitutional law cases for publication in the U. of T. L. J.

devoted to constitutional issues were excluded. Finally, I excluded the cases reviewing the decisions of labour relations boards. This was not because they do not fit my definition — they do — but because they form part of a study of labour relations cases in the Supreme Court of Canada which has been published by Professor Paul C. Weiler.² There seemed no point in simply duplicating the work reported in Weiler's admirable study. However, where a labour board case seemed especially important, or where my results would be distorted or misleading by reason of the exclusion of labour board cases, I have made reference to them; the result is that they are quite frequently referred to.

Role of Court

Before starting an analysis of the decisions it is appropriate that I should disclose my own views as to the proper scope of judicial review of administrative action. My views are set out in detail in another article,³ and I shall simply summarize that article here.

I start with the undeniable proposition that judicial review inevitably involves extra delay, extra expense, and the duplication of effort. These costs should be born only if there is a strong likelihood of improvement in the quality of decision. If there is no strong likelihood of improvement in the quality of decision, then the administrative decision should be treated as conclusive.

When an agency has made findings of fact, law or policy which need to be made in order to reach a decision, then those findings should normally be treated as conclusive. There are two reasons for this. The first, a functional one, is that the court has less experience with the regulated area and less knowledge and understanding of it. Just as in medicine the general practitioner will not presume to overrule the specialist in his area of competence, so the generalist court should not overrule the specialist agency within its area of competence. The overwhelming majority of agency decisions, therefore, should be treated as conclusive. There is no strong likelihood of a better decision on the part of the court. This is so, in my view, even where the error allegedly made by the agency can be classified as one of "law". The reports contain a number of decisions in the labour relations area where the court has overruled the agency on what appeared to be a pure question of law, and unwittingly disturbed longstanding and rational expectations and practices of both the agency and those regulated by its decisions.⁴ A ruling of "law" tends to be a compound of law, fact and policy, lying peculiarly within the competence of

² P. C. Weiler, *The 'Slippery Slope' of Judicial Intervention* (1971), 9 Osgoode Hall Law Journal 1.

³ P. W. Hogg, *Judicial Review: How Much Do We Need?* (1972), a public lecture, unpublished at the time of writing.

⁴ The most recent case is *Metropolitan Life Insurance Co. v. International Union of Operating Engineers*, [1970] S.C.R. 425; criticized by J. G. Norwood, Comment (1970), 28 U. of T. Fac. L.R. 109; J. N. Lyon, Comment (1971), 49 Can. Bar Rev. 365; P. W. Hogg, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada* (1971), 9 Osgoode Hall Law Journal 203 at 212; P. C. Weiler, *supra*, note 2 at 30. Weiler's article, which has been referred to earlier in the text, is a study of all the Supreme Court of Canada's decisions in the labour relations field since 1950.

the agency. The less well-informed court should defer to the agency. The second reason why the courts should defer to agency findings of fact, law or policy is more fundamental. A decision made by an agency within its statutory powers should be treated as conclusive because the power of decision was granted by the legislature to the agency, and not to the court. Thus, whether we speak in functional terms, and emphasize the comparative qualifications of court and agency, or whether we speak in constitutional terms, and emphasize the mandate granted by the elected legislature, we reach the same conclusion: there is an area within which agency action should be unreviewable.

There is however a need for judicial review. The very characteristics which make the agency well qualified within its area of specialization may lead it to overlook or underestimate general values which are fundamental to the legal order as a whole. The generalist court is ideally suited to check the specialist agency at the point where these values are threatened. Furthermore, in deciding controversies between the State or its officials and the individual, the court offers as good a guarantee of neutrality as it is reasonable to expect in an imperfect world: the judges enjoy high social standing, security of tenure and a long tradition of independence.

In *Chaput v. Romain*⁵ police broke up an assembly of Jehovah's Witnesses who were meeting peacefully in a private house. In *Lamb v. Benoit*⁶ police arrested a Jehovah's Witness, held her for a weekend without charging her, then laid some baseless charges against her. In *Roncarelli v. Duplessis*⁷ the Premier of Quebec ordered the cancellation of a Jehovah's Witness' liquor licence. In each case the official action was taken without any legal authority. In each case the Supreme Court of Canada held the action to be invalid, and awarded redress to the injured citizen.

It is essential to any civilized community that official action be authorized by law. In a democratic community the requirement of legal validity has special significance in that the laws which must authorize official action must be enacted by a freely elected legislature. Every exercise of power must therefore have a democratic root. What the Supreme Court did in the three Jehovah's Witnesses cases was to insist on the democratic character of the Quebec government. No institution other than the courts was as well suited to identify the democratic value which was involved, and no other institution had the strength to insist upon the supremacy of that value.

The Jehovah's Witnesses cases are unusual in that the defendants were unable to point to any statute which authorized their actions. Much more frequent are the cases where an official or agency has acted in the conscientious belief that his statutory powers authorize what he has done. When the official act is challenged, the judicial duty is to interpret the statute and see whether it really does give power to do the very thing complained of. But this duty, in my view, should be exercised with restraint. Where the statute will reasonably bear the meaning which its administrator has placed upon it, the court should not substitute a different meaning. The agency's interpretation of the empower-

⁵ [1955] S.C.R. 834.

⁶ [1959] S.C.R. 321.

⁷ [1959] S.C.R. 121.

ing statute is likely to be well-informed as to the policy of the statute and as to the needs of effective government. It should not be lightly overridden.

There are cases, however, where the agency view must be overridden. The agency may have adopted a distorted position which takes insufficient account of values which are fundamental to the legal order as a whole. The generalist court should check the specialist agency at the point where these general values are threatened. In deciding whether an agency's interpretation of its powers is "reasonable", the court must therefore weigh the official perception of the needs of effective government against the general values of civil liberty which are asserted by the individual affected. The more serious the effect on the individual the narrower will be the range of reasonable interpretations of the statute. In *Beatty v. Kozak*,⁸ for example, Saskatchewan's Mental Hygiene Act gave power to the police to arrest a person "apparently mentally ill" if that person was "conducting himself in a manner which in a normal person would be disorderly". The plaintiff was arrested while working peacefully in her office, and was detained for 44 days. The majority of the Supreme Court held that the plaintiff was not at the time of her arrest "conducting [herself] in a manner which in a normal person would be disorderly". Rand J. dissented from this decision. He held that the statute could be interpreted as justifying arrest on the basis of *past* persistent disorderly conduct. Since this was the interpretation which the administrators of the statute (the police) had placed upon it, and since this interpretation was reasonable (according to Rand J.), he held that the Court should not substitute its view.

It seems to me that Rand J.'s approach to the question is preferable to that of the majority, in that the majority assumed a single "correct" meaning of the statute. To ask whether the administrative interpretation is "reasonable" seems to me to be a better approach, since it acknowledges the administrator as having a contribution to make to the question. But in the actual result of the case I side with the majority. The plaintiff, it will be recalled, had been denied her personal liberty for 44 days. In interpreting a statute which confers a power of this order the court must weigh the claim to personal liberty against the claim to effective government. The police interpretation of the power was not absurd, but it did strain the statutory language. The Court was justified in insisting that a serious invasion of a fundamental civil liberty should be authorized by relatively clear language. (It may be possible to support the dissenting view on the basis that there was a privative clause in the statute; the privative clause would justify greater judicial restraint.)⁹

There is even scope for judicial review in some cases where the agency decision is authorized by a literal reading of the empowering statute. In *Smith and Rhuland Ltd. v. The Queen*¹⁰ the Nova Scotia Labour Relations Board refused certification to a union which had established the requisite support among the employees in the bargaining unit. The Board's refusal to certify the union was based on the ground that the union was dominated by an official who was a communist. The Supreme Court of Canada, by a majority,

⁸ [1958] S.C.R. 177.

⁹ See text accompanying note 47, *infra*.

¹⁰ [1953] 2 S.C.R. 95.

quashed the decision. Rand J.'s majority opinion agreed that the Board had a discretion whether or not to certify a union which enjoyed the support of a sufficient number of employees in the bargaining unit. But that discretion was not unfettered. It was not open to the Board to "act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization".¹¹ An exercise of discretion on that ground was outside the empowering statute and invalid.

Can this result be accommodated within a philosophy of judicial review which emphasizes restraint on the part of the courts? After all, the Labour Board had made a considered determination upon what was essentially a question of labour relations policy. Were the three dissenting judges right in refusing to intervene? I believe that the majority decision was the better one. In this case the Board's policy collided with a general value of the highest importance to the Canadian democratic legal order, namely, the freedom of association. This value had to be weighed in the balance with the agency's perception of its policy. In rejecting that policy the court was insisting that such a serious invasion of democratic and civil libertarian values be rather clearly authorized by the empowering statute. The generalist court was reminding the specialist agency that the agency was not "an island entire of itself", and that its work had to be brought "into harmony with the totality of the law".¹²

The tension between the agency's claim to carry out the legislative mandate in its own way, and the court's claim to protect the integrity of the system as a whole, is what makes administrative law so difficult. I have attempted elsewhere to elaborate this theme,¹³ and of course it will run through the rest of this article.

Voting Patterns

The number of cases with which I was left after the various exclusions reported at the beginning of this article was 71. The period of study, 1949 to 1971, comprised 23 years, so that there was an average of only three (3.09 to be precise) reported administrative law cases decided in the Supreme Court of Canada in each year. If the 29 reported cases reviewing labour board decisions¹⁴ are added, the total rises to 100 (exactly) and the yearly average to a little over four (4.35). It is fair to conclude that administrative law is not a major part of the Court's work; certainly the Court decides many more cases in each of the areas of taxation, criminal law and torts.¹⁵

¹¹ *Id.*, at 100. Rand J.'s opinion was concurred in by Kerwin and Estey JJ. Kellock J. concurred in the result, but on the ground that the Board had no discretion, i.e., it was under a duty to certify any union which satisfied the express statutory requirements for certification. Taschereau, Cartwright and Fauteux JJ. dissented on the ground that the Board had validly exercised its discretion.

¹² L. L. Jaffe, *Judicial Control of Administrative Action* (Boston: Little, Brown, 1965) at 590.

¹³ P. W. Hogg, *supra*, note 3.

¹⁴ P. C. Weiler, *supra*, note 2, included 27 decisions in his study of the period 1950 to 1970, to which must be added any decisions in 1949 (none) and 1971 (two).

¹⁵ See, e.g., *Statistical Analysis of [1964] S.C.R.* (1965), 3 Osgoode Hall Law Journal 445; *Statistical Analysis of [1969] S.C.R.* (1970), 8 Osgoode Hall Law Journal 622.

A breakdown of the results by subject matter, for what it is worth, is as follows:

Federal:

Immigration		
Sustained	7	
Reversed	5	12
Other federal officials		
Sustained	8	
Reversed	1	9
Federal regulatory agencies		
Sustained	2	
Reversed	7	9
Federal labour board		
Sustained	0	
Reversed	2	2
Totals		
Sustained	17	
Reversed	15	32

Provincial:

Municipal		
Sustained	9	
Reversed	12	21
Courts and their officials		
Sustained	2	
Reversed	0	2
Police		
Sustained	0	
Reversed	3	3
Discipline of self-governing occupations		
Sustained	4	
Reversed	1	5
Workmen's compensation boards		
Sustained	4	
Reversed	0	4
Provincial regulatory agencies		
Sustained	3	
Reversed	2	5
Other provincial officials		
Sustained	0	
Reversed	1	1
Provincial labour boards		
Sustained	18	
Reversed	9	27
Totals		
Sustained	40	
Reversed	28	68

The numbers are probably too small to treat the variations in different classes as significant. However, it is interesting that the rate of review of decisions made under federal statutes (15 out of 32) is higher than the rate of review of decisions made under provincial statutes (28 out of 68). The figures offer no support for a thesis that a federally-appointed court would favour federal agencies. The labour board figures are also interesting in that they display a lower rate of review than the average. There has been considerable criticism of judicial intervention in the labour field,¹⁶ and I have argued elsewhere that the court has intervened in a number of cases where it should have sustained the labour board.¹⁷ But the figures as a whole do not suggest a court which is anxious to upset labour board determinations.¹⁸

If the overall picture of the results suggests restraint, there is nevertheless considerable variation in the voting patterns of the individual judges. The 100 decisions of the court included 69 in which the members were unanimous and 31 in which the members were divided.

