The Individual and the Bureaucracy: Judicial Review — Do We Need It? *

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INTRODUCTION

The word "bureaucracy" often carries negative connotations in common parlance. Yet when a new problem arises in our complex society, the citizen almost invariably looks to government for the passage of legislation to deal with the difficulty. The public seemingly desires, or at least tolerates, increased public intervention in private lives as the price for coping with the exigencies of the day. Effective implementation of legislation, however, requires some kind of administration. One perceives a certain duality of attitude toward the administrative apparatus of government — a reliance on the benefits, but a mistrust of the possible abuses.

History has taught us to be wary of uncontrolled power, and in the common law world, courts have evolved over the centuries as the chief protector of the citizen from unauthorized or arbitrary administrative actions of government. This evolution was marked, some would say marred, by many of the haphazard traits of the common law in its pragmatic approach to individual cases, and has been greatly complicated by form and technicality.[1]

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* The third of four lectures in the 1972-73 Annual Lecture Series of the Osgoode Hall Law School, York University. A related lecture, the second in the series, by Professor Peter W. Hogg entitled *Judicial Review: How Much Do We Need?* appears immediately preceding in this issue.

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[1] An excellent work on the early development of the more important prerogative writs is Henderson, *Foundations of English Administrative Law* (1963). For brief treatments of the distinctive origins and growth of English administrative law, see: de Smith, *Judicial Review of Administrative Action* 2d ed. (1968), 4-7, 23-24, 83-85; and Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (1965), 54-80. One can gain a perspective on the importance of the historical background from such classic judgments as those of Lord Sumner in *The King* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128, 131 (P.C.); Lord Justice Denning (as he then was) in *R.* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 K.B. 338, 346 (C.A.); and Lord Reid in *Ridge* v. *Baldwin*, [1964] A.C. 40, 63 (H.L.).

Although recent decades have spawned dramatic growth in legislation and government administration, we have relied largely on the judicial machinery of earlier times as our shield from administrative excesses. In the changed situation of modern society, is it not reasonable to ask whether judicial review of administrative action continues to meet our needs and expectations? My starting point, therefore, is to question the effectiveness of judicial review as a means to protect the interests of citizens from the abuse of governmental administrative power.

I. HOW EFFECTIVE IS JUDICIAL REVIEW?

Apparent public confidence that the courts can and will protect citizens from the wrongs of government administrative action is indeed remarkable. Those of us close to the law know, of course, that the usefulness of judicial review is limited in many ways. Yet even we really know relatively little about how effectively the judiciary controls the administrative process. Our experience is random at best. Cases in the law reports deal only with selected legal issues, and do not present a comprehensive view. It remains for a law reform commission or a research institution with substantial financial resources to undertake a thorough and profound study of what is really happening on a day to day basis both within and without the courts in relation to administrative agencies.[2]

What follows here are a few preliminary thoughts based on some exploratory research and pragmatic observations. They constitute a rather modest attempt to break new ground when compared to present day social science methods, and thus may be open to challenge.[3] But this risk is accepted because it seems to me that we should be looking in new directions to resolve the continuing prob-

[2] Unfortunately the widely publicized Royal Commission Inquiry into Civil Rights in Ontario, known as the McRuer Commission, did not engage in empirical research to any significant extent. For an extremely perceptive criticism of its first report, see Willis, *The McRuer Report: Lawyers' Values and Civil Servants' Values*, (1968) 18 U. of T. L.J. 351. The term "agencies" is used throughout my lecture in a broad sense to encompass boards, commissions, tribunals, departments and public officers, in preference to "tribunals" which perhaps conveys a narrower meaning.

[3] Subsequent discussions with qualified social scientists reassured me somewhat in that they were of the view that the methodology used was sufficient to assure reasonably reliable results and that a full scale inquiry by researchers experienced in social science methods would probably produce the same or very similar findings as those set forth hereafter.

lems of administrative law in preference to a reliance on the old assumptions and formulae.

The Tip of the Iceberg

A fair estimate on the number of administrative decisions made by government agencies in Canada each year would extend into the millions. Only a very few of these decisions are ever reviewed by a court. To obtain some idea of the enormous volume of decision-making by government agencies, consider that the Workmen's Compensation Board of Ontario in 1971 received 366,830 claims;[4] the Ontario Labour Relations Board disposed of 1,499 applications in a one year period ending in 1972;[5] the Canada Pension Commission and its Appeal Boards made 6,206 decisions in the year ending March 31, 1971, and a recent report stated that the number had increased to approximately 10,000 a year because of legislative changes increasing the range of benefits;[6] in the final nine months

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[4] Statistics for 1972 became available after the lecture was given, and a total of 376,967 new claims were received in that year, a slight increase. In 1971, approximately 6% of the claims were initially rejected, compared to 7.8% in 1972. These percentages confirm a report in *The Globe and Mail*, Monday, April 3, 1972, 5 (cols. 3-6) where senior labour officials asserted that close to 95% of claims go through quickly and satisfactorily. Figures for review or appeal at the three stages and decisions favourable to the claimant are as follows (1972 statistics in brackets): Review Committee — 3,695 (4,370) applications resulting in 810 (885) decisions changed in whole or in part; Appeal Tribunal — 1,066 (1,417) appeals with decisions favourable to the appellant on 541 (752) occasions; Compensation Board — 192 (285) appeals and 98 (142) decisions altered. Success rates on review or appeal, therefore, were as follows: Review Committee — 21.9% (20.3%); Appeal Tribunal — 50.8% (53.1%); Compensation Board — 51.0% (49.8%). The figures were provided by officers of the Board.

[5] Provisional figures for the next year ending March 31, 1973 show an increase in applications and complaints from 1,598 to 1,770, and a corresponding rise in the number disposed of to 1,713. The statistics were made available by the Board Solicitor.

[6] Department of Veterans Affairs, The Canadian Pension Commission, and the War Veterans Allowance Board: Annual Report, 1970-71, 74 (Ottawa: Information Canada, 1971). Of the total, 5,210 claims were submitted and approximately 42% were allowed in whole or in part. From these decisions, 996 appeals were taken to Appeal Boards and again nearly 42% succeeded. This success rate compares to a ten year average between 1961-62 and 1970-71 of 36.5% and 44.1% respectively. *The Pension Act*, R.S.C. 1970, c.P-7 was amended by R.S.C. 1970, 2d Supp., c.22 to broaden the benefits and also created a new three-level structure for the consideration of claims. Figures provided by the Bureau of Pensions Advocates in Toronto for claims to the Canada Pension Commission under the amended Act in 1971-72 and 1972-73 show a substantial

of 1971, 546,332 applications were filed in Ontario alone for benefits under the Unemployment Insurance Act.[7] One could carry on for pages with figures of these staggering proportions, but surely the point has been made.

Compare with the foregoing some figures for judicial review of administrative decisions. In the period from January 1 to December 31, 1972, the "Proceedings at Osgoode Hall" column in *The Globe and Mail*, which reports all cases heard in Toronto and their disposition in summary form, listed a total of 210 cases of an administrative law nature — 59 in the Ontario Court of Appeal, 44 in the new Divisional Court and 107 on application in Weekly Court and Chambers.[8]

Obviously only a minute fraction of administrative agency decisions are, or could be, reviewed by the courts. If judicial review of every administrative decision was feasible, an already overworked judiciary would simply be swamped by the volume. At best, therefore, judicial review performs a minimal supervisory function. Although the spectre of judicial intervention may be an inhibiting factor for administrative agencies, the fact remains that it is a remote possibility in reality.

Prospects for Successful Judicial Review

The likelihood of a litigant adversely affected by agency action obtaining a favourable result in the courts is not so overwhelming that he should rush into the judicial forum. Indeed the contrary appears to be the case. Professor Hogg's analysis of Supreme Court

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increase to 10,202 and 10,307 respectively. In 1972-73, provisional statistics indicate that 1,307 decisions of the Canada Pension Commission were taken to Entitlement Boards for hearing and review, and appeals from the Entitlement Boards to the Pension Review Board were 88 in number.

[7] National figures are even more impressive. Statistics Canada (1972), 31 *Statistical Report on the Operation of the Unemployment Insurance Act*, Table 10 (Ottawa: Information Canada, 1972-73) records a total of 3,936,380 initial, renewal and revised claims adjudicated in the 1972 calendar year. Of 2,047,145 initial claims, 1,299,168 were found entitled to benefits for a success rate of 63.5%. Renewal claims succeeded in 338,261 of the 420,377 applications or 80.5% of the time.

[8] The Divisional Court was authorized by the passage of *The Judicature Act Amendment Act, 1970 (No. 4)*, S.O. 1970, c.97, as amended by *The Judicature Act Amendment Act, 1971*, S.O. 1971, c.57, but the legislation was not proclaimed in force until April 17, 1972. In the interim, applications for review of administrative agency proceedings were brought in Weekly Court and Chambers whose jurisdiction in these matters was transferred to the new Divisional Court under the statutory amendments.

of Canada decisions in the administrative law field between 1949 and 1971 indicates a success rate for the litigant against the agency of approximately 44%.[9] A similar study by Professor Weiler of labour relations judgments in the Supreme Court between 1950 and 1970 shows that the board decision did not prevail in only 37% of the cases.[10] From the Proceedings at Osgoode Hall column during 1972, one likewise finds that the success rate of litigants was less than 35% in Weekly Court and Chambers, approximately 32% in the Divisional Court, and rose slightly to 44% in the Ontario Court of Appeal.[11]

One might wonder why the success rate of the aggrieved litigant is greater in the Supreme Court of Canada and the Ontario Court of Appeal than on initial review in the courts below. An answer is perhaps to be found in the volume of cases at each level. For example, the Ontario Court of Appeal heard 59 administrative law cases in 1972, while a total of 151 proceedings were brought before the Divisional Court and on application in Weekly Court and Chambers.[12] Appeals to the Ontario Court of Appeal by parties disputing administrative action who were unsuccessful at the initial stage of judicial review outnumbered appeals by administrative agencies roughly in the proportion of two to one. Presumably the cases with the best chances of success were the ones appealed.

These figures on success rates should be regarded with some caution, because they do not include an evaluation of qualitative elements.[13] At the same time, the few cases which do see the light of judicial review are probably those where the prospects for success by the aggrieved litigant were reasonably attractive. But the results do not provide much room for optimism on the ultimate prospect of a favourable judicial decision.

The Second Round

Even if a litigant succeeds in having the decision of an administrative agency quashed through judicial review, the court in most instances is unable to decide in his favour on the substantive issues which were before the agency. Ordinarily the agency decision is

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[9] Hogg, *The Supreme Court of Canada and Administrative Law, 1949-1971,* (1973) 11 Osgoode Hall L.J. 187.

