COMMENTS
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Some Comments from a Symposium on Quebec's Professional Code

On Wednesday, January 21, 1976 a symposium was held by the Quebec Board of the Canadian Bar Association section on Administrative Law. The purpose of the symposium was to examine certain features of Quebec's new *Professional Code* and of three unpublished *documents de travail* emanating from the newly-created Office des professions: "Règlement déterminant la procédure du Comité d'inspection professionnelle", "Règlement concernant la tenue des dossiers et des cabinets de consultation" and "Code de déontologie type". There were six speakers, three representing the Office des professions and three unconnected with it. The McGill Law Journal has asked the three independent panelists to summarize their comments. It is hoped that the Office des professions will reply in a subsequent issue and that a useful debate will be set in motion on this topical and important subject.

I. Lack of recourse

"Recourses" which are open to an individual under a legal system are traditionally of two types — appeal and review. The right of appeal is not presumed but must be expressed by statute.[1] On the other hand, the possibility of review exists (albeit on fairly narrow grounds), unless taken away.[2] It is the goal of this comment to examine the situations in which review and appeal are available to professionals under the new *Professional Code*[3] together with certain related evidentiary problems,[4] and to suggest a number of ominous lacunae.

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[1] R. Dussault, *Traité de Droit Administratif* (1974), 1054.

[2] *Ibid.*, 1018. Judicial review of an administrative action is available where a tribunal acts without jurisdiction or *ultra vires*; it is also available when a breach of natural justice or an improper exercise of discretion has occurred, or when there is an error of law on the face of the record.

[3] S.Q. 1973, c.43, as am.by S.Q. 1974, c.65; Bill 32, 3d Sess., 30th Leg., Que.Nat. Ass. 1975, assented to June 19, 1975; Bill 62, 3d Sess., 30th Leg., Que.Nat.Ass. 1975, assented to December 9, 1975.

[4] *E.g.*, hearsay; self-incrimination.

The Code envisages three distinct situations which may give rise to sanctions: (i) questions of discipline;[5] (ii) questions of general incompetence revealed by professional inspection;[6] and (iii) questions of incapacity due to physical or mental condition.[7] A preliminary problem is that as far as the last two situations are concerned, there is no form of recourse available to *prevent* an enquiry into a professional's competence or health. On the contrary, an obligation is created to submit both to professional inspection[8] and to medical (including psychiatric) examination.[9] Given the effect that such an examination can have not only on the reputation[10] and the general sense of well-being and dignity of an individual, but also on the ability of a professional to obtain insurance, the failure to provide strict guidelines for use of the power to demand a medical examination is surely a serious violation of individual rights. At the present time, the Bureau of a corporation ordering such an examination is merely required to give the reasons for its decision.[11]

In addition, it must be remembered that attacks on individuals' competence or physical or mental health can, even more than attacks on probity, be used to discourage unorthodox (though not necessarily incorrect) professional theories, or unpopular opinions. It is generally agreed that professions thrive in an atmosphere of free research and experimentation, and it is submitted that, while a certain level of professional competence must be maintained, everyone has a right to a degree of eccentricity. An untrammelled power to inspect and to examine individuals is a threat both to this right and to innovative ideas in general.

In Samuel Butler's classic *Erewhon*, we find a world in which illness and ugliness are more serious matters than wickedness. Under the *Professional Code*, before a person can be brought before the committee on discipline, a complaint must be lodged which is not only in writing and under oath[12] but "which appears to be justified".[13] In comparison, no such minimal protection exists for professionals whose competence or health is called into doubt and one

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[5] *Supra*, note 3, ss.114-176.
[6] *Ibid.*, ss.107-113.
[7] *Ibid.*, ss.51-53.
[8] *Ibid.*, s.112.
[9] *Ibid.*, s.53.
[10] The system of "confidentiality" is quite clearly insufficient to protect reputation, especially in smaller communities; see the comment by Michel Décary in this issue of the McGill Law Journal, *infra*.
[11] *Supra*, note 3, s.53.
[12] *Ibid.*, s.124.
[13] *Ibid.*, s.125.

wonders if the *Erewhon* philosophy has not taken root among us. It is submitted that a recourse should be created without delay, to allow professionals to demand reasonable grounds before submitting to inspection or examination.