Unanimous decisions

Agency sustained	41	
Agency reversed	28	69

Divided decisions

Agency sustained	16	
Agency reversed	15	31

The judge who voted most consistently in favour of the agency was Abbott J. He participated in 18 divided decisions and voted to sustain the agency in 15. Judson J.'s voting pattern was similar; he participated in 14 divided decisions and voted to sustain the agency in 11. The other judges who cast a majority of their votes in divided cases in favour of the agency were Taschereau J. (11-5), Kerwin J. (10-5), Ritchie J. (5-4) and Pigeon J. (2-1). At the other end of the spectrum, Spence J. participated in 9 divided decisions and voted to sustain the agency in only 2. Locke J. (3-8), Martland J. (5-9), Cartwright J. (8-14), Rand J. (6-8), Fauteux J. (7-9), Kellock J. (3-4), Hall J. (4-5) and Laskin J. (0-1) also cast a majority of their votes in divided cases against the agency. The voting of Estey J. (3-3) and Rinfret J. (2-2) was evenly divided.

Plural Remedies

The cases which comprised the study entered the court system in a great variety of ways. Here are the figures:

Prerogative writs (or orders):

Mandamus alone	9
Mandamus with certiorari in aid	1
Prohibition alone	2
Certiorari alone	6

¹⁶ P. C. Weiler, *supra*, note 2, is the latest article.

¹⁷ P. W. Hogg, *supra*, note 4 at 212.

¹⁸ *Accord*, P. C. Weiler, *supra*, note 2 at 9.

Certiorari with a statutory appeal	1
Habeas corpus alone	1
Habeas corpus with certiorari in aid	4
Civil actions:	
Declaration alone	7
Declaration with injunction or damages	2
Injunction alone	3
Injunction with declaration and damages	1
Damages alone	7
Damages with declaration or injunction	2
Money had and received	1
Recovery of documents	1
Criminal prosecutions:	
For breach of by-law	2
Statutory proceedings:	
Appeal alone	17
Appeal with certiorari	1
Reference by agency	1
Application to quash by-law	4
Application to set aside default judgment	1

The variety of proceedings reflects the fact that the validity of official action may become a relevant issue in almost any kind of proceedings. Plurality of remedies will never be entirely corrected; or at least not until some legislature is bold enough (and skillful enough) to prohibit even collateral attack (e.g., in a tort action or criminal prosecution). But the need to choose between the various prerogative writs, declaration, injunction and statutory remedies is a completely unnecessary complexity in the law of judicial review. The plurality of remedies is now starting to receive legislative attention, notably in Ontario's Judicial Review Procedure Act.¹⁹ But the cases in my study, which end with the 1971 volume of the Supreme Court Reports, all precede any such reform.

According to Professor Kenneth Culp Davis, whose views have become dogma in the law schools of the common law world, much judicial time is consumed in the resolution of the sterile question as to which of the plural remedies is appropriate; and, as the result, a "myriad of cases fail to reach the merits".²⁰ The cases in my survey show that these criticisms do not apply to the Supreme Court of Canada. Only one case out of the 71 failed to reach the merits because the court held that the wrong remedy had been chosen. In that case, *Masella v. Langlais*,²¹ habeas corpus had been selected to attack a deportation order made against an alien who was no longer in custody. Locke J. in careful scholarly opinion concluded that habeas corpus was not available; the appropriate remedy was certiorari. He did not address himself

¹⁹ S. O. 1971, c. 48. See also Federal Court Act, S.C. 1970-71, c. 1.

²⁰ Kenneth C. Davis, *Administrative Law Treatise* (St. Paul: West Pub. Co., 1958) at section 24.01.

²¹ [1955] S.C.R. 263.

to the merits at all. Even here, however, where the error of selection was both serious and obvious, two of the five judges (Taschereau and Abbott JJ.) ignored the remedial point and decided against the applicant on the merits.²²

One "cardinal principle" of judicial review which Davis rightly condemned is that which "denies one method of review when another is adequate".²³ It is safe to say that this principle has no place in the jurisprudence of the Supreme Court of Canada. There is not one case in the study in which the Court denied an otherwise appropriate remedy on the ground that another remedy would be more or equally appropriate. The court was invited in *King v. University of Saskatchewan*²⁴ to hold that mandamus should not be granted against a university where there was statutory provision for a "visitor" with power to redress the grievance; the argument was rejected, although mandamus was in fact denied on the merits. In *City of Ottawa v. Boyd Builders Ltd.*²⁵ counsel for the city argued that mandamus should not be granted for the purpose of attacking a municipal by-law, where there was statutory provision for an application to quash the by-law; the Court rejected this argument and awarded mandamus. The same argument was made in *Wiswell v. Metropolitan Corporation of Greater Winnipeg*²⁶ against the award of a declaration to quash the by-law; again the argument was rejected and the declaration granted. In *Wiswell* the action for the declaration had been brought outside a three-month limitation period which applied to the statutory application to quash, so that the effect of the Court's decision was to evade the limitation period.²⁷

There has been controversy in Canada and elsewhere in the common law world as to whether the remedy of declaration, especially when claimed by itself, is available for the review of official action.²⁸ Commentators have pointed out that the declaration offers significant advantages over the prerogative writs as a tool of review.²⁹ And yet, while the availability of declaration seems now to be well-established in England,³⁰ courts elsewhere have been strangely cautious and conservative; they have been reluctant to allow a newcomer to supplant the prerogative writs. In *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*³¹ the Ontario Court of Appeal held that the remedy of declaration could not be employed when one of the prerogative writs would

²² Cartwright J. agreed with Locke J., but added a short opinion of his own to the effect that he would have been prepared to quash the order if the proceedings had been properly brought. The remaining judge, Fauteux J., agreed with both Locke and Cartwright JJ.

²³ K. C. Davis, *supra*, note 20 at section 24.01.

²⁴ [1969] S.C.R. 678.

²⁵ [1965] S.C.R. 408.

²⁶ [1965] S.C.R. 512.

²⁷ The same result was reached in *Tonks v. Reid*, [1967] S.C.R. 81.

²⁸ R. F. Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1971) at 363-66.

²⁹ G. J. Borrie, *The Advantages of the Declaratory Judgment in Administrative Law* (1955), 18 Mod. L. Rev. 138; I. Zamir, *The Declaratory Judgment v. The Prerogative Orders* [1958] Public Law 341; D. T. Warren, *The Declaratory Judgment: Reviewing Administrative Action* (1966), 44 Can. Bar Rev. 610.

³⁰ *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.).

³¹ [1952] O.R. 366.

be appropriate. There is a similar decision in the High Court of Australia.³² The reader who confined himself to the cases in the study would be entirely unaware of the existence of any controversy as to the availability of declaration as a method of judicial review. No trace of it appears in any opinion in the Supreme Court of Canada. The Court has often heard actions for declarations where the sole purpose was to secure review of an official decision,³³ and it has never doubted that the remedy of declaration is available as a substitute for a prerogative writ.³⁴

The Supreme Court's refusal to decide cases on technical procedural grounds³⁵ is wholly praiseworthy. Less praiseworthy, however, is the Court's refusal ever to discuss in general terms the procedural points which are urged before it. Thus, while it is possible to predict on the basis of the Court's actual decisions that the availability-of-alternative-remedy argument is not likely to succeed in the Supreme Court of Canada, we search in vain for a general statement expressly rejecting the doctrine or defining the scope of the doctrine. Presumably, therefore, the argument will continue to be urged before lower courts, and they will have difficulty in deciding how to deal with it. It would surely be desirable for the Supreme Court to generalize from its actual practice and to lay down a rule that the availability of an alternative remedy is not a sufficient ground for the refusal of an otherwise appropriate remedy. To that rule there would need to be at least this exception (although it is not recognized in any of the cases in the study): where a statutory remedy is available, and the statute providing for that remedy makes the remedy exclusive, then other remedies are not available.³⁶ This suggested exception to the general rule takes us into consideration of privative clauses, a topic which is treated next in this article.

Privative Clauses

Privative clauses are clauses in statutes which purport to exclude judicial

³² *Toowoomba Foundry Pty. Ltd. v. Commonwealth of Australia* (1945), 71 C. L.R. 545 (H.C. of A.); criticized, P. Brett and P. W. Hogg, *Cases and Materials on Administrative Law* (2nd ed. Melbourne: Butterworths, 1967) at 173.

³³ *Henderson v. Johnston*, [1959] S.C.R. 655; *Canadian Bank of Commerce v. A.-G. Can.*, [1962] S.C.R. 729; *Township of North York v. Metropolitan Toronto*, [1965] S.C.R. 401; *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512; *The Queen v. Randolph*, [1966] S.C.R. 260; *Tonks v. Reid*, [1967] S.C.R. 81; *Jones and Maheux v. Gamache*, [1969] S.C.R. 119; *Baldwin v. Pouliot*, [1969] S.C.R. 577.

³⁴ The discussion of the availability of the remedy by Fauteux J. in *Jones and Maheux v. Gamache*, [1969] S.C.R. 119 at 129 is not primarily directed to this fundamental question, although there are allusions to it. The availability of declaration in Quebec is more limited than in the common law provinces: [1969] S.C.R. 119 at 130.

³⁵ The labour cases do include a case deciding a procedural controversy: as to whether certiorari will lie to quash the award of an arbitration board appointed under a collective agreement. The court did examine the question, and it decided that the board could be characterized as a statutory tribunal so as to make certiorari available. The court then went on to decide that the award should be quashed: *Port Arthur Shipbuilding Co. v. Arthurs*, [1969] S.C.R. 85. This decision is discussed by P. C. Weiler, *supra*, note 2 at 63.

³⁶ See now *Pringle v. Fraser*, [1972] S.C.R. 821, outside the period studied.

review. They include the "finality clause" (which declares an agency decision to be final), the "exclusive jurisdiction clause" (which is a kind of finality clause), the "no-certiorari clause" (which expressly protects the agency decision from review by certiorari and other named remedies), and even notice or limitation clauses (which exclude review unless prior notice has been given or unless proceedings are brought within a short time).

The treatment of privative clauses by the courts has long been the despair of academic commentators. Particularly notorious are the cases reviewing the decisions of labour relations boards, where the Supreme Court of Canada has consistently refused to give any effect to strongly-worded privative clauses.³⁷ In my study the immigration cases present a similar picture. Up until 1967, when the Immigration Appeal Board was established, together with a right of appeal from the Board to the Supreme Court, there was a privative clause in the immigration legislation.³⁸ Between 1949 and 1967 there were eight cases in which the decisions of immigration officials were under attack, and in three of them the attack was successful. In one case the existence of the privative clause was noted and quickly dismissed.³⁹ In none of the remaining seven cases was the clause even mentioned, let alone discussed.

There is of course an argument of statutory interpretation in favour of the judicial refusal to give effect to privative clauses. It is said that, if the clause protects a "decision", then a decision made outside or in excess of jurisdiction is no decision. This argument, or some variant thereof, will apply to almost any form of privative clause.⁴⁰ What makes the argument implausible, to say the least, is the fact that only decisions outside or in excess of "jurisdiction" (in the broad sense of that term) are reviewable anyway: the argument assumes

³⁷ See H. Sutherland, Comment, (1952), 30 Can. Bar Rev. 69; B. Laskin, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses* (1952), 30 Can. Bar Rev. 986; J. G. Pink, *Judicial "Jurisdiction" in the Presence of Privative Clauses* (1965), 23 U. of T. Fac. L. R. 5; K. Norman, *The Privative Clause: Virile or Futile?* (1969), 34 Sask. L. Rev. 334. Cf. R. Carter, *The Apparent Virility of Privative Clauses* (1967), U. B. C. L. Rev. — C. de D. (joint centennial issue) 219, who argues that the clauses have had some effect.

³⁸ Immigration Act, R.S.C. 1927, c. 93, s. 23; R.S.C. 1952, c. 325, s. 39. This provision was repealed in 1967 when the Immigration Appeal Board was established: Immigration Appeal Board Act, S.C. 1966-67, c. 90, s. 30 and see ss. 22, 23 (see now R.S.C. 1970, c. I-3, ss. 22, 23).

