Legislative Limitations On The Courts' Power To Review Administrative Action In Quebec *

René Dussault **

Introduction

SECTION I — The Power of Limitation

Para. I — Its Source: The Doctrine of the Sovereignty of Parliament

A) Judicial Manifestation of Its Incorporation in the Canadian Constitution

B) Particular Situation in the Provinces

Para. II — Constitutionality of the Power

A) Argument based upon Section 96 of the British North America Act

a) Strict Interpretation of Section 96 of the British North America Act

b) Broad Interpretation of Section 96 of the British North America Act

B) Argument based upon the General Tenor of the Canadian Constitution

SECTION II — The exercise of the Power of Limitation

Para. I — Different Types of Privative Clauses

A) Nature and Origin of Privative Clauses

a) Development in England

b) Development in Canada and in Quebec

---

* The present work is part of a thesis for which the author has been awarded the degree of Ph.D. in laws of the University of London, England.

** B.A., L.L.L. (Laval) Ph.D. (London), Member of the Quebec Bar, Legal adviser to the Quebec Federal-Provincial Affairs Department, Lecturer in Public Law, Faculty of Law, Laval University.

B) Indirect Privative Clauses

a) Non-Express Privative Clause: "The King Can Do No Wrong"

b) Very General Privative Clauses

i) The Henry VIII Clause

ii) Provisions Affording Very Extensive Discretionary Powers

1. In British and Canadian Law

2. In Quebec Law

C) Direct Privative Clauses

a) In British and Canadian Law

i) Partial Clauses

ii) Total Clauses

b) In Quebec Law

i) General Privative Clauses

ii) Special Privative Clauses

1. Partial Clauses

2. Total Clauses

Para. II — Judicial Effect of Privative Clauses

A) Nature of the Problem

a) Meaning of the Phrase "Court of Inferior Jurisdiction"

b) Proposed Statutory Interpretation

B) Interpretation given by the Courts

a) In England

b) In the Common Law Provinces

c) In Quebec

i) Older Case Law

ii) Modern Case Law

Conclusion

INTRODUCTION

The important role which the courts of justice play in matters of public law is often considered as an essential element in the good functioning of a democratic constitution.[1] In Canada, they assure the protection of the rights and liberties of the citizens and see to the just and lawful execution of the administrative policies of the Central Government as well as those of the different provinces. The various statutory instruments issued by these governments, and the bodies they set up in order to further their policies, as well as their proper functioning, are, under Canadian constitutional law, subject to the control and supervision of a minister responsible to Parliament or to one of the ten Provincial Legislatures.

Yet, the courts question, and with good reason, whether this theory of ministerial responsibility adequately safeguards the rights and liberties of the citizens especially in the case of administrative decisions where arbitrariness and injustice are not always apparent. The marked tendency of the courts to consider themselves the main, if not the sole guardians of individual rights and liberties[2] has led them to resist vigorously any attempt to deprive them of their supervisory jurisdiction. But their slowness and adherence to form, often inconsistent with the modern necessity for prompt and definitive administrative action, have constantly forced the Executive branch to seek the right to supervise in a final manner, free from judicial intervention, the agencies it has established to further its policies.

In Quebec, as in the other provinces, the Legislature has yielded more and more to the urgent demands of the Administration for the enactment of laws to protect the latter against intervention by the courts. The method usually preferred has been to insert in the

---

[1] Lederman, *Independence of the Judiciary*, [1956] Can. Bar Rev., 1139 at 1178; Bernard Schwartz, *Case and Comment*, (1950) 28 Can. Bar Rev., 679; L. Lesage, *Le Bref de Prohibition*, (1953) R. du B., 305 at 313; Gerald E. Le Dain, *The Supervisory Jurisdiction in Quebec*, (1957) Can. Bar Rev., 788 at 818.

[2] As Farwell J. pointed out in the case of *Dyson* v. *Att.-Gen.* [1911] I.K.B. 410 at 424 "the courts are the only defence of the liberty of the subject against departmental aggression". See also the remarks of Lemieux J. in the case of *Mathieu* v. *Wentworth*, (1899) 15 C.S. 504 at 507: "J'ajouterai seulement que si le législateur enlevait ou pouvait enlever aux tribunaux supérieurs le droit de surveillance et de contrôle sur les cours inférieures, ce serait dans bien des cas consacrer l'arbitraire et l'injustice, et mettre en péril la liberté des citoyens dont la loi est toujours jalouse".

various Acts creating administrative bodies specific clauses suppressive of the common law judicial power of review. Such clauses are commonly called "privative clauses". They may be defined as legislative provisions, forming part of a general or special Act, the judicial effect of which is to remove the action of certain public officers or administrative agencies more or less completely from the common law judicial power of review, by exluding the various methods by which that power might be exercised.

By means of these privative clauses, which are sometimes direct and sometimes rather indirect, the Quebec Legislature has tended more and more to impose a maximum limitation on the courts' power to review administrative action. It cannot be disputed that this attitude imperils the very existence of the judicial power of review.

It is therefore necessary to examine, in the first section, this power of limitation, and in the second section, the use made of it by the Quebec Legislature.

SECTION I — THE POWER OF LIMITATION

It is most important to determine, in the first place, the exact source of the power of limitation, i.e. the true judicial foundation upon which the Legislature bases itself and gains support for the enactment of clauses suppressive of judicial authority and, in the second place, the constitutional status of this power in Canada.

Para. I — Its Source: The Doctrine of the Sovereignty of Parliament

The authority enjoyed by Parliament to limit the common-law power of the courts to review administrative action is rooted in the historical concept of the Sovereignty of Parlament. As professor Yardley recently pointed out:

> The principle of Parliamentary sovereignty ensures that Parliament is able, should it so desire, to pass an Act rendering the executive completely immune all forms of judicial control.[3]

This doctrine of the Sovereignty of Parliament, which acquired considerable scope and development in England in the seventeenth century following the Parliament's victory over the King, was im-

---

[3] *A Source Book of English Administrative Law,* 222. As was also stressed by E.C.S. Wade in the preface to the tenth edition of Dicey's work, *The Law of the Constitution,* at XXVI:

> It is of course possible for the Parliament using its sovereignty to decree that administration should be at the absolute discretion of the administrator.

planted in Canada in common with many other English doctrines and constitutional principles. The intention to bestow upon Canada "a Constitution similar in principle to that of the United Kingdom" is indeed quite explicit in the very preamble of the *British North America Act.*[4]

By its incorporation in the Canadian Constitution the English doctrine of the Sovereignty of Parliament has necessarily undergone some modification due to the federal character of that Constitution. The modification has been limited to matters of form; the substance has remained unchanged.[5] The only ground the courts can invoke to invervene in the exercise of absolute sovereignty by the Central Parliament or by any of the ten Provincial Legislatures is that of jurisdictional competence. In so far as the Canadian Parliament legislates in a sphere which is not explicitly reserved to the provinces by section 92 of the *British North America Act,* that is, as long as it acts within the limits of its jurisdiction, it knows no other law than that of its free will and enjoys an absolute sovereignty.[6] The same applies to the Provincial Legislatures, when they legislate within the limits of their jurisdiction. Indeed, as was pointed out by F.P. Walton:

> The Constitutional doctrine of the Sovereignty of Parliament is as applicable to the provincial Legislatures as the Parliament of the Dominion or even the Imperial Parliament, provided always that the province was dealing with a subject included in the field of legislation assigned to it.[7]

It is in virtue of this sovereignty that the Quebec Legislature,[8] within the limits of its own jurisdictional competence, prides itself

---

[4] See M. Olivier, *British North America Act and Selected Statutes, 1867-1962.*

[5] As pointed out by J. T. Thorson in, *The Rule of Law in a Changing World,* [1960] U.B.C.L. Rev., 176 at 182:

> It was therefore not to be expected that such countries would accept the doctrine of the Sovereignty of Parliament and confidence in the executive that we in Canada have inherited from Great Britain.

[6] As was pointed out by C.-A. Sheppard in an article, *Is Parliament still Sovereign ?,* [1964] C.B.J., 39 at 42:

> this theory of absolute Parliamentary supremacy, even tough it originated in England, is highly relevant to Canada.

[7] *The Legal System in Quebec,* (1913) 33 Can. Law Times, 280 at 296. Voir aussi *Beardmore* v. *City of Toronto,* (1910) 21 O.L.R. 505.

[8] Although the term "Legislatures" is used in the *British North America Act* to designate the provincial legislative authorities, one could just as well speak here of the "Quebec Parliament". In fact, the Quebec Legislature possesses all the attributes of a Parliament, as do those of the other provinces also. See Louis Philippe Pigeon, *Are the Provincial Legislatures Parliaments ?,* [1943] Can. Bar Rev., 826. See also Beaudoin, *Les aspects généraux du droit public dans la province de Québec,* (1965). See Stephen Scott, *Thrice the Brinded Cat Hath Mewed,* [1965] McGill L.J. 356.

upon legislating as it wishes, even to the point of seeking to withdraw, by means of appropriate privative clauses, the acts and decisions of the Administration from the common law judicial power of review.

A) Judicial Manifestation of Its Incorporation in the Canadian Constitution

Notwithstanding the inherent limitations of the federal division of constitutional powers and of the colonial status which, until the *Statute of Westminster*, 1931, was the juridical status of Canada,[9] the English doctrine of the Sovereignty of Parliament has profundly affected the Canadian Parliament and the Provincial Legislatures, with the many political and legal consequences that this implies. This was due, for the most part, to the influence of the English jurists who sat on the Judicial Committee of the Privy Council in London.

It is difficult not to be impressed by the clarity, vigour and precision of their many *obiter dicta* on the question.[10] In the well known case of *Hodge* v. *The Queen*,[11] for instance, Lord Fitzgerald expressed himself in unequivocal terms:

> Within these limits of subjects and area (prescribed by sect. 92) the local legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have under like circumstances.

A few years later, in *Re The Initiative and Referendum Act*,[12] Viscount Haldane declared:

> Within these limits of area and subjects, its local legislature, so long as the Imperial Parliament did not repeal its own act conferring this status was to be supreme and has such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the provinces, in accordance with the scheme of distribution which it enacted in 1867.

---

[9] The power of the Imperial Government to disallow a law passed by the Canadian Parliament has not in strict theory been abolished by the *Statute of Westminster*, 1931. It is however difficult to imagine a situation where it could he used, for since then, the Queen acts on the advice of her Canadian Ministers in relation to Canadian affairs. It must be added that even prior to the *Statute of Westminster*, this power was scarcely used by the British Government. In fact only one Canadian law was disallowed. This was in 1873. See Clokie, *Canadian Government and Politics*, 32, 115.

[10] See *Dobil* v. *The Temporalities Board*, [1882] A.C. 136 at 146, 147, per Lord Watson; *Henrietta Miur Edwards* v. *Att.-Gen. for Canada*, [1930] A.C. 125 at 136, per Lord Sankey; *Croft* v. *Dunphy*, [1933] A.C. 156 at 163, per Macmillan L. J.; *British Columbia Electric R. Co.* v. *The King*, [1946] 4 D.L.R. 81 at 87, per Viscount Simon.

[11] [1883] A.C. 117 at 132.

[12] [1919] A.C. 935 at 942.

Finally, Lord Atkin sanctioned the same principle in *Shannon* v. *Lower Mainland Dairy Products Board:* [13]

> Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament.

It appears from all these observations, that the Canadian Parliament and the Provincial Legislatures do not act under the orders of the Imperial Parliament and consequently are neither its delegates nor its representatives. Within the sphere prescribed by sections 91 and 92 of the *B.N.A. Act* their scope of legislation is as complete and extensive as that of the Imperial Parliament in London; their legislative sovereignty is as absolute.[14]

Many Canadian judges have expressed the same opinion as the Privy Council on the question. In *Florence Mining Co. Ltd.* v. *Cobalt Lake Mining Co. Ltd.,*[15] Riddell J. of the Court of Appeal of Ontario asserted categorically:

> The Legislature within its jurisdiction can do anything that is not naturally impossible and is restrained by no rule human or divine. If it be that the plantiff acquired any rights,... the Legislature had the power to take them away.[16]

Many years later, Middleton J. of the same Court of Appeal re-emphasized this principle:

> The Legislature in matters within its competence is unquestionably supreme.[17]

Henderson J., also of the Court of Appeal of Ontario, in the *King ex rel Tolfree* v. *Clark, Conant and Drew,*[18] expressed himself as follows:

> It is well settled by authority that the Legislature when legislating upon a subject matter within the jurisdiction has plenary powers with which the courts have no jurisdiction to interfere.

Finally, Bissonnette J. of the Quebec Court of Appeal, in the case of *Switzman* v. *Dame Elbing,*[19] summarized the question in these explicit terms:

> En résumé dans l'exercice de l'autorité législative qui lui est conférée par l'art. 92, la Législature de Québec a une souveraineté aussi totale, aussi

---

[13] [1938] A.C. 708 at 722.

[14] See H. H. Lefroy, *The Law of Legislative Power in Canada,* 699. Also by the same author, *Canada's Federal Ssystem,* 64-67.

[15] [1909] 18 O.L.R. 275 at 279, affirmed by the Privy Council at [1918] 43 O.L.R. 474.

[16] This is precisely what the Quebec Legislature is trying to do as far as the common law judicial power of review is concerned. Relying on its legislative sovereignty, it enacts clauses designed to suppress that power.

[17] *Beauharnois Light, Heat and Power Co. Ltd.* v. *The Hydro-Electric Power Commission of Ontario,* [1937] O.R. 796 at 822. See also *Reference re Adoption Act,* [1938] S.C.R. 398 at 399, per Sir Lyman Duff.

[18] [1943] 3 D.L.R. 684 at 688-689.

[19] [1954] B.R. 421 at 431.

ample que le Parlement impérial lui-même possède. Et cette souveraineté, elle la tient de la prérogative royale, sans aucune subordination au Parlement fédéral.

B) Particular Situation in the Provinces

The fact remains that in matters of sovereignty the Provincial Legislatures do not enjoy the same position as the Federal Parliament. The division of the legislative powers, as it exists in the *B.N.A. Act*,[20] excludes the possibility of the provinces becoming real sovereign states in an international sense,[21] most of the necessary powers to that end (External Affairs - Defence - Immigration etc.) being vested in the Federal Parliament. When one speaks of sovereignty for the provinces, one uses the word solely in the restricted sense of internal legislative powers,[22] and even then, that sovereignty is not perfect.[23]

First, it should be noted that, although section 92 (1) of the Act of 1867 grants to the provinces the power to amend their constitutions, there is an exception relative to the appointment of the Lieutenant-Governor. Moreover, provincial laws are always subject to disallowance by the Federal Government for reasons of disagreement or non-approval.[24] In matters of concurrent jurisdiction, provincial legislation has effect only as long as it is not repugnant to any federal legislation.[25] In addition, there is a judicial principle, recognized by the courts, whereby the Federal Parliament, in cases of urgent need, has an unlimited jurisdiction even in matters strictly reserved to the provinces by section 92 of the *B.N.A. Act*.[26] It is true

---

[20] ss. 91, 92.

[21] See Michel St. Aubin, *La Province de Québec est-elle un Etat ?*, (1963) 45 Thémis, 51 at 54. See also Marc Brière, *Souveraineté au Canada*, [1953] Thémis, 125.

[22] Me Maximilein Caron, *Notre Milieu*, 383.

[23] F. R. Scott, *Centralization and Decentralization in Canadian Federalism*, (1951) 29 Can. Bar Rev., 1095 à 1100-1101.

[24] See G. V. La Forest, *Disallowances and Reservations of Provincial Legislation*, Department of Justice, Ottawa 1955. The author cites 112 laws which have been disallowed since the Confederation, only twelve of them from 1924 to our day. The Federal Government uses this power of disallowance less and less. The last law to be disallowed by the Governor General was entitled *Act to Prohibit the sale of the Land to any, Enemy, Alien or Hutherite for the Duration of the War*, S.A. 1946, c. 16. It was disallowed on the recommandation of the Hon. Louis St. Laurent then Minister of Justice in the Government of McKenzie King. See also Beaudoin, *op. cit.* 34, 35.

[25] *B.N.A. Act.*, s. 95.

[26] *Fort Francis* v. *Manitoba Free Press*, [1923] A.C. 695: See also J. P. Humphrey, *The Theory of the Separation of Functions*, (1943-46) 5-6 U. of T.L.J., 331 at 347.

that laws so enacted are of a temporary nature and cease to be effective when the emergency ceases; nevertheless this is an important legislative restriction to the absolute sovereignty of the provinces in matters within their legislative competence. Furthermore, in matters of education, Provincial Legislatures are prohibited from "prejudicially affecting any right or privilege with respect to denominational schools which existed by law at the time of the Union".[27] Finally, the Legislatures cannot validly set up administrative tribunals vested with jurisdiction which would make them similar to superior, district or county courts unless they allow the Federal Government to appoint their members.[28] If they did so, these tribunals would not be unconstitutional for that reason alone, but it would be impossible for them to exercise validly their jurisdiction from a constitutional viewpoint, because their members would not have been validly appointed.

Excepting these and other minor restrictions, the will of the Provincial Legislatures is supreme when they act within the limits of their jurisdictional competence. It is by basing itself upon this supreme authority that the Quebec Legislature claims the right to decide whether or not the public interest requires such and such legislation, and to judge if in any particular sphere the common law judicial power of review is being abused, and is consequently causing more harm than good. In cases where the legislature is of the opinion that an accelerated form of procedure is less prejudicial to citizens than the slow procedure of the courts,[29] it tries to protect the action of the various agents, tribunals and administrative bodies from judicial review by means of clauses suppressive of judicial authority, which it causes to be enacted in their constituent statutes.

The Quebec Legislature displays great boldness in drafting such privative clauses, as it feels it is supported by two very significant facts.[30] In the first place, it is clearly established by the terms of section 4 of the *Statute of Westminster*, 1931, that no Dominion law is null because it is contrary to the law of England and, by virtue of section 7(2) of the same statute, this principle also applies to any law passed by a province. In the second place, section 92(14) of the *B.N.A. Act* confers upon it exclusive jurisdiction in the creation, maintenance and organization of courts of justice in the province. The only exception to its legislative power in that sphere is procedure in criminal matters.[31] It is admitted that it cannot

[27] *B.N.A. Act*, s. 93. See also D. A. Schmeiser, *Civil Liberties in Canada*, 12.

[28] *B.N.A. Act*, s. 96.

[29] This is the motive normally invoked by the Legislature to justify the presence of privative clauses.

[30] Voir L. E. Bélanger, *Corps Administratif - Brefs de Prérogatives*, [1964] McGill L.J., 217 at 223.

validly create a court analogous to that provided for in section 96, unless it allows the federal power to appoint its judges, but this restriction is not of a legislative nature. The appointment of the members of Superior, District, and County courts by the Governor-General is a purely executive act.