[10] Weiler, *The "Slippery Slope" of Judicial Intervention: The Supreme Court and Canadian Labour Relations, 1950-1970,* (1971) 9 Osgoode Hall L.J. 1, 13-16.

[11] *Cf. supra,* notes to f.n.8.

[12] *Ibid.*

[13] Weiler, *supra,* f.n.10, 12, 16, elaborates on this point.

simply set aside or quashed. On occasion, the agency will commence its proceeding afresh, and correct the error made previously. This is particularly true, of course, where a procedural defect such as a denial of natural justice persuaded the court to upset the agency determination.

Many on the academic side tend to be interested in the law created by a judicial decision, and are often less concerned with the eventual outcome in any given case. Whether the matter is taken up again by the administrative agency, and with what results, are not usually explored unless one has a particular interest in the case. To satisfy my curiosity in this regard, a questionnaire was sent to each agency which had been successfully challenged through judicial review in a reported case between 1970 and mid-1972. The number of cases was small, 32 in all, and 29 returns were received.[14] Many of the responses proved interesting and informative.

First, in 14 cases where the final result favoured the successful litigant, no further action was taken by the agency.[15] Three other instances produced a new proceeding by the agency in which the result was more favourable to the litigant than on the first occasion.[16]

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[14] Responses to the questionnaire were not forthcoming from the administrative agency concerned in *Regina* v. *Des Rosiers, ex parte Millard,* [1970] 3 O.R. 446 (Ont. H.C.); *Raes* v. *Township of Plympton* (1971), 20 D.L.R. (3d) 645 (Ont. C.A.); and *Re MacKay Construction Ltd. and Local 721C, International Union of Operating Engineers* (1972), 21 D.L.R. (3d) 485 (P.E.I. S.C.).

[15] *Johnston* v. *Association of Professional Engineers of Saskatchewan* (1970), 75 W.W.R. 740 (Sask. C.A.); *Kerster* v. *College of Physicians and Surgeons of Saskatchewan* (1970), 72 W.W.R. 321 (Sask. Q.B.); *Reich* v. *College of Physicians and Surgeons of Alberta* (1970), 75 W.W.R. 561 (Alta. C.A.); *Re Thomas' Certiorari Application* (1970), 72 W.W.R. 54 (B.C. S.C.); *Re Pollution Control Act, 1967, Re Application of Hooker Chemicals (Nanaimo) Ltd.* (1970), 75 W.W.R. 354 (B.C. S.C.); *Bell* v. *Ontario Human Rights Commission,* [1971] S.C.R. 756; *Re Ontario Racing Commission, ex parte Taylor,* [1971] 1 O.R. 400 (Ont. C.A.); *Re Lloyd and Superintendent of Motor Vehicles* (1971), 20 D.L.R. (3d) 181 (B.C. C.A.); *Re Carter and Metropolitan Toronto Board of Commissioners of Police,* [1971] 3 O.R. 559 (Ont. H.C.); *Associates Finance Co. Ltd.* v. *Stonell, Gillette and Gowsell,* [1971] 2 W.W.R. 226 (Alta. S.C.); *Fortier Arctic Ltd.* v. *Liquor Control Board of Northwest Territories,* [1971] 5 W.W.R. 63 (N.W.T. T.C.); *Re Horowitz and Minister of Manpower and Immigration* (1972), 24 D.L.R. (3d) 370 (Que. C.A.); *Knight* v. *Board of Yorkton School Unit No. 36 of Saskatchewan* (1972), 24 D.L.R. (3d) 1 (Sask. Q.B.), aff'd [1973] 1 W.W.R. 385 (Sask. C.A.); *Re Hogan and Director of Pollution Control* (1972), 24 D.L.R. (3d) 363 (B.C. S.C.).

[16] *Dome Petroleum Ltd. and Pan American Canada Oil Co. Ltd.* v. *Swan Swanson Holdings Ltd.* (1970), 72 W.W.R. 6 (Alta. C.A.): the right of way was reduced by the Public Utilities Board from fifty to thirty-five feet by order issued in October of 1972. *Brook and Sunnybrook Holdings Ltd.* v. *City of*

Thus the ultimate success rate was 17 out of 29, or almost 59%.[17]

Three of the above situations where no further action was taken by the agency are worthy of special note. In one, the commission implemented new administrative procedures and standards of proof in light of the litigation to cover future proceedings of a similar nature.[18] This may be regarded as a positive product of the case since the administrative law issues were clarified. In the other two situations deserving of particular comment, the result of the litigation prompted amendment of the legislation to effectuate the position argued on behalf of the administrative agency, but without retroactive application.[19] Although the litigants succeeded through judicial review, their exertions became of historical significance only for others in the same or similar situations.

Turning now to those cases where a party won the battle in the courtroom but lost the war in subsequent events, one finds a variety

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Calgary, [1971] 1 W.W.R. 429 (Alta. C.A.): the owner's lands were subsequently assessed at a lower rate in accordance with the court ruling. *Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498 (Ont. C.A.): on the referral back to the Ontario Labour Relations Board, the Board certified the applicant union.

[17] Further proceedings by the administrative agency were still in progress for three of the twenty-nine cases, and a favourable result in any of them would increase the success rate. In *Lieba* v. *Minister of Manpower and Immigration*, [1972] S.C.R. 660 the applicant was reassessed pursuant to the directions of the Supreme Court and awarded points in excess of those required for landed status, but had not yet complied with medical requirements; in *Podlaszecka* v. *Minister of Manpower and Immigration*, [1972] S.C.R. 733 further requirements respecting landing had not been completed; and in *College of Physicians and Surgeons of British Columbia, ex parte Ahmad* (1971), 18 D.L.R. (3d) 197 (B.C. C.A.) the College initiated a new inquiry which resulted in Dr Amhad's name being erased from the Medical Register, but he again resorted to judicial review, see *infra*, f.n.31.

[18] *Re Ontario Racing Commission, ex parte Taylor, supra*, f.n.15.

[19] *Re Lloyd and Superintendent of Motor Vehicles, supra*, f.n.15: the British Columbia Legislature amended the *Motor-Vehicle Act*, R.S.B.C. 1960, c.253, by S.B.C. 1972, c.35, s.24, inserting a new section 86D in the Act providing for mandatory suspension of a driver's licence on conviction of a listed offence, thereby removing the suspension question from the Superintendent's discretion and confirming the result argued on behalf of the Superintendent in the litigation. *Bell* v. *Ontario Human Rights Commission, supra*, f.n.15: an amending Act, S.O. 1971-72, c.119, s.4 repealed the "self-contained dwelling unit" provision of *The Ontario Human Rights Code*, R.S.O. 1970, c.318, s.3, and substituted the term "housing accommodation" with the express intention of changing the position asserted by the Supreme Court of Canada; see Legislature of Ontario Debates, 2d Sess., 29th Legis., 21 Eliz. II (1972), 4333-4. Legislative response to judicial decisions is discussed more fully *infra*.

of explanations. Of the reported decisions for which responses to the questionnaire were returned, the litigants' successful court action failed to achieve the desired result in 9 of the 29, or a shade over 31%, of the situations.[20] In 3 of these instances, the administrative agency considered the matters in issue again and reached the same result as in the initial proceeding.[21] Retroactive effect was achieved in another case by the passage of a by-law.[22] In one instance, the litigant's registration with the licensing commission expired, effectively precluding him from any benefits achieved by judicial review.[23] Although a property rezoning decision was quashed by the court in another action, the zoning authority then refused to rezone the land to meet the requirements of the successful litigant.[24] The winning party subsequently went out of business in the most anti-climactic of the examples.[25] During the course of the court proceedings in a labour dispute, the respondent union amended its constitution to meet the employer's objection, and thus rendered the legal action moot. As a further nail in the coffin following the judicial decision in this case, legislative amendment followed almost immediately to

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[20] See comment, *supra*, f.n.17.

[21] *Gana* v. *Minister of Manpower and Immigration* (1971), 13 D.L.R. (3d) 699 (S.C.): the Immigration Appeal Board reviewed the assessment made by the Examining Immigration Officer and found no evidence to warrant a change; *Re Valade and Eberlee*, [1972] 1 O.R. 682 (Ont. C.A.): the Ontario Department of Labour again dismissed Valade but gave more explicit reasons and his appeal by way of grievance to the Public Service Grievance Board subsequently failed; *Inter-City Freight Lines and Highway Traffic and Motor Transport Board of Manitoba* v. *Swan River — The Pas Transfer Ltd.*, [1972] 2 W.W.R. 317 (Man. C.A.): although changed in latitude because of circumstances arising in the interval since the first hearing, the decision again was in favour of the applicant.

[22] *Chrismas* v. *City of Edmonton* (1970), 75 W.W.R. 453 (Alta. C.A.): as a result, the street median remained. Retroactive legislative response to a judicial decision is considered *infra*.

[23] *R.* v. *Broker-Dealers' Association of Ontario, Ex parte Saman Investment Corporation Ltd.*, [1971] 1 O.R. 355 (Ont. H.C.): despite reinstatement as a member of the Association following the litigation, a prior suspension by the Ontario Securities Commission was confirmed by that body at a subsequent hearing, and remained in force until the end of the registration period.

[24] *Re Saratoga Holdings Ltd. and District of Surrey* (1971), 18 D.L.R. (3d) 371 (B.C. C.A.): the municipality then purchased the property from the litigant and proceeded to resell the lots.

[25] *Re Nova Scotia Labour Relations Board, Ex parte International Union, United Automotive, Aerospace and Agricultural Implement Workers of America (U.A.W.)* (1971), 16 D.L.R. (3d) 254 (N.S. C.A.).

uphold the agency position.[26] The foregoing illustrates the variety of perils which may befall the apparently successful litigant in an administrative law suit.

To round out the list, a final determination was still pending in three matters. Two were immigration cases in which deportation orders had been quashed by the courts and the Department of Manpower and Immigration had initiated new proceedings.[27] The other is a rather remarkable professional discipline case where the applicant had been investigated for unprofessional conduct and placed on the temporary register of the College of Physicians and Surgeons, but successfully appealed this action before the Supreme Court of British Columbia.[28] A new investigating body was established by the College, the validity of which was challenged in a *certiorari* proceeding. The application was dismissed,[29] but an appeal to the British Columbia Court of Appeal succeeded.[30] Once again, the College initiated a fresh inquiry, where the matter currently rests. Almost four years have elapsed since the College first commenced disciplinary proceedings.[31]

The object of this exercise is to illustrate that a lawyer cannot assure his client that a favourable result in judicial review will mean achievement of the desired objective with the agency. At most, the client has a chance of eventual success if he wins the court action.