³⁹ *A.-G. Can. v. Brent*, [1956] S.C.R. 318 at 321.

⁴⁰ J. G. Pink, *supra*, note 37 at 14, suggests that better drafting, and in particular explicit denial of jurisdictional error as a ground of review, "could virtually eliminate judicial review". He cited *R. ex. rel. Sewell v. Morrell*, [1944] 3 D.L.R. 710. He might well have added the Australian case of *R. v. Commissioner of Police for the Northern Territory; Ex parte Holroyd* (1965), 7 F.L.R. 8. But it seems doubtful that Pink's view would prevail, for it assumes that clearer language will somehow overcome the institutional jealousy and the competing democratic and civil libertarian values which have so persistently led the courts to circumvent privative clauses: see B. Laskin, *supra*, note 37 at 990.

that the legislature has enacted a provision which could never, under any circumstances, have any work to do.⁴¹

Professor Bora Laskin, writing in 1952, argued for a different approach to privative clauses. He argued that the purpose of a privative clause was to exclude all judicial review, and that it should be interpreted as doing just that.⁴² This theory is attractive, but its simplicity is as deceptive as that of the theory which has been accepted by the courts. If it is unrealistic to interpret privative clauses as excluding *no* judicial review, it is almost equally unrealistic to interpret them as excluding *all* judicial review. The latter interpretation gives too little weight to the democratic and civil libertarian values with which agency action occasionally comes into conflict. If an official or agency acts without a shadow of legal justification, should the courts deny redress because of the existence of a privative clause? If an official or agency acts in violation of fundamental civil liberties, should the courts deny redress because of the existence of a privative clause? These kinds of cases are rare, but they do occur from time to time. The trilogy of Quebec cases litigated by Jehovah's Witnesses in the 1950's, which have already been mentioned⁴³ and which are discussed below,⁴⁴ are examples. I believe that the courts properly granted redress in those cases, despite the existence of privative clauses. There is no need to fall into the all-or-nothing fallacy and interpret the general language of a privative clause as denying the power to grant redress even in exceptional cases.

There have been intermittent indications that the Supreme Court of Canada, influenced perhaps by Laskin's article, is moving away from the old simplistic view which in effect robbed privative clauses of any efficacy at all. In several cases in which an official decision has been attacked in a tort action for damages brought against the official who made the decision, a privative clause has featured prominently. The privative clause has not been ignored by any means, although it has only once been held effective. The one case is *The Queen v. Randolph*,⁴⁵ where the Crown was sued for damages for an allegedly illegal suspension of the petitioner's mail service. The Court held that the suspension of service was *intra vires* and therefore not actionable. This was sufficient to decide the case, but the Court added that a provision in the Post Office Act which stated that neither the Crown nor the Postmaster General was "liable to any person for any claim arising from the loss, delay

⁴¹ This is a slight exaggeration in that it is now orthodox doctrine that the standard non-certiorari clause will exclude review for non-jurisdictional error of law on the face of the record: see R. Carter, *supra*, note 37; K. Norman, *supra*, note 37. But this ground of review is available only on certiorari, not on any of the other common law or equitable remedies. Moreover, it is not difficult for the court which desires to review to treat an error of law as one which amounts to a jurisdictional error. It may be noted here too that review for breach of natural justice is available in the face of a privative clause: *Board of Health (Saltfleet Township) v. Knapman*, [1956] S.C.R. 877.

⁴² B. Laskin, *supra*, note 37.

⁴³ See text accompanying notes 5, 6 and 7, *supra*.

⁴⁴ See text accompanying notes 51 to 63, *infra*.

⁴⁵ [1966] S.C.R. 260.

or mishandling of anything deposited in a post office" would also preclude any action for damages.⁴⁶

Beatty v. Kozak,⁴⁷ discussed earlier in this article, was an action for false imprisonment brought against a police officer and police matron who without legal authority had arrested the plaintiff and had her detained in mental hospitals for 44 days. The defendants relied upon two privative clauses in the Mental Hygiene Act. The first clause prohibited proceedings against anyone who detained a mentally ill person, "if the person so acting has acted in good faith and with reasonable care". The Court held this clause inapplicable, because the defendants had not acted "in good faith and with reasonable care". The second clause imposed a six-month limitation period upon "proceedings against any person for anything done or omitted to be done in pursuance of this Act." (The plaintiff's action had not been commenced in time.) The Court held that this clause did not protect the defendants either, because in order to obtain its protection the defendants had to show at least that they had a "bona fide belief in facts which, if they existed, would have afforded a justification under the statute".⁴⁸ It is significant that neither of the two majority judgments rested its decision on the ground that an ultra vires act could never be done "in pursuance of this Act". This approach would have emptied the provision of all content, but it would of course have been in accord with plenty of precedent. Instead, the Court was prepared to contemplate the limitation provision protecting some ultra vires acts, namely, those done under a bona fide belief in facts which, if they existed, would have afforded a justification under the statute. Rand J., who dissented, accepted a similar test,⁴⁹ and was prepared to hold that it was satisfied on the facts of this case. He would have given effect to the limitation provision, so as to bar the plaintiff's action.

There is a well-known trilogy of damages actions brought by Jehovah's Witnesses in Quebec in the 1950s. These cases were briefly referred to earlier in this article.⁵⁰ In *Chaput v. Romain*⁵¹ police broke up an assembly of Jehovah's Witnesses which was meeting peacefully in a private house. There was not a shadow of legal justification for the police action. The Supreme Court of Canada, sitting as a full bench of nine, unanimously awarded damages against the policemen involved to the owner of the house. In order to reach this decision the court had to overcome three privative clauses. Two of these were six-month limitation provisions, and one was a notice requirement. The action had been brought outside the short limitation period, and the required prior notice of action had not been served. Locke J. used the traditional privative clause reasoning to evade these provisions. Since each policeman was acting illegally, he was not (in the terms of the various provisions) "fulfilling any public duty", or acting "in the execution of his duty" or "in

⁴⁶ *Id.*, at 267.

⁴⁷ [1958] S.C.R. 177; and see text accompanying note 8, *supra*.

⁴⁸ *Id.*, at 182 per Kerwin C. J., at 194 per Cartwright J.

⁴⁹ *Id.*, at 183-88.

⁵⁰ See text accompanying notes 5, 6, 7 and 43, *supra*.

⁵¹ [1955] S.C.R. 834.

the exercise of his functions".⁵² But the other judges were more sophisticated. Kellock J. (with whom Rand J. agreed) pointed out that "if [these expressions] were to be read literally, the statute would be meaningless, as such acts need no protection procedurally or otherwise".⁵³ He applied the same test as was later used in *Beatty v. Kozak*. What was required to make the provision applicable was "a bona fide belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did".⁵⁴ The other concurring opinions were to similar effect.⁵⁵

In *Lamb v. Benoit*⁵⁶ police arrested a Jehovah's Witness who was distributing some pamphlets on a street corner, and held her in custody for a weekend. At the end of the weekend she was offered her freedom in exchange for signing an undertaking not to sue the police who had arrested and detained her. She refused, and was then charged with two offences for which the police had no evidence whatsoever. After her acquittal she sued the police for damages for false imprisonment and malicious prosecution. The Court found that the arrest, detention and prosecution was substantially the work of only one of three policemen who were sued. The other two escaped liability. The principal actor's only defence was a cluster of privative clauses similar to those which were relied upon in *Chaput v. Romain*. As in the earlier case, the Court held these clauses unavailing, and awarded damages. However, all of the majority judges, including Locke J. this time, used the test of the bona fide belief in facts which if they existed would have afforded a legal justification, or a similar formulation. They held that this test was not satisfied. The three judges from Quebec, namely, Taschereau, Fauteux and Abbott JJ., dissented. They did so on the ground that, although the defendant's actions were legally unjustified, he was nevertheless acting sufficiently in his official capacity to be protected by the privative clause.

The third case of the trilogy is *Roncarelli v. Duplessis*,⁵⁷ which may enjoy the distinction of being Canada's best-known judicial decision. It will be recalled that Premier Duplessis ordered the cancellation of restaurateur Roncarelli's liquor licence on the ground that Roncarelli was a Jehovah's Witness who had made a practice of acting as bondsman for Jehovah's Witnesses who were arrested for distributing "The Watch Tower" and "Awake", allegedly in breach of municipal by-laws. This was clearly an ultra vires act on the part of Duplessis. Not only was the cancellation designed to accomplish a purpose which had nothing to do with the sale of liquor, but Duplessis had no statutory power to cancel a liquor licence even for good reason. That power lay with another official, the General Manager of the Liquor Commission, who in this case had (so the majority of the court found) simply acted under the dictation

⁵² *Id.*, at 862.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Concurring opinions were written by Taschereau J. (with whom Kerwin C. J. and Estey J. agreed), Fauteux J. (with whom Cartwright J. agreed) and Abbott J.

⁵⁶ [1959] S.C.R. 321.

⁵⁷ [1959] S.C.R. 121.

of Duplessis. Roncarelli sued Duplessis for damages, but he omitted to comply with Article 88 of the Quebec Code of Civil Procedure. Article 88 provided that:

No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions . . . unless notice of such action has been given him at least one month before the issue of the writ of summons.

The majority of the Court did not allow Duplessis to escape liability by reason of Article 88. Martland J., with whom Kerwin C.J. and Locke J. agreed, used the conventional privative clause argument to hold that Duplessis' act, because it was ultra vires, was not done "in the exercise of his functions".⁵⁸ Rand J., with whom Judson J. agreed, seemed to take the same view, although he was careful to point out that there was no "colour of propriety" in Duplessis' act.⁵⁹ Abbott J. framed his reasoning in language more consistent with that in *Lamb v. Benoit*:

In my opinion before a public officer can be held to be acting "in the exercise of his functions", within the meaning of art. 88 C.C.P., it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform . . .⁶⁰

But the French-Canadian judges, Taschereau and Fauteux JJ., dissented.⁶¹ (The other Quebec judge, Abbott J., who had joined them in dissent in *Lamb v. Benoit*, this time voted with the majority.) Taschereau J. said that he could not "subscribe to the fallacious principle that an error, committed by a *public officer*, in doing an act that is connected with the object of his functions, strips it of its official character, and that its author must then be considered as being without the scope of his duties".⁶² Fauteux J. made a similar statement.⁶³ Neither offered any elaboration of their reasons for differing from the majority.

It appears from the cases that the Supreme Court of Canada's approach to privative clauses differs according to the remedy which is being sought. Where the remedy being sought is damages against the Crown or an official, the court will concede some scope for the operation of privative clauses. Formulations have varied unaccountably, as we have seen, but the predominant view is that the clauses will protect the defendant from liability for an ultra vires act if he had a bona fide belief in facts which, if they existed, would have afforded a justification under the statute. And in the cases concerning privative clauses in Quebec statutes the French-Canadian judges have been prepared to give an even wider scope to the clauses, partly no doubt in deference to interpretations in the Quebec courts. On the other hand, where the remedy being sought is simply review of an official decision, with no coercive relief

⁵⁸ *Id.*, at 158.

⁵⁹ *Id.*, at 144.

⁶⁰ *Id.*, at 186.

⁶¹ Cartwright J. also dissented, but on the ground that the cancellation had been validly effected by the General Manager of the Liquor Commission. He did not discuss Article 88 of the Code of Civil Procedure.

⁶² *Id.*, at 130; 16 D.L.R. (2d) 689 at 695 (translation into English) (emphasis in original).

⁶³ *Id.*, at 181, 727.

against the decision-maker, the Court will usually concede no scope for the operation of privative clauses. The Court's decision whether or not to review will not be in any way affected by the existence of a privative clause. (Some exceptions to this proposition will be considered shortly.)

The difference between the damages cases and the pure review cases suggests that the Court sees the tort remedy as in the nature of a penalty imposed upon the defendant decision-maker. Viewed in this light, it is sensible to interpret the privative clause as excusing the defendant where he acted without blame, i.e., where he had a bona fide belief in facts which if they existed would have provided legal justification. In the pure review cases, since no "penalty" is sought, there is no similar reason for "excusing" the decision-maker.

Another analysis which might explain the divergent results in the two classes of case concerns the nature of the privative clauses. In each of the immigration and labour cases the clause was one which purported to prohibit review altogether. In *Beatty v. Kozak* and the Quebec trilogy the clauses imposed limitation or notice requirements, but did not prohibit review entirely.⁶⁴ There is obviously a case for construing the absolute clause more strictly than the notice or limitation clause.

