Can Fairness be Effective?

Julius H. Grey*

I. The Limits of Fairness

Procedural fairness undoubtedly constitutes the most important achievement of administrative law since the seminal decision of *Ridge* v. *Baldwin*.[1] The concept of fairness has been used to extend some protection to individuals affected by decisions of a public nature in matters previously deemed "administrative" and therefore presumably unreviewable.[2] To put it in more accessible terms, the courts have acceded to Lord Denning's view that practically nothing is *totally* outside the sphere of courts[3] and now hold that even in those matters where it is desirable for officials to have wide powers and considerable immunity from judicial review, it is not correct to categorize that immunity as total. Certain minimum standards must be met.

These minimum standards do not mean that courts serve as an automatic appeal from administrators. It has often been stressed by courts that judicial review means review of the *legality* of a decision and not of the *merits*.[4] It follows that in many cases courts will not review decisions with which they disagree, because they cannot substitute their opinions for those of the officials.

---

* Of the Faculty of Law, McGill University.

[1] *Ridge* v. *Baldwin* [1964] A.C. 60 (H.L.). The leading Canadian cases are *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311 and *Martineau* v. *Matsqui Institution Disciplinary Board (No. 2)* [1980] 1 S.C.R. 602. See also Mullan, *Fairness: The New Natural Justice?* (1975) 25 U.T.L.J. 281.

[2] See Grey, *Discretion in Administrative Law* (1979) 17 Osgoode Hall L.J. 107 [hereinafter *Discretion*] and Grey, *The Duty to Act Fairly After Nicholson* (1980) 25 McGill L.J. 598 [hereinafter *After Nicholson*]. See also Macdonald, *Judicial Review and Procedural Fairness in Administrative Law* (1980) 25 McGill L.J. 520 and (1980) 26 McGill L.J. 1.

[3] See, *e.g.*, *A.-G.* v. *Chaudry* [1971] 1 W.L.R. 1624 (C.A.) *per* Lord Denning M.R.: "The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient to do so" and see, *infra*, note 79. See also *Roncarelli* v. *Duplessis* [1959] S.C.R. 121, 140-2 *per* Rand J.

[4] For an account of the distinction between appeal and review, see R. Dussault, *Traité de droit administratif canadien et québécois* (1974), 1055. See also *Bhadauria* v. *M.M.I.* [1978]

Nor is it totally inconceivable for certain types of decisions to be entirely unreviewable on grounds of fairness. In *M.N.R.* v. *Coopers and Lybrand*,[5] Mr Justice Dickson suggested in his description of the "continuum" of decisions that some may be totally unreviewable. Even more significant is the Supreme Court decision of *A.-G. Canada* v. *Inuit Tapirisat of Canada*[6] in which a decision to determine Bell Canada tariffs was held not to be subject to "fairness". The decision was essentially an interpretation of a statute which provided for cabinet appeals; it touched on the nebulous but crucial question of the division of powers and of the review of political questions. This case—although it never fully developed the discussion of these questions—is thus analogous to *Gouriet* v. *Union of Post Office Workers*[7] and *Laker Airways* v. *Department of Trade*.[8]

Gouriet[9] showed that certain political questions could not be tried on the merits before the courts. The jurisdiction of courts can be quite elastic in our constitutional system, but the elasticity is not infinite. *Laker* indicates that all of this does not mean that such decisions are unreviewable.[10] The *dicta* in *Roncarelli* v. *Duplessis*[11] and observations in Wade's *Administrative Law*[12] stating that nothing is ever totally unreviewable still stand. However, the review would normally concern the statutory limits of the power[13] and not involve considerations of fairness. *Inuit Tapirisat*[14] clearly states that review would be possible on the issue of "geographic" jurisdiction even where fairness had no place.

The controversial issue of the review of Royal prerogative powers could also be affected by this analysis. Lord Denning thought they were reviewable in the same way as other powers.[15] The judgments in other cases have been less liberal.[16] Since prerogative powers are not normally created by statute, review could not in these types of cases consist purely of statutory

---

1 F.C. 229 (T.D.) and the comments on this case in Grey, *Discretion*, *supra*, note 2, 112.

[5] [1979] 1 S.C.R. 495, 505.

