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THE TWILIGHT OF JUDICIAL CONTROL IN THE PROVINCE OF QUEBEC?

Gerald E. LeDain*

A serious situation is developing in Quebec with respect to the control exercised over administrative bodies by the courts of law. That control, which we have taken for granted as an essential safeguard of legal rights, has, in fact, been far from what it might have been, but it now passes to another stage where it threatens to disappear entirely. Provincial legislative policy, deficiencies in our law of procedure, and the attitude of the courts to both these factors have combined so to restrict the application and scope of judicial control as to make it no longer a general right, but a chance privilege in rare cases.

Strangely enough the problem has aroused little or no comment in the province. It may be that the general enfeeblement of judicial control has been so gradual as to escape detection, or simply that a problem must reach the level of public concern before it arouses the legal profession. It is the belief, however, of the undersigned that there is a very real and widespread concern in the profession over this question, and that the time is now ripe for a public debate of it.

The reason for the lack of criticism to date is more probably that we know something of long and cherished tradition is being swept away, but we are not absolutely convinced that it should not go. Those members of the profession who are most concerned are bound to feel a certain sympathy for the legislative attitude underlying attempts to prohibit recourse to the courts. The practising lawyer who has conscientiously risked his client's money on a writ of certiorari or prohibition only to have his action dismissed for reasons

*B.C.L. (McGill); Docteur de l'Université de Lyon; Sessional Lecturer in Administrative Law, McGill University.

that are more metaphysical than legal is apt to conclude that perhaps after all it is better to remove this expensive uncertainty. The right which exists on the statute book and in the popular consciousness, but seldom exists in fact, is an embarrassing allurement. That there should he some control over administrative acts is not seriously disputed, but among those who have considered the question there is less general agreement as to what form it should take.[1] It is true that the weight of opinion in the Anglo-American world is apparently that this control should be left to the courts of law. Often this opinion would seem to rest, however, on nothing firmer than the complacency engendered by certain nineteenth century generalities.[2] Those who continue to see the jurisdiction of the ordinary courts as an indispensable attribute of the Rule of Law have not always taken the trouble to acknowledge and diagnose the obvious weaknesses of the present system, which, if it is to be saved, must undergo some reform. The challenging opinion today is that which urges an entirely radical approach to the problem of legal safeguards by the institution of administrative tribunals of general jurisdiction such as exist in western Europe.[3]

This proposal, attractive as it may be, on the assumption that you must fight fire with fire, is not likely to rally sufficient support for sometime yet because of two kinds of objection to it. To begin with, it involves a sharp and unnatural break with the continuity of our legal traditions: an innovation that would seem to be without indigenous roots in our constitutional system.[4] Judicial like legislative institutions inspire confidence and grow in effectiveness as they evolve and develop naturally out of circumstances to which they are particularly adapted. It is the experience of Europe itself that such institutions are transplanted with difficulty. The French *Conseil d'Etat,* which now attracts the admiring glances of Anglo-American lawyers (though to some extent still beneath the raised eyebrows of A.V.Dicey) is an institution which survived the Revolution and as such is one of the few embodiments of creative tradition in French political life. The confidence which it inspires in the French people is due to the fact that it is not a theoretical innovation like proportional representation, but a venerable and tested institution that figures prominently in the constitutional memory of the nation. The Conseil d'Etat in its present

[1]See REPORT OF THE COMMITTEE ON MINISTERS' POWERS, CMD. No 4060 at 110 (1932); ROBSON, JUSTICE AND ADMINISTRATIVE LAW 459-465 (3d ed. 1952).

[2]See Dicey's concept of the *Rule of Law* and his opinion of the French *droit administratif* in his LAW OF THE CONSTITUTION (9th ed. 1939). Cf. JENNINGS, THE LAW AND THE CONSTITUTION (3d ed. 1946); ROBSON, *op. cit. supra* note 1, at 437-444.

[3]*E.g.,* de Smith, *The Limits of Judicial Review,* 11 MOD. LAW REV. 306, 325 (1948); ROBSON, *op. cit. supra* note 1, at 459; Fitzgerald, *Safeguards in the Exercise of Functions by Administrative Bodies,* 28 CAN. BAR REV. 538, 555-559 (1950); Schwartz, *The Administrative Courts in France,* 29 CAN. BAR. REV., at 381-385 (1951).

[4]Though see the parallel drawn by Schwartz in *A Common Lawyer Looks at the Droit Administratif,* 29 CAN. BAR. REV. 121 (1951) between the evolution of the French *Conseil d'Etat* and the English courts of equity.

form has grown as a logical necessity out of the French notion of the Separation of Powers. Again, this principle is truly French, not only in conception but in its realisation. As understood in France, it is chiefly and specifically concerned with the separation of the administration and the judiciary,[5] and it has its historical origin in the hostile attitude of the Parlements toward administrative reforms in the latter days of the *ancient Régime*. A corrollary of this first principle is the separation of the administrative courts *(l'administration contentieuse)* from the administration itself *(l'administration active)* though this separation has not been as fully realised as that between the administration and the judiciary. As it is, some jurisdiction in administrative matters has been left to the civil courts, and the resultng conflicts of jurisdiction must be settled by still another body, the *Tribunal des Conflits*. The various jurisdictions in France make up a highly complex system of justice that has taken more than a century to develop and is so typically a product of French thought and historical circumstances that it would seem to defy imitation by the Anglo-American world.

It does not necessarily follow, however, that the French system of administrative courts should not serve as an inspiration for a typically Anglo-American experiment with the same general principle. There is no doubt that the French enjoy a much greater measure of protection under their *droit administratif* than that presently afforded by our own courts. Yet the reason for this is not altogether the specialized character of the French tribunals. Undoubtedly, the fact that the Conseil d'Etat is not only a tribunal but an advisory body to the government gives it an intimate knowledge of the administrative process which contributes immeasurably to the effectiveness of its judicial rôle. But more important still is the fact that the jurisdiction of the French administrative tribunals is a general one, firmly established by tradition and public confidence. It can be said, at least with some justice of the French system of administrative law, that where there is a wrong there is a remedy. It is true that even the French have not solved the problem of delay caused by overcharged rolls,[6] but recourse to the French tribunals has the merit of being simple, direct and inexpensive.[7]

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[5]*"Les fonctions judiciaires sont et demeureront toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfaiture, troubler de quelque manière que ce soit les opérations de corps administratifs, ni citer devant eux les administrateurs par raison de leurs fonctions."* — France: Law of Aug. 16-24, 1790, Vol. II, art. 13.

[6]Schwartz, *supra* note 3, at 407-410.

[7]The general procedure before the *Conseil d'Etat* is by written petition addressed to the Secretary-General. The complainant is ordered to communicate his petition within a delay of two months to the defendant who has a delay of fifteen days in which to reply. The record consists of these written arguments, supporting documents and the observations of a government official whose function is to advise the court. In the most important recourse before the *Conseil d'Etat* it is not necessary that the parties be represented by counsel. The judge directs the inquiry, which is based on the written argument and evidence. The judgments are remarkable for their terseness.

