

“A Sacred Right”: Judicial Review of Administrative Action as a Cultural Phenomenon

*Ian Holloway**

I. INTRODUCTION

CANADIAN SCHOLARS HAVE TENDED to view the evolution of the law of judicial control over administrative tribunals in three phases: the first is the period from the late 1940s to the end of the 1970s, the second the years between the Court's decision in *CUPE v. New Brunswick Liquor Corporation*¹ in 1979 and its judgment in *Syndicat des employés du Québec et l'Acadie v. Canada Labour Relations Board*² in 1984, and the third from 1984 to the present.³ The first is typically looked upon as the “bad old days,” when courts would quash the decisions of tribunals on mere whim. The second, in contrast, is said to represent a period of judicial restraint and fidelity on the part of the judiciary to the will of the legislature. The third in turn is viewed by many with concern as the beginning of a return to judicial activism.

Canadian legal literature is rife with criticism of this supposed vacillation. For over a half century now, administrative scholars in Canada have decried the tendency of the courts to involve themselves in the executive process.⁴ What has been notable in its absence from

* B.Sc., LL.B., Dalhousie University; LL.M., the University of California at Berkeley. Of the Bar of Nova Scotia. I would like to express my gratitude to Thomas Garden Barnes, Professor of Law and History at the University of California at Berkeley, and a true friend of Canada. It was he who taught me that unless it is fun, legal scholarship is not worthwhile. I would also like to acknowledge the debt that I owe to my colleagues at the Labour Bar of Nova Scotia for all that they have taught me about the significance of administrative law.

¹ [1979] S.C.R. 227 [hereinafter *CUPE*].

² [1984] 2 S.C.R. 412 [hereinafter *l'Acadie*].

³ See, for example, B. Etherington, “Arbitration, Labour Boards and the Courts in the 1980s: Romance Meets Realism” (1989) 68 Can. Bar. Rev. 405.

⁴ One of the earliest Canadian articles in this vein was Professor John Willis' “Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional” (1935) 1 U.T.L.J. 53.

most of these pieces, however, is any attempt to look at what lies behind this "judicial compulsion"⁵ or to identify the forces at play in leading the courts to intervene where they might not be wanted. Any attempt to read *between* the lines of the case reports, so to speak.

In a piece written a few years ago, Professor Brian Etherington argued that despite the usual temporal characterization, one can in reality see a streak of judicial interventionism in the administrative process running throughout.⁶ I agree, but I would go even further and say that if one looks at the evolution of judicial review from its beginnings, one sees a more-or-less steady increase in the judicialization of the modern form in the first half of this century. Furthermore, I believe this to be the case even during the years immediately following the Supreme Court's decision in *CUPE* in which courts as a matter of course proclaimed their adherence to a doctrine of judicial restraint and deference to administrative expertise.

To use a riparian metaphor, the level of actual intervention has ebbed and flowed over the years, but one sees as a consistent pattern the assertion by the courts of their role as the final arbiter of both private and public rights in Canada, and a quickness to intervene if they sense that one of the "sacred rights" of citizens, as they were described by the late Sir William Mulock, former Chief Justice of Ontario,⁷ is being placed in jeopardy. In my view, an appreciation of this is critical if one is to truly understand the courts' approach to the supervision of administrative action.

II. "DICEYISM" IN PERSPECTIVE

CANADIAN JUDGES HAVE OFTEN been accused of being captive to "Diceyism," in the sense of having an inflated sense of their own importance to the preservation of social justness. Though to the law student of today, it may not be as well known as other British legal works, there is no doubt that within the Commonwealth, Professor A.V. Dicey's *Introduction to the Law of the Constitution*⁸ (or simply *The Law of the Constitution*, as it is more commonly known), and his

⁵ This expression is borrowed from Professor Jeremy Rabkin's *Judicial Compulsions: How Public Law Distorts Public Policy* (New York: Basic Books, 1989).

⁶ *Supra* note 3.

⁷ In an address given at a dinner in honour of his ninetieth birthday, reproduced at (1934) 12 Can. Bar Rev. 35 at 38.

⁸ 10th ed. (London: MacMillan and Co., 1961).

formulation therein of the principle of the "Rule of Law," has had a lasting impact upon political and social culture. In Madam Justice Wilson's understated terms, Dicey's writing has been "remarkably influential."⁹

In its most simple formulation, Dicey's Rule of Law contains three propositions: first, that "regular law," i.e. judicially applied law, is supreme and that individuals should not be subject to "arbitrary power";¹⁰ secondly, that every person, "whatever be his rank or condition," "is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals," i.e. no one is above the law¹¹ and; thirdly, that the principles of the British Constitution are derived by judicial decisions interpreting the rights of private citizens in ordinary cases, i.e. the Constitution is part of the ordinary law of the land.¹² In Dicey's words "the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts."¹³

As can be seen, two points were implicit in his formulation: the government was to be treated as a private party in legal disputes, and the responsibility for resolving those disputes — hence the responsibility for development of constitutional law — remained with the "ordinary" courts. The postscript, of course, was that there was to be little or no reliance in this regard upon non-curial bodies. Speaking of the Continental administrative tribunals, he wrote "there can be with us nothing really corresponding."¹⁴ And as to substantive administrative law, he wrote dismissively: "This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs."¹⁵

⁹ *American Farm Bureau Federation v. Canadian Import Tribunal (sub nom. National Corn Growers Association v. Canada (Import Tribunal))*, [1990] 2 S.C.R. 1324 at 1332 [hereinafter *National Corn Growers*].

¹⁰ *Supra* note 8 at 188.

¹¹ *Ibid.* at 193.

¹² *Ibid.* at 195.

¹³ *Ibid.* at 203.

¹⁴ *Ibid.* Lord Hewart, the Lord Chief Justice of England, took the point even further. Writing in *The New Despotism*, *infra* note 74 at 35 he stated: "Between the rule of law and what is called 'administrative law' (happily there is no English name for it) there is the sharpest possible contrast. One is substantially the opposite of the other."

¹⁵ *Supra* note 13.

In light of his insistence that there should be no difference in legal status between the state and the private citizen, it is no surprise that there have been few works which have rivalled the controversy caused by Professor Dicey's writings, even a century after their publication. Criticism has ranged from the biblically metaphorical¹⁶ to the historically sceptical,¹⁷ and from the respectfully sarcastic¹⁸ to the downright hostile.¹⁹ Mr. P.P. Craig perhaps summed up the concern with Dicey's work most kindly when he suggested that "Dicey in fact misconceived the nature of representative democracy, and he failed to perceive certain important political developments which occurred in the late nineteenth and early twentieth centuries."²⁰

Beyond questions of intellectual oversight and academic inaccuracy, however, a more serious allegation has been made that it is Dicey's formulation which lies at the heart of the resistance by the courts to the development of a "modern" doctrine of administrative law. In *National Corn Growers*, for example, Madam Justice Wilson spoke of

¹⁶ Dicey's conception of The Rule of Law has been described as a "bridle for Leviathan" (W. Burnett Harvey, "The Rule of Law in Historical Perspective" (1960) 59 Mich. L. Rev. 487 at 491).

