SHORT TITLE

THE PUBLIC PROTECTOR AND THE COURTS

THE PUBLIC PROTECTOR AND THE COURTS:

Complementary Mechanisms for the Redress of Grievances

by

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A thesis submitted to the
faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the
degree of Master of Arts

Department of Economics and Political Science
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Montreal

September, 1975

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ABSTRACT

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This is a study of the effectiveness of the courts, the members of the National Assembly and the Public Protector, the main remedies presently available to citizens aggrieved by administrative activities. It seeks to demonstrate that the two more traditional vehicles for the redress of grievances have become inadequate to protect individuals completely from administrative wrongdoing. The defects of these two mechanisms - the cost, the delays and the technical procedural and substantive implications of judicial review, and the lack of time and research facilities and the political character of the interventions of the M.N.A.'s - have necessitated the creation of the Public Protector to supplement the protection offered by them.

The three mechanisms now available for the redress of grievances are examined and their procedure, criteria, scope, jurisdiction and the ultimate results of their interventions are compared. The study concludes that the citizens of Quebec possess a more complete protection from governmental maladministration by the presence of these three mechanisms than has heretofore been possible, though additional reforms of each are required to achieve a balance that would take account not only of the need to protect individuals from administrative activities but also of the exigencies of administrative efficiency.

RESUME

Cette étude est une analyse de l'efficacité des trois principales voies de revendication misent à la portée des citoyens ayant des griefs contre l'administration, à savoir: Les cours judiciaires, les députés de L'Assemblée Nationale et le Protecteur du Citoyen. Ces dernières sont examinées et leurs procédures, critères, juridictions et résultats de leurs interventions sont comparés.

Cette analyse tente de démontrer que les deux véhicules traditionnels, soit les cours judiciaires à cause de leurs coûts dispendieux, leurs délais et les difficultés d'ordre techniques pour recourir au contrôle judiciaire de l'administration ainsi que les députés de L'Assemblée Nationale dus à leurs maintes préoccupations et du caractère politique de leurs interventions, s'avèrent fréquemment inefficaces pour protéger les citoyens des injustices occasionnées par les activités gouvernementales.

Cette étude conclue que les citoyens du Québec possèdent maintenant, avec cette nouvelle institution, une protection plus complète contre les erreurs gouvernementales. Néanmoins, des réformes supplémentaires sont requises pour maintenir en équilibre une défense adéquate des droits des individus et les exigences de l'efficacité administrative.

PREFACE

This is a comparative study of the three remedies available to individuals aggrieved by administrative activities. Although scholars have dealt separately with the inadequacies of the various political, administrative and legal remedies offered to citizens, relatively little scholarly attention has been given to the achievements of the Public Protector, the new institution created by the legislature to compensate for the deficiencies of the other mechanisms for the redress of grievances and to supplement the protection furnished by them. Possibly because of the relatively recent interest in the institution of the Public Protector, no scholar has to date attempted a thorough comparison of these remedies, and it is to fill this lacuna that this study was chosen.

In preparing this paper, I benefited greatly from the research facilities offered to me by Mr. D.C. Rowat and Me Louis Marceau. I am particularly indebted to them and to the other gentlemen who permitted me to interview them. Their response has been generous, courteous and cooperative. Sincere thanks also are extended to my thesis advisor, Professor J.R. Mallory, for his valuable assistance and advice during the preparation of this thesis. I would also like to thank my friend, John Parisella, who proof-read this thesis.

Special thanks to my wife, Diane, whose patience, encouragement and assistance were an inspiration, and without whose deciphering and typing skills this effort would never have been possible.

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INTRODUCTION

The British North America Act of 1867 (1) was an instrument that as far as possible simply adapted those institutions existing in the Canadian Colonies before Confederation and continued them within a federal framework. The preamble to the Act expressed the desire that a Dominion be created with "a Constitution similar in Principle to that of the United Kingdom". This incorporation by reference was broad enough to encompass various fundamental British constitutional principles such as parliamentary sovereignty, the rule of law, the independence of the judiciary (2), judicial control over inferior administrative and adjudicative bodies, responsible government and countless other features of the British Constitution that had evolved since the Magna Carta.

This wholesale acceptance of British constitutional principles into a federal system subject to a constitutional document has, however, produced some modifications in the application of these principles, particularly in the field of administrative law which seeks to regulate the relationships between individuals and the state. Administrative law is concerned with the powers conferred upon administrative authorities by a legislature and with the extent that those powers can be controlled. (3)

Historically, this control has been exercised by the common law courts which assumed the duty of preserving the "rule of law". This concept denotes the supremacy of the law over governmental activity, especially in relation to the rights of individuals, and it demands that this activity be confined to what is authorized by law. The key ingredient of the rule of law is the existence of an independent judiciary which possesses the means to restrain and control the abusive, arbitrary and illegal use of administrative powers and to remedy encroachments upon the rights of individuals committed by such use.

It is, however, the interaction between the principles of parliamentary supremacy and the rule of law, the two most fundamental principles of the British, and by adoption of the Canadian constitution, that determines the extent to which governmental activity is controlled either by the courts or by some other mechanism. Whatever vehicle is employed, whether it is the

common law courts, the member of Parliament, the Swedish "Ombudsman", the French "Conseil d'Etat", or any combination of these, their very existence as alternatives proclaims their indispensability in any society concerned with justice. They have been created to ensure that the rights of the individual are protected from unjust and unlawful governmental activity.

CHAPTER I - THE DOCTRINES OF PARLIAMENTARY SUPREMACY AND THE RULE OF LAW.

A- THE RECEPTION OF THESE DOCTRINES INTO CANADA

The British North America Act of 1867 had the effect of incorporating the fundamental British constitutional principles known as the rule of law into Canada and into the newly-created province of Quebec. This principle means the supremacy of the law, common as well as statute law, as applied by the independent common law courts, over the Crown and its servants. "The Rule of Law requires that the powers of the Crown and of its servants shall be derived from and limited by either legislation enacted by Parliament, or judicial decisions taken by independent courts." (4) Arbitrary and illegal acts and the infringement of individual rights by the Crown and its officials required not only legal justification, but these acts were subject to review in the courts. Therefore, the liberties enjoyed by individuals were "the result of judicial decisions determining the rights of private persons in particular cases before the courts." (5)

The rule of law had been established in Canada by the creation of the Courts of King's Bench on the same model as those of England shortly after the Quebec Act of 1774. (6) Accordingly, in addition to applying the law both common and statute as well as any ordinances that were enacted, they were entrusted with the same supervisory jurisdiction over the legality of government activities since these courts possessed the power to issue the prerogative writs when rights of individuals were illegally interfered with. (7) Therefore, the law of judicial control which was one aspect of the rule of law was "introduced into Quebec as a result of the cession."(8)

The Courts of King's Bench were replaced by a Superior Court, a court of first instance with jurisdiction in all civil cases except those strictly reserved to another court, in 1849. (9) The statute responsible for the change made provision for judicial independence and impartiality from the two other branches of government, (10) another essential ingredient comprising the rule of law. Article 7 entrusted the supervisory function and the controlling power exercised by the Courts of King's Bench over government agencies to the Superior Court. The jurisdiction to issue the prerogative writs, whereby the

supervisory function could be exercised was also vested in the Superior Court. (11) Consequently, because of its historical origins, the Superior Court possessed authority over inferior bodies created by the government.

The Superior Court was introduced into the Province of Quebec by section 129 of the B.N.A. Act of 1867. That Act simply maintained the existing courts with their attributes of judicial control and independence. The latter characteristic was reinforced and enshrined by sections 96, 99 and 100. (12) Since both these attributes formed the basis of the rule of law, an integral part of the common law, whereby the rights of individuals were protected from arbitrary and illegal acts posed by government officials, the rule of law was imported into the federated Canada. This is supported by section 129 which furthermore provided that all laws, including those inherited at the cession, in force in the federating colonies at the Union, shall continue. Moreover, by virtue of the preamble of the Act, the judiciary was to resemble and function as the British judiciary, which had been conferred a supervisory jurisdiction over inferior government bodies.

The B.N.A. Act, in the same way, also imported the doctrine of parliamentary supremacy into Canada and Quebec. After 1689, this doctrine meant the superiority of Parliament not only over the King and the executive branch of government but also over the courts and the common law. (13) The principle of the rule of law, an integral part of the common law, became subjected to the doctrine of parliamentary supremacy because Parliament had the authority to enact any laws it wished in the form of statutes thus altering the common law. Parliament "has the right to make or unmake any law whatsoever". (14) In other words, no power could limit that body from conferring either wide discretionary or arbitrary powers on the executive, thus permitting the time-honored principles of the rule of law that protected individual rights and liberties to be violated. Since the rule of law, upon which the independence of the judiciary is based, is dependent upon the will of Parliament, the courts became bound to apply the law as enacted by Parliament. "Any act of Parliament ... will be obeyed by the Courts". (15)

That parliamentary supremacy has become the overriding principle of the common law and of the British Constitution has been frequently recognized and accepted by the courts. Though the rule of law, with its emphasis on the

preservation of individual liberties as protected by the common law courts, could not preclude Parliament from conferring arbitrary powers upon the executive, the Court of King's Bench, its authority to issue the prerogative writs intact after the Glorious Revolution, could require that executive action conform strictly with the actions permitted by the statute conferring those powers. To the extent that the Court of King's Bench was empowered to issue the prerogative writs to require compliance with the terms of the statute enacted by Parliament, it retained the power to control and supervise the legality of executive action and the means to protect individuals from such interference with their rights as was not contemplated by the enactment. The rule of law, therefore, is preserved in that any illegal deviation from the express terms of the statute could be dealt with by the courts. Lord Wright, in the case of Liversidge v. Anderson (16), defined the extent to which the rule of law had applicability in Britain and how it could be reconciled with the supremacy of the legislature: "Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament... is alleged to limit or curtail the liberty of the subject or vest in the Executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the power given". Therefore, so long as illegal actions on the part of the government are subject to the prerogative writs and to final determination in the common law courts, the rule of law is maintained and to that extent the rights of the subject are protected.

The doctrine of parliamentary sovereignty as it was known in England could not be adopted in the federated Canada. For, the B.N.A. Act created one federal and four provincial legislatures by section 17 and sections 69, 71 and 88 respectively. It is by reason of their subjugation to a constitutional document that the doctrine, as it is applied to these legislatures, was to some extent qualified. (17) Their legislative authority was limited to enacting laws within specified areas as defined by sections 91 and 92 respectively. However, within these areas of competence, the powers of each were absolute. Sir Barnes Peacock, who delivered the judgement of the Judicial Committee of the Privy Council in Hodge v. The Queen (18), stated that the provincial legislatures "are in no sense delegates of... the Imperial Parliament... The British North America Act... conferred authority as plenary and as ample

within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow - Within these limits of subjects and area the local legislature is supreme..." The argument that the federal legislature was superior to the provincial legislatures was also discredited by that judgement. Consequently, although the supremacy of the legislatures was not unqualified, they could enact any law whatsoever within their area of competence, whether those laws were unjust, unreasonable, oppressive or even immoral or retroactive. In Canada as in Great Britain, the function of the judiciary with regard to such laws was to apply them and enforce obedience to them, notwithstanding that they might transgress the principle of the rule of law which seeks to protect the liberty of the subject. In the case Cedar Towers Corp. v. Cité de Montréal et al., it was held that oppressive laws affecting the rights of individuals enacted by the Quebec legislature, or enacted with the express permission of that legislature, could not be invalidated by the courts. Brossard, J., affirmed that "ces dispositions de la charte peuvent sans doute être une source de préjudice sérieux pour les propriétaires de terrains homologués. Les juges cependant ne peuvent ignorer la loi; ils doivent la respecter; ils ne peuvent substituer leur opinion sur la sagesse de la loi à celle du législateur; toute critique de la sagesse de la loi doit s'adresser à la législature et non pas aux tribunaux. Dura lex sed lex". (19) Therefore, although Canada inherited the rule of law by virtue of section 129 of the B.N.A. Act, the supremacy of the legislatures overrides that principle when they enact statutes within their area of competence.

B- THE INCREASE IN GOVERNMENTAL ACTIVITIES IN THE PROVINCE OF QUEBEC.

The rule of law as it had evolved in Britain was concerned mainly with the protection of individual rights. This emphasis was in line with the inclinations of the common law which, as it had developed since the Magna Carta, rested upon an individualistic conception of society. The law as applied by the courts was preoccupied with securing for the individual his rights of property and his own personal freedom.

This preoccupation of the law coincided with the functions of government, which from the feudal era to the end of the nineteenth century, were restricted to those relating predominantly to the maintenance of order, both internally

and externally. In Quebec, its development parallel to, though somewhat behind, that of the United Kingdom, the range of functions that the government had assumed in 1867 was limited. This was in keeping with the predominant political thought of the times which supported individual liberty of action. The political theory of laissez-faire, propounded by Adam Smith, whose contribution was individualism in an economic sense which emphasized freedom from state regulation, precluded the government from interfering in economic and social matters except in so far as it was necessary to facilitate commerce, trade and industry. During this period of government inactivity, the legislature enacted laws that were designed to preclude individual rights and liberties from being interfered with. The courts complemented the legislative process by applying the laws passed by the legislature and by punishing all transgressions to them whether by individuals or by governmental officials.

It was a period during which the legislature was able to cope with the topics at hand. Policies were decided upon and no difficulties existed in working out the technical details of those policies in that forum. When they had been enacted into law, the administration of the details of the policies as defined by the law was entrusted to the executive. However, because of the existence of the theory of non-intervention, few laws were enacted and the administrative branch of government remained insignificant. The judiciary, which had the task of applying these laws, enforced them when disputes arose. When the disputes related to illegal interference with individual rights on the part of government, the courts possessed the means of settling those disputes by the issuance of prerogative writs. But, because of the limited role assumed by the government, such disputes were infrequent. Consequently, the constitution of the judiciary and the procedure it employed was adequate to discharge its duties of applying statutes, of enforcing them and of settling disputes arising from them.

The acceptance of the theory of laissez-faire by the governments of the Province of Quebec both before and after Confederation, however, helped to produce social and economic problems of some magnitude. It was only after considerable harm had been done to the social and economic health of the province that the state began to assume an active role in the affairs of the province. (20) Whether the reasons for the assumption of a positive role by

the state were because of increasing public pressure from all segments of society, by virtue of the demands of the clergy, (21) due to the extension of the franchise, (22) by reason of the increased effectiveness of trade unions, (23) because of the substitution of the individualistic conception of society by a more collectivist orientation on the part of the state, or just by plain human solicitude exhibited by the legislators, is not the concern here. Arguments can undoubtedly be presented to substantiate that each of these causes contributed to the state's involvement in the social and economic affairs of the province. (24) It is enough, however, to state here that whereas the government in the nineteenth century had a predominantly negative role with functions to maintain law and order, its interests and its tasks became enlarged and a positive role was assumed in the twentieth century. (25)

The state has assumed responsibilities which hitherto had belonged to individuals and families. This positive role was the antithesis of the economic individualism that predominated in the nineteenth century. "One hundred years ago, the responsibility of the state was very narrowly interpreted. It only provided the bare necessities of the community as a whole, such as defence against aggression, the maintenance of order... When a man grew old and unable to work, he had to be kept by his children... If he fell sick and could not pay for medical treatment, he had to rely on charity. If he was injured at his work and perhaps disabled for life by some slip or miscalculation on his own part, or by the fault of his mate, he got no compensation from his employer... The law... did little more than provide a defence for 'rights of property' and 'freedom of contract'. It did not recognize any right from want. All was left to the charitable instincts of the few". (26)

In contrast to the nineteenth century, the state has rejected individualism and has early in this century adopted measures to provide for better working conditions and better living and health conditions. Subsequently, these schemes were improved and extended with the establishment of unemployment insurance, minimum wages, workmen's compensation, family allowances, pervasive old age pensions, free education, and most recently hospitalization and medical assistance measures have been introduced. Whereas the individual was free from government regulation in the last century, legislation extending

governmental activities and services to all aspects of socio-economic life has placed the individual in a "labyrinth of governmental regulation from craddle to grave". (27)

C- THE DELEGATION OF LEGISLATIVE POWERS TO ADMINISTRATIVE BODIES.

The legislature, near the beginning of the twentieth century, became more and more incapable of adequately coping with the multifarious subjects that required legislative intervention. The members of that body had neither the time nor the expertise necessary to deal in any adequate way with the enactment of comprehensive legislation. Consequently, the practice of delegation was resorted to, "... because, for instance, the topic involved much detail, or because it was technical, or because the pressure of other demands upon Parliamentary time did not allow the necessary time to be devoted... to the particular bill". (28) The legislature became compelled to pass a skeleton statute, fixing the general policy to be followed, and to charge the executive, a minister of a particular department, or a board or commission to establish the details of the policy adopted by framing and issuing rules and regulations to carry out the object of the policy and apply it in particular situations.

In order to permit the legislature more time to devote itself to the consideration of essential principles in legislation, technical matters and the other details to carry out the policy have been left to subordinate bodies for formulation and implementation. Moreover, the whole of the administrative machinery required to implement a policy would not possibly be inserted in a statute. (29) Nor could the legislature attempt to debate and enact the countless rules indispensable to execute the various schemes that were being enacted. (30) Therefore, powers of regulation had to be entrusted to various governmental bodies not only because of the magnitude of the legislative intervention, but also due to the technical and specialized character that the administration of the areas with which they became concerned had assumed. (31) Consequently, the practice of delegation has become inevitable by reason of the growth of government activity and by the increased complexity of legislation.

The resort to delegation has become inevitable also due to the duration of legislative sessions. The length of the sessions of Quebec legislatures has been only slightly increased since Confederation, despite the monumental growth of legislative and governmental activities since that time. A random sample of the sessions of the Legislative Assembly from the second to the twelfth Legislatures, from November 7, 1871 to April 3, 1913, has revealed that the Assembly had sat, on an average, approximately two months each year during that span of time. (32) The twenty-seventh Legislature which continued from January 15, 1963 to April 18, 1966, sat, on an average, for about five months during each of its six sessions. The twenty-eighth Legislature, the National Assembly as it came to be called, which opened on December 1, 1966 and which came to an end on March 12, 1970, had only a slightly better record. With summer adjournments, the Assembly sat approximately six months during each session, notwithstanding the abolition of the upper chamber. (33) It is not surprising, therefore, that the practice of delegating subordinate legislative powers became so necessary to the proper functioning of government.

The legislature possessed the authority to delegate substantial legislative power to subordinate bodies it had created by reference to the doctrine of parliamentary supremacy, which signified that the legislature could enact any law it desired. An early Canadian case concerned with the power of delegation was Hodge v. The Queen. (34) This case arose when the appellant was convicted and fined for violating a regulation made by the Board of Licence Commissioners which had been conferred the authority to regulate taverns by the Ontario legislature. He appealed, maintaining that the Board had no power to legislate by rule-making and that the legislature had no right to authorize such power to legislate.

Sir Barnes Peacock delivered the judgement of the Privy Council, the most authoritative judicial body in the Fourth British Empire. It was held: "Within these limits of subjects and area (S. 92 B.N.A. Act), the local legislature is supreme, and has the... authority... to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment..." (35) Furthermore, the court considered that delegation was not only permissible but necessary.