In considering the reform of our own judicial control, the procedural simplicity of the French system ought first to attract our attention. For here we find one of the most pronounced and fundamental contrasts with our own system. In other respects the two types of judicial control present striking similarities despite their institutional differences. This is especially true of the principles applied by both to test the legality of administrative acts. The doctrine of *Ultra Vires* as evolved by our courts is very like the French notion of *excès de pouvoir* (which is itself the gradual product of jurisprudence) and hardly less effective when properly understood and unreservedly applied.[8]

Here then is the second objection to the suggestion that we set up separate administrative courts. This suggestion may not always be free from confusion as to the true function of judicial control. If what is sought is an appeal on the merits from administrative decisions then the civil courts are certainly not suited for this purpose. Such an appeal, however, can be, and generally is, provided within the administrative hierarchy. Though a general appeal tribunal of this type might be desirable, it does not seem to be the pressing need of the moment. Judicial control is concerned with the legality and not the wisdom of administrative acts,[9] and to determine this none seem to be more competent that the courts of law. They are the institutions which have developed the techniques of statutory interpretation and legal analysis, and it is inconceivable that we should throw away this vast accumulation of experience and insights to confide the interpretation of the public law of the land to persons whose only recomendation is that they are presumed to know better than judges what the legislature had in mind.

If, on the other hand, it is intended that the new administrative courts should be staffed by judges, then what is being proposed in effect is merely a redistribution of labour within the present judicature. Can this purpose not be achieved without the need for radical institutional innovation? Such specialisation already exists in our Superior Court, for example, in the field

[8]The grounds of *incompétence, violation formelle de la règle de droit, vice de forme,* and *détournement de pouvoir* have their counterparts within the Anglo-American doctrine of *ultra vires,* which includes, in addition to want or excess of jurisdiction in the objective sense, procedural irregularity or violation of natural justice and extraneous considerations. It must be conceded, however, that the French tribunals are often a good deal bolder than our courts in the extent to which they will appreciate the facts where the terms of the law are sufficiently precise to permit of it: See Treves, *Administrative Discretion and Judicial Control,* 10 MOD. L. REV. 276 (1947).

[9]This is the cardinal principle of French judicial control. As often emphasised by the *Conseil d'Etat,* the *recours pour excès de pouvoir* is a *contrôle de la légalité* of administrative acts and nof of their *opportunité. E.g., Arrêt Dreyfus,* July 7, 1916, S. 1917.3.41: " . . . *le législateur a entendu laisser à l'appréciation du gouvernement seul, le soin de décider souverainement de quelles sont celles des naturalisations postérieures au 1 février 1913 qui seront maintenues et qui seront rapportées; que par suite le sieur Dreyfus n'est pas recevable à discuter devant le Conseil d'Etat l'opportunité de la mesure prise à son égard.*"

of bankruptcy. It is frankly conceded, however, that any reorganisation that is not accompanied by thorough procedural simplification is doomed to failure. The need for some reform is unquestionably urgent, and the projected revision of the Quebec Code of Civil Procedure would seem to offer an excellent opportunity to attempt some of this needed reform within the framework of the present system. Any proposal of this nature by the committee for revision would at least serve the useful purpose of bringing the whole subject up for discussion by the legislature. If the result were nothing more than to acquaint the public with the broad issues we should still have taken an important step towards a solution.

For this reason special attention is drawn here to the situation in Quebec. The problem is of course not confined to Quebec; it exists in varying degrees throughout the Anglo-American world. If anything characterises the Quebec situation, it is that the attitude of our judges seems to offer less resistance than that of the common law courts to the statutory exclusion of judicial control. This attitude combined with the recent emphasis in provincial legislative policy on the denial of the prerogative writs and other recourse from administrative decisions makes the virtual extinction of judicial control almost a certainty.

The General Theory of Judicial Control

In order to set the present problem in focus it is perhaps necessary to consider briefly the general nature and scope of judicial control as it has been developed and applied by Anglo-Canadian courts.

The general and limiting principle of judicial control is that so long as an administrative authority has acted within its statutory jurisdiction a court will not interfere with its decision. This axiom has been so long established and so often stated that it is unnecessary to cite authority for it. It is sometimes emphasised by the statement that the courts do not exercise an *appellate* jurisdiction over administrative bodies and that they will not substitute their opinion on the facts for that of the administrator. The definition at various times by the courts of what constitutes or goes to jurisdiction has, however, qualified this general rule, so that it is more accurate to state that the administrator's decision is final on all facts except those upon which his jurisdiction is based. For no matter how broad or absolute his discretion may appear on the face of a statute, he cannot be allowed to be the final judge of what persons or things the statute governs, and to give himself jurisdiction over matters to which the statute does not apply.[10] Whether a particular person or situation comes within the terms of a particular statute is a mixed question of fact and law upon which judges very properly insist on having the final say.

[10] *Banbury* v. *Fuller* (1853), 9 Ex. 111, 140.

Then there is the spirit as well as the letter of the law, and although the letter is often rather silent as to how and for what reasons an administrator may do a certain thing, the spirit, in a constitutional democracy, is that it must be done in the public and not a private interest, in a spirit of fairness and impartiality, and for lawful and proper reasons. It is not always easy to say what would be lawful or proper reasons because that is getting too close to the administrator's discretion, but the courts will not tolerate obviously unlawful or arbitrary motivation,[11] such as the administrator's or *somebody else's* private opinion, prejudice or wish, whether economic, political or religious.[12] Where a statute confers a power for one purpose, an administrative authority will not be allowed to exercise it for another, even though that other purpose is also in a public interest.[13] It is unnecessary, of course, to speak of fraud or other such manifest abuses of power.

Now to determine whether an administrator has made a correct interpretation of "jurisdictional fact" or whether his real reasons, stated or otherwise, were proper and lawful ones involves an examination and appreciation of the facts of a case. So although it is quite true for the courts to say that they do not exercise an appeal function in the sense that they cannot revise or modify the administrator's decision, they must be able to get at the facts or reasons underlying that decision in order to make their control at all effective.[14] It has, for instance, been held that an administrator must have *some* evidence upon which, as a reasonable man, he could have come to his conclusion,[15] though this appears to have been a highwater mark, from which subsequent jurisprudence has receded.[16] In any event, the courts seem to have established a contradictory and self-defeating principle that the administrator need not disclose the reasons for his decision.[17] On one notable occasion it

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[11]*Sharp* v. *Wakefield,* [1891] A.C. 173, 179; *R.* v. *Vestry of St. Pancras* (1890), 24 Q.B.D. 371, 375-376.

[12]In Quebec see *Jaillard* v. *City of Montreal* (1934), 72 S.C. 112; *Baikie* v. *City of Montreal* (1937), 75 S.C. 77; *Bouchard* v. *Longueuil,* [1942] S.C. 303; *Leroux* v. *City of Lachine,* [1942] S.C. 352; *Roncarelli* v. *Duplessis,* Superior Ct. Montreal, May 2d, 1951, No. 253124, judgment of Mackinnon, J. (unreported).

[13]*Galloway* v. *Mayor & Commonalty of London* (1866), L.R. 1 H.L. 43; *Hanson* v. *Radcliffe Urban District Council,* [1922] 2 Ch. 490; *Mun. Council of Sydney* v. *Campbell,* [1925] A.C. 338; see Treves, *Administrative Discretion and Judicial Control,* 10 MOD. L. REV. 276 (1947).

[14]*Re Silverberg, Re Bd. Police Commrs.,* [1937] 3 D.L.R. 509, 512.