¹⁷ In his article "Three Approaches to Administrative Law," *supra* note 4 at 54, Professor Willis described Dicey as writing of constitutional practice "just at the moment when it was rapidly proving to be untrue." In the same vein, Professor Harry Arthurs has noted that Dicey "has been rightly criticized for failing to acknowledge the existence, even in 1885, of many other tribunals besides the "ordinary courts," for ignoring the extensive immunities from "ordinary law" of various public officials, for mis-stating the principles and practice of both English and French administrative law, and for slighting the contribution to constitutional law of Parliament itself." (*Infra* note 19 at 6-7 (internal citations omitted)).

¹⁸ In his "Foreword" (to the discussion of "Current Developments in Administrative Law") (1938) 47 Yale L. J. 515 at 517, the then Professor Frankfurter stated: "Few law books in modern times have had an influence comparable to that produced by the brilliant obfuscation of Dicey's *Law of the Constitution* Generations of judges and lawyers were brought up in the mental climate of Dicey. Judgments, speeches in the House of Commons, letters to *The Times*, reflected and perpetuated Dicey's misconceptions and myopia. The persistence of the misdirection that Dicey had given to the development of administrative law strikingly proves the elder Huxley's observation that many a theory survives long after its brains are knocked out."

¹⁹ See, for example, H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L. J. 1 at 5. Professor Arthurs wrote that Dicey's concept of the rule of law "has become a legal-cultural artifact. It has an emotive and symbolic significance, and still commands loyalty to which, on any objective assessment of its intellectual merits, it is not entitled."

²⁰ "Dicey: Unitary, Self-Correcting Democracy and Public Law" (1990) 106 L.Q. Rev. 105 at 105-106.

Dicey's writing being responsible for a "continuing judicial reluctance" to accept the proposition that tribunals should not occupy a distinctive place in society.²¹ Similarly, Mr. Craig wrote that the "role of both constitutional and administrative law was profoundly shaped by [Dicey's] vision, and the vision is no longer sustainable."²²

In my view, there is truth in much of what Madam Justice Wilson and Mr. Craig have written, but I believe that they are wrong in laying the blame for the state of our administrative law at Dicey's door. He may indeed have misapprehended the form of British constitutional law when he wrote,²³ but it is far too much to suggest that his writing alone — however moving it may have been — could have prevented the development of a continental-style administrative state. As Professor Willis himself admitted (and as will be discussed shortly), the roots of the opposition to administrative power went much, much deeper.²⁴

I think that in reality, what Dicey did so well was to capture the contemporary flavour of British constitutionalism — a "legacy of popular distrust of discretionary power," to borrow Professor Willis' words.²⁵ But a study of history shows that this is something which dated back to long before 1885. History is admittedly not a linear progression,²⁶ but I would argue that the antipathy to administrative government can be traced back to at least 1215. From the terms of *Magna Carta* onwards — at least until the attempts to introduce the welfare state in this century — the history of the common law, whether in England, the Commonwealth or the United States, can be seen as a gradual, but deliberate exclusion of executive involvement in private legal affairs. So when scholars carp about judicial resistance

²¹ *Supra* note 9 at 1335.

²² *Supra* note 20 at 105.

²³ But if this criticism is true, i.e. if that Dicey's misapprehension has had the effect that some claim it has, is this not corroboration of his suggestion that the British constitution was developed through the workings of the regular courts, rather than through any grand constitutional process?

²⁴ *Supra* note 4 at 54.

²⁵ *Ibid.*

²⁶ "History is not a linear progression, but rather like a meandering river." (Professor Eugen Weber, Professor of History, University of California at Los Angeles, "The Western Culture" (televised lecture 3 May 1992)).

to modern administrative schemes,²⁷ they should be aware that they are not simply fighting against the musings of an Oxford don of the last century, but rather against almost eight hundred years of legal evolution.

III. SIR EDWARD COKE AND JUDICIAL RESISTANCE TO EXECUTIVE AUTHORITY

IN FACT, MUCH OF the criticism which has been levelled at Dicey might better be directed at his philosophical predecessor of the sixteenth and seventeenth centuries, Sir Edward Coke, for it was he more than anyone who crystallized the resistance to executive authority during the turbulent years of the Stuart reigns.

While the subject has of course been thoroughly examined from an historical standpoint,²⁸ a review of the process by which the Royal Courts originally wrested control of the dispute resolution apparatus from the executive is of interest to the modern administrative lawyer. Not only can one see in it the very same judicial behaviour that is the subject of so much academic criticism today, but also, if it had *not* taken place, and were it not for Coke's leadership, it is perfectly within the realm of possibility that the notion of "responsible government" through a strong Parliament and an independent judiciary would never have taken hold in Great Britain. Without Coke, therefore, we may well have developed a comprehensive system of *droit administratif* in the Continental style.

Sir Edward Coke, or Lord Coke, as he is sometimes known despite the fact that he was never created a peer,²⁹ is without a doubt one of the greatest figures in the history of the common law.³⁰ Throughout his long life, he held most of the high legal offices: Solicitor

²⁷ Or equally, when practising lawyers self-satisfiedly draw attention to inconsistencies in judicial handling of administrative law issues.

²⁸ A very readable summary accounting of what one might call the judicialization of the early administration can be found in J.H. Baker, *An Introduction to English Legal History*, 3rd ed. (London: Butterworths, 1990) c. 9.

²⁹ Itself a testament to his public stature.

³⁰ On both sides of the Atlantic. Professor Samuel E. Thorne, the late Professor of Legal History at Harvard University, said in the first Selden Society Lecture in 1957, "Some of his doctrines and ideas, as you know, have taken firmer root abroad than at home, and more American than English law can be traced back to his books and no further If he was born and died a British subject, he has since achieved dual nationality."

General, Attorney General, Chief Justice of the Common Pleas, Chief Justice of the King's Bench and Privy Counsellor.

Coke was an active man, but more than that, he was a man of the moment. Whatever the situation in which he found himself, he threw himself into his work with zeal. Accordingly, when he served as Solicitor and Attorney General, he was the perfect "King's man," willing to adopt a forceful, even brutal, prosecutorial style. It was Coke, for example, who prosecuted Sir Walter Raleigh. And it has been estimated that in the six years that he sat in the Star Chamber, he was responsible for assessing nearly *one quarter* of the fines collected between 1596 and the Court's abolition in 1641.³¹

Coke's contribution to study of the common law generally through his *Institutes*, and to the law of real property in particular through his volume on Littleton's *Tenures*, and even to what we might without stretching it too far think of as a very early form of law practice management, through his *Book of Entries*, is unquestioned. Each of these works is a legal classic in every sense of the word — and is even still from time to time of value to the working lawyer. Nonetheless, it is in the field of constitutional development that his work has had the greatest continuing impact.