"It is obvious that such an authority (to create a body and endow it with legislative power) is ancillary to legislation and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail". (36) Moreover, the courts have taken judicial notice of the practice that Parliament passes laws in general form, allowing subordinate bodies to enact the details by regulation. Fitzpatrick, C.J., in Re Gray. Re Habeas Corpus (37) stated, "The practice of authorizing administrative bodies to make regulations to carry out the object of an act, instead of setting out all the details in the act itself is well known and its legality is unquestioned".

This authority to delegate to subordinate bodies has been restated in a number of other leading cases, which did, however, impose some limitations on the legislature. In the case of Re The Initiative and Referendum Act, the Privy Council concluded that a legislature could not so delegate power as to "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence". (38) This was reasserted in Re Gray. Re Habeas Corpus (39) by the Chief Justice of the Supreme Court of Canada. This limitation upon the power of delegation is part of the general rule that the legislature may not efface itself. Moreover, in keeping with the federal principle upon which the Canadian political system is based, it has been authoritatively held that the delegation of competence in a legislative field from one legislative body to another is prohibited. (40) Subject to these few considerations, however, delegation of legislative power to the executive as well as to other subordinate bodies is legally permissible and is not subject to judicial restriction (41).

In any event, due to the growth of government activities, the legislature has become incapable of legislating all the law and it has delegated considerable power to a fourth branch of government which has emerged and

assumed some part of the responsibilities of the legislature. Because the Quebec legislature has been obliged to enact statutes in skeleton form, setting out only the broad guidelines of the policies to be administered, it has delegated the power to make detailed rules and regulations having the force of law to administrative bodies to provide for the variety of circumstances that were liable to arise in the implementation of those policies. Consequently, these statutory bodies have been endowed with considerable discretion to make rules of general applicability that can have a considerable impact upon individuals. When, for example, regulations are issued laying down the standards by which licences shall be issued, if an individual cannot fulfill the requirements laid down, he would thereby be deprived of a right which might considerably affect his livelihood. (42) The Rental Commission for instance, may by regulation "adopt such measures as it deems expedient to ensure the fair and effective carrying out of this act". (43) This discretionary power affects the extent to which a property owner is permitted to dispose freely of his property. Since the amount of subordinate legislation has become as immense as the amount of statutes enacted by the legislature, (44) and since subordinate legislative power can be discretionary either as to whether it shall be exercised at all or as to the manner in which it is to be exercised, there is room for the abuse or misuse of this power. For example, discretions can be exercised for an unlawful purpose, for irrelevant considerations, in bad faith and they can be exercised unreasonably. Any of these abuses can adversely affect the rights of the individual.

D- THE DELEGATION OF ADMINISTRATIVE AND JUDICIAL POWERS TO ADMINISTRATIVE AGENCIES.

The administration in the Province of Quebec comprises 22 government departments and approximately 60 other major governmental agencies - boards, commissions, offices and officials. In addition to entrusting subordinate rule-making powers to these various bodies, the legislature has conferred the execution of particular policies to them to regulate and control particular economic and social activities by applying the statutes enacted by it as well as the regulations made in pursuance of those statutes. Though this list does not pretend to be exhaustive, they have been entrusted with the power to grant

permits, certificates, licences, to extend assistance to various categories of persons, to administer social insurance schemes, to protect consumers and to regulate labor relations. Because these bodies were created to administer government policies and adjudicate disputes arising from that administration, the Quebec legislature bestowed not only administrative but also judicial and quasi-judicial powers upon them.

Although the superior courts have historically exercised the function of applying and interpreting laws and of settling the disputes arising from them, the Act of 1867 entrusted the legislature with certain powers over the administration of justice. By section 92(14) the legislature possessed the jurisdiction to make laws with respect to the "Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial courts, both of Civil and of Criminal Jurisdiction..." This provision has been interpreted so as to permit the provincial legislature to vest certain adjudicative functions upon statutory bodies of its own creation. Moreover, the Hodge decision, rendered by the Judicial Committee of the Privy Council, was by extension interpreted to permit the delegation of administrative, judicial and quasi-judicial powers as well as rule-making authority.

If the Quebec legislature has been unable to adequately cope with the many issues arising from the growth of its activities and has been obliged to delegate legislative powers to subordinate agencies, the superior courts have also been affected by the transformation in the role of the state to one of positive intervention in socio-economic affairs. Whereas the application of the law had been almost exclusively carried out by the courts until the twentieth century, the multiplication of government bodies and officials by reason of this monumental legislative interference has resulted in a corresponding multiplication of individual protests against government authorities. By the twentieth century, the superior courts were becoming overwhelmed by the frequency of these protests and this has resulted in a slowdown in the adjudicative process. (45) The cost of superior court adjudication was moreover a burden for those seeking justice by recourse in the courts (46), and both factors combined provided the justification for the legislature to delegate adjudicative functions to administrative bodies, which could administer the law in a more expeditious and economical manner. Another

consideration which favored the creation of such agencies was the lack of expertise of the courts in relation to complex legislative policies upon which adjudication was required. The courts have condoned the existence of administrative tribunals because they realized that their lack of expertise was at times detrimental to the ends of justice. In the case of Pigott Construction Co. Ltd. v. Fathers of Confederation Memorial Citizens Foundation, it was held that "it may very well be that, considering the nature of the questions to be determined, more accurate justice will be obtained from a tribunal composed of men who are familiar with adjusting 'building contracts' than by means of a trial in the courts". (47)

The Donoughmore Committee in Great Britain investigated these administrative tribunals, as they came to be called. The Committee approved of them and suggested that they may be preferred to ordinary courts, "in cases where justice can only be done if it is done at a minimum cost... in addition they may be more readily accessible, freer from technicality, and where relief must be given quickly - more expeditious. They possess the requisite expert knowledge of their subject - a specialized court may often be better for the exercise of a special jurisdiction." (48) Therefore, because expedition, economy and expert knowledge were elements that the courts could not provide, the Quebec legislature, in accordance with the need for new adjudicative techniques, has provided for a cheap and speedy method of deciding claims arising from the administration of particular policies.

Administrative tribunals were instituted because the application of common law principles in the courts as well as their procedures had failed to provide adequate justice for the individual. For example, prior to government intervention in the area of industrial injuries, an employee who was injured in the course of his employment had to bring an action in tort or delict in court against his employer to obtain compensation for his injuries. This meant legal costs as well as lengthy court litigation during which time the worker received no remuneration. Besides, the price of legal adjudication was an obstacle that only the few could overcome so that it amounted to a denial of justice for the majority of injured workers.

Because the traditional method of recourse to the judiciary was inadequate, the legislature established a novel instrument to compensate workers

deprived of wages through injury. In the place of the law of delict administered by the courts was substituted a scheme of compensation administered by a board according to statutes and regulations which defined the conditions for a claim of compensation. Not only were the costs and delays of the law eliminated by the establishment of a Workmen's Compensation Board (49), but the judiciary itself, with its strict rules of procedure and evidence, was replaced by the innovation. The Board did not have to apply legal principles. Rather, it was charged with the application of statutory criteria in deciding claims. Consequently, this government insurance scheme afforded workers with a cheaper, swifter, more expert and less technical mechanism to receive compensation.

Due to their own deficiencies, therefore, the superior courts of Quebec and of the other provinces have acquiesced in the creation of inferior courts such as magistrates' courts and juvenile and family courts whose members were appointed by the Lieutenant-Governor in Council. (50) The courts have consented to the existence of Workmen's Compensation Boards (51) and Labor Relations Boards (52) even though it meant that the judiciary would be precluded from applying the common law to disputes arising in those fields. (53) In the case of Bakery and Confectionary Workers International of America Local no. 468 et al v. White Lunch Ltd.(54), Hall, J., stated that enactments such as those relating to labor relations should be liberally construed even if they derogate from common law rights. "In the stage of industrial development now existing it must be accepted that legislation to achieve industrial peace and to provide a forum for the quick determination of labour-management disputes is legislation in the public interest, beneficial to employee and employer and not something to be whittled to a minimum or narrow interpretation in the face of the expressed will of legislatures which, in enacting such legislation, were aware that common law rights were being altered because of industrial development and mass employment which rendered illusory the so-called right of the individual to bargain individually with the corporate employer of the mid-twentieth century". This attitude on the part of the judiciary as well as the necessities of expedition, economy and expert knowledge have therefore contributed to the replacement of the courts by administrative tribunals to solve disputes arising out of new laws enacted by the legislature.

E- THE IMPACT OF ADMINISTRATIVE AGENCIES UPON THE RIGHTS OF INDIVIDUALS.

Administrative agencies can be divided into those which must administer a particular area by reference to statutory criteria or regulations made pursuant thereto and those which exercise considerable discretion in applying general policies to specific situations. The functions of the former are primarily judicial in nature and they administer matters that could be sent to the courts were it not for the need of expedition, economy and expert knowledge, or because the volume of claims is too immense for courts to handle. The function of the latter are non-judicial or administrative in nature. They possess the authority to act and make decision in a discretionary manner on grounds of expediency or public policy.

However, if the decisions or actions of administrative bodies purport to affect the rights of individuals, they may be performing quasi-judicial functions. The distinction between administrative, quasi-judicial and judicial is mainly one of degree and will depend upon the extent that the function affects the rights of the individual. To complicate matters further, most government bodies have been endowed with the authority to perform all these functions so that it may be difficult to determine which function is being exercised at any particular time. Definitions have been formulated to characterize these functions: "Une décision judiciaire suppose une dispute entre deux parties ou plus, où, après audience, une décision est prise en applicant la loi aux faits prouvés; la décision quasi-judiciaire contient les mêmes éléments auxquels s'ajoutent des considérations de politiques générales ou discrétionnaires; quant à la décision administrative, elle ne repose pas sur la preuve des faits ou sur une argumentation en droit, mais serait entièrement discrétionnaire". (55) Although only the bodies exercising a quasi-judicial and administrative function possess a discretion in arriving at decisions, they all possess a discretion in deciding what procedures they are to follow and to some extent in deciding the bounds of their jurisdiction (56).

The manner in which administrative agencies discharge their responsibilities conditions the treatment individuals receive at the hands of government. To illustrate, the Workmen's Compensation Board has been defined as an administrative tribunal fulfilling a quasi-judicial function when adjudicating

upon claims in pursuance of the Workmen's Compensation Act (57). Its function is quasi-judicial when it gives compensation if various conditions, imposed by the statute conferring this power and the regulations made pursuant to it, are fulfilled. For example, the Board must determine whether the worker is in the employ of a company or whether he is an independent worker (58). It must determine whether the injury happened in the course of his work, (59) if it was due to his own negligence (60). Furthermore, the Board receives contributions in accordance with the criteria stipulated by law (61), but it enjoys some discretion to determine the percentage, the rate and the sum to impose upon each employer as contributor to the fund in accordance with those criteria. (62) On the other hand, the Board possesses the discretionary power to accord to the worker who has successfully met all the criteria "such sum... as it may deem proper". (63) Consequently, an individual seeking compensation must rely on the concepts of justice that the Board applies and the extent of his compensation is ultimately determined by a discretionary decision on the part of that agency.

That the Workmen's Compensation Board possesses discretionary authority enhances the possibility that the claimant will suffer injustice at its hands: "Wherever there is discretion, there is room for arbitrariness". (64) This danger exists, moreover, because it possesses not only discretionary quasi-judicial powers that affect the rights of individuals (65) but also the discretionary power to make statutory regulations to determine the norms it will apply to the claims that arise in the course of its administration. (66) That the Board applies criteria that it created offers a substantial possibility of bias in favor of these standards. Consequently, the requisite impartiality that is so necessary in adjudication is absent. The individual may have the opportunity to present his claim to a body that is expeditious and economical, but the possible absence of impartiality might obviate the advantages of these characteristics.

Similar hazards exist for individuals applying for a licence. An applicant for a licence must know what requirements exist in order to obtain that licence. When a governmental agency must consider an application for a licence by reference to objective standards laid down in the statute or the regulations governing the field, the licence must be granted if the applicant meets all the requirements. However, the majority of regulatory authorities have been

vested with some discretions to withhold a licence. Notwithstanding that the exercise of such discretions must generally conform to the general public policy that the legislature sought to promote in establishing that authority, the discretions remain to some extent subjective. The only limits placed upon the exercise of discretionary powers are that they must be based upon considerations of "public interest" or "for valid reasons", but within that wide framework, administrative agencies may exercise their discretions "as they see fit".

For example, the Minister of Finance, by virtue of the Insurance Act, has been entrusted with the quasi-judicial power to issue permits upon the report of an investigator attesting that the applicant has "conformed to the requirements of the law". Consequently, the Minister is obliged to apply objective standards contained in regulations when approving permits to Mutual Insurance Companies. On the other hand, in the final analysis, he is given the discretion to issue the licence by reference to the public interest and he has the authority to refuse that licence "in the discretion of the Minister of Finance". (67)

The Liquor Board must consider objective criteria before granting various permits: "that a person is a Canadian citizen, of full age, without a criminal record..." (68) Yet, it must also consider "if the application is in the public interest", and it may accord permits only so far as public interest requires. (69)

The local administrator of rents by virtue of the Act to Promote Conciliation between Lessees and Property-Owners has been entrusted with certain discretionary powers. For example, "he may authorize the subdivision into several dwellings, of a large house occupied by a single lessee under a prolongation of a lease, upon such conditions as he may determine for the protection of the rights of such lessee..." (70) The local administrator possesses the discretionary power to "prolong the lease for any period he deems fair and just to the parties, but not exceeding the term of the act". (71) On the other hand, in refusing the application for the prolongation of a lease, he must consider purely objective criteria contained in the statute: "that the lessee is more than three weeks in arrears in the payment of his rent..." (72)

The Director of the Motor Vehicle Bureau grants licences if certain criteria are met. For instance, he must demand proof of solvency before registering an automobile to a minor. (73) Yet, he possesses a wide discretionary power to refuse, suspend and renew a licence if by the circumstances "he deems it necessary". (74) Therefore, if the authority issuing the licence possesses discretionary powers to emit it or refuse to do so, the applicant has no assurance that he will obtain the permit. Notwithstanding that the applicant has met all the requirements upon which the issuance of a licence is dependent, it may be refused because the particular authority may exercise its discretion "as it deems fit".

These and other administrative bodies have been created by the legislature in the public interest to execute and apply policies enacted in the public interest. Whether these bodies perform quasi-judicial or judicial functions and administer a government policy by reference to objective standards contained in statutes or regulations or whether they perform administrative functions and administer the policy by virtue of discretions permitting them to set their own norms to regulate a particular field, in the final analysis, both types of bodies decide matters and act upon subjective consideration of the "public interest". This is true whether the legislator or the subordinate body conferred with rule-making and other discretionary powers determines the norms that are to be applied to particular situations.

The transformation of the role of the state vis-à-vis the individual and the consequent enlargement of state machinery to regulate and control particular economic and social activities in the public interest has generated conflicts of rights and interest. This conflict has pitted the individual interest against the general interest of society. Individuals have contested the extent to which their rights must be infringed in the public interest and they have not been convinced that the governmental agencies created to administer the policies of the legislature for the benefit of the public have taken sufficient account of the individual interest; nor have individuals been convinced of the impartiality of the administrative bodies that were created to adjudicate these disputes and to establish a balance between these conflicting interests when they must at the same time carry out the purposes of the policies which they have the duty to administer.

These bodies were created by the legislature to attain efficient and effective administration of the policies enacted. Although these attributes should not be hampered by an undue and unreasonable concern for the interests of individuals, the administration of legislative policies must proceed with a reasonable regard to the balance between the public interest and the private interest. "There is no place in a true democracy for the doctrine of the welfare of the corporate state as distinct from the welfare of the individuals who are its components". (75) If these two opposing interests are to be harmonized, justice and fair play must be extended to the individual at odds with the policy administered by government agencies.

If these disputes are to be decided in accordance with justice, an appropriate procedure to settle controversies arising in the course of policy execution must be adopted. Therefore, justice in adjudication can be assured only through a process requiring a hearing, the giving of notice, the presentation of evidence and the handing down of a reasoned decision. Furthermore, impartial adjudication demands adherence to the maxim that "it is not sufficient that justice be done, but it must be seen to be done". (76) This maxim demands that impartiality and absence of bias be present in the adjudication of disputes.

The Franks Committee suggested that adjudication by government agencies should contain the characteristics of openness, fairness and impartiality. "Openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decision (taken by administrative agencies); fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require freedom of tribunals from the influence, real or apparent, of Departments (the Executive) concerned with the subject matter of their decisions". (77)

These attributes are to varying degrees absent in the adjudications of disputes by administrative bodies in Quebec. For example, bodies such as the Quebec Pensions Board, (78) the Workmen's Compensation Board, (79) the Transportation Board (80) and the Liquor Board (81) possess not only quasi-judicial powers that affect the rights of individuals, but are also empowered to make statutory regulations which determine the norms they apply to disputes and

claims that arise in the course of the administration of their particular field. That they apply standards they themselves created offers a greater possibility of bias in favor of their norms and so the requisite impartiality that is necessary in adjudicating disputes is more likely to be absent.

These and other bodies have been conferred the power to revise their own decisions. This is the case with the Pensions Board, (82) the Workmen's Compensation Board, (83) the Transportation Board, (84) and the Ministry of Social Affairs. (85) This power is a denial of the maxim "Nemo judex in sua causa protest esse" (that an adjudicator must be disinterested and unbiased), for in revising their decision, they act as a court of appeal in their own cause. This power is inconsistent with the procedure of courts which, after handing down a decision in a case, can no longer take cognizance of it. The decision is "chose jugé" and only an appeal to another court can reopen the case.

Moreover, if it is insufficient that justice be done, but must also be seen to be done, the majority of administrative agencies in Quebec do not provide for justice as no impartiality can be said to exist when the bodies are dependent upon the executive. Most administrative bodies are appointed by the Lieutenant-Governor in Council which has a substantial power over the salary, the tenure and the removal of the members of these agencies. The salaries of members of the majority of agencies are subject to variation at the pleasure of the executive. Only in some cases has explicit provision been made to assure the security of tenure and the independence of the members of administrative bodies. (86) The length of tenure, if it is not specifically provided for, is regulated by the Public Servants Act (87) which states: "Unless otherwise specifically provided, every public officer or employee shall be appointed by the Lieutenant-Governor in Council, by Commission or otherwise, and remain in office during pleasure". Removal at pleasure applies to various important adjudicative bodies such as the Transportation Board (88), the Workmen's Compensation Board (89) and the Minimum Wage Commission. (90) Removal at pleasure is an affront to the principle of independence and it is an open invitation for executive interference in adjudication. The combination of the lack of security of tenure and a guaranteed salary places these adjudicators in a difficult position to resist pressures from executive sources.

Moreover, their decisions are more likely to be unduly influenced by the desire to please the government in power, either because of salary considerations or to assure re-appointment, especially if the length of tenure is short.