[6] [1980] 2 S.C.R. 735, 755 *per* Estey J.: "While it is true that a duty to observe procedural fairness, as expressed in the maxim *audi alteram partem*, need not be express..., it will not be implied in every case. It is always a question of construing the statutory scheme as a whole".

[7] [1977] 2 W.L.R. 310 (C.A.), *rev'd* [1978] A.C. 435 (H.L.).

[8] [1977] 2 W.L.R. 234 (C.A.). An analogous Canadian case is *Roman Corp.* v. *Hudson's Bay Oil and Gas Co.* [1973] S.C.R. 820.

[9] *Supra*, note 7.

[10] *Supra*, note 8, 250 *per* Lord Denning M.R.

[11] *Supra*, note 3, 142 *per* Rand J.

[12] H. Wade, *Administrative Law*, 4th ed. (1977), 340 *et seq.*

[13] *I.e.*, did the officials exceed jurisdiction in the "geographic" sense and did they follow the rules set out in the statute?

[14] *Supra*, note 6, 756-9 *per* Estey J.

[15] *Laker*, *supra*, note 8, 250 *per* Lord Denning M.R.

[16] See, *e.g.*, *Re Multi-Malls Inc.* v. *M.T.C.* (1976) 14 O.R. (2d) 49, 58 (C.A.) *per* Lacourcière J.A. See also Grey, *Discretion*, *supra*, note 2, 123-4.

construction. But it is arguable that review is limited to verifying whether the limits of the prerogative power were observed. There is, of course, no doubt that such verification is possible.[17] Could it also be the sole recourse? This solution, while not unreasonable, would seem to offer officials too easy a shelter from most judicial review. It is likely that in a deserving case, Lord Denning's view that Crown prerogative is not absolutely unreviewable — as seen in *Laker*[18] — would prevail. However, Crown prerogative is difficult to review and this is another illustration of the fact that fairness is not a plaintiff's panacea designed to turn the courts into supervisors of the entire administrative process.

Another potential weakness of fairness is its potential susceptibility to privative clauses. Privative clauses — defined as statutory ways of avoiding judicial review — have had mixed fortunes before our courts. They do not operate where there is a jurisdictional error,[19] but they have sometimes received surprisingly wide application. In certain cases, courts have shown a tendency to apply statutes literally in this respect. Perhaps the clearest case was *Woodward Estate* v. *Minister of Finance*.[20] Even more far-reaching was the case of *Pringle* v. *Fraser*[21] where a "jurisdictional" privative clause was held to be effective.

Privative clauses were also given considerable importance in *C.U.P.E. Local 963* v. *New Brunswick Liquor Employees*.[22] It is likely that if a move away from judicial review ever developed in Canada, it would centre on privative clauses. Does the obligation to act fairly yield to privative clauses? It is not easy to answer this question categorically in the present state of the law.

Given the "continuum" of fairness and natural justice,[23] it seems certain

---

[17] *A.-G.* v. *De Keyser's Royal Hotel* [1920] A.C. 508, 537-8 (H.L.) *per* Lord Atkinson.

[18] *Supra*, note 8, 249-51. There is a difficulty in that many abuses of power may technically be justified by the words of a statute although the statute is in fact used for the wrong purpose. See, *e.g.*, *Re Multi-Malls*, *supra*, note 16, 62-3 *per* Lacourcière J.A., and *Congreve* v. *Home Office* [1976] Q.B. 629, 652 (C.A.) *per* Lord Denning M.R., concerning the improper exercise of a Minister's discretionary power to propose to revoke a licenee validly obtained as a means of levying money it had no right to demand.

Since Crown prerogative is not of statutory origin and has no specific purpose, this type of review is not usually possible. For a judicial discussion of the origin of Crown prerogative, see *Burmah Oil Co.* v. *Lord Advocate* [1965] A.C. 75, 99-112 *per* Lord Reid.

[19] See, *e.g.*, *Lalonde Automobiles Ltée* v. *Naylor* [1974] R.P. 372 (Qué. C.A.); *A.-G. Québec* v. *Labrèque* (1980) 38 N.R. 1, 18 (S.C.C.) *per* Beetz J.

[20] [1973] S.C.R. 120, 128-30 *per* Martland J.