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[26] *Metropolitan Life Insurance Company* v. *International Union of Operating Engineers, Local 796,* [1970] S.C.R. 425. A sympathetic comment on the case by Lyon, (1971) 49 Can. Bar Rev. 365 contains a thorough discussion of the policy issues. Professor Hogg, in his companion lecture to mine, however, is highly critical of the Supreme Court of Canada's reasoning. *The Labour Relations Act,* R.S.O. 1960, c.202, ss.1(1), 77 was amended by *The Labour Relations Amendment Act, 1970,* S.O. 1970, c.3 to achieve the desired policy objective. Legislative intervention is further discussed *infra.*

[27] *Lieba* v. *Minister of Manpower and Immigration* and *Podlaszecka* v. *Minister of Manpower and Immigration, supra,* f.n.17.

[28] Not reported, but referred to in *Re Medical Act, Re Ahmad's Application* (1970), 75 W.W.R. 80, 81 (B.C. S.C.).

[29] *Ibid.*

[30] *College of Physicians and Surgeons of British Columbia, ex parte Ahmad, supra,* f.n.17.

[31] Since my lecture was given, there have been further developments. The new Inquiry Committee held a hearing lasting six days, and made its report to the Council of the College. After some delay in having Dr Ahmad appear before it, the Council ordered that his name be erased from the Medical Register. Dr Ahmad secured a stay of erasure from the Supreme Court of British Columbia pending the hearing of an appeal. Numerous postponements were encountered and the appeal was scheduled to be heard on July 9, 1973 at the time of writing.

Against this must be balanced the costs to him in terms of delay, expense and other incidental factors.

The High Cost of Litigating

All types of litigation are conducted at considerable financial expense to the adversaries. Lawyers know very well that even a modest settlement may be more advantageous to a client than eventual success in the courts. The high cost of litigation is even more apparent when an individual challenges the proceedings of an administrative agency, because monetary recovery is rarely in issue. In most civil litigation, there is the prospect of a pot of gold at the end of the rainbow from which the victor may at least recover his litigation expenses.[32] The objective in an administrative law case, however, is ordinarily to set aside the decision of an agency, to prevent the commencement or continuation of an agency proceeding, or to compel an agency to fulfill its statutory duty.

Where damages are sought in an administrative law action, the recognized ground of bad faith on the part of the administrator can rarely be established because most administrators simply do not endeavour to inflict harm on members of the public. Of recent date, actions for damages against administrative agencies have turned to the ground of negligence established by the leading decision of the House of Lords in *Hedley Byrne* v. *Heller & Partners Ltd.*[33] *Hedley Byrne* has enjoyed only limited administrative law application in Canada,[34] and the recent position of the Supreme Court of Canada in *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of*

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[32] He will recover costs from the losing party, of course, according to the schedule provided by the court rules, but these will be insufficient to cover his own solicitor-client fees which are usually met from the award of damages against the loser in the suit.

[33] [1964] A.C. 465 (H.L.). *Hedley Byrne* stimulated extensive comment in common law jurisdictions. For Canadian reaction, see: Harvey, (1963) 41 Can. Bar Rev. 602; Atkey, (1964) 3 Western L.Rev. 104; Mis, (1964) 3 Alta. L.Rev. 318; Walker, (1964) 3 Osgoode Hall L.J. 89; Gordon, (1965) 2 U.B.C. L.Rev. 113.

[34] *Windsor Motors Ltd.* v. *Corporation of Powell River* (1969), 68 W.W.R. 173 (B.C. C.A.) is the leading authority based on *Hedley Byrne* for recovery on the ground of negligence against an administrative agency, but *Windsor Motors* has been applied in only two cases, neither of which concerned administrative agencies. For a general review of the matter, see Molot, "Administrative Bodies, Economic Loss and Tortious Liability", in Fridman (ed.), *Studies in Canadian Business Law* (1971), 425.

Greater Winnipeg[35] clearly establishes that the scope for recovery in negligence is a narrow one. Indeed the decision of the Privy Council in *Mutual Life & Citizens' Assurance Co. Ltd.* v. *Evatt*[36] from Australia further inhibits the prospects for a broad application of *Hedley Byrne*. As a consequence, actions for damages cannot be regarded as a promising avenue for lessening the financial burden on litigants in administrative law cases.[37]

Financial barriers to legal action theoretically have been removed by the advent of legal aid schemes. For the year ending March 31, 1971, the Ontario Legal Aid Plan assisted applicants in 37,221 completed cases, of which 264 were characterized as before "Review Boards".[38] In a different analysis of the total, 191 immigration matters and 128 workmen's compensation cases were completed, with the possibility that other administrative law matters might be included in a miscellaneous category of 888 cases.[39] Administrative agencies were thus concerned in only a fraction of one per cent of the total. Taking into account the complex machinery of public welfare and unemployment insurance, for example, one is left with the impression that the Ontario Legal Aid Plan barely scratches the surface of administrative agencies, although the reasons for this

[35] [1971] S.C.R. 957. The case developed out of an earlier Supreme Court of Canada decision in *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512, in which a zoning amendment of the Metropolitan Corporation was held to be invalid because of a procedural defect in posting notices of the proposed amending by-law. In *Welbridge Holdings*, the developer who had been forced after the *Wiswell* case to demolish a luxury multi-storey apartment building constructed on the invalidly rezoned property, brought an action against the Metropolitan Corporation of Greater Winnipeg claiming close to four million dollars in damages. Laskin,J. (as he then was) for the Supreme Court of Canada declined to extend *Hedley Byrne* to the situation, and distinguished *Windsor Motors*, *supra*, f.n.34. Freedman,J.A. wrote an interesting dissenting opinion in the Manitoba Court of Appeal which would have imposed liability on the *Hedley Byrne* doctrine: (1970), 12 D.L.R. (3d) 124, 126. However, his view was expressly rejected by the Supreme Court of Canada.

[36] [1971] A.C. 793 (P.C.). For a thoughtful comment on this important case, see Glasbeek, (1972) 50 Can. Bar. Rev. 128.

[37] Nevertheless some of the leading Canadian administrative law cases, such as the well known Quebec trilogy of civil rights decisions in the Supreme Court of Canada discussed *infra*, have been actions for damages.

[38] The figures were provided in a personal interview with the Administrator of York County Legal Aid.

[39] Obviously immigration and workmen's compensation cases together exceed the total ascribed to review boards in the other set of figures, but no matter which of the two groups of statistics is used, it is clear that the number of administrative law matters is small in terms of the whole Ontario Legal Aid operation.

state of affairs are not readily apparent. On the other hand, extended legal aid of the magnitude which might be necessary to serve low income litigants with administrative agency problems adequately would substantially increase the already soaring costs of the Ontario Legal Aid Plan and further add to the judicial work load.

A basic difficulty is that judicial review of many agency decisions is uneconomic, that is, the monetary amount involved or the importance of the question is not worth the high cost of judicial review. Perhaps this limitation is desirable, but it does raise the issue whether financial considerations should be the governing criteria which determine reviewability of administrative action.

Who Uses Judicial Review?

Although one can gain a rough idea from reported cases concerning what kinds of administrative law matters come to the courts by way of judicial review, an examination of the Proceedings at Osgoode Hall for 1972 may be more enlightening since every action heard there is reported in summary form.[40] Of the 210 cases having administrative law content, land use zoning and building permit decisions were the subject matter in 44 decisions or close to 21% of the total; labour relations cases followed closely with 42 cases or exactly 20%;[41] tax assessment questions amounted to 28 or slightly over 13%; licensing matters totalled 24 in number or approximately 11½%; and disciplinary proceedings of professional groups and associations came next with 15 or slightly in excess of 7%. These five subject areas thus accounted for 153 of the 210 cases or almost 73% of the administrative law matters before the Ontario courts at Osgoode Hall in 1972. The rest of the proceedings were widely dispersed among a variety of government agency endeavours.[42]

An obvious observation from the foregoing figures is the concentration of judicial review on relatively few fields of administrative activity. It is also apparent that large areas of public administration receive little or no supervision through judicial review. Particularly noticeable is the very high percentage of situations which by their nature disclose that the litigant challenging the administrative action has the private resources to bear the financial costs of the court

[40] Cases are not necessarily reported in the press the day after being heard, but if not, they ordinarily appear within a few days.

[41] This figure includes judicial review of labour arbitrations, a subject which is discussed *infra*.

[42] Some of the more frequent of these cases were in relation to securities regulation, expropriation and compensation, immigration, and miscellaneous municipal government activities.

proceeding. Absent in any significant number is the social welfare type of case, where monetary expense may be a substantial barrier to judicial review.

Of the labour relations cases, 33 of the 42 involved reviews of arbitrations. The use of the courts as a continuing forum for disputes arising under a collective agreement is surely questionable. Rarely are the issues of overwhelming importance, and often the judicial decision is based on a somewhat technical error of law or jurisdiction.[43] When the object of arbitration would seem clearly to be an expeditious procedure to resolve a relatively minor issue without resort to elaborate and lengthy proceedings in the courtroom, it is somewhat puzzling to see the volume of arbitrations before the courts. Judicial restraint in upsetting the awards of arbitrators might well discourage prospective litigants and bring some perspective to the situation.[44]

Statutory Amendment of Judicial Decisions

In a significant number of cases, the legislature has responded to the quashing of an administrative decision by changing the applicable statute to recognize the position unsuccessfully argued in the courts. Usually the legislation is not made retroactive to reverse the outcome in the particular case. A recent example is *Lloyd* v. *Superintendent of Motor Vehicles*,[45] where the British Columbia Court of Appeal held that the Superintendent could not automatically suspend a driver's licence for thirty days on a conviction for impaired driving, but was required to consider the individual circumstances of each case and exercise his discretion accordingly. The British Columbia Legislature promptly introduced a Bill making it mandatory for the Superintendent to impose a one month suspension in such cases.[46] Similarly, the Ontario Human Rights Code[47] was amended following the decision of the Supreme Court of Canada

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[43] Any number of examples could be given, but see *R.* v. *Barber, Ex parte Warehouseman's and Miscellaneous Drivers' Union* (1968), 68 D.L.R. (2d) 682 (Ont. C.A.), and *R.* v. *Board of Arbitration, Ex parte United Steel Workers of America, Local 4751* (1970), 7 D.L.R. (3d) 571 (Ont. H.C.), among many others.

[44] For a comprehensive examination of the issue, see Adams, *Grievance Arbitration and Judicial Review in North America,* (1971) 9 Osgoode Hall L.J. 443. Weiler, *supra,* f.n.10, 60 *et seq.* analyses the performance of the Supreme Court of Canada in labour arbitration cases during the fifties and sixties, and articulates several deficiencies from his evaluation.

[45] *Supra,* f.n.15.

[46] *Supra,* f.n.19.