However the results of the cases are rationalized, the almost total futility of absolute privative clauses in the immigration and labour cases cannot be defended, for it is nothing short of defiance to the command of the legislature. If it is possible in the damages cases to find a compromise between a literal reading of the language of the statute and civil libertarian values, why is it not possible in the immigration and labour (or pure review) cases? And the answer is, that a doctrine very similar to that applied in the damages cases can be applied in the pure review cases.

In the labour board cases the usual neglect of the privative clause is relieved by some dissenting opinions. In *Toronto Newspaper Guild v. Globe Printing Co.*,⁶⁵ where a majority of the Court quashed a decision of the Ontario Labour Relations Board, Rand J. rejected each pole of the all-or-nothing dichotomy and suggested a middle ground. The Court should only review a decision protected by a privative clause if the decision is not "within any rational compass that can be attributed to the statutory language".⁶⁶ Rand J.'s eloquent statement of his position is strikingly similar to a well-known passage from a judgment given by Dixon J. in the High Court of Australia in 1945:

[Privative clauses] are not interpreted as meaning to set at large the [agencies] to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down

⁶⁴ *The Queen v. Randolph*, [1966] S.C.R. 260, discussed in text accompanying note 45, *supra*, does not fit this analysis, for there the privative clause which was held to be effective was absolute.

⁶⁵ [1953] 2 S.C.R. 18.

⁶⁶ *Id.*, at 29.

by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.⁶⁷

This statement was quoted and applied by Judson J. in his dissenting opinion in *Jarvis v. Associated Medical Services Inc.*⁶⁸ He held that the Labour Board's decision in that case was protected from review by the privative clause, because the decision was a bona fide attempt to exercise the Board's power, the decision related to the subject matter of the legislation, and the decision was reasonably capable of reference to the Board's powers. Abbott J. agreed with Judson J., adding a few comments of his own to the same effect.⁶⁹ Neither Judson J. nor Abbott J. referred to the damages cases of the 1950's, but clearly their doctrine if accepted would bring all the privative clause cases into harmony. In effect the privative clause would become a counsel of restraint. The official decision must stand, so long as it is rendered in good faith and bears a defensible relationship to the statutory power.

Does the Rand-Judson-Abbott approach stand any chance of acceptance by the Supreme Court of Canada? It has in fact been accepted by the Court in a line of four Workmen's Compensation Board cases; the opinions in each of the first three cases were written by Judson J., and the opinion in the fourth was written by Ritchie J.⁷⁰ There are suggestions of the same approach in several other opinions written by Judson and Abbott JJ.; and each of these opinions attracted the concurrence of other members of the court.⁷¹ However the recent decision in *Metropolitan Life Insurance Co. Ltd. v. International Union of Operating Engineers*⁷² does not give ground for optimism. In that case Cartwright C.J., writing for a unanimous court consisting of himself, Martland, Ritchie, Spence and Pigeon JJ., quashed a decision of the Ontario Labour Relations Board. The entire discussion of the two privative clauses in the Board's Act consisted of the following sentence:

I regard the law as well settled that the Board, by asking itself the wrong question, has stepped outside its jurisdiction and that [the privative clauses] cannot avail to protect its certificate.⁷³

It is certainly unfortunate that the Court did not see fit to discuss the privative clause more fully, especially as the Court was in effect differing

⁶⁷ *The King v. Hickman; Ex parte Fox and Clinton* (1945), 70 C.L.R. 598 at 614; and see P. Brett and P. W. Hogg, *Cases and Materials on Administrative Law, supra*, note 32 at 546-57.

⁶⁸ [1964] S.C.R. 497 at 511.

⁶⁹ *Id.*, at 506.

⁷⁰ *Alcyon Shipping Co. Ltd. v. O'Krame*, [1961] S.C.R. 299; *Farrell v. Workmen's Compensation Board*, [1962] S.C.R. 48; *Workmen's Compensation Board v. Rammell*, [1962] S.C.R. 85; *Re Kinnaird v. Workmen's Compensation Board*, [1963] S.C.R. 239.

⁷¹ *Saine v. Beauchesne*, [1963] S.C.R. 435 at 437-38 per Abbott J. with concurrence of Taschereau, Fauteux, Judson and Hall JJ.; *Commission des Relations Ouvrières de Québec v. Burlington Mills Hosiery Co. of Canada Ltd.*, [1964] S.C.R. 342 at 346 per Abbott J. with concurrence of Taschereau C. J. and Judson J.; cf. *Labour Relations Board (B.C.) v. Canada Safeway Ltd.*, [1953] 2 S.C.R. 46 at 54-55 per Rand J.

⁷² [1970] S.C.R. 425.

⁷³ *Id.*, at 435.

from Fraser J. in the Ontario High Court⁷⁴ and Laskin J.A. writing for a unanimous Ontario Court of Appeal.⁷⁵ Both these lower courts had held the Labour Board's decision to be unreviewable for reasons which included the privative clause.

Is it too much to hope that the Supreme Court may yet repent of this decision,⁷⁶ perceive the relevance of its own decisions in the damages cases of the 1950s, and be willing to examine the Rand-Judson-Abbott opinions and the jurisprudence which has developed in Australia? The Court's style of opinion-writing gives absolutely no grounds for a prediction one way or the other. It is however relevant to point out that Judson and Abbott JJ. are still on the Court, and that they have now been joined by Laskin J. who in 1952 as a law professor had argued strongly against the prevailing judicial approach.⁷⁷ At the very least the willingness of these three judges to support their approach with reasons may force the other members of the Court to reconsider the question.⁷⁸

Findings of Fact or Law

Agency findings of fact or law are reviewable if they are jurisdictional (or collateral). An error as to a "jurisdictional fact" (which includes findings of law as well as fact) makes the agency's decision void for lack of jurisdiction. Findings of fact or law which are within jurisdiction (or in issue) are unreviewable, except in two classes of case: (1) where the remedy sought (and available) is certiorari and an error of law is apparent on the fact of the agency's record, and (2) where the legislature by statute has granted a right of appeal (or other form of review) from the agency's decision on the ground of error of law or fact.

This area of the law bristles with difficulties. When is a finding of fact or law "jurisdictional"? What is an error of "law"? What degree of respect should be accorded agency findings of fact or law when there is a power to review? These difficulties are familiar to administrative lawyers, and will not be elaborated here.⁷⁹ It suffices to say that the concepts of "jurisdiction" and

⁷⁴ (1968), 68 D.L.R. (2d) 109.

⁷⁵ (1968), 2 D.L.R. (3d) 652.

⁷⁶ The commentary on the decision has generally been critical: J. G. Norwood, *supra*, note 4; P. C. Weiler, *supra*, note 2 at 30; P. W. Hogg, *supra*, note 4 at 212; J. N. Lyon, *supra*, note 4.

⁷⁷ B. Laskin, *supra*, note 37, discussed in the text accompanying note 42, *supra*. For a possible guide to Laskin J.'s judicial attitude to privative clauses, see his opinion for the Court in *Pringle v. Fraser*, [1972] S.C.R. 821, refusing to grant certiorari on the ground that the statutory appeal procedure of the Immigration Appeal Board Act was exclusive. His lordship did however expressly deny the relevance of the privative clause cases.

⁷⁸ *Woodward Estate v. Minister of Finance* (1972), 27 D.L.R. (3d) 608 (S.C. Can.) appears to be a new development. In that case a privative clause which ratified prior decisions (as well as purporting to protect future decisions) was held effective to exclude review even for excess of jurisdiction. Martland J. wrote the opinion for a seven-man court, of which Abbott and Judson JJ., but not Laskin J., were members.

⁷⁹ There is an enormous literature on these problems. Discussion, and references to the best-known writing, will be found in S.A. de Smith, *Judicial Review of Administrative Action* (2nd ed. London: Stevens, 1968) at ch. 3; K. C. Davis, *supra*, note 20 at ch. 30; L. L. Jaffe, *supra*, note 12 at Chs. 14, 15 and 16. See also P. Brett and P. W. Hogg, *supra*, note 32 at ch. 2; R. F. Reid, *supra*, note 28 at ch. 11.

“law” are sufficiently vague — some would say meaningless — to offer a means of review of any erroneous finding of fact or law. The crucial factor in each case is the attitude which the judge brings to it. An attitude of restraint, or a willingness to intervene, can each be justified in the traditional language of the administrative lawyer. I do not mean to imply that cases are predetermined by the prejudices of the judges, for the attitude of one judge may vary from case to case, depending upon his perception of the gravity of the error, and upon other considerations. However it is true, as we have seen, that in divided cases some judges vote fairly consistently for the agency while others vote fairly consistently against it.⁸⁰

The jurisdictional fact doctrine has been much used in the labour board cases as a device for reviewing the findings of labour boards. The same doctrine was applied in two cases in my study, namely, *The Queen v. Leong Ba Chai*⁸¹ and *Bell v. Ontario Human Rights Commission*.⁸²

I have criticized the jurisdictional fact doctrine in general, and the *Bell* case in particular, in an earlier article in this journal.⁸³ Professor Weiler has criticized the labour cases.⁸⁴ There is no point in going over the same ground again. In brief, the Court has used the jurisdictional fact doctrine to substitute its opinion for that of the agency on matters which (in my view) were peculiarly within the competence of the agency. It has used the doctrine as a kind of underground appeal when no appeal had been expressly provided. The values of judicial restraint, extolled earlier in this article, and evident in other areas of the Court's work, have been utterly submerged by a mistaken zeal to “correct” the agency's decision.

Apart from the two cases mentioned, the jurisdictional fact doctrine has not cast its dark shadow outside the labour area. In two cases errors of law by agencies have been corrected on appeal to the Supreme Court of Canada.⁸⁵ In cases arising otherwise than by appeal from the agency the Court has shown commendable restraint. In *Farrell v. Workmen's Compensation Board*⁸⁶ Judson J. for a unanimous court refused to enter into the

⁸⁰ The “jurisdictional fact” cases in which the Court was divided are: *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18; *Labour Relations Board (B.C.) v. Canada Safeway Ltd.*, [1953] 2 S.C.R. 46; *Commission des Relations Ouvrières de Québec v. Burlington Mills Hosiery Co. of Canada Ltd.*, [1964] S.C.R. 342; *Jarvis v. Associated Medical Services Inc.*, [1964] S.C.R. 497; *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. The voting in these cases bears some relationship to the overall pattern of voting described earlier. Thus Abbott J. is consistently in favour of the agency, while Fauteux J. is consistently against it. On the other hand, Judson J., who usually votes for the agency, voted to review in *Bell*, and Spence J., who usually votes against the agency, voted for the agency in *Jarvis*.

⁸¹ [1954] S.C.R. 10.

⁸² [1971] S.C.R. 756.

⁸³ (1971), 9 Osgoode Hall Law Journal 203. For a reply, see D. Mullan, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada — A Mitigating Plea* (1972), 10 Osgoode Hall Law Journal 440.

⁸⁴ (1971), 9 Osgoode Hall Law Journal 1 at 17-33.

⁸⁵ *Joy Oil Co. Ltd. v. The King*, [1951] S.C.R. 624; *Township of Scarborough v. City of Toronto*, [1956] S.C.R. 450.

⁸⁶ [1962] S.C.R. 48.

question whether the Board was correct in deciding that a workman's death was not the result of an accident arising out of and in the course of his employment. "This issue", said Judson J., "is unquestionably within the jurisdiction of the Board under Part I of the Act and even if there was error, whether in law or fact, it was made within the exercise of the jurisdiction and is not open to any judicial review, including certiorari".⁸⁷ There was a privative clause in that case, and the reference to certiorari was no doubt made explicit in order to make plain that the privative clause successfully precluded review for error of law on the face of the record, which is available only on certiorari.⁸⁸ The interesting feature of the case, for present purposes, is the refusal to apply the jurisdictional fact doctrine in order to review the finding that there had been no accident arising out of and in the course of the employment. Judson J. does not even mention the doctrine, yet it could have been applied with as much (or as little, as I think) justification to a Workmen's Compensation Board, as to a Labour Relations Board.