In so far as procedure is concerned, it has not been required that administrative bodies making quasi-judicial decisions affecting the rights of individuals adopt procedures similar to those in the courts. (91) They have been permitted to follow their own procedures so as to ensure efficiency. However when administrative tribunals determine questions affecting the rights of individuals, the courts have held that "they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But... they are not bound to treat such questions as though it were a trial... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statements prejudicial to their view". (92) Statutory bodies, therefore, even if they exercise predominantly administrative functions should act in such a manner that justice is not only done but also seen to be done. When making decisions of a quasi-judicial nature, that is, if rights of individuals are liable to be affected, they should have the duty of arriving at the decisions in a just and fair manner.

Despite these requirements of justice and fair play, the legislature has imposed the duty of listening fairly to both sides before determining a question upon only a few tribunals. (93) Furthermore, not all administrative tribunals are obliged to give reasoned decisions. (94) The characteristics by which government agencies should be guided in adjudicating controversies between the public and the individual interests have therefore been lacking to some extent in the Province of Quebec.

The legislature has created numerous government agencies which have been entrusted with adjudicative power because the courts were inadequate to handle the bulk of controversies arising out of government interventionist policies. Although the common law has historically sought to protect the individual in his dealings with the state and the common law superior courts have evolved procedural technicalities and rules of evidence to ensure that

justice is done as well as seen to be done, the legislature has opted for the creation of bodies which have not been obliged to render judgements in accordance with the fundamental requirements of justice. Therefore, the problem has become "one of balancing the slower and more orderly procedures of the courts, which, it is hoped, produce the maximum possibility of fairness, against the necessity of providing speedy relief to a large number of applicants, with perhaps the greater probability of injustice". (95)

Because administrative agencies are generally dependent upon the executive in one way or another, because they are not obliged to adopt fundamental procedures that would ensure justice for the individual whose interests are affected by their determinations and because they exercise considerable discretion in arriving at their decisions, opportunities for arbitrary, unreasonable, oppressive and inconsiderate decisions are present. Individuals are liable to suffer from numerous abuses at the hands of government. These include abuses legally rectifiable in the courts and a host of others not susceptible of correction in that arena. In the former are included actions and decisions that are made for an unlawful purpose, for irrelevant considerations, in bad faith, arbitrarily and unreasonable. Errors of law and of fact are also possible. Then, procedural abuses are the existence of bias, the denial of a fair hearing, of proper notice and of cross-examination. Such abuses can result either "within the jurisdiction" conferred upon administrative agencies by statute or "in excess" of it. In the former are included general acts of maladministration such as mistakes, acts of negligence, lack of observance of proper standards of conduct or behavior, inefficiency, harshness, high-handedness and unreasonableness. These usually amount to illegalities "within jurisdiction". (96) Until recently, however, individuals subject to abuses of this variety have been unable to obtain justice from any source that purported to be of general availability. (97) Consequently, the only recourse for the individual who suffered prejudice at the hand of a government agency or official was the superior courts, which had historically assumed the responsibility of protecting the individual from illegal government activity. However, this recourse has been generally available only for abuses considered to be in excess of jurisdiction.

F- THE DOCTRINE OF PARLIAMENTARY SUPREMACY VERSUS THE RULE OF LAW

Notwithstanding the historic role of the judiciary in supervising administrative legality, the Quebec legislature has, by virtue of the doctrine of parliamentary supremacy, sought to oust this jurisdiction of the superior courts. It has done so by the privative clause. The privative clause provided for in "An Act to Promote Conciliation between Lessees and Property Owners" is typical of legislative assaults upon the authority of superior courts. "None of the extraordinary recourses provided in articles 834 to 850 of the Code of Civil Procedure shall be exercised and no injunction shall be granted against the Commission or any of its members, administrators or assistant administrators by reason of acts, proceedings or decisions relating to the exercise of their functions under the Act. Article 33 of the Code of Civil Procedure shall not apply to the Commission". (98) The aim of this attempt to oust the review function of the superior courts, the prime element in the maintenance of the rule of law, has been to secure efficient and effective administrative action in the sense that government activity be effectuated without delay. For if every administrative decision and action were subject to superior court intervention, the very purpose for which administrative bodies were created, that is, for reasons of economy and expedition, would be defeated.

The privative clause has become the principal vehicle by which the legislature of the Province of Quebec has endeavoured to render decisions and actions of its delegates final and without appeal to any court of law and to deprive individuals adversely affected by administrative activity both within and in excess of jurisdiction, from recourse to the superior courts. Yet, notwithstanding that judicial review could totally cripple effective administrative action if an undue number of individual complaints against such action could be presented for superior court adjudication, the judiciary has sought to preserve the rule of law by maintaining its function to protect individual rights and liberties from illegality "in excess of jurisdiction" and by upholding the right of the individual to have access to [redacted].

The judiciary has justified its resistance by reason of its historic duty of enforcing obedience to valid statutes enacted by the legislature.

This function has provided the courts with the means to compel strict adherence to the powers conferred by statutes upon administrative authorities charged with the execution and application of those statutes. The function of the courts, to apply the laws enacted and therefore also to interpret them, has permitted them to determine the scope of valid statutes. In so doing they have defined the extent of the powers entrusted to inferior governmental agencies. Consequently, although the judiciary has been unable to question valid statutes by virtue of the doctrine of parliamentary supremacy which authorized the enactment of oppressive and even retroactive laws, (99) it has assumed the duty of precluding statutory bodies from exceeding the jurisdiction entrusted to them by statute.

Moreover, the judiciary has historically been the arbiter of litigation between individuals and the state. To perform this role, the principle of access to the courts has become basic to the rule of law. Tremblay, J., in Continental Casualty Co. et al v. Combined Insurance Co. of America et al, (100) affirmed, "L'ordre publique exige que tous les justiciables puissent s'adresser aux tribunaux en vue de la reconnaissance et de l'exercise de leur doit et que les tribunaux soient en mesure de les leur accorder. C'est à cette condition que les tribunaux pourront remplir leur rôle d'arbitres des différends entre les particuliers et entre l'Etat et les particuliers".

The principle that the government and subordinate administrative agencies are subject to judicial control has been codified in Article 50 of the Quebec Code of Civil Procedure which came into effect in 1867: "Excepting the Court of Appeal, the courts within the jurisdiction of the Legislature of Quebec, and bodies politic and corporate within the Province are subject to the superintending and reforming power of the Superior Court in such manner and form as by law provided". Moreover, the legislature of Quebec entrusted the prerogative writs, the remedies by which the superintending and reforming powers contained in article 50 are made operative, to the superior courts. (101) This legislative initiative therefore has codified the rule of law in the Province of Quebec and superior courts were empowered to rectify any administrative illegality whether "within jurisdiction" or "in excess" of it until the introduction of privative clauses.

After codifying the rule of law in 1867, the legislature has sought to withdraw the superintending and reforming power of the superior courts by excluding individuals adversely affected by administrative activity from recourse to article 50 of the Code by privative clauses purporting to render statutory bodies immune from judicial review. Subsequently, that article was amended by the legislature in 1965 (102) and it was replaced by article 33 which added a novel provision to the former: "...save in matters declared by law to be of the exclusive competency of such courts or of any one of the latter, and save in cases where the jurisdiction resulting from this article is excluded by some provision of a general or special law". This new version sought to strengthen privative clauses, which the judiciary had refused to heed except in so far as they applied to illegal administrative action "within the jurisdiction" of statutory bodies, by precluding judicial review for illegality "in excess of jurisdiction" as well.

The doctrine of parliamentary supremacy, previous to the 1965 Code, had the effect of precluding the judiciary from reviewing illegal activity "within the jurisdiction" of statutory agencies. It had been authoritatively stated that any illegality made within the jurisdiction conferred by statute upon such agencies was not susceptible of judicial review if a privative clause existed. (103) Therefore, an individual who was adversely affected by a decision that was illegal but within the competence of a statutory authority which was protected by such a clause, could receive no relief in the superior courts.

Notwithstanding the enactment of article 33, the courts have maintained their refusal to be bound by privative clauses seeking to oust their role of reviewing illegalities "in excess of jurisdiction", because the rule of law existed in the Province of Quebec by virtue of the Constitution and not because of the codification of its precepts. Cross, J., who rendered the judgement of the Quebec Court of Appeal in Laberge v. Cité de Montréal, stated: "The authority of the Superior Court to exercise jurisdiction exists by law and a corresponding right of action likewise exists wherever a person stands in breach of, or in default of compliance with a legal obligation... The purport of article 50 C.P. is to establish that there are no privileged persons, or corporate bodies, but that all are alike subject to judicial power". (104) Consequently, the rule of law was present in this province,

but not by virtue of article 33 C.P. That article simply specified the body in which the superintending and reforming power resided. Rather, the rule of law which embodied this power traced its origin to the introduction of English public law into Quebec at the Conquest. The Superior Court possessed its authority over inferior bodies "en vertu de sa loi organique et des pouvoirs inhérent à sa fonction". (105) Consequently, the legislature was unable to withdraw the judicial review power even if it did codify it, as the legislature did not originate that power.

The state of the law on the existence of the inherent supervisory power of the Superior Court over government administrative bodies whose actions and decisions adversely affected the rights of individuals was authoritatively summarized by Fauteux, J., later Chief Justice, who rendered the judgement of the Supreme Court of Canada in Three Rivers Boatman Ltd. v. Conseil Canadien des relations ouvrières et Syndicat International des marins Canadiens. By virtue of the two statutes enacted in 1849, it was held: "la Cour Supérieure devenait ainsi nanti du pouvoir de surveillance basé sur la 'common law', qu'exerçait en Angleterre la 'Court of King's Bench' sur laquelle la Cour du Banc du Roi fut modelée. Cette loi du contrôle judiciaire sur les tribunaux, corps politiques ou corporations exerçant des pouvoirs judiciaires ou quasi-judiciaires nous vient du droit public anglais introduit au Québec lors et par suite de la cession". (106) It was concluded in that case that the present Superior Court of the Province of Quebec possessed that jurisdiction. "Il s'ensuit que la Cour Supérieure possède toujours cette autorité dont elle hérita... de sorte que toute personne qui se prétend lésée dans ses doits, par suite d'un excès de juridiction de la part d'un organisme fédéral (ou provincial), peut, afin de les faire reconnaître et en assurer le respect, recourir à cette autorité". (107)

The judiciary has justified its resistance to legislative intervention by privative clauses in part upon the proposition that the superintending function of the superior courts and the rule of law was entrenched in the Canadian Constitution. The doctrine of parliamentary supremacy by virtue of which the legislature has purported to encroach upon the courts and the rule of law, must be held to be limited to the extent that the judiciary and the rule of law enjoy such a position. If, as has been argued above, (108) the

doctrine of legislative supremacy is already qualified by reason of the existence of a Constitution, for a provincial legislature can enact laws only in so far as they are consistent with section 92 of the B.N.A. Act, then there is room to suppose that other principles implicit in that Act can in addition circumscribe the scope of that doctrine.

Whether the judiciary possesses an inherent supervisory jurisdiction or not, in Canada at least, it does possess the final authority to declare whether or not a legislative enactment infringes the Constitution. It is this function that permits the courts to involve themselves in matters which, in Great Britain, they would have no right to review. In the latter country, whatever the subject of the statute enacted by Parliament it must be obeyed by the courts. This is the result of a strict application of the doctrine of parliamentary supremacy. In Canada, on the other hand, although this doctrine was adopted at Confederation, the provincial legislatures as well as the federal Parliament are to some extent limited in their supremacy. The Hodge decision inferred that the federal principle and the existence of a Constitution under which these legislatures must function confined their power to enact laws to those areas within their competence, that is, within sections 91 and 92 respectively. Since the legislatures of both levels of government were created by a Constitution from which they derived their powers, they were subordinate to and had to function in accordance with its provisions. Because neither the federal nor the provincial legislatures could be permitted to ultimately decide the extent of their legislative powers, some other body had to possess the jurisdiction to finally determine the constitutional validity of legislative enactments. The B.N.A. Act had, by implication, entrusted this function to the superior courts.

That the superior courts were the final arbiters, with authority to settle disputes with regard to the distribution and division of powers as enunciated in that Act, has not been challenged by the legislatures. And, because the judiciary possessed this jurisdiction, recourse to the courts was available whenever individuals sought to determine the constitutional validity of statutes enacted by the legislature. This proposition has been affirmed in the case of Ottawa Valley Power Co. v. A.G. of Ontario et al. The case arose when the Ontario legislature sought to oust this authority

of the courts by prohibiting individuals from having recourse to a court of law. Fisher, J.A., held that the provisions of the enactment purporting to do so limited the jurisdiction of the Supreme Court of Ontario. "Being a limitation its effect is to take away from the Supreme Court one at least of the essential characteristics of a Superior Court. The B.N.A. Act does not, it is true, guarantee the continued existence of the Superior Court in each of the Provinces. But it is quite clear that both ss. 96 and 129 are founded upon an unwritten guarantee of the continuance of the Superior Courts in the Provinces. To alter the essential character of the Supreme Court as a Superior Court in any vital particular, is contrary to the spirit of the B.N.A. Act and tantamount to an unauthorized repeal of the statute in that respect. To do so therefore is beyond the power of any Legislature which is the creature of that statute". (109) Masten, J.A., agreed that "it is of the essence of the Canadian Constitution that the determination of the legislative powers of the Dominion and of provinces respectively should not be withdrawn from the judiciary". (110) Other judicial decisions have expressed similar views, (111) and these cases have argued that the superior courts possess an unassailable jurisdiction to interpret the Constitution and that access to them cannot be prohibited by the legislature, thereby limiting the latter's sovereignty. Implicit in the arguments presented is the assertion that there exists a separation of power in the Canadian constitutional system.

In Great Britain, acts of Parliament are the law of the land. The role of the courts in that country is to interpret the law and apply it. They are totally subordinate to the legislature. Though it is possible for Parliament to abolish the courts or interfere with their decisions by virtue of the doctrine of parliamentary supremacy, it has relinquished all control over the judiciary on the theory that the judicial function has utility only in so far as it it free from any suspicion of interference or domination. Consequently, there can be said to exist a separation of powers in the United Kingdom, not between the legislative and executive branches because of the cabinet system and ministerial responsibility, but between these two branches and the judiciary. "The judicial power is truly separate. The judges for the last 250 years have been absolutely independent... No member of the government, no member of Parliament, and no official of any government department,

has any right whatsoever to direct or influence or to interfere with the decisions of any of the judges". (112)

If a separation of powers can be said to exist in the United Kingdom, all the more reason for such an assertion in Canada where legislative supremacy is limited not only by the provisions of the B.N.A. Act, but also by the entrenched position of the courts to which access cannot be denied when constitutional questions require determination. Moreover, the rule of law, a primary ingredient of which is the independence of the judiciary from legislative interference in applying the law, has been enshrined in sections 96, 99 and 100. Though the Act did not entrust the superior courts with any specific function, role or power, they have historically exercised the function of applying and interpreting the laws enacted by the legislature. Denning, L.J., affirmed: "It is the function of the courts to determine questions of law". (113) Therefore, when the Quebec legislature began to confer judicial and quasi-judicial powers upon various subordinate agencies it had created to apply the laws it had enacted, it came into conflict with the judiciary. The latter was unwilling to be divested of this function. The judiciary viewed some of these legislative initiatives as being an unjustified usurpation of its role and it accordingly proceeded to curb this intervention by limiting the extent to which judicial functions could be entrusted to provincial appointees.

Sections 96, 99 and 100 of the B.N.A. Act were in part the basis upon which the courts sought to maintain their guaranteed jurisdiction and to restrict the legislature from conferring the power to determine all types of legal questions upon provincially-appointed adjudicative bodies. Section 96 demanded that the federal level collaborate with the province in establishing provincial superior courts. The result of the interpretation given to this section was that only bodies appointed in accordance with it could decide certain legal questions. For example, in the case of Toronto v. York (114), it was held that a provincial legislature could not entrust the jurisdiction to interpret the provisions of a contract to a municipal board. This was a judicial power reserved to the judiciary only. In Toronto v. Olympia Edward Recreation Club Ltd. (115), the Supreme Court of Canada decided that only a superior court could determine the question of which types of property formed

part of real estate as defined by a provincial taxation act. That same court declared that the power of dissolution of a corporation was a function of the superior courts in Tremblay v. The Quebec Labor Relations Board. (116) The Ontario Court of Appeal stated that a provincially-appointed body had no power to determine a pure question of law such as whether the Ontario Food Terminal Board was a Crown agency. Since the answer to this question determined whether the Board was subject to the Labor Relations Act, Laidlaw, J.A., held that this was "a pure question of law which can be determined only by a Judge or Judges appointed by the Governor General pursuant to the provisions of the B.N.A. Act". (117) The proposition that the superior court enjoyed an exclusive jurisdiction over the interpretation of laws had already been approved by the same court in Beauharnois Light, Heat and Power Corporation v. Hydro Electric Power Commission. (118)

These cases have decided by implication that the superior courts have a guaranteed jurisdiction which cannot be withdrawn from them by the provincial legislatures. In the case of Martineau and Sons Ltd. v. Montreal, (119) the Privy Council affirmed that the judicial functions entrusted by the Quebec legislature to the Public Service Commission were valid only because it was the successor of a body exercising a similar jurisdiction in existence at Confederation. The Privy Council had adopted a test to determine the validity of a legislative grant of judicial powers in that case - if a judicial power had not been confided to an inferior court or an administrative body at Confederation, it could not be so confided afterwards. This test rested upon article 31 of the Quebec Code of Civil Procedure which stated: "The Superior Court is the court of original general jurisdiction; it hears in first instance every suit not assigned exclusively to another court by a specific provision of law". Consequently, whatever judicial powers were not specifically entrusted to some body other than a superior court at Confederation would henceforth be within the exclusive jurisdiction of that court.

The Toronto v. York (120) case also restricted the power of the provincial legislatures to entrust inferior courts and administrative tribunals with the ability to deal with judicial questions which were normally determined by superior courts at Confederation. Though the rigidity introduced by these judgements requiring that provincial creations exercise a judicial function

only if they had exercised it prior to 1867 was subsequently modified by the Privy Council in Labor Relations Board of Saskatchewan v. John East Iron Works Ltd., (121) the proposition that superior courts possessed a guaranteed jurisdiction was maintained. That court held that a provincial legislature was unable to confer upon a body created by it the type of jurisdiction exercised by superior courts.

Both the Martineau (122) and the Toronto v. York cases remain the authoritative cases affirming the independence of the judiciary from provincial legislative interference, thereby giving the rule of law ascendency over the doctrine of parliamentary supremacy as it applied to the provincial legislatures. The court in the Martineau case, affirmed that sections 96, 99 and 100 of the Confederation Act were "adopted by the framers of the statute to secure the impartiality and the independence of the Provincial Judiciary. A Court of Construction would accordingly fail in its duty if it were to permit these provisions and the principles therein expressed to be impugned upon in any way by Provincial Legislation". (123) The judgement handed down by Lord Atkin in Toronto v. York supported that affirmation: "While legislative power in relation to the constitution, maintenance and organization of Provincial Courts of Civil jurisdiction... is confided to the Province, the independence of the judges is protected by provisions that the judges of the Superior... Courts shall be appointed by the Governor General (S.96...), that the judges shall hold office during good behaviour (S.99), and that the salaries of the judges... shall be fixed and provided by the Parliament of Canada (S.100). These are three principle pillars in the temple of justice, and they are not to be undermined". (124)

The provisions of the Confederation Act and the interpretation of these provisions by the courts have, therefore, established a judicary that not only possesses an exclusive jurisdiction over certain legal questions but that is also free from legislative and executive control and interference, at least in the provincial sphere. Since the provisions relating to the independence of the judiciary and the jurisdiction of superior courts are modelled upon those extended to British superior courts, and if a separation of powers can be said to exist in that country, all the more reason for drawing such a conclusion with respect to the Canadian provinces where those provisions are

entrenched in a constitution. To the extent, therefore, that the courts are independent and possess a jurisdiction that may not be interfered with by the provincial legislatures, legislative supremacy is far from absolute.