[47] R.S.O. 1970, c.318.

in *Bell* v. *Ontario Human Rights Commission*[48] to change the effect of the Supreme Court's interpretation of the Code.[49] In a sense, Mr Bell won the battle and lost the war since the amended version of the Code would thereafter apply to his situation. The much discussed decision of the Supreme Court of Canada in *Metropolitan Life Insurance Company* v. *International Union of Operating Engineers*[50] stimulated almost immediate legislative reversal.[51] Occasionally a legislature will be sufficiently aroused that it will pass an enactment with retroactive effect to reverse a court decision, as happened and was recently upheld by the Supreme Court of Canada in *Executors of Woodward Estate* v. *Minister of Finance*.[52]

Thus the litigant may well find that his efforts have been in vain. Cases such as these also suggest that the courts may not have been in tune with the will of the legislature, although the explanation that the legislature is enacting new policy objectives or merely correcting its own drafting deficiencies is also arguable. Whichever may be the case, the net effect of the judicial decisions is short-term and minimal.

Some of the inadequacies of judicial review in supervising administrative action have been illustrated above. They raise questions whether judicial review should be retained in its present deficient form, in part or perhaps at all. To respond, one might ask what useful purposes may be served by retention, and what other vehicles might be more appropriate.

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[48] *Supra*, f.n.15. See Hogg, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada: Bell* v. *Ontario Human Rights Commission*, (1971) 9 Osgoode Hall L.J. 203 for a thorough and questioning analysis of the case, followed by Mullan, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada — A Mitigating Plea*, (1972) 10 Osgoode Hall L.J. 440 in reply. Hunter, *The Development of The Ontario Human Rights Code: A Decade in Retrospect*, (1972) 22 U. of T. L.J. 237 provides a broader perspective of the *Bell* case. He also offers a specific criticism: *Judicial Review of Human Rights Legislation: McKay* v. *Bell*, (1972) 7 U.B.C.L.Rev. 17.

[49] *Supra*, f.n.19.

[50] *Supra*, f.n.26.

[51] The statutory intervention included a section which, although it did not affect the parties in *Metropolitan Life* because the issue was already moot, had specific retroactive application "to proceedings commenced before but not finally disposed of when this Act comes into force": *The Labour Relations Amendment Act, 1970*, S.O. 1970, c.3, s.3.

[52] (1972), 27 D.L.R. (3d) 608 (S.C.C.). This remarkable example of retroactivity was designed to remove a natural justice defect in a particular instance. See *An Act to Amend the Succession Duty Act*, S.B.C. 1970, c.45, s.12(4) for an extreme example of a retroactive statutory provision. Section 6 of the amending Act proscribed any future application of the amendment.

II. WHY DO WE NEED IT?

At this point, Professor Hogg's analysis of the proper scope for judicial review is germane to the discussion.[53] Briefly, his conclusions are that the findings of administrative agencies should normally be treated as conclusive where the matters to be decided lie within their particular expertise. Where, however, the agency's decision is in conflict with a value fundamental to the legal order as a whole, then the generalist court is under a duty to consider whether the administrative decision should prevail over the more fundamental value. An administrative decision which is found to be a reasonable interpretation of the statutory power should prevail. To decide whether the interpretation is reasonable, the court should consider the reasons for the administrative assumption of authority, and balance them against the civil libertarian or proprietary values asserted by the party affected. Although the agency decision may be authorized by a literal reading of general language in the statute, the court should retain a power of review to limit the generality of the statutory language in order to protect fundamental civil libertarian values. Basic to Professor Hogg's view is the conclusion that the court is the institution in the community best equipped by virtue of its generalist qualifications to determine when the agency action is out of harmony with the basic values of the legal order.[54]

That the generalist court should protect civil libertarian values is a position with which there can be little, if any, dissent. A few comments and caveats, however, are in order. We in Canada do not have an entrenched bill of rights in our constitution. As a result, courts have been forced to intervene under other guises where civil libertarian values are at stake. For example, *Smith* v. *Rhuland* in the Supreme Court of Canada was decided on the administrative law ground that the Nova Scotia Labour Relations Board had not been empowered to exercise its discretion against certification of the applicant union because the communist political views of a union officer were considered by the Board to be dangerous.[55] The well known trilogy of Supreme Court cases from Quebec, *Chaput* v.

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[53] *Supra*, at p. 157.

[54] This statement of Professor Hogg's position is paraphrased from his conclusions and should not be regarded as a substitute for reading his complete text.

[55] [1953] 2 S.C.R. 95, 100. Rand,J. delivered the majority opinion in the 4-3 decision of the Court.

Romain,[56] *Lamb* v. *Benoit* [57] and *Roncarelli* v. *Duplessis*,[58] relating to freedom of religion for the Jehovah's Witnesses, were damage actions based on the *ultra vires* exercise of administrative authority. In these three cases, the civil liberties aspects were prominent, and judicial intervention for their protection accorded with the fundamental values of our society despite the lack of a written constitutional underpinning.

Civil libertarian values are not always so clear, however. In *Bell* v. *Ontario Human Rights Commission*,[59] for example, the civil rights of the allegedly offending landlord were said in some quarters to have been violated.[60] One might well ask what happened in the Supreme Court of Canada to the civil libertarian objectives of the Ontario Human Rights Code. A distinction should be drawn, it is suggested, between civil libertarian values and proprietary values. Protection of proprietary values as included by Professor Hogg will raise very difficult policy questions. If courts intervene extensively to protect proprietary interests, the implications for effective achievement of statutory objectives through administrative action are sub-

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[56] [1955] S.C.R. 834. Its contribution to civil liberties is discussed by Scott, *Civil Liberties and Canadian Federalism* (1959), 42-44; Schmeiser, *Civil Liberties in Canada* (1964), 111, 115; and Tarnopolsky, *The Canadian Bill of Rights* (1966), 115, 122.

[57] [1959] S.C.R. 321. See Scott, *supra*, f.n.56, 44-45; Schmeiser, *supra*, f.n.56, 116-117; Tarnopolsky, *supra*, f.n.56, 181-182; and a comment by McWhinney, (1959) 37 Can. Bar Rev. 503.

[58] [1959] S.C.R. 121. Civil liberties interest focused particularly on the *Roncarelli* case, and it has been the subject of much comment. As he was counsel in the appeal before the Supreme Court of Canada, see especially Scott, *supra*, f.n.56, 47-49. See also: Schmeiser, *supra*, f.n.56, 116-117; Tarnopolsky, *supra*, f.n.56, 104-106; McWhinney, *supra*, f.n.57; and Sheppard, *Roncarelli* v. *Duplessis: Article 1053 C.C. Revolutionized*, (1960) 6 McGill L.J. 75.

[59] *Supra*, f.n.15.

[60] In his trial judgment granting the order of prohibition against the board of inquiry established under the Ontario Human Rights Code, *R.* v. *Tarnopolsky, Ex parte Bell*, [1969] 2 O.R. 709, 718 Stewart,J. said: "It is equally as important that the rights of a middle-aged white Canadian homeowner be protected as those of a young, black, Jamaican tenant. Neither more important or less important. Equally. And perhaps it is time that this was made clear." An editorial in *The Globe and Mail*, Saturday, May 10, 1969, 6 (col. 1) echoed: "But those who are accused of practicing it should be brought before the courts, where they can be as sure that their civil rights will be protected as are the civil rights of their accusers. They should not be chivvied and badgered by a commission or by boards of inquiry which offend against civil rights in the first place and offend again by having their judgments heavily protected from appeal."

stantial. Inevitably legislatures and courts will be at loggerheads, with some considerable danger that the courts will have entered the domain of politics. Proprietary values should not be indiscriminately lumped with civil libertarian concerns in the exercise of the court's generalist judgment if harmful conflict between the legislature and the judiciary is to be avoided.

The "Jurisdiction" Quandry

Essential to the present system of judicial review is the concept that an administrative agency can exercise only the powers conferred on it by the statute. For an agency to act outside the provisions of the statute violates what Professor Hogg variously describes as the principle of validity, legislative supremacy, or the rule of law.[61]

The *ultra vires* concept is disarmingly simple to state, but has proved extremely complex in application, a difficulty which pervades many areas of the law. Courts are sometimes prone to seizing on the smallest error and describing it as a "jurisdictional" defect. They often do so to avoid a privative clause, with the appealing explanation that surely the legislature did not intend that the agency should act beyond the boundaries set forth in the statute. To compound the confusion, some errors of law are found by the courts to have been made within the jurisdiction of the agency,[62] while others are seen to go to the validity of its jurisdiction when the distinction between the two situations appears nonexistent.[63] In this semantic jungle, one may easily conclude that any error of the agency can be construed as being outside the limits of the statute.

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[61] Professor Hogg's discussion on this subject is to be found in that portion of his lecture concerned with interpreting the empowering statute, *supra,* in this volume. See also: de Smith, *supra,* f.n.1, 85, 94-99; I *Report of the Royal Commission Inquiry into Civil Rights* (hereinafter called the "McRuer Report"), 244-247 (Toronto: Queen's Printer, 1968).

[62] The leading modern statement of this position is, of course, Lord Justice Denning's opinion in *R.* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw, supra,* f.n.1, which has been followed in numerous Canadian cases.

[63] An excellent example of the difficulty in making the distinction is to be found in the judgment of Freedman,J.A. in *Parkhill Bedding & Furniture Ltd.* v. *International Molders & Foundry Workers Union of North America, Local 174 and Manitoba Labour Board* (1961), 26 D.L.R. (2d) 589, 594-598 (Man. C.A.), where that very able judge considered six similar cases divided into two groups of three, one group in which the error was found by the courts to be jurisdictional in nature and the other group in which it was found to have been made within the jurisdiction of the agency. He then endeavoured to rationalize the common distinguishing feature.

One view is that the court should only be concerned with the question of whether the administrative agency had "subject matter" jurisdiction initially to consider the issues before it. Any error at a later stage in the proceedings is not one which truly goes to the jurisdiction of the agency.[64] Perhaps the clearest example of a "subject matter" jurisdiction issue is where the competence of the agency is challenged on the ground that the matter is one which does not fall within the legislative power of Parliament (or a Provincial legislature as the case may be) under the *British North America Act*.[65] Courts have been quick, however, to discover many kinds of "jurisdictional fact" defects, matters which are regarded as a condition precedent to the obtaining of competence by the agency to consider the substantive issues. An examination of the cases in which the "jurisdictional fact" doctrine (which includes "jurisdictional law" and mixed "jurisdictional law and fact" matters) is invoked, leads one to the conclusion that many of these questions are the very issues which the legislature has given to the agency to decide as the substance of the proceeding before it.[66] Professor Hogg acknowledges this unwarranted intervention by the courts, and shares the view that the specialist qualifications of the agency in deciding these points should ordinarily prevail over the generalist approach of the court.[67]

A second recognized type of jurisdictional defect assumes that the administrative agency had capacity initially, but subsequently

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[64] One of the most cogent explanations of this position is the analysis of Lord Sumner in *The King* v. *Nat Bell Liquors, Ltd., supra,* f.n.1, 151-154. See also: de Smith, *supra,* f.n.1, 96-97 and the cases cited therin.