As a jurisprudential activist, both as lawyer and judge, Coke did two things, one selfless and one selfish, although from our twentieth century vantage point, we are likely to see them in reverse. Selflessly (though imperfectly) he made a concerted effort to redefine the common law to reflect what he perceived to be the needs of the society in which he lived. It was for that reason that he was willing on occasion to falsify his reports of cases³² and, more commonly, to dress his judgments in the clothes of antiquity.³³ Coke's selfish ambition

³¹ Approximately £200,000. Thomas G. Barnes, *Introduction to Coke, The First Part of The Institutes of the Laws of England* (Legal Classics Edition) at 22.

³² This has been proven in at least one case. See, Wallace, *Reporters*, 4th ed. (1882) at 174 (cited in T.F.T. Plucknett, "Bonham's Case and Judicial Review" (1926) 40 *Harvard L. Rev.* 30 at 51).

³³ Professor Thorne, *supra* note 30 at 7, described Coke's *modus operandi* in delightful terms: "As a rule of thumb it is well to remember that sentences beginning 'For it is an ancient maxim of the common law,' followed by one of Coke's spurious Latin maxims, which he could manufacture to fit any occasion and provide with an air of authentic antiquity, are apt to introduce a new departure. Sentences such as 'And by these differences and reasons you will better understand your books,' or 'So the doubts and diversities in the books well resolved,' likewise indicate new law. If I may formulate a theorem of my own, I advance this — the longer the list of authorities reconciled, the greater the divergence from the cases cited."

was related to, but different from, his first aim: he was determined to expand the jurisdiction and authority of the courts against all other tribunals, and even against the Throne itself.

Besides earning the enmity of the King personally, Coke's stand helped crystallize the concept of the Monarchy as an executive institution existing apart from the wearer of the Crown at the moment. Asserting the office of the judges as the administrators of the King's justice under an irrevocable delegation³⁴ — a superior form of administration, so went the necessary corollary — it was Coke who began the large scale use of the ancient "prerogative writs," as they are known, to exert control over bodies acting on the Sovereign's behalf. As Professor Thomas Barnes has described it, Coke used the writs "with a hitherto unknown prodigality and broadened scope."³⁵

IV. THE PREROGATIVE WRIT OF *CERTIORARI* AND JUDICIAL CONTROL

ALTHOUGH IT IS JUST one of the four traditional prerogative writs,³⁶ it is the writ of *certiorari*, or its modern equivalent,³⁷ that is most often at issue in administrative judicial review cases. *Certiorari* is usually believed to have been introduced in the latter half of the

Professor J.C. Holt, in his classic work on *Magna Carta* (recently reprinted in a second edition) also speaks of Coke's approach to legal history: "[Coke] was not primarily concerned with writing history or interpreting the past. His aim was to call in the past in order to support his arguments about the present. Any judgment he makes about medieval society was entirely subsidiary to this." (*Magna Carta*, 2nd ed. (Cambridge University Press, 1992) at 9).

³⁴ The King "hath committed all his power judicall, some in one court, some in another ... the King hath wholly left matters of judicature according to his laws to his judges," 4 Inst. 73.

³⁵ *Supra* note 31 at 16.

³⁶ The other three being prohibition, *mandamus* and *quo warranto*.

³⁷ A number of jurisdictions have formally abolished the old writs and introduced a general form of application for "judicial review" in their stead. See, for example, the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209 and the *New Zealand Judicature Amendment Act 1972*. England, too, has introduced a single mechanism for judicial review (see Wade, *Administrative Law*, *infra* note 87), though the prerogative writs apparently still run in Northern Ireland — see Lord MacDermott, the Lord Chief Justice of Northern Ireland, *Protection From Power Under English Law* (London: The Hamlyn Trust, 1986) at 85). Nonetheless, however the cause of action may be styled, the form of relief sought remains the same — an order from the court quashing a decision of an administrative authority.

thirteenth century.³⁸ Translated literally, *certiorari* means "to be informed,"³⁹ and originally, the writ was essentially a Royal demand for information. Its theoretical basis, and the foundation for its transformation to an instrument of judicial control, was captured nicely by Mr. Justice Riddell of the Supreme Court of Ontario in *Regina v. Titchmarsh*:

The theory is that the Sovereign has been appealed to by some one of his subjects who complains of an injustice done him by an inferior court; whereupon the Sovereign, saying that he wishes to be certified — *certiorari* — of the matter, orders that the record, etc., be transmitted into a court in which he is sitting.⁴⁰

In a very interesting article written in 1956,⁴¹ Professors Louis Jaffe and Edith Henderson pointed out that a number of the cases from which the modern law of judicial review was developed dealt with the activities of the Sewer Commission.⁴² That an office like that of "Sewer Commissioner" could occupy such an important position in the annals of our legal history seems somewhat amusing, but it is worthwhile to consider that in the middle ages, "sewer" referred not to waste disposal, but rather to the flow of water generally, and the Sewer Commissions, responsible as they were for ensuring water

³⁸ For general historical sketches of the introduction of the prerogative writs, see, S.A. De Smith, "The Prerogative Writs" (1951) 11 Cambridge L.J. 40; S.A. De Smith, "Wrongs and Remedies in Administrative Law" (1952) 15 Mod. L. Rev. 188; L.L. Jaffe and E.G. Henderson, "Judicial Review and the Rule of Law: Historical Origins" (1956) 72 L.Q.Rev. 345; and P.P. Craig, *supra* note 20.

³⁹ See, for example, Black's Law Dictionary.

⁴⁰ (1915), 22 D.L.R. 272 at 277-278.

⁴¹ If I may digress for a moment, one of the most exciting things that I learned during my research for this paper was just how free of national boundaries was the study of the common law in years past. One is of course familiar with the historical work of Professors Plucknett and Thorne, but one also sees, for example, the noted American Professor Louis Jaffe writing on early English administrative law in an English law journal and Professor Bernard Schwartz analyzing French administrative law for the common law world in the Canadian Bar Review (A Common Lawyer Looks at the Droit Administratif (1951), 29 Can. Bar Rev. 121). One can even see something as charming as a debate between Oliver Wendell Holmes Jr. and the Lord Chief Justice of England on "The Bar as a Profession" in succeeding issues of the 1896 volume of the *Youth's Companion* (reproduced in Holmes, *Collected Legal Papers* (New York: Harcourt, Brace and Co., 1920) at 153-163). I cannot help but think that we are much poorer for the passing of this exchange. At a time when the study of law should become more transnational, it seems instead to have become more insular.

⁴² *Supra* note 38.

supply in an agrarian society were very important bodies indeed. Viewed in context, therefore, the illustration provided by Professors Jaffe and Henderson is all the more relevant. Considering that without irrigation, there would be neither work, income, nor food, the Sewer Commissions occupied a position roughly comparable to that of the modern-day labour relations board, unemployment insurance commission and departments of agriculture and health and welfare rolled into one!