[21] [1972] S.C.R. 821, 826-7 *per* Laskin J. (as he then was).

[22] (1979) 26 N.R. 341, 349-50 (S.C.C.). Mr Justice Dickson justified the existence of privative clauses protecting the decisions of labour boards on the grounds that such boards develop "[c]onsiderable sensitivity and unique expertise" in relation to their specialized subject matter.

[23] *Coopers and Lybrand*, *supra*, note 5, 505.

that failure to act fairly does affect jurisdiction. It is equally certain, following *Harelkin* v. *University of Regina*,[24] that "unfair" decisions are only voidable and not absolutely void. It also seems evident from the jurisprudence that some decisions can be exempted from fairness.[25] One would conclude that, with careful drafting, legislatures could immunize many of their functions from review for fairness, or at least greatly diminish the scope of such review.[26]

It is possible to interpret *Inuit Tapirisat*[27] as a case where drafting excluded fairuess. Another ominous decision in this area is *Hasma* v. *Canadian Wheat Board*,[28] which effectivly says that fairness cannot be used to overturn the plain words of a statute. In short, courts cannot refuse to apply a statute because it is "unfair". However, this type of case is only a short distance from one in which fairness is excluded by a privative clause.

Of course, privative clauses, even where effective, are usually given the minimum effect reasonably arguable in the circumstances.[29] It is also politically difficult for governments to permit actions which are unfair in explicit terms. Nevertheless, given the ardent desire of governments to avoid judicial review and the sophistication of its draftsmen, it is difficult not to discard the fear that statutory drafting could seriously dilute fairness.

The narrowness of fairness is apparent in the case which was its greatest triumph — *Martineau (No. 2)*.[30] Both Mr Justice Dickson and Mr Justice Pigeon emphasized that although it was possible to obtain review of an administrative decision it was not easy and would take a strong case indeed.[31]

Both the constitutional limits and the practical limits[32] made it unlikely that fairness could turn out to be a danger to tlie integrity of the administrative process. Tlie fears that fairness initially inspired[33] seem wholly unjustified. In fact, fairness is such a vulnerable coneept that grcat

---

[24] [1979] 2 S.C.R. 561, 585 *per* Beetz J.

[25] This is stated explicitly in *Coopers and Lybrand*, *supra*, note 5, 505 *per* Dickson J. See also *Inuit Tapirisat*, *supra*, note 6 and the quotation *per* Estey J.

[26] It is submitted that no matter what drafting technique was employed, truly scandalous cases would not be tolerated by the courts.

[27] *Supra*, note 6.

[28] (1981) 122 D.L.R. (3d) 706, 713 (Alta Q.B.) *per* MacDonald J.

[29] See, *e.g.*, *Re Pioneer Grain Co. and Kraus* (1981) 123 D.L.R. (3d) 48 (F.C.A.); *Teamsters Union Local 938* v. *Masicotte* (1980) 34 N.R. 611 (F.C.A.); *Yellow Cab Ltd* v. *Board of Industrial Relations* [1980] 2 S.C.R. 761.

[30] *Supra*, note 1.

[31] At least in a prison matter, *ibid.*, 630 *per* Dickson J. and 637 *per* Pigeon J.

[32] For further discussion of the limits of fairness, see Grey, *After Nicholson*, *supra*, note 2, 600-2.

[33] See, *e.g.*, *Kurek* v. *Solicitor General* (F.C.T.D.) No. T-1324-75, 10 September 1975, in which Addy J. held that an administrative decision of a Minister involved the exercise of a right similar in kind to a prerogative right of the Crown and was therefore unreviewable.

care must be taken for it not to be lost. A number of ways could be found by officials of forestalling review of high-handed decisions. One way would be to say as little as possible and give as few reasons as possible. Another way would be to observe all the procedural rules scrupulously and then hide behind the fact that fairness is supposed to be procedural only.[34] The combination of these two methods of evasion could be highly effective.

II. Silence as a Way of Evading Fairness

It is not the intention of the writer to provide a complete analysis of the obligation to provide reasons for decisions in administrative law. In the first place, this was done very recently;[35] in the second, it is not directly connected with fairness.[36] Nevertheless, it is not possible to ignore this question altogether in discussing fairness, because it is obvious that portentous silence could easily result in review for unfair conduct.