As far as appeals are concerned, sections 158 and 51 create a general right of appeal from decisions of the committee on discipline and from decisions regarding the physical or mental health of a professional, to a tribunal consisting of three Provincial Court judges.[14] However, no appeal lies from a decision of a professional inspection committee regarding general competence. A further complication is that section 138 allows the committee on discipline to suspend provisionally a professional in the interests of the public before a final decision is made. The section does not provide an appeal from such provisional measures and while the tribunal has in the past entertained such appeals and is continuing to do so, the rights involved are too important to be granted "on tolerance". The Code should be amended to make appeals from provisional suspension and from decisions of inspection committees a matter of right.

When we turn to the concept of review, we find that the Code has attempted to take it away entirely. An appeal taken to the tribunal from a decision of the committee on discipline or from a decision concerning a medical examination is final and cannot be reviewed by a higher appellate body.[15] Furthermore, section 187 frees members of the committee on discipline, the professional inspection committee and the appeal tribunal from prosecution for acts done in good faith.

One also feels some uneasiness at the wording of sections 188 and 189. Not only are the extraordinary recourses eliminated for the purpose of the *Professional Code*, but section 189 is a specific attempt to destroy the general supervisory jurisdiction of the Superior Court which is described in article 33 of the Code of Civil Procedure and dates from the dawn of the common law. Quite apart from the constitutional issues it raises,[16] it seems safe to say that this privative clause goes much too far in depriving individuals of established recourses.[17]

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[14] *Ibid.*, s.158.

[15] *Ibid.*, s.170.

[16] This section could be interpreted as an attempt to usurp the exclusive supervisory jurisdiction of the Superior Court, whose judges must be appointed federally; *British North America Act, 1867*, 30-31 Vict., c.3, s.96 (U.K.). See generally, G. LeDain, *The Supervisory Jurisdiction in Quebec* (1957) 35 Can.Bar Rev.788.

[17] *I.e.*, the ordinary recourses such as a declaratory judgment, action in nullity or injunction and the prerogative or extraordinary recourses such as certiorari, mandamus and prohibition.

Finally, article 190 enables two judges of the Court of Appeal to strike out any action commenced contrary to sections 187 and 188.

It is of course true that, according to traditional administrative law, such privative clauses do not operate when an excess of jurisdiction occurs.[18] However, recent decisions of the Supreme Court indicate that greater weight may henceforth be given to such provisions,[19] and the inclusion of these sweeping privative clauses in the *Professional Code* is certain to have considerable importance in reducing the success of applications for review. Where an appeal lies to the tribunal, one can argue that no further recourses are required. But, as we have seen, the appeal is an incomplete weapon since it is unavailable in the case of a decision of a professional inspection committee. It must be noted, too, that since the Code makes the extraordinary recourses unavailable, there seems to be no way of limiting the exercise of an official's discretion or to stop him or her from meddling unduly.

It is unclear what mischief the privative clauses are designed to remedy. Courts have never been inclined to interfere with professional affairs,[20] and it is therefore likely that any attempt to obtain redress before the Superior Court would succeed only in cases of clear injustice. The impartiality and detachment of the Superior Court could only encourage the maintenance of high professional standards along with a desirable level of justice.

Finally, we come to the problems of evidence. Sections 139 and 145 appear to permit any type of evidence, including hearsay, to be used before the committee on discipline. Only recently, the law excluding hearsay was recognized as part of Quebec civil procedure.[21] The right to practise as a professional is no less important than any other civil right and there is no reason for allowing less stringent rules of evidence for professional matters.[22]

Sections 143 and 145 give the committee on discipline the power to compel professionals and witnesses to appear and answer all questions. It would seem to follow from these provisions that a person could be forced into a situation of self-incrimination. While

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[18] *E.g., Lalonde Automobiles Ltée* v. *Naylor* [1974] R.P. 372. Excess of jurisdiction includes a breach of the rules of natural justice; *ibid.*, 373.

[19] *Pringle* v. *Fraser* [1972] S.C.R. 821, (1972) 26 D.L.R. 3d 28; *Re Woodward Estate* [1973] S.C.R. 120.

[20] *E.g., Re a Solicitor* [1974] 3 All E.R. 855.

[21] *Morrow* v. *Royal Victoria Hospital* [1974] S.C.R. 501.

[22] It is perhaps arguable that we should let into evidence all "direct" hearsay as Britain did in the *Civil Evidence Act 1968*, 16-17 Eliz.II, c.64. But this is no justifieation for inventing special, lax rules for one eategory of individuals.