It would therefore seem that by the use of appropriate words, the Quebec Legislature could deprive the Superior Court of its power to review the action of administrative tribunals or bodies which it has set up. Indeed the doctrine of the Sovereignty of Parliament, which Quebec has inherited from Britain as a member state of the Canadian Federation, justifies at least in theory, the steps taken by the Quebec Legislature with the object of limiting and even of totally suppressing the control exercised by the courts over the activities of the provincial Administration.

However, since Quebec is part of a federal state with a written constitution which established between the General Parliament and the Provincial Legislatures not only a division of legislative powers [32] but also the necessity for close co-operation in the administration of justice,[33] the power of the Quebec Legislature to limit judicial review can raise very serious constitutional problems.

Para. II — Constitutionality of the Power

It is most important to determine if the power of limitation of judicial review has any constitutional basis in Canada, i.e., if from a constitutional standpoint it is possible for the Quebec Legislature to use this power validly by enacting clauses suppressive of judicial authority.[34] Canadian courts have generally avoided pronouncing explicitly on this point, though certain judges have on occasion manifested their wish to do so.[35]

---

[31] *B.N.A. Act*, s. 91 (27).

[32] *B.N.A. Act*, ss. 91, 92.

[33] *Ibid.*, s. 96.

[34] Voir J. G. Pink, *Judicial "Jurisdiction" in the presence of Privative Clauses*, [1965] U. of T.F.L. Rev., 5 at 9 *et seq...*

manifested their wish to do so.[35]

[35] *Miron et Frères Ltd.* v. *Commission des Relations Ouvrières*, (1956) C.S. 389 et 389*a*, per Caron, J.; *L'Alliance des Professeurs Catholiques de Montréal* v. *Labour Relations Board*, [1953] 2 S.C.R. 140 at 155, per Rinfret, J.; *Syndicat National des Travailleurs de la Pulpe et du Papier* v. *Commission des Relations Ouvrières*, (1958) B.R. 1 at 24, per Hyde J.; *The E. B. Eddy Co.* v. *Commission des Relations Ouvrières*, [1958] B.R. 542 at 546, per Rinfret J.,; *Dauphin* v. *Director of Public Welfare*, [1956] 5 D.L.R. (2d) 274; *Ontario Labour Relations Board, Bradley et al.* v. *Canadian General Electric Co. Ltd.*, [1957] O.R. 316 or [1957] 8 D.L.R. (2d) 65; *Slax Inc.* v. *La Commission des Relations Ouvrières de Québec et Amalgamated Clothing of America, local 115*, [1964] R.D.T. 1 at 6, per Brossard, J.

Two main arguments are usually raised against the constitutional validity of these legislative limitations. The first, of a specific nature, is based upon a definite section of the *British North America Act,* to wit, section 96. The second, of a general character, is based upon the general tenor of the Canadian Constitution. The interpretation which has been given to them by the courts and their present judicial value in Canadian constitutional law will now be examined.

A) Argument based upon Section 96 of the British North America Act.

To endeavour, by means of privative clauses, to render unassailable the decisions of administrative tribunals, and render them exempt from the power of review of the superior courts, is equivalent to the turning of those tribunals into superior courts, in the sense of section 96 of the *B.N.A. Act,* which means that their members should have been appointed by the Governor-General of Canada in Council, and not by a provincial Lieutenant-Governor in Council. Such is the argument most often put forward in contesting the constitutional validity of privative clauses in Canada.

The case law is far from being in agreement on this question so that it is difficult to draw reliable guidance from it, at least in the present state of the law.[36]

In their effort to determine whether or not certain provincial administrative tribunals or bodies had been, for all practical purposes, empowered to act as superior courts within the meaning of section 96 of the *B.N.A. Act,* and were therefore, from a constitutional point of view, in the impossibility of exercising validly their jurisdiction, the Canadian courts have put forward three more or less obscure criteria which they have used with very little consistency. The first, of an institutional character, consists in questioning whether the administrative body concerned possesses the normal attributes of a superior court of justice.[37] The second, of a more or

---

[36] See Marc Lapointe, *La Place des Tribunaux du Travail dans l'ensemble de l'Organisation Judiciaire,* (1961) 16th Congrès des Relations Industrielles de l'Université Laval, 93 et 103-104; J. Willis, *Administrative Law and the British North America Act,* (1939-40) 53 Harv. L. Rev., 251 at 261 *et seq...*

[37] See J. Willis, *Section 96 of the British North America Act,* (1940) 18 Can. Bar Rev., 517; See also *Kowanko* v. *J. H. Tremblay Co. Ltd.,* (1920) 50 D.L.R. 578; *Procureur Général de la Province de Québec* v. *Slanec et Grimstead,* (1933) 54 B.R. 230; *Toronto Corporation* v. *York Corporation,* [1938] A.C. 415; *Re Toronto Ry Co. and City of Toronto,* (1918) 43 D.L.R. 739.

less historical character, consists in questioning whether or not it possesses powers and functions which belonged to the superior courts at the time of Confederation.[38] Finally, the third, of a substantive character, consists in questioning whether, in its very substance and taken as a whole, a law presently entrusted for administration to a provincial administrative body should not rather have been entrusted to the administration of a superior court.[39] The absence of precise rules as to the use of these criteria has brought about a division of the case law into two groups of decisions each with specific tendencies.

a) Strict interpretation of Section 96 of the British North America Act.

The first tendency is based on a number of decisions which, by a somewhat literal interpretation of section 96 of the *B.N.A. Act*, seeks to protect the supervisory jurisdiction of the Superior Court against any progressive encroachment by the provinces.[40] Criteria of an institutional and historical character have been most often used for this purpose.

This type of interpretation first appeared in the case of *Toronto Corporation* v. *York Corporation*.[41] Although the Privy Council held that the jurisdiction exercised by the Municipal Commission of Ontario was of an administrative nature, Lord Atkin pointed out

[38] See M. C. Shumiatcher, *Section 96 of the British North America Act re-examined*, (1949) 27 Can. Bar Rev., 131; *McLean Gold Mine Ltd.* v. *Att.-Gen. for Ontario*, [1924] 1 D.L.R. 10; *Martineau and Son* v. *Cité de Montréal*, (1931) 50 B.R. 545; *Reference re the Adoption Act*, [1938] S.C.R. 398, per Duff J.; *Labour Relations Board of Saskatchewan* v. *John East Iron Work Ltd.*, [1949] A.C. 134.

[39] Lederman, *The Independence of the Judiciary*, [1956] Can. Bar Rev., 1139 at 1170-1171. This substantive criterion is very closely linked with the historical one. It was especially put forward in the case of *Labour Relations Board of Saskatchewan* v. *John East Iron Work Ltd.*, [1949] A.C. 134. Its effects is to widen and to give more flexibility to the historical criterion. See also *Att.-Gen. for Ontario and Display Service Co. Ltd.* v. *Victoria Medical Building Ltd.*, [1960] S.C.R. 32.

[40] *Clubine* v. *Clubine*, [1937] 3 D.L.R. 754; *Toronto Corporation* v. *York Corporation*, [1938] A.C. 415 or [1938] 1 D.L.R. 593; *Quance* v. *Thomas A. Ivey and Sons Ltd.*, [1950] 3 D.L.R. 656; *City of Toronto* v. *Olympia Edward Recreation Club Ltd.*, [1955] S.C.R.454; *Mindamar Metals Corp. Ltd.* v. *Richemond County*, [1955] 2 D.L.R. 183; *R.* v. *Ontario Labour Relations Board, ex p. Ontario Food Terminal Board*, (1963) 38 D.L.R. (2d) 530; *Bertrand* v. *Bussière et les Commissaires d'Ecoles pour la Municipalité de Jacques Cartier*, [1962] C.S. 480; *Re Constitutionalité de la cour de Magistrat*, [1965] B.R. 1, reversed by [1965] S.C.R. 772.

[41] [1938] A.C. 415.

that the fact of its possessing certain powers of a judicial nature would render it constitutionally invalid with respect to those powers.[42] It was with the support of this opinion that the Ontario Court of Appeal held some years later that the same Municipal Commission of Ontario had no jurisdiction to decide whether or not a given individual was subject to municipal taxation. Jurisdiction to decide this question was vested in the Superior Courts of the Province both before and at the time of Confederation and could not now be exercised by a tribunal whose members were provincially appointed. As Robertson C.J. pointed out:[43]

> It is clear that the Board has assumed, under an authority that the Legislature has assumed to give it, to exercise the jurisdiction of a Superior Court, or a tribunal anologous thereto.

Subsequently, in the case of *City of Toronto* v. *Olympia Edward Recreation Club Ltd.*,[44] the Supreme Court of Canada held on similar grounds that the question decided by the Municipal Commission of Ontario was a question of law over which it had no authority.[45] In 1960, the same court decided that the Ontario Legislature did not have the required authority to confer judicial powers upon the Master [46] of York County and to make his judgment final, since the nature of the jurisdiction so conferred broadly conformed to the type of jurisdiction exercised by the Superior, District, or County courts at Confederation.[47]

In the recent case of *R.* v. *Ontario Labour Relations Board, ex p. Ontario Food Terminal Board,* Ladlaw J., speaking on behalf of the Ontario Court of Appeal, stated that the Labour Relations Board was not empowered to determine whether Commission created by statute was or was not a Crown agency, that being a question of law which could be determined only by a judge appointed by the Gov-

---

[42] *Ibid.*, at 427: "It is primarily an administrative body: so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority".

[43] *Quance* v. *Thomas A. Ivey and Sons Ltd.*, [1950] 3 D.L.R. 656 at 666.

[44] [1955] S.C.R. 454.

[45] See Bora Laskin, *Municipal Tax Assessment,* [1955] Can. Bar Rev., 993. He criticises the division made between the taxation and evaluation functions. His suggestion to leave both functions to the administrative tribunal with provision for an appeal on question of law to courts listed in section 96 of the *B.N.A. Act* is certainly expedient. This happens more and more frequently in England since the *Tribunals and Inquiries Act,* 1958.

[46] Court's officer who assists a High Court's Judge generally in matter of procedure.

[47] *Att.-Gen. for Ontario and Display Service Co. Ltd.* v. *Victoria Medical Building Ltd.*, [1960] S.C.R. 32; see also *Tremblay* v. *La Commission des relations ouvrières,* [1966] B.R. 44 at 57, per Montgomery J. (dissenting).

ernor-General of Canada under section 96 of the *B.N.A. Act.*[48] Finally, in *Re. Constitutionalité de la Cour de Magistrat,*[49] the Court of Appeal of Quebec recently declared that the Magistrate's Court which replaced the Circuit Court existing at the time of Confederation was a Superior, District or Country court within the meaning of section 96 of the *B.N.A. Act* and that consequently its members had to be appointed in accordance with this section.

b) Broad Interpretation of Section 96 of the British North America Act

The indisputable weight of this first group of cases is vigorously opposed by a much more liberal interpretation of section 96 of the *B.N.A. Act,* expressed in an even greater number of decisions,[50] to the effect that the provinces may vest administrative tribunals with judicial powers, provided that their functions are predominantly administrative. The majority of the Canadian judicial decisions in this group have to do with the Workmen's Compensation and Labour Relations Boards of the various provinces, and in such cases it is the criterion relating to the very substance of the law establishing such tribunals which has especially been used, with the subsidiary aid of history.

The decisions rendered by Duff C.J. of the Supreme Court of Canada, in *Reference Re the Adoption Act,*[51] and by the Privy Council in the case of *Labour Relations Board of Saskatchewan* v. *John East Iron Work Ltd,*[52] are without doubt the two principal decisions in this group. An examination of these decisions shows that a provincial

---

[48] (1963) 38 D.L.R. (2d) 530. See the stern criticisms of this decision by B. Laskin, [1963] Can. Bar Rev., 446.

[49] [1965] B.R. 1 reversed by the Supreme Court of Canada, but on a much more restricted issue. See [1965] S.C.R. 772.

[50] *Kowanko* v. *J. H. Tremblay Co. Ltd. et al.,* (1920) 5$ D.L.R. 578; *Re Toronto Ry Co. and City of Toronto,* (1918) 43 D.L.R. 739; *Workmen's Compensation Board* v. *C.P.R.,* [1920] A.C. 184; *Martineau and Son* v. *City of Montreal,* (1931) 50 B.R. 545 affirmed by [1932] A.C. 113; *Procureur Général de la Province de Québec* v. *Slanec et Grimstead,* (1933), 54 B.R. 230; *Reference Re The Adoption Act,* [1938] S.C.R. 398; *Labour Relations Board of Saskatchewan* v. *John East Iron Work Ltd.,* [1948] 4 D.L.R. 673 or [1949] A.C. 134; *Acme Home Improvements Ltd.* v. *Workmen's Compensation Board,* (1958) 11 D.L.R. (2d) 461; *Dupont* v. *Inglis* [1958] S.C.R. 535; *Alcyon Shipping Co. Ltd.* v. *O'Krane,* [1961] S.C.R. 299; *Shell Co. of Australia* v. *Federal Commissioner of Taxation,* [1931] A.C. 275; *R.* v. *Ontario Labour Relations Board, ex p. Taylor,* (1964) 41 D.L.R. (2d) 456.

[51] [1938] S.C.R. 398.

[52] [1949] A.C. 134 or [1948] 4 D.L.R. 673.

administrative body may exercise certain judicial functions which belonged to the *Curia Regis* in 1867, without for this reason coming under section 96 of the *B.N.A. Act.*[53] Carrying out duties normally exercised by a Superior Court is not a determining factor and does not necessarily make of the tribunal in question a Superior Court, or a court analogous thereto.[54] The functions of the tribunal must be considered as a whole.[55]

The courts had long before made decisions along these lines, but so clear and comprehensive an indication of the criteria and motives on which they were based had never been made. In 1920 the Court of Appeal of Manitoba, in the case of *Kowanko* v. *J.H. Tremblay Co. Ltd. et al.*,[56] had held that the provisions of the *Manitoba Workmen's Compensation Act*,[57] relative to the appointment of members of the Board were *intra vires* of the Provincial Legislature and therefore did not conflict with any power reserved to the Federal Parliament under sections 96-100 of the *British North America Act.*[58]

A few years later, the Court of Appeal of Quebec declared in two famous decisions [59] that the Public Service Board [60] and the Workmen's Compensation Commission [61] did not exercise the functions of a Superior Court according to section 96 of the constitutional law of 1867, and that their members could therefore be legally appointed by provincial authority. Again, the principles and criteria at the basis of these decisions were not exceptionally clear or coherent.[62]

---

[53] *Ibid.*

[54] *Reference Re The Adoption Act*, [1938] S.C.R. 398 at 414, per Duff, C.J.

[55] The test proposed by Lord Simonds in the *John East Iron Works' Case*, [1948] 4 D.L.R. 673 at 685, reads as follows:

> Does the jurisdiction conferred by the Act upon the appelant Board broadly conform to the type of jurisdiction exercised by the Superior, District, or County court ?

See also at 682:

> It is relevant to consider the alleged judicial function of the Board under s. 5 (a) of the Act in relation to its other duties.

[56] (1920 50 D.L.R. 578.

[57] S.M. 1916, c. 125.

[58] This decision was based on *Re Toronto Ry Co. and City of Toronto*, (1918) 43 D.L.R. 739 and *Workmen's Compensation Board* v. *C.P.R.*, [1920] A.C. 184.

[59] *Martineau and Son* v. *City of Montreal*, (1931) 50 B.R. 545 affirmed by [1932] A.C. 113; *Procureur Général de la Province de Québec* v. *Slanec et Grimstead*, (1933) 54 B.R. 230.

[60] Established by the *Public Service Act*, R.S.Q. 1925, c. 17.

[61] Established by the *Workmen's Compensation Act*, *S.Q.* 1928, c. 79 s. 36.

[62] In *Martineau's case*, for instance, it seems that the decision on behalf of the Public Services Board was largely determined by the fact that this Board was the successor of a body which was already in existence in 1867 and was then exercising a similar jurisdiction.

In fact, the decision of the Privy Council in *John East Iron Works,*[63] that the Labour Relations Boards of Saskatchewan did not constitute a Superior Court under section 96 of the *B.N.A. Act,* was really the first judicial decision to state explicity the need for considering the functions of an administrative tribunal in a global perspective. Subsequently the Supreme Court of Canada, on several occasions, approved this view,[64] and in the very recent case of *R.* v. *Ontario Labour Relations Board, ex p. Taylor,* McRuher J. of the Ontario High Court substantiated this point of view when he declared:

> I do not think it was beyond the powers of the Legislature to clothe the Labour Relations Board with jurisdiction to make decisions of law incidental to its administrative duty.[65]

In times or rapid evolution, with multiple changes occurring in the social and economic structure of Canada, when new procedures of adjudication have become necessary — in labour relations, workmen's compensation, social insurance, valuation for taxation etc., — this second judicial trend which gives a much more liberal interpretation of section 96 of the *B.N.A. Act* seems more realistic, comprehensive, and adaptable than the first. When the traditional system becomes inadequate to deal effectively with new situations, the creation of new and appropriate tribunals must be encouraged.

In view of this second judicial tendency, it is submitted that provincial administrative tribunals are in no way restricted to the functions of the lower courts at the time of Confederation,[66] and that they may validly perform all types of new functions now required for the specific application of a particular law. The constitutional validity of provincial legislation setting up an administrative body which possesses some of the functions and duties of a Superior Court depends on whether that body, viewed in a global perspective, bases its decisions on policy and expediency, or on objective norms laid down by the legislature.[67]

---

[63] [1948] 4 D.L.R. 673 or [1949] A.C. 134. See also *Procureur Général de la Province de Québec* v. *Slanec et Grimstead,* (1933) 54 B.R. 230 at 234, per Letourneau J.

[64] *Dupont* v. *Inglis* [1958] S.C.R. 535 at 541, per Rand J.; *Alcyon Shipping Co. Ltd.* v. *O'Krane,* [1961] S.C.R. 299; *Farrell et al. v. Workmen's Compensation Board,* [1962] S.C.R. 48; *Att.-Gen. for Ontario* v. *Scott,* [1956] S.C.R. 137; *Brooks* v. *Pavlich et al.,* [1964] 42 D.L.R. (2d) 572 or [1964] S.C.R. 108.

[65] [1964] 4 D.L.R. (2d) 456 at 462. See also *Tremblay* v. *La Commission des relations ouvrières,* [1966] B.R. 44 at 52, per Casey J.

[66] *Tremblay* v. *La Commission des relations ouvrières,* [1966] B.R. 44 at 47, per Hyde J.