[65] This question has most frequently arisen in labour relations cases. See: *Pronto Uranium Mines Ltd.* v. *Ontario Labour Relations Board* (1956), 5 D.L.R. (2d) 342 (Ont. H.C.), commented on by Scott, *Federal Jurisdiction over Labour Relations — A New Look,* (1960) 6 McGill L.J. 153, 165-166; *Re Jessiman Bros. Cartage Ltd. and Letter Carriers' Union of Canada* (1972), 22 D.L.R. (3d) 363 (Man. C.A.); *Canadian National Railway Company* v. *Canada Labour Relations Board and Canadian Brotherhood of Railway, Transport and General Workers,* [1972] 2 W.W.R. 674 (Alta. S.C.).

[66] Recognition of this state of affairs was admirably recorded some time ago by Gordon, *The Relation of Facts to Jurisdiction,* (1929) 45 L.Q.R. 459 and *The Observance of Law as a Condition of Jurisdiction,* (1931) 47 L.Q.R. 386, 557. More recently, he has addressed the issue again: *Conditional or Contingent Jurisdiction of Tribunals,* (1960) 1 U.B.C.L.Rev. 185 and *Jurisdictional Fact: An Answer,* (1966) 82 L.Q.R. 515, in response to the views of Wade, *Anglo-American Administrative Law: More Reflections,* (1966) 82 L.Q.R. 226.

[67] Professor Hogg's lecture remarks on this point are amplified in his article on the subject, *supra,* f.n.48.

exceeded or declined its "jurisdiction". Obviously the word "jurisdiction" is being used in a different sense here. This particular approach is frequently used by the courts where the applicable statute contains a privative clause attempting to exclude judicial review, and was firmly established by the leading decision of the Supreme Court of Canada in *Toronto Newspaper Guild* v. *Globe Printing Company*.[68]

The standard "no certiorari" clause has been held effective to preclude judicial supervision of an error of law on the face of the record after the subject matter jurisdiction of the agency has been established, on the ground that the error was made "within the jurisdiction" of the agency.[69] However, a finding that an error resulted in an excess or declining of jurisdiction of the second type will render this form of privative clause nugatory.[70] Whether a court will regard the error as one made within the jurisdiction of the agency or as one resulting in an excess or declining of jurisdiction appears to be completely unpredictable. In the same manner, the "exclusive jurisdiction" form of privative clause, designed to prevent judicial scrutiny for jurisdictional fact defects, may be an exercise in legislative futility because the court can concede the subject matter competence of the agency and then find a subsequent excess or declining of jurisdiction.[71] Thus this second type of jurisdictional defect is a formidable weapon in the assault on an administrative agency decision.

Although other examples could be given to show the types of errors which are called "jurisdictional" by the courts, the foregoing should be sufficient to illustrate that the term is a coat of many

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[68] [1953] 2 S.C.R. 18. For an interesting comment on a comment on the case, see Gordon, (1953) 31 Can. Bar Rev. 1158, in response to Whitmore, (1953) 31 Can. Bar Rev. 679.

[69] Acknowledged by Cartwright,J. in *Jarvis* v. *Associated Medical Services Inc.*, [1964] S.C.R. 497, 502, among many other authorities. A good discussion of the point is to be found in *Re Ontario Labour Relations Board, Bradley* v. *Canadian General Electric Co. Ltd.* (1957), 8 D.L.R. (2d) 65, 79-82 (Ont. C.A.).

[70] On the authority of *Toronto Newspaper Guild* v. *Globe Printing Company, supra,* f.n.68, applied or followed in numerous other cases including *Jarvis* v. *Associated Medical Services Ltd., supra,* f.n.69, 502. The policy reasons behind the intervention of the courts in this situation are explored by Reid, *Administrative Law and Practice* (1971), 183-184.

[71] *Metropolitan Life Insurance Company* v. *International Union of Operating Engineers, Local 796, supra,* f.n.26, is a fine example of this dodge. The *Metropolitan Life* case was recently followed in this regard by *Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association, supra,* f.n.16.

colours.[72] Resort to it by the courts is often destructive of what would seem clearly to be the intention of the legislature to have the issues decided by the agency. Professor Hogg recognizes the problem and proposes that a compromise be worked out between the competing claims of the principle of validity and the principle of comparative qualifications.[73] His study of Supreme Court of Canada decisions between 1949 and 1971 discloses no clear pattern of result, although he perceives a tendency in favour of upholding the administrative agency construction of the statute.[74] One would hope that this tendency will continue, but it is certainly disquieting when the Supreme Court of Canada emerges with a decision such as that in *Metropolitan Life Assurance Company* v. *International Union of Operating Engineers.*[75]

One might well ask how often an administrative agency is likely to act where it does not have subject matter competence to commence its proceeding. Most agencies are sufficiently occupied with responsibilities clearly within their powers that it would be rather extraordinary for them deliberately to seek out a field of endeavour beyond the boundaries of the authorizing statute. And in view of their specialized function, it is not very often that they will accidentally tread on unauthorized ground. Hog marketing boards are unlikely to deal with cattle, to offer a simplistic example.

If an *ultra vires* approach to subject matter jurisdiction is to be retained, and I do not argue against it, the artificial application of the jurisdictional fact doctrine should surely be abandoned by the courts and, if necessary, prevented by legislative enactment of comprehensive exclusive jurisdiction clauses. One would hope further that both courts and legislatures will move against the excess or declining of jurisdiction ploy now in vogue to avoid privative clauses.

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[72] In *United States* v. *L. A. Tucker Truck Lines Inc.*, 344 U.S. 33, 39 (1952) Frankfurter,J. referred to the term "jurisdiction" as "a verbal coat of too many colors". Enlightening discussions, insofar as it is possible to shed light on elusive concepts of jurisdiction, are to be found in de Smith, *supra,* f.n.1, 96-99; and the McRuer Report, *supra,* f.n.61, 244-247.

[73] The contributions of Davis, IV *Administrative Law Treatise* (1958), s.28.21 and Abel, *Appeals against Administrative Decisions: III In Search of a Basic Policy,* (1962) 5 Can.Pub.Admin. 65, are acknowledged by Professor Hogg with respect to their advocacy of the comparative qualifications principle.

[74] *Supra,* f.n.9.

[75] *Supra,* f.n.26, 50, 51 and 71.

Administrative Discretion and Judicial Restraint

Although judicial review of discretion exercised by administrative agencies also incorporates the *ultra vires* concept, courts by and large have shown commendable restraint in avoiding unwarranted intervention and have recognized a legislative intention that policy considerations should be left to the administrative agency. Of the generally recognized grounds for judicial review of administrative discretion,[76] an *ultra vires* motive in the exercise of discretion is rarely present in the agency action, but the safeguard is there if needed.[77] Similarly, since the leading decision of the English Court of Appeal in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*,[78] the test of "reasonableness" has not been argued before Canadian courts with any frequency.[79]

The only ground for review of discretion which poses some difficulty is that only relevant considerations may be taken into account by the agency in the exercise of its discretion, and the corollary that irrelevant matters must not be considered. What is relevant or irrelevant in any given situation is often not an easy judgment to make. Notwithstanding the obvious opening for judicial intervention on this ground, courts have used it relatively sparingly for situations such as that in *Smith and Rhuland* v. *The Queen*,[80] where a civil liberties value was at stake. The recent decision of the Supreme Court of Canada in *Boulis* v. *Minister of Manpower and Immigration*[81] is illustrative. Mr Justice Laskin there stated that the agency's reasons for the exercise of its discretion are not to be read microscopically, but that it is sufficient if they show a grasp of the issues raised and of the evidence addressed, without detailed reference. So long as the courts continue to show

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[76] De Smith, *supra*, f.n.1, 309-339, sets forth the grounds as exercise of a discretionary power for an improper purpose, on irrelevant grounds or without regard to relevant considerations, and unreasonableness, but is careful to point out the difficulties of precise classification and terminology in particular fact situations.

[77] *Roncarelli* v. *Duplessis*, *supra*, f.n.58 is regarded by some as an example of judicial intervention on this ground. See also: *Brampton Jersey Enterprises Ltd.* v. *Milk Control Board of Ontario*, [1956] 1 D.L.R. (2d) 130 (Ont. C.A.); and *Re Henry's Drive-In and Hamilton Police Board*, [1960] O.W.N. 468 (Ont. H.C.).

[78] [1948] 1 K.B. 223 (C.A.).

[79] In *Fishman* v. *The Queen*, [1970] Ex. C.R. 784 the *Associated Provincial Picture Houses* case was applied to uphold an exercise of discretion by the Postmaster General in issuing an interim prohibitory order suspending mail services to the complainant.

[80] *Supra*, f.n.55.

[81] (1972), 26 D.L.R. (3d) 216, 223 (S.C.).

restraint, judicial review of administrative discretion will not be subject to serious criticism.

Errors of Law and Fact

Since 1952, when Lord Justice Denning (as he then was) revived error of law on the face of the record in the *Northumberland* case [82] as a ground for review where a jurisdictional defect is not present, privative clauses have assumed an even greater significance. Many of them are now regarded by the courts as excluding judicial review for an error of law found to have been made "within the jurisdiction" of the agency.[83] Where the privative clause has been effective to exclude errors made within the agency's jurisdiction, the rationale is that the specialized and expert qualifications of the tribunal were meant by the legislature to be recognized.[84]

The same line of reasoning might be advanced in the absence of a privative clause. If a court admits that the error of law does not amount to a jurisdictional defect, the argument for judicial intervention is less weighty. The interpretation of a statute is difficult at the best of times, and more than one meaning is often possible. In this circumstance, is the court's view more likely to be correct than that of the agency? In the great majority of cases, it is suggested, the agency is probably much closer to the situation designed to be covered by the statute, and therefore is in a better position to interpret the provision in accordance with the legislative objective.

As matters now stand, however, the court is permitted to arrive at its own interpretation in the absence of a privative clause. An alternative position widely recognized in the United States is that

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[82] *Supra*, f.n.1.

[83] *Supra*, f.n.69.