Though the Canadian courts purport only to limit the powers of the provincial legislatures to interfere with them, a similar limitation can by analogy be imposed upon the federal Parliament. Support for such an extension exists in the judgement delivered by the Judicial Committee of the Privy Council in Liyanage v. R. (125) It was contended in that case that the legislature of Ceylon had attempted to usurp the judicial powers entrusted to the judiciary by the Ceylon Constitution. The outcome of the decision rested upon an interpretation of the provisions of that Constitution.

A substantial similarity exists between the Ceylon and Canadian Constitutions. The former was divided into parts similar to the division fashioned in the latter, that is, Executive, Legislative and Judicature. Neither Constitution provided for judicial power to be vested in the courts although explicit provision was made to invest the two other branches with their respective powers. Neither provided for the continued existence of the superior courts. However, the court systems in both countries had evolved in a similar manner, and both traced their origins and histories back to British counterparts upon which they were modelled. Therefore, the judicial power had, through the operation of the common law, been vested in the judicature, and by implication that power had been incorporated into the respective Constitutions by a provision analogous to section 129 of the B.N.A. Act. Moreover, the Ceylon Constitution contained provisions similar to sections 96, 99 and 100 of the Act of 1867.

The statements of Lord Pearce who delivered the judgement of the court in that case are equally applicable to the Canadian situation, both federally and provincially. It was held that, because the Ceylon Constitution was divided into parts, expressly providing for a section on the Judicature which contained principles analogous to those in sections 96, 99 and 100 of the Canadian Constitution, by implication, these sections had created a judiciary separate from the executive and legislative branches of government. These provisions, while not in terms vesting judicial functions in the judiciary, nevertheless manifested "an intention to secure in the judiciary a freedom

from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature... The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent that henceforth it should pass to or be shared by, the executive or the legislature."(126)

It follows from this decision that the federal or provincial legislatures could no more interfere with the judicial functions and powers of the courts than could the Ceylon legislature, because the existence of the judicial jurisdiction is entrenched by implication in the Canadian Constitution. Therefore, any attempt to usurp the judicial power of the judicature would amount to an interference with their functions and this would be inconsistent with the manifest intention of the Constitution. It was held that such attempts would be invalid as an infringement of the Constitution for if this were not the case, "the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges". (127)

Consequently, it can be argued from the cases cited above that the Confederation Act of 1867 entrenched not only the independence of the judiciary, a primary element in the rule of law, but also provided the courts with a central core of jurisdiction over certain judicial questions and over the final interpretation of that Act. "This guaranteed jurisdiction arises from the cumulative effect of all the judicature sections of the B.N.A. Act. These provisions collectively make it clear that the B.N.A. Act contemplates the continued existence and functioning of superior courts on the English model as basic institutions of our form of government". (128)

If the rule of law was entrenched in the B.N.A. Act by the preamble, and if provision was made for an independent judiciary, a prime element of that principle, it follows that its other element, the review of the legality of administrative action where an excess of jurisdiction is alleged, a superior court function which was directly inherited from British counterparts, was also entrenched. Therefore, judicial review can no more be assailed by reference to the doctrine of parliamentary supremacy than any other inherent judicial function. If the superior courts have historically

possessed the jurisdiction to determine the limits of the powers of government bodies and if this jurisdiction is guaranteed and entrenched by the B.N.A. Act, it follows that " the disregard of superior courts of privative clauses in provincial statutes is constitutionally sound for the clauses would deny their guaranteed reviewing or appellate jurisdiction". (129) However, even if the proposition that the superior courts have a jurisdiction to review inferior governmental agencies that is entrenched in the B.N.A. Act is erroneous, practice has nevertheless operated to make this a reality. The superior courts have refused to be totally bound by privative clauses enacted by the legislature of Quebec, and this, in the face of the doctrine of parliamentary supremacy.

In the case of Mathieu v. Wentworth it was held "si le législateur enlevait ou pouvait enlever, aux tribunaux supérieurs, le droit de surveillance et de contrôle sur les cours inférieurs, ce serait, dans bien des cas, consacrer l'arbitraire et l'injustice et mettre en péril la liberté des citoyens dont la loi est toujours jalouse". (130) The judiciary has preserved its review jurisdiction whether the function of the administrative agency whose actions were in question were legislative, administrative or judicial. Subordinate legislation issued by legislative creations had to conform to judicial standards of legality. Disbury, J., in Trans-Canada Pipe Lines Ltd. v. Provincial Treasurer of Saskatchewan, maintained "that in these times of ever increasing administrative tribunals commissions and other statutory bodies and officials, the jurisdiction of Her Majesty's courts to enquire into and test the validity of the multitude of orders and Regulations they enact, pursuant to the delegation of such powers by Parliament or Legislature [must be preserved]; such jurisdiction exercised by the Courts is the only shield Her Majesty's subjects have to protect their liberties and property from excessive or improper or otherwise unauthorized use of such delegated powers to legislate ...this court is not precluded... [by privative provisions] from examining the said Regulations for the purpose of determining whether the Lieutenant-Governor in Council acted within the limits of his delegated power..." (131) The Courts have argued that "it would be unreasonable to think that when the legislature created a Board with extensive powers... without control other than that of its creator, it intended to permit it to act even beyond these

powers, but on the other hand, it must be assumed that it considered it had the right to rely on its Superior Court to exercise the power which it possesses to prevent where necessary any acts of the Board beyond its jurisdiction..." (132)

The Supreme Court of Canada in a similar manner has interpreted the intention of the legislatures by presuming that they could not have intended to authorize an administrative agency to act or to decide in any manner it pleased. Kellock, J., in Toronto Newspaper Guild v. Globe Printing Company, maintained that "the statute does not endow the board with power to make arbitrary decisions. The legislature must be taken to have been quite familiar with the principles applicable to decisions of inferior tribunals when questioned in the courts. It has not used apt language if it intended, as it cannot be presumed to have intended, to place either of the parties to such a proceeding as that here in question in a position permitting of no relief no matter how arbitrary any particular decision of its creature, the board, may be". (133) Consequently, the privative clause has been held inapplicable when administrative illegality is in question. (134) Thus, the rule of law, which became part of the Canadian Constitution by virtue of section 129 and the preamble of the B.N.A. Act, has safeguarded the rights of the individual not only to question administrative action but also to have access to the courts of law for the determination of the legality of that action. The doctrine of parliamentary supremacy has had to succumb to the rule of law in this country where a separation of powers has been held to exist by reason of the independence of the judiciary and its inherent jurisdiction over various judicial questions.

The situation is very similar in Great Britain where Parliament has permitted judicial independence in the determination of legal questions. The courts have continued to exercise their reviewing power in cases of illegality in the face of privative clauses enacted by Parliament, notwithstanding the doctrine of parliamentary supremacy, which in that country enjoys a position of primacy over the other fundamental constitutional principles. The judicial review function has existed since the fourteenth century when the Courts of King's Bench were entrusted with the power to issue the prerogative writs. In Smith's Case, Chief Justice Kelynge held: "This Court cannot be

ousted of its jurisdiction without special words; here is the last appeal, the King himself sits here, and that in person if he pleases, and his predecessors have so done, and the King ought to have an account of what is done below in inferior jurisdiction". (135)

Access to the courts for the determination of administrative legality, moreover, has become a fundamental principle which cannot be withdrawn by means of privative clauses. In the case of Dyson v. The Attorney General Farwell, L.J., affirmed: "the convenience in the public interest is all in favor of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by government departments and government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any court". (136) Accordingly, privative clauses have been held inapplicable in Great Britain when inferior administrative bodies purported to exercise powers that exceeded the jurisdiction entrusted to them by statutes. In Anisminic Ltd. v. Foreign Compensation Commission, (137) the highest British Court decided that privative clauses are no bar to court supervision of administrative illegality. In practice, therefore, the judicial review function, which has existed since the fourteenth century, has been maintained notwithstanding the affront to parliamentary sovereignty.

The Quebec and Canadian courts, their development paralleling British experience, have for similar reasons resisted legislative attempts to restrict the rule of law. However, their constitutionally-entrenched status has afforded them with a substantially more solid foundation upon which to assert their jurisdiction over the maintenance of the rule of law than the British judiciary. For the reasons enunciated above, if the Quebec legislature tried to introduce explicit language to preclude superior court review over cases of excess of jurisdiction, such a provision might be held unconstitutional. "Certainly, it is but a short step from the position already adopted by Canadian Courts... to proclaiming that the principle of judicial control is part of the fundamental law of the Constitution. However this might strike legal theorists, it would only be a recognition of current legal reality. The view which is taken of our democratic legal order today is that it presup-

poses two things: a sovereign legislature and superior courts to see that those on whom statutory authority has been conferred keep within their jurisdiction. The right to judicial control can be regarded as the one qualification of parliamentary sovereignty because it is the 'sine qua non' of a parliamentary legal order". (138)

CHAPTER I - FOOTNOTES

1. 30 and 31 Victoria, c. 3.

2. Unless otherwise stated, the terms "courts", "judiciary" and "judge" are hereafter restricted to superior courts and members thereof as opposed to members of inferior tribunals both administrative and adjudicative such as justices of the peace, magistrates' courts, provincial courts, Workmen's Compensation Boards and the like.

3. Similar definitions have been framed by Sir Ivor Jennings, The Law and the Constitution. 5th ed. University of London Press Ltd.: London, 1959, p. 217 and H.W.R. Wade, Administrative Law. 2nd ed. Clarendon Press: Oxford, 1967, p. 5.

4. Ibid., Sir Ivor Jennings, at p. 47.

5. A.V. Dicey, An Introduction to the Study of the Law of the Constitution, 10th ed. Macmillan and Co. Ltd.: London, 1965, at p. 195.

6. 14 George III, C. 83, article 17 and subsequent Ordinances in 1777.

7. These writs, issued in the name of the King, evolved to provide wronged individuals with judicial remedies for the enforcement of particular rights. They had been issued by the Courts of King's Bench ever since the fourteenth century.

8. G.E. Le Dain, "The Supervisory Jurisdiction in Québec", (1957) 35 C.B.R. 788, p. 791.

9. 12 Victoria, c. 38, s. 2-3.

10. Judges were to be appointed during "good behavior", with an involved procedure of removal, that is, upon the address of both Houses of the legislature.

11. 12 Victoria, c. 41, s. 16.

12. Post , p. 28 ff.

13. This was the price the legal profession and the common law courts had to pay to obtain their independence from the Crown as a result of their support of Parliament during the Glorious Revolution.

14. Op.cit., note 5, at p. 40.

15. Ibid., at p. 40.

16. (1942) A.C. 206, at p. 261.

17. It was only by the Statute of Westminster of 1931, 22 George V, c. 4, s. 2,3, that the restriction upon the supremacy of the Canadian legislatures by the Colonial Laws Validity Act of 1865, 28 and 29 Victoria, c. 63, was removed. It had provided that no colonial or even Canadian legislature could enact provisions either repugnant to the terms of any Act of Parliament extending to the colonies or having extraterritorial application.

18. (1883-84) A.C. 117, at p. 132. The doctrine of parliamentary supremacy has been held to apply to Canadian legislatures in other authoritative decisions: Reference Re Chemicals (1943) S.C.R.1; British Coal Corporation v. The King (1935) A.C. 500; Re Initiative and Referendum Act (1919) A.C. 935; Re Gray. Re Habeas Corpus (1919) 42 D.L.R.1; Reference Re Proclamation of Section 16 of the Criminal Law Amendment Act, 1968-9 (1970) 10 D.L.R. (3d) 669.

19. (1960) C.S. 552, at p. 555. In Procureur Général du Canada v. La Compagnie de Publication La Presse Ltée. (1967) S.C.R. 60, the Supreme Court of Canada held that the Governor General in Council had the power to make regulations having a retroactive effect since the Radio Act, R.S.C. 1952, C. 233, S.3, contained such a grant of power. The rule of non-retroactivity, a rule of interpretation employed by the courts to mitigate legislation was of no avail since the statute enacted by the Federal Parliament plainly implied such a power.

20. The development of trade and commerce, facilitated by the improvement of transportation and movement of people into the cities, set the stage for the industrial revolution in Quebec. However, the facilities to accomodate the influx of the population to the towns to move the industrial machine had not been created, causing overcrowding with the attendant consequences of ill-health, poverty and crime. Furthermore, the exploitation of workers - long hours and low wages, women and child labor - was not a phenomenon restricted only to Great Britain. Because these and other problems occasioned by industrialization could not be ignored, demands for government intervention grew.

21. The social measures which existed from Confederation to the early 1920's had been established by the local clergy. The latter gave what help they could to those in need of protection from the evils of free enterprise and laissez-faire. Yet, after the papal encyclical "Rerum Novarum" in 1891, the clergy became positively involved in the elimination of the abuses of free enterprise by actively demanding that the government assume the responsibility of providing health services (the Public Health Act was passed in 1901, S.Q. 1901, c.10), and that it occupy the social services field. Minimum wage legislation applying to women was passed in 1919: S.Q. 1919, c. 11. Social services legislation became the rule rather than the exception after an old age pension scheme was adopted in the province in 1936: S.Q. 1936, C.1. The clergy also demanded the regulation of commerce and industry as well as laws for the protection of women and child labour and for the safety inspection of factories. The Factories Act, S.Q. 1885, c.32 was subsequently introduced to remedy the conditions complained about.

22. The positive role that was slowly being assumed by the Quebec governments from 1885 onwards was undoubtedly in part due to and accelerated by the qualified acceptance of adult male suffrage, as those subjected to the tyranny of laissez faire sought a government that would assume the responsibility of enacting legislation to improve the lot of the working man. The Election Act of 1888 based the right to vote upon real estate value qualifications: R.S.Q. 1888, title II, c.II, s. II, articles 172-173, and even if its provisions disqualified the majority of Quebecers, it provided more people with a voice in the government. Government intervention, in any event, became more prevalent after the franchise was extended. A definite correlation exists between the number of social measures enacted and the reduction in voting qualifications which ultimately extended the right to vote to the less fortunate segments of society. In 1889, the franchise was expanded (S.Q. 1889, c. 4) to include teachers, farmers and their sons, who did not require property qualifications. In 1895, the legislature withdrew property qualifications for anyone who obtained an annual revenue of at least $300.00 (S.Q. 1885, c. 9, s.9(1). Property and revenue qualifications were all but dropped by a statute in 1925, R.S.Q. 1925, c. 4, s. 10, so that adult male suffrage was almost a reality. It was finally achieved by S.Q. 1936, c. 8, s. 12, and universal suffrage became a reality in 1940: S.Q. 1940, c. 7.

23. Initially, trade-unionism was outlawed by the common law which considered conspiracy in restraint of trade to be either a criminal offence or a tort. Even if workers' organizations had already appeared before Confederation, they became effective in making demand only in this century by the growth of catholic and the more militant international unions. Therefore, the government entered the labor regulation field by providing for mediation and conciliation to settle disputes by the enactment of the Quebec Trades Dispute Act in 1901: S.Q. 1901, c. 31. Some mandatory procedure to settle conflicts, enforced by penal and civil sanctions were enacted in 1909: S.Q. 1909, c. 32.

24. Besides regulating the field of social security, health, and the regulation of commerce and industry to improve the conditions of the working class and the poor, agriculture was not neglected. The field of marketing regulation was entered in 1870 to protect consumers: S.Q. 1870, c. 30, products: milk grading by S.Q. 1921, c. 40; S.Q. 1934, c. 27; tobacco came under government supervision by S.Q. 1933, c. 27. The conservation of the inland fisheries (S.Q. 1883, c. 8; R.S.Q. 1880, art. 1396-1420) and Crown lands (R.S.Q. 1888, art. 1309)were not neglected either. Public utilities and transportation became controlled by a Public Service Commission (S.Q. 1909, c. 15) the jurisdiction of which was enlarged by subsequent legislation.

25. Another way to perceive the increasing role of the state is to look at events from the financial viewpoint. The expenditures of the government of Quebec increased from $29 million in 1923 to $1,437 million in 1965. Such an increase was certainly not solely due to the devaluation of the dollar or by the rise in population. One can determine the evolution of the role of the state by looking at the percentage which public expenses

occupy in the G.N.P. In 39 years, to 1968, the state has doubled its importance and the same phenomenon exists if one examines the similar increase in the employees of the government.

26. Sir Alfred Denning, Freedom Under the Law. Stevens and Sons Ltd.: London, 1949, p. 74-75. The situation in Britain was so similar to that of Quebec that this quotation is appropriate to express the conditions on both sides of the ocean in the nineteenth century. However, it is true that the British government introduced social legislation some time prior to the Quebec initiatives.

27. J.M. Hendry, "Some Problems on Canadian Administrative Law", (1967-8) 2 Ott.L.R., 71, at p. 71.

28. Report of the Committee on Ministers' Powers (The Donoughmore Committee), Cmd. 4060, Her Majesty's Stationary Office, London, 1932, at p. 16.

29. The act creating the Social Affairs Department, S.Q. 1970, ch. 40, has entrusted the Minister with the power to implement the policy enacted by the legislature under the Act, and regulations were made which were published in the Quebec Official Gazette (1970) no. 102, p. 6329, art. 5.01 and following. The regulations made by the Lieutenant-Governor in Council empowered the Minister to establish local and regional offices and to determine their territorial jurisdiction (art. 5.01). They created a Social Aid and Allowances Appeal Board to hear appeals from local and regional offices with regard to applications for social aid.

30. The regulations detailed the methods of computing and the form of financial aid, the criteria to appraise needs, the criteria to appraise resources and it stipulated the forms that had to be used for an application for social aid. Various other matters of detail were covered - the method of contributions and the mode of repayment. Moreover, the Minister was entrusted with additional powers of inquiry to investigate applicants.

31. Other bodies which have been entrusted with the power to make regulations in particular areas are for example, the Quebec Pension Board, S.Q. 1965, c. 24, s. 226 and S.Q. 1965, c. 25, s. 58; The Workmen's Compensation Board R.S.Q. 1964, c. 159, s. 66, 67; The Transportation Board, R.S.Q. 1964, c. 228, s. 21, 25, 26, 27, 45; The Quebec Liquor Board, R.S.Q. 1964, c. 44, s. 7, 76.

32. Statistical Yearbook (1914), King's Printer, Quebec, 1914, at p. 412.

33. Annuaire du Québec, 50th ed. Government of Quebec: Centre D'information Statistique, 1970.

34. (1883-4) A.C. p. 117.

35. Ibid, at p. 132.

36. Ibid, at p. 132.

37. (1918) 42 D.L.R. 1, at p. 2.