[67] See B. Jackson, *Recent Judicial Consideration of the Privative Clause in Workmen's Compensation Legislation,* [1961] Alberta Law Rev., 583 at 587. See

B) Argument based upon the General Tenor of the Canadian Constitution

From the very nature and terms of the Canadian Constitution it follows that the power of supervision and review of the Superior Court has a constitutional basis, and that any attempt to deprive it of that power is therefore unconstitutional. Such is the second argument generally used to contest the constitutional validity of privative clauses in Canada.

The main contention is that the judicial power of review, though not created by any precise text of law, is nonetheless a necessary corollary of the essential characteristics of the Canadian Constitution. The fact alone, it is said, that a country is endowed with a constitution, implies that in that country, authority is derived from the law and cannot be exercised otherwise than in the manner prescribed by the law. It is the purpose of a constitution to determine how authority shall be both constituted and exercised.

The admission of this elementary and fundamental principle demands, in any country which possesses a democratic constitution, the establishment of a judicial power distinct from the legislative and executive branches of Government in order that the law may be properly observed and that such authority be exercised within the limits prescribed by law. The judicial power must be the independent arbiter in any dispute that may arise, not only between individuals, but also between the authorities and the citizenry. The power of the courts to curb abuses by those who exercise powers delegated to them by Parliament or the Legislature, would therefore stem from the fact that Canada has a democratic constitution providing for an independent system of courts whose powers cannot be abrogated without violation of principles essential to the proper functioning of that constitution.

In fact ,this is the meaning many writers on constitutional law have ascribed to the doctrine of Supremacy of the law or the *Rule of Law,* when they have affirmed that it is one of the essential characteristics of the British and Canadian Constitutions.[68] In Canada, and especially in Quebec, the authors of a number of articles

also D. M. Gordon, *Administrative Tribunals and the Courts,* (1933) 49 L.Q.R., 94 at 108: "In contrast, non judicial tribunals of the type called 'administrative' have invariably based their decisions and orders not on legal rights and liabilities but on policy and expendiency". See also *Leeds (Corp.)* v. *Ryder,* [1907] A.C. 420 at 423-424, per Loreburn L. J.; *Boutler* v. *Kent, J. J.,* [1897] A.C. 556 at 564; *Shell Co. of Australia* v. *Federal Commissioner of Taxation,* [1931] A.C. 275 at 295. *Tremblay* v. *La Commission des relations ouvrières,* [1966] B.R. 44 at 47, per Hyde, J.

on administrative and constitutional law have suscribed to this opinion.[69] They were no doubt prompted by Lord Atkin's statement in *Toronto Corporation* v. *York Corporation*[70] that the provisions of the *B.N.A. Act* concerning the organization of the courts of justice[71] are "three principal pillars in the temple of justice".[72]

However attractive it may be, especially to lawyers filled with the desire to see all citizens protected from even the possibility of abuse by the Administration, this thesis is of doubtful legal authority, since it is not supported by any precise text of the *B.N.A. Act* or by any principle of established law.

However, by reason of the division of powers now existing in Canada between the Central Parliament and the provincial legislatures,[73] the supremacy of the judicial power in constitutional matters is an accepted fact. The Supreme Court of Canada is the supreme arbiter in all disputes between the Federal Parliament and that of a province, or between two or more provinces. Therefore, neither the Federal Parliament nor a Provincial Legislature could remove from a statute, even by express words, the right of appeal to the Supreme Court of Canada to decide a constitutional matter.[74]

Moreover, in 1960 the Federal Parliament passed the *Bill of Rights*, the purpose of which is not only to guarantee to individuals the protection of their rights and fundamental liberties, but also to prevent them from being deprived of such rights without a fair hearing and an equitable trial.[75] However, the Canadian *Bill of Rights* possesses no fundamental character.[76] It is a law like any other, and

---

[68] Dicey, *op. cit.*; R. M. Dawson, *The Government of Canada* (4th ed.), 88; J. A. Corry, *Democratic Government and Politics*.

[69] W. R. Lederman, *The Independence of the Judiciary*, [1956] Can. Bar Rev., 768 and 1139. The author's attempt to give a constitutional basis to the judicial power of review and to the supporting decisions seems to be unsuccessful. See also Bernard Schwartz, *Case and Comment*, (1950) 28 Can. Bar Rev., 679; Louis Lesage, *Bref de Prohibition*, [1953] R. du B., 316; Philip Cutler, *The Controversy on Prerogative Writs*, [1963] R. du B., 197; Jean Beetz, *Le Contrôle Juridictionnel du Pouvoir Législatif et les Droits de l'Homme dans la Constitution du Canada*, [1958] R. du B., 364 at 367-370.

[70] [1938] A.C. 415.

[71] ss. 96, 99, 100.

[72] [1938] A.C. 415 at 426.

[73] *B.N.A. Act*, ss. 91, 92.

[74] *I.O.F.* v. *Bd. Trustees Lethbridge Nor. Irr. Dist.*, [1938] 3 D.L.R. 89 at 102-103, per McGillivray J. A.; *Re Tank Truck Transport Ltd.*, (1960) 25 D.L.R. (2d) 161; See also the *Supreme Court Act*, R.S.C. 1952, c. 259 s. 55.

[75] *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, S.C.* 1960, c. 44 ss. 1(a), 2(e). See Bora Laskin, *Canada's Bill of Rights: a Dilemma for the Courts ?*, [1962] I.C.L.Q., 519.

[76] Schmeiser, *Civil Liberties in Canada*, 37.

might be repealed in accordance with ordinary parliamentary procedure.[77] It would have to be incorporated in the Canadian Constitution in order to acquire any significant or reliable protective value. It therefore does not compare in any way with the famous phrase 'Due Process of Law' which was made an integral part of the United States Constitution by the Fifth Amendment. Furthermore, the Canadian *Bill of Rights* has no positive judicial value as regards the Quebec administration, for it is clearly specified in the Act itself that its provisions "must be interpreted as referring only to matters under the jurisdiction of the Canadian Parliament".[78] Provincial laws are in no way affected by this Act.

It would seem that despite these two peculiarities, there exists in Canada no positive constitutional principles upon which the Superior Courts could base a claim to the right to review the decisions of administrative tribunals which do not come under section 96 of the *B.N.A. Act* and which are entrusted with the application of laws on matters within the legislative competence of a province.[79] An identical situation prevails in England.[80]

The power of the Legislature to immunize administrative bodies which are within its legislative competence against possible intervention by the courts is therefore a fundamental attribute of its sovereignty, which the doctrine of the *Rule of Law* cannot impair.

The Canadian Parliament and the Provincial legislatures, despite the jurisdictional limits imposed by the Constitutional Law of 1867, possess to the same extent as the British Parliament an absolute legislative sovereignty and supremacy. They can in theory enact unjust, oppressive, unreasonable, and even immoral laws. They can derogate from the rules of international law[81] and even from the rule which asserts that a Parliament or Legislature has not the

---

[77] See J. Y. Morin, *Une Charte des Droits de l'Homme pour le Québec*, [1963] McGill L. J., 273 at 303. The author proposes a procedural solution which would give to this Act a special status and a more definite character.

[78] S.C. 1960, c. 44 s. 5(2)(3). This provision is necessary to deter the Federal Parliament from interfering in some legislative sphere which belongs exclusively to the provinces.

[79] *Ottawa Valley Power Co.* v. *Att.-Gen. for Ontario*, [1936] 4 D.L.R. 594 at 603, per Masten J. See also Bora Laskin, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses*, (1952) 30 Can. Bar Rev., 986 at 989; Yves Ouellette, *Les Clauses Privatives en Droit Administratif Québécois*, (1963) 44 Thémis, 235 at 246; J. Willis, *Section 96 of the British North America Act*, (1940) 18 Can. Bar Rev., 517 at 523 approved by Laskin in *Canadian Constitutional Law*, 777.

[80] As was pointed out by Garner, *Administrative Law*, 123, "there is no principle by which the validity of a statutory provision may be called into question".

[81] *British Columbia Electric R. Co.* v. *The King*, (1946) 46 D.L.R. 81 (P.C.).

right to adopt retroactive laws.[82] In such cases the control is political,[83] not judicial.

The Canadian courts do not derive their jurisdiction from the Constitution, as is the case in the United States. By virtue of sections 92(14), 96 to 101 and 129 of the *B.N.A. Act*, their jurisdiction proceeds from the joint action of Parliament and the Legislatures and is therefore at their mercy. The role of the courts in the Canadian legal system is solely to examine if the law is enacted according to the jurisdiction conferred on the Legislature, and to apply it whether it is just or not.[84]

In recent years, and particularly since the abolition of appeals to the Judicial Committee of the Privy Council in London,[85] members of the Supreme Court of Canada seem to have elaborated a new theory to restrict the Sovereignty of Parliament and the Legislature, especially in cases where fundamental public liberties appear to be in danger.[86] This altogether new tendency departs from the traditional paths and does not rely upon the division of legislative powers. Rather is it based on the substance of the federal character of the Canadian State and on the position of interdependence in which the Federal Parliament and the Provincial Legislatures stand in relation to the proper functioning of their parliamentary institutions.

In the *Alberta Press Bill case*[87] of 1938, the Supreme Court of Canada held that a provincial law attempting to regulate newspapers by way of compulsory publication of prescribed matter was invalid because it constituted a possible obstacle to the proper function of federal institutions.[88] It follows clearly that even on a subject which

---

[82] *Western Minerals Ltd.* v. *Gaumont*, [1953] 3 D.L.R. 245 at 269, per Cartwright J. See also *La Cie de Publication La Presse Ltée* v. *Le Procureur Général du Canada*, [1964] Ex. C.R. 627 at 639, per Dumoulin J.: "Si en principe, la rétroactivité d'une mesure fiscale ou autre est condamnable, il ne reste pas moins, que, décrétée par une loi du Parlement du Canada ou d'une Législature provinciale, elle devra recevoir sa pleine application."

[83] It consists in a free and enlightened electorate.

[84] As was pointed out by Riddell, J. in the case of *R. ex rel Tolfree* v. *Clarck, Conant and Drew* [1943] 3 D.L.R. 684 at 686: "the court is to look to the ambit of the jurisdiction conferred on the Legislature and has no right to consider the justice, the wisdom, the result of the legislation."

[85] The *Supreme Court Act*, S.C. 1949, c. 37 s. 3.

[86] See Jean Beetz, *Le Contrôle Juridictionnel du pouvoir Législatif et les Droits de l'Homme dans la Constitution du Canada*, [1958] R. du B., 361 at 366. See also J. Yvan Morin, *Une Charte des Droits de l'Homme pour le Québec*, [1963] McGill L. J., 273 at 297-298.

[87] *Reference Re Alberta Statutes*, [1938] S.C.R. 100.

[88] This criterion for review was put forward by Duff and Davis JJ. Cannon J. relied on the traditional criterion of invasion of the field reserved to the Federal Parliament. (Bias Criminal Law).

is explicity reserved to them by section 92 of the *B.N.A. Act,* the provinces cannot always legislate as they see fit, for they must not enact laws which would hamper or invalidate any federal institution. In several recent decisions mainly concerned with fundamental public liberties [89] this opinion has been followed to such an extent that Abbott J. in the case of *Switzman* v. *Elbling and Att.-Gen. for Quebec,*[90] contrived to read into the Constitution implied limitations on the power of any Legislature in Canada to eat away fundamental freedoms:

> I am also of the opinion that as our Constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in any view, restricted to such powers as may be exerciseable under its exclusive legislative jurisdiction with respect to criminal law and to make law for the peace, order and good government of the nation.[91]

This view, although not as yet generally endorsed,[92] could lead to the adoption in Canada of a new theory which restricts the sovereignty of the Federal Parliament and that of the Provincial Legislatures even in matters within their own jurisdictional competence whenever legislation adopted by the one interferes with the proper functioning of the democratic and parliamentary institutions of the other. This is certainly a happy development in the very important matter of the protection of public liberties and fundamental rights in Canada. However, it would be very difficult to predict if this new judicial theory could protect the right of citizens to appeal to the courts either to attack or to have annulled improper administrative acts or decisions affecting them.

It was in 1962 that for the first time — with the exception of cases under section 96 of the *B.N.A. Act* — the Supreme Court of Canada was called upon to make an explicit statement as to the constitutionality of the Legislature's power to limit judicial review

---

[89] *Boucher* v. *The King,* [1951] S.C.R. 265; *Saumur* v. *City of Quebec,* [1953] S.C.R. 299; *Chaput* v. *Romain* [1955] S.C.R. 834; *Chabot* v. *Les Commissaires d'Ecoles de Lamorandière,* [1957] B.R. 707; *Henry Birks and Sons (Montreal) Ltd.* v. *City of Montreal,* [1955] S.C.R. 799.

[90] [1957] S.C.R. 285. See also Jank. Wanczycki, *Union Dues and Political Contributions Great Britain, United States, Canada - A Comparison,* [1966] 21 Industrial Relations, 143 at 197.

[91] *Ibid.,* at 328.

[92] See however *Chemical and Atomic Workers International Union* v. *Imperial Oil Ltd. and al.,* [1963] S.C.R. 584 where Cartwright, Abbott and Judson JJ., all dissenting, upheld the proposition asserted by Abbott J. in the *Switzman's Case.* See especially the remarks of Abbott, J. at 599, 600. This case is commented on at [1964] Osgoode Hall Law Journal, 203 at 209.

by means of privative clauses.[93] This was in an appeal from a judgment of the Supreme Court of British Columbia, Division of Appeals.[94]

In this case, the widow of an employee of North Vancouver General Hospital who, according to medical evidence, had died as a consequence of physical exercises required in the course of his duties, appeared before the Workmen's Compensation Board of British Columbia to seek monetary compensation for herself and her children. Her claim was disallowed, the Board holding that the husband's death had not resulted from a work accident. The widow then petitioned the Supreme Court's Trial Division to issue a writ of *mandamus*, with a *certiorari* in aid to quash the Commission's decision. Notwithstanding the presence in section 76(1) of the *Workmen's Compensation Act*[95] of a forceful clause suppressive of judicial authority, Manson J. acceded to her request and decreed that this clause was *ultra vires* of the Provincial Legislature for the two reasons previously studied, namely that such a legislative provision makes the Workmen's Compensation Board a Superior Court under section 96 of the *B.N.A. Act*, and that in view of the general tenor of the Canadian Constitution a Legislature has no authority to deprive citizens of their right of access to the courts.[96] The Supreme Court of British Columbia, Division of Appeals, later reversed this decision.[97] The case came before the Supreme Court of Canada, where the only argument invoked was that based on constitutional principles guaranteeing the power of judicial review. Judson J. speaking on behalf of the Court, declared as follows:

> If an argument based upon section 96 of the B.N.A. Act is untenable, the other argument based upon right of access to the courts falls with it..... Short of an infringement of this section, if the legislation is otherwise within the provincial power, there is no constitutional rule against the enactment of section 76 (I).[98]

The Supreme Court of Canada appears to have clearly established that there are no constitutional principles to prevent a Provincial Legislature from enacting, in a matter within its competence, a clause suppressive of judicial authority, provided that this does not entail an infringement of section 96 of the *B.N.A. Act.*

It is to be regretted ,however, that the highest court in the country did not take advantage of this opportunity to make a thor-

[93] *Farrell et al.* v. *Workmen's Compensation Board,* (1962) S.C.R. 48.
[94] (1961) 26 D.L.R. (2d) 185.
[95] R.S.B.C. 1948, c. 370 s. 76 (1) now R.S.B.C. 1960, c. 413 s. 77 (1).
[96] (1960) 24 D.L.R. (2d) 272.
[97] (1961) 26 D.L.R. (2d) 185.
[98] [1962] S.C.R. 48 at 52.

ough study of the authorities and the doctrine on this obscure and controversial problem. It is also surprising, that in an absolutely identical case, involving the Workmen's Compensation Board of British Columbia,[99] the Supreme Court of Canada decided along the same lines as in the *Farrell case* but without alluding to the privative clause in section 77(I).[100] One may conclude that the Commission's decision could have been quashed if there had been any defect as to its jurisdiction.[101] Thus the court overlooked another opportunity to make more explicit its opinion on this matter.

It cannot be said that the problem has been solved to the intellectual satisfaction of all litigants. It is not altogether impossible that some may again contest the constitutional validity of privative clauses on the basis of this argument, hoping to obtain, if not a reversal or a modification of the opinion of the Supreme Court of Canada, at least a more detailed and judicially more satisfactory statement of reasons for judgment.[102]

Consequently, even though, historically speaking, the superior courts in Canada have always exercised an inherent power of supervision and review over lower and administrative tribunals, it does not appear that such power is based on any juridical constitutional guarantee, at least when a Provincial Legislature enacts laws on a matter within its competence. It would, therefore, be theoretically and constitutionally possible for the Quebec Legislature to use the sovereignty it enjoys within its legislative competence to render, by means of appropritately worded clauses, finally and totally judge-proof, the decisions of administrative tribunals which it has set up,[103] provided of course that such tribunals successfully met the test of section 96 of the *B.N.A. Act.*

---

[99] *Rammell* v. *Workmen's Compensation Board,* [1962] S.C.R. 85.

[100] *Workmen's Compensation Act,* R.S.B.C. 1960, c. 413 replacing R.S.B.C. 1948, c. 370 s. 76(1).

[101] See S. M. Chumir, *Case and Comment,* [1963] Alberta Law Review, 124 at 128. The author affirms that the Supreme Court's decision in both cases is due to the presence in s. 77(1) of the *Workmen's Compensation Act* not only of a common 'no *certiorari* clause' but also of a clause which confers on the Workmen's Compensation Board an exclusive jurisdiction.

[102] Y. Ouellette, in *Les Clauses Privatives en Droit Administratif Québécois,* (1963) 44 Thémis, 235 at 247, expresses the opinion that the question is definitely settled by tbe *Farrell case.* Such an opinion seems to be premature.

[103] As was pointed out by St. Jacques J. in the case of *La Commission des Relations Ouvrières de la Province de Québec* v. *L'Alliance des Professeurs Catholiques de Montréal,* [1951] B.R. 752 at 768:

> C'est au Législateur — et à lui seul et non aux cours civiles qu'il appartient d'accorder ou de supprimer le recours aux bref exceptionnels de prohibition ou de *certiorari,* pour tester la juridiction ou la compétence des tribunaux inférieurs ou des corps politiques qui exercent des pouvoirs quasi-judiciaires.

Therefore, it is necessary to determine if the Quebec Legislature has, in practice, really been able to remove administrative action from review by the courts; and to this end, one must examine carefully how the legislative power to limit juidcial review has been exercised in Quebec.

SECTION II — THE EXERCISE OF THE POWER OF LIMITATION

The method generally adopted by the Quebec Legislature with a view to limiting the power of the courts to review the acts and decisions of the Administration is to insert, in laws which confer very wide powers upon administrative agencies, provisions calculated either directly or indirectly to limit or even suppress entirely the judicial power of review. There follows an examination of, first, the different types of privative clauses which at present exist in Quebec statutes and second, the attitude of the courts towards them, i.e., the interpretation which they have given to them, and therefore the actual judicial effect of these clauses in Quebec administrative law.