A similarly restrained approach is evident in two immigration cases where a deportee argued that the immigration officials had misconstrued their regulations.⁸⁹ One case arose on certiorari, and the other on appeal, so that in each case error of law was available as a ground of review. In each case the officials had construed the regulations very literally, and this had produced what seemed (to me at least) a harsh result to the would-be immigrant. In each case dissenting opinions held that the officials had erred in law in interpreting the regulations so harshly, but the majority sustained the official interpretation and held that no error of law had been committed.

Discretionary Action

As one might expect, the largest class of cases in the study (34 out of 71) was concerned with the exercise of discretion by officials or agencies. The blackletter law here is of course that an exercise of a discretion which has been conferred by statute on an official or agency is unreviewable in the courts. In order to be protected from attack, however, the discretionary action must be exercised within the limits defined by the statute. If the action taken is outside the express limits of power, then the problem is simple. A power to regulate the sale of meat will not authorize a regulation concerning the sale of grain. In practice, however, the cases which arise are not so simple. Typically, the statutory power is expressed in language which is susceptible of more than one interpretation. Under one interpretation the action is authorized. Under another it is unauthorized. Complicating the question still further is the doctrine that there are certain implied limitations on the exercise of all statutory discretions: they must not be exercised in bad faith, or for an improper purpose, or upon irrelevant considerations. What is an "improper purpose" or an "irrelevant consideration"? In theory these are purposes or considerations which lie outside the scope and purpose of the enabling statute. However there is usually room for disagreement as

⁸⁷ *Id.*, at 51.

⁸⁸ See *supra*, note 41.

⁸⁹ *Españillat-Rodríguez v. The Queen*, [1964] S.C.R. 3; *Mihm v. Minister of Manpower and Immigration*, [1970] S.C.R. 348.

to whether a given purpose or consideration is properly within the scope and purpose of the enabling statute. On one view it will be proper; on another it will be improper.

The result of a case involving an attack on a discretionary decision is highly unpredictable. It will often depend upon the cast of mind with which the judge approaches his task. The judge who thinks he sees a grievance unredressed will usually be able to interpret the empowering statute so as to allow him to review. The judge who prefers to defer to the judgment of the agency will usually be able to interpret the empowering statute so as to justify the agency action.

There is a danger that the doctrines of improper purpose or irrelevant considerations will be used by a court as a device to substitute its opinion on the contested matter for that of the statutory agency. This is an illegitimate extension of the power of judicial review. My view is that here, as elsewhere, the agency should be given the benefit of any reasonable doubt. But cases do arise, as I hope my earlier discussion of *Smith and Rhuland Ltd. v. The Queen*⁹⁰ has shown, where an agency uses its power to accomplish an end which is not reasonably within the scope of its empowering statute. Where, as in *Smith and Rhuland*, the agency uses a vaguely-worded discretion to impair values fundamental to the legal order as a whole, or where the court is convinced that the statutory scheme cannot on any reasonable view support what has been done, then review is justified and indeed demanded. Such cases are however infrequent.

On the whole, the Supreme Court of Canada has chosen the wise path of deference to the agency's perception of its role. Only a small minority of the decisions which were attacked as an abuse of discretion were actually quashed, and those that were quashed often attracted dissenting support from some members of the court.

The results, but not the judges' opinions, show that the Supreme Court has felt freer to review exercises of official discretion when they are by statute *appealable* into the Supreme Court itself. This used to be the case with many of the federal agencies, and this probably explains why the rate of review of those agency's decisions is higher than in any other class of case. Out of five appeals to the Supreme Court of Canada from decisions by federal agencies, on the ground of an improper exercise of discretion, all five appeals were successful.⁹¹ Three other cases in which exercises of discretion by federal agencies were under attack, but not on appeal, produced two affirmations of the agency decision and one quashing.⁹² The last was sub-

⁹⁰ [1953] 2 S.C.R. 95; see text accompanying note 10, *supra*.

⁹¹ *C.P.R. v. Alberta*, [1950] S.C.R. 25; *Joy Oil Co. Ltd. v. The King*, [1951] S.C.R. 624; *Crow's Nest Pass Coal Co. Ltd. v. Alberta Natural Gas Co.*, [1963] S.C.R. 257; *Metcalfe Telephones Ltd. v. McKenna*, [1964] S.C.R. 202; *Confederation Broadcasting (Ottawa) Ltd. v. Canadian Radio-Television Commission*, [1971] S.C.R. 906.

⁹² *Canadian Wheat Board v. Nolan*, [1951] S.C.R. 81 (reversed by P.C., [1952] A.C. 427); *Canadian Bank of Commerce v. A.-G. Can.*, [1962] S.C.R. 729; *Procureur Général du Canada v. La Compagnie de Publication La Presse Ltée*, [1967] S.C.R. 60.

sequently reversed by the Privy Council, the case having commenced before the abolition of appeals to the Privy Council.⁹³

A notable feature of the cases studied is how few of them involved any flagrant abuse of power. The three cases brought by Jehovah's Witnesses in Quebec, which have already been discussed in the context of the role of the court and in the context of privative clauses, fall into this class.⁹⁴ In each of them there was an exercise of power without any shadow of statutory justification, and in each case the official action invaded the basic freedoms of worship or personal liberty of an unpopular minority. Dicey would have delighted in these cases, as classic illustrations of his concept of the rule of law. And they do indeed demonstrate — in my mind at least — the absolute necessity of some degree of judicial review of administrative action.⁹⁵

The remaining 30 or so discretion cases do not present a picture of irresponsible, arbitrary or oppressive action by officials. On the contrary, in the main it is clear that the officials under attack were acting honestly and conscientiously in the exercise of what they believed to be their powers. Even that dreaded creature, the honest but over-zealous official, is not really in evidence. I recognize of course that the proportion of cases which reach the Supreme Court of Canada is minute, and that those which do may not convey to the reader the full flavour of the facts. Nevertheless, if bureaucratic oppression were a widespread Canadian problem one would expect more evidence of it to surface at the Supreme Court level.

In five cases would-be immigrants challenged decisions by federal immigration officials on the basis that there had been an improper exercise of discretion. Four of the five decisions were upheld, with dicta as to the unreviewability of "administrative" discretion.⁹⁶ The fifth, where the official decision was upset, is an aberration in that it involved a very strict reading of the statutory power.⁹⁷ The power could easily have been read as supporting the action taken, as the dissenting opinion of Abbott J. (concurring in by Taschereau and Judson JJ.) showed.

The provincial agencies which regulate utility rates have been attacked four times on the basis of an improper exercise of discretion. They have won three⁹⁸ and lost one.⁹⁹ In the one lost there was a disagreement between the

⁹³ *A.-G. Can. v. Hallet and Carey Ltd.*, [1952] A.C. 427.

⁹⁴ *Chaput v. Romain*, [1955] S.C.R. 834; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Lamb v. Benoit*, [1959] S.C.R. 321; see text accompanying notes 5-7 and 51-63, *supra*. *Beatty v. Kozak*, [1958] S.C.R. 177 might arguably be added to the list, but it was a much less clear case than the others, as Rand J.'s dissent shows.

⁹⁵ This point is elaborated in my article *Judicial Review: How Much Do We Need?* (1972), *supra*, note 3.

⁹⁶ *Masella v. Langlais*, [1955] S.C.R. 263; *Narine-Singh v. A.-G. Can.*, [1955] S.C.R. 395; *Louie Yuet Sun v. The Queen*, [1961] S.C.R. 70; *Moore v. Minister of Manpower and Immigration*, [1968] S.C.R. 839.

⁹⁷ *Violi v. Superintendent of Immigration*, [1965] S.C.R. 232.

⁹⁸ *Union Gas of Canada Ltd. v. Sydenham Gas and Petroleum Co. Ltd.*, [1957] S.C.R. 185; *Memorial Gardens Assn. (Canada) Ltd. v. Colwood Cemetary Co.*, [1958] S.C.R. 353; *City of Edmonton v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392.

⁹⁹ *B.C. Electric Ry. Co. Ltd. v. Public Utilities Commission of British Columbia*, [1960] S.C.R. 837.

agency and the Court as to the priority to be accorded various factors in fixing electricity rates. The agency view was at least defensible, and it attracted the support of Kerwin C.J., who dissented on the ground that the weight to be assigned to each factor in rate-fixing was a matter for the agency.

Then there is a group of six cases in which disciplinary rules or decisions were attacked on the basis of an improper exercise of discretion. The disciplinary bodies in these cases — a police superintendent,¹⁰⁰ a Board of Hospital Trustees,¹⁰¹ the Ontario Racing Commission,¹⁰² a physicians' discipline committee¹⁰³ and a pilotage authority¹⁰⁴ have been upheld every time save one. The exceptional decision¹⁰⁵ denied to the Minister of Transport as pilotage authority the power to classify pilots for the purpose of their salary and the class of ships with which they could be entrusted. The Minister's power was to "make regulations for the government of pilots". Similarly vague language had been given wide scope in the other discipline cases, but in this one the Court unexpectedly asserted its power of review. This decision was unanimous, but the Court did not include Abbott or Judson JJ.

The most numerous class of discretion cases concerned those in which a municipal exercise of discretion was attacked. Where an elected local body has decided a local question the general argument for judicial restraint is reinforced by a democratic principle. This point is occasionally made explicit in judicial dicta.¹⁰⁶ There were nine cases in the study in which the decision of a municipal council was attacked as an improper exercise of discretion. The attack was successful in three. The first successful attack, in *Ross v. The Queen*,¹⁰⁷ involved a by-law governing the parking of taxi-cabs on private property for the purpose of obtaining passengers. In this case there was an argument in favour of the by-law which was sufficiently strong to attract Kerwin C.J.'s dissenting vote. But the majority were impressed with the fact that the by-law purported to apply to taxi-cabs licensed by municipalities other than the enacting municipality. It would require clear and specific words to confer "so unusual a power".¹⁰⁸ No doubt too, though it was not emphasized by the Court, the fact that the by-law would affect the livelihood of cab-drivers contributed to the narrow construction of the empowering statute.

The second case, *Metropolitan Toronto v. Village of Forest Hill*,¹⁰⁹ concerned a by-law providing for the fluoridation of drinking water. The

¹⁰⁰ *The Queen and Archer v. White*, [1956] S.C.R. 154.

¹⁰¹ *Henderson v. Johnston*, [1959] S.C.R. 655.

¹⁰² *Wm. F. Morrissey Ltd. v. Ontario Racing Commission*, [1960] S.C.R. 104.

¹⁰³ *Saine v. Beauchesne*, [1963] S.C.R. 435.

¹⁰⁴ *Jones and Maheux v. Gamache*, [1969] S.C.R. 119; 7 D.L.R. (3d) 316 (translation into English of Pigeon J's opinion); *Baldwin v. Pouliot*, [1969] S.C.R. 577.

¹⁰⁵ *Jones and Maheux v. Gamache*, [1969] S.C.R. 119.

¹⁰⁶ E.g., *Kruse v. Johnson*, [1898] 2 Q.B. 91 at 100 per Lord Russell of Killowen; *Cité de Sillery v. Sun Oil Co. Ltd.*, [1964] S.C.R. 552 at 556 per Abbott J.

¹⁰⁷ [1955] S.C.R. 430.

¹⁰⁸ *Id.*, at 438.

¹⁰⁹ [1957] S.C.R. 569.

statutory power was to enact by-laws to secure a supply of "pure and wholesome water". It seems to me that the principle of judicial restraint should have been applied in this case to uphold the municipality's interpretation of its powers. This was the approach taken by Kerwin C.J. and Locke J. in dissent, each of whom explicitly stated that the judicial role should be restrained.¹¹⁰ On the other hand, the fluoridation of drinking water is seen by some as a major civil liberties issue. This was not explicitly recognized by the majority, but it may explain their holding that the power to supply "pure and wholesome water" did not authorize the pursuing of "a special health purpose".¹¹¹ The voting in this case was interesting. I have already mentioned that Locke J., who dissented, wrote an opinion in support of the municipality and explicitly grounded his decision on a doctrine of judicial restraint. And yet his overall voting record has been far from restrained, as noted earlier in the discussion of voting patterns.¹¹² It is even more surprising to find that the five judges in the majority included Abbott J., whose overall voting record has been very restrained indeed.¹¹³ It may be that the key to these unexpected votes, and to the majority decision to intervene, lies in the fluoridation issue which at that time was being hotly debated and which was perceived in very different ways by those engaged in the controversy.