Posing a dilemma which could be taken from an introductory administrative law case book of today, Professors Jaffe and Henderson pointed out that as the science of agriculture became more advanced, the original conception of the Sewer Commissions became strained:

It was no longer possible to pretend that the Sewer Commissioners were merely enforcing common law property obligations, or that they were acting 'according to the laws and customs of our Realm of England' [as their Commissions described their role]. But what then were their powers, and how were they to be reconciled with traditional law? If they were not a law unto themselves, who then should control their activities?⁴³

*Rooke's Case*⁴⁴ is an example which they used to illustrate the judicial activism of the time. One Rooke's land had been seized by a Sewer Commission to satisfy an assessment for the costs of repair to the banks of the River Thames. Rooke claimed, however, that the Commission had erred in limiting assessments to property bounding on the river. The Court of Common Pleas agreed and, despite a statutory provision which allowed a Sewer Commission to act according "to their discretions," it held the assessment invalid. The Court stated — again in language that sounds eerily familiar:⁴⁵

[N]otwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections⁴⁶

⁴³ *Ibid.* at 350.

⁴⁴ (1599), 5 Co. Rep. 99b, 77 E.R. 209 (C.P.).

⁴⁵ Although Professors Jaffe and Henderson suggest that the words may be those of Coke, who was reporting the case, rather than the Court itself.

⁴⁶ 5 Co. Rep. at 100a, 77 E.R. at 210.

The height of this early activism was reached in *Dr. Bonham's Case*,⁴⁷ in which Coke challenged both King and Parliament. Dr. Bonham was a graduate in medicine from the University of Cambridge. He practised in London without a licence issued by the London College of Physicians, a body which had the power to regulate and examine medical doctors throughout England, except graduates of Oxford and Cambridge. When he ignored an order from the College of Physicians not to practice (presumably on account of his status as a Cambridge man), the College fined and imprisoned him for contempt.

In the case brought by Bonham for false imprisonment, Coke delivered what has become one of the most controversial judgments in the history of the common law. He found that by acting as both judge and beneficiary of the fine, the College was violating the common law maxim that a person cannot be the judge in his own cause. This being the case, the College's action was illegal, *even though* it was carried out under purported legislative authority:

and it appears in our books that in many cases the common law will controul [sic] acts of parliament and judge them utterly void: for when an act of parliament is against common right or reason, or repugnant or impossible to be performed, the common law will controul it and adjudge such act to be void.⁴⁸

The aftermath of these cases sounds equally modern. After the courts rendered further decisions in which they applied the reasoning set out in *Rooke's Case*,⁴⁹ including one in which it fined individual Sewer Commissioners who had ignored the Court's ruling that assessments had to be levied equitably,⁵⁰ the King issued in 1616 an order forbidding judicial interference with the Sewer Commissions. Putting the lie to any notion that judicial frustration of the administrative will is a development of the industrial age, the order spoke among other things of the necessity for "speedy and sudden execution" and the inappropriateness of the "direct frustration and overthrow of the authority of the Commissioners" by the courts.⁵¹

⁴⁷ (1610), 8 Co. Rep. 113b, 77 E.R. 646; 2 Brownl. 255, 123 E.R. 928 (C.P.) (also sometimes referred to as *The Case of the College of Physicians*).

⁴⁸ 8 Co. Rep. at 118a, 2 Brownl. at 265.

⁴⁹ Including, by this time, decisions rendered by Coke himself. He had been appointed Chief Justice of the Common Pleas in 1606.

⁵⁰ *Hetley v. Boyer and Mildmay* (1615), Cro. Jac. 336, 79 E.R. 287; 2 Bulstr. 197, 80 E.R. 1064.

⁵¹ Quoted in Jaffe and Henderson, *supra* note 38 at 353-354.

After this royal rebuke, the courts gave up for a time their attempt to control the Sewer Commissions, but beginning with the judgment of the King's Bench in *Commins v. Massam* in 1643,⁵² there was a "small but steady stream"⁵³ of writs of *certiorari* being issued to review Commission actions. As the seventeenth century drew on, the scope of the prerogative control exercised by the courts expanded. In *The King v. The Corporation of Winchelsea*,⁵⁴ for example, the King's Bench held that *certiorari* would issue to review taxing orders made by the Corporation of Winchelsea, despite the fact that as one of the Cinque Ports⁵⁵ the regular legal process did not extend there. By the end of the seventeenth century, Chief Justice Holt was able to formulate the scope of judicial review power using the language of "jurisdictional control" as we know it today — a subtle change from Coke's assertion of power to regulate on the basis of "reason." Although the statute in issue did not provide for review by the court,⁵⁶ Chief Justice Holt held that *certiorari* would issue nonetheless:

That a *certiorari* lies, for no court can be intended exempt from the superintendency of the king in this court of *Banco Regis* [King's Bench]. It is a consequence of every inferior jurisdiction of record that their proceedings be removable into this court and see whether they keep themselves within the limits of their jurisdiction.⁵⁷

⁵² March, N.R. 197, 82 E.R. 473.

⁵³ Jaffe and Henderson, *supra* note 38 at 356.

⁵⁴ (1673), 2 Lev. 86, 83 E.R. 462; 3 Keb. 154, 84 E.R. 648.

⁵⁵ The Cinque Ports, literally "the five ports" (even though in the end, there were seven of them), traditionally enjoyed a certain degree of constitutional autonomy which included autonomy from the King's writ, i.e. *the normal legal process*. A similar situation existed with the so-called "Counties Palatine": Durham, Lancaster and Chester.

⁵⁶ *Groenvelt v. Burwell* (1700), 1 Salk. 144, 91 E.R. 134. The case involved a false imprisonment action brought by a Dr. Groenvelt, who had been fined and imprisoned for allegedly administering noxious medication, under authority claimed by the London College of Physicians by virtue of their incorporating statute.

⁵⁷ In another report of the case (1 Ld. Raym. 454 at 469, 91 E.R. 1202 at 1212), he is reported as having put it a different way: "It is a consequence of all jurisdictions to have their proceedings returned here by *certiorari* ... Where any court is erected by statute, a *certiorari* lies to it." ... and ... "[I]t is by the common law that this court will examine, if other courts exceed their jurisdictions."

Similarly, in *Rex v. Glamorganshire Inhabitants*, Chief Justice Holt is reported as having said:

For this court will examine the proceedings of all jurisdictions erected by an Act of Parliament. And if they, under pretence of such Act, proceed to encroach jurisdiction to themselves greater than the Act warrants, this Court will send a *certiorari* to them, to have their proceedings returned here.⁵⁸

Over the next century, the degree of vigilance exercised by the judiciary in their self-asserted controlling role varied. But after 1830, when responsibility for local administration began to be transferred from Justices of the Peace to elected local government bodies, a discernable rise in judicial oversight and the use of *certiorari* took place.⁵⁹ The courts tended to read curial obligations into statutes which created administrative bodies.⁶⁰ In *Regina v. Local Government Board*, for example, Lord Justice Brett stated that "wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling these bodies."⁶¹

Similarly, in *Parsons v. Lakenheath School Board*, the Court imposed a high procedural onus upon the workings of the Department of Education: "They have been entrusted with judicial duties, and should, I think, perform those duties in the ordinary judicial way."⁶² In the oft-cited case of *Cooper v. Wandsworth Board of Works*, Mr. Justice Byles went so far as to say that even though there was nothing in a statute which would permit the court to sit in review of

⁵⁸ (1700), 1 Ld. Raym. 580, 91 E.R. 1288. The Court issued *certiorari* to quash an order made by local justices concerning the assessment of rates to repair the Cardiff bridge despite an argument that the rate-making power "was a new jurisdiction erected by a new Act of Parliament, the trust and the execution of which is reposed in the justices and this Court has nothing to intermeddle with it."