Para. I — Different Types of Privative Clauses

Before a detailed examination is made of the principal types of privative clauses which at present exist in Quebec statutes, some particulars of their nature and historical origins must be given.

A) Nature and Origin of Privative Clauses

Since they first occurred in British statutes, it is important to give a short historical outline of their development in English law.[104]

a) *Development in England*

The Justices of the Peace in England in the seventeenth century possessed great judicial and administrative powers. Many statutes conferred upon them the power of summary conviction of an individual without previous arraignment.[105] However, it was a well-established fact that such a conviction could be quashed upon appli-

---

[104] See Yardley, D. C. M., *Statutory Limitations on the Powers of the Prerogative Orders in England,* [1957] U. of Q. L.J., 103.

[105] Paley, *Summary Convictions* (10th ed.) Introduction 3-6; T. F. T. Plucknett, *Bonham's Case and Judicial Review,* (1926-27) 40 Harv. L. Rev., 30.

cation for *certiorari* before the Court of King's Bench, either for excess of jurisdiction or for error on its face.[106]

The courts of justice reluctantly accepted this procedure by summary conviction without previous formal arraignment, and then interpreted the statutes in a somewhat restrictive manner.[107] When Parliament enacted laws creating new jurisdictions,[108] particularly laws relating to municipal or school matters, the courts interpreted such laws in the same manner; so much so that they even quashed decisions and orders for merely technical and unimportant faults.

This attitude provoked a defensive reaction by Parliament, which is understandable. Parliament then incorporated in many statutes granting summary jurisdiction, provisions designed to obviate any possibility of obtaining the issuance of a writ of *certiorari*. It proceeded either by inserting special words to that effect,[109] or by providing that the final decision would be made by the Justices of the Peace, or by some other officers of the Court.[110]

It is in this historical context that the first examples of privative clauses in England originated. It must be stated, however, that the Court of King's Bench did not easily accept the suppression by these clauses of its judicial powers in matters of *certiorari*, especially when there was evidence of an error of law [111] or lack of jurisdiction.[112]

b) *Development in Canada and in Quebec*

The procedure followed by Canadian legislators, in framing legislation to abolish review of administrative decisions by the courts, differed somewhat from that followed by the British Parliament. Not only did it differ in point of time, but also in its historical setting. It must be admitted that this procedure, while not quite identical with that followed at Westminster, had a similar purpose.[113]

The earliest evidence of clauses suppressive of judicial review which we were able to find in Canada was in the *Intemperence*

---

[106] *Groenvett* v. *Burwell*, 12 Mod Rep. 386, per Holt J.; *R.* v. *Corden*, [1769] 4 Burr. 2279.

[107] *Warwick* v. *White*, (1769) 4 Bunb. 106.

[108] Paley, *op. cit.*, 2; Holdsworth, *History of English Law*, vol. X, 248, 250, 251.

[109] *Conventicle Act*, 1670, 22 Car. 2, c. 1 s. 6; *Gaming Act*, 1738, c. 28 s. 6. See also *R.* v. *Mahony*, [1910] 2 I.R. 695 at 730, per Gibon J.

[110] Paley, *op. cit.*, 800.

[111] *R.* v. *Plowright*, (1686) 3 Mod. 95.

[112] *R.* v. *Moreley* (1760) 2 Burr. 1041; *Hartley* v. *Hooper*, (1777) 2 Cowp. 523; *R.* v. *Jukes*, (1800) 8 T.R. 542; *R.* v. *Reeve, Morris, Osborne*, [1760] 1 BL.W. 231 at 233, per Lord Mansfield.

[113] Philip Cutler, *The Controversy on Prerogative Writs*, [1963] R. du B., 198 at 210.

Repression Act,[114] 1853. Section 6 of this Act deprived the parties convicted by Justices of the Peace under the said Act of the benefit of the writ of *certiorari* in the following terms:

> And, be enacted, that no judgment or conviction in pursuance of the Act cited in the preamble of this Act, or adjudication on appeal therefrom, shall be removed by *certiorari*, or otherwise, into any of Her Majesty's Superior Courts of Record in Lower Canada.

After the Constitutional Act of 1867, this sort of legislative provision appeared more and more frequently in federal and provincial statutes. One may find in certain federal statutes of the time very significant examples of such privative clauses.[115]

As regards Quebec, it has already been stated that privative clauses were on record there as far back as in any other part of Canada.[116] This is so manifestly true that a number of Quebec statutes of that time include such legislative provisions.[117]

It should be noted that the historical and social contingencies which favoured the inclusion of certain privative clauses in the statutes seem to be less specific in Canada than in England.[118] It would seem that after the enactment of the *B.N.A. Act*, Canadian administrations became more aware of their strength and of the need for real autonomy. Legislators were disposed to protect the administrations from too frequent intervention by the courts in certain specific cases which required some freedom of administrative action.

Legislative attempts to remove the action of administrative officers or bodies from the control of the courts have adopted one or the other of two distinct methods. The first, of a rather indirect nature, consists in including in certain laws formulae of a general nature which often seem innocuous at first sight, but which prove to be formidable barriers behind which the Administration entrenches itself. The second, of a much more direct nature, consists in including,

---

[114] C.S. 1853, c. 214 s. 6 reproduced in the R.S.L.C. 1861, c. 6 s. 49.

[115] *An Act to amend the agricultural Act*, C.S. 1861, c. 30 s. 15; *An Act providing for the Organisation of the Department of the Secretary of State for Canada*, S.C. 1868, c. 42 s. 21; *Canada Temperance Act*, S.C. 1878, c. 16 s. 111; *Indians Act*, S.C. 1880, c. 28 s. 97 as amended by S.C. 1884, c. 27 s. 15.

[116] G. Le Dain, *The Supervisory Jurisdiction in Quebec*, [1957] Can. Bar Rev., 788 at 822.

[117] *Quebec Corporation Act*, S.Q. 1868, c. 33 s. 19; *An Act respecting District Magistrates in this Province*, S.Q. 1869, c. 23 s. 29 as amended by S.Q. 1870, c. 11 s. 4; *Town Corporation's General Clause Act*, S.Q. 1876, c. 29 s. 440.

[118] The exact influence of the presence in English statutes of certain model privative clauses upon the Canadian statutes is not easy to define. It can be said that English legislators opened the way in this sphere for Canadian legislators.

in statutes which confer powers on the Administration, provisions directly and expressly limiting or suppressing the common law judicial power of review.

B) Indirect Privative Clauses

The Legislature that wishes to limit or exclude the judicial power of review in an indirect manner has more than one method at its disposal. It can, for example, forbid recourses to the courts unless prior authorization has been given by a minister[119] or by the Attorney-General;[120] it can also prescribe common procedures for summary convictions or even refrain from insisting in the statute that the Administration justify its decision. Examination here will be restricted to, on the one hand, the indirect limiting effect of the famous maxim "The King can do no wrong" on the judicial power of review, and on the other hand, all those formulae of a very general nature which confer, in vague and inexplicit terms, very wide powers on the Administration.

a) Non-Express Privative Clause: "The King Can Do No Wrong"

This ancient maxim, the very basis of British common and public law, is without doubt the most pervasive and least conspicuous principle suppressive of judicial review that is to be found in law. It is the first clear judicial manifestation of the innate desire of all state authority to protect its action and decision against intervention by the courts of justice. In the Middle Ages this maxim meant that he power of the King extended to doing only what was right. Then it came to mean that no intention of abusing his power can be attributed to him. Finally it acquired its present meaning, namely that whatever the King does is right.[121] The universal character of this maxim stems from the fact that it does not appear in any statute.

The purpose here is not ta make a profund study of the practical implications of this maxim in modern law, but rather to show the ultimate motivation which brought it into being, and also its restrictive judicial effect on the common law judicial power of review. This effect, although not immediately apparent in the maxim itself, nevertheless dominates modern judicial relations between administrators and those administered, in British law as well as in Canadian and Quebec law.

---

[119] *Employment Discrimination Act*, R.S.Q. 1964, c. 142 s. 7.
[120] *Labour Code*, R.S.Q. 1964, c. 141 s. 131.
[121] Keir and Lawson, *Cases in Constitutional Law* (4th ed.), 46.

The origins of the rule are shrouded in the obscurity of the Middle Ages and cannot be easily traced.[122] The rule appears to stem from the fact that before the victory of Parliament over the Crown in the seventeenth century, and especially under the Tudor dynastry, the King enjoyed almost absolute authority and was even considered in the seventeenth century, and especially under the Tudor dynasty, nistration forced the King to delegate ever greater authority to new inferior jurisdictions or Justices of the Peace who enjoyed a great freedom of action. In order to maintain a proper balance between the Crown and its subjects, the medieval maxim to the effect that the King was the source of all justice and equity and could permit recourse to justice against his own administration was then applied. From this originated the procedure known as Petition of Right.

In modern law, the restrictive judicial effect of this maxim, which tends to grant the privilege of immunity to the Crown, is still felt,[124] despite an increasing tendency to place the Crown on the same footing as a private individual as far as liability is concerned. Thus, in 1947 the British Parliament enacted a law which many considered revolutionary.[125] For the first time in England liability for tort was imposed upon the Crown.[126] The Canadian legislator followed suit[127] and in

---

[122] See W. I. C. Binnie, *Attitudes toward State Liability in Tort; a Comparative Study*, [1964] U. of T.F.L.R., 88 at 92-94.

[123] Holdsworth, *op. cit.*, Vol. IX, 4, 5.

[124] This maxim still had its full application in Confederation days. See F. Dorion, *Réclamation en dommages-intérêts contre la couronne - Faute commune*, [1947] R. du B., 397. The first Canadian Act on the subject: *Petition of Right Act*, was enacted in S.C. 1875, c. 12, now R.S.C. 1952, c. 210.

[125] *The Crown Proceedings Act*, U.K. 1947, c. 44; See the comments by Sir Thomas Barnes, *The Crown Proceedings Act, 1847*, (1948) Can. Bar Rev., 387. As far as the United States are concerned, see the *Federal Tort Claim Act*, U.S. 1946, c. 753 commented on by Borchard, *Government Liability in Tort*, [1948] Can. Bar Rev., 399.

[126] The *Crown Proceedings Act*, U.K. 1947, c. 44 s. 2.

There are three classes:

a) Tort committed by servants or agents.

b) Breaches of the duties which a private employer owes to his servants or agents at common law by reason of being their employer.

c) Breaches of duties attaching at common law to the ownership, occupation, possession or control of property.

[127] See the stern criticism of the existing situation by D. Park Jamieson, *Proceedings by and against the Crown in Canada*, [1948] Can. Bar Rev., 373 at 385. In order to have a precise idea of the position of the Crown in matters of liability before 1952, see *Farthing* v. *The King*, [1948] 1 D.L.R. 385, per O'Connor J.

1952 a law concerning the responsibility of the Crown was enacted.[128] In Quebec, the right of recourse against the Crown in matters of delict and quasi delict was, until 1965, governed by the *Code of Civil Procedure* which required that permission be obtained before an action might be taken against the Government.[129] But the Royal Commission set up in 1945 [130] to improve the *Code of Civil Procedure,* in its final reports made recently,[131] strongly recommended that the Legislature of Quebec, following the example of the Federal Parliament and the other Provincial Legislatures as well as those of other countries of the Commonwealth, adopt in this respect a law as wide as possible to replace procedure by Petition of Right.[132] This was very recently done by the addition to the *Code of Civil Procedure* of arts 94 to 94 K.

The Petition of Right is a modern residual manifestation of the restrictive effect of the maxim "The King can do no wrong", on the power of the judiciary to review the action of the Crown. At a time when the increasing activity of the Crown and its agents in the different sectors of economic and social life is giving rise to more and more disputes it seems only fair and right that private individuals should no longer be at a disadvantage in asserting their rights. The Petition of Right is an obsolete procedure and it is with good reasons that it has been abolished.

b) *Very General Privative Clauses*

The principal types of formulae which confer in vague and inexplicit terms very wide powers on administrative authorities will be examined under this heading.

i) *The Henry VIII Clause* [133]

Here, without doubt, is the most outstanding of the very general formulae designed to protect the Administration against intervention

---

[128] The *Crown Liability Act,* S.C. 1952-53, c. 30 s. 3. See also *Côté* v. *Guardian,* [1959] R.L. 438. This case clearly indicates the evidence required to succeed against the Crown especially in Quebec. See also H. Immarigeon, *La responsabilité extra-contractuelle de la Couronne au Canada,* 1965.

[129] Arts. 1011 to 1025 C.C.P.

[130] *An Act to improve the Code of Civil Procedure,* S.Q. 1945, c. 69.

[131] Proposed new *Code of Civil Procedure,* art. 94.

[132] It is interesting to note that in English law the Petition of Right has been abolished except with regard to proceedings against Her Majesty in her private capacity. See The *Crown Proceeding Act,* U.K. 1947, c. 44 s. 1.

[133] This clause, which appeared for the first time in the *Statute of Proclamations,* 1539, 31 Henry VIII c. 8, gave to the King Henry VIII, on the advice of his majority Council, the power to issue Proclamations which would have the same effect as a law enacted by Parliament.

by the courts of justice. In British statutes, it is usually worded as follows:

> The Board of Trade, (or Minister) may from time to time make such general rules and do such things as they think expedient, subject to the provisions of this Act.[134]

From this clause was derived another very similar formula which was very popular with the British legislator during the first quarter of the twentieth century. The following is the usual form:

> The order of the Minister when made shall have effect as if enacted in this Act.[135]

The problem is to know what happens when the order or regulation is contrary to the initial purport of the statute. The two main decisions on this point come from the House of Lords, but unfortunately they cannot be easily reconciled.[136]

In the first case, *Institute of Patent Agents* v. *Lockwood,*[137] the decision was that the courts could not intervene to question the validity of a regulation made under the aegis of a statutory provision defined in terms as broad as these.

In the second case, *Minister of Health* v. *R. ex p. Yaffé,*[138] the House of Lords concluded that such a legislative provision did not prevent intervention by the courts when the latter considered that the order was not consistent with the provision of the law authorizing it. The opinion of the highest British Court was well summed up by Viscount Dunedin, when he stated that "it is inconceivable that the protection afforded by such a legislative provision should be limitless".[139] It is also a well established principle that the procedure required by the parent Act must be observed even though authority to enact subordinate legislation has been granted in broad terms.[140]

This type of clause came under violent attack and criticism from Lord Hewart[141] and the Donoughmore Committee on Ministers' Powers.[142] Since then, the clause has not reappeared in British statutes, with perhaps one exception.[143] The reason for this seems to

---

[134] *Patent Act,* U.K. 1883, c. 57 s. 101; *The Pharmacy Act (Ireland),* Ireland 1875, c. 57 s. 17.

[135] *Housing Act,* U.K. 1925, c. 14 part. 11 s. 40 (5).

[136] de Smith, *op. cit.,* 234.

[137] [1894] A.C. 347.

[138] [1931] A.C. 494. See J. A. Corry, *Administrative Law and the Interpretation of Statutes,* [1935-36] U. of T.L.J., 286 at 307-308.

[139] *Ibid.,* at 501-503.

[140] *R.* v. *Minister of Health, ex p. Davis,* [1929] 1 K.B. 619.

[141] *The New Despotism,* (1929).

[142] Cmd. 4060 (1932).

[143] *Emergency Powers (Defence) Act,* U.K. 1939, c. 62.

be entirely of a political nature, as there is no doubt that the enactment of such clauses is legally valid.[144]

It is interesting to note that very few examples of this clause can be found in Canadian statutes, whether Federal [145] or Provincial.[146] This may be due simply to the fact that our legislators, enjoying as they do a certain historical perspective over the British legislator, have been able to foresee and have even profited by the unfortunate experiences of the latter in this domain.

ii) *Provisions Affording Very Extensive Discretionary Powers.*
1. *In British and Canadian Law*

It is easy to find in British statutes [147] as well as in those emanating from the Canadian Parliament [148] a great many instances of this legislative tendency to delegate discretionary powers in extremely broad terms. It has become customary for legislators to insert in statutes delegating powers phrases which confer upon ministers or other public authorities extensive administrative, legislative or judicial authority, defined in such terms that it is practically impossible for the courts to decide whether or not such authority has been exceeded.

These phrases, obviously designed to remove the action of administrative authorities from review by the courts, are perhaps the most effective means used by the legislator along these lines.[149] Very often, the courts have found themselves powerless before such statutory phrases which exlude their authority. The principal judicial

---

[144] *Garner, op. cit.*, 128.

[145] *Post Office Act*, R.S.C. 1927, c. 161 s. 7(2); *Live Stock Pedigree Act*, R.S.C. 1927, c. 121 s. 3(2); *Militia Act*, R.S.C. 1927, c. 132 s. 140.

[146] *Liquor Control Act*, R.S.Q. 1927, c. 257 s. 10(1).

[147] *Town and Country Planning Act*, U.K. 1962, c. 38 s. 7 (I)(b): "If the Minister is satisfied"; *Highway Act*, U.K. 1958, c. 25 s. 215 (I): "Where in the opinion of the Minister..."; *Pipe Lines Act*, U.K. 1962, c. 58 s. 11(2): "The Minister shall have the power in his discretion"; *Ibid.*, s. 13(1): As he thinks fit..."

[148] *Customs Tariff Act*, R.S.C. 1952, c. 60 s. 5(5): "If at any time it appears to the satisfaction of the Minister"; *Defence Production Act*, R.S.C. 1952, c. 62 s. 21(5): "Where the Minister is satisfied..."; *Ibid.*, s. 24(I): "The Minister may where he deems it necessary"; *Excise Act*, R.S.C. 1952, c. 99 s. 27: "The Minister may for sufficient cause, of which sufficiency he shall be the sole judge..."; *Veterans Insurance Act*, R.S.C. 1952, c. 279 s. 13: "The Minister may... where... in his opinion..."; *Visiting Forces Act*, R.S.C. 1952, c. 284 s. 24(1): "...as in the opinion of the Minister... are reasonable".

[149] As has been pointed out by Professor de Smith, *op. cit.*, 247 the courts are more likely to give up their power of review in cases where the legislator has spoken in vague and general terms than in those where he has spoken clearly.

decisions in this regard were rendered in wartime and in the immediate post-war period. In the case of *Liversidge* v. *Anderson*,[150] the House of Lords, reluctant to obstruct the war effort of the Administration, decided not to question the reasonableness of the motives which prompted the Secretary of State to use his discretionary powers.[151] In Canada, there are two decisions to the effect that it is up to the Governor-General in Council or to the officer to whom his authority has been delegated, and not to the courts, to define the motives which determine the necessity or desirability of a decision.[152] It must be emphasized that such a judicial interpretation was influenced by the public interest, and that nothing prevents it from being altered.[153]

2. *In Quebec Law*

The Quebec Legislature has certainly not been exempt from this legislative tendency to suppress the common law judicial power of review. The statutes abound with instances where discretionary powers have been conferred in excessively broad terms, not only on the Lieutenant-Governor in Council [154] but also on ministers,[155] senior

[150] [1942] A.C. 206.