[84] In *The Dominion Canners Ltd.* v. *Costanza*, [1923] S.C.R. 46, 54 Duff,J. looked to the objectives of workmen's compensation legislation to uphold the privative clause, as did Judson,J. in *Alcyon Shipping Co. Ltd.* v. *O'Krane*, [1961] S.C.R. 299, 304-305. Hall,J., delivering the judgment of the Court in *Bakery and Confectionery Workers International Union of America Local 468* v. *White Lunch Limited*, [1966] S.C.R. 282, 292-293, spoke to the general intent of labour relations legislation to achieve industrial peace and provide a forum for quick determination of labour-management disputes as something not to be whittled down in the face of the expressed will of legislatures. On this point, see: Laskin, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses*, (1952) 30 Can. Bar Rev. 986; and Carter, *The Apparent Virility of Privative Clauses*, (1967) U.B.C.L.Rev. - C. de D. 219, for excellent discussions of the policy issues.

the agency's view should prevail if it has a "rational basis", even though the court would prefer a different interpretation.[85] This approach obviously provides a narrower scope of review than the present English and Canadian stance, but would seem more in keeping with the premise that the agency's qualifications should be recognized unless in conflict with fundamental values of the legal order. If the rational basis test were applied by our courts with the same restraint that they display in the area of discretion, then unwarranted judicial intervention for error of law would rarely occur.

For questions of fact, the trend has not been to a wider scope of judicial review. Although the McRuer Commission recommended a broader approach comparable in some respects to the "substantial evidence" standard in the United States,[86] and thus would involve the court in weighing the evidence, the *Judicial Review Procedure Act* passed by the Ontario Legislature in response to other recommendations of the McRuer Commission expressly reaffirms the common law "no evidence" rule.[87]

On the other hand, the new *Federal Court Act* provides for review by the Federal Court of Appeal where the federal board, commission or other tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".[88] Exactly what test in currently recognized terms has been enunciated by Parliament with this provision is unclear. Some suggest that it introduces the American "substantial evidence on the record as a whole" position;[89] others speculate that it merely affirms the

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[85] For a statement of the "rational basis" test, see: Davis, *supra*, f.n.73, at s.30.05; and the leading case of *National Labour Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (S.C., 1944). For an interesting comparison of the British and United States positions, see Wade, *supra*, f.n.66, 241-247.

[86] McRuer Report, *supra*, f.n.61, 172-73, 261-263, 291-293, 310-313, although said to be modified in the Model Act wording "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record". This language would seem to be a significant departure from the United States position, which is set forth in Davis, *supra*, f.n.73, 29, and Jaffe, *Judicial Control of Administrative Action*, 595-604. *Universal Camera Corp.* v. *National Labour Relations Board*, 340 U.S. 474 (1951) is the authoritative case. For the comparative approach, again see Wade, *supra*, f.n.66, 229-240.

[87] S.O. 1971, c.48, s.2(3). A comprehensive review of the rule appeared recently: Elliott, *"No Evidence": A Ground of Judicial Review in Canadian Administrative Law?*, (1972-73) 37 Sask.L.Rev. 48.

[88] S.C. 1970, c.1, s.28(1)(c).

[89] Professor Hogg alludes to this possible effect in his article. Elliott, *supra*, f.n.87, 100 suggests that if section 28(1)(c) resembles anything, it is the 'clearly erroneous' formula used in some jurisdictions of the United States.

"no evidence" rule previously regarded as the common law position.[90] Perhaps it is a new and different approach.

The "no evidence" rule is sufficiently narrow that judicial intervention on questions of fact is limited to extreme situations.[91] This assumes, of course, that courts do not seek to avoid the strictures of the "no evidence" rule by adding the words "of probative value" or the like as has happened in some instances.[92] Except for the uncertainty created by the new *Federal Court Act* provision, therefore, the Canadian position on judicial review of factual questions is satisfactory.

Requirements of Natural Justice

No one would dispute that administrative agency proceedings should be procedurally fair for the parties concerned. Few would suggest that administrative agencies willfully violate the principles of natural justice so as to inflict harm on the parties before them. A procedural defect will more likely arise through inadvertence or lack of awareness. The new *Statutory Powers Procedure Act*[93] in Ontario, based to a considerable extent on the recommendations of the McRuer Commission, is therefore a commendable piece of legislation in that it extensively codifies the common law rules of natural justice.[94] With these guidelines, administrative decision-

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[90] Mullan, *The Federal Court Act: A Misguided Attempt at Administrative Law Reform?*, (1973) 23 U. of T. L.J. 14, 38-40. His conclusion is, however, that section 28(1)(c) has worked a broadening of the scope of judicial review.

[91] Lord Sumner in *The King* v. *Nat Bell Liquors, Ltd., supra,* f.n.1, 149-150 so asserts. Elliott, *supra,* f.n.87, 65-66 lists 22 reported Canadian cases which have applied the "no evidence" rule since *Nat Bell Liquors,* and 23 cases holding that there was some evidence in the particular case. This suggests that the "no evidence" rule retains some punch.

[92] For example, in *Re Sisters of Charity, Providence Hospital and Labour Relations Board,* [1951] 3 D.L.R. 735 (Sask. C.A.), and *Children's Aid Society of the Catholic Archdiocese of Vancouver* v. *Salmon Arm,* [1941] 1 D.L.R. 532 (B.C. C.A.).

[93] S.O. 1971, c.47. An informative guide to the new Ontario legislation and the *Statutory Powers Procedure Act* in particular is Mundell, *Manual of Practice on Administrative Law and Procedure in Ontario* (1972). See also Atkey, *The Statutory Powers Procedure Act, 1971,* (1972) 10 Osgoode Hall L.J. 155.

[94] It does not, however, exclude the common law rules as is pointed out by Mundell, *supra,* f.n.93, 23-24, offering section 21 of the Act on adjournments as an example. The "minimum" nature of the statutory expression was stressed by the Minister at the time of the debate in the Ontario Legislature: Legislature of Ontario Debates, 4th Sess., 28th Legis., 20 Eliz. II (1971), 3166-3167.

making in Ontario should be able to avoid procedural pitfalls to a much greater degree than in the past.[95]

Further, the new *Judicial Review Procedure Act* in Ontario follows a recommendation of the McRuer Commission that where the sole ground for relief established is a defect in form or a technical irregularity and no substantial wrong or miscarriage of justice has occurred, the court may refuse relief and validate the decision of the agency notwithstanding the defect.[96] If Ontario courts exercise the discretion conferred by this provision, the upsetting of an agency decision for a minute and insubstantial breach of natural justice will not be a problem.

The key question is not whether there should be review of administrative agency procedures so that they conform to the principles of natural justice, but whether a court is the only body with the qualifications to ensure adherence. Courts do, of course, deal with criminal and civil procedure questions from day to day in a highly competent manner. However, their very competence in courtroom procedure may lead them to impose too high and technical a standard on administrative agencies. A specialized and expert understanding of natural justice principles with the assistance of guidelines such as those set forth in the *Statutory Powers Procedures Act* could be acquired by a body other than the traditional courts. In short, it cannot be said absolutely that only a court can ascertain and apply the principles of natural justice to an administrative agency. Other vehicles and methods may be capable of performing this task equally well or better.

Exclusion of Judicial Review

Legislatures have responded to judicial review regarded as undesirable, of course, by inserting privative clauses in statutes. These attempts have been many and varied, but Canadian courts have been particularly ingenious on occasion in circumventing them with the simple and superficially plausible argument that surely the legislature did not intend that the administrative agency should act beyond the powers conferred on it by the statute.[97] It has been

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[95] An argument can be made, however, that embodying minimum rules of natural justice in statutory form will increase the volume of litigation as questions arise on the interpretation of the statutory provisions, and thereby achieve an undesirable result.

[96] S.O. 1971, c.48, s.3, enacting the recommendation of the McRuer Report, *supra*, f.n.61, 315 (Report No. 1, vol. 1, 1968).

[97] Mentioned *supra* with respect to the concepts of jurisdiction.

relatively easy for the courts to proceed then to discover a so-called jurisdictional defect of a highly technical nature.[98] Legislatures have from time to time replied with more creative exclusionary clauses covering jurisdictional errors, which further challenge the ingenuity of the judiciary, and so the game continues.[99]

By and large, however, the legislatures are winning the dispute and the courts increasingly are recognizing the sovereignty of the legislature. A succession of cases in the Supreme Court of Canada during the early 1960's confirmed the effectiveness of exclusionary provisions found in most workmen's compensation legislation.[100] On the other hand, the labour relations field has given rise to very mixed results. From widespread judicial intervention despite privative clauses in the late forties and early fifties, an increasing trend to recognition of their validity by the courts has been observed.[101] In the Supreme Court of Canada, however, the lack of a coherent approach in labour relations cases makes prediction of the result in this field very uncertain.[102] Recently the Supreme Court of Canada in an immigration case, *Pringle* v. *Fraser*,[103] has indicated that where a statutory scheme adequately provides for appeal procedures, the privative clause in the statute will be respected.

Where a legislature has come to the conclusion in reasonably clear statutory language that it wishes to exclude judicial review, the courts surely should respect that intention.[104] In the Canadian

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[98] On this, see Laskin, *supra*, f.n.84, 992, 994-996; Carter, *supra*, f.n.84, 224-227; Strayer, *The Concept of Jurisdiction in Review of Labour Relations Board Decisions*, (1963) 28 Sask. Bar Rev. 157; and Pink, *Judicial "Jurisdiction" in the Presence of Privative Clauses*, (1965) 23 U. of T.Fac.L.R. 5, 13.

[99] This classic battle was fought in the Province of Saskatchewan in the late forties and early fifties, and prompted Laskin's celebrated article, *supra*, f.n.84. Carter's sequel, *supra*, f.n.84, indicates the swing in the other direction, followed shortly by Norman, *The Privative Clause: Virile or Futile?*, (1969) 34 Sask.L.R. 334.

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

[101] *Supra*, f.n.99.

[102] Weiler, *supra*, f.n.10, 32-33.

[103] [1972] S.C.R. 821.

[104] The vagaries of the English language are such, however, that clarity is not easy and probably no privative clause is immune to the semantics of the "jurisdiction" game. De Smith, *supra*, f.n.1, 347 was moved to say: "In Canada, where apparently unambiguous privative clauses have often been embodied in legislation setting up administrative boards, restrictive interpretation has been carried so far that at times they have been rendered almost meaningless."

system of government, the legislature is sovereign and supreme within the provisions of the *British North America Act*. Observance of legislative dictates is also a part of the "rule of law", and judicial intervention to thwart legislative objectives is a violation thereof. If we wish to make an exception for civil libertarian values, that is surely acceptable, but the Canadian experience shows that our courts have not always restrained their intrusions to this limited domain in the face of privative clauses.[105]

A role for courts in the protection of civil liberties through judicial review of administrative action is acknowledged, but preservation of proprietary values by the judiciary is likely to lead to conflict with valid legislative objectives. The ground of jurisdictional error should be limited to questions of capacity to commence the administrative proceeding, without artificial contortions to bring the very matters to be decided by the agency under the statute within the term "jurisdiction". Judicial restraint in reviewing administrative discretion to this point in time has been salutary, and the same is largely true for questions of fact. A substitution of the court's interpretation on questions of law, however, might better give way to a position which recognizes the agency view if it has a "rational basis" although the court would not have come to the same conclusion. An observance of the principles of natural justice should continue to be required of agencies, but a more appropriate supervisory forum and methods might be found. Finally, privative clauses excluding judicial review are in need of wider recognition by the courts in the interests of the "rule of law".