The third case in which a municipal exercise of discretion was successfully attacked, *City of Ottawa v. Boyd Builders Ltd.*,¹¹⁴ involved a zoning by-law. Other challenges to zoning by-laws have been uniformly unsuccessful.¹¹⁵ The private property interest which is affected by such by-laws has not led to a strict construction of zoning powers. This is because the whole purpose of the power to zone is to limit the uses to which private property may be put.¹¹⁶ In *Boyd Builders*, however, the municipal council had enacted the by-law to prohibit the building of apartments on land owned by a developer after the developer had applied for a building permit. The Supreme Court, in a unanimous decision in which both Abbott and Judson JJ. participated, held that a generally-worded zoning power, although it always defeats pre-existing property rights to some extent, could not defeat the rights of an owner who had actually applied for a building permit under the old zoning.

These three cases each involved a somewhat unexpected use of statutory power in derogation of individual liberties, and they can clearly be accom-

¹¹⁰ *Id.*, at 571 per Kerwin C. J., at 580 per Locke J.

¹¹¹ *Id.*, at 574.

¹¹² Locke J. participated in eleven divided decisions and voted to sustain the agency in only three (including this one).

¹¹³ Abbott J. participated in eighteen divided decisions and voted to sustain the agency in fifteen.

¹¹⁴ [1965] S.C.R. 408.

¹¹⁵ *Township of Scarborough v. Bondi*, [1959] S.C.R. 444; *Canadian Petrofina Ltd. v. Martin*, [1959] S.C.R. 453; *Taylor Blvd. Realities Ltd. v. City of Montreal*, [1964] S.C.R. 195; *Cité de Sillery v. Sun Oil Co. Ltd.*, [1964] S.C.R. 552.

¹¹⁶ See, e.g., *Canadian Petrofina Ltd. v. Martin*, [1959] S.C.R. 453 at 458 per Fauteux J.

modated within a general pattern of judicial restraint. The remaining municipal discretion cases displayed a liberal interpretation of municipal power, and upheld the attacked discretion.¹¹⁷

Delegation of Discretion

In *City of Verdun v. Sun Oil Co. Ltd.*¹¹⁸ the Sun Oil Co. applied for and obtained mandamus to compel the council of the City of Verdun to grant to it permission to build a service station on a particular location in the city. Quebec's Cities and Towns Act gave to the city council the power "to make by-laws . . . to regulate the location within the municipality of industrial and commercial establishments and other buildings intended for special purposes". Pursuant to this power, the City of Verdun had enacted a by-law which required application to build a service station in the city to be made to the city council. The application had to be examined by the city's building inspector, who had to certify to the council whether the proposal satisfied the by-laws and would not endanger life or property. Then, under the by-law, the City Council "may, at its discretion, grant or deny the permission applied for". The Supreme Court of Canada held that this last portion of the by-law, which purported to grant to the City Council discretion to grant or deny permission, was ultra vires. Sun Oil, which had satisfied the requirements of the by-laws, and which had obtained a favourable certificate from the building inspector, was entitled to be granted permission to erect its service station. The contrary decision of the City Council was a nullity.

Fauteux J., who wrote the unanimous opinion of a court comprising himself, Taschereau, Kellock, Estey and Cartwright JJ., held that the vice of the by-law was that it "effectively transforms an authority to regulate by legislation into a mere administrative and discretionary power to cancel by resolution . . .".¹¹⁹ The right to regulate, he held, "is to be maintained at the legislative level and not to be brought down exclusively within the administrative field, as it was in the present instance".¹²⁰ He pointed out that a by-law is passed only after certain formalities; it is general in its application; and it is published. A mere resolution, by contrast, could be passed by majority vote at any meeting of a council which changes in its composition; it need apply only to one case; and it need not be published. Thus the permission to build a service station would be left "to the mere whim of the persons who might form the council of any particular meeting", and the door would

¹¹⁷ *Bouchard v. School Commissioners of Saint-Mathieu-de-Dixville*, [1950] S.C.R. 479 (expulsion of students from school); *Township of North York v. Metropolitan Toronto*, [1965] S.C.R. 401 (levy on area municipalities). The zoning cases are referred to in note 115, *supra*. There are two cases in which a discretionary decision of the Ontario Municipal Board (which is not an elected body) has been successfully attacked: *Township of Scarborough v. City of Toronto*, [1956] S.C.R. 450; *Etobicoke Board of Education v. Highbury Developments Ltd.*, [1958] S.C.R. 196.

¹¹⁸ [1952] 1 S.C.R. 222.

¹¹⁹ *Id.*, at 229.

¹²⁰ *Id.*

be open "to discrimination and arbitrary, unjust and oppressive interference in particular cases".¹²¹

The same kind of reasoning was used, again by Fauteux J. for a unanimous court, in *City of Outremont v. Protestant School Trustees*¹²² to hold invalid a by-law which purported to give to a city council a discretion to "allow the construction of churches, schools and hospitals" in areas reserved for private housing. And in *City of Toronto v. Outdoor Neon Displays Ltd.*¹²³ Cartwright J. for a unanimous court held that a by-law which purported to confer on a building inspector an "uncontrolled discretionary power" to grant or refuse permission to erect signs would be ultra vires a power to regulate by by-law. In light of this principle he held that the by-law could be saved by construing it as not conferring discretion upon the building inspector: he was obliged to approve any sign which satisfied the city's by-laws.

This strong anti-delegation doctrine has been applied by the Court once outside the municipal area. In *A.-G. Canada v. Brent*¹²⁴ the court held that immigration regulations were invalid because they handed the subject matter to be regulated over to the discretion of special inquiry officers. "There is no power", said Kerwin C.J. for the Court, "in the Governor General-in-Council to delegate his authority to such officers".¹²⁵

The opinions in all these cases seem to me to be incomplete. Of course there is force in the reasons given by Fauteux J. for his decision in *City of Verdun v. Sun Oil Co. Ltd.*¹²⁶ If the legislature gives to a municipal council (or other agency) a power to regulate development by by-law, it is obviously arguable that it intends only the specified body (the municipal council) to exercise the power, and then only in the manner specified (by by-law). And yet a moment's reflection suffices to demonstrate that such a rule could never be absolute. No regime of control over development (for example) could work unless discretionary power were delegated to the council or to subordinate officials. Effective government usually involves the delegation of discretion to officials. When the legislature delegates a power to legislate to a subordinate agency, it must be taken to impliedly authorize the further delegation of at least some degree of discretionary power. By condemning so roundly and absolutely the admittedly broad delegations in the cases mentioned the Supreme Court of Canada has failed to provide guidance in answering the crucial question: to what extent is delegation authorized? The answer which these cases seem to give is: not at all.

That the answer cannot be so absolute, is shown by the Court's own decision in *Bridge v. The Queen*.¹²⁷ This is the only case in the study in which

¹²¹ *Id.*, at 230, quoting from *Corporation du Village de Ste.-Agathe v. Reid* (1904), Q.R. 10 R. de J. 334 at 337-38.

¹²² [1952] 2 S.C.R. 506.

¹²³ [1960] S.C.R. 307.

¹²⁴ [1956] S.C.R. 318.

¹²⁵ *Id.*, at 321.

¹²⁶ [1952] 1 S.C.R. 222.

¹²⁷ [1953] 1 S.C.R. 8.

an anti-delegation argument has failed.¹²⁸ In that case the City of Hamilton had statutory power to provide by by-law for the opening and closing hours of gasoline service stations; the power expressly included power to "provide for the issuing of permits authorizing [a station] to be and remain open, notwithstanding the by-law, during the part or parts of the day or days specified in the permit". The City by by-law established a regime for the issue of permits for evening and Sunday opening on a rotational basis. It gave powers to administer the scheme to a committee of the council and to the City Clerk, and they had certain discretionary powers to sort out the details of the rotation. The by-law was attacked on the basis that it involved an invalid delegation. The majority of the Supreme Court rejected this argument. Cartwright J., who wrote the opinion, explained that the by-law had "provided with sufficient particularity for the issuing of permits", and that the duties which it delegated were merely "administrative".¹²⁹ He did not elaborate on what was meant by "sufficient particularity" or "administrative". Rand J. dissented. He agreed that "administrative details could be left to a committee or an official", but that "no part of the legislative action or discretion reposed by the legislature in the council could be delegated to any other body or person".¹³⁰ He considered that the by-law left room for "significant judgment"¹³¹ in the committee and City Clerk, and that this made it invalid. Although Rand J. never explicitly says so, he seems to equate "legislative" discretion with discretion involving "significant judgment".

The use of the classification of functions to solve problems of delegation is by no means unknown in Canadian courts.¹³² "Administrative" discretion can be delegated, so it is said, but not "legislative" or "judicial" discretion. But unless these labels are satisfactorily defined, and they never are, they serve only to conceal the reasons which have led a judge to allow or disallow a particular delegation. Indeed, if a judge takes the labels seriously he may well be distracted from the considerations which really are relevant to the issue whether a particular delegation should be allowed. For example, Rand J.'s opinion in *Bridge* pointed out the complexities of fairly rotating among service stations in a municipality the right to open for extended hours. He regarded his discussion as demonstrating that "significant judgment" had been delegated, which was "legislative" and bad. But for the reader who is not spellbound by the classification of functions Rand J.'s opinion demonstrates the impossibility of operating a fair scheme without delegating "significant judgment" to some official; the commonsense conclusion is that the delegation should be regarded as essential to effective government and good.

Professor John Willis, writing in the *Canadian Bar Review* in 1943,¹³³

¹²⁸ There are cases in which the Court simply closes its eyes to a delegation of power, e.g., *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344; *Violi v. Superintendent of Immigration*, [1965] S.C.R. 232.

¹²⁹ [1953] 1 S.C.R. 8 at 14.

¹³⁰ *Id.*, at 16.

¹³¹ *Id.*, at 17.

¹³² E.g., *R. v. Campbell* (1962), 38 D.L.R. (2d) 579 (Ont. C.A.); *R. v. Joy Oil Co. Ltd.* (1963), 41 D.L.R. (2d) 291 (Ont. C.A.).

¹³³ J. Willis, *Delegatus Non Potest Delegare* (1943), 21 *Can. Bar Rev.* 257.

suggested an approach to delegation which would avoid any need to classify functions as "administrative" or "legislative". He pointed out that delegation problems raise a clash of two competing policies. On the one hand, the legislature must be presumed to have desired that the agency which it named should exercise the discretion given to it. On the other hand, the legislature must be presumed to have desired that the process of government should go on in its accustomed and most effective manner. To determine which of these two policies should be paramount in a particular situation the court has to examine the known practices and apprehended needs of the agency involved, and the alternative ways in which the purpose of the statute could be accomplished. No doubt, this kind of instruction to the courts will not provide high predictability of decisions, but at least the courts would be addressing themselves to the relevant considerations. The courts in the United Kingdom and Australia now tend to follow the Willis approach.¹³⁴ But the Supreme Court of Canada has not only never referred to Willis' fine article, but shows no indication of having read it. This is not to say that the Court's delegation decisions are wrong, or even that they are grounded on different reasons. It may well be that the Court is conscious of the need to balance the requirements of effective government against the ideal of personally-exercised discretion, but the task is never performed openly in its opinions. Thus, the opinions in the three municipal planning cases with which this discussion opened never ask whether a town planning regime can be established without the subdelegation of significant discretion; and the opinion in *A.-G. Canada v. Brent* never asks whether a regime of controlled immigration can be established without the subdelegation of discretion. The aims of the statute, and the needs of the statutory agency, are simply not discussed. If the Court had addressed itself to these issues it might have been more sympathetic to the problems of the agency, and less ready to attack its decision to delegate its function. Here, as elsewhere, there should be a presumption in favour of judicial restraint.

Natural Justice

The rules of natural justice are procedural limitations on the exercise of certain statutory powers. There are two rules: (1) that the decision-maker must give to the persons affected an opportunity to be heard, and (2) that the decision-maker must be unbiased.