[151] A defence regulation No. 18B, made under the *Emergency Power (Defence) Act*, U.K. 1939, c. 62 enabled the secretary of State to detain without trial any person whom he had "reasonable cause to believe to be of hostile origin or association".

[152] *See Reference Re Validity of Regulations in relation to Chemicals*, [1943] S.C.R. 1 at 12, per Duff C.J. In this case the discretionary powers were given to the Governor-General in Council by the *War Measure Act*, R.S.C. 1927, c. 206 s. 3. See also *Att.-Gen. for Canada* v. *Hallet and Carey Ltd.*, [1952] A.C. 427 at 450, per Lord Radcliffe, where the powers were given to the Governor-General in Council by the *National Emergency Transitional Powers Act*, S.C. 1945, c. 60 s. 2(I). See also *In Re Gray*, (1919) 57 S.C.R. 150.

[153] *Minister of Transport* v. *Upminster Service*, [1934] I K.B. 277.

[154] *Quebec Licence Act*, R.S.Q. 1964, c. 79 s. 2: "The Lieutenant-Governor in Council may, as he deems expedient...";*Quebec Municipal Commission Act*, R.S.Q. 1964, c. 170 s. 14: "Whenever he deems it necessary..."; *Lands and Forests Act*, R.S.Q. 1964, c. 92 s. 57: "Whenever it is shown to the satisfaction of the Lieutenant-Governor in Council"; *Ibid.*, s. 117: "He may, whenever it shall be deemed advisable..."; *Workmen's Compensation Act*, R.S.Q. 1964, c. 159 s. 96: "Whenever the Lieutenant-Governor in Council is of the opinion that..."

[155] *Lands and Forests Act*, R.S.Q. 1964, c. 92 s. 42: "if the Minister be satisfied..."; *Public Work Act*, R.S.Q. 1964, c. 138 s. 41 ; "The Minister, whenever he deems it advisable ... may..."; *Hospital Insurance Act*, R.S.Q. 1964; c. 163; see regulations s. 8 (1): "If in the opinion of the Minister..."; *Department of Agriculture and Colonisation Act*, R.S.Q. 1964, c. 101 s. 6: "The Minister shall, when he deems it expedient..."; *Quebec Bureau Statistics Act*, R.S.Q. 1964, c. 207 s. 7: "The Minister shall determine what... deemed necessary..."

officers,[156] commissions,[157] and boards of every kind.[158] The Quebec courts, in cases where they did not have to support the Administration in efforts useful to the community, as for instance in time of war, interpreted certain of these phrases in a rather restrictive manner. For example, in the case of *Procureur Général de Québec* v. *Lazarovitch and Joint Committee of Shoe Repairers of the District of Montreal*,[159] the Quebec Court of Appeal declared that it had the power to question whether or not the Lieutenant-Governor had exceeded his discretionary powers under the relatively broad terms of section 10 of the *Collective Labour Agreement Act*.[160] The remarks of Barclay J. were very clear on this point:

> If the appellant is to succeed at all, he must do so in virtue of the last clause of section 10 of the Act, which confers a discretion upon the Lieutenant-Governor in Council, namely to enact such provisions as he may deem in conformity with the spirit of the Act. But this is not an unlimited discretion, as contended for by the appellant, but one limited to such provisions as upon a true construction come within the subject and area of the Act, and does not permit the passing of rules and regulations which may be the result of a fanciful view of the spirit of the Act. The exercise of this limited discretion is therefore open to the scrutiny of the courts.[161]

In conclusion, it seems that the Legislature's intent in conferring discretionary powers in such broad terms is to grant permission to administrative authorities to act practically as they think fit. This method should be used with the utmost care and only in exceptional

---

[156] *Quebec Public Health Act.* R.S.Q. 1964, c. 161 s. 131: "Whenever he thinks necessary, the executive officer..."

[157] *Act respecting Securities,* R.S.Q. 1964, c. 274 s. 40; "Where the Commission deems it necessary..."; *Ibid.,* s. 50 (6): "The Commission may when it deems it exepedient..."; *Workmen's Compensation Act,* R.S.Q. 1964, c. 159 s. 63: "The Commission may adopt such conclusions as it may deem just"; *Ibid.,* 86(2): "the Commission, if satisfied..."; *Ibid.,* s. 89(4): "If the Commission sees fit...".

[158] *Labour Code,* R.S.Q. 1964, c. 141 s. I (m): "A person who, in the opinion of the Board";*Quebec Agricultural Marketing Act,* R.S.Q. 1964, c. 120 s. 14: "The Board, whenever it deems it necessary..."; *Quebec Water Board Act,* R.S.Q. 1964, c. 183 s. 18: The Board may make... such orders as it deems it proper...; *Transportation Board Act,* R.S.Q. 1964, c. 21 s. 22 (2): "It shall adjudicate at its discretion...".

[159] (1940) 69 Que. K. B. 214.

[160] S.Q. 1937, c. 49 as amended by S.Q. 1938, c. 52 s. 10: "... and also such provisions as the Lieutenant-Governor in Council may deem in conformity with the spirit of this Act".

[161] (1940) 69 B.R. 214 at 228. See also on the interpretation of this type of formulae, the interesting and important New Zealand decision *Reade* v. *Smith,* [1959] N.Z.L.R. 996 where the Supreme Court decided that the words "in the opinion of the Governor-General" did not give the Governor-General a complete and unexaminable discretion. The courts can examine if this opinion is reasonable according to the facts and the law of the case.

cases, where the public interest has to be considered before that of the individual.[162]

C) Direct Privative Clauses

The second method used by the Legislature in its efforts to free administrative action from the common law judicial power of review is the direct insertion in a considerable number of statutes of legislative provisions of a clearly restrictive nature.

a) *In British and Canadian Law*
i) *Partial Clauses*

Following the almost complete disappearance of the Henry VIII clause in British statutes, there appeared regulations which instituted new procedures and special recourses. These were evidently intended to block, at least partially, recourse to the courts of justice by ordinary means; and the one most frequently employed is without doubt that which declares that the validity of administrative decisions may be contested before the High Court within six weeks only after their enactment, and that thereafter they are not to be subject to attack by prohibition, *certiorari* or any other legal means.[163]

ii) *Total Clauses*

There are also in England many laws designed to remove all possibility of recourse to the ordinary courts of justice. They contain provisions to the effect that a determination by an administrative body or order of a minister shall not be called in question in any court of law. The legislator's intent could not be clearer. Notable examples of these may be seen in the *Foreign Compensation Act*[164] and the *National Service Act*.[165]

As regards the Canadian Common Law Provinces, an excellent study of the different kinds of privative clauses was published in 1952 by the Canadian Bar Review.[166] We therefore do no more than refer to it.

---

162 Professor de Smith, *op. cit.*, 247, states in substance, that it is much more prejudicial to permit the Administration to be the sole judge of its motives when using discretionary powers, than it is to exclude by precise words the power of judicial review when an administration has been granted very definite authority.

163 *Housing Act*, U.K. 1930, c. 39 s. 2.; *Acquisition of Land Act*, U.K. 1946, c. 49 schedule I (16); *Town and Country Planning Act*, U.K. 1962, c. 38 ss. 176, 177.

164 U.K. 1950, c. 12 s 4 (4).

165 U.K. 1948, c. 64 ss. 15 (2), 22 (2).

166 H. Sutherland, *Case and Comment*, [1952] Can. Bar Rev., 69. See also, J.G. Pink, *Judicial "Jurisdiction" in the Presence of Privative Clauses*, [1965] U. of T.F.L. Rev., 5 at 7 et sep....

b) *In Quebec Law*

i) *General Privative Clauses*

The Quebec legislator, by reason of the general grouping of all rules of procedure in a single code,[167] enjoyed a great advantage over his other Canadian and British common-law colleagues, as it was possible for him to introduce into this very broad legislation privative clauses of an extremely general nature, which could be applied to all other specific statutes.

The opportunity so offered was utilized to insert a legislative provision of very wide scope in the *Code of Civil Procedure* of Quebec. Indeed article 100 of this Code declares that "no extraordinary recourse or provisional remedy lies against a minister of the government of the province or any officer acting upon his instructions to force him to act or to refrain from acting in a matter which relates to the carrying out of his duties or to the exercise of any authority conferred upon him by any law of the province".[168] The purpose of this provision is evidently to place the actions of the Quebec Administration beyond the review of the courts of justice.

ii) *Special Privative Clauses*

Besides this general provision of the *Code of Civil Procedure,* there is a large number of other privative clauses contained in specific statutes with limited application.

These clauses appear in different forms and include one or more of the three following elements; exclusion of appeal and revision by the courts; exclusion of prerogative writs and of procedure by injunction; exclusion of the power of supervision and review of the Superior Court, i.e. of article 33 of the *Code of Civil Procedure.*[169] For purposes of classification we shall term "principal element" that which relates to prerogative writs and procedure by injunction. The other two will be called "secondary elements".

I. *Partial Clauses*

The privative clauses that have a merely partial effect may be divided into five groups of increasing restrictiveness. The first are those which provide for an appeal to the Magistrate's Court.[170] Their restrictive nature is rather subtle. The Legislature wishes to divert

---

[167] *The Quebec Code of Civil Procedure* put into effect on June 28th 1867 and revised in 1897 and 1965.

[168] Art. 87a in the former Code, enacted by S.Q. 1929, c. 79 s. 1. See *Théberge v. Galinee Mattagami Mines Ltd.,* [1965] C.S. 384 at 391, per Bernier J.

[169] Article 50 in the former Code.

[170] Now called "Provincial Court".

to provincially oppointed District Judges the review of decisions of administrative tribunals established under certain provincial laws.[171]

There are also clauses which, altough exluding the right of appeal, favour the use of *certiorari* [172] or else leave the recourse to article 33 of the *Code of Civil Procedure* open.[173] Thirdly, there are legislative provisions designed to exclude completely any appeal to the higher courts.[174]

Fourthly, there are privative clauses which exclude either what has been called the "principal element", i.e. prerogative writs and procedure by injunction,[175] or the two secondary elements at one time.[176]

Finally, there are also clauses which exclude the principal element and one of the secondary elements.[177]

---

[171] *Pharmacy Act*, R.S.Q. 1964, c. 225 s. 58 (6); *Veterinary Surgeons of the Province of Quebec Act*, R.S.Q. 1964, c. 259 s. 59; *Optometrists and Opticians Act*, R.S.Q. 1964, c. 257 s. 47 (g); *Dispensing Opticians Act*, R.S.Q. 1964, c. 28 (5); *Education Act*, R.S.Q. 1964, c. 235 ss. 508, 515.

[172] *Licence Act*, R.S.Q. 1964, c. 199 (3). This act prescribes very precise conditions which must be fulfilled to permit legal use of *certiorari* an prohibition writs. For instance the party aggrieved has to apply for them within tbe 8 days which follow the decision. See also *Medical Act*, R.S.Q. 1964, c. 249 s. 76; *Dental Act*, R.S.Q. 1964, c. 253 s. 155.

[173] *Medical Radiological Technicians Act*, R.S.Q. 1964, c. 251 s. 11; *Speech Therapist and Audiologist Act*, R.S.Q. 1964, c. 256 s. 17.

[174] *Notarial Act*, R.S.Q. 1964, c. 248 s. 131; *Dental Act*, R.S.Q. 1964, c. 253 ss. 121, 133 (8).

[175] *Workmen's Compensation Act*, R.S.Q. 1964, c. 159 s. 59; *Autoroute Act*, R.S.Q. 1964, c. 134 s. 12; *Highway Victims Indemnity Act*, R.S.Q. 1964, c. 232 s. 70; *Water Board Act*, R.S.Q. 1964, c. 183 s. 12. This Act provides for an appeal to the Court of Queen's Bench from any order of the Board on a point of law but only upon leave granted by a judge of that court. It is interesting to note that the Quebec Legislature protected these new administrative bodies by strong privative clauses. This is a good example of the increasing development of this legislative tendency in Quebec. See also — slightly different, the *Hydro-Quebec Act*, R.S.Q. 1964, c. 86 s. 16. The Act contains a provision which excludes recourse by way of *mandamus*, prohibition, *quo warranto* and injunction, but nothing is said there in relation to *certiorari*. *Engineers Act* R.S.Q. 1964, c. 262 s. 26. This Act excludes recourse by way of prohibition or injunction but provides for recourse by way of *certiorari* against a final decision of the Council or of a Committee. One should note tbat in the new *Mining Act*, S.Q. 1965, c. 34 s. 278, an exclusive jurisdiction over all litigation respecting any rights, privileges or title conferred by this Act has been vested in a District Judge. There is an appeal to the Court of Queen's Bench sitting in appeal from any final decision of this judge. See Raoul Barbe, *Tribunal Minier du Québec*, [1966] C.B.J., 227.

[176] *Bar Act*, R.S.Q. 1964, c. 247 s. 56; *Adoption Act*, R.S.Q. 1964, c. 218 s. 19; *Public Inquiry Commission Act*, R.S.Q. 1964, c. 11 s. 17.

[177] *Liquor Board Act*, R.S.Q. 1964, c. 49 s. 83. This act excludes the appeal and recourse by way of prerogative writs or injunction; *Act respecting the*

2. *Total Clauses*

Total privative clauses in Quebec statutes are legislative provisions which, by combining all the three exclusive elements mentioned above, appear to take away completely the common law judicial power of review.[178] In enacting such clauses the purpose of the Legislature is to remove absolutely from the control of the courts the acts and decisions of the administrative agency concerned. Two recent measures show particularly well all the subtlety and agility displayed by the Legislature to attain its ends. They contain privative clauses which in our opinion are the most powerful to be found at this time in the statutes of Quebec.

The first, the *Quebec Agricultural Marketing Board Act*,[179] contains a privative clause which reads as follows:

> Notwithstanding any legislative provision inconsistent herewith,
> a) the decisions of the Board can be revised only by the Lieutenant-Governor in Council.
> b) No writ of *quo warranto, mandamus, certiorari*, or prohibition shall be issued and no injunction shall be granted against the Board, or against its members acting in their official capacity.
> c) The provision of article 50 of the Code of Civil Procedure shall not apply to the Board or to its members acting in their official capacity.
>
> Two judges of the Court of Queen's Bench may annul summarily, upon petition, any writ, order or injunction issued or granted contrary to this section.

This clause is very ingenious in that it not only excludes the usual means of review through regular judicial channels, but it provides also for an appeal against the decisions of the Board within the administrative hierarchy itself, in this instance to the Lieutenant-Governor in Council i.e. for all practical purposes, to the Cabinet.[180]

Montreal Transportation Commission, S.Q. 1950-51, c. 124 s. 2; *Act respecting regulation of Rentals*, S.Q. 1950-51, c. 20 s. 17; *Civil Service Act*, S.Q. 1965, c. 14 s. 15; *Quebec Deposit and Investment Fund Act*, S.Q. 1965, c. 23 s. 17; *Quebec Pension Plan Act*, S.Q. 1965, c. 24 s. 23. These acts are exclusive of recourse by way of prerogative writs and procedure by injunction and also of recourse to article 50 C.C.P. (art. 33 in the new Code).

[178] See *Securities Act*, R.S.Q. 1964, c. 274, s. 13. See also the former *Quebec Labour Relations Act*, R.S.Q. 1941, c. 162A s. 41a.

[179] R.S.Q. 1964, c. 120 s. 8 as amended by S.Q. 1965, c. 44 s. 1.

[180] See sub-paragraph (a). There is a similar privative clause in the *Act respecting the production etc... of Newsprint*, S.Q. 1955-56, c. 26 s. 17. This Act provided for an appeal to the Chief District Judge in Quebec, Division III of the Act, including ss. 9 to 26, which created the Newsprint Board, was never put into effect, the necessary proclamation by the Lieutenant-Governor in Council never having been made.

The second measure, the *Labour Code*,[181] contains the following privative clause:

s. 121 No action under article 50 of the Code of Civil Procedure or recourse by writ of prohibition, *quo warranto*, *certiorari* or injunction shall be exercised, against any council of arbitration, court of arbitration, conciliation officer or the Quebec Labour Relations Board, or against any member of such bodies, on account of any act, proceeding or decision relating to the exercise of their functions.

s. 122 Two judges of the Court of Queen's Bench may annul summarily upon petition, any writ, order or injunction, issued or granted contrary to the proceeding section.[182]

The second part of both these clauses, which empowers two judges of the Court of Queen's Bench to annul summarily, upon petition, any writ, order or injunction granted despite the first part, certainly constitutes a very determined attempt by the Quebec Legislature to free completely the Agricultural Marketing Board, the councils of arbitration, courts of arbitration, conciliation officers, and the Labour Relations Board from the intervention of the courts of justice.

The foregoing discussion makes it clear that the statutes of Quebec contain many express restrictive provisions designed to thwart the exercise of judicial review. The order of increasing restriction in which they have been examined shows effectively all their possible variations and also demonstrates the farthest point to which the Quebec Legislature has so far ventured in this field.[183]

---

181 R.S.Q. 1964, c. 141 ss. 121, 122 replacing R.S.Q. 1941, c. 162A s. 41a.

182 There exists a similar clause in the *Provincial Controverted Elections Act*, R.S.Q. 1964, c. 8 s. 93 whose purpose is to deny to the Superior Court and its judges any jurisdiction in respect of a contestation of the election of a member of the Legislative Assembly. It should be observed that this clause aims to protect against the intervention of the Superior Court not an administrative tribunal or body but a Magistrate's Court the members of which are appointed by the Lieutenant-Governor of the province. This provision forms part of the recent legislative tendency in Quebec which aims to vest the Magistrate's Court with wider jurisdiction sometimes very similar to that of the Superior Court. See *Act to amend the Code of Civil Procedure*, S.Q. 1952-53, c. 18 s. 12; S.Q. 1954-55, c. 34 s. 2; *Act respecting Municipal and School Offices*, S.Q. 1957-58, c. 38 s. 1; *Act respecting the jurisdiction of the Magistrate's Court*, S.Q. 1963, c. 62. Upon a reference by the Quebec Legislature as to the constitutionality of the last mentioned statute, the Quebec Court of Queen's Bench held that the whole court was unconstitutional. See *Référence re Constitutionalité de la Cour du Magistrat*, [1965] B.R. 1. The Supreme Court of Canada recently reversed this judgment but only on a restricted issue. It held that the precise statute referred to it was constitutional and it did not discuss the constitutionality of the whole court. See (1965) S.C.R. 772. This case was commented on by J. Westmoreland, *The Increased Jurisdiction of the Magistrate's Court of Quebec*, [1966] Thémis, 155.