⁵⁹ See S.A. de Smith, *Judicial Review of Administrative Action*, 3rd ed. (London: Stevens & Sons, 1980) at 381-384.

⁶⁰ See, for example, *R. v. Arkwright* (1848), 12 Q.B. 960 (review of order of church building commissioners stopping up churchyard paths); *Re Crosby-upon-Eden Tithes* (1849), 13 Q.B. 761 (prohibition issued against tithe commissioners); *R. v. Aberdare Canal Co.* (1850), 14 Q.B. 854 (review of decision to sanction the building of a bridge); and generally, S.A. de Smith, *Judicial Review of Administrative Action*, *supra* note 59.

⁶¹ (1882), 19 Q.B.D. 309 at 321.

⁶² (1889), 58 L.J.Q.B. 371 at 372 *per* Field J.

a decision of one of the newly-formed administrative bodies, "the justice of the common law will supply the omission of legislature."⁶³

For a brief period in the early years of the twentieth century, however, it seemed that the judiciary might accept a more limited role in the scheme of things. In what one might be tempted to call a presaging of *CUPE*, the courts expressed a willingness to allow the newly emerging administration a broader leeway in the performance of its statutory duties. Interestingly, this relaxation of direct judicial involvement corresponded with the first, limited steps taken by the Liberal administrations⁶⁴ to enact modern style social welfare legislation during the years leading up to the First World War.⁶⁵ Thus, in *Board of Education v. Rice*, Lord Loreburn declared in 1911 that administrative tribunals should not be restricted by the legal rules of evidence in their information-gathering process: "they can obtain information in any way they think best," provided they simply gave "a fair opportunity to those who are parties in the controversy any relevant statement prejudicial to their view."⁶⁶

Similarly, in the famous case of *Regina v. Local Government Board ex parte Arlidge*, Lord Shaw unequivocally rejected a suggestion by the Court of Appeal⁶⁷ that the principles of natural justice required that an administrative tribunal employ rules of practice and procedure employed by the superior courts. He stated that although the tribunal in question had to reach "just ends by just means," "it must be (and is intended by Parliament to be) the master of its own procedure."⁶⁸ Lord Haldane adopted a similar stance: "What the procedure is to be must depend on the nature of the tribunal."⁶⁹ In its decision in *R. v.*

⁶³ (1863), 14 C.B. (N.S.) 180 at 194, 143 E.R. 414 at 420.

⁶⁴ Of Sir Henry Campbell-Bannerman (1905–1908) and Sir Herbert Henry Asquith (1908–1916).

⁶⁵ For example, the *Education (Provision of Meals) Act, 1906* (U.K.), 6 Edw. 7, c. 57; the *Trades Disputes Act, 1906* (U.K.), 6 Edw. 7, c. 47; the *Old Age Pensions Act, 1908* (U.K.), 8 Edw. 7, c. 40; the *Trade Boards Act, 1909* (U.K.), 9 Edw. 7, c. 22; the *Housing Act, 1909* (U.K.), 9 Edw. 7, c. 44; the *National Health Insurance Act, 1911* (U.K.) 1 & 2 Geo. 5, c. 55; the *Coal Mines (Minimum Wage) Act, 1912* (U.K.), 1 & 2 Geo. 5, c. 50; and the *Shops (Early Closing) Act, 1912* (U.K.), 1 & 2 Geo. 5, c. 55.

⁶⁶ [1911] A.C. 179 at 182.

⁶⁷ [1914] 1 K.B. 160.

⁶⁸ [1915] A.C. 120 at 138.

⁶⁹ *Ibid.* at 132.

Nat Bell Liquors,⁷⁰ the Judicial Committee of the Privy Council went even further, holding that a conviction made on the basis of a lack of evidence could not be quashed through *certiorari*.⁷¹

Beyond the "utilitarian" attitude displayed by the courts in these cases, two other common threads run through them. First, in *none* of them did the court repudiate its right to review. On the contrary, each of the decisions is written in an almost paternalistic style. Reading them, one has the sense that the courts were treating the tribunals as children to be tolerated, and from time to time admonished, rather than as autonomous bodies charged by Parliament with the important public duty of administering governmental social welfare policy.

Secondly, it is significant that the courts used inarticulate language in describing the legal duties attendant on the tribunals. While in these cases, this worked in the tribunals' favour, it was equally clear that the knife could cut both ways. As will be seen, a holding that parties to a controversy be given "a fair opportunity" to correct "any relevant statement" that may be "prejudicial to their view" is capable of an *extremely* broad interpretation. And no one could seriously imagine that describing an administrative tribunal's duty as being to "reach a just end by just means" would be of much advantage to the tribunal in the face of a judge intent on overturning its conclusion. In this sense, the "relaxed attitude" displayed by the courts in cases like *Arlidge* and *Rice* seems more akin to curial machiavellianism than any sort of judicial enlightenment as to the benefits of the administrative state. To borrow from Professors Jaffe and Henderson, the courts may have recognized a sphere of administrative discretion, but they insisted that it function within limits set by law — law as interpreted by the superior courts.⁷²

This "tolerant attitude," as Professor Willis described it,⁷³ changed dramatically in 1929 when Lord Hewart, the Lord Chief Justice of England, published a book entitled *The New Despotism*,⁷⁴ in which he viciously attacked the government bureaucracy. He described

⁷⁰ [1922] 2 A.C. 128. The case was actually a Canadian appeal.

⁷¹ Strictly speaking, the case dealt with criminal procedure, but since it dealt with an "inferior" tribunal, the holding has long been accepted as forming part of the administrative common law.

⁷² *Supra* note 38 at 348.

⁷³ *Supra* note 4 at 65.

⁷⁴ (New York: Cosmopolitan Book Co., 1929).

administrative law as "profoundly repugnant" to "English ideas,"⁷⁵ and as something "which, upon analysis, prove[s] to be nothing more than administrative lawlessness."⁷⁶ And though he posed it in hypothetical terms, he described the introduction of the administrative apparatus as "a persistent and well-controlled system, intended to produce, and in practice producing, a despotic power which at one and the same time places government departments above the sovereignty of Parliament and the jurisdiction of the courts."⁷⁷

Lord Hewart's book caused such a furore⁷⁸ that it led to the appointment of a Royal Commission to investigate his allegations.⁷⁹ More to the point for instant purposes, though, it was followed immediately by a series of decisions in which the courts made an abrupt about-face on their earlier approach. *In doing so, they used the same broad language employed during the tolerant period.* In *Rex v. Milk Marketing Board*, for instance, the Divisional Court of the King's Bench Division held that the failure by the Milk Marketing Board to put to an individual a statement made in his absence rendered the decision a nullity, even though it concluded that taken as a whole, the applicant had received a hearing conducted in a "spirit of fairness."⁸⁰ Likewise, in *Errington v. Minister of Health*, the Court of Appeal struck down a decision made by a slum clearance enquiry when the enquiry met with, and received correspondence from, a surveyor

⁷⁵ *Ibid.* at 6.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at 8.