[15]*Wilson* v. *Esquimalt and Nahaimo Ry.,* [1922] 1 A.C. 202; *Re Bowman,* [1932] 2 K.B. 621, 634; *London County Council (Riley Street Chelsea No. 1) Order* 1938, [1945] 2 All E.R. 484. See also *Goldberg* v. *City of Montreal,* 48 R.J. 309, 333 (S.C., 1942); *Normand* v. *Leroux,* [1945] K.B. 101; for case where administrator decides in the face of evidence see *King* v. *Board of Education,* [1910] 2 K.B. 165, 175. But cf. *Belleau* v. *Minister of National Health,* [1948] Ex. C.R. 288.

[16]*E.g., Robinson* v. *Minister of Town and County Planning,* [1947] K.B. 702.

[17]*Sharp* v. *Wakefield, supra* note 11, at 183; *Cassel* v. *Inglis,* [1916] 2 Ch. 211; *Robinson* v. *Minister of Town and County Planning, supra* note 16; *Re Silverberg, supra* note 14,

was very shrewdly said that though the administrator could not be forced to give his reasons, if he chose not to disclose them, it would be presumed that he had none which were lawful, and his decision would have to be quashed.[18] But again this effort to put a few more teeth in judicial control was apparently considered too bold for imitation.[19]

Any attempt to apply the requirements of "some evidence" or "reasonableness" to administrative decisions is generally defeated by the character of modern legislation which confers such broad and subjective discretions that the courts find themselves without any guide as to what grounds, if any, are required to justify an administrative decision.[20] Judicial *review* of administrative *discretion* is, therefore, generally confined to a determination of those persons or things over which the administrator has jurisdiction. The other grounds for upsetting his decision, namely, that the statute or regulation under which he purported to act was *ultra vires,* that he failed to conduct a fair hearing, or that he was manifestly motivated by improper considerations, involve in no way an encroachment on his right to be the sole judge of the facts. They are merely instances of want or excess of jurisdiction which no body or law can be presumed to have authorised.[21]

These common places are of some importance in considering the effect to be given to statutory provisions prohibiting judicial control.

The Problem in Quebec

Although the principles of judicial control in Quebec are those of English public law, and common law decisions are cited and applied by our courts, the general jurisdiction in administrative matters and the means by which that jurisdiction is exercised are set out in the Code of Civil Procedure. The effect of this codification, however general its terms, has been to give somewhat less elasticity to the application of the prerogative writs than in common law jurisdictions, where the development and extension of judicial control

for case where statute exempted authority from giving reasons; *Villeneuve* v. *Corp St. Alexander* (1912), 42 S.C. 487, 493. Cf. *Waller* v. *City of Montreal* (1914), 45 S.C. 15, 24-25 *per* Greenshield, J. dissenting; see recommendation of Committee on Ministers Powers in this regard, Cmd. No. 4060, at 100 (1932).

[18]*Wrights' Can. Ropes* v. *Min. of Nat'l Rev.,* [1947] 1 D.L.R. 721.

[19]*Poizer* v. *Ward,* [1947] 4 D.L.R. 316. See criticism of this decision in 25 Can. Bar. Rev. 1156 (1947).

[20]*E.g., Liversedge* v. *Anderson,* [1942] A.C. 202. See *Poizer* v. *Ward, supra* note 19, for the expression "absolute discretion".

[21]Warrington, J. in *Short* v. *Poole Corp.,* [1926] 1 Ch. 66, 91: "The only case in which the court can interfere with an act of a public body which is, on the face of it, regular and within its powers, is when it is proved to be in fact ultra vires, and the references in the judgments . . . to bad faith, corruption, alien and irrelevant motives, collateral and indirect objects, and so forth, are merely intended, when properly understood, as examples of matters which, if proved to exist, might establish the ultra vires character of the act in question."

have been almost entirely the work of jurisprudence. The point of departure in Quebec for any consideration of whether a certain remedy will lie is generally the terms of the Code rather than the principles to be discovered in the common law. Even the grounds upon which a remedy may be sought have to some extent been codified, though this cannot be said to have sensibly restricted the scope of judicial control as defined by common law decisions.

The law provides that the "superintending and reforming power, order and control of the Superior Court" over "all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the Province" is to be exercised "in such manner and form as by law provided."[22] At the very least, this is a statutory recognition of the general supervisory jurisdiction which Superior Courts have traditionally exercised over inferior tribunals by means of the prerogative writs.[23] But so general are the terms of this provision that it is difficult to conceive of any impediment or restriction, other than a procedural one, to the jurisdiction of the Superior Court in administrative matters generally. This part of the law, therefore, would not seem to require any revision to assure a more general and adequate judicial control.

The expression "in such manner and form as by law provided" has been taken to include, in addition to special appeals provided by other statutes, the prerogative writs of certiorari, prohibition, mandamus, quo warranto and habeas corpus, as well as injunction, and any other proceedings,[24] collateral or enforcement, by which an administrative decision may be indirectly brought within the purview of the Superior Court. It is difficult to see how, in the absence of other provision, these words confer any right to attack an administrative decision by ordinary or direct action, though the jurisprudence has left sufficient doubt on this question to make it still debatable.[25] For the purposes of this article, however, it is assumed that no such right exists in Quebec with respect to the decisions of public administrative bodies other than municipal corporations. Even if it did, it would not be a solution to the present problem, but would merely remove procedural uncertainties in those cases where judicial control had not been removed by law.

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[22]C.C.P., art. 50.

[23]*Rex* v. *Board of Education,* [1910] 2 K.B. 165 *per* Farwell, L.J., at 178: " . . . the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals."

[24]As to whether the declaratory action exists in Quebec, see *R.* v. *Central Rly. Signal Co. Ltd.,* [1933] S.C.R. 555; *Corp. du Village de la Malbaie* (1924), 36 K.B. 70; *Alexander Furs Ltd.* v. *Sadosky,* [1947] K.B. 53, 55.

[25]See Bruneau, *De l'article 50 du Code de procédure,* R. DU D. 403, 439 (1924-25); Faribault, *L'article 58 C.P.C. et les procédures municipales,* 4 R. DU D. 582 (1926); with regard to municipal acts, *Côté* v. *County of Drummond,* [1924] S.C.R. 186; *Donohue* v. *Malbaie,* [1924] S.C.R. 510; with regard to judgments, *Riberdy* v. *Tremblay* (1918), 27 K.B. 385; *Lacroix* v. *Tardif* (1926), 29 Q.P.R. 13; *Lamarche* v. *Cardin,* [1949] S.C. 384; with regard to quasi-public bodies, *Payment* v. *Académie de Musique de Québec* (1935), 59 K.B. 121; as to other provinces, see *Lower Mainland Dairy Products* v. *Kilby and Turner's Dairy Ltd.,* [1941] S.C.R. 573.

It must be admitted, however, that these procedural uncertainties have in some measure invited the statutory prohibition of judicial control. The uncertainty with which the legislature is concerned is not so much that of the private citizen as that of the administration, and the principal reason for such prohibition is presumably the delay involved in recourse to the courts. But the courts have so restricted the application of the writs of prohibition and certiorari that their denial by statute is in many cases merely a legislative recognition of the jurisprudence.