183 It should be noted that there cannot be found in Quebec statutes any clause similar to the powerful "exclusive jurisdiction clause" which exists in the *Ontario Labour Relations Act*, S.O. 1960, c. 202 s. 80.

Para. II — Judicial Effect of Privative Clauses

As was declared by Kellock J. of the Supreme Court of Canada in the case of *Chaput* v. *Romain*:[184]

> The highest minister of the Crown and the humblest official are equally answerable for the legality of their acts to the ordinary tribunals.

The citizen's right to be protected against illegal administrative action is a matter of public order and cannot be waived.[185] The Canadian and Quebec courts have always been ready to afford this protection and they have occasionally shown a certain hostility towards legislative provisions designed to deprive them of this right. In the recent case of *Guay* v. *Lafleur* [186] Brossard J. of the Quebec Superior Court declared:

> Pas plus en pays de liberté démocratique qu'en pays de dictature l'Etat n'est justifié au nom de ce qu'il considère le bien commun, de dépouiller l'individu de la protection de la loi quant à sa personne et à ses biens.

It is then very important to know the exact judicial effect of the various privative clauses.[187] Do these legislative provisions effectively remove the decisions of the administrative authorities which they protect from all power of review by the Superior Court ? This is what the following study should try to determine.

A) Nature of the Problem

The Superior Court, as a tribunal of original general jurisdiction, has powers of supervision and reform over all courts of inferior jurisdiction, bodies politic and corporate, and all persons in the province.[188] The question as to the exact judicial import of clauses suppressive of the Superior Court's authority arises only where an inferior tribunal or court of inferior jurisdiction abuses or exceeds its jurisdiction; for it is recognized that when a decision is made by such a body within the limits of the powers assigned to it by the Legislature, privative clauses are fully effective, although one may wonder whether they are really necessary to protect the validity of such a decision and to make it unassailable.

---

[184] [1955] S.C.R. 834 at 854.

[185] *Alfred Lambert Inc.* v. *La C.R.O. et le Syndicat des Employés du Commerce de Gros de Montréal*, [1963] R.D.T. 519 at 527, per Archambault J.

[186] [1962] C.S. 254 at 271-272.

[187] Rubenstein, *Jurisdiction and Illegality*, 85 *et seq*... See also J. F. W. Weatherill, *Labour Relations Board and the Courts*, [1966] 21 Industrial Relations, 58 at 72; J. G. Pink, *Judicial "Jurisdiction" in the Presence of Privative Clauses*, [1965] U. of T.F.L. Rev., 5 at 13 *et seq*...

[188] Art. 33 C.C.P. See also *Vassard* v. *Commission des Relations Ouvrières de Québec*, [1963] B.R. 1 at 4, per Rivard J.; *Alfred Lambert Inc.* v. *La C.R.O. et le Syndicat des Employés du Commerce de Gros de Montréal*, [1963] R.D.T. 519 at 526, per Archabault J.: *Garant* v. *Lacroix*, [1916] 50 C.S. 436.

a) *Meaning of the Phrase "Court of Inferior Jurisdiction"*[189]

Originally, the decided cases limited the scope of the phrase to those courts whose jurisdiction extended only to legal issues.[190] This over-restrictive interpretation was subsequently modified[191] and today it seems incontestable that the phrase includes all administrative tribunals or public bodies whose decisions are of a judicial or quasi-judicial nature.[192] In the case of *Canadian British Aluminium* v. *Dufresne*,[193] Lafleur J. of the Quebec Superior Court recently summarized this point:

> D'après la jurisprudence actuelle, le tribunal inférieur visé par l'article 1292 C.P. et que mentionne la première partie de l'article 1307 C.P. signifie toute personne, corporation, association, commission ou conseil d'arbitrage qui, en droit, est appelé à agir judiciairement, i.e., à départager ou déterminer les droits entre deux ou plusieurs parties.

It is pertinent also to refer to the decision of the Supreme Court of Canada in the case of *l'Alliance des Professeurs Catholiques de Montréal*,[194] in which Rinfret C.J. declared as follows:

---

[189] In the new *Code of Civil Prooedure* the phrase has been replaced by the other: "Court subject to its superintending and reforming power". (See article 846). It is subnritted however that this substitution of words does not eliminate the difficulties raised by the phrase.

[190] *Gaynor and Green* v. *Lafontaine*, (1906) 7 P.R. 240. See also Claude Dugas, *Du Bref de Prohibition*, [1951] Thémis, 99, 100; *Breton* v. *Landry*, [1898] 13 C.S. 31; *ex p. Bélanger*, 2 R.J.R.Q. 351.

[191] See A. Desgagné, *Des Procédures en voie de Disparition: le Bref de Prohibition et le Bref de Certiorari*, [1965] R. du B., 129 at 130, 131.

[192] See Louis Pratte, *Brefs de Prohibition et Conseil d'Arbitrage*, [1954] R. du B., 469 at 470-71. See the cases cited there. See also Yardly, *The Grounds for Certiorari and Prohibition*, [1959] Can. Bar Rev., 294 at 295 note 3; *The Scope of the Prerogative Orders in Administrative Law*, (1957-58) 12 Northern Ireland Legal Quaterly, 78 at 83, 84 and 142 at 149; *Gosselin* v. *Bar of Montreal*, [1912] 2 D.L.R. 19 (B.R.); *Rayonnaise Textile Ltd.* v. *Conseils d'Arbitrage et Autres Ouvriers Unis des Textiles d'Amérique*, [1959] C.S. 313 at 315, per Jean J.; *Maillet* v. *Bureau des Gouverneurs des Chirurgiens Dentistes*, (1919) 18 B.R. 539 at 542, per Carroll J.; *Brique Citadelle Ltée* v. *Gagné*, [1954] C.S. 262 at 267; *Kearney* v. *Desnoyers*, (1901) 19 C.S. 279 at 282, per Davidson J.: "Licence commissioners, although not among the inferior courts mentioned in C.C.P., arts. 59, 63, 64, 65 are called to the performance of duties of a judicial character, which on proper occasion, subject them to the superintending authority of this court".

[193] [1964] C.S. 1 at 17.

[194] [1953] 2 S.C.R. 140. See also the case of *Donatelli Shoes Ltd.* v. *Labour Relations Board*, [1964] C.S. 193 at 199 where Brossard J. pointed out:

> La jurisprudence a toutefois reconnu que les organismes administratifs qui exercent aussi des pouvoirs judiciaires ou quasi-judiciaires en rendant des décisions de caractères judiciaire constituent, dans l'exercice de ces pouvoirs, des tribunaux judiciaires de jurisdiction inférieure sans pour autant les assimiler au cours de justice régulière; d'ou l'application à ces organismes des dispositions relatives au bref de prohibition et au *certiorari*.

> Que l'on décore du nom de tribunal administratif une commission du genre de la commission intimée, dès qu'elle exerce un pouvoir quasi-judiciaire... elle doit être assimilée à un tribunal inférieur dans le sens de l'article 1003 du Code de Procédure Civile.[195]

Further on, the Chief Justice added:

> Il est de jurisprudence constante que même les commissions administratives sont sujettes à la prohibition telle qu'édictée à l'article 1003 du Code de Procédure Civile lorsqu'elles exercent les fonctions judiciaires ou quasi-judiciaires.[196]

It would therefore seem logical to conclude that administrative tribunals, such as the Labour Relations Board, are subject to supervision and review by the Superior Court. However, it has been asserted that this power of supervision and review has been taken away by the privative clauses contained in the statutes which establish these tribunals.

According to this assertion these provisions would, as far as administrative tribunals are concerned, take away all power of supervision and review by the Superior Court; and all the decisions of these tribunals, even if clearly *ultra vires,* would be valid and binding for all parties, having the same force and effect as decisions rendered within the limits of their jurisdiction.[197]

What can be thought of such a claim ? Can it properly be stated that privative clauses have the effect of removing the administrative bodies, which they protect, from review by the courts, even in cases where jurisdiction has been exceeded ? This is what must now be determined.

b) *Proposed Statutory Interpretation*

Any delegation of power, as such, has some limitation, and whatever the extent of the delegatory terms used, they will always include the implication that they must have some limit. The very fact that an administrative body receives its authority from Parliament or from the Legislature, necessarily implies a limited jurisdiction. Therefore the Quebec Legislature, when for example, it created the Labour Relations Board, clearly indicated that a body having limited jurisdiction was intended. Turning to a formula used by Rand J. in

---

[195] [1953] 2 S.C.R. 140 at 148.

[196] *Ibid.,* at 149.

[197] In the case of *Burlington Mills Hosiery Co.* v. *Commission des Relations Ouvrières de Québec,* [1960] P.R. 64, counsels for the Board made a total inscription in law in which they submitted that the privative clause contains in s. 41a of the *Quebec Labour Relations Act,* R.S.Q. 1941, c. 162A, fully prohibited recourse to prohibition or *certiorari,* even in cases where the Board exceeded its jurisdiction. Batshaw J. dismissed the inscription in law.

the case of *Toronto Newspaper Guild, local 87, and Globe Printing Co.*,[198] it may be stated that a reference to the *Quebec Labour Code* [199] would enable to determine:

> The real scope of action within which the body created is contemplated and intended by the legislator to act.

To maintain that the Labour Relations Board is not subject to review by the courts, even in cases where it exceeds its powers, is to admit that decisions rendered outside its jurisdiction have the same value as those made under an authority recognized by law. It would also be affirming that the Legislature, while limiting the powers of the board, at the same time endowed it with unlimited powers by denying access to a court of justice in protest against such excess of power.

It is difficult to believe that the Legislature can have intented such an absurdity.[200]

> Statutes will be construed as far as possible to avoid absurdity.[201]

This contention was substantiated by Rinfret C.J. in somewhat different terms in the case of *l'Alliance des Professeurs Catholiques de Montréal* v. *La Commission des Relations Ouvrières de Québec*.[202]

> Le législateur, même s'il le voulait, ne pourrait déclarer l'absurdité qu'un tribunal qui agit sans juridiction peut être immunisé contre l'application du bref de prohibition. La décision est nulle et aucun texte d'un statut ne peut lui donner de la validité ou décider que, malgré sa nullité, cette décision devrait quand même être reconnue comme valide et exécutoire.

It would in fact be contradictory to grant limited jurisdiction to a tribunal and then to recognize as valid decisions rendered by the same tribunal outside the limits of its jurisdiction. As was pointed by Brossard J. in the recent case of *Slax Inc.* v. *La Commission des Relations Ouvrières de Québec et Amalgamated Clothing of America, local* 115:[203]

> Appliquer l'art. 41a, même aux actes de la Commission et de ses membres qui pourraient être *ultra vires* des pouvoirs qui leur sont conférés en termes

---

198 [1953] 2 S.C.R. 18 at 28.

199 R.S.Q. 1964, c. 141.

200 *Alfred Lambert Inc.* v. *La C.R.O. et le Syndicat des Employés du Commerce de Gros de Montréal*, [1963] R.D.T. 519 at 528, per Archambault J.

201 C. E. Odgers, *The Construction of Deeds and Statutes* (4th ed.), 188. See also the case of *La Ménagère Corp.* v. *Le Comité paritaire du Commerce de Gros et de Détail de Rimouski*, [1962] C.S. 164 at 185 where Blois J. pointed out:

> Considérant que dans l'interprétation d'un statut, il existe en faveur du législateur certaines présomptions, savoir qu'il n'a pas voulu excéder l'objet spécifique de la loi... et qu'il n'a pas voulu non plus créer une injustive ou énoncer une absurdité.

202 [1953] 2 S.C.R. 140 at 155.

203 [1964] R.D.T. 1 at 4.

> explicites et limitatifs par la loi, serait nier toute signification et tout effet juridique aux dispositions relatives à ces pouvoirs en supprimant toute sanction légale à la violation d'icelle; on ne saurait prêter au législateur des intentions aussi contracdictoires.

A restrictive interpretation of clauses suppressive of judicial authority would therefore seem to be imperative and it is actually along these lines that English and Canadian case law, as well as that of Quebec, has developed.

B) Interpretation Given by the Courts

a) *In England*

As early as the seventeenth century, English courts had to speak out on the scope of such legislative provisions;[204] and the decision of the Court of Appeal in *ex. p. Hopwood*[205] shows clearly that in 1850 there existed a similar judicial tendency. In that case it was necessary to determine whether a conviction should be quashed by *certiorari* under the *Factory Act*,[206] section 69 of which prohibited any recourse to *certiorari*. Lord Campbell, commenting on the manner in which this provision should be considered, declared:

> The *certiorari* is taken away so that we cannot interfere unless they act altogether without jurisdiction.

A few years later in the case of *R.* v. *Cheltenham Commissioners*,[207] Denman C.J. affirmed:

> We have already stated our opinion that the clause which takes away the *certiorari* does not limit our exercising a superintendence over the proceedings so far as to see that what is done shall be in pursuance of the statute. The statute cannot affect our right and duty to see justice executed.

In 1878, the same Court of Appeal, in *ex. p. Bradlaugh*,[208] had to decide as to the admissibility of an application for *certiorari* by means of which it was sought to quash the order of a magistrate under the *Act respecting Metropolitan Police Courts*.[209] The Court granted the *certiorari*, regardless of a provision expressly prohibiting it.[210]

In rendering this decision the Court only followed an already well-established line of cases which had been up-held a few years

---

[204] *R. v. Plowright*, [1686] 3 Mod. 95; *R.* v. *Moreley*, [1760] 2 Burr. 1041; *Hartley* v. *Hooper*, [1777] 2 Cowp. 523; *R.* v. *Jukes*, [1800] 8 T.R. 542.

[205] [1850] 15 Q.B. 121.

[206] U.K. 1844, c. 15 s. 69.

[207] [1841] 1 Q.B. 467.

[208] [1877-78] 3 Q.B. 509.

[209] U.K. 1839-40, c. 71.

[210] *Ibid.*, at s. 49.

previously by the Privy Council in the case of *Colonial Bank of Australasia* v. *Willan*.[211] Recent British decisions in the matter show that such precedents are always adhered to.[212]

b) *In the Common Law Provinces*

The principles thus formulated in Britain guided Canadian courts whenever similar provisions had to be interpreted. As early as 1859, the Ontario Court of Appeal, Queen's Bench Division, in referring to the prerogative writ, held that:

> ... this remedy would be assessible if a statute had declared that a *certiorari* should not issue, because that prohibition would not be held to apply when the justices or sessions have entertained a matter not within their jurisdiction [213]

Another of the early decisions rendered in the Province of Ontario on this question dates from 1883.[214] It concerned an application for the issue of a writ of *certiorari* against a judgment rendered under the *Canada Temperance Act*.[215] The court granted the *certiorari* in spite of a clause which expressly prohibited it.[216]

In their recent decisions,[217] the Ontario courts were influenced by the same principles, to which, in any case, the Supreme Court of Canada gave unqualified approval in *Re Toronto Newspaper Guild, Local 87, and Globe Printing Co.*[218] In this case there came before the court a petition for a *certiorari* against a decision of the Labour Relations Board of Ontario. The *certiorari* was granted, regardless of the apparently clear restrictive terms of section 5 of the *Ontario Labour Relations Act*.[219]

---

211 [1874] L.R. 5 A.C. 417.

212 *R.* v. *Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *R.* v. *Medical Appeal Tribunal, ex p. Gilmore*, [1957] 1 Q.B. 574 at 585, 588; *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*, [1958] 1 Q.B. 554.

213 *Hespeller* v. *Shaw*, (1859) 16 U.C.Q.B. 104 at 105-106.

214 *R.* v. *Wallace*, 4 O.L.R. 127. See also *R.* v. *Eli*, [1886] 10 O.R. 727; *Re Holland*, [1875] 37 U.C.Q.B. 214.

215 S.C. 1878, c. 16.

216 *Ibid.*, at s. 111.

217 *Knapman* v. *Board of Health for Saltfleet Township*, [1955] 3 D.L.R. 248; *McCord and Co. Ltd.* v. *Ontario Labour Relations Board*, [1956] O.R. 645; *Ontario Labour Relations Board, Bradley et al.* v. *Canadian General Electric Co. Ltd.*, (1957) 8 D.L.R. (2d) 65 at 79; *R.* v. *Ontario Securities Commission, ex p. Bishop*, (1963) 37 D.L.R. (2d) 308.

218 [1953] 2 S.C.R. 18. This case is commented on by E. F. Whitmore, [1953] Can. Bar Rev., 679.

219 S.O. 1948, c. 51. Now R.S.O. 1960, c. 202 ss. 79, 80. The case shows clearly that where the courts desire to intervene they ignore privative clauses. See especially the remarks of Rand J. at 28. See also *Jarvis* v. *Associated Medical Services Inc. at al.*, [1964] S.C.R. 497.

The Province of Saskatchewan, by reason of its *avant-garde* position as regards economic and social legislation, has experienced a great deal of litigation on this question. The unanimity of its court decisions is clearly revealed by the frequent upholding of *certiorari* against decisions of the Labour Relations Board, and this in spite of section 15 of the *Trade Union Act*, 1944,[220] which expressly prohibited it.[221] These decisions of the Saskatchewan courts were approved by the Privy Council in the case of *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*[222]

The courts of the Provinces of Manitoba, Alberta and British Columbia, as well as those of the Maritime Provinces, have interpreted the clauses suppressive of judicial authority in more or less the same way. Thus, in the case of *Town of Dauphin v. Director of Public Welfare*,[223] the Court of Appeal of Manitoba held that section 682 of the *Criminal Code*[224] did not prevent recourse to *certiorari* in cases where a lower court had acted without jurisdiction. In *R. v. Richmond*,[225] the Court of Appeal of Alberta, having to decide as to the effect of section 12 of the *Opium Drug Act*,[226] held that such a text of law should not apply in cases of excess of jurisdiction. It restated this principle unequivocally in a recent decision regarding the public utilities Board of Alberta.[227] Brtish Columbia case law

---

220 Now R.S.S. 1953, c. 259 s. 17.

221 *Burton* v. *Regina City Policemen's Association Local No. 155*, [1945] 3 D.L.R. 437; *Labour Relations Board of Saskatchewan* v. *Speers*, [1948] 1 D.L.R. 341; *John East Iron Work Ltd.* v. *Labour Relations Board et al.*, [1949] 3 D.L.R. 51; *Regina Grey Nun's Hospital Employees Association* v. *Labour Relations Board et al.*, [1950] 4 D.L.R. 775; *Marshall Wells Co. Ltd.* v. *Retail Wholesale and Department Store Union Local 454*, [1955] 4 D.L.R. 591 affirmed by [1956] 2 D.L.R. (2d) 569; *Labour Relations Board of Saskatchewan* v. *The Queen ex rel. F. W. Woolworth Co. Ltd. et al.*, [1955] 5 D.L.R. 607.