In *Nicholson*,[37] Laskin C.J.C. noted that one of the basic requirements of fairness was to inform the person affected by a decision of the reasons for it. This probably meant reasons for contemplating a particular step in order to give the other side an opportunity to argue against it, but it could also mean giving a rudimentary explanation after the fact. Traditional administrative law did not require reasons unless there was a statutory provision,[38] but the traditional law is changing quickly and, if fairness is to be a meaningful concept, a way of policing it must be found. It is reasonable to suppose that the duty to give reasons and the sophistication of the reasons must depend on the decision taken.[39] The total absence of a duty to motivate would make it possible to review only the decisions of the more naive, unskilful or honest officials who provided reasons or made such glaring errors that the reasons ceased to matter.

Before a general notion of fairness had developed — when only "quasi-judicial" decisions were generally considered reviewable[40] — motivation was

---

[34] Fairness is certainly treated as a procedural concept in *Martineau (No. 2)*, *supra*, note 1, 623-30 *per* Dickson J., and in Mullan, *supra*, note 1, 288.

[35] Lévesque-Crevier, *La motivation en droit administratif* (1980) 40 R. du B. 535.

[36] The purpose of requiring that a decision be motivated is often simply to maintain the "appearance of justice". See, *e.g.*, *Alvarez* v. *M.M.I.* [1979] 1 F.C. 149 (C.A.).

[37] *Supra*, note 1, 328.

[38] See Wade, *supra*, note 12, 211 and 772; *Monsanto Co.* v. *Commissioner of Patents* [1979] 2 S.C.R. 1108, 1118-21 *per* Pigeon J.; *Northwestern Utilities Ltd* v. *City of Edmonton* [1979] 1 S.C.R. 684, 704-7 *per* Estey J.

[39] *I.e.*, in the same way that the degree of fairness required depends on the nature of the particular issue. See the "continuum" idea in *Coopers and Lybrand*, *supra*, note 5, 505.

[40] In the more distant past certain English decisions came close to expressing modern notions of fairness, *e.g.*, *Cooper* v. *Board of Works for the Wandsworth District* (1863) 14 C.B. (N.S.) 180, 143 E.R. 414 (C.P.); *Local Government Board* v. *Arlidge* [1915] A.C. 120 (H.L.). Therefore, one should perhaps speak of the "rebirth" rather than the "birth" of

less crucial, since in court-like situations there was usually a transcript, some form of explanation was in any case provided and there was considerable procedural refinement. When one subjects administrative and peremptory decisions to review, it is essential to order that a certain minimum of information be provided, or no real review will be possible. This minimum is necessarily fluid and variable. Nevertheless, in this area the courts will have to guard against tautological reasons or explanations which merely repeat the words of the statute creating the official's particular power.[41] The details remain to be worked out, but it is amply clear that the duty to act fairly is incompatible with a general right to refuse to justify administrative decisions.

III. Scrupulous Observance of Procedure as a Way of Evading Fairness

If the external forms of procedure were scrupulously observed, it would still be possible for grossly unfair decisions to be made. The fact that one side is given the chance to speak does not mean that the other side is listening. It is certain that someone who is biased or determined to take a particular course of action will often bend over backwards to appear even-handed or indeed well-disposed. It would be sad if the sole effect of the growth of fairness was a proliferation of manuals written to help officials clothe their decisions in the garb of fairness. This would not only be undesirable, but also contrary to the principles of law, since every remedy is supposed to be potentially effective[42] and review for fairness would thus be rendered toothless.

It follows that in order to prevent fairness from becoming a sham there must be some provision for review of questions of substance and not only procedure. Procedural fairness is based on the proposition that there are limits in procedure beyond which officials will not be permitted to go, even where their functions are "administrative" in nature. Is there an equivalent in matters of substance?

It is submitted that the equivalent is found in the rules for review of

---

fairness after *Ridge* v. *Baldwin*, *supra*, note 1, in 1963. It is also necessary to remember that the "unreviewability" of administrative decisions may have meant simply the unavailability of the remedy of *certiorari*.