38. (1919) 48 D.L.R. 18, at p. 29.

39. (1918) 42, D.L.R. 1, at p. 2.

40. A.G. Nova Scotia v. A.G. Canada (1951) S.C.R. 31. The constitutional rigidity in delegation that resulted from this judgement has been circumvented by the establishment of joint boards by both spheres of government to coordinate activities over which both have an interest. For, the case of P.E.I. Potato Marketing Board v. H.B. Willis Inc. (1952) 2 S.C.R. 392 confirmed that a provincial board had the capacity to receive a delegation of powers from the federal government, since it was held that Parliament could choose its own executive officers or agents to carry out legislation which is within its constitutional authority. The P.E.I. Potato Marketing Board and the Ontario Highway Transport Board (Coughlin case, (1968) 68 D.L.R. (2d) 384) are examples of this cooperation.

41. See below, p. 28.

42. The Transportation Board, R.S.Q. 1964, c. 228, s. 22, 25, 26, 27, 45 and the Quebec Liquor Board, R.S.Q. 1964, c. 44, s. 7, 76 have the power to make their own standards for the issuance of licences by statutory regulations.

43. S.Q. 1951, c. 20, as amended. Office Consolidation, an Act to Promote Conciliation between Lessees and Property-Owners, S.Q. 1951, c. 20 as amended. Office Consolidation 1971, s.11.

44. In Quebec, nearly 500 new statutory regulations are adopted annually, representing about 3000 pages in the Quebec Official Gazette. The recent consolidation of all statutory regulations, having the force of law, comprised 950 regulations covering 8000 pages of text.

45. The workload of the Superior Courts in Quebec paralleled the growth of government bureaucracy. There was an increase in the number of prerogative writs issued to supervise and control government agencies by those courts, from 8,268 per average year during the period between 1891-1895, to 11,735 on the average between 1906-1919. The percentage of contested cases constantly increased during these periods, thus contributing to the delay in legal adjudication. The number of writs issued and the number of contested cases has risen ever since, thereby necessitating regular increases in the number of Superior Court judges and staff. The most recent addition of judges to that court was in 1971 in Quebec. Statistical Year book (1914) King's Printer: Quebec, at p. 16.

46. See chapter II.

47. (1965) 51 D.L.R. (2d) 367, at p. 372.

48. Report of the Committee on Ministers' Powers, op.cit., p. 97. This was confirmed by the Report of the Committee on Administrative Tribunals and Enquiries, (The Franks Committee), Cmd., 218 (1957), Her Majesty's Stationary Office. London, 1965, at p. 9. This latter report concluded that tribunals are here to stay as they possess certain characteristics that give them advantages over the courts. Similar conclusions were drawn in the Report of Committee on the Organization of Government in Ontario. Queen's Printer: Toronto, September 1959. Also by the Ontario Royal Commission Inquiry into Civil Rights. Queen's Printer: Toronto, 1968, vol. I, p. 122. Also, by the Quebec Rapport du Groupe de Travail sur les Tribunaux Administratifs (Le Rapport Dussault) - Report to the Minister of Justice of Quebec, 1971.

49. R.S.Q. 1964, c. 159.

50. Reference Re Adoption Act (1938) S.C.R. 398.

51. A.G. Quebec v. Slanec and Grimstead et al., (1933) 2 D.L.R. 289.

52. Labor Relations Board v. John East Iron Works Ltd. (1948) 4 D.L.R. 673

53. However, the superior courts by virtue of S. 96 of the B.N.A. Act have resisted attempts to take away certain other matters over which they had jurisdiction before Confederation. See p.30 and following.

54. (1966) S.C.R. 282, at p. 292-293. Similar statements have been made in relation to other bodies exercising judicial powers. In Dupont et al v. Inglis (1958) 14 D.L.R. (2d) 417, at p. 22-23, Rand, J., declared: "To introduce into the regular courts with their more deliberate and formal procedures what has become summary routine in disputes... would create not only an anomalous feature of their jurisdiction but one of inconvenience both to their normal proceedings and to the expeditious accomplishment of the statute's purpose".

55. René Dussault, Les Tribunaux Administratifs au Québec. Rapport du Groupe de Travail sur les Tribunaux Administratifs. Ministère de Justice, 1971, at p. 170. The report of the Royal Commission Inquiry into Civil Rights, Queen's Printer: Toronto, 1968, Vol. I, at p. 28-29, presented a similar definition. "A power is administrative if, in the working of the decision, the paramount considerations are matters of policy. A power is primarily 'judicial' where the decision is to be arrived at in accordance with governing rules of law. At times administrative powers must be exercised by acting 'judicially'. That is, the decision, although administrative because it is arrived at on ground of policy, it is to be made after compliance with certain minimum standards of fair procedure, somewhat resembling judicial procedure... in these cases, the administrative power is termed 'quasi-judicial'".

56. The Workmen's Compensation Commission, by S. 59(4) of the enabling Act states: "The Commission shall render its decisions according to equity and upon the real merits and justice of the case, and shall not be bound to follow the ordinary rules of evidence in civil matters".

57. A.G. Quebec v. Slanec and Grimstead et al (1933) 2 D.L.R. 289.

58. R.S.Q. 1964, C. 159, S. 2(1) (o) (p), 3.

59. Ibid., S. 3(1).

60. Ibid., S. 3(1) (b).

61. Ibid., S. 89.

62. Ibid., S. 91 + 97. Other discretions are found in S. 77.

63. Ibid., S. 6.

64. A.V. Dicey, op.cit., at p. 189.

65. R.S.Q. 1964, C. 159, S. 59 (3). The Commission may, at any time, with respect to matters within its jurisdiction, reconsider any question decided by it, and rescind, amend or alter its decisions or orders.

66. R.S.Q. 1964, C. 159, S. 66, 77. S.66(1) states that the Commission "may make, amend or repeal such regulations as it may deem necessary to carry out the provisions of this act and to meet cases not specifically provided for therein".

67. R.S.Q. 1964, ch. 295, S. 88, 106, 111, 113.

68. R.S.Q. 1964, ch. 44, S. 42, modified by S.Q. 1965, ch. 19, S. 22. Now, the Liquor Permit Control Commission Act, S.Q. 1971, c. 19.

69. R.S.Q. 1964, ch. 44, S. 54, 55.

70. Op.cit., Office Consolidation, 1971, S. 27 (a).

71. Ibid., s. 20 (a).

72. Ibid., s. 25, ss. (a).

73. R.S.Q. 1964, c. 232, s. 21.

74. Ibid., s. 26, 29.

75. Report of the Royal Commission into Civil Rights. Queen's Printer: Toronto, 1968, vol. I, p. 2.

76. Scott v. Scott (1913) A.C. 417.

77. Report of the Committee on Administrative Tribunals and Enquiries. (The Franks Committee), Cmnd. 218, 1957. Her Majesty's Stationary office: London, 1915, p. 10.

78. S.Q. 1965, C. 24, S. 226.

79. R.S.Q. 1964, C. 159, S. 66, 77.

80. R.S.Q. 1964, C. 228, S. 22: "The Board, in matters within its authority and the limits of its powers, shall decide any questions submitted to it and may issue any ordinances which it deems expedient".

81. R.S.Q. 1964, C. 159, s. 66, 77.

82. S.Q. 1965, c. 24, s. 94; S.Q. 1969, c. 50, s. 2.

83. R.S.Q. 1964, c. 159, s. 59 (3) cited above at page 17 ff.

84. R.S.Q. 1964, c. 22, s. 28.

85. S.Q. 1969, c. 63, s. 27-29.

86. Pensions Board, S.Q. 1965, c. 24, s. 14.

87. R.S.Q. 1964, c. 12, s. 1.

88. R.S.Q. 1964, c. 228, s. 3.

89. R.S.Q. 1964, c. 159, s. 55 (2).

90. R.S.Q. 1964, c. 144.

91. "The Transportation Board may make such procedures and practice rules as it may deem useful for the expedition of the business submitted it". R.S.Q. 1964, c. 22, s. 45.

92. Board of Education v. Rice (1911) A.C. 179, at p. 181-182.

93. The Liquor Board has this duty: S. 63: "The Board, for cause, may refuse to renew a permit after giving the person concerned the opportunity to be heard".

94. It is explicitly stated that the Liquor Board must do so (s.7).

95. R.I. Cheffins, The Constitutional Process in Canada. McGraw-Hill Co., Toronto, 1969, at p. 83.

96. These are merely illustrations and this list does not purport to be exhaustive.

97. The Member of Parliament, although he has acted as a protector of the individual and has rectified some abuses, has become unsuited to the enormous task of providing redress for most grievances. It is partly because of this inadequacy that a 'Public Protector' was resorted to. See Chapter III.

98. Office Consolidation 1971, s. 17. The Workmen's Compensation Act R.S.Q. 1964, c. 159, s. 59(1) and the Liquor Act R.S.Q. 1964, c. 44, s.(83) are similar.

99. See footnote no. 19.

100. (1967) B.R. 814, at p. 819.

101. Articles 834-861 C.P. in the present code.

102. S.Q. 1965, c. 80.

103. Farrel et al v. Workmen's Compensation Board (1962) S.C.R. 48, at p. 51. See chapter II for a detailed examination of this subject.

104. (1918) 27 B.R. 1, at p. 7-8.

105. This proposition was upheld by the Supreme Court of Canada which cited with approval the opinion of Choquette, J., of the Quebec Court of Appeal in Agence Maritime Inc. v. Conseil Canadien des relations ouvrières et le syndicat internationale des marins canadiens (1968) B.R. 381, at p. 387, affirmed by (1969) S.C.R. 851.

106. (1969) S.C.R., at p. 615-616. See infra, p. 3.

107. Ibid., at p. 618, approved by Quebec Telephone v. Bell Telephone Company of Canada (1972) S.C.R. 182, at p. 190.

108. See above p. 5-6.

109. (1936) 4 D.L.R. 594, at p. 622.

110. Ibid., at p. 603.

111. The Privy Council affirmed the Canadian decision in the Independent Order of Foresters v. Board of Trustees of Lethbridge Northern Irrigation District et al (1938) 3 D.L.R. 89 (affirmed by (1940) A.C. 513, in which it was held, at p. 102 agreeing with the Ottawa Valley Power Company case, "that the consideration of the legislative capacity of Parliament or of the Legislatures cannot be withdrawn from the courts either by Parliament or Legislature. In my view this statement may rest upon the safe ground that by necessary implication from what has been said in the B.N.A. Act the Superior Courts whose independence is thereby assured, are just as surely made the arbiters of the constitutional validity of statutory enactments as Parliament and the Legislatures are made law enacting bodies... Parliament... (cannot deny) access to the courts for the determination of constitutional questions".) This proposition was subsequently affirmed by the highest judicial authority in this country. The Supreme Court of Canada, in B.C. Power Corporation v. Royal Trust Co. (1962) S.C.R. 642, held that the Supreme Court had the jurisdiction to determine the constitutional validity of legislation.

112. Sir Alfred Denning, "The Spirit of the British Constitution", (1951) 29 C.B.R. 1180, at p. 1182.

113. Rex v. Northumberland Compensation Appeal Tribunal Ex parte Shaw (1952) 1 K.B. 338, at p. 346.

114. (1939) A.C. 415.

115. (1955) S.C.R. 454.

116. (1967) S.C.R. 697.

117. Regina v. The Ontario Labor Relations Board, Ex parte Ontario Food Terminal Board (1963) 38, D.L.R. (2d) 530, at p. 532.

118. (1937) 3 D.L.R. 458.

119. (1932) A.C. 113.

120. (1939) A.C. 415.

121. (1948) 4 D.L.R. 673.

122. (1932) A.C. 113.

123. (1932) A.C. 113, at p. 119. However, the John East case restricted the scope of these two decisions.

124. (1939) A.C. 415, at p. 426.

125. (1967) A.C. 259. Although the decisions of the Privy Council are no longer authoritative in Canada, they carry substantial weight. Canadian courts often refer to British decisions in support of their arguments and judgements.

126. Ibid., p. 287-288.

127. Ibid., p. 291.

128. W.R. Lederman, "The Independence of the Judiciary", (1956) 34 C.B.R. 769 and 1139, at p. 1172.

129. Ibid., at p. 1174.

130. (1899) 15 C.S. 504.

131. (1968) 67 D.L.R. (2d) 694, at p. 702.

132. R. ex. rel. Davies v. McDougall Construction Co. Ltd. (1930)1 D.L.R. 621, at p. 624, per Harvey, C.J.A.

133. (1953) 2 S.CR. 18, at p. 38.

134. In Quebec Telephone v. The Bell Telephone Co. et al (1972) S.C.R. 182, Pigeon, J., stated at p. 191-192: "In no case has such a provision (the privative clause) been considered as depriving a Superior Court of the jurisdiction to hear a case in which the extent of the jurisdiction of a board or the effects of its decisions is in question. On the contrary, such provisions have always been construed as preserving to

the Superior Courts the jurisdiction to determine the scope of the authority of the board that made the decision and this determination has always been made on the merits".

135. (1670) 86 E.R. 47, at p. 47-48.

136. (1911) K.B. 10, at p. 423.

137. (1969) 2 W.L.R. 163, at p. 169. Moreover, the rule of law has been further protected when the British Parliament recently enacted a statute, Tribunals and Enquiries Act (1971), S. 14, providing that any provision in any act passed before August 1958, which excludes any of the powers of the High Court (a Superior Court), does not have the effect so as to prevent that court from exercising its powers of judicial review. As a result of the Franks Committee Report recommendation, Parliament has besides refrained from including such provisions in statutes since 1958.

The removal of privative clauses has permitted British courts to review all administrative action, whether illegal within or in excess of its jurisdiction. Consequently, the rule of law in Great Britain has preserved its essential characteristics over a period of seven centuries and individual access to a court of law to test alleged administrative illegality has been guaranteed by legislative enactment.

Similar developments have occurred in Canada in the federal jurisdiction. By the enactment of the Federal Court Act, S.C. 1970-1, c. 1, the federal Parliament has implied that privative clauses shall henceforth be eliminated. Section 28 of the Act introduced a novel method of judicial review apart from the prerogative writs. The application to review is the form of proceeding created to review federal administrative action by the Federal Court of Appeal. Section 28 has permitted that court to review and set aside a decision or order made by a federal statutory body if it erred in law, whether or not the error appears on the face of the record. This provision has produced the same effect as the British legislation, as that court can review any administrative illegality, even illegality within jurisdiction.

The Quebec legislature, however, has not thought fit to pass similar legislation guaranteeing the review function of Quebec Superior Courts.

138. Gerald E. Le Dain, op. cit. note 8, at p. 827.

CHAPTER II - THE COURTS AS PROTECTORS OF THE PUBLIC IN QUEBEC

The individual aggrieved by an administrative decision may opt for assistance and seek rectification of prejudice in the judicial arena. In order to avail himself of this recourse, however, his complaint must be one with which the courts can appropriately be seized; there must be a justiciable matter in issue, that is, some administrative excess or illegality must have been committed, and it must be sufficiently flagrant to warrant judicial interference. Moreover, it must fall within a narrow range of matters which the courts have declared to be within the scope of their supervisory competence. If the complaint fulfills these requirements, the individual, prior to the institution of the action, must decide whether the matter of which he complains is of sufficient importance to justify the involvement not only of his time but also of his financial resources which would be required to see the matter through until the final judgement. When this decision has been reached in the affirmative, the complainant must then choose the proper judicial remedy with which to institute the action in order that the judiciary may be seized of the matter. This is the crucial choice, for the adoption of the wrong remedy has at times led to the dismissal of the action notwithstanding the ease with which the declaration instituting the action can in most circumstances be amended. (1)

This chapter begins by an examination of the various procedural recourses open to the individual seeking to impugn an administrative action. The advantages and disadvantages of each are considered, and their objects are compared. Then, the substantive aspects of administrative law, that is, the type of conflicts that oppose the individual against the administration which the judiciary is competent to resolve, and the extent to which the powers of administrative authorities can be controlled, are examined. Finally, certain other drawbacks particularly characteristic of the legal arena are considered.

A- PROCEDURAL ASPECTS OF JUDICIAL REVIEW

1. The Action in Damages: The Liability of Public Officials.

The rights of individuals in Quebec are protected in part by the right to an action in damages against anyone, whether private citizen or public officer, who causes damage to another by his negligence or fault. The public

agent must act within the limits of legality, that is, he must justify his activity in the law or in the regulations made pursuant to statutes. If he causes damage while acting beyond the exercise of his functions or by abusing the powers conferred on him, he can be held personally liable for damages caused, and the extent of fault and damages, as well as the compensation, is determined by article 1053 and following of the Civil Code of the Province of Quebec. "Within the ambit of article 1053 comes also the general rule and a very important one, that an act of a public officer exceeding his powers, or a faulty act within his powers, creates a liability to repair the consequent damage". (2)

The celebrated case of Roncarelli v. Duplessis (3) illustrates this principle. Premier Duplessis ordered Mr. Archambault, the head of the Quebec Liquor Commission to revoke Mr. Roncarelli's liquor licence because of his assistance to members of the Jehovah's Witnesses. In a press statement (4), the Premier assumed the responsibility for the cancellation, an action which was intended to punish Mr. Roncarelli and to terminate his activities on behalf of that religious society.

The restaurant which was owned by Mr. Roncarelli had been continuously licenced for the sale of liquor for 34 years. Then, in 1946, that licence was revoked, and it was declared by the Premier and echoed by the Commission that Mr. Roncarelli was "forever" barred from receiving another. Without the permit, the restaurant soon lost its clientele and eventually the doors were closed. Mr. Roncarelli sued Mr. Duplessis in his personal capacity for $118,741.00 in damages for having, without legal justification and by his fault, gone beyond the limits of his powers. (5) It was alleged that his action could not be justified by any law or regulation, and that the Premier had employed his position to arbitrarily order the revocation of the liquor licence.

The Supreme Court of Canada, by a majority, found that Mr. Roncarelli's action should succeed. Rand, J., stated that "the act of the respondent through the instrumentality of the Commission... was a gross abuse of legal powers expressly intended to punish him for an act wholly irrelevant to the statute... Whatever may be the immunity of the Commission or its members from an action for damages, there is none in the respondent. He was under no duty

in relation to the appellant and his act was an intrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability ... under article 1053 of the Civil Code. That, in the presence of expanding administrative regulation of economic activity, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of the disintegration of the rule of law as a fundamental postulate of our constitutional structure". (6) Accordingly, the court allowed the appeal and Mr. Roncarelli was awarded the wholly inadequate sum of $33,123.53 with interest and costs for the prejudice he suffered.

Although it is possible, as was illustrated by this judgement, to sue a public officer who causes damage by acting in bad faith or by abusing the powers conferred upon him (7), it is upon the person prejudiced by such action that the burden lies of making it appear that a virtual abuse of power had been committed. The plaintiff, in legal proceedings of this type has the difficult task of adducing some evidence to destroy the presumption of good faith in article 2202 C.C. This onus is a heavy one to discharge, for as in all proceedings undertaken to contest administrative actions, the injured party is often faced not only with the impossibility of requiring that authorities give reasons for their decisions (8), but also of securing the production of documents and of compelling witnesses to appear in court. Therefore, since few public officers are as accomodating as Mr. Duplessis was in openly avowing the reasons for his actions, it may be futile to sue an official for the damage he has caused. Besides, more frequently than not the official who is sued would rarely have sufficient assets to satisfy a judgement awarding damages.