222 [1948] 4 D.L.R. 673 or [1949] A.C. 134.

223 [1956] 5 D.L.R. (2d) 274. See also *Creamette Co. of Canada Ltd.* v. *Retail Store Employees Local Union 830 et al.*, [1956] 4 D.L.R. (2d) 78; *Re Workmen's Compensation Act and C.P.R.*, [1950] 2 D.L.R. 630; *R.* v. *Sparrow*, (1964) 3 C.C.C. 33.

224 No conviction or order shall be removed by *certiorari*

a) where an appeal was taken, whether or not the appeal has been carried to a conclusion, or

b) where the defendant appeared and pleaded and the merits were tried, and an appeal might have been taken, but the defendant did not appeal.

225 (1918) 39 D.L.R. 117.

226 S.C. 1911, c. 17: "No conviction, judgment or order in respect of an offence against this Act should be removed by *certiorari* into any of His Majesty Court of Record".

227 *City of Calgary Home Oil Co. Ltd.* v. *Madison Natural Gas Ltd. and British American Utilities Ltd.*, (1959) 19 D.L.R. (2d) 655, 656.

also contains many decisions having the same effect,[228] and in the Provinces of Nova Scotia and New Brunswick the courts have very often made decisions along the same lines.[229]

Privative clauses have therefore been interpreted rather restrictively by both English and Canadian common law provinces' courts and it would seem to be a well-established fact that such legislative provisions should not apply in cases of exceeded jurisdiction.

c) *In Quebec*

The nature and scope of the authority enjoyed in Quebec by English and Canadian decisions in matters of public law have been discussed elsewhere.[230] It must merely be pointed out here that the case law of the Common Law Provinces has been cited and applied consistently by the Quebec Courts, which have in fact reached solutions identical with those of the other provinces.

Quebec decisions on this question may be divided chronologically into two distinct periods, the first from before Confederation up to the 1920's, the second from then on and still current, the point of demarcation between the two being the *Alcoholic Liquor Act*[231] which included the first modern type of privative clause in Quebec.

---

[228] *Labour Relations Board of B.C.* v. *Canada Safeway Ltd.*, [1952] 3 D.L.R. 855 affirmed by [1953] 2 S.C.R. 46; *Regina and McDonell* v. *Leong Ba Chai*, [1952] 4 D.L.R. 715 affirmed by [1954] 1 D.L.R. 401; *Re Hotel and Restaurant Employees International Union, Local 28* v. *Labour Relations Board*, [1954] 1 D.L.R. 772; *Martin and Robertson Ltd.* v. *Labour Relations Board*, [1954] 2 D.L.R. 622; *Re British Columbia Hotel Employees Union, local 260, and Labour Relations Board*, [1956] 2 D.L.R. (2d) 460; *Battaglia* v. *Workmen's Compensation Board*, (1960) 32 W.W.R. 1; *Re Workmen's Compensation Act: Re Ursaki's Certiorari* and *Mandamus Application*, (1960) 33 W.W.R. 261; *Society of the Love of Jesus* v. *Smart*, [1944] 2 D.L.R. 551.

[229] *Re Lunenburg Sea Products Ltd.*, (1947) 3 D.L.R. 195; *R.* v. *Labour Relations Board of Nova Scotia*, [1951] 4 D.L.R. 227; *Re Labour Relations Board of Nova Scotia*, [1952] 3 D.L.R. 42 affirmed by *Smith and Rhuland Ltd.* v. *R. ex. rel Price Andrews et al.*, [1953] 2 S.C.R. 95; *Ex. p. Hill*, (1891) 31 N.B.R. 84; *Re Canadian Fish Handlers' Union, local 4*, [1952] 2 D.L.R. 621.

[230] See E. Lareau, *Histoire du Droit Canadien*, 54; F. P. Walton, *The Legal System of Quebec*, (1913) 33 Can. Law Times, 280 at 281, 287, 289; G. E. Le Dain, *The Supervisory Jurisdiction in Quebec*, [1957] Can. Bar Rev. 788 at 796; L. P. Pigeon, *Rédaction et interprétation des lois*, 35 et seq... (cours donnés en 1965 aux conseillers juridiques du gouvernement du Québec); Louis A. Pouliot, *L'autorité de la jurisprudence dans notre droit, Etudes Juridiques en Hommage à M. le Juge Bernard Bissonnette*, (Montréal, 1963) 475 at 480. See also *Chaput* v. *Romain*, [1955] S.C.R. 854, per Kellock J.; *Lynch* v. *Poisson*, [1955] C.S. 20 at 27, per Challies J.; *Langelier* v. *Giroux* (1932) 52 B.R. 113 at 116, per Dorion J.; *Canadian Copper Refiners Ltd.* v. *Labour Relations Board*, [1952] C.S. 295 at 307 per Choquette J.

[231] S.Q. 1921, c. 24 s. 131.

i) *Older Case Law*

The privative clauses in older statutes were not as effective as they are now, and generally were content to exclude the possibility of attack by *certiorari* on the decisions of a magistrate, Justice of the Peace, or other executive officers.

From the very first, the Quebec courts recognized the principle that there can be no limited jurisdiction without review.[232] As early as 1863 the Superior Court, in *ex p. Church*,[233] granted a *certiorari* against a decision by a Justice of the Peace, in spite of the fact that recourse to *certiorari* was prohibited by the statute under which the conviction occurred.[234]

A few years later, Mackay J. of the Superior Court, in the case of *ex p. Morrisson*,[235] was confronted with an application for a *certiorari* against a decision made under an *Act Providing for the Organization of the Department of the Secretary of State of Canada*,[236] section 21 of which excluded recourse in the following terms:

> The said Secretary of State, or such officer or person as aforesaid, shall cause the judgment or order against the offender to be drawn up, and such judgment shall not be removed by *certiorari* or otherwise, or be appealed from, but shall be final.

Notwithstanding this unequivocal text of law, the judge granted the *certiorari*.

In the case of *ex p. Lalonde*,[237] the Superior Court decided also for the *certiorari* in spite of section 15 of an *Act to amend the Agricultural Act*,[238] which expressly prohibited it. Similarly, Meredith J. of the Superior Court, in *ex p. Matthews*,[239] granted a *certiorari* against a decision of the Recorder of the City of Quebec, regardless of the fact that such recourse was expressly prohibited by the statute.[240] The judge held that the Recorder, in acting without jurisdiction, had placed himself beyond protection by the statute. In 1890,

---

[232] *Hamilton* v. *Fraser*, (1811) Stuart's Reports, 21.

[233] 13 R.J.R.Q. 49 or 14 L.C.J. 318.

[234] *Intemperance Repression Act*, R.S.L.C. 1861, c. 6 s. 49.

[235] 1 R.L. 437.

[236] S.C. 1868, c. 42.

[237] (1871) 15 L.C.J. 251.

[238] C.S. 1861, c. 30 s. 15:

> No judgment rendered in virtue of the said Act or of this Act shall be contested or set aside by writ of *certiorari*.

[239] (1875) 1 Q.L.R. 353.

[240] *Quebec Corporation Act*, S.Q. 1868, c. 33 s. 19:

> ..., and no appeal or writ of *certiorari* shall lie or be taken from any decision given in the said recorder's court, in any civil case before the said court, to any other court in this province, any law to the contrary notwithstanding.

[241] 16 Q.L.R. 210.

Larue J. in the case of *Nadeau* v. *La Corporation de Lévis*,[241] declared:

> Lors même que le *certiorari* serait enlevé expressément, néanmoins ce writ s'accorde, lorsqu'il y a absence de juridiction de la part d'un tribunal inférieur.[242]

This was the opinion that prevailed thereafter;[243] it was approved by Bruneau J. in the case of *Démétré* v. *La Cité de Montréal*,[244] where he stated that even an express statutory prohibition did not remove the right of recourse to *certiorari*, not only in cases of excess of jurisdiction or of the illegal constitution of the tribunal, but also in all cases where the decision of the inferior tribunal had been obtained by fraud.[245]

ii) *Modern Case Law*

The constant growth of the Administration led the Quebec Legislature to extend to various administrative bodies the protection of privative clauses which had previously been restricted mainly to magistrates and Justices of the Peace. In modern times the restrictive judicial interpretation of these clauses continued, and even developed further, stimulated by increasingly severe privative clauses designed for the most part to protect provincial administrative action against any intervention by the courts.

However the appearance in the *Alcoholic Liquor Act*[246] of the first modern privative clause took some Quebec judges by surprise, and a *dictum* of Lord Sumner in the case of *R.* v. *Nat Bell Liquor Ltd.*,[247] persuaded them to accord strict respect to privative clauses

---

[242] *Ibid.*, at 212.

[243] *Therrien* v. *McEachern*, (1898) 4 R. de Jur. 87; *Mathieu* v. *Wentworth*, [1899] 15 C.S. 504. In the judgment rendered in the latter case, Lemieux J. cited two unreported cases to the same effect. They are, *Fournier* v. *Darche*, [1868], per Mondelet J. and *South Eastern Reg.* v. *Les Commissaires d'Ecoles*, [1866], per Sicotte J.; See also *Desormeaux* v. *La Corporation de la Paroisse de Ste-Thérèse*, [1910] 19 B.R. 481 at 499.

[244] [1911] P.R. 232. See also *Boivin* v. *Sénécal*, (1912) 14 P.R. 183, per Beaudoin J.

[245] 1911 P.R. 232 at 234.

[246] S.Q. 1921, c. 24 s. 131.

[247] [1922] 2 A.C. 128 at 162: "...and it follows *prima facie* that Canadian Legislation, affecting summary convictions and the powers of Superior Courts to quash them upon *certiorari*, is to be construed, in accordance with the older English decisions, as limiting the jurisdiction by way of *certiorari* only where explicit language is used for that purpose... Of course, it is competent for the Legislature to go further than this, and, where the language used shows such an intention, the presumption above stated is negative".

and to see that they were fully effective.[248] This literal interpretation regained favour at intervals [249] but there can be no doubt that it is contrary to the trend of modern case law.[250]

In 1953 the Supreme Court of Canada rendered its now famous decision in the case of *L'Alliance des Professeurs Catholiques de Montréal* v. *La Commission des Relations Ouvrières*.[251] It held that the Board had gone beyond its jurisdiction in depriving *L'Alliance des Professeurs* of its right to be recognized as negotiating agent, without first affording it an opportunity of being heard, not only as to the fact but also as to the law; and then, reversing a judgment of the Quebec Court of Appeal,[252] it granted a writ of prohibition against the Board.

It should be noted that when this dispute was initiated, section 41a had not yet been added to the *Labour Relations Act* and that it was by virtue of section 36 of that Act that the Board enjoyed the

---

[248] *Dame Wafer* v. *Perrault*, [1923] 61 C.S. 205, per Martin J.; *Dubé* v. *Lamonde*, [1929] 32 P.R. 151. These two cases refusing recourse to prerogative writs, even where jurisdiction had been exceeded, provoked indignation in certain circles. In 1935, L. Calder published *Comment s'éteint la liberté*, in which he criticized vehemently both decisions.

[249] In the case of *Johnson Woolen Mills Ltd.* v. *Southern Canada Power et le Secrétaire de la Province*, [1945] B.R. 133 at 137, full effect was given to the privative clause contained in art. 87a C.C.P. See also *Daigneault* v. *Meunier*, [1946] C.S. 437 at 439, per Lazure J.; *McFall* v. *Laflèche*, [1951] P.R. 378; *Commission des Relations Ouvrières de la Province de Québec* v. *L'Alliance des Professeurs Catholiques de Montréal*, [1951] B.R. 752. See especially the remarks of St. Jacques J. at 769; *Coca-Cola Ltd.* v. *Ouimet*, [1950] Montreal C.S. No. 32514, May 13th; *Price Brothers and Co. Ltd.* v. *Letarte*, [1953] B.R. 307 at 316, 322; *Cortler* v. *Lamarre*, [1954] C.S. 225, per Prévost J.; *Transport Boischatel tcl Ltée* v. *Commission des Relations Ouvrières* [1957] B.R. 589 at 590. In this case St. Jacques, J. shows himself far less explicit than in the *Alliance* case; *Lagrenade Shoes Manufacturing Ltd.* v. *Commission des Relations Ouvrières*, [1961] C.S. 305 at 309; *Dominion Canners Ltd.* v. *Costanza*, [1923] S.C.R. 46 at 61, per Anglin J.:

> I find here a positive and clear enactment that the jurisdiction of the Board shall be exclusive and nothing to warrant a refusal to give to that word its full effect;

Langlais v. *S.R.B.*, [1932] 52 B.R. 282 at 291, 294; *Robitaille et autres* v. *Les Commissaires d'Ecoles de Thetford-les Mines*, [1965] R.D.T. 345 at 348, per Cannon J.

[250] See *Furness Withy Co. Ltd.* v. *McManamy*, [1943] C.S. 276; *Grondin* v. *Lessard et Roy*, [1948] C.S. 368; *Canadian Copper Refiners Ltd.* v. *Labour Relations Board*, [1952] C.S. 295, per Choquette J.; *St. Aubin* v. *Courchesne*, [1952] Montreal C.S. No. 318315, July 24th; *L'Association Patronale des Manufactures de Chaussures de Québec* v. *Blois*, [1951] C.S. 453: *Pionner Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenu* [1940] A.C. 127.

[251] [1953] 2 S.C.R. 140.

[252] [1951] B.R. 752.

powers, immunity and privileges of a commissioner appointed under the *Public Inquiry Commission Act*.[253] No writ of prohibition or injunction was supposed to have the power to thwart or halt its proceedings. However, the Supreme Court, determined to right an injustice, ignored the privative clause.[254] Quebec judges, taking advantage of the opportunity afforded them by this decision, granted writs of prohibition and of *certiorari* more and more frequently against decisions of administrative trbunals, more particularly the Labour Relations Board, and this notwithstanding unequivocal privative clauses.[255]

Thus, in the case of *John Murdock Ltd.* v. *La Commission des Relations Ouvrières*,[256] Boulanger J. spoke of the effect which should be given to the privative clause in section 41a of the *Labour Relations Act* and expressed the following forceful opinion:

> Si l'article 41a de la loi des Relations Ouvrières, comme le prétend la Commission, autorise cette dernière à violer impunément la loi, ce texte est immoral et contraire à l'ordre public et, s'il n'y a pas de recours contre les actes illégaux et injustes de la Commission, autant vaudrait proclamer ce dogme tout de suite de l'infaillibilité de la Commission et l'excommunication de ceux qui osent mettre cette infaillibilité en doute.[257]

In another case, the *Syndicat National des Travailleurs de la Pulpe et du Papier de la Tuque Inc.* v. *La Commission des Relations Ouvrières de la Province de Québec*,[258] three dissenting judges of the Court of Appeal, Hyde, Owen and Choquette JJ., declared categorically that section 41a of the *Labour Relations Act* does not apply when the Commission exceeds its jurisdiction. The remarks of Choquette J. were exceptionally clear and concise on this point:[259]

---

[253] R.S.Q. 1941, c. 9 s. 17.

[254] See [1953] 2 S.C.R. 140 at 154, per Rinfret C.J.

[255] *Brique Citadelle* v. *Gagné*, [1954] C.S. 262 at 267, per Dion J.; *Lynch* v. *Poisson* [1955] C.S. 20, per Challies J.; *Miron et Frères Ltée* v. *Commission des Relations Ouvrières*, [1956] C.S. 389; *Canadian Ingersol-Rand Ltd.* v. *Commission des Relations Ouvrières*, [1958] C.S. 217; *Hôpital St. Luc.* v. *Building Service Employees*, [1958] C.S. 606 at 612; *Fraternité des Policiers de Granby* v. *Delany*, [1961] C.S. 367 at 369; *Cie Légaré Ltée* v. *Commission des Relations Ouvrières*, [1962] Que. C.S. 281; *Boulanger* v. *La Commission Royale d'Enquête*, Quebec C.S. No. 109859, per Dorion J. reversed by [1962] B.R. 251; *Service Larammée Inc.* v. *Marchand et Procureur Général*, [1955] St. François No. 13126, November 13th.

[256] [1956] C.S. 30.

[257] *Ibid.*, at 36.

[258] [1958] B.R. 1. See also *Price Brothers* v. *Letarte* [1953] B.R. 307, per Barclay J. dissenting; *The E.B. Eddy Co.* v. *Commission des Relations Ouvrières de Québec*, [1958] B.R. 542.

[259] [1958] B.R. 1 at 50.

S'il est vrai que l'Art. 41a pris isolement, supprime: 1- L'appel et la revision des décisions de la Commission; 2- Les brefs de prérogative contre la Commission ou ses membres 'agissant en leur qualité officielle'; et 3- L'article 50 C.P.C.; à leur égard, il n'en est pas moins vrai que d'autres dispositions de la même loi accordant des droits certains aux personnes ou associations qu'elle indique, imposent des obligations précises à la Commission intimée et fixent aux pouvoirs de celle-ci des limites qu'elle ne saurait franchir. C'est cette contradiction de la loi elle-même — cette absurdité, dirait l'ancien juge-en-chef du Canada — qui rend inopérante la clause suppressive de l'ART. 41a, dans le cas d'incompétence ou d'excès de pouvoirs de la Commission et laisse subsister le bref de prohibition, même si ce bref ne peut se concevoir sans un excès de juridiction.

Recently, Batshaw J. of the Superior Court, declaring himself bound by the decisions of the Supreme Court in the *Alliance case*[260] and in *Re Toronto Newspaper Guild, Local 87, and The Globe Printing Co.*,[261] rejected the total inscription in law of counsel for the Labour Relations Board to the effect that section 41a protected the Board's decision against any intervention by the courts, even in cases where its jurisdiction was exceeded.[262] The Court of Appeal of Quebec, in its decision in the same case,[263] affirmed Batshaw J.'s decision on the total inscription in law,[264] quashed the judgment of the Superior Court on the merits [265] and granted a writ of prohibition against the Board, declaring that it had exceeded it jurisdiction and that consequently, section 41a offered no obstacle to such relief.[266] Finally, in the recent case of *Slax Inc.* v. *La Commission des Relations Ouvrières de Québec*,[267] Brossard J. of the Superior Court expressed himself as follows regarding the effect which should be given to the privative clause in section 41a:

Nonobstant les dispositions suppressives de l'autorité judiciaire dont la Cour Supérieure est investie contenues en l'art. 41a de la Loi sur les relations ouvrières de Québec, la Cour Supérieure a juridiction *ratione materiae*, en vertu de l'art. 48 C.P.C., et *ratione personae*, en vertu de l'art. 50 C.P.C. et de l'art. 36 de la Loi sur les tribunaux judiciaires, pour reconnaître comme

---

260 [1953] 2 S.C.R. 140.