It was long ago recognised in English law that if the courts were to exercise any control to speak of over administrative bodies, they would have to allow themselves some latitude in the construction of the word "court" or "tribunal" so as to make the writs of prohibition and certiorari applicable to bodies which had few or none of the institutional characteristics of a court and in many cases only a remote functional resemblance to one.[26] Once admitted, this principle became a very flexible one, without which the present development of judicial control in the Anglo-American world would have been extremely difficult, if not impossible. It has been said, perhaps with some justice, that the courts have sometimes pushed the principle too far,[27] but a more serious criticism is that they have been inconsistent. As if afflicted by serious misgivings, they have by turns enlarged and restricted the application of prohibition and certiorari, so that the second state of the law is worse than the first.[28]

For a time it appeared as if a general criterion for the application of these writs, reasonably free from semantic difficulties, was emerging from the jurisprudence. Briefly stated, this criterion would recognise as a judicial function for the purposes of certiorari or prohibition any decision or act which imposed obligations on persons or determined their rights or property in particular cases.[29] Admittedly, this test would not be entirely free from difficulties (which we cannot enlarge on here) but any possibilities inherent in it, have been fairly well destroyed in Quebec by preoccupation with, and confusion of, two kinds of theoretical distinction. The first of these distinctions, made necessary by section 96 of the BNA Act, is the one between the ordinary courts and administrative tribunals. This is an

[26]Brett, L.J., in *Reg.* v. *Local Government Board* (1882), 10 Q.B.D. 309, 321: "My view of the power of prohibition at the present day is that the court should not be chary of exercising it, and that whenever the Legislature entrusts to any body of persons other than to Superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons . . . "

[27]*E.g., Rex* v. *Electricity Commissioners,* [1924] 1 K.B. 171. See Gordon, *Administrative Tribunals and the Courts,* 29 L. Q. REV. 419, 438.

[28]Gordon, *supra* note 27; Finkleman, *Separation of Powers; A Study in Administrative Law,* 1 U. OF TORONTO L. J. 313 (1935-36).

[29]*Reg.* v. *Local Gov't Board, supra; Local Gov't Board* v. *Arlidge,* [1915] A.C. 120, 140; CORRY, THE GROWTH OF GOVERNMENT ACTIVITIES SINCE CONFEDERATION 17 (1939).

essentially institutional distinction, but the Quebec courts have based it on what they perceive to be a fundamental difference of function between courts and administrative bodies, and have contrasted what they call the "judicial" and "administrative" functions of these two institutions.[30] Whether or not this is a valid or meaningful distinction is not really worth arguing for the purposes of section 96 of the BNA Act, because, from a practical point of view, it is inconceivable that the Canadian constitution should be allowed to defeat the right of provincial legislatures to constitute and control their own administrative bodies. The second distinction, however, is a more serious one as far as judicial control is concerned. It is the distinction made between the various functions within the administrative process.

Now certain of these functions, notably that of making regulations of general applicability, are clearly of what might be called a legislative nature. Others, consisting of well defined statutory duties involving little or no discretion, are of a ministerial nature. The residue defies analysis, but is unfortunately the principal object for judicial control. To call this residue of powers "administrative" is to apply the generic term for all the various types of function to one of them. To use the term "discretionary" is to describe one of their characteristics, but not really to distinguish them from the powers of the courts and certainly not to say that they are non-judicial. It is the judicial character of these powers, whatever form it takes, that we are really interested in, for the writs of certiorari and prohibition apply not merely to the institutions which we recognise as the regular courts of law, but to all bodies exercising powers of a judicial nature. It is in the definition of what constitutes or characterises the judicial function, regardless of institutional differences, that the difficulty arises. The distinction between "law" and "discretion" which has so influenced the jurisprudence on this point does not bear too close analysis.[31] The expression of this distinction in any one of numerous other ways, such as by saying that the judicial function is to declare existing rights and liabilities, but not to create them, or that the courts are bound by law, but administrative bodies are a law unto themselves,[32] is hardly less free from objection. Be that as it may, there is still room for discussion on this point, though such discussion has so far done little or nothing to advance the cause of certainty in administrative law. (Latterly, its most worthwhile effect has been to underscore the inadequacy of the prerogative writs.)

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[30] *Attorney-General of Quebec* v. *Slanec and Grimstead* (1933), 54 K.B. 230, 249.

[31] See LAUTERPACHT, FUNCTIONS OF LAW IN THE INTERNATIONAL COMMUNITY (Oxford, 1933); ROBSON, *op. cit., supra* note 1, at 351, for criticism of this distinction.

[32] Gordon, *supra* note 27, at 106-108; *Re Ashby*, [1934] 3 D.L.R. 565, 568; *Rex* v. *Pantelidas*, [1943] D.L.R. 569, 574; *Re Brown and Brock and Rentals Administrator*, [1945] 3 D.L.R. 324; *Commission des Relations Ouvrières* v. *Alliance des Professeurs Catholiques de Montréal*, [1951] K.B. 752, 772.

When, however, as in Quebec, the institutional distinction made for the purpose of section 96 of the BNA Act is invoked to justify the functional distinction with respect to certiorari or prohibition the confusion is only intensified. For example, the case of *Slanec and Grimstead,* which decided that the Quebec Workmen's Compensation Commission was not a court within the meaning of section 96 of the BNA Act, is cited as authority in Quebec cases where the sole question for determination is whether a certain administrative body is exercising a judicial function so as to make it amenable to prohibition or certiorari.[33] It may be argued that in such cases the courts are merely referring for purposes of illustration to the analysis by the judges in *Slanec and Grimstead,* but it is hard to escape the impression that they actually consider that case to have decided the question before them.

Now, in the common law provinces, at least, it is assumed that the decision of a workman's compensation board is subject to review on certiorari, regardless of the fact that it may not be a court as understood in section 96 of the BNA Act.[34] So, for that matter, is a decision of a labour relations board.[35] Yet Quebec courts have in the last few years made it fairly clear that neither prohibition nor certiorari will lie to our labour relations board.[36] It is submitted that this result is due at least in part to a tendency to overlook the real issue in *Slanec and Grimstead.*

This tendency has perhaps been furthered in Quebec by the terms of the Code of Civil Procedure respecting the application of prohibition and certiorari.[37] Article 1003 of the Code states that

> the writ of prohibition lies whenever a *court* of inferior jurisdiction exceeds its jurisdiction. [Italics supplied]

Article 1292 provides that

> In all cases where no appeal is given from the inferior court mentioned in articles 59, 61, 63, 64, and 65, the case may be evoked before judgment or the judgment may be revised, by means of a writ of certiorari, unless this remedy is also taken away by law.

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[33]*E.g., Prudential Assurance Co. of America* v. *La Commission des Relations Ouvrières,* [1951] Q.P.R. 1, 2; *Alliance des Professeurs Catholiques, supra* note 32, at 765; see Beaulieu, *Législation du Travail,* 10 R. DU B. 393, 394, 395 (1950).

[34]*E.g., Re Workmen's Compensation Act and CPR,* [1950] 2 D.L.R. 630. See *La Commission des Accidents de Travail* v. *Laurentian Spring Water* (1939), 43 Q.P.R., 432, for proposition that the Quebec Workmen's Commission is governed by art. 50, C.C.P.

[35]*E.g., Capital Cab Ltd.* v. *Can. Brotherhood Ry. Employees,* [1950] 1 D.L.R. 184; *Bruton* v. *Regina City Policeman's Ass'n,* [1945] 3 D.L.R. 437; *Dominion Fire Brick Clay Products* v. *Labour Relations Bd.,* [1946] 4 D.L.R. 130.