[41] In cases where reasons are explicity required by statute the Supreme Court of Canada has taken note of this problem: *Monsanto*, *supra*, note 38, 1118 *et seq.*; *Northwestern Utilities*, *supra*, note 38, 704 *et seq.* It is submitted that in questions of fairness the same principle should apply.

[42] *M.N.R.* v. *Wrights' Canadian Ropes Ltd* [1947] A.C. 109, 122 (P.C.) *per* Lord Greene M.R.: "This right of appeal must, in their Lordships' opinion, have been intended by the legislature to be an effective right."

discretion.[43] These rules require that even discretionary decisions[44] be made in good faith, without the influence of error of law or irrelevant facts, and not arbitrarily or unjustly.[45] The broad notion of good faith is particularly interesting because it includes not only malice or dishonesty, but also acting for purposes not included by the legislator or for reasons which, however laudable, are not part of the official's function.[46] It is also important because of strong authority which holds that at *all* times and in *all* circumstances bad faith may be invoked against a public decision.[47]

No less important is the concept of reasonableness.[48] Unreasonableness is not an easy thing to prove,[49] but once proven it invalidates any decision. Variants on this would include decisions made arbitrarily or capriciously.[50] All such decisions would be invalidated.[51] There exists a line of English cases of particular importance here, because the issue of reasonableness is discussed with relation to *certiorari* and its availability where "rights" are not necessarily determined and no "superadded duty" can be found. The most

---

[43] See, in general, Grey, *Discretion*, *supra*, note 2, and, in particular, Grey, *After Nicholson*, *supra*, note 2, 602, where the theme of this article is outlined in capsule form. See also the celebrated case of *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147, 208 (H.L.) *per* Lord Wilberforce where much of this argument is foreshadowed.

[44] *I.e.*, decisions where there is no right or wrong solution and the official may to a large extent do as he pleases.

[45] See *Boulis* v. *M.M.I.* [1974] S.C.R. 875, 877 *per* Abbott, J. quoting from the judgment of Lord Macmillan in *Fraser and Co.* v. *M.N.R.* [1949] A.C. 24, 36 (P.C.) and 885 *per* Laskin J. (as he then was).

[46] See *Roncarelli*, *supra*, note 3, 143 *per* Rand J.; *Congreve*, *supra*, note 18, 651 *per* Lord Denning M.R.; Wade, *supra*, note 11, 372. See also *Toronto* v. *Forest Hill* [1957] S.C.R. 569, 572 *per* Rand J. While this case dealt with the interpretation of subordinate legislation, the principles behind the control of this type of discretion are not substantially different.

[47] *Landreville* v. *Boucherville* [1978] 2 S.C.R. 801, 813-4 *per* Beetz J. It is interesting to consider whether the S.C.C. decision in *Inuit Tapirisat*, *supra*, note 6, would have been different if bad faith had been proved.

[48] *Secretary of State for Education and Science* v. *Tameside Metro Borough Council* [1977] A.C. 1014, 1024-7 (C.A.) *per* Lord Denning M.R., *aff'd* [1977] A.C. 1036, 1064 (H.L.) *per* Lord Diplock: "[I]n public law "unreasonable" as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt." See also *Roberts* v. *Mapwood* [1925] A.C. 578, 586-90 (H.L.) *per* Lord Buckmaster.

[49] See *Tameside*, *ibid.*, 1064 *per* Lord Diplock.

[50] See *Boulis*, *supra*, note 45, 877 *per* Abbott J. See *Federal Court Act*, R.S.C. 1970, Supp. II, c. 10, s. 28(3).

[51] Remedies might differ depending on the nature of the decision, but following *Vachon* v. *A.-G. Québec* [1979] 1 S.C.R. 555, 561-3 *per* Pigeon J. with respect to evocation and *Solosky* v. *Government of Canada* (1979) 30 N.R. 380, 388-90 *per* Dickson J. with respect to declaration, it should no longer be difficult to get a remedy in the case of an unreasonable or arbitrary decision by a public body.

explicit decision is that of *R.* v. *Hillingdon London Borough Council, Ex parte Royco Homes.*[52]

These cases conclude unequivocally that unreasonableness is sufficient ground for judicial review and *Hillingdon*[53] recognizes the possible use of *certiorari* in this area of law. When we consider that the very same debate took place with respect to fairness,[54] the relationship between the two concepts becomes all the more clear.