The suit of an individual against a government body or official whose action he disputes is likely to be doomed to failure if sufficient material is not made available upon which an action can be based. The right to compel witnesses to disclose information and to force the production of documents by virtue of article 308 C.P. is far from absolute, however. That article can

exempt public officers from testifying in a judicial inquiry if "in the opinion of the minister or deputy-minister to whom the witness is answerable... the disclosure would be contrary to public order". Although the judge has some discretion in the matter, it is obvious that an adverse decision on the part of the latter could render the burden of establishing illegality and actionable damages difficult if not impossible for the plaintiff to discharge. And, it is common ground that although the courts possess the power to weigh the conflicting interests in issue, the public interest and the interests of justice, and to overrule a ministerial objection, only in exceptional circumstances will they exercise their power to order witnesses to testify and to produce the required documents. (9) Accordingly, the litigant can never be assured of the court's stand on the matter, notwithstanding its importance to the success of the action.

The action in damages suffers from further drawbacks. The individual instituting such a suit against public officials must overcome a variety of immunities and privileges with respect to the extent of their liabilities. Due to the special nature of their functions, the state has imposed special prerequisite procedures before admitting a recourse against various categories of civil servants. For example, recourse against public servants applying the Liquor Licence Act (10), by section 14, must be initiated "within six months of the date of the damages". The Liquor Board Act (11) provides that authorization from the Chief Justice of the Province is necessary to sue a commissioner applying the Act. Such procedural requirements, contained in numerous other statutes emanating from the Quebec legislature, restrict the right of the private individual from instituting legal proceeding for damages caused to them.

Moreover, officers of the Quebec government and administration have by law been granted certain immunities from suit. Members of the National Assembly possess an absolute privilege and cannot be sued for damages caused in their official capacity in the legislature (12). Like judges of the superior courts, justices of the peace and other inferior court judges are not responsible for acts done by virtue of an unconstitutional law (13). The latter and commissioners appointed pursuant to the Investigation Commissioners Act (14) have the same immunity as a Superior Court judge, that is, an absolute immunity

from suit for damages caused in their official capacity. The same applies to officers appointed by virtue of the Workmen's Compensation Act (15).

Otherwise, public servants who act in a quasi-judicial or judicial capacity possess an immunity that is limited to official acts done "in good faith" in the exercise of their functions. (16) In such a case, if the plaintiff institutes an action seeking the annulment of the act as well as damages from the wrongdoer, he will succeed only in the former. In Hlookoff v. City of Vancouver, it was affirmed "the authorities make it clear that a person exercising a judicial or quasi-judicial power is not, in the absence of fraud, collusion or malice, liable to any civil action at the suit of a person aggrieved by his decision". In this case, a licence inspector, acting judicially, refused to give the plaintiff an opportunity to be heard, and as is usually the case in actions involving breaches of the rules of natural justice, the suspension of the licence was declared null and void. However, because neither fraud, collusion nor malice was proved on the balance of probabilities, the court concluded that the officer was not liable for the damages that were caused because he had acted honestly and in good faith, even if he had acted wrongly. (17)

A further barrier to be overcome by an individual seeking to rectify an injustice in the courts is article 100 C.P. This article operates to protect Crown officials and exonerate them from civil responsibility in certain cases. It is a privative clause of sorts, purporting to limit and even bar the supervisory power of the courts over public authorities. Since, however, this article replaced the former articles 87(a) and 88 C.P., the latter of which was clearly delimited by authoritative jurisprudence, it can be argued that the scope of article 100 is to be confined to the juridical construction placed upon its predecessor. In both Chaput v. Romain and A.G. Quebec (18) and Roncarelli v. Duplessis (19) the public officials whose actions were attacked sought to avail themselves of the protection offered by the one month's notice of action as required by article 88 C.P. In both judgements, the Supreme Court found that the article did not afford any protection for illegal activities, since it could never be a substantive defence to a delict and could not relieve the wrongdoers from liability under article 1053 of the Civil Code. Article 88 C.P., it was held, was available only if the public

officers had acted in good faith and in the performance of their duties, and that was not the case with the officers involved. It may be presumed, accordingly, and the courts are likely to so interpret on the basis of their previous decisions, that by wording article 100 as enacted, it was the intention of the legislature to preclude public officials from acting in "bad faith" and from exceeding their lawful authority with impunity. However, since bad faith must be established, this article may yet operate as a bar to successful litigation if that essential ingredient is not proved to the satisfaction of the judge. (20)

a) Vicarious Liability of the Crown

In addition to the obstacles that must be overcome by the individual commencing an action in damages for prejudice caused to him by administrative action, ultimate victory might be thwarted by the financial circumstances of the defendant. An award for damages cannot be recouped from an insolvent debtor. For this reason, individuals aggrieved by the action of government officials, have attempted, by analogy to the law relating to the vicarious liability of employers for the acts of their employees, to sue the official as an agent or servant of the Crown, thereby making the Crown vicariously answerable for the wrong caused by the servant.

In so far as the Crown is subject to the Civil Code concerning the responsibility of the master for the fault committed by his employees by article 1054(7), certain necessary elements must exist to entail vicarious liability. The plaintiff must have incurred damages; the master-servant relationship must exist between the Crown and the employee; there must have been fault on the part of the latter which caused damage; and that fault must have been committed by the employee while acting "in the exercise of his functions". The combination and presence of these elements render the Crown liable. (21)

The aggrieved individual can be precluded from having recourse to the vicarious liability of the Crown, since not every employee of the state can be considered to be in a master-servant relation with it. The question of who is a civil servant has been the issue in numerous actions. (22) It has been determined that there can be vicarious liability only when the master

can tell his servant not only what to do but how to do it. For example, no such relationship exists between the Crown and judges. None exists with police officers who have received no specific orders from superiors but are simply carrying out the provisions of the Criminal Code. (23) Such a result is disadvantageous both for the plaintiff, who would probably be precluded from recuperating damages by reason of the financial circumstances of the defendant, as well as for the official since he would lose the financial protection engendered when the reparation of damages caused is charged to the public treasury.

Once the Crown is held to be vicariously liable by reason of a determination that the official was an employee, no distinction can be made between the fault of the state and the personal fault of the agent. The fault of one does not exclude the fault of the other. Consequently, the civil servant personally and the Crown as employer become parties in the suit undertaken by the victim of the damages (24), and the latter, if successful, is compensated for the damages incurred. (25)

Vicarious liability of the Crown serves as an excellent means of securing administrative legality, for if the Crown must compensate the victim of the fault, it can thereupon institute a recursory action or an action in damages against the official at fault. (26) Penal sanctions can furthermore be levied against the officer (27) or disciplinary action can be taken within the civil service. These remedies undoubtedly act as a constraint against administrative excesses, and thus provide a necessary preliminary protection for the administered. Yet, the numerous qualifications that exist with respect to an action in damages in the courts against the individual official and against the Crown as employer render such an action fraught with uncertainties.

b) The Liability of the Crown.

The new Code of Civil Procedure has subjected the Crown to the rules of articles 1053 and 1054(1) of the Civil Code for damages caused by its own fault. Therefore, the Crown in right of Quebec may have to answer for damages which it caused personally as well as damages which were caused by the autonomous fault of things which it has under its guard. The state, like

every other person, has the obligation to act with prudence and diligence with regard to third parties. The liability of the Crown is based on fault, and fault can be imputed if it does not act in accordance with the law. "Public authorities (including the Crown) may do nothing but what they are authorized to do by some rule of common law or statute". (28) The illegality of the act becomes the fault engendering liability. Therefore, if damages are caused, the individual has a recourse not only to have the act annulled, but also to receive compensation. (29)

On the other hand, where an agent of the Crown has a discretion by law to act, the omission to do so, even if damageable does not entail liability. Moreover, damage can be caused by actions authorized by law and the just exercise of powers conferred by law which causes damage, does not constitute fault. In numerous cases, in addition, the liability of the Crown has been completely excluded. For instance, the Crown is not responsible for damage to shock-absorbers of cars under the Highway Code.(30) By virtue of section 97, the Minister of Roads is not responsible when a contractor has been given a contract to build a road, or when work is done on a road and loss or diminution of private property ensues. The Public Works Act (31) and other statutes contain similar provisions. These considerations can preclude individuals from having any success by instituting actions against the Crown in the courts.

The state has not only administrative but also legislative functions. While the legislature and its members cannot be held responsible for damage caused by the laws that are enacted (32), the power of regulation granted to various administrative authorities can be challenged and held ultra vires by the courts. The adoption of regulations by municipal councillors when these regulations have exceeded the powers conferred by statute, for example, has been actionable. (33) In general, the remedy most appropriate to quash ultra vires regulations and by-laws is the action in nullity provided by article 33 C.P. Although such an action may be joined with an action in damages, bad faith must be present to succeed in the latter. As has been mentioned above, bad faith is difficult to prove and the meager success rate of such actions is authority for this assertion.

2. JUDICIAL REVIEW AND ITS PROCEEDINGS.

a) The Prerogative Writs.

The individual who is aggrieved by governmental action rarely undertakes legal proceedings with the sole object of obtaining damages for the harm caused to him. Most complaints dealing with such action are not susceptible of being resolved by means of an action in damages, unless of course, the complainant can prove bad faith tantamount almost to malice and is able to overcome the numerous other obstacles in the way of a successful damage suit against the government and its officials. Rather, by petitioning the judiciary for assistance, he endeavours most frequently to eliminate the prejudice caused to him, either by having some administrative action quashed or declared null and of no effect, or by compelling the wrongdoer to perform his statutory duty. Accordingly, by resorting to legal proceedings he invokes the judiciary's inherent power of supervision over the governmental bureaucracy.

Article 33 of the Code of Civil Procedure is the basis upon which rests the jurisdiction of the superior court to review administrative action. If the argument presented above is correct, this superintending power of the superior court is an inherent power that predates Confederation and article 33 C.P. is but the codification of that power. It is by reason of that article: "Excepting the Court of Appeal, the courts within the jurisdiction of the Legislature of Quebec, and bodies politic and corporate within the Province are subject to the superintending and reforming power of the Superior Court..." that the superior courts have reviewed inferior bodies at the instance of aggrieved members of the public by means of the various procedural writs and other remedies at their disposal.

Historically, the courts have exercised their power of supervision over inferior tribunals by means of the prerogative writs. The writs of "certiorari" and "prohibition" have been joined into a single form of procedure termed "evocation" by article 846 of the new Code of Civil Procedure. Article 846 enables the superior court, at the demand of litigants to "evoke before judgement a case pending before a court subject to its superintending and reforming power or revise a judgement already rendered by such court, in the following

cases: 1. when there is want or excess of jurisdiction; 2. when the enactment upon which the proceedings have been based or the judgement rendered is null or of no effect; 3. when the proceedings are affected by some gross irregularity, and there is reason to believe that justice has not been, and will not be done (34); 4. when there has been a violation of the law or an abuse of authority amounting to fraud or of such a nature as to cause a flagrant injustice. However, in the cases provided in paragraphs 2, 3 and 4 above, the remedy lies only if, in the particular case, the judgements of the court seized with the proceedings are not susceptible of appeal. Besides this drawback, because evocation is identical to the two writs it replaced (35), it suffers from the same defects, thus making it an unsuitable proceeding by which to review administrative action in certain circumstances.

On the authority of Fekete v. The Royal Institution for the Advancement of Learning, (36) the prerogative writs of certiorari and prohibition and therefore evocation will lie only against a tribunal that is established by statute. Moreover, this writ will lie only to quash proceedings, acts or orders of administrative bodies exercising judicial or quasi-judicial functions. A purely administrative act is not susceptible of review by evocation. In Giese v. Williston (37), Rutlan, J., affirmed that "the minister's function was administrative and not judicial or quasi-judicial and his decisions are therefore not reviewable by certiorari." In Ville de St-Léonard v. La Commission municipale de Québec et autres, (38) the court felt itself bound by the Supreme Court Case of Guay v. Lafleur (39), and consequently refused to issue evocation because the Commission was only holding an inquiry, which was a purely administrative function.

In comparing the prerogative writ of certiorari, or evocation as it is now called in Quebec, to the declaratory action, D.T. Warren enumerated the disadvantages of the former: "In an application for certiorari, the plaintiff may not ask for other relief, examine for discovery, request a decision on the merits, proceed in some provinces after six months, request the quashing of a decision of a domestic tribunal, proceed unless the error of law appears on the face of the record, or proceed if the administrative agency is said to be exercising an administrative function". (40) Therefore, the

primary disadvantages of the prerogative writs and evocation are the technical limitations to which it is subjected. (41) On the other hand, perhaps their greatest advantage lies in the fact that suits commenced by evocation "must be heard and decided by preference" by virtue of article 835 C.P. Any applicant seeking relief from any administrative abuse by way of any proceeding considered to be an ordinary action has to take his place among the multitude of other civil litigants awaiting their day in court.

The prerogative writ of mandamus has been codified in Quebec in article 844 C.P.: "Any person interested may apply to the court to obtain an order commanding a person to perform a duty or an act which is not of a purely private nature, more particularly..... when a public officer... a public body or a court subject to the superintending and reforming power of the Superior Court, omits, neglects or refuses to perform a duty belonging to such office, or an act which by law he is bound to perform...". de Smith aptly delimited the scope of mandamus: "Mandamus lies to secure the performance of a public duty, in the performance of which the applicant has a sufficient legal interest. The applicant must show that he has demanded performance of the duty and that performance has been refused by the authority obliged to discharge it. It is primarily a discretionary remedy, and the court will decline to award it if another legal remedy is equally beneficial, convenient and effective". (42) Moreover, the Supreme Court decided in R. v. Leong Ba Chai (43) that mandamus will not lie against the Crown because the courts do not issue commands to it. In that case, it was held that mandamus is available against an officer acting not as a servant and answerable only to the Crown, but solely as an officer designated by statute to fulfill a particular act. Because the officer refused to examine the plaintiff's application for admission into Canada and since there was no right of appeal to higher authorities, the court asserted that "the more convenient, beneficial and effective mode of redress, is by way of mandamus, as there is no other legal specific remedy for enforcing the applicant's right to a hearing before the Board and the Minister". (44)

Mandamus is generally invoked when an administrative body fails or refuses to render a decision or perform an act that is required by statute. (45) If no discretion to act has been conferred upon it, then mandamus can issue to order the performance of the duty the statute requires. (46) On the other

hand, if the body possesses a discretion to act and no duty is imposed by statute, mandamus does not lie. (47) However, the courts will award mandamus where a discretion conferred by statute is exercised for improper purposes, for wrong principles or for extraneous considerations. This was demonstrated in the case of Smith and Rhuland v. the Queen (48) and by reason of the dicta of Rand, J., in Roncarelli v. Duplessis (49) that "in public regulation of this sort there is no such thing as absolute and untrammelled 'discretion'...", mandamus lends itself as a possible recourse wherever an abuse of a discretion is involved.

For, where a statute confers a discretionary power to act and the authority refuses to do so for invalid reasons, it refuses to exercise its jurisdiction and "il est bien établi que, si un tribunal comme la Commission erre en droit dans l'interprétation du texte qui lui confère compétence, les tribunaux ordinaires doivent intervenir, et le mandamus et le recours approprié pour forcer le tribunal inférieur à exercer une compétence que la loi lui confère."(50) Mandamus will lie, therefore if jurisdiction is refused, if a duty is not done, and if a discretion is exercised illegally. But for mandamus to issue the court must be satisfied that these conditions exist so that the main difficulty faced by the individual with the requisite interest, who petitions the court for the writ, is evidentiary.

Judicial review of administrative action by way of the prerogative writs is fundamentally different from an ordinary action and an appeal. In its supervisory function, the court is asked to review and quash the findings of an inferior body and the basis for reviewing those decisions is the concept of jurisdiction. A recourse by the prerogative writs does not raise a "lis" between the parties. (51) Thus, the court is not concerned with the merits of a dispute between litigants, but with getting the record from the inferior tribunal brought before it to ascertain whether that body has acted within its jurisdiction. (52) Review by way of the prerogative writs, therefore, is based on the legality of proceedings, actions and decisions of the inferior authority. This control flows from the fact that Parliament has conferred various powers upon the Crown and government agencies, and the deliberations of these bodies are limited to the terms of the enabling legislation. Any action outside the scope intended by the statute becomes illegal

as made in excess of jurisdiction (53) and is therefore "ultra vires".

The courts employ their reviewing power and justify its use on the principle that all inferior bodies have been invested with only a limited jurisdiction by virtue of the delegation of the multitude of tasks by the legislature to them. The latter must confine their deliberations within the bounds legally entrusted to them by statute. Because it is within the scope of the courts to interpret valid legislation and enforce obedience to these legislative enactments, and because the legislature could not have intended to authorize its creatures to act and decide as they pleased, the judicial branch of government, by reason of its supervisory capacity has awarded the prerogative writs and has declared illegal or "ultra vires" any deviation exceeding the scope of those delegated powers.

However, in their supervisory capacity, the courts have restricted themselves to quashing only those decisions that have exceeded the jurisdiction conferred by the legislature. A body, acting within the scope of the powers delegated to it, is not subject to review by the courts. "The jurisdiction of a public agent is the only question that can be brought before the courts in an administrative matter, for the abusive, arbitrary or unjust exercise of administrative discretion if within its jurisdictional limits, is beyond judicial review". (54) It does not matter if the agency came to the right conclusion or not. The question of the correctness of an administrative decision can be reviewed only by an appeal if such a recourse has been granted by the legislators. Because the purposes served in an appeal and in judicial review are different, the courts, in their supervisory capacity, cannot sit as courts of appeal. (55)

b) Appeal

Where the legislature has seen fit to permit a court to reconsider a decision of an inferior jurisdiction on the merits, it has given the individual subjected to the decision a statutory right of appeal. An appeal, therefore, is simply another form of judicial review. Appeals may take the form of a trial or hearing "de novo", where the appellate tribunal starts afresh as if no initial decision existed. In this case, the appeal is taken against the entire decision of the inferior jurisdiction and it is reexamined

on the facts and on the law, and the appellate body may substitute its opinion for that of the inferior body. Such appeals "de novo" exist from administrative tribunals by virtue of express statutory provisions contained in the enabling enactments creating them. An appeal "de novo" also lies from the Superior Court and the Provincial Court to the Court of Appeal by virtue of article 26 of the Code of Civil Procedure, and from the latter to the Supreme Court of Canada. (56)

c) Judicial Review and Appeal Proceedings Compared:

The legislature in Quebec has sought, by virtue of the last paragraph of article 846 C.P., to impose a further limitation upon the writ of evocation by expressly prohibiting the availability of that recourse when an appeal from an administrative tribunal to some higher authority exists. This restriction, however, appears of small significance by reason of the exception contained in the same article, for evocation is possible in cases of want of jurisdiction notwithstanding the proviso. Moreover, there is room for argument as to whether the other three conditions for the application of evocation are simply particular forms or variations of jurisdictional faults. In any case, by the terms of that article, the person aggrieved by an administrative decision has the option of having recourse either to an appeal, if appeal provisions exist, or to evocation, in cases of excess of jurisdiction.