⁷⁸ While it has long been fashionable to mock Lord Hewart's earnestness as a throwback to the worst of Diceyism (Frankfurter, for example, said that he "attempted to give fresh life to the moribund unrealities of Dicey by garnishing them with alarm" (*supra* note 18 at 517)), there is no denying that he wrote in an engaging style.

In describing what he saw happening to the British system of government, for example, he said: "The paradox which is in the course of being accomplished is, indeed, rather elaborate. Writers on the Constitution have for a long time taught that its two leading features are the sovereignty of Parliament and the rule of law. To tamper with either of them was, it might be thought, a sufficiently serious undertaking. But how far more attractive to the ingenious and adventurous mind to employ one to defeat the other, and to establish a despotism on the ruins of both! ... The old despotism, which was defeated, offered Parliament a challenge. The new despotism, which is not yet defeated, gives Parliament an anaesthetic." (*Ibid.* at 11-12).

⁷⁹ The Committee on Ministers' Powers (also known as the Donoughmore Committee, after its chairman, the Earl of Donoughmore).

⁸⁰ (1934), 50 T.L.R. 559 at 560 (*per* Lord Hewart, CJ).

without advising an affected property owner.⁸¹ Decisions like these hardly read like ones which recognize any sort of administrative primacy or deference to executive judgment.

Moreover, it became clear during the post-*New Despotism* period that the Courts still viewed their judicial review power as being above Parliament. This is made evident by their handing of the so-called "privative" clauses, i.e. provisions intended to limit review.

Privative clauses are usually worded in bold terms and to anyone but a lawyer, they would be clear in their meaning. A typical clause will say that a decision of a given tribunal "shall be final," or "shall be final and conclusive," or even that it "shall not be questioned in any legal proceedings whatsoever,"⁸² but British courts have consistently interpreted them as simply precluding only a right of appeal.⁸³ They have never been allowed to interfere with the courts' supervisory role. Lord Justice Denning (as he then was) set out the courts' position on them in the following way:

In stopping the abuse [of excessive judicial intermeddling in the administrative process] the statutes proved very beneficial,⁸⁴ but the court never allowed those statutes to be used as a cover for wrongdoing by tribunals. If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.⁸⁵

It sounds contradictory for an unelected official, acting in the name of the democratic rule of law, to proclaim himself above Parliament,⁸⁶ but the degree to which the courts felt that they did occupy a supra-

⁸¹ (1934), 51 T.L.R. 44.

⁸² Examples of such clauses are found in s. 4(4) of the *British Foreign Compensation Act 1950*, s. 60(1) of the *Australian Conciliation and Arbitration Act 1904* and s. 5 of the *Ontario Labour Relations Act* of 1948, quoted *infra* at notes 89, 112 and 125, respectively.

⁸³ Though this is a plainly absurd interpretation. A right of appeal did not exist at common law. Prior to the wholesale restructuring of the system of administration of justice in the Judicature Acts of the latter half of the nineteenth century, the only way to question the correctness of a decision was to apply for a writ of error, the issuance of which was at the sole discretion of the Crown, or to request a new trial. Either way, there was no "appeal" to be precluded. To interpret a privative clause in this way is simply to preclude a right that does not exist. For a discussion of the evolution of the appeal, see W.S. Holdsworth, *A History of English Law*, 7th ed. (London: Methuen & Co., 1956) vol. 1 at 213-216 and 222-226.

⁸⁴ A case of the pot calling the kettle black?

⁸⁵ *Regina v. Medical Appeal Tribunal, ex parte Gilmore*, [1957] 1 Q.B. 574 at 586.

⁸⁶ Or at least it would have sounded contradictory in Canada before 1982.

parliamentary position was made plain in the renowned (or infamous, depending on one's point of view)⁸⁷ case of *Anisminic Ltd. v. Foreign Compensation Commission*. The *Foreign Compensation Act 1950*⁸⁸ contained a privative clause which stated that a decision of the Foreign Compensation Commission "shall not be called into question in any court of law."⁸⁹ Nonetheless, in a dispute over compensation for the expropriation of a British owned mine in the Sinai Peninsula which had been seized by the Egyptian Government during the Suez crisis, the House of Lords held that a decision of the Commission could not be protected from examination on jurisdictional grounds. "What," asked Lord Wilberforce in his speech, "would be the purpose of defining by statute the limits of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed?"⁹⁰ Clearly the House of Lords was using jurisdiction as a means of substituting its views on the merits for those of the body specifically created by Parliament to determine questions of compensation, but it remained steadfast in its assertion that in doing so, it was merely acting on an unstated instruction from Parliament to police the bounds of jurisdiction: "In each task [the Court is] carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive."⁹¹

No longer would a court be so bold as to ignore a statute on the ground that it was "contrary to reason," as was done in the days of Coke, but by styling themselves as legislative watchdogs, the courts found for themselves a much more secure position. As Mr. Craig has described it, the theory of legislative monopoly has provided a conceptual framework in which to justify the exercise of non-constitutional review.⁹²

⁸⁷ Professor Sir William Wade, a supporter of judicial activism in administrative law, has described *Anisminic* as the "high-water mark of judicial control" (*Administrative Law*, 6th ed. (Oxford: Clarendon Press, 1988) at 725).

⁸⁸ 14 Geo. 6, c. 12.

⁸⁹ s. 4(4): The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.

⁹⁰ [1969] 2 A.C. 147 at 208.

⁹¹ *Ibid.*

⁹² *Supra* note 20 at 113.

V. JUDICIAL REVIEW IN ENGLAND TODAY

THOUGH CANADIANS OFTEN EXPRESS surprise to hear it, the law concerning judicial control of administrative tribunals has continued to grow vigorously in England in the years since *Anisminic*. As Professor Wade has put it, British judges "have been in a highly enterprising, not to say aggressive, mood for the past twenty or thirty years."⁹³

In the highly publicized 1985 *GCHQ* case, which involved the right of employees employed at the Government's secret communications facility to unionize, for example, the House of Lords enunciated a very broad scope of review. In one of his last speeches in the House, Lord Diplock stated that government decisions could be reviewed for illegality, irrationality, "procedural impropriety" and possibly even proportionality.⁹⁴ This is as wide a scope as has been uttered anywhere in the common law world.⁹⁵ Moreover, in a number of recent cases, the English courts have extended the range of cases for which judicial review is available to areas in which there is no direct state involvement.⁹⁶

The reasons for this level of present day activism are uncertain, although my own view is that they are connected at least in part with Britain's joining the European Communities and an accompanying sense of concern over loss of domestic control over private affairs.⁹⁷ What is interesting, though, is the degree to which the British

⁹³ "Beyond the Law: A British Innovation in Judicial Review" (1991) 43 Admin. L. Rev. 559.