The most striking case on this subject is probably a recent Australian decision, *Minister of Immigration and Ethnic Affairs* v. *Pochi.*[55] It suffices to quote a passage from the judgment of Deane J. to see its relevance:

> It would be both surprising and illogical if, in proceedings before a statutory tribunal involving an issue of the gravity of deportation of an established resident, the rules of natural justice were restricted to the procedural steps leading up to the making of a decision and were completely silent as to the basis upon which the decision itself might be made. There would be little point in the requirements of natural justice aimed at ensuring a fair hearing by such a tribunal if, in the outcome, the decision maker remained free to make an arbitrary decision.[56]

One of the best Canadian examples of unreasonableness as a form of review akin to fairness is the second test for jurisdiction propounded by Dickson J. in *C.U.P.E.* After deciding in the first test that the issue under discussion was within the Labour Relation Board's geographic jurisdiction, the learned judge stated the second test as follows:

> Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention, by the Court upon review?[57]

---

[52] [1974] Q.B. 720, 729 (D.C.) *per* Lord Widgery C.J. quoting with approval the *dictum* of Lord Denning M.R. in *Pyx Granite Co.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572 (C.A.): "The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose "such conditions as they think fit", nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authorities are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

Lord Widgery C.J. also quotes approvingly from the headnote in *Hall & Co.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 (C.A.), at p. 730 of *Hillingdon*: "[A]lthough the object sought to be attained by the [planning authority] was a perfectly reasonable one, the terms of the conditions, requiring the plaintiffs to construct an ancillary road at their own expense... , were so unreasonable that they were *ultra vires.*"

[53] *Ibid.*, 648 *per* Lord Widgery C.J. applying *Ridge* v. *Baldwin*, *supra*, note 1, 74-6 *per* Lord Reid.

[54] See *Re Alberta Union of Provincial Employees and Alberta Classification Appeal Board* (1977) 81 D.L.R. (3d) 184 (Alta S.C., App. Div.) and *Martineau (No. 2)*, *supra*, note 1.

[55] (1980) 44 F.L.R. 41 (F.C. Aust.).

[56] *Ibid.*, 67.

[57] *Supra*, note 22, 351. A similar case was decided in *Service Employees' International Union* v. *Nipawin Union Hospital* [1975] 1 S.C.R. 382, but its importance has only now become clear. The case was heavily relied on in *C.U.P.E.*

One could link this to fairness by saying that a decision made in bad faith, unreasonably, or in a capricious or arbitrary way is clearly unfair.[58] It would seem that review of procedural fairness and review of substantive discretion are really twin duties vested in courts to police the administration and to make certain that no official is permitted to exercise unlimited power. Even though many functions, hitherto described as "administrative", are to be exercised in an informal, rapid manner, and even though in many of them the officials quite properly have great discretion, there will always be limits both of procedure and substance beyond which officials will not be able to go.

IV. Substantive Fairness and the Trends in Administrative Law

One major advantage in eliminating the "procedural" requirement for the application of fairness is consistency with present and, it is submitted, healthy trends in administrative law. The distinction between procedure and substance is often blurred and ean give rise to much technical sophistry. There has been an unmistakable trend towards eliminating unessential technical distinctions in administrative law.

There can be no doubt that several years ago, administrative law was a highly technical subject, dominated by well-entrenched but unclear distinctions.[59] Since *Ridge* v. *Baldwin*,[60] courts had done much to alleviate this problem. As a general statement of principle, one can take a passage from the judgment of Lord Reid in *Wiseman* v. *Borneman*:

> Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances and I would be sorry to see this fundamental principle degenerate into a series of hard and fast rules.[61]

The most important "rule" — the distinction between administrative and judicial function — has been substantially weakened by the introduction of the notion of a "continuum".[62] Some authorities have even denied the significance of the distinction altogether.[63] Whether this is correct or not,

---

[58] *Nipawin*, *ibid.*, 389, certainly joins unreasonableness and natural justice together; presumably, fairness would also be included.

[59] See, *e.g.*, "*B*" v. *Commission of Inquiry* [1975] F.C. 602 (T.D.).

[60] *Supra*, note 1.

[61] [1969] 3 All E.R. 275, 277 (H.L.).