The constitutional justification for the imposition of procedural requirements by the court upon the agency is that the court is merely "interpreting" the agency's empowering statute. When the legislature confers authority upon an agency to determine questions affecting the rights of subjects the legislature could not have intended the authority to be exercised in breach of fundamental principles of justice. That is how the argument runs, when it is spelled out (which is seldom). The argument cannot, of course, be invoked when the legislature has made it clear that the agency need not provide an opportunity to be heard, or need not be unbiased. There is no constitutional

¹³⁴ See *Carltona Ltd. v. Commissioners of Works*, [1943] 2 All E.R. 560; *Vine v. National Dock Labour Board*, [1957] A.C. 488; *Ex parte Forster*; *Re University of Sydney*, [1964] N.S.W.R. 1000.

impediment to the various Canadian provincial legislatures doing just that. Since 1960 the federal Parliament has been subject to the Canadian Bill of Rights, which by s.2(e) provides that no law of Canada shall be construed or applied so as to:

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

It may be that s.2(e) would render inoperative a provision in a federal statute which purported to exclude the rules of natural justice from a statutory power which would otherwise be subject to the rules.¹³⁵ Section 2(e) has been relied upon in three cases in the Supreme Court of Canada.¹³⁶ In each of them it was in effect held to be merely declaratory of the rules of natural justice. But so far a federal provision purporting to exclude natural justice has not reached the Court for a decision as to whether it conflicts with s.2(e).

The natural justice cases raise two kinds of problems: (1) when are the rules applicable?, and (2) what is the content of each rule?¹³⁷ The purpose of the rules is to ensure procedural fairness. There is such a variety of situations to which the rules must apply that it would be unreasonable to expect clear and precise definitions from the courts which will cover all cases. On the other hand, the courts are in my view well suited to the task of elaborating the requirements of natural justice. Where the rights of individuals may be affected by official action there are certain values of procedural fairness which apply to a wide variety of otherwise different agencies, which are therefore susceptible of generalized statement, and which the courts are peculiarly well placed to formulate. The courts have a long tradition of concern with their own procedure and with those of the subordinate bodies which for centuries have come before them on certiorari. This is not to say that the courts should impose courtroom rules of procedure and evidence upon the agencies. That would utterly defeat the objectives of speed and informality. The court must start with a presumption in favour of restraint, which means deferring to any reasonable agency decision as to its own procedure. But the court is well equipped to identify the point at which an agency's procedure ceases to be merely informal and becomes positively unfair. At that point judicial intervention is justified.

The Supreme Court of Canada has not been successful in producing consistent, principled decisions in the natural justice area. It has rather produced "a wilderness of single instances". It would not be profitable to

¹³⁵ The Canadian Bill of Rights, by s. 2, allows the federal Parliament to exempt any statute from its provisions by declaring that the statute shall operate notwithstanding the Bill of Rights. There is also a question whether the Bill of Rights, being an ordinary statute, can have any effect on statutes enacted after it.

¹³⁶ *Rebrin v. Bird*, [1961] S.C.R. 376; *Guay v. Lafleur*, [1965] S.C.R. 12; *The Queen v. Randolph*, [1966] S.C.R. 260.

¹³⁷ A third problem which occasionally arises is: what is the effect of breach of the rules? Do they make the resulting decision void or voidable? See *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1956] S.C.R. 512; S. A. de Smith, *supra*, note 79 at 222, 260.

discuss all sixteen of the natural justice decisions during the period of study.¹³⁸ But the deficiency in the Court's work may be fairly demonstrated by taking six of the best-known of the cases.¹³⁹

Four of the cases concern the problem of when the rules of natural justice are applicable. The first is *Board of Health (Saltfleet Township) v. Knapman*.¹⁴⁰ In that case the Board of Health had statutory power to require the occupants of a building used as a dwellinghouse to quit it, where the Board was satisfied that the building had become (1) unfit for the purpose of a dwelling, or (2) a nuisance, or (3) dangerous or injurious to the health of the occupants or the public. The Board in exercise of this power required the occupants of several dwellinghouses owned by Knapman to be vacated. Knapman and the occupants were refused a hearing by the Board, which made its decision in a closed meeting. The Supreme Court of Canada, affirming the Ontario courts, issued certiorari to quash the decision. Cartwright J., who wrote the opinion of four of the five members of the Court, said that in determining whether or not one of the specified causes for the exercise of its power existed, the Board was under a "duty to act judicially"; it had to give the occupants "an opportunity to know which of such causes was alleged to exist or [*sc. and*] to make answer to the allegation".¹⁴¹

Knapman was about as easy a case for the application of the rules of natural justice as one finds in the reports. It is perhaps not surprising, although I think it is unfortunate, that the Court did not refer to any of the many authorities which hold that a power to take away property rights is normally subject to the rules of natural justice. It is also, in my view, unfortunate that the Court referred to the "duty to act judicially", and never used the term "natural justice" at all.

Two years later a similar case came before the Court. In *Calgary Power Ltd. v. Copithorne*¹⁴² the issue was whether the Minister of Agriculture for Alberta was under a duty to provide an opportunity to be heard to a landowner before expropriating a right of way for electricity lines over the landowner's land. The Minister had expropriated a right of way over

¹³⁸ The exclusion from my study of the labour board cases means that the number sixteen comprises only the non-labour cases. It does not include, for example, the important cases of *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18 or *Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140.

¹³⁹ One well-known case which, because it stands somewhat on its own, I have not discussed in the text is *King v. University of Saskatchewan*, [1969] S.C.R. 678. The doctrine laid down there that a fair hearing on appeal cures defects of natural justice in lower proceedings seems to me to be highly dubious. In my opinion the existence of an appeal *prima facie* entitles the appellant to two fair hearings — at first instance as well as on appeal. If the first hearing is unfair much of the value of having an appeal is lost. In this respect an appeal should not be confused with a genuine rehearing by the same body as originally committed the breach of natural justice; in that situation I agree that the rehearing should cure the defect: see *Ridge v. Baldwin*, [1964] A.C. 40; *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330.

¹⁴⁰ [1956] S.C.R. 877.

¹⁴¹ *Id.*, at 879.

¹⁴² [1959] S.C.R. 24.

Copithorne's ranch without giving to Copithorne an opportunity to be heard. The one difference between this case and *Knapman* was that in *Knapman* the conditions for the exercise of the Board's powers were precisely spelled out in the empowering statute. Here the Minister's statutory power was expressed in much vaguer language — to expropriate land "which the Minister may deem necessary for the authorized undertaking". The issue in *Calgary Power* therefore was whether a broad discretionary power over property should also be subjected to the requirements of natural justice.

The decision of the Supreme Court of Canada is astonishing in its failure to address itself to this issue. The decision was that the Minister did not have to provide an opportunity for Copithorne to be heard. The Court included two members of the *Knapman* court, namely Cartwright J., who had written the *Knapman* opinion, and Locke J., who had agreed with it. And yet Martland J.'s opinion for the Court in *Calgary Power* failed even to refer to the *Knapman* decision of two years earlier. Instead, Martland J. turned to the dictum of Lord Hewart in the *Church Assembly* case¹⁴³ to the effect that a body which had legal authority to determine questions affecting the rights of subjects was only obliged to give a hearing if it was subject to a "super-added duty to act judicially".¹⁴⁴ Martland J. then embarked on a search for that elusive super-added duty to act judicially and did not find it: the Minister's duties were "not judicial or quasi-judicial", but were merely "administrative".¹⁴⁵

The use of the classification of functions to decide issues of natural justice thoroughly obfuscates the relevant issues, for it involves a search for a concept which no-one has ever succeeded in defining. In recent years this approach has fallen out of favour with most courts, thanks mainly to the fine opinion by Lord Reid in *Ridge v. Baldwin*.¹⁴⁶ Why the Supreme Court of Canada in 1958 should suddenly neglect its own prior decision in *Knapman* for such a sterile conceptual approach is a mystery to me.

Compounding further the confusion which the Supreme Court has wrought in this area is *Wiswell v. Metropolitan Corporation of Greater Winnipeg*.¹⁴⁷ The Council of the Metropolitan Corporation of Greater Winnipeg had enacted a by-law rezoning a parcel of land formerly zoned for single family dwellings so as to permit the erection of an apartment building on the land. A local homeowners' association brought proceedings to have the by-law declared void on the ground that inadequate notice of the proposed rezoning had been given to neighbouring owners. There was no statutory procedure laid down for the enactment of amendments to zoning by-laws. However, council had passed a resolution establishing the procedure of (1) advertising the rezoning application in two Winnipeg newspapers, and (2) posting notice of the application on the land affected. The council had failed to take the second step of posting on the premises. What the

¹⁴³ *R. v. Legislative Committee of the Church Assembly*, [1928] 1 K.B. 411 at 415.

¹⁴⁴ [1959] S.C.R. 24 at 30.

¹⁴⁵ *Id.*, at 34.

¹⁴⁶ [1964] A.C. 40.

¹⁴⁷ [1965] S.C.R. 512.

council had done was to advertise the application for rezoning in two Winnipeg newspapers. The homeowners' association had not seen these advertisements because the official of the association who perused the advertisements had been on vacation when they appeared. The association had therefore not taken up the advertised opportunity to appear before a committee of council and oppose the rezoning.

A majority of the Supreme Court of Canada held that the failure to post notice of the rezoning application on the land (or to give specific notice to the homeowners' association) was fatal to the validity of the rezoning by-law. Hall J., who wrote for the majority, classified the council's function in enacting the by-law as not "legislative" but "quasi-judicial"; the council was therefore "required to act fairly and impartially".¹⁴⁸ In Hall J.'s view, it had not done so. Judson J. dissented. He agreed that council "could not act without notice to those affected", but in his view the newspaper advertisements were "clear, reasonable and adequate notice", and the "failure to direct the posting of notices pursuant to their own internal regulations, which were subject to their own control, does not affect the validity of the by-law".¹⁴⁹

Wiswell is similar to *Calgary Power* in its reliance on the classification of functions. Judson J.'s dissenting judgment breathed some commonsense into the law reports by condemning that approach:¹⁵⁰

I do not think that it helps one towards a solution of this case to put a label on the form of activity in which the Metropolitan Council was engaged when it passed this amending by-law. Counsel for the municipality wants to call it legislative and from that he argues that they could act without notice. The majority of the judges prefer the term quasi-judicial. However one may characterize the function, it was one which involved private rights in addition to those of the applicant and I prefer to say that the municipality could not act without notice to those affected.

Wiswell and *Calgary Power* are consistent if one is prepared to accept the labelling of official activity as decisive of natural justice issues. If one is not, then the cases seem to be irreconcilable. In *Calgary Power* a broad discretion to expropriate land was held to require no prior notice even to the person whose land was to be taken. In *Wiswell* the discretion to amend the zoning by-law was just as broad, and the person whose land was to be rezoned had actively sought the rezoning. The claim to notice by the neighbouring owners in *Wiswell* is weaker than the claim in *Calgary Power*, since the interest of a person in the rezoning of someone else's land is less direct than the interest of a person in the expropriation of his own land. How then did the Court in *Wiswell* distinguish its own earlier decision in *Calgary Power*? The answer, incredible as it may seem, may be verified by examination of the report: the Court did not even refer to *Calgary Power*.

The remaining important case in the study concerning the applicability of the rules of natural justice is *Guay v. Lafleur*.¹⁵¹ In that case an officer of the National Revenue Department was conducting an inquiry into the

¹⁴⁸ *Id.*, at 522.

¹⁴⁹ *Id.*, at 526.

¹⁵⁰ *Id.*

¹⁵¹ [1965] S.C.R. 12.

affairs of a number of taxpayers, of whom the plaintiff was one. The plaintiff asked to be present and be represented by counsel during the examination of all persons summoned by the officer. When this request was refused, the plaintiff sued for an injunction to stop the proceedings until the plaintiff was permitted to be present. The Supreme Court of Canada, by a majority of eight to one, refused the injunction. The principal opinion was written by Abbott J. He lapsed into the regrettable Supreme Court habit of labelling the official's function. In his view it was "administrative" and not "judicial" or "quasi-judicial".¹⁵² But he also descended from that metaphysical level to more down-to-earth considerations. The result of the officer's inquiry would be an assessment of tax. Once that assessment was made the taxpayer would have available to him the whole structure of appeals provided by the Income Tax Act. Abbott J. did not mention the possibility of a criminal prosecution for breach of the Act, but if this were recommended by the inquiring officer then the normal safeguards of the criminal procedure would immediately be available to the plaintiff. In other words, whatever the result of the inquiry, the plaintiff was assured of his "day in court" at some stage.