Prior to the enactment of the new Code of Civil Procedure, the authorities and the jurisprudence were divided as to whether an individual who had a right of appeal could alternatively seek a recourse by way of the court's supervisory and reforming power. In the case of L.R.B. v. Civic Parking Center Ltd., (57), it was decided that the individual had to exhaust his other remedies before recourse could be had to the prerogative writs. In the contrary vein, the case of W.C.B. v. Forbes, (58) in agreement with Regina v. Spalding, (59) maintained that the right of appeal did not have to be previously resorted to. In the latter case, it was decided that "the exercise of a right of appeal is merely another factor to be considered by the court in determining whether it should grant or withhold the writ... The importance to be attached to it will vary with the circumstances of each case". (60)

Most recently, after the enactment of the new Code of Procedure, the Quebec Court of Appeal, in Marois v. La Ville de Québec et La Régie des Services Publics, (61) resorted to verbal gymnastics by reason of the existence of the last paragraph of article 846 C.P. to evade the contention of the respondent that evocation was not the appropriate remedy because a right of appeal lay from the decisions of the Public Service Board. Notwithstanding that the appellant had framed his action under article 846(2) C.P., the court decided to maintain the proceedings in evocation by virtue of the first paragraph of that article in order to give the appellant the remedy he sought. In practice, therefore, though the legislature has sought to limit the remedy of evocation, the courts have interpreted the article so as to extend its scope, thus permitting an individual aggrieved by an administrative decision from which an appeal would lie, to alternatively seek to quash the decision by evocation.

It is because the courts have considered the provisions enacted by the legislature providing for appeals to higher administrative authorities (62) as insufficient, and because of the dubious effectiveness of such administrative appeals, that some courts have permitted a recourse to their superintending power by means of the prerogative writs. In the Spalding case, the issue was whether an appeal to the minister by virtue of the Immigration Act was an effective recourse for the person who was ordered deported by the Special Inquiry Immigration officer. O'Halloran, J.A., stated: "Examining s. 31 [of the Immigration Act], there is nothing to indicate that the 'appeal' to which it refers, is anything more than a documentary review of the proceedings by the Minister, in his own private office, in his own time, as part of his multifarious administrative and executive duties... In short the review by the minister is not an 'appeal' in the legal sense, but is only the exercise of an executive or political act." (63) Moreover, the Court maintained that because the conduct of the original decision-maker was not patently outrageous, the Minister might refuse to intervene and that such a likelihood was enhanced because "such a specialized officer would very likely have much more experience and knowledge in such matters than the Minister himself whose duties are multifarious and on much higher level". (64) Consequently it was decided that certiorari lay because the appeal to the Minister offered neither a convenient nor an adequate remedy for the injustice done to the respondent on the original

hearing. This interpretation, however, has not been unanimously accepted, so that evocation is subject to suspension at least until the final outcome of whatever appeal may have been granted by statute.

Evocation becomes subject to almost the same considerations as an appeal when the appeal is "by way of stated case". It is in such circumstances that the supervisory jurisdiction of the courts by means of the prerogative writs is most similar to the supervision afforded by an appeal. When only an appeal "by way of stated case" is permitted by statute, a statement of the point of law to be considered on appeal is made by the lower court with a statement of facts upon which it based its decision. (65) The argument in the appellate court is therefore confined to this and the court does not usually pronounce itself on the merits of the decision appealed from, that is, on the facts that led that body to take the view it did; the facts are generally accepted as correct. Therefore, it is because the courts on evocation proceedings refrain from judging the merits of an inferior decision, just as on an appeal on a point of law, that these two modes of court supervision are so closely analogous.

Although the courts are precluded from appreciating the facts on an appeal "by way of stated case" or in their supervisory capacity, they possess the discretion to determine what constitutes a "question of law", and its scope has, where necessary, been widened to encompass a variety of questions of fact. In Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue, Kellock, J., asserted (66): "While the construction of a statutory enactment is a question of law, and the question whether a particular matter or thing falls within the legal definition is a question of fact, nevertheless, if it appears to the appellate Court that the tribunal of fact had acted either without evidence or that no person properly instructed as to the law and acting judicially could have reached the particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination". Notwithstanding the capacity of the courts to interfere with determinations of fact, they have generally refrained from doing so unless these were manifestly wrong or without basis. In Ville de Saint-Hubert v. Ville de Longueuil, (67) it was held that when an appeal lies to the Court of Appeal from the quasi-judicial decisions of the Water Board, "un tribunal

d'appel n'interviendra pas dans ces décisions à moins d'une erreur de droit ou d'une erreur flagrante d'interprétation et d'application des faits équivalant à déni de justice, et dès lors, à erreur de droit".

Similarly, the courts have in exercising their supervisory authority, refrained from appreciating the merits of the decisions of inferior tribunals. If the latter acted within jurisdiction to reach a particular decision, a court cannot interfere since it is not sitting as a court of appeal. In R. v. Ludlow Ex parte Barnsley Corp. (68), the court maintained that if an inferior tribunal acted within its jurisdiction, absence of evidence does not affect the jurisdiction of the tribunal to try the case, nor does a misdirection by the tribunal to itself in considering the evidence, nor what might be held on appeal to be a wrong decision in point of law. None of these matters are grounds on which the court can grant certiorari. The reason is, of course, that, if Parliament has chosen to make the tribunal or body the absolute judge of certain matters, and to give no appeal, this court cannot interfere". Although this statement has been followed by Canadian courts as a general rule, (69) they have retained the power to determine what constitutes excess, denial, or want of jurisdiction. In Cahoon v. Le Conseil de la Corporation des Ingénieurs et autres (70), a decision of Deschenes, J., of the Quebec Court of Appeal, it was affirmed that the Conseil had refused to hear proof with respect to certain matters in issue in the case, which "constituait un élément de preuve nécessaire pour que l'appelant obtienne justice." (71). This omission was considered to constitute a gross irregularity and consequently, because justice was not done, the decision was quashed by virtue of article 846(3)C.P. The court maintained that "l'absence totale de preuve constitue un motif valable pour l'émission d'un bref d'évocation". (72) Absence of evidence, therefore, is an instance where the courts have interfered in their supervisory capacity notwithstanding that the inferior body's decision might be made within its jurisdiction, for the rendering of a decision without sufficient evidence has been assimilated to the rendering of a decision in excess of jurisidiction.

Although the general rule, that the courts will on evocation proceedings refrain from reviewing erroneous decisions in law or fact made within the jurisdiction of inferior tribunals, remains valid, the absence of evidence criterion has qualified that rule. Another exception to the rule is the power

of the courts to review errors that are within jurisdiction but are apparent on the face of the record of the administrative tribunal. Martland, J., in the Board of Industrial Relations of Alberta v. Stedelbauer Chevrolet Oldsmobile Ltd., held that the proceedings of the Board could be reviewed "not only on a question of jurisdiction, but in respect of an error of law on the face of the record. That certiorari would issue to quash the decision of a statutory administrative tribunal for an error of law on the face of the record, although the error did not go to jurisdiction was clearly stated..." (73) in the Northumberland case (74).

Notwithstanding that an appeal on a point of law includes the grounds on which the prerogative writs will issue (75), the main difference between an appeal by way of stated case and judicial review is that the latter procedure does not authorize a court to annul a decision that is within the inferior body's jurisdiction, unless there is error of law on the face of the record. (76) In other words, errors of law within jurisdiction cannot usually be assailed except by an appeal on a point of law, the more comprehensive of the two forms of proceedings. However, since such appeals rarely lie against administrative bodies, the complainant must rely on error of law on the face of the record to have decisions of bodies not subject to an appeal quashed. To be successful in such an action, administrative tribunals must have produced a sufficient record for an effective review (77), and this is the case also when provisions for appeal exist and are resorted to (78).

Because of the existence of the numerous bodies that are not required to give reasons for their decisions, what constitutes the record becomes a matter of some importance. This question was partly answered in the Northumberland case. Denning, L.J., stated: "I think the record must contain at least the document which initiates the proceedings (which gave the tribunal its jurisdiction); the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision". (79) This notion of what constitutes the record has in some instances been enlarged in order to afford the courts with a means to turn a review of an inferior decision into what might almost be termed an appeal on the merits. (80)

Even bodies not required to give reasons for decisions have had their determinations quashed notwithstanding that the courts could not conclude that an error was responsible for the determination because no reasons appeared on the record. In Wrights' Canadian Ropes Ltd. v. The Minister of Revenue (81), the Judicial Committee of the Privy Council confirmed the Supreme Court of Canada and concluded, that despite the fact that the Act did not compel the Minister to state his reasons for disallowing items as deductible expenses from income tax, "this does not necessarily mean that the Minister by keeping silence can defeat the taxpayer's appeal. To hold otherwise would mean that the Minister could in every case... render the right of appeal given by the statute completely nugatory. The court is... always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the Court insufficient in law to support it the determination cannot stand. In such a case the determination can only have been an arbitrary one. If, on the other hand, there is in the facts shown to have been before the Minister sufficient material to support his determination the Court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion". (82) In this case, the decision of the minister was considered to be purely arbitrary and consequently disallowed. More recently, in Padfield v. Minister of Agriculture (83), a case where a mandamus was sought against a determination of the Minister, Lord Upjohn affirmed that if the Minister "does not give any reasons for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and directing a prerogative order to issue accordingly." Notwithstanding these decisions, in Stiffel v. Cité de Montréal (84), another case where a mandamus was sought against the Chief of Police for refusing to accord a permit for a billiard hall, Galipeault, J., observed that the enactment entrusting the police chief with the power to accord permits at his discretion did not compel him to give reasons for refusal. Therefore, he concluded, "Le Chef de police n'était certainement pas tenu de donner des raisons pour lesquelles il opposait un refus à la requête du demander,"(85) and he maintained the refusal despite the injustice that was caused to the plaintiff who had sought the permit in good faith and in accordance with the requirements laid down by

the city.

Due to the uncertainties that surround both the appellate and supervisory recourses available to the individual, he can never be assured of ultimate success until the last court of appeal has pronounced itself on the numerous issues that underlie these two mechanisms for the redress of grievances. The individual must carefully choose the proceeding to which he has recourse and even the proper choice is no assurance that his action will succeed, for he must contend with the judicial propensity to decide the merits and the subsidiary matters by the application of precedent, and this concern invariably produces incertitude as to result by reason of the conflicting views expressed by the earlier jurisprudence.

d) Homologation

A procedure, almost in the nature of an appeal, though really an exercise by the superior court of its right of supervision and reform as contained in article 33 C.P., is that of homologation. It is in substance a procedure that enables administrative tribunals to have their judgements executed by some binding legal authority. (86) At times, however, the superior court, though not ostensibly concerned with the merits of an inferior decision, can by means of homologation, verify the legality and even the correctness of the decision sought to be homologated. For example, in Dame Bouvier et un autre v. Procureur Général de Québec (87), the Public Service Board made an order with respect to the indemnity to be paid for an expropriated property. This order was homologated by the Superior Court. The expropriated party appealed to the Court of Appeal from the decision homologating that order. It was held that the Board had erred on the merits since it had accepted the evaluation given by its own expert without discussion.

Generally, however, the courts have disguised their interferences with the merits of the decisions of subordinate agencies by basing the interventions on the principle of excess of jurisdiction. In La Commission Scolaire Régionale le Boyer v. Dame Tremblay (88), Lajoie, J., declared: "Notre rôle, comme tribunal d'appel, n'est pas de substituer notre opinion à celle des régisseurs mais de n'intervenir que si ceux-ci ont commis une erreur de droit, ont rendu une décision qui ne pouvait être raisonnablement supporté par la

preuve, ou commis une erreur manifeste dans l'appréciation de celle-ci ou des conclusions à en tirer". (89)

On other occasions, although the courts have refused to permit the homologation procedure to be employed as a means of interfering with the merits of inferior decisions, they have permitted recourse to evocation to quash decisions made in excess of jurisdiction. Lajoie, J., in Commission des Accidents du Travail v. Commission de Transport de la Communauté Urbaine de Montréal et Martineau (90), decided that the respondent did not have to wait until the homologation of the Commission's decision by a superior court to state its objections. The court permitted the respondent to proceed immediately by evocation to test the decision of the administrative tribunal.

e) Declaratory Action.

Turning now to other proceedings (91) that individuals can avail themselves of to invalidate and quash prejudicial administrative actions, the declaratory action has been employed with some success not only to hold regulations invalid (92), but more generally, in cases of administrative (93) illegality, as an alternative to the issuance of the prerogative writs. The declaratory judgement, contained in article 453 and following of the Quebec Code of Procedure, is an ordinary remedy whereby the courts declare finally the rights and duties of litigants. It is a procedure by which the aggrieved individual petitions the court to make an order declaratory of the rights of the parties or declares what the law is on a particular point, as where a public official threatens to do something which is believed to be illegal.(94)

Although the declaratory order was resorted to by aggrieved parties because of its freedom from the technical limitations of the prerogative writs (95), Quebec courts proceeded to limit the scope of that remedy, and in contrast to decisions in other provinces, it was decided that an action in damages could not accompany a declaratory judgement. (96) In addition, actions instituted by that proceeding have been dismissed for lack of "locus standi", a special interest on the part of the plaintiff in having a particular question determined. It has been refused by reason of an overly strict adherence to the rule that this recourse will be granted only when no other equally effective remedy exists.

In Laflamme v. Drouin (97), Rivard, J., maintained that the recourse was purely of a preventive nature. "Its use was predicated on a real difficulty, a litigious question, a peril present or future, and one for which the Code of Civil Procedure had no other effective recourse that is as appropriate or as direct". In this case, the appellant tried, by means of the declaratory judgement, to have determined whether the Director of the Motor Vehicles Bureau had the right to suspend his driving licence, this, notwithstanding the availability of a right of appeal which he did not make use of. The remedy was further circumscribed in this case by a determination that a petition for a declaratory judgement could not be substituted for a right of appeal.

The jurisprudence to date upon articles 453 and following of the Code of Civil Procedure has not been encouraging for individuals seeking an alternative to the prerogative writs and the other techniques for invalidating administrative illegality. The technical advantages of the declaratory action have been obliterated by formalities of a different sort and the reduction of the scope of this recourse by judicial interpretation has precluded more frequent resort to it on the part of aggrieved persons searching for justice in the legal forum.

f) The Direct Action in Nullity.

Although the use of the declaratory judgement is subject to numerous limitations in the province of Quebec, the existence of the direct action in nullity by virtue of article 33 C.P. has more than made up for the deficiency. Notwithstanding that article 33 C.P. is but a codification of the inherent supervisory power of the superior courts over inferior tribunals and declaratory of this principle, a direct action in nullity has been created by the jurisprudence as an alternative to the issuance of the prerogative writs to annul illegal acts and decisions of administrative bodies. (98) The case of L'Alliance des Professeurs Catholiques de Montréal v. The L.B.R. (Quebec), (99) authoritatively decided that the direct action in nullity has an existence independent of the prerogative writs. Moreover, both remedies could alternatively be joined in one action. (100) In Canadian Copper Refineries Ltd. v. L.B.R. (Quebec), (101) it was declared that where a privative clause prohibited recourse to the prerogative writs, the latter "ne sont pas les seules formes... sous lesquelles le justiciable peut faire appel au pouvoir

de contrôle et de redressement de la Cour Supérieure. Dans le cas d'excès de pouvoir, d'excès de juridiction ou dans le cas de fraude, la Cour Suprême du Canada a reconnu plus d'une fois le recours de l'action directe".

This form of recourse is advantageous in that it is not dependent, as is evocation, upon the character of the body, the actions of which are in issue. Evocation can be resorted to only if the actions called into question are those of a statutory body.(102) In Fekete v. The Royal Institution for the Advancement of Learning (McGill University)(103) the plaintiff sought by evocation to preclude the Committee on Student Discipline from conducting a hearing of certain charges against him. The issue was whether this Committee was a court as contemplated by article 846 C.P., the section on evocation. Brossard, J., agreed with the Superior Court that it was not a statutory board so that only the direct action lay against it. "The Superior Court, by virtue of article 33 C.P., has a superintending and reforming power not only over the courts within the jurisdiction of the legislature of Quebec, but also over bodies politic and corporate. Article 846, however, does not say that the Superior Court can evoke before judgement a case pending before bodies politic and corporate, but only a case pending before a court subject to its superintending and reforming power. If the legislature had intended to subject bodies politic and corporate to evocation on decisions to be made by them in contested matters, it would have said so clearly... The words "the Court" mentioned in article 846 can only mean a statutory court and not a court set up by a corporate body whether private or public". (104) In this case, therefore, the petitioner was unsuccessful because it was decided that no duty was imposed upon the University by the statute to establish such a Committee, thus barring the availability of the writ of evocation. And, although, a direct action would have been the proper remedy, a demand founded upon article 33 C.P. would have been premature.

In contrast to evocation, the availability of the direct action in nullity, like the declaratory judgement, does not depend upon whether the administrative act is administrative, judicial or quasi-judicial in nature. Another advantage of the direct action, unlike the declaration in this province, is that it can be accompanied by an action in damages. No other relief can be sought with a petition for evocation.

Notwithstanding that the direct action is considerably freer from technicalities than is evocation, the petitioner must frame his action carefully to avoid defeat on a procedural matter. Although the new Code of Civil Procedure has given considerable latitude to amend the writ and any pleadings before judgement, by virtue of articles 199 to 207 C.P., account must be taken of all formalities, technicalities and procedural questions, for otherwise a justified suit may be doomed to failure. After years of consistent interpretation by a long line of jurisprudence, the Quebec Court of Appeal broke with tradition in Séminaire St-François de Cap-Rouge v. Yacoarini et al (105). In this case, the plaintiff, who contended that he could proceed either by way of evocation or by direct action, opted for the latter to annul a decision alleged to be beyond the jurisdiction of a statutory board. Mr. Justice Casey imposed a new requirement prior to the institution of a direct action: "At one time one might have argued that the question of procedure - the use of the direct action rather than evocation - is a matter of little importance. Today that position is untenable. The introduction of the control provided by article 847 C.P. coupled with article 850 C.P. and sec. 122 of the Labor Code, clearly disclose the intention that matters that necessarily obstruct the administrative process should be disposed of as speedily as possible. This leaves no choice. Before one may ask the Superior Court to intervene one must convince a judge of that court that 'the facts alleged justify the conclusions sought'. Since this permission was neither obtained nor sought the case comes within article 165 C.P. and, in my opinion, the action was properly dismissed". (106) In this case, therefore, not only was a limitation imposed on the availability of the direct action, thus bringing it more in line with the procedural technicalities of the writ of evocation, but a procedural nicety precluded the aggrieved litigant from the determination of the substantive issue. It is this preoccupation of the courts with procedural matters that has prevented the courts in many cases from dealing adequately with administrative illegality. It has brought uncertainty into the law and has dealt a severe blow to the traditional role of the courts as protectors of the individual from administrative abuse.

g) Conclusion

The predominant deficiency of all these recourses is the extremely technical nature of their availability. "It may be deduced that anyone feeling himself aggrieved by an act of the Administration now has a number of courses open to him, though each individual remedy is hedged round with limitations and restrictions. (107) However, the various remedies that exist to supervise administrative activities are not always interchangeable. Notwithstanding that an action in law is taken before the courts to determine the substantive rights and obligations of the parties, the proceeding instituting the suit is decisive, for to get a hearing on the merits the correct remedy must be adopted. Otherwise, the action may be rejected by the court seized of the issue, even if it would have succeeded on the merits. (108) Therefore, despite the liberality of the new Code of Civil Procedure, as for example, in respect to amendments of the pleadings, the procedural skills and legal astuteness or the ineptitude of the lawyer representing the aggrieved party continues, in large measure, to determine the outcome of administrative law actions. As a consequence, the plurality of remedies and their extremely technical and complex requirements renders them inadequate to assist the individual searching for reparation in the judicial arena. Accordingly, by reason of their insufficiency in this respect, they do not afford an effective control over administrative authorities either.