[62] *Coopers and Lybrand*, *supra*, note 5.

[63] *Re Scott and Rent Review Commission* (1977) 81 D.L.R. (3d) 530, 533-5 (N.S.C.A.) *per* MacKeigan C.J.N.S.: "Modern Canadian Courts... have tended to reject the "administrative" *versus* "judicial" test, and have looked rather at the subject-matter involved and the function of the tribunal or official involved to determine broadly what procedural rules should be followed to ensure fairness to those protected." This means that the distinction, as it is made in *Coopers and Lybrand*, *supra*, note 5, is only important for the purposes of ss. 18 and 28 of the *Federal Court Act*, R.S.C. 1970, Supp. II, c. 10.

there is no doubt that the distinction no longer has the decisive effect it did in the past.

The distinction between "rights" and "privileges", while it has not lost its analytic appeal,[64] has also lost some of its significance. Prior to *Ridge* v. *Baldwin*,[65] the determination of rights was a *sine qua non* for judicial review. Now such cases as *R.* v. *Criminal Injuries Board, Ex parte Lain*[66] and *Wiseman* v. *Borneman*[67] seem to have established a more flexible standard.[68]

An area particularly suited for technical wrangling was one of remedies. It could, for instance, be argued that the complicated arguments about judicial review of the 1950s and 1960s were really about the use of *certiorari*. In *Vachon*[69] the Supreme Court firmly established that procedure was not to become the deciding factor in law, and that substantive law was to have primacy at all times.

In *C.U.P.E.*[70] the utility of the traditional technical terminology of "collateral and preliminary matters" was put in doubt by the Supreme Court.

Technical bans to obtaining damages from officials and public authority started to crumble with *Roncarelli*.[71] In the field of tort this tendency has continued with *Gershman* v. *Manitoba Vegetable Producers' Marketing Board*[72] and *Chartier* v. *A.-G. Québec*.[73] In contracts, the leading, "liberal" case is *Verrault* v. *A.-G. Québec*.[74] In "restitution", one

---

[64] See Grey, *After Nicholson*, *supra*, note 2, 607, fn. 59 and the unreported case *Siclait* v. *M.E.I.* (F.C.T.D.) No. T-5569-78, 24 September 1979.

[65] *Supra*, note 1.

[66] [1967] 2 Q.B. 864, 881-2 *per* Lord Parker C.J., 884 *per* Lord Diplock.

[67] *Supra*, note 61, *per* Lord Reid.

[68] The judgment of Dickson J. in *Martineau (No. 2)*, *supra*, note 1, 618 is particularly important in this respect. But in *Saulnier* v. *Québec Police Commission* [1976] 1 S.C.R. 572, as interpreted in *Martineau (No. 2)*, the distinction still played a role.

[69] *Supra*, note 51. *Vachon* was followed by *Solosky*, *supra*, note 51, and *Kelso* v. *Government of Canada* (1981) 35 N.R. 19, 29 (S.C.C.) *per* Dickson J., which have, practically speaking, turned declaration into a general remedy.

[70] *Supra*, note 22, 346-9 *per* Dickson J.

[71] *Supra*, note 3.

[72] (1976) 69 D.L.R. (3d) 114 (Man. C.A.) *per* O'Sullivan J.A. The Court found that the Board's conduct, consisting of unlawful threats outside the scope of its statutory powers and duties, amounted to the tort of intimidation, justifying an award of punitive damages.

[73] [1979] 2 S.C.R. 474. In his judgment for the majority, Mr Justice Pigeon found that members of the Québec Police Force, in the performance of their duties, committed acts of fault by, *inter alia*, misusing a Coroner's Warrant to detain the appellant and unjustifiably incarcerating him for 30 hours. Damages of $50,500 were awarded.

[74] [1977] 1 S.C.R. 41 *per* Pigeon J. The appellant obtained damages for the unjustified cancellation by the Minister of Social Welfare of a building contract under which it was to build an old-age home.

can quote *Manitoba Fisheries* v. *The Queen*.[75] It is clear that in all these matters, technical difficulties were disregarded in favour of substantive justice.