261 [1953] 3 D.L.R. 561 or [1953] 2 S.C.R. 18.

262 *Burlington Mills Hosiery Co. of Canada* v. *La Commission des Relations Ouvrières*, [1960] P.R. 64. See Laurent E. Bélanger, *Corps administratifs - Brefs de Prérogative*, [1964] McGill L.J., 217.

263 [1962] B.R. 469.

264 *Ibid.*, at 475, per Choquette J.

265 Montreal S.C. No. 412695, January 14th 1960, per Bertrand J.

266 This decision of the Court of Queen's Bench of Quebec was reversed by the Supreme Court of Canada at [1964] S.C.R. 342, but not on the matter of privative clauses. The Supreme Court of Canada simply decided that the Labour Relations Board had not exceeded its jurisdiction.

267 [1964] R.D.T. 1.

268 *Ibid.*, at 4.

étant nul et sans effet juridique tout acte de la Commission des relations ouvrières ou de ses membres qui est *ultra vires* des pouvoirs de cette Commission ou de ses membres.[268]

Consequently the Quebec courts have opposed legislative provisions which aim at suppressing their power of review over the lower courts, administrative tribunals or agencies, by interpreting them restrictively. Taking into consideration the restrictive meaning which has long been given by the courts to clauses suppressive of judicial authority, it would seem that in enacting such provisions the Legislature intends nothing more than to remove the administrative tribunals concerned from the power of review of the Superior Court in case where they do not exceed the authority specifically assigned to them by statutes.[269] No other interpretation of these provisions seems possible without giving to the law a meaning which it does not possess.

The Quebec Legislature seems to have conceded the point in the new *Labor Code* by inserting in section 121 the words "relating to the exercise of their functions". As Casey J. pointed out in the recent case of *Commission des Relations du Travail de Québec* v. *Civic Parking Centre Ltd.*[270] "the text of the law now justifies the proposition that if the Board steps outside its field it will not enjoy the protection of the privative clause".[271]

It is submitted however, that this sort of privative clause cannot be really effective for it does not prevent the Courts which want to intervene in a particular case from considering the irregularities that occur in the exercice of jurisdiction as justification for an attack on jurisdiction.[272] This happens particularly in case where there is breach of the rule *audi alteram partem*, i.e., when the Board acting within its jurisdiction condemns someone unheard. The courts then generally consider "that the violation of this rule vitiates the proceedings in which it occurs and entitles the party aggrieved to attack the

[269] A similar opinion was expressed by Rand J. in *Re Toronto Newspaper Guild Co., local 87, and Globe Printing Co.*, [1953] 3 D.L.R. 561 at 572:

> Any other view would mean that the Legislature intended to authorize the Tribunal to act as it pleased, subject only to the legislative supervision... The acquiescence of the Legislature, particularly during the past 50 years, in the rejection by the courts of such view confirms the interpretation which has consistently been given to the privative clauses.

[270] [1965] B.R. 657.

[271] *Ibid.*, at 663.

[272] This type of privative clause only forces the courts to stretch the concept of jurisdiction and to rationalize into defects of jurisdiction many errors which should be considered as mere errors in the exercise of jurisdiction. This contributes largely to the obscurity that pervades that part of administrative law.

decision".[273] Naturally, as Casey J. so well pointed out, "if *audi alteram partem* were no more than a rule of procedure the Board would be covered by section 121".[274] But he declared himself "not prepared to decide whether the Legislature may eliminate this doctrine from our law, as it may well have tried to do by the wording of section 121".[275]

Moreover, it is submitted that section 122 of the *Labour Code*,[276] which empowers two judges of the Court of Queen's Bench to annul summarily, upon petition, any writ, decree or injunction directed against the Labour Relations Board despite section 121 which expressly prohibits them, does not totally suppress the review of the courts; for the Legislature does not require, but merely permits the two judges of the Court of Appeal to annul them. This text is therefore intended simply to stem the flood of useless prerogative writs that have assailed the Board in the past few years. It is in order to avoid lengthy contestations on the merits that power has been given to the two judges to quash them summarily when they should manifestly not have been issued. This does not prevent the judges from upholding these writs when they feel that the latter have been issued for a good reason.

Such was the case in the very recent decision of *Houghco Products Ltd.* v. *Commission des Relations du Travail*,[277] where this provision came for the first time under judicial interpretation. Owen J. of the Quebec Court of Appeal, speaking on behalf of his colleague Badeau J., declared:

> I see no substantial difference in the wording of the 'clauses privatives' contained in sect. 41a of the Quebec Labour Relations Act and sect. 121 of the Quebec Labour Code.[278]

Further on, he added:

> There is strong authority for the proposition that if a body such as the Quebec Labour Relations Board exceeds its jurisdiction the privative clauses such as sect. 121 of the Quebec Labour Code do not apply.[279]

He finally concluded:

> This power or discretion given to two judges of this Court by sect. 122 of the Quebec Labour Code which, in this case, can be said to exceed the powers of the full Court which has no power to hear appeals in matters of *certiorari*, should in my opinion be exercised sparingly. Unless it is clear that there was no excess of jurisdiction, the two judges of this Court should

[273] [1965] B.R. 657 at 663, per Casey J.
[274] *Ibid.*
[275] *Ibid.*
[276] R.S.Q. 1964, c. 141.
[277] [1965] R.D.T. 252.
[278] *Ibid.*, at 253.
[279] *Ibid.*, at 256.

not usurp the functions of the Superior Court by annulling the writ of *certiorari* which has been issued and, thereby, preventing any decision on the merits.[280]

Subsequently, in the case of *Labour Relations Board* v. *J. Pascal Hardware Co. Ltd.*, Choquette J. also defended the principle of judicial review:

> J'ajoute que je ne vois aucune différence essentielle entre l'ancien article 41a et le nouvel article 121, si ce n'est que l'ancien était d'ordre encore plus général que le nouveau.
>
> Comment alors interpréter l'article 122 portant que deux juges de la Cour du Banc de la Reine peuvent sur requête annuler sommairement tout bref ou tout ordonnance ou injonction délivrée ou accordée à l'encontre de l'article précédent ? Les mots article précédent doivent s'entendre à mon avis, de l'article précédent tel qu'interprété par la jurisprudence en matière de clauses dites privatives.[281]

However, in the same case, Taschereau J. advocated a much more restrictive interpretation.[282] In doing so, he merely corroborated the opinion previously given by Brossard and Casey JJ. in *Commission des Relations Ouvrières* v. *Civic Parking Centre Ltd.*[283] Indeed in this case, Brossard J., advocating a restrictive interpretation of the principle of judicial review and therefore of ss. 121 and 122 of the Labour Code, stated:[284]

> Ce n'est plus uniquement la juridiction de la Commission que le législateur entend protéger, mais ce sont aussi et surtout les actes, procédures et décisions qu'elle fait ou rend 'en rapport' avec l'exercice de sa juridiction. La Commission et ses membres, ainsi que leurs actes, demeurent sujets à, entre autres procédures, celle du *certiorari* dès lors qu'il n'xiste aucun lien entre ces actes et la juridiction, tels, à titre d'exemples extrêmes, l'octroi de dommages et intérêts ou le prononcé d'une séparation de corps, mais si un tel rapport existe, le législateur entend soustraire ces actes, procédures et décisions au droit de 'contrôle' et de surveillance des tribunaux, pour supprimer les délais et retards inhérents aux procédures devant les tribunaux ordinaires.

Further on, he added:[285]

> L'effet de la dernière manifestation d'intervention du législateur exprimée par l'article 121 doit être de rendre les tribunaux circonspects dans l'application par eux d'un droit d'intervention pouvant tirer sa source de textes de loi ou de concepts juridiques entrant en conflit avec les textes formels du Code du travail; les tribunaux n'ont pas à corriger la loi lorsqu'elle est claire; ils ont le devoir de l'appliquer; tout particulièrement ils ne peuvent attribuer à aucun tribunal provincial une juridiction que la Législature provinciale lui refuse.

---

[280] *Ibid.*
[281] [1965] B.R. 791 at 795.
[282] *Ibid.*, at 798-799.
[283] [1965] B.R. 657.
[284] *Ibid.*, at 665.
[285] *Ibid.*, at 667.

> Nous ne pouvons non plus méconnaître que, par ces clauses privatives par lesquelles il entend protéger le libre exercice de leurs fonctions par les membres des tribunaux dits administratifs, le législateur a exprimé sa confiance en l'esprit de justice et de bonne foi des juges et autres personnes qui président ces tribunaux, notamment, dans le cas de la Commission des relations de travail, en lui accordant, à l'article 117 du Code du travail, le droit de reviser ou révoquer pour cause toute décision et tout ordre rendus par elle.

The foregoing shows that the interpretation given by the courts to ss. 121 and 122 of the *Labour Code* up to now is contradictory. One must hope that further light will be brought on soon. For the time being, it seems that the principles on this matter still remain those stated by Rinfret J. in the *Alliance case*:

> Toute restriction aux pouvoirs de contrôle et de surveillance d'un tribunal supérieur est nécessairement inopérante lorsqu'il s'agit pour lui d'empêcher l'exécution d'une décision, d'un ordre ou d'une sentence rendue en l'absence de juridiction.[286]

However, the question whether a privative clause places any limit in fact on the power of supervision and review of the Superior Court which would otherwise be exercised, has been squarely raised in Quebec until the recent case of *La Commission des Ecoles Catholiques de Shawinigan* v. *Roy*.[287] There it was held by Laroche J. of the Superior Court that the privative clause contained in the *Act respecting Municipal and School Corporations and their Employees*,[288] protected the Council of Arbitration set up under this Act from having its decisions quashed by *certiorari* on the grounds provided for by article 1293 (1a) (2), (3) of the former *Code of Civil Procedure*,[289] but not on those provided for by (I) of the same article:[290]

> L'Art. 15 par. b précité, ne prive pas du recours au *certiorari*, mais en restreint le champ d'application au premier cas prévu par 1293 C.P. (Lorsqu'il y a défaut ou excès de juridiction). En d'autres termes, la 'clause privative' n'anéantit pas le droit de 'contrôle' de la Cour Supérieure, mais en

---

[286] *L'Alliance des professeurs catholiques de Montréal* v. *La Commission des Relations Ouvrières de la province de Québec*, [1953] 2 S.C.R. 140 at 155. See also: B. Starck, *Aspects juridiques du syndicalisme québécois: l'accéditation*, [1966] Can. Bar Rev., 173 at 225.

[287] [1965] C.S. 147.

[288] S.Q. 1949, c. 26 s. 15, amended by S.Q. 1952-53, c. 15 s. 4, now *Labour Code*, R.S.Q. 1964, c. 141 s. 121.

[289] Art. 1293: "The remedy lies, nevertheless, only in the following cases:
- (1a) When the decision of a court entails grave injustice amounting to fraud;
- (2) When the regulations upon which a complaint is brought, or the judgment rendered, are null or of no effect;
- (3) When the proceedings contain gross irregularities and there is reason to believe that justice has not been or will not be done".

[290] Art. 1293 (1): "When there is a want or excess of jurisdiction".

limite l'exercice aux cas les plus graves d'abus de pouvoirs et d'excès de juridiction. Il ne suffit pas qu'il ait été commis des irrégularités procédurales, que le tribunal inférieur ait mal interprété un point de droit, certains éléments de la preuve, mais il faut que ce tribunal inférieur ait abusé de ses pouvoirs ou qu'il se soit arrogé des pouvoirs que la loi ne lui destinait pas.[291]

The case still leaves unsettled the question of the effect of privative clauses on error of law on the face of the record.[292] The latter would appear to be another logical point which might give rise to the whole question of the efficacity of privative clauses in relation to defects within jurisdiction. However this criterion for review has not yet been used as such in Quebec administrative law.

In conclusion, it appears that the Quebec Legislature, in enacting privative clauses, has not yet seen fit to use language so clear as to make judicial interpretation impossible and to compel the acquiescence of the courts,[293] since that would necessitate the use of terms which the political morality of the times would condemn as indecent, immoral, and dictatorial.

An examination of Canadian and especially Quebec case law has revealed that the method of statutory interpretation, which consists in denying the intent of the Legislature expressed in these clauses by affirming that such intent cannot be inferred from the text in question, has in fact been the real stumbling block which permitted our judges to offer an almost systematic resistance to clauses suppressive of judicial authority.

In fact, although Canadian and Quebec judges have repeatedly agreed [294] that the Legislature could exclude, by clear and explicit words, the superintending and reforming power of the Superior Court under art. 33 of the *Code of Civil Procedure,* one very seldom comes across instances where the words of the Legislature in enacting privative clauses were held so clear and explicit as to exclude that

---

291 [1965] C.S. 147 at 151.

292 There would appear to be a certain conflict of opinion in the common law provinces of Canada as to whether privative clauses exclude recourse to *certiorari* for an error of law on the face of the record. Compare: *R.* v. *Labour Relations Board of Saskatchewan, ex p. Tag's Plumbing and Heating Ltd.,* (1962) 34 D.L.R. (2d) 128; *Re Ontario Labour Relations Board, Bradley* v. *Canadian General Electric Co. Ltd.,* (1957) 8 D.L.R. (2d) 65; with *R.* v. *Canada Labour Relations Board, ex p. Federal Electric Corporation,* (1964) 44 D.L.R. (2d) 440.

293 See G. Le Dain, *The Supervisory Jurisdiction in Quebec,* [1957] Can. Bar Rev., 788 at 789; John Willis, *Administrative Law in Canada,* [1961] Can. Bar Rev., 251 at 257.

294 *Rex* v. *Gingras,* 1 R.J.R.Q. 413 at 414; *Commission des Relations Ouvrières de la Province de Québec* v. *L'Alliance des Professeurs Catholiques de Montréal,* [1951] B.R. 752 at 769, per St. Jacques J.; *Lynch* v. *Poisson,* [1955] C.S. 20 at 29, per Challies J.; *Syndicat National des Travailleurs de la Pulpe et du Papier*

power. In the case of *Canadian Copper Refiners Ltd.* v. *Commission des Relations Ouvrières*,[295] Choquette J. expressed himself unequivocally on this point:

> Pour supprimer cette autorité même dans le cas d'excès de pouvoir ou d'excès de juridiction, il faudrait que le législateur le dise expressément ou s'exprime en des termes qui ne souffrent aucune discussion; mais jusqu'ici aucun Parlement, aucune Législature ne semble avoir cru sage, du moins en temps normal, de décréter cette suppression totale.

It is therefore suggested that the only way to prevent the courts of justice from exercising their power of review over administrative officers, tribunals and agencies would to expressly deny them that power by law, being very careful to add "even in cases of excess, lack or complete refusal of jurisdiction."[296] Even then the reaction of the courts would be most interesting to observe.[297]

CONCLUSION

> A court of law has nothing to do with a Canadian Act of Parliament lawfully passed except to give it effect according to its tenor.[298]

> Acts of Parliament and Legislature are not sacrosanct — not even in our democratic system. The right of the subject to have his rights determined by a court of law is, in my view, more sacred than an Act of a Legislature. It is said that Parliament is supreme. That is too wide a statement. Both Parliament and Legislature can only legislate within the limits prescribed by our Constitution.[299]

---

v. *Commission des Relations Ouvrières*, [1958] B.R. 1 at 24, per Hyde J.; *John East Iron Work Co. Ltd.* v. *Labour Relations Board of Saskatchewan*, [1949] 3 D.L.R. 51 at 64; *Bennett and White (Calgary) Ltd.* v. *Municipal District of Sugar City No. 5*, [1951] A.C. 808, 809, 812; *Balfour* v. *Malcom* [1842] 8 CL. & F. 485 at 500.

[295] [1952] C.S. 295 at 298.

[296] As was recently pointed out by Spence J., of the Supreme Court of Canada in the case of *Jarvis* v. *Associated Medical Services Inc. et al.*, [1964] S.C.R. 497 at 524:

> Until the relevant legislative enactment expressly prohibits the Superior Court's investigation of whether the inferior tribunal has exceeded its jurisdiction and so acted beyond any power granted it by the Legislature, I conceive it the duty of the Superior court to litigant to exercise such function.

[297] Moreover, it would be interesting to observe the reaction of the courts if they were confronted with a clause giving to an administrative tribunal an exclusive jurisdiction to decide questions preliminary or collateral to its jurisdiction, i.e., whether or not it has jurisdiction. See *R.* v. *Ontario Labour Relations Board, ex p. Taylor*, [1964] 41 D.L.R. (2d) 456. See also J. G. Pink, *Judicial "Jurisdiction" in presence of Privative Clauses*, [1965] U. of T.F.L. Rev., 5 at 12-13.

[298] *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada*, [1912] A.C. 571 at 583, per Loreburn J.

[299] *Farrell et al.* v. *Workmen's Compensation Board*, (1960) 24 D.L.R. (2d) 272 at 277, per Manson J.

These two opinions, the one uttered by a Lord of the Judicial Committee of the Privy Council and the other by a judge of the Supreme Court of British Columbia, illustrate very well the controversy between the Legislature and the Judiciary on the question of judicial review of administrative action, a controversy which imperils the very existence of that review.

In Canada, a court of justice cannot attack a law which lies within the jurisdictional competence of the authority which enacted it, except when that law has not received the full assent of the parties in dicated by the *British North America Act* as being essential to the legitimate process of law-making.[300] Subject to these conditions, both federal and provincial legislators have sovereign power in the elaboration of any legislative measure which is within the limits of their respective legislative competence.

Consequently, it seems that in point of strict law, it is possible for the Quebec Legislature, by virtue of the almost absolute sovereignty it enjoys within the limits of its own jurisdictional competence, to suppress totally the common law judicial power of review over the Administration's activity, without the judges being able to attack such a measure. Such a legislative attitude would not run counter to any constitutional principle, provided of course that it met the requirements of section 96 of the *B.N.A. Act.*

By means of ever improved privative clauses, the Quebec Legislature has frequently attempted to suppress the authority of the courts of justice over the Administration's acts and decisions. However, restrained mainly by political considerations, it has never dared to draw up these clauses in absolutely clear fashion which would leave no room whatever for judicial interpretation. These clauses have never, in Quebec administrative law, proved to be barriers behind which the Administration could entrench itself in complete immunity. The courts have very often been able to get round them without too much difficulty by clever interpretation of the statute. The effect of the clauses, although not quite negligible, has never been very powerful.

Consequently, even though the common law judicial power of review is sometimes restricted by a clause suppressive of judicial authority, there exists in Quebec a quite definite and sometimes fairly vigorous review by the courts over the activities of the Administration.

---

300 In the case of a law which proceeds from the Legislature of Quebec, the necessary parties are : the Legislative Assembly, the Legislative Council and the Lieutenant-Govrnor. See the *B.N.A. Act*, ss. 71, 92.