[36]See note 33 *supra;* cf. *Classon Mills Ltd.* v. *Council of Arbitration et al.,* [1951] K.B. 366; *L'Assoc. Patronale des Manufacturiers de Chaussures,* [1951] S.C. 453, showing that prohibition will lie to an arbitration council.

[37]Dorion, J., in *Rossi* v. *Lacroix* (1929), 46 K.B. 405, 414: *"Le Code de Procédure n'a pas créé le bref de prohibition. Il existait en vertu du droit commun."*

In a recent Quebec case it was held that certiorari did not apply to the Labour Relations Board because it was not a *court* within the meaning of article 1292 above.[38] No reference was made to another article of the Code of Civil Procedure which reads:

> The procedure regulated by this Chapter applies also to *all other cases in which the writ of certiorari will lie,* and against any other inferior court not referred to by Article 1292 . . . [Italics supplied] [38a]

This neglected article would seem to confer sufficient authority for the common law application of certiorari to all other tribunals or bodies exercising powers of a judicial nature.

It has been suggested by one writer[39] that there is something paradoxical about the courts declaring that an administrative body is not a court within the meaning of section 96 of the BNA Act, but that it is a court for the purpose of certiorari or prohibition, and this may well be the view taken by some Quebec judges. But the extended application of these writs by the common law jurisprudence is a recognition not only of a practical necessity if there is to be any judicial control, but of the fact that judicial functions may be exercised by institutions other than the courts of law. The choice is between a paradox and a dilemma wherein the writs of certiorari and prohibition could not apply at all to administrative bodies, or where they did apply, such bodies would be constituted in violation of section 96 of the BNA Act.

In any event, the question, so far as Quebec is concerned, is fast becoming academic, because the legislator seems determined that there shall be neither paradox nor dilemna. A recent amendment to the Quebec Labour Relations Act reads as follows:

> No writ of quo warranto, of mandamus, of certiorari, of prohibition or injunction may be issued against the Board, or against any of its members, on account of a decision, a procedure or any act whatsoever relating to the exercise of their functions. Article 50 of the Code of Civil Procedure shall not apply to the Board.[40]

The same immunity has been conferred on the recently constituted Provincial Rentals Commission[41] and Montreal Transportation Commission.[42] Such legislative provisions barring recourse to the courts from administrative decisions and purporting to exclude all judicial control whatsoever, even in collateral proceedings, are not new to the law of Quebec. They are to be found in numerous statutes,[43] even the one governing the legal profession,[44] and

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[38]*Prudential Assurance Co.* v. *La Commission des Relations Ouvrières, supra* note 39.
[38a]C.C.P., art. 1307.
[39]Willis, *Section 69, British North America Act*, 18 CAN. BAR. REV. 517, 538 (1940).
[40]STATUTES OF QUEBEC, 1950-51, 14-15 GEO. VI, c. 36, § 1.
[41]STATUTES OF QUEBEC, 1950-51, 14-15 GEO. VI, c. 20, § 17.
[42]STATUTES OF QUEBEC, 1950-51, 14-15 GEO. VI, c. 124, § 1.
[43]Notably Alcoholic Liquor Act, R.S.Q., 1941, c. 255, § 139.
[44]Bar Act, R.S.Q., 1941, c. 262, § 61.

the Code of Civil Procedure itself contains such a provision.[45] Nor, of course, are they peculiar to Quebec. Many examples could be cited from the statute law of the other provinces and of England. Such provisions are, in fact, a general feature of modern legislation.

It is the attitude of our courts toward them that makes these provisions of special interest in Quebec. Although the Quebec jurisprudence is not rich in decisions on this point, the few isolated statements which may be found rather indicate that our judges will, in contrast to their common law brethern, give full effect to the terms of administrative finality. In the other provinces, as in England, the general tenor of the jurisprudence has been that no statute will be construed as conferring immunity on administrative authorities for want or excess of jurisdiction, and that the control of the courts over such questions cannot be ousted.[46] At first blush this may appear to be a perfectly reasonable and even self-evident principle if there is to be any limit whatsoever to administrative conduct. But on closer inspection it is seen to be very insecurely grounded in judicial rationalisation.

This fact is amply illustrated by a case comment in the Canadian Bar Review on the recent decision of the Manitoba Court of Appeal in *Re Workmen's Compensation Act and CPR.*[47] In that case it was held that despite the statutory exclusion of judicial control in the Manitoba Workmen's Compensation Act, the Court was not prevented from reviewing the question of whether an injured person was a "workman" within the meaning of the Act as this point went to the jurisdiction of the Board, and the Court reversed the Board's finding on this fact. The commentator on the case,[48] in expressing his approval of it, says:

> The approach of McPherson, C.J.M., enables the courts to maintain control over administrative action despite the presence of a statutory provision for administrative finality of the type of a 'conclusive-evidence' clause. In his view, such a clause means only that the administrative discretion is, so long as the agency concerned keeps within the limits the enabling statute allows, absolute; but the question of *vires* is still within the judicial competence.

And he cites a number of English cases containing statements to similar effect, notably that of Lord Slesser in *Ex parte Yaffe* that such a clause would valid-

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[45]C.C.P., art. 87a.

[46]*Minister of Health* v. *The King (ex parte Yaffe),* [1913] A.C. 494; *Canadian Northern Ry. Co.* v. *Wilson* (1918), 43 D.L.R. 412; *The King* v. *National Fish Co.* [1931] Ex. C.R. 75; *Re McEwen, The Board of Review for Manitoba* v. *Trust & Loan,* [1941] C.S.R. 452; *Society of the Love of Jesus* v. *Smart and Nicolls,* [1944] 2 D.L.R. 551; *Bruton* v. *Regina City Policeman's Ass'n.* [1945] 3 D.L.R. 437; *Dominion Fire Brick and Clay Products and Sask. Labour Relations Board,* [1946] 4 D.L.R. 130; *Re Lunenburg Sea Products Ltd., Re Zwicker,* [1947] 3 D.L.R. 195.

[47][1950] 2 D.L.R. 630.

[48]Schwartz, 28 CAN. BAR. REV. 673 (1950).

ate administrative action that was "legally *intra vires* but administratively imperfect."[49]

Such statements are, however, no more nor less than an expression of the limits to which a court will interfere with an administrative decision under any circumstances. As pointed out above, even where there is no statutory exclusion of their control, the courts never claim more than the right to review the jurisdiction of an administrative authority, to question the legality, but not the wisdom, correctness or expediency of its decision. It has always been assumed that within the limits of its jurisdiction, in the fullest sense given to that term by the jurisprudence, the decision of the administrative authority is final. To say, therefore, that the terms of statutory exclusion mean nothing more than this, is, in fact, to ignore such terms altogether and to treat them as a vain and repetitious attempt to confer on administrative bodies an authority which the courts have never denied nor even seriously challenged.