Another similar evolution has been that of *locus standi*. From a technical bar to review, *locus standi* has become a way of weeding out actions by persons with no interest at all.[76]

It stands to reason that, in the context of the new, flexible administrative law, it would not be the court's intention to embark on a technical definition of procedure and substance and that certain minimal and similar rules of justice would apply to both. Thus "substantive fairness" is not only not a heresy but is an essential component of the new orthodoxy.[77]

Conclusion

Our system of government vests seemingly unlimited legislative power in the Queen in Parliament under the title of parliamentary sovereignty.[78] It vests equally unlimited original jurisdiction in the superior courts[79] to adjudicate on all issues. Although Parliament may limit the courts' jurisdiction, the courts will have the last word in interpreting such a restriction of their power. This division of powers is essential to prevent the growth of tyranny and to maintain an equilibrium in a system where few of the formal protections of the American Constitution exist.[80]

---

[75] [1979] 1 S.C.R. 101, 116-8 *per* Ritchie J., *aff'g* Lord Atkinson's judgment in *A.-G.* v. *De Keyser's Hotel*, *supra*, note 17, 542. The appellant was awarded damages for the deprivation of its goodwill as a going concern.

[76] See *A.-G. Gambia* v. *N'Jie* [1961] A.C. 617, 634 (P.C.) *per* Lord Denning speaking to the question of what constitutes an aggrieved person for the purpose of obtaining *locus standi*: "The words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him." *Thorson* v. *A.-G. Canada* [1975] 1 S.C.R. 138 *per* Laskin J. (as he then was) for the majority, held that courts have a discretion to grant *locus standi* to taxpayers to raise a constitutional question when it would otherwise in all likelihood be immune from judicial review. *Nova Scotia Board of Censors* v. *McNeil* [1976] 2 S.C.R. 265 *per* Laskin C.J. widened the scope of this discretion to "members of the public".

[77] One proof of the orthodoxy of the idea is the fact that an article by Prof. David Mullan on substantive fairness appears in this very issue and was presumably exactly contemporary with the present essay. Another interesting analysis is found in Lyon, *Administrative Law — Combining Search for a General Theory of Judicial Review of Administrative Action for Legality* (1980) 58 Can. Bar Rev. 646.

[78] See, *e.g.*, A. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (1965), 39-85, and G. Marshall, *Constitutional Theory* (1971), 35-72.

[79] See *Board* v. *Board* [1919] A.C. 956, 962 (P.C.) *per* Viscount Haldane: "If the right exists, the presumption is that there is a Court which can enforce it." *Chaudry*, *supra*, note 3, 1624, *per* Lord Denning M.R.: "Whenever Parliament has enacted a law and given a particular remedy for the breach of it... the High Court always has reserve power to enforce the law."

[80] The connection between fairness and certain constitutional problems is clearly seen by Deane J. in *Pochi*, *supra*, note 55. At p. 65, Deane J. discusses American principles of

Absolute power on the part of members of the executive is absolutely incompatible with the court's role in the system.[81] The expansion of government and growth in the scope of officials' decisions has forced courts to look for more effective tools of review in order to maintain the equilibrium of forces.

Procedural fairness is one such tool. By itself, fairness is a limited concept, and moreover is very easy to evade. Its effectiveness is only ensured when it is not too narrowly circumscribed. Of course, there can be no question of government by courts; the courts will only interfere in cases of flagrant abuse. However, it is not possible to limit fairness to matters of procedure. Fairness is only effective when combined with some form of obligation to motivate public decisions and with the traditional and well-established rules for the review of the *substance* of discretionary decision.

---

procedural due process and views them as essentially no different from British (and hence Australian or Canadian) law. It would be a welcome development if this view were generally accepted.

[81] For judicial discussion of the division of powers, see, in particular, *R.* v. *Catagas* (1977) 81 D.L.R. (3d) 396 (Man. C.A.) *per* Freedman C.J.M., who held that the Crown may not by executive action dispense with laws in favour of a particular group; *Gouriet*, *supra*, note 7, (C.A.) 322 *per* Lord Denning M.R., and (H.L.) 496 *per* Lord Diplock; *Laker*, *supra*, note 8, 250 *per* Lord Denning M.R.: "Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive". In *Kelso*, *supra*, note 69, Dickson J. makes it clear that government departments are not above the law.