III. ALTERNATIVES TO JUDICIAL REVIEW

To this point, I have endeavoured to show that judicial review of administrative action is inadequate in a number of respects, and that its present scope should be narrowed. It would seem incumbent on me, therefore, to suggest alternatives which might be more effective. As in most situations, recognizing the problems is easier than providing the solutions, but the following possibilities may be worthy of consideration.

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[105] The distinction between civil libertarian and proprietary values has been considered previously in the lecture with respect to *Bell* v. *Ontario Human Rights Commission, supra*, f.n.59.

On the Basic Level

To begin with that which is axiomatic, any administrative agency is only as good as the quality of its personnel. Highly qualified administrators should produce results that largely obviate the need for judicial review. Although government administration on all levels in Canada is blessed with many able and dedicated public servants, personnel weaknesses will exist as in any other human institution.

Even a cursory look at salary structures within government service compared to those in the private sector reveals a very significant differential for comparable qualifications.[106] If the public wants the best in administrative decision-making, it must be prepared to pay a competitive price. The mentality of the taxpayer, it is probably fair to say, is more directed to obtaining the most for the least. The politician who must go to the electorate periodically is acutely aware of public reaction to increased government salaries leading to higher taxes. An expectation that underpaid public employees will produce the high quality of government administration which the citizen seems to demand is surely mistaken.

A less tangible and therefore more elusive element is the social and professional standing of those who make a career in the public service. Many administrators make decisions as important as those handed down by judges. Yet the judiciary enjoys a respect which is not accorded to other public servants. Although long term appointments to important regulatory agencies may not be practicable or desirable, some form of security of tenure and independence would do much to gain public confidence in administrative decision-making. Patronage appointments to some agencies do not enhance the reputation of government administration in the public eye. What is needed is a sense of professionalism in all ranks of the public service.

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[106] Statistics are available from a variety of sources, and comparisons should be made with appropriate caution. Salaries of government employees are a matter of public record; see, for example, Office of the Provincial Auditor, *Public Accounts for the Province of Ontario for the Fiscal Year ended 31 March 1972* (Toronto: Queen's Printer, 1972). For the private sector, see Department of National Revenue, *Taxation Statistics Analyzing the Returns of Individuals for the 1970 Taxation Year* (Ottawa: Information Canada, 1972); Chapman & Associates Ltd., *A Report on Executive Compensation in Canada: 1969-1971* (1972). It is recognized, however, that my assertion of the existence of a differential for comparable qualifications is subject to debate.

Our educational institutions have only recently become seriously interested in training and preparation for public service.[107] In these endeavours, we probably have something to learn from civil law jurisdictions in continental Europe.[108] Continuing education programmes for those already employed by government would appear to be another largely unexplored field. We in the law schools undoubtedly have a contribution to make in these new directions, both for law students who will seek public administration careers in increasing numbers and for students in other disciplines of the university community.

Delivery of Legal Services

Because the services of the legal profession command a comparatively high fee, lawyers are usually brought into an administrative agency proceeding by a client only if the stakes are high enough in economic terms. As a result, persons of modest means or those who have what appears to them to be a relatively straightforward problem, are likely to handle their dealings with government agencies themselves without the benefit of legal advice.[109] In many instances, the matter will work out to the satisfaction of the citizen, but in other situations, he encounters difficulty, frustration and annoyance, becoming greatly disenchanted with government from his experience.

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[107] Carleton University appears to have been the first Canadian institution for post-secondary education to have developed a specialized interest through its School of Public Administration. For a description of the public law content of the Carleton programme, see Abbott, *Legal Studies at Carleton University*, (1964) 1 Can. Legal Studies 71. York University recently established a Faculty of Administrative Studies which offers a Masters degree in Public Administration, and other Canadian universities have developed similar programmes of various kinds. Community colleges and other institutions of post-secondary education probably have a role to play in training public administrators at a more basic level, while the secondary school curriculum is also showing signs of an increased awareness of governmental endeavours.

[108] An excellent description of European legal education and its public dimensions is provided by Schweinburg, *Law Training in Continental Europe: Its Principles and Public Function* (1945).

[109] Discussed *supra* in the first part of this article on the high cost of litigating and on those who use judicial review. For a very interesting study of the need for legal services by those who do not fall within poverty guidelines, see Standing Committee of the California State Bar on Group Services, *Report on Group Legal Services*, (1964) 39 Calif. State Bar J. 639, 652. Distribution of legal services in civil matters is given thoughtful and provocative treatment in Countryman and Finman, *The Lawyer in Modern Society* (1966), 535-576.

What I am wondering, therefore, is whether a new form of delivery of legal services on the administrative agency level could not accommodate individuals in these circumstances. Some movement in this direction can already be discerned. Storefront and voluntary legal aid clinics are attracting a certain amount of this kind of traffic. Advice on immigration matters is obtainable within ethnic communities. Union representatives often assist members in claiming workmen's compensation benefits, and a voluntary group has been formed in Ontario to help workmen resolve their claims satisfactorily.[110] Legion organizations aid veterans and dependents in obtaining pension and other statutory benefits.

There would appear to be significant potential for development of a new type of law practice to service clients in their dealings with administrative agencies. As the exclusive participation of lawyers would be uneconomic in terms of the income expectations of the legal profession, substantial use of paraprofessionals would be anticipated. In this regard, it should be noted that the new *Statutory Powers Procedure Act* in Ontario sanctions the appearance of personal representatives who are not required to be lawyers at agency hearings.[111]

An impediment to participation by lawyers in these developments at the moment, however, is the prohibition against holding oneself out as a specialist in a given field. *De facto* specialization has already arrived in the legal profession as we all know, and recognition of it in an official way should not be long in forthcoming.[112] When it does, it will facilitate the building up of an

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[110] Called the Injured Workmen's Consultants, it was founded by a claimant aggrieved by his unsatisfactory experience with the Ontario Workmen's Compensation Board. Financed by the federal government and private grants, in 1972 it had seven full-time and thirty part-time employees, the latter group including law students, social workers and medical students, and an active caseload of 1,700 claims: *The Globe and Mail*, Wednesday, June 14, 1972, 5 (cols. 1-3). In June of 1972, the Injured Workmen's Consultants presented a highly critical brief on the Board to the Ontario Legislature's Standing Committee on Resources Development: *The Globe and Mail*, Tuesday, June 27, 1972, 42 (cols. 6-9).

[111] *Supra*, f.n.93, s.10. Note that section 23 of the Act also provides for exclusion from a hearing of anyone appearing as an agent who is found by the tribunal not to be competent to do so.

[112] The Benchers of the Law Society of Upper Canada established a Special Committee on Specialization in the Practice of Law which in a report dated October 19, 1972 asserted "that a plan should be adopted in Ontario to train, test and qualify specialists in certain areas of the practice of law". The report was adopted in principle by the Benchers in Convocation on November 17, 1972: Minutes of Convocation, [1973] 2 O.R. ccx/iii, ccx/vi - cc/ii (includes the Special Committee report).

administrative law practice of the type envisaged with the use of paraprofessionals. The result may well be a more effective working of the administrative process.

Where is the Ombudsman?

One of the significant developments of recent date relating to resolution of grievances by citizens against government has been the institution of the Ombudsman.[113] Although of Scandinavian origin, the Ombudsman has enjoyed a successful transferral to common law jurisdictions with appropriate adjustments to national, provincial or local conditions. New Zealand was once again the pioneer for the introduction of a new concept,[114] followed by the United Kingdom [115] and seven Canadian provinces.[116]

In the Province of Quebec, the Public Protector, as the Ombudsman figure is called, handled 9,962 complaints in his first two

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[113] For a description, see: Rowat (ed.), *The Ombudsman: Citizens' Defender* 2d ed. (1968); Gellhorn, *Ombudsmen and Others: Citizens' Protectors in Nine Countries* (1967); and Rowat, *The Ombudsman Plan: Essays on the Worldwide Spread of an Idea* (1973).

[114] See: Northey, "New Zealand's Parliamentary Commissioner" in Rowat (ed.), *supra*, f.n.113, 127; Gellhorn, *supra*, f.n.113, 91; Sir Guy Powles, *The Office of Ombudsman in New Zealand: Its Origin and Operation*, (1964) Can. Bar Papers 1; Sir Guy Powles, *The Citizen's Rights against the Modern State and Its Responsibilities to Him*, (1964) 3 Alta.L.Rev. 164; Sir Guy Powles, *Aspects of the Search for Administrative Justice with Particular Reference to the New Zealand Ombudsman*, (1966) 9 Can. Pub. Admin. 133. Sir Guy Powles is, of course, the first New Zealand Parliamentary Commissioner.

[115] An early call for a British Ombudsman was Utley, *Occasion for Ombudsman* (1961). In the same year, the "Whyatt Report" by "Justice" entitled *The Citizen and the Administration: The Redress of Grievances* (1961) recommended that an Ombudsman be introduced. Sir Edmund Compton, *The Parliamentary Commissioner for Administration*, (1968) 10 J.Soc.Pub. Teachers L. (N.S.) 101 became the first incumbent on passage of the legislation. For commentary, see: Garner, *The British Ombudsman*, (1968) 18 U. of T. L.J. 158; Stacey, *The British Ombudsman* (1971); and Wade, *The British Ombudsman: A Lawyer's View*, (1972) 24 Admin.L.Rev. 137.

[116] Canadian Ombudsman developments of recent date are reviewed by Rowat, *The Ombudsman Plan, supra*, f.n.113, 97. Compare to his earlier piece with Lambias in Rowat (ed.), *supra*, f.n.113, 196; and Anderson, *Canadian Ombudsman Proposals* (1966). In two Provinces, Ombudsman legislation has been passed but the statutes have not yet been proclaimed in force: *The Parliamentary Commissioner (Ombudsman) Act*, S.Nfld. 1970, c.30, and *The Ombudsman Act*, S.S. 1972, c.87. According to Rowat, *The Ombudsman Plan, supra*, f.n.113, 100, the Newfoundland legislation has been stalled by a change in government, but a Saskatchewan Ombudsman is imminent.

years and eight months of operation;[117] the Alberta Ombudsman deal with 2,727 grievances in slightly over four years;[118] in New Brunswick, the Ombudsman received 1,378 complaints in four and a half years;[119] 1,216 matters were brought to the Manitoba Ombudsman in his first three years;[120] and the Nova Scotia Ombudsman has handled 524 complaints after sixteen months in office.[121] The figures are significant when one considers that few of these complaints would have been suitable for judicial review.