Attempts have been made to make some real distinction for the case of statutory exclusion, whereby the grounds upon which the courts may quash an administrative decision are more limited than in ordinary cases where the exercise of their jurisdiction is not prohibited by statute. For example, in the case of *Colonial Bank of Australasia* v. *William*[50] it was said that these grounds were limited to "manifest defect of jurisdiction in the tribunal" or "manifest fraud in the party procuring [the decision]." But this is admitting the thin edge of the wedge and is hardly less difficult to justify than the unqualfied refusal to recognise statutory exclusion. The expression "administratively imperfect" used by Lord Slesser above might conceivably be understood to refer to procedural irregularity, hut if such were the intention of the legislature, it could be quite easily stated without the need for barring all recourse whatsoever to the courts of law.

The truth of the matter is that the real reason or justification for statutory exclusion is not so much that judicial control goes too far in its interference with administrative discretion but that it causes delay and uncertainty in the administrative process. It is not the theory or scope of judicial control which is at fault, but the procedure or means by which it is exercised. This is particularly true for legislation of a temporary and emergency nature. An example of such legislation is the Quebec Rentals Act[51], which expressly provides that it is to be in force only until April 30th, 1953. If decisions under this Act were exposed to attack in the courts, its usefulness would be greatly impaired, and its operation could be brought to a virtual standstill. With the present congested state of our rolls and the latitude which attorneys are in the habit of extending to one another in the matter of delays, it is more than likely that matters decided under the Act would still be in issue before the Courts after the Act itself had ceased to be in force. This does not mean to

[49][1930] 2 K.B. 98, 170.
[50](1874) L.R. 5 P.C. 417, 442.
[51]STATUTES OF QUEBEC, 1950-51, 14-15 GEO. VI, c. 20.

say that there should be no judicial control over administrative activity of this kind, but that the control should be of the same swift and expeditious character as the administrative activity iself.

It is therefore apparent that if the Courts are to give effect to the obvious intent of the legislature, statutory provisions for prohibiting judicial control have to be taken seriously, however we may disapprove of them, and the remedy is not to rationalise them away but to attempt to meet the legislator on his own ground by proposals that will remove some, at least, of the more serious objections to the present system. For this reason, the attitude of the Quebec courts towards statutory exclusion, as far as it can be ascertained and predicted from the *jurisprudence,* seems to be a more realistic one than that of common law jurisdictions and better calculated to force a satisfactory solution of the present problem.

A decision which contrasts the Quebec attitude sharply with that of common law courts is to be found in the recent case of *McFall* v. *Laflèche.*[52] There Judge Marier of the Superior Court was faced with section 15(2)[53] of the Wartime Prices and Trade Board Regulations (P.C. 8528) on an application for certiorari to set aside a decision of the rentals administrator exempting a lease from the provisions of the Regulations. Although Judge Marier based his refusal of certiorari primarily on the ground that the administrator, in exempting the lease, was exercising an "administrative" and not a "judicial" function subject to review by certiorari, his pronouncement on the effect of section 15(2) above, purporting to exclude judicial control, must be taken to be not merely a loose obiter dictum, but a considered expression of the Quebec position on the question.

Said Judge Marier:

> The Court of Appeal in the case of *Brown and Brock* expressed the opinion that section 15 of Order in Council P.C. 8528 would not be a bar to these proceedings if the Order of the Deputy Administrator is a judicial one, and the plaintiff's attorney has cited many judgments rendered by our Courts to the same effect, when there is want or excess of jurisdiction or if the decision entails grave injustice amounting to fraud, but a more recent jurisprudence seems to the effect that when the proper authority has by special law taken away the recourse to certiorari or injunction, etc., effect must be given to that special law.[54]

In point of fact, it was the judgment appealed from *In re Brown and Brock* and not the Court of Appeal which held that this section was not a bar to

[52][1951] Q.P.R. 378.

[53]"No proceedings by way of injunction, mandatory order, mandamus, prohibition, certiorari or otherwise shall be instituted against any member of the Board, Administrator or other person for or in respect of any act or omission of himself or any other person in the exercise or purported exercise of any power, discretion or authority or in the performance or purported performance of any duty conferred or imposed by or under these regulations or any regulations for which these regulations are substituted or otherwise conferred or imposed by the Governor in Council."

[54][1951] Q.P.R. at 383.

judicial control. Robertson, C.J.O., speaking for the Court of Appeal, said:

> Let me say at the outset that we are not to be taken as acquiescing in the view — if any such view is expressed in the judgment appealed from — that the privative clause in the Order in Council is of no effect. We express no opinion one way or another upon that. It has not been argued . . . and we do not think it necessary to determine the matter in disposing of this appeal. Therefore, we are not to be taken as having dealt with it.

But the same section of the Wartime Prices and Trade Board Regulations was considered by the Supreme Court of British Columbia in *Society of the Love of Jesus* v. *Smart and Nicolls*,[55] and the Court held, on a rather narrow construction of its terms, that it did not take away the right to interfere where the authority had exceeded its jurisdiction.

The recent jurisprudence to which Judge Marier referred in the *McFall* case consisted of the decisions in *Dubé* v. *Lemonde*[56] and *Daigneault* v. *Meunier*.[57] The first of these cases concerned the effect of section 149 of the Canada Temperance Act on an application for certiorari from a conviction under that Act. Judge Stein, basing himself for the most part on the decision of the Privy Council in *Rex* v. *National Bell Liquors Ltd.*,[58] held that the section was an effective bar to recourse by certiorari. Certain of his general remarks bear quotation as illustrating the matter of fact attitude of Quebec judges to such provisions. For example:

> *Puisque l'on veut procéder sous l'empire de l'art. 1292 de notre code de procédure, et puisque cet article suppose qu'il peut exister une loi qui refuserait le recours au bref de certiorari, il me semble qu'il n'y a pas lieu de s'étonner qu'un juge donne effet à une telle loi, quand on lui présente une procédure prise sous son empire.*[59]

And again:

> *De plus, remarquons que la plupart des jugements qui ont décidé en faveur de l'octroi du bref, malgré une prohibition légale, sont des jugements rendus par des tribunaux étrangers à cette province, dans le cas où le bref de certiorari avait été émis sous l'empire du Code Criminel, articles 1120 à 1132, articles qui ne contiennent pas cette restriction de notre article 1292 C.P.*[60]

It is to be remarked that in this case Judge Stein was concerned with the statutory remedy of certiorari provided for by article 1292 of the Code of Civil Procedure and confined in its application by the terms of the Code to "courts" in the strict sense of the word. Specific reference is not made to article 1307 of the Code which, as stated above, may be considered to re-

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[55] [1944] 2 D.L.R. 551.
[56] (1929), 32 Q.P.R. 151.
[57] [1946] S.C. 437, 439.
[58] [1922] 2 A.C. 128.
[59] (1929), 32 Q.P.R. at 154.
[60] *Id.* at 155.

cognise the common law remedy, but allusion is indirectly made to it in the following statement:

> *Les nombreux jugements qui veulent que ce recours existe malgré une telle prohibition, lorsqu'il y a eu, de la part de la Cour inférieure, excès de juridiction, soumettent qu'il s'agit là d'un bref de prérogative, d'un recours qui est toujours ouvert à un sujet britannique, quand il est lésé par suite du défaut de juridiction d'une Cour inférieure.*[61]

To this extent, therefore, the case of *Dubé* v. *Lemonde* is not directly applicable in *McFall* v. *Laflèche.* Moreover, the application given to the decision in *Rex* v. *National Bell Liquors Ltd.* is itself not free from objection, but it is not intended here to enter upon that particular criticism, because the problem with which we are concerned is larger than judicial misunderstanding.