The assurance of a later hearing seems to me to be the crucial element of *Guay v. Lafleur*, and it was certainly regarded as important by Abbott J. Cartwright J.'s concurring opinion, on the other hand, never so much as mentions this point; he held that the officer's duties "are administrative, they are neither judicial nor quasi-judicial",¹⁵³ and he emphasized that the officer had no power to actually adjudicate upon the plaintiff's rights. Spence J.'s concurring opinion is similar to Cartwright J.'s. Hall J. dissented in a brief opinion which also never considered the question whether natural justice required a hearing at a preliminary as well as a later stage in the proceedings.¹⁵⁴

The remaining two cases which I have selected for discussion concern the content of the rules of natural justice. It is clear that, speaking generally, an opportunity to be heard involves disclosing to the party affected any evidence adverse to him and giving him an opportunity to correct or contradict such evidence. Does natural justice also require that the party affected be given an opportunity to test adverse evidence by cross-examination?

In *Mehr v. Law Society of Upper Canada*¹⁵⁵ a resolution by the Benchers of the Law Society striking Mehr off the rolls was quashed for breach of natural justice. Mehr was charged with failing to account for a sum of money received by him on behalf of two clients. Mehr said that he had retained the money in partial satisfaction of an agreed fee owed to him by the clients, and that he had written to the clients advising them of his receipt of the money and of his reason for retaining it. The clients made a sworn joint declaration in which they denied having agreed to pay Mehr a fee, and denied having received any letter from him after his receipt of the money. The discipline committee of the Law Society had this declaration before them, but they never provided Mehr with an opportunity to cross-examine the clients. In its report to the

¹⁵² *Id.*, at 16.

¹⁵³ *Id.*, at 17.

¹⁵⁴ *Id.*, at 19.

¹⁵⁵ [1955] S.C.R. 344.

Benchers the committee rejected Mehr's account of the facts in favour of the clients' account. But the committee claimed that in reaching its decision it had "not given any effect to these declarations because the [clients] were not present in person and available for cross-examination". The Ontario High Court and Court of Appeal each decided that the committee's statement that it had excluded the joint declaration from consideration was sufficient to support the committee's decision. The Supreme Court of Canada reversed. Cartwright J. for the Court characterized the declaration as "evidence to contradict on a vital point the defence which had been sworn to by [Mehr]",¹⁵⁶ and he pointed out that the declaration could have had an unconscious effect on the decision of the committee. Because it had never been tested by cross-examination, its reception was "wrongful and fatal to the validity of the proceedings".¹⁵⁷

This decision seems to me to be correct. However, it is certainly no triumph of judicial craftsmanship. Cartwright J. never explains by what rule of law the reception of evidence is "wrongful"; he never even uses the term "natural justice"; and he cites no authorities relevant to the cross-examination point.

Mehr may be contrasted with *Hoffman-La Roche Ltd. v. Delmar Chemical Ltd.*¹⁵⁸ in which a decision of the Commissioner of Patents was upheld over an allegation of breach of natural justice. The Commissioner had statutory power to grant a compulsory license for the manufacture of patented drugs, "unless he sees good reason to the contrary". Hoffman held the patent for the drug "librium". Delmar applied to the Commissioner for a licence to manufacture it. Hoffman opposed the application on the ground that Delmar's production facilities were inadequate to cope with the manufacture of the drug. Hoffman's opposition was elaborated in a written statement filed with the Commissioner. Delmar filed a statement in reply. Hoffman then requested either a full oral hearing or the opportunity to cross-examine the president of Delmar on Delmar's statement in reply. The Commissioner accepted Delmar's version of the facts and granted the licence. He refused Hoffman's request to test Delmar's evidence by cross-examination. The Supreme Court of Canada refused to quash the Commissioner's decision. Martland J., who wrote the opinion of the Court, did not find it necessary to decide whether or not the rules of natural justice were applicable, because they were in any event satisfied by the "ample opportunity" given to Hoffman "to present its case in writing".¹⁵⁹

According to Martland J.:¹⁶⁰

[The Commissioner] was entitled to set the procedures, and he did so. It was for him to decide whether or not the circumstances required an oral hearing, cross-examination upon affidavits, or oral submissions. In my opinion, his decision not to require any of these things cannot be considered to be a denial of natural justice to [Hoffman].

¹⁵⁶ *Id.*, at 349.

¹⁵⁷ *Id.*

¹⁵⁸ [1965] S.C.R. 575.

¹⁵⁹ *Id.*, at 581.

¹⁶⁰ *Id.*

This result is of course the opposite one from that reached by the Court in *Mehr* ten years earlier. It is also apparently inconsistent with another of the Court's own prior decisions, namely, the labour board case of *Toronto Newspaper Guild v. Globe Printing Co.*,¹⁶¹ in which the Court had assumed that cross-examination of controverted evidence was a necessary ingredient of natural justice. The decision in *Hoffman-LaRoche* is also probably inconsistent with the well-known decision of the Privy Council in *University of Ceylon v. Fernando*.¹⁶² How were these three prior decisions on the right to cross-examine distinguished in *Hoffman-La Roche*? The answer is that they were not even referred to by the Court.

My own view is that *Hoffman-La Roche* is wrongly decided. It seems to me, on the present state of the authorities, that natural justice does afford a right to cross-examine controverted evidence, at least where cross-examination is requested, and where the evidence is of a kind which cross-examination could test.¹⁶³ However, it cannot be said that the law is clearly settled. Robert F. Reid, for example, has argued for a narrower right, arising when a "person's rights, reputation or status were, or were likely to be, in jeopardy".¹⁶⁴ But if the law is still in doubt, it is nevertheless an inexcusable defect in judicial technique for the Court to decide one way in *Mehr* and the other way in *Hoffman-La Roche* and not to refer to the earlier case or offer reasons for distinguishing it. In the former a person's rights, reputation or status were in jeopardy, while in the latter only economic considerations were in issue.¹⁶⁵ In the former some oral evidence was admitted, while in the latter there was no oral hearing at all.¹⁶⁶ Either or both of these points could be the crucial distinction. But in the absence of any real reasons by the Court for the decision in either case the issue is left in unnecessary doubt.

Conclusions

In the early part of this article, discussing the proper role of the courts, I argued for a policy of restraint in judicial review. By and large, it seems to me that the Supreme Court of Canada has been restrained in the exercise of its review function. The overall figures show that the agency wins more than half the time. And — more significantly — analysis shows that the cases in which the agency loses usually do have special features: either the agency is well outside its allotted power (this is rare), or the agency action is an unexpected use of its power, usually in conflict with a strong competing civil libertarian value. One gets the impression that a serious injustice would never go unredressed in the Supreme Court of Canada, and that its decisions are given in complete independence of the government which appoints the judges and of other governments or groups. In short the decisions given by the Court are generally consistent with my own theory as to the proper role of the Court.

¹⁶¹ [1953] 2 S.C.R. 18.

¹⁶² [1960] 1 W.L.R. 223.

¹⁶³ This view is expounded in P. Brett and P. W. Hogg, *supra*, note 32 at 501-503.

¹⁶⁴ R. F. Reid, *supra*, note 28 at 81.

¹⁶⁵ *Id.*

¹⁶⁶ See P. Brett and P. W. Hogg, *supra*, note 32 at 503.

But, if the Court's instinct for the proper result in each case is usually sound (as I believe it is), its reasons for judgment are often woefully inadequate. First of all, it is very rare to find the Court enunciating the grounds for what I detect as its tendency towards restraint in review; since there are excellent policy reasons for this tendency it is a pity that they so seldom appear in the reports. Secondly, the Court occasionally does not state the legal rule upon which its decision is based, or (as in the delegation and natural justice cases) it states the rule in terms of meaningless formulae such as the classification of functions. Thirdly, the Court commonly relies on a very narrow base of source material: its own prior decisions, even when they are clearly relevant, and even when they seem inconsistent with the instant decision, are sometimes not referred to; the decisions of inferior courts and of the courts of other jurisdictions are only sparsely referred to; the Canadian periodical literature, which is quite rich in the area of administrative law (thanks to Abel, Arthurs, Gordon, Laskin, Willis, and others), is never referred to; other secondary sources, such as English texts (the two Canadian texts both being very recent), are referred to very rarely. Fourthly, and I suppose this is the inevitable result of the previous three points, the Court's reasons for judgment tend to be brief and in some cases even perfunctory.

It is plain that the judges of the Supreme Court have viewed their role in almost exclusively adjudicatory terms. They have been preoccupied with the disposition of the particular case before them. This, obviously, is the Court's primary task. But part of the task of administering justice according to law is the enunciation of sound legal reasons for each decision. The absence of such reasons does less than justice to the parties. And the absence of such reasons means that the Court fails in an important secondary task, which is to clarify and synthesize the law affecting the cases which come before it. As Reid's recent textbook so amply demonstrates, the state of Canadian administrative law is lamentable.¹⁶⁷ The Supreme Court of Canada by reason of its position at the head of the hierarchy of courts, could help to reconcile the conflicting doctrine and dicta. Instead, I believe that on balance it has added to the confusion. It has produced apparently inconsistent decisions of its own, and it has failed to provide guidance to the lower courts, the agencies or the lawyers. For example, the Court has wisely eschewed the technical procedural snares which have disfigured the administrative law of other jurisdictions, but it has never openly repudiated in general terms the argument that the availability of an alternative remedy is ground for refusing to grant an otherwise appropriate remedy. The Court has been inconsistent in its approach to privative clauses, disregarding them in the immigration and labour cases, and giving some effect to them in other kinds of cases. Dicta offering a new approach to privative clauses by Rand, Judson and Abbott JJ. (and in the Australian courts) has been allowed to stand without explicit rejection by a majority of the Court, even in decisions which seem inconsistent with the dicta. The delegation cases provide no workable criteria

¹⁶⁷R. F. Reid, *supra*, note 28 *passim*; see review in (1971), 9 Osgoode Hall Law Journal 663 criticizing the book's emphasis on the confusion in the law.

as to when an agency may delegate and when it may not. The natural justice cases present a particularly confused picture of apparently inconsistent decisions, each one given with little or no reference to the others.

There are notable exceptions to the general tendency towards restraint in review, perhaps because that tendency has never been clearly articulated and supported with reasons. The jurisdictional fact doctrine has been used as a device for reviewing the findings of labour relations boards, usually with unfortunate results. The doctrine has only been used twice in the period of study outside the labour relations area. This willingness in the labour field to review findings which are peculiarly within the special competence of the agency is not typical of the Court's work, which is usually characterized by restraint. Yet the existence of these islands of activism leaves in doubt the extent to which agency findings can be treated as conclusive. The delegation cases too must be treated as activist aberrations: delegations by agencies tend to be upset with little or no examination of or sympathy for the agency's reasons for delegating.

In the absence of more information it would be speculative and presumptuous to offer reasons or remedies for the Court's failures in craftsmanship. Obviously, the heavy and diverse caseload which the Court carries must be an important factor. And of course some opinions, especially some of Rand and Judson JJ.'s, have been very good (though not necessarily influential).¹⁶⁸ But, looking at the caselaw overall, I cannot escape the conclusion that the Supreme Court of Canada, despite its abundant wisdom and commonsense, has not in the last 23 years made an important contribution to the development of a coherent body of Canadian administrative law.¹⁶⁹

¹⁶⁸ E.g. Rand J. in *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18 (dissenting opinion), in *Smith and Rhuland Ltd. v. The Queen*, [1953] 2 S.C.R. 95, and in *Roncarelli v. Duplessis*, [1959] S.C.R. 121; Judson J. in *Jarvis v. Associated Medical Services Inc.*, [1964] S.C.R. 497 (dissenting opinion), and in *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512. Judson J.'s administrative law opinions, in my respectful view, have been consistently good. Another excellent opinion is that of Locke J. in *Metropolitan Toronto v. Village of Forest Hill*, [1957] S.C.R. 569 (dissenting opinion).

¹⁶⁹ I am grateful to my colleague, Professor William Angus, who read this article in draft form and made suggestions which enabled me to improve it.