⁹⁴ *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374 at 410.

⁹⁵ For an interesting discussion of the significance of modern British developments in the scope of judicial review of administrative action from the point of view of a common law country with an extreme degree of governmental regulation, see: Tan Book Teik, Attorney General of Singapore, Law Review Lecture (1987) printed at 9 Singapore L. Rev. 69.

⁹⁶ See, for example, *Regina v. General Council of the Bar*, [1990] 3 W.L.R. 323 (Q.B.); *Regina v. Advertising Standards Authority* (unreported, Q.B. Divisional Court, July 6, 1989); and *Regina v. Panel on Take-overs and Mergers*, [1987] Q.B. 815 (C.A.), all of which are discussed in Wade, *supra* note 93. See also generally, Lord Justice Woolf, "Administrative Law in England" (1991) 16 Queen's L.J. 209.

⁹⁷ There may also be partly an expression of the same sentiment expressed by Lord Hailsham, a former Lord Chancellor, in "Elective Dictatorship" (Richard Dimbleby Lecture, broadcast on BBC 1, 14 October 1976) (published by BBC, 1976) in which he warned of an abdication of power by Parliament to the executive.

judiciary has made use of administrative law to suit its own ends. Gone are the days when the Lord Chief Justice could suggest that "happily" there was no such creature as administrative law in England, as Lord Hewart did in *The New Despotism*. As a measure of the degree to which the Bench has chosen to work from within, in 1982, in *Regina v. Inland Revenue Commissioners*, Lord Diplock stated that it was "progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime."⁹⁸

VI. ADMINISTRATIVE REVIEW IN THE COMMONWEALTH — THE AUSTRALIAN SITUATION

LIKE MOST OF THE other countries of the British Empire, Australia⁹⁹ inherited the English common law,¹⁰⁰ including the system of prerogative writs and remedies. Their subsequent curial treatment in Australia, however, has been in some ways unique, and provides an interesting chapter in the story of judicial supervision.

The Australian Constitution¹⁰¹ does not contain an express grant of legislative power over labour relations to either the federal government or the states. Nonetheless, subsection 51 (xxxv) of the Constitution, which provides that the federal government has jurisdiction over "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state" has, in a manner not unlike that of the Commerce Clause of the United States Constitution, been interpreted as conferring a broad (though not exclusive) legislative jurisdiction. Accordingly, most of the major labour relations cases — and hence much of the law of judicial administrative review — deal with the *Federal Conciliation and Arbitration Act 1904*.¹⁰²

Subsection 60(1) of the *Conciliation and Arbitration Act* is a privative clause which, like such clauses everywhere in the Common-

⁹⁸ [1982] A.C. 617 at 641.

⁹⁹ To avoid unnecessary confusion with my occasional references to the British Commonwealth of Nations, I will as much as possible refer to Australia simply by its name rather than by its title, i.e. "The Commonwealth of Australia".

¹⁰⁰ For more information on the process by which English law was carried throughout the Empire, see *infra* note 120.

¹⁰¹ The *Commonwealth of Australia Constitution Act, 1900* (U.K.), 63 & 64 Vic., c. 12.

¹⁰² As amended.

wealth, has never been allowed to stand in the way of judicial review.¹⁰³ Nevertheless, the story of the clause's evolution to its present form is highly revealing.¹⁰⁴ In many ways, the *Conciliation and Arbitration Act*, passed in 1904, was a forerunner of the labour relations statutes which appeared in North America in the 1930s and 1940s in that it was a reaction to a perceived deficiency in the way in which the common law courts handled employment cases. The Act created the Commonwealth Court of Conciliation and Arbitration which, notwithstanding its name, was intended to administer the entire field of industrial relations law, and to render arbitration and conciliation awards on a non-judicial basis. In simple terms, it was supposed to develop what Mr. Justice Douglas of the Supreme Court of the United States would later refer to as the industrial common law.¹⁰⁵

The ability of the new body to carry out its intended role was severely limited, however, by a series of decisions based on section 71 of the Australian Constitution, which vests the judicial power in the regular courts.¹⁰⁶ Interestingly from a Canadian perspective, though, the legislation was found to be defective, not because it purported to vest a judicial function in a non-curial body, but rather because as a judicial body, the Conciliation and Arbitration Court could not exercise non-judicial functions which, the courts held, included the making of arbitration awards!¹⁰⁷ So the analysis seen in most other common law countries was turned on its head: normally, one sees tribunals

¹⁰³ See, for example, *Regina v. Commonwealth Industrial Court Judges; Ex Parte Cocks* (1968), 121 C.L.R. 313; *Regina v. Portus; Ex Parte TWU* (1977), 141 C.L.R. 1, and more generally, Anderson, "The Application of Privative Clauses to Proceedings of Commonwealth Tribunals" (1956) 3 U. of Queensland L.J. 35.

¹⁰⁴ For the complete story, see M. Aronson and N. Franklin, *Review of Administrative Action* (Sydney: The Law Book Co., 1987) at 691ff.

¹⁰⁵ In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) at 581.

¹⁰⁶ Like Canada, Australia was influenced in her constitution by the American experience. Section 71 was in fact patterned after Article III of the U.S. Constitution. It reads:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

¹⁰⁷ *Waterside Workers Federation of Australia v. J.W. Alexander Ltd* (1918), 25 C.L.R. 434 (H.C.); *Regina v. Kirby; Ex Parte Boilermakers' Society of Australia* (1957), 95 C.L.R. 529 (P.C.), affg. (1956), 94 C.L.R. 254 (H.C.).

attempting to convince a court that arbitration and similar informal processes should not be considered judicial in character, but in Australia, one sees the argument posed in the reverse.¹⁰⁸

As it was originally enacted, the privative clause in subsection 60(1) of the *Conciliation and Arbitration Act* forbade "review" or "challenge" of an award, but it did not specifically mention the prerogative writs. Not surprisingly, therefore, the High Court in a very early case, held that its traditional review powers had not been usurped.¹⁰⁹ The clause was accordingly amended in 1911 to include the additional phrase that no award or order of the Court was to be "subject to prohibition or *mandamus* ... on any account whatsoever," but this, too, was held ineffectual to prevent judicial review.¹¹⁰

Attempting to temper administrative efficiency with the reality of judicial interventionism, Parliament tried a new tack in amending the clause to allow for review, but only if it took place prior to the consideration of the case on the merits by the Court of Conciliation and Arbitration. Needless to say, in 1924, *this* version was ignored. The High Court held that review could still take place after the conclusion of the case, and, as if to rub salt in the wound, it added that review was available on both jurisdictional and non-jurisdictional grounds.¹¹¹ After this, the legislation was amended yet again to take its present form, which is quite similar to the style of privative clause found in a number of Canadian jurisdictions.¹¹²

It was not until the well known decision of Mr. Justice Dixon (as he then was)¹¹³ in *Rex v. Hickman; Ex Parte Fox and Clinton*¹¹⁴ that

¹⁰⁸ See, for example, the discussion in Aronson and Franklin, *supra* note 104.