We in the Province of Ontario have not been so fortunate, and it is difficult to understand the reluctance to take what would appear to be a positive step in providing the citizen with a mechanism for investigation and possible resolution of his grievance against some aspect of government administration.[122] The establishment of a federal Ombudsman in Canada is a more complex issue, but the difficulties would not necessarily appear to be insurmountable. A decentralized approach might be feasible, or even a single federal Ombudsman in Ottawa with sufficient personnel efficiently organized to cope with the volume of complaints.[123]

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[117] *The Public Protector: Third Annual Report* (1971), 203. The office was established under *The Public Protector Act*, S.Q. 1968, c.11.

[118] *Report of the Ombudsman* (Edmonton: Queen's Printer 1968, 1969, 1970, 1971). The Alberta Ombudsman was Canada's first (*The Alberta Ombudsman Act*, S.A. 1967, c.59) and has accordingly received considerable public attention. See: Sawer, *The Ombudsman Comes to Alberta*, (1968) 6 Alta.L.Rev. 95; McDonald, *The Alberta Ombudsman Act*, (1969) 19 U. of T. L.J. 257; and Friedmann, *The Alberta Ombudsman*, (1970) 20 U. of T. L.J. 48. In *Re Alberta Ombudsman Act* (1970), 10 D.L.R. (3d) 47 (Alta. S.C.) the jurisdiction of the Alberta Ombudsman to investigate a decision of the Provincial Planning Board was upheld.

[119] *Fifth Report of the Ombudsman* (Fredericton: Province of New Brunswick, 1971), 10. *The Ombudsman Act*, S.N.B. 1967, c.18 is reviewed by Reid, (1968) 18 U. of T. L.J. 361.

[120] *Report of the Ombudsman* (Winnipeg: Province of Manitoba, 1970, 1971, 1972), 4, 3, 6 respectively. In 1965 a brief was presented by the Manitoba Bar Association to the Manitoba Legislature's Committee on Orders and Regulations: *An Ombudsman for Manitoba*, (1966) 2 Manitoba L.J. 61. *The Ombudsman Act*, S.M. 1969 (2d Sess.), c.26 is commented on by Northey, (1970) 4 Manitoba L.J. 206.

[121] *Report of the Ombudsman* (Halifax: Province of Nova Scotia, 1971, 1972), 21-34, 62. Nova Scotia's Ombudsman was created by the *Ombudsman Act*, S.N.S. 1970-71, c.3.

[122] Although many of the recommendations of the McRuer Report, *supra*, f.n.61 were implemented by legislation, its thorough study and conclusion in favour of a Parliamentary Commissioner similar to the New Zealand model (Report No. 2, vol. 4, 1340-1390) has not enjoyed the same success.

[123] The case for a Federal Ombudsman is strongly advocated by Rowat in *The Ombudsman Plan*, *supra*, f.n.113, 106-115, which reflects his earlier writing

The Ombudsman cannot be a panacea for all the problems of citizens with government administration, but it clearly would be of assistance to a large number for whom judicial review is not a realistic avenue of redress.

A Specialized Forum for Review

Some form of independent review of an administrative decision may be desirable in many instances. Whether the reviewing body needs to be a generalist court of the traditional variety is the relevant question. The establishment of a Divisional Court with power to review decisions of administrative agencies in the Province of Ontario was at least a step in the direction of having a single body bring some focus to the administrative law field in which it will build up a certain expertise.[124] At the same time, the Divisional Court handles many other matters [125] and it comes to the administrative law field with understandable preconceptions based on history, experience and case law in regard to administrative agencies. An appeal lies with leave on any question not of fact alone to the Court of Appeal,[126] and ultimately to the Supreme Court of Canada,[127] which gives rise to the possibility of a very lengthy judicial proceeding. It is too early as yet to evaluate whether the Divisional Court will live up to the mixed expectations of it, but it deserves a fair chance.

An alternative worthy of serious consideration, it is suggested, would be an independent review body for administrative agencies within provincial or federal jurisdiction, as the case may be. Essential to its success would be a simple and inexpensive procedure. The French model, called the Conseil d'Etat, is well-known and highly regarded in many quarters, the essential principles of which

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on the topic. Sheppard, *An Ombudsman for Canada*, (1964) 10 McGill L.J. 291, 327-329, 335-337 discusses some aspects of an Ombudsman on the federal scene.

[124] *Supra*, f.n.8. This development was the result of a recommendation of the McRuer Report, *supra*, f.n.61, vol. 2, 663-668. One criticism of the Divisional Court in practice, however, is that its judiciary has changed from one sitting to another, with the result that an expertise in administrative law matters is not being acquired by the Bench. If this is a problem, it would seem easily remedied by an appropriate adjustment in the Supreme Court of Ontario calendar with respect to judicial assignments.

[125] *The Judicature Act Amendment Act, 1971, supra*, f.n.8, s.1 repealed section 17 of *The Judicature Act*, R.S.O. 1970, c.228, and substituted a new section setting forth the jurisdiction of the Divisional Court in various matters.

[126] *Ibid.*, s.3, repealing section 29(1)(2) of *The Judicature Act* and substituting a new section 29(1) therefor.

[127] *Supreme Court Act*, R.S.C. 1970, c.S-19, ss.35-45.

might be adaptable to our common law situation.[128] Public acceptance, however, would be critical. The review body would need to have a clearly established independence from all aspects of politics and government. This would probably require tenure of office and attractive emoluments to ensure a highly qualified membership. It could be labelled as an administrative court.[129] Further review or appeal might be excluded, except where fundamental legal values such as civil liberties are in issue, so that a prolongation of proceedings and substitution of judicial views would not be possible. What it could bring to the administrative law field is a greater perspective and understanding of the role and function of administrative agencies with less prospect for unwarranted intervention in the guise of generalist values.

The Role of Legal Education

For a moment, it may be useful to indulge in a few words of self-evaluation. We who teach in the law schools have largely perpetuated the traditional thinking on judicial review of administrative action. Perhaps this is because we assume that most law school graduates will go forth and do battle with administrative agencies in the courts on behalf of an aggrieved citizen as a client. After a law student has been thoroughly indoctrinated in the judicial process through the first year curriculum, he or she can hardly be expected to approach the administrative law course in the second or third year of law school with an open mind.

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[128] Increased common law interest in the Conseil d'Etat and French administrative law in recent years is reflected in the quantity of writing now available in English. For a selection, see: Brown and Garner, *French Administrative Law* (1967); Freedman, *The Conseil d'Etat in Modern France* (1961); Schwartz, *French Administrative Law and the Common-Law World* (1954); Hamson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat* (1954); and Cake, *The French Conseil d'Etat — An Essay on Administrative Jurisprudence,* (1972) 24 Admin.L.Rev. 315 for a briefer treatment, among many others. The McRuer Report, *supra,* f.n.61, 1410-1473 (Report No. 2, vol. 4, 1969), gave extensive consideration to the French administrative court system, but did not favour its adoption in Ontario for a variety of reasons, the "insuperable barrier" being the appointment of 'superior court' judges under section 96 of the *British North America Act.* It is difficult to comprehend why section 96 should pose any greater problem for administrative courts if introduced, than for the present superior courts in Ontario. Since *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.,* [1949] A.C. 134 (P.C.), section 96 may even be less of an obstacle.

[129] The idea is being mooted in the United States: Nathanson, *Proposals for an Administrative Appellate Court,* (1973) 25 Admin.L.Rev. 85.

Another important factor in our present approach is the availability of teaching materials. Principally, these have been cases illustrating judicial intervention where an administrative agency has overstepped statutory boundaries. As a result, many law students seem to emerge from the basic course in administrative law thinking that government agencies are committing jurisdictional excesses and denials of natural justice with abandon. What we may fail to convey as a counterweight is the positive and constructive view of the administrative process. How suitable teaching materials can be designed to communicate the broader picture is not easy to answer. As an increasing number of law school graduates seek employment in government, business and other endeavours outside the practice of law itself, we can no longer justify the narrowness of our teaching vehicles. To this point, however, we have failed to come up with viable alternatives.[130]

One last comment goes to teaching method. In addition to, or in substitution for the classroom, the clinic operation would seem admirably suited for teaching administrative law.[131] Existing clinic programmes already include administrative agency problems as standard fare, but the concept could be expanded along more specialized paths including the placement of law students in government offices for a first hand look at the other side of the coin. Law schools

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[130] This is not to suggest, however, that experimentation is not taking place in many Canadian law schools. Professor John Willis has produced a fascinating collection of materials entitled *Cases and Readings on Public Authorities* (Toronto: Faculty of Law, University of Toronto, 1971) for use by his class in Administrative Law. Professor Hudson Janisch's *Administrative Law Materials* (Halifax: Faculty of Law, Dalhousie University, 1972-73) make use of a "file" on various administrative agencies for his course on the subject. One also cannot overlook law teaching developments in the United States, such as the distinctive approach of Auerbach, Garrison, Hurst and Mermin, *The Legal Process: An Introduction to Decision-Making by Judicial, Legislative, Executive and Administrative Agencies* (1961).

[131] Clinic programmes are regarded, of course, as the great new discovery in legal education. Medical education has long used the clinic setting, and it was advocated for law schools some years ago by Frank, *Why Not a Clinical Lawyer School?*, (1933) U.Pa.L.Rev. 907. For developments in the United States, Ferren, *Goals, Models and Prospects for Clinical-Legal Education*, (1969) 20 U. Chicago L. School Conference Series 94 and Gorman, *Clinical Legal Education: A Prospectus*, (1971) 44 So.Calif.L.Rev. 537 are two among a host of articles. Introduction of clinics to provide legal services for indigent persons in Canada, and its relation to clinic programmes in law schools, are explored by Lowry, *A Plea for Clinical Law*, (1972) 50 Can. Bar Rev. 183, who cites a number of publications on the subject. Most Canadian law schools have established legal aid clinic operations of various kinds or are in the process of doing so.

have only begun to scratch the surface in clinical training, and the administrative law field offers obvious potential for future development.

Do We Need It?

Judicial review of administrative action is still needed, although its scope should be narrowed and its inadequacies should lead us to consider other forms of supervision. Where civil libertarian values are at stake or constitutional questions are in issue, judicial review will continue to be the most satisfactory and acceptable form of control. One would hope that courts will exercise substantial restraint in other situations. If they fail to do so, legislative restriction or exclusion of their supervisory role is clearly justified. Over the long haul, however, judicial review of administrative action will most likely be of declining importance as more effective and appropriate means of overseeing the actions of administrative agencies gradually develop.