The case of *Daigneault* v. *Meunier,* cited by Judge Marier, might appear to be even less solid authority for his statement. In an action in the Superior Court to evict him pursuant to a decision of the rentals administrator exempting his lease from the application of the Wartime Regulations, the defendant pleaded that the administrator's decision was illegal as having been based on false declarations. The ordinance governing the case provided that the administrator's decision should be final and conclusive. With reference to this provision Judge Lazure of the Superior Court said:

> *Considérant que la loi déclare que la décision de l'administrateur est finale et concluante, qu'il n'y avait pas lieu d'admettre ladite preuve des prétendues déclarations fausses faites à l'administrateur par le demandeur et qu'en droit cette Cour n'a pas le droit de reviser ladite décision.*[62]

Again, this is nothing more nor less than a statement of the limits of judicial control in any case, whether there be terms of administrative finality in the governing statute or not. It has never been the function of a Superior Court to weigh the evidence before an administrative authority, though it might be said with some justice that this particular case points up one of the objectionable features of the present informality of most administrative proceedings.

However one may succeed in weakening the force of Judge Marier's remarks in the *McFall* case by an analysis of the authority which he invokes, it is difficult to escape the conviction that his view is bound in the long run to prevail. Breachs have already been made in the common law bulwark,[63] and the Quebec jurisprudence itself is not without other pronouncements to

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[61] (1929), 32 Q.P.R. at 155.

[62] [1946] S.C. 437, 439.

[63] *E.g., Rex* v. *Ludlow, ex parte Bamsley Corp.,* [1947] 1 All. E.R. 880; see also *Ex parte Ringer* (1909), 25 L.T. 718; *Institute of Patent Agents* v. *Lockwood* [1894] A. C. 347, 369; see Editorial Note to *Re Lunenburg Sea Products Ltd., Re Zwicker,* [1947] 3 D.L.R. 195.

the same effect.[64] It is submitted, therefore, that because of both the uncertain and narrow application being given to the prerogative writs and the effect which the Quebec courts may be expected to give to the statutory exclusion of judicial control, it is time to consider some procedural reform of the present system.

The effect which an unquestioned right of access to the courts may have on their attitude and the effectiveness of their control[65] is to be seen in the recent judgment of the Quebec Court of Appeal in *Giroux* v. *Maheux*.[66] This case bears very favourable comparison with the decision of the same court in *Commission de Relations Ouvrières de la Province de Québec* v. *Alliance des Professeur Catholiques de Montréal*,[67] where the thought and energies of the court were largely occupied with the question of whether a writ of prohibition would lie, and only subsidiarily with the grounds of complaint. In the *Giroux* case the Court was sitting on an appeal from a decision of the Provincial Transportation and Communication Board granting a transportation monopoly for a certain district to one of the parties. Maheux had applied to the Board for the right to operate a bus service between Ste. Thérèse and Québec and had served his petition on Giroux because the latter was at the time operating an exclusive service between Laval and Québec, including Ste. Thérèse en route. After hearing the parties in accordance with its rules of procedure, the Board granted a permit to Maheux to operate a service between Ste. Thérèse and Québec, thus removing the monopoly character of Giroux's right. But after publishing this decision and without hearing the parties again, the Board revised its decision, annulled in part the permit of Giroux and granted to Maheux the exclusive right to operate the service in question. As expressly permitted by the Act, Giroux appealed to the Court of Queen's Bench on the ground that the Board had exceeded its jurisdiction in revising its decision in this way.

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[64]As to art. 87a, C.C.P., see *Johnson Woolen Mills Ltd.* v. *Southern Canada Power Co. and Sec. of Province*, [1945] K.B. 134, 137; *Man. de Chaussures* v. *Dependable Slipper & Shoe Mfg.*, Superior Ct. Quebec, Aug. 30, 1947, No. 52461, judgment of Boulanger, J. (unreported); *Alliance des Professeurs Catholiques*, *supra* note 32, at 768, 769. Cf. *L'Assoc. Patronale des Manufacturiers de Chaussures* v. *De Blois*, [1951] S.C. 453, *per* Savard, J., at 456: *"Il est possible que c'était l'intention du législateurs d'abolir absolument le bref de prohibition dans tous les cas où la commission des relations ouvrières et les conseils d'arbitrage étaient intéressés. Seulement, la rédaction de la loi ne va pas jusque-là, il s'agit d'une loi d'exception qui doit être interprétée très strictement parce qu'elle enlève un droit que confère la loi générale"*; see also *Langlais* v. *S.R.B.* (1932), 62 K.B. 282, 287-291, 294.

[65]*E.g.*, Bergman, J.A., in *Poizer* v. *Ward*, [1947] 4 D.L.R. 316, 323: "In the Wrights' Ropes case the Judicial Committee was dealing with the scope of the right of appeal given by the Income Tax against the decision of the Minister . . . and it exercised its right of review under a statutory right of appeal. That decision has no application to a case where, as here, relief is sought by way of mandamus."

[66][1947] K.B. 163.

[67]See notes 32, 33 and 64, *supra*.

The case is of interest from several points of view. One is the jurisdiction given by statute to the Court of Appeal to review the decision of the Board on questions of jurisdiction and law. The second is the character of the procedure adopted by the Board. The law provides that the Board and its members shall have the powers of a judge of the Superior Court and authorises them to make rules of practice to govern their proceedings. The procedure laid down by these rules of practice is avowedly modelled on that of a Superior Court, though necessarily more expeditious. Every reasonable safeguard is provided for thoroughly judicial proceedings. If these rules of practice were more generally imitated by administrative tribunals there might be less need for control by the courts of law.

The Court of Appeal held, three to two, that the decision of the Board should be quashed. Even among the majority there was some divergence of opinion, and discussion turned very largely on the terms of the statute and rules of practice governing the Board. Pratte, J., held that the decision of the Board constituted a violation of the *audi alteram partem* principle expressly guaranteed by its own rules of practice, though he did not recognise in the Board the judicial character which judges Galipeault and Marchand acknowledged. These judges, while making mention of the same irregularity, declared also that the Board's decision was *ultra petita* as there had never been any question before it of granting a monopoly to Maheux. The dissenting judges held in substance that the Board was exercising an administrative function and was free to revise or correct its decision as it did. It is discouraging that even this case should not have been free of that abstract discussion of the terms "administrative" and "judicial" which has been the curse of the whole subject to date, and which seems by its intellectual glitter to constitute an irresistible attraction for lawyers and judges.

The discussion on this point was, however, not the essential basis of the decision, nor even the important element that it was in the case of *Alliance des Professeurs Catholiques* above. The latter case illustrates as forcefully as anything the critical state of judicial control in this province. The syndicate of Catholic School teachers appealed by way of prohibition from the revocation of their certificate without a hearing by the Labour Relations Board. Two of the judges declared that the Board was not exercising a judicial function subject to control by prohibition. Two of them confined themselves to stating that prohibition was not in any event the proper remedy as there remained nothing to prohibit. The fifth did not pronounce on either question but found that the failure to hear the syndicate did not, in view of the silence of the law on this question, constitute an excess of jurisdiction. His opinion on this point was shared by two of the other judges.