B- SUBSTANTIVE ASPECTS OF JUDICIAL REVIEW

1. Excess of Jurisdiction

Turning now to the substantive implications of judicial review, it has been asserted in the last chapter that the judiciary possesses an inherent power to review the decisions of inferior tribunals notwithstanding privative provisions. (109) This judicial control has been based on the concept of jurisdiction, which consists of a determination of whether the purported exercise of a power by an administrative tribunal is authorized by the common law, by statute, or by regulations made by virtue of a statute. If the exercise of the power is not so authorized, it is "ultra vires" or "void". "The ultra vires rule is the comprehensive principle upon which all

judicial control of public authorities is founded". (110)

The judiciary disclaims to review the merits of administrative decisions. It is concerned only with the legality of those decisions and not with deficiencies which, for lack of a better word, have been called acts of maladministration. These include acts of government officials such as mistakes, acts of negligence causing undue delay and expense, inefficiency, improper conduct and behavior, harshness, high-handedness and unreasonableness. Complaints of maladministration were the subject of an inquiry by the Whyatt Report which defined them as: "Complaints of official misconduct in the sense that the administrative authority responsible for the act or decision complained of has failed to observe proper standards of conduct and behavior when exercising his administrative powers. This may take a great variety of different forms. It may take the form of an abuse of power by an administrative authority as, for example, when a public official behaves oppressively towards a person who has been lawfully placed in his custody. Or it may happen that an administrative authority misuses its powers, for instance, a public official may show an unfair preference when allocating a government contract. Or again, official misconduct may cause loss or damage to a citizen through inefficiency, negligence or error on the part of the official handling his rights or interests. More rarely perhaps, official misconduct may consist in a decision so harsh and unreasonable as to offend a sense of justice. These are merely illustrations... [of] complaints that an administrative authority has failed to discharge the duties of its office in accordance with proper standards of administrative conduct. (111) This category of wrongdoing has never been susceptible of rectification in a court of law, for they are not usually considered to be defects of a legal nature, though they may be equally damaging to the individual in the final result.

The courts restrict their inquiry to the legality of the decision to ensure that it does not transgress the limits of jurisdiction. However, any error of law or fact committed within the jurisdiction conferred by statute upon an administrative tribunal is not susceptible of court review and this has become a general rule. (112) In other words, an incorrect decision in fact or law, or one that is arbitrary, abusive or unjust, or if the tribunal "is actuated by an improper purpose, takes into account an irrelevant

consideration, fails to take into account a relevant considerations, or exercises its powers unreasonably, [it] will be guilty only of an error within its jurisdiction" (113), and consequently not accountable to the judiciary.

One exception to this general rule exists, and that is error of law on the face of the record. Administrative illegalities like those mentioned above could be reviewed and declared ultra vires notwithstanding that they were committed within the jurisdiction of the tribunal, if those illegalities appeared on the record that was transmitted to the review court. By reason of the existence of this technique, the individual was able to obtain justice in the judicial arena for a wide variety of administrative defects encompassing those both within and without jurisdiction, and the courts proceeded to quash decisions made by administrative tribunals for even the most trivial defects, provided always that the record contained the necessary information for doing so. Justice was done to the individual but at the expense, it was said, of obstructing the administration of government policies, since this more detailed control of the wide variety of administrative irregularities that became subject to judicial review by the application of error of law on the face of the record had the effect of delaying and frustrating those policies. Accordingly, the legislatures proceeded to attempt to restrict judicial interference not only by enacting statutes conferring power on administrative agencies to make decisions in their respective fields without requiring them to keep a record of the proceedings, that is, the evidence and reasoning by which those decision-makers reached their decisions (114), but also by enacting privative provisions, hoping thereby to preclude judicial review at least for illegalities made within jurisdiction.

The legislatures were successful to the extent that the courts bowed to the legislative will in respect of defects appearing on the record and committed within jurisdiction. However, the judiciary has generally refused, as has been illustrated above, to heed privative clauses when decisions were made by inferior tribunals in excess of jurisdiction and without any evidence or reasons to support those decisions. (115) So far as error of law on the face of the record is concerned, therefore, it has been categorically determined that where errors of law or fact were committed within the jurisdiction

of a statutory body which was protected by a privative clause, judicial review was effectively restrained (116). The unfortunate effect of the settlement of the controversy was not only to restrict judicial control of the administration by reason of the propagation of privative clauses, but also to deprive the individual of a recourse to the judiciary in all cases where the alleged defect of an administrative decision was one within the competence of the deciding body.

Because the prevalence of statutes containing privative clauses has virtually debarred the judiciary from reviewing on the basis of error of law on the face of the record, the courts proceeded to expand the concept of jurisdiction to encompass a wide variety of errors falling within jurisdiction in order to counteract the effect of those clauses and so to retain some control over wrongdoing committed within the competence of administrative authorities. Where, for example, a statute purported to confer the power on a statutory body to decide solely all questions of fact and law, the judiciary was constrained to review errors committed within the jurisdiction indirectly, in instances where privative clauses precluded direct review. The foundation for such an indirect review was the principle that a body could not assume a jurisdiction that it was not given by the statute conferring it. Any error committed by an administrative tribunal in deciding a question of law or in determining the existence of certain facts or in following a compulsory procedure upon which its jurisdiction to resolve the main question depended, was considered by the courts to be an error upon a preliminary or collateral matter. Such errors were deemed to be outside their jurisdiction and therefore subject to review in spite of exclusionary provisions. (117)

A statute may confer an authority to act only on the condition that certain facts exist. Therefore, those facts must be present before the main matter in issue can be determined. In Bradley et al v. Canadian General Electric Co. Ltd. (118), Roach, J., affirmed: "When the jurisdiction of an inferior tribunal to decide what I will call the main question before it, depends upon a collateral matter it must, of course, decide that preliminary or collateral matter. It can decide only on the evidence. If there is no evidence then the existence of the facts on which the tribunal's jurisdiction depends, has not been established and the tribunal is without jurisdiction to

proceed further". (119) On the assumption that there is evidence and the tribunal makes a decision upon it, "The court will weigh the evidence on the collateral matter and decide whether the inferior tribunal's decision on it was right or wrong". (120)

Similar considerations apply to jurisdictional error of law. An administrative body whose competence depends upon a proper interpretation of the statute conferring that competence must interpret it correctly. In the case of Bexal v. City of Montreal (121), Lamont, J., affirmed: "It is now well settled law that where the jurisdiction of the judge of an inferior court depends upon the construction of a statute, he cannot give himself jurisdiction by misinterpreting the statute". (122)

Only a fine line, however, separates jurisdictional error from error of fact or law within jurisdiction particularly if the statute entrusted the authority with a jurisdiction that included the competence to determine preliminary facts as well as questions of law. Two recent Canadian decisions (123) sought to set down criteria to determine whether a matter was collateral or not. However, the criteria laid down were so general and of such wide application that it could almost be said that the courts are competent to intervene at their pleasure, whenever justice demands such interventions, by the simple method of categorizing any alleged error as jurisdictional. But, this exercise has created some measure of uncertainty, since the individual seeking to impugn an administrative decision can never be assured that the court seized of the issue will adopt that mechanism to quash the inferior body's determination. This uncertainty is illustrated by the numerous inconsistent decisions reached by the courts on the proper characterization of administrative error. (124)

The denial or refusal of jurisdiction also constitutes a jurisdictional defect. It occurs most frequently when an authority misinterprets its enabling statute so that the determination it arrives at amounts either to the refusal to act in accordance with the powers conferred by it or to the disregard of its statutory duties. In Association International des Commis du Détail v. Commission des Relations de Travail du Québec (125), a petition for certification was refused in spite of the fact that all conditions had been complied with by the appellant union. Consequently, it applied for a mandamus to

require the Commission to perform its duty. The Supreme Court declared that the latter was obliged to certify if all the requirements had been followed. Pigeon, J., affirmed: "the board's power of interpreting the statute by which it is governed does not go so far as to authorize it to decline to exercise its jurisdiction in disregard of its duties". (126) The allegation of denial or refusal of jurisdiction is most appropriate for the judicial review of administrative agencies concerned with the granting of licences and the like. When the latter are conferred the power to issue permits upon some specified criteria, in the absence of a discretionary power, the compliance with those criteria obliges them to exercise that power accordingly. Otherwise, the refusal becomes tantamount to jurisdictional error for which mandamus will lie despite privative provisions. (127)

A particularly wide view of the scope of jurisdiction was taken by the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission et al (128). Lord Reid asserted that even though a tribunal might have jurisdiction to entertain a particular question, its decision could nevertheless be quashed on jurisdictional principles. The grounds on which a tribunal might lose jurisdiction, in the opinion of the House of Lords were substantially those heretofore considered with some exceptions to be within jurisdiction and not reviewable by the judiciary. The practical effect of this judgement was that virtually any error of law might be regarded as jurisdictional. "It is difficult to envisage any recognised form of error which would not now fall within the category of jurisdictional errors. In the course of one or other of the judgements of the majority...almost every recognised form of abuse of power is expressly stated to render a judgement a nullity". (129) Unfortunately, this judgement of the House of Lords has not been followed in Canada to any extent, and Canadian courts have remained much more timid in expanding the scope of the ultra vires doctrine.

2. Natural Justice

The broad view of the concept of jurisdiction has procedural as well as substantive implications. Accordingly, where the enabling act conferring jurisdiction upon an administrative agency either expressly or by implication prescribes a particular procedure for the exercise of that jurisdiction, that procedure must be followed. Otherwise, the agency risks judicial interference

by the application of the ultra vires rule. These express or implied statutory procedural requirements have enabled a whole range of irregularities, generally considered to be within the competence of statutory bodies, to be reviewed and controlled by the courts on the ground of excess of jurisdiction. This is particularly the case with the procedural requirements referred to as the principles of natural justice. Choquette, J., in Quebec L.R.B. v. J. Pascal Hardware Co. Ltd. concluded: "Tout en ayant la compétence de juger une matière, il peut arriver qu'un tribunal perde ou excède sa juridiction au cours des procédures, en n'observant pas les conditions requises pour l'exercise de cette juridiction. C'est ainsi que la doctrine et la jurisprudence tiennent pour excès de juridiction la violation d'un principe fondamental de la justice naturelle. On considère que tout ce qui touche à l'essence de la justice touche à la juridiction elle-même". (130)

The concept of natural justice consists of "elementary and essential principles of fairness". (131) It refers to the principle that proceedings of administrative tribunals liable to affect the rights and interests of individuals must be conducted in such a manner as to assure that justice shall not only be done, but shall also be seen to be done. It is satisfied, first, by the principle that an adjudicator be disinterested, unbiased and not be a judge in his own cause (nemo judex in sua causa) and, second, that the parties to a dispute be given sufficient notice and the opportunity to be heard and to plead their respective cases (audi alteram partem). Consequently, the principles of natural justice consist of those fair procedures that any body, called upon to decide questions having a substantial impact upon the interests of individuals, should follow.

a) "Audi Alteram Partem"

The principle "audi alteram partem" has been codified in article 5 of the Quebec Code of Civil Procedure, and adherence to it is mandatory for the judiciary. The latter have attempted to impose similar compliance with this standard of justice on all administrative bodies whose activities are judicial and quasi-judicial in nature and whose decisions are liable to affect the rights and interests of the public. However, "there is no general law requiring executive power, that is, all officers, public corporations and other administrative agencies, to respect the elementary principles of natural

justice in their dealings with the citizens of Quebec" (132). Accordingly, the courts have been obliged to assure compliance with this principle on the part of government bodies by reference to the "hearing" provisions of their enabling statutes, and to quash as ultra vires any disregard of such explicit provisions. (133)

Because the majority of legislative creations, do not, however, require adherence to the "audi" rule, the courts have, at common law, sought to quash a determination made without hearing the interested parties on the ground that such a decision is no decision within the terms of the enabling statute, whether it provided for, or was silent with respect to, such provisions. In the case of Alliance des Professeurs Catholiques de Montréal v. La Commission des Relations Ouvrières (134), the Supreme Court of Canada read into the statute in question the requirement of making decisions in accordance with the principles of natural justice. It was affirmed: "that respect for the rule audi alteram partem was the implicit duty of everybody exercising judicial or quasi-judicial functions, and need not be expressly mentioned in the statute". (135) Lord Guest in Wiseman et al v. Borneman (136), agreed with the principle laid down in the Alliance judgement on the basis that "Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest... Parliament is not to be presumed to act unfairly". (137) On the other hand, the Supreme Court in Calgary Power Co. Ltd. et al v. Copithorne (138), maintained, although perhaps obiter, that the statute was expressly obliged to declare that the principles of natural justice were to apply. Moreover, in other judgements, notwithstanding unambiguous provisions requiring a hearing, the courts have refused to quash determinations not in accordance with those provisions because no real prejudice had occurred. (139)

One consideration that has figured in the judicial refusal to require compliance with the audi principle has as its foundation the necessity of administrative efficiency and expediency. The insistence on a hearing does not mean that proceedings should be conducted analogous to what takes place in a court room. The requisite procedural conduct of administrative officers determining questions affecting the rights and interests of individuals are that "they must act in good faith and fairly listen to both sides... But...

they are not bound to treat such questions as though it was a trial... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statements prejudicial to their view". (140) The case of Komo Construction Co. v. Commission des Relations de Travail du Québec (141) offers a prime example where a formal hearing was unnecessary in the opinion of the Supreme Court despite the explicit provisions of the Labour Code. Pigeon, J., asserted: "Il ne faut pas oublier que la Commission exerce sa juridiction dans une matière où généralement tout retard est susceptible de causer un préjudice grave et irrémédiable. Tout en maintenant le principe que les règles fondamentales de la justice doivent être respectées, il faut se garder d'imposer un code de procédure à un organisme que la loi a voulu rendre maître de sa procédure". (142)

In opposition to this jurisprudence, numerous judgements have refused to be bound by the low standard of administrative procedure that has been applied. They have sought to impose a strict compliance with the audi rules of procedure in the interests of justice and fairness for the person at the receiving end of an administrative decision, notwithstanding the harm likely to be caused to the administration of government policies by reason of the delays that might result. The judges rendering these decisions have been motivated by the principle that justice not only be done but be seen to be done. Accordingly, they have attached numerous procedural conditions for the proper exercise of the quasi-judicial jurisdiction of tribunals.

In order of priority, the courts have quashed decisions of inferior bodies where no notice of the issues that would be considered was given to the person interested in the determination to be made by the body invested with the administration of a particular policy. In Confederation Broadcasting (Ottawa) Ltd. v. Canadian Radio-Television Commission (143), the plaintiff applied for the renewal of his licence to operate. The Commission's refusal to renew the licence was based on the issue of financial and management control of the plaintiff company. The plaintiff had received no notification that this issue was to be considered by the Commission nor was he given an opportunity to meet the evidence accumulated against him. Spence, J., asserted: "It is quite plain that the requirements of natural justice demand that a

person have full and complete notice of the charges against him and an opportunity to reply thereto". (144) This statement of principle refers moreover to the requirement that before a valid decision can be made, the person affected must have been afforded with the opportunity to state his case. In Fairbairn v. Highway Traffic Board of Saskatchewan (145), the plaintiff was convicted of impaired driving, and as a result of the conviction, the Board revoked his licence for two months. The court felt that drastic consequences might result from such a revocation: "... Financial loss and in some cases, even the loss of employment. There are numerous vocations in which the use of a motor car is essential to the earning of a livelihood". (146) Consequently, Graham, J., concluded, "In my opinion where the revocation or suspension of a licence is under consideration, the person affected by the decision to be reached should be given the opportunity to appear before the Board and to be informed of the allegations with which he is faced and given an opportunity to reply thereto and to plead circumstances that might influence the Board in the exercise of the power which it proposes to exercise". (147) As a result of these procedural deficiencies, justice was not done and the order of the Board was quashed by the court.

Despite judgements of high authorities to the contrary, some decisions have ruled that the parties had a right not only to be heard but also to have an oral hearing and all that this implies - to be personally present, to be represented by counsel, to offer evidence, to produce witnesses, and even to cross-examine them. This broad interpretation of the audi rule has been espoused by the judgement in Toronto Newspaper Guild et al v. Globe Printing Co. (148). The Labour Relations Board was required by statute to accord a hearing, and in the process refused to permit a cross-examination by the advocate of one of the parties. The Supreme Court decided that a full and fair hearing could not be conducted in its absence, since that was the "only remaining means of knowing what the case of the appellant was". (149)

It can be concluded from the diverging jurisprudence on the issue of the contents of the audi alteram partem rule that the public is protected from denials of justice by the administration in the course of hearings or inquiries which might cause real prejudice only when review proceedings are taken before sympathetic judges. This protection becomes even less effective

when considerations regarding the type of administrative functions performed by statutory bodies are taken into account by the judiciary. There is unanimity only with respect to one category of functions; solely agencies discharging administrative functions of a judicial or quasi-judicial character have the obligation of respecting the basic principles of natural justice. This characterization has excluded numerous agencies from the application of these principles to the detriment of those individuals whose rights and interests have been affected by their decisions.

The basis upon which bodies exercising administrative functions have been excluded from the application of the rules of natural justice was a misunderstanding of a passage of Atkin, L.J., in Rex v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (150). His statement on the operation of the writs of certiorari and prohibition was extended to apply to natural justice. He asserted that courts could review "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially...". (151) This statement was interpreted to mean that the principle of natural justice had to be observed not when solely the rights of individuals were determined, but when the duty to act judicially was superimposed onto the first condition. In other words, to be obliged to observe the rule audi alteram partem, the decision-maker had to be exercising at least a quasi-judicial function, and therefore any decision of an administrative nature which nevertheless affected the rights of individuals did not have to comply with that obligation.

This interpretation has been the cause of numerous court judgements producing injustice to individuals by reason of the denial of natural justice in circumstances where the so-called administrative determination to be made was certain to prejudice rights and interests. The Supreme Court in the Coquitlam judgement decided that the Minister was exercising a discretionary administrative function in expropriating the plaintiff's property, and notwithstanding that proprietary interests were in issue, because the former was not acting judicially, neither notice nor hearing had to be given to the plaintiff (152). This very legal and technical characterization of functions as administrative has been interpreted by the courts to apply to all sorts of situations where administrative discretions exist, for example, in matter of penal and