Without passing criticism on these reasons for judgment, it is respectfully submitted that, viewed in its entirety, this case reflects the disquieting uncertainty of the present state of the law in Quebec. It is not the purpose of

this article to emphasise this uncertainty, in so far as it affects the scope or theory of judicial control, though in this respect attention might be drawn to the position adopted in this case on the requirement of a fair hearing. It is enough for now to underline what appears to be the principal issue, namely the right of access to the courts, and to make some modest suggestion of reform in this regard.

A SUGGESTED REMEDY

Assuming always that the need for judicial control of some kind is generally acknowledged, it would seem apparent that the jurisdiction of the courts should not be left in doubt. It is therefore suggested that the Committee for Revision of the Code of Civil Procedure propose the inclusion in the Code of a new section to govern appeals from administrative decisions. A direct appeal on questions of law or jurisdiction, similar to that exercised in the case of *Giroux* v. *Maheux,* might be given to the Superior Court from all administrative decisions affecting the rights or obligations of individuals. The delay for such appeal should be fairly short, say, ten days, and it might even be by leave to be granted by a judge of the Court of Queen's Bench. Such leave could be sought on a simple notice outlining the grounds for appeal. The administrative body concerned would have a certain delay to file the decision appealed from, the reasons for it and all supporting documents. This requirement that the administrative authority be forced to give the reasons for its decision is most important if there is to be any effective judicial control. The delays should be *de rigueur* and the appeal dismissed or the administrative decision quashed by a judge of the Court of Queen's Bench upon failure of either party to comply with them.

Should leave to appeal be granted, the notice or application, together with the administrative decision and reasons for it and all documents or affidavits in support thereof, would be sent down to the Superior Court to be heard summarily by three judges out of a number to be appointed especially for this purpose, and on a date to be fixed by the registrar of a special division of the Court established to look after such appeals. The decision of these judges should be final. It should be left to their discretion to order any proof which they deem necessary and to adjourn the case for this purpose, but as a general rule, the appeals should be conducted in the form of a stated case. Serious consideration should be given to the advisability of codifying in fairly specific form the grounds for such appeal. There should be established for such appeals a special tariff, designed to discourage frivolous proceedings, but at the same time to make recourse available to the citizens generally.

Such a reform might necessitate some changes in the Courts of Justice Act and other statutes, but the Code could grant such appeal "notwithstanding any other provision of law" so as to avoid the need for amendment to special laws

presently prohibiting recourse by the prerogative writs and otherwise. The prerogative writs would remain in force, where they had not been expressly taken away, and continue to serve a useful purpose in the control of inferior courts of law.

No doubt the above proposal is open to some objections, and perhaps even to fatal ones, but it is offered only as a point of departure for discussion, in the hope that such discussion may place the problem in the kind of focus that will force the Legislature and other responsible powers to consider the real issue of our time; whether there are to be adequate safeguards for the citizen in an age in which the public law spreads like a relentless lava over the area of private legal relations.[68]

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[68]Since the above article went to press, the Quebec Superior Court has made two very interesting pronouncements on the scope and effect of the recent provision, quoted at page 12, purporting to confer immunity from judicial control on the Quebec Labour Relations Board and Rentals Commission.

In the first of these decisions, *Canadian Copper Refiners Limited* v. *Labour Relations Board of the Province of Quebec and Oil Workers Int'l Union,* Superior Ct. Quebec, June 21, 1952, No. 65148, judgment of Mr. Justice Choquette (as yet unreported) the issue, on inscription-in-law, was the right to bring a direct action to quash the certification of a minority union. The Board invoked § 41a of the Labour Relations Act which is reproduced at page 12 of the foregoing article, but the Court held that the words "Article 50 of the Code of Civil Procedure shall not apply to the Board" had not taken away the jurisdiction of the Superior Court in virtue of § 36 of the Conrts of Justice Act (1941 R.S.Q. c. 15) This section sets forth, in terms almost identical to those of art. 50 of the Code of Civil Procedure, the general superintending and controlling power of the Superior Court, making express reference to the statute, 12 Vic. c. 38, which transferred that jurisdiction to the Superior Court from the Court of Queen's Bench. Historically and juridically, this is undoubtedly the true authority for the Superior Court's jurisdiction over inferior courts and other bodies, though in exercising that jurisdiction, judges have generally made reference only to art. 50 of the Code of Civil Procedure, which stipulates the jurisdiction of the civil courts as well as the procedure to be adopted before them. Mr. Justice Choquette observes that art. 50 was merely the reproduction in the Code of Civil Procedure of 1897 of the first paragraph of § 2329 of the Revised Statutes of 1888, now § 36 of the Courts of Justice Act. This judgment, therefore, impliedly recognises that the recent provincial legislation has, within its limits, achieved its intended purpose (" . . . the legislature could suppress totally article 50 of the Code of Civil Procedure without ipso facto touching in bearing article 36 of the Courts of Justice Act") but it is perhaps hasty to conclude that the effect of this judgment is merely to postpone the ultimate triumph of the Legislature, for the court adds: "It cannot accept that being ruled by a public system of law, the principles of which go back to the same source as that of the other provinces, the citizens of the province of Qnebec should be less protected by those principles in their rights and liberty than the other citizens of Canada are. So with all due respect to the contrary opinion, this Court does not feel inclined by reason of that § 41a of the Labour Relations Act, to abdicate a power so essential for the safeguard of the right of the individuals, as that which has been conferred upon the Court by the law which has given the Court its existence and constitution."

In addition to the foregoing, this judgment is interesting for the fact that it recognises the recourse by direct action against the decisions of an administrative tribunal, though

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Montreal, Canada.

no attempt is made to justify this in terms of the historical derivation of § 36 of the Courts of Justice Act.

The second decision, *St. Aubin* v. *Courchesne,* Superior Ct. Montreal, July 24, 1952, No. 318315, judgment of Mr. Justice Montpetit, (as yet unreported) involved the same provision of law in an action to evict pursuant to a decision of the Quebec Rentals Commission exempting a lease from the provisions of the Rentals Act. Plaintiff inscribed in law (invoking § 17 of the Rentals Act which is in the same terms as § 41a of the Labour Relations Act) against Defendant's allegation that the decision of the Commission was *ultra vires.* Said Mr. Justice Montpetit: *"La Cour n'arrive pas à se convaincre que le législateur en édictant que l'article 50 du Code de Procédure Civil ne s'applique pas à la Commission, ni à ses membres, ni aux administrateurs (paragraphe 2 de l'article 17 de la loi concernant la régie des loyers) a voulu que la Cour Supérieure endosse, sans broncher, toutes les injustices ou illégalités qui pourraient, par hasard, se glisser dans une décision ou un ordre de cette Commission ou de l'un de ses membres ou administrateurs. Si tel était le cas, le législateur n'aurait-il pas ajouter dans le second paragraphe les mots qui se trouvent dans le premier . . . 'en raison d'une décision, d'une procédure ou d'un acte quelconque relevant de l'exercise de leurs fonctions' ?"*

The author's reaction to the above judgments must be to admit that they tend to confirm his earlier misgivings about the justice of his title, for, although both of these decisions suggest some embarrassment in the face of recent legislation, it is a matter of satisfaction that they show at the same time a resistance on the part of Quebec judges fully as vigorous and ingenious as that of their common law brethren. The problem, however, remains, for we may expect the "intention" of the legislature to be rendered increasingly manifest until we are forced to come to grips with the real problem, which is one of procedural reform.