¹⁰⁹ *Rex v. Commonwealth Court of Conciliation and Arbitration; Ex Parte Whybrow & Co.* (1910), 11 C.L.R. 1.

¹¹⁰ *Rex v. Commonwealth Court of Conciliation and Arbitration; Ex Parte Gulf Steamship Co. Ltd.* (1912), 15 C.L.R. 586.

¹¹¹ *Ince Brothers v. Federated Clothing & Allied Trades Union* (1924), 34 C.L.R. 457.

¹¹² It provides:

Subject to this Act, an award (including an award made on appeal)

(a) is final and conclusive;

(b) shall not be challenged, appealed against, reviewed, quashed or called into question in any court

(c) is not subject to prohibition, *mandamus* or injunction in any court on any account.

¹¹³ Sir Owen Dixon, later the Chief Justice of Australia, was one of Australia's most highly regarded judges.

¹¹⁴ (1945), 70 C.L.R. 598 (H.C.).

the Australian courts enunciated any sort of deferential approach to the review of administrative decisions. He said that while it was "impossible" for Parliament to deprive the Court of its review power, an administrative decision should not be overturned on review if it is "a bona fide attempt to exercise its power" and that it is "reasonably capable of reference to the power given to the body."¹¹⁵ Like his namesake's decision in *CUPE*, Mr. Justice Dixon's judgment has since been regularly cited with approval by the courts, but just as regularly, it has been ignored in application.¹¹⁶

Another area of Australian judicial creativity with respect to judicial review has been in the crafting of remedies. Subsection 75 (v) of the Australian Constitution simply provides that the High Court has jurisdiction to grant the remedies of *mandamus* and prohibition. It makes no mention of *certiorari*. Nonetheless, the courts have by implication extended the availability of prohibition, which normally lies only to prevent a body from exercising jurisdiction, to include the review of a tribunal's final decision.¹¹⁷

The Australian historical experience is highly relevant to an examination of judicial behaviour in the common law culture. It shows two things: First, that the courts are strongly wedded to their conception of the rule of law as grounded in unhindered access to the superior courts, and that they will seek to maintain their hegemony over the authoritative hierarchy in order to preserve what they view as the proper bounds of legal order. Secondly, the cases show that like their brethren elsewhere in the Commonwealth, the Australian judges will do so even if it flies in the face of the legislature's plainly stated wishes. One can indeed sympathize with the Attorney General for Australia when, in one of the debates over one of the amendments to the *Conciliation and Arbitration Act*, he vented his frustration: "This Arbitration Court was to be one shorn of all circumlocution and technicalities, but it has become a place where circumlocution and technicality have taken up their abode, indeed, it is their very citadel."¹¹⁸

¹¹⁵ *Ibid.* at 615.

¹¹⁶ In the recent case of *Re Coldham; Ex Parte Builders Labourers' Federation* (1986), 64 A.L.R. 215, for example, the High Court reiterated that s. 60(1) of the *Conciliation and Arbitration Act* could not bar the courts from exercising their review jurisdiction.

¹¹⁷ See N. Gunningham, *Industrial Law and the Constitution* (Sydney: Federation Press, 1988) at 153.

¹¹⁸ *Parliamentary Debates*, no.75 (13 November 1914) at 652.

Describing the interplay between Parliament and the courts as a "miserable battledore and shuttlecock business" he continued: "We throw the High Court an amending Act, and they hurl back its shattered remains. Then, spurred on by the demon of eternal hope, we pass another; again it is thrown back"¹¹⁹

VII. THE EARLY DEVELOPMENT OF JUDICIAL REVIEW IN CANADA

LIKE THE AUSTRALASIAN COLONIES, the British North American colonies which eventually joined together to form the Dominion of Canada "received," as the expression has it, the *corpus* of English law, including the law relating to prerogative remedies.¹²⁰ So one sees, for example, the Supreme Court of Nova Scotia holding as early as 1854 that "finality clauses" could not interfere with the jurisdiction of the Court to issue writs of *certiorari*,¹²¹ and the Ontario Court of King's Bench in 1834 relying on a statute from the reign of Elizabeth I as the basis for denying prerogative relief.¹²²

Nevertheless, what one would call the "Canadian" law of judicial control of administrative tribunals did not begin until the decision of the Supreme Court of Canada in *Toronto Newspaper Guild v. Globe*

¹¹⁹ *Ibid.* at 653. Mr. (later Sir William) Hughes, who was later to serve as the Prime Minister of Australia, was a very powerful and amusing parliamentary orator. In the same speech, he also said: "In times past, we have — surcharged with almost incurable optimism — introduced various amendments of this Act, only to see them all hopelessly wrecked and discredited, mere objects of contempt and derision. I introduce this measure, therefore, in a very chastened spirit. I do not venture to say for a moment that the High Court will not attempt to clip its wings. There is about the high court, in some of its aspects, an air almost sublime."

And *ibid.* at 651: "The idea in our minds [in including a privative clause in the Act] was that we were clothing the Arbitration Court with power to make an award which would not be the subject of an order of prohibition. But the High Court regarded this attempt of the National Legislature merely as a stimulus to further efforts. Its latest achievement has been truly magnificent."

¹²⁰ For a broad description of the doctrine of reception and its application in the Canadian setting, see Bora Laskin's Hamlyn Lectures, *The British Tradition in Canadian Law* (London: The Hamlyn Trust, 1969) at 3–10. A more comprehensive discussion of the introduction of the common law in Canada and the reception of English law by the various provinces and territories can be found in A.H. Oosterhof and W.B. Rayner, *Anger and Honsberger, The Law of Real Property*, vol.1, 2nd ed. (Aurora: Canada Law Book Inc., 1985) c. 3.

¹²¹ *Barnaby v. Gardiner*, 2 N.S.R. (1 James) 306.

¹²² *Tully v. Gass*, 3 Q.B. (O.S.) 1491.

*Printing Co.*¹²³ This is so for at least two reasons. To begin, *Globe Printing* was the first time that the Supreme Court had heard a judicial review case involving a privative clause, something which is so much more prevalent in Canada today than in either Great Britain or the United States that one is sometimes inclined to think of it as a distinguishing feature of Canadian administrative law.

Further — but equally importantly — *Globe Printing* was the first major administrative law case heard by the Supreme Court after appeals to the Privy Council had been abolished. So if there were ever a time when administrative law in Canada could have developed a “distinctively Canadian” flavour,¹²⁴ and established a restrained approach to judicial review, this case provided it. Sadly for the non-traditionalists, however, this was not to be. Quite to the contrary, the Supreme Court of Canada showed itself in its first “free” encounter with the new style of administrative legislation to be even more prone to regard judicial review as an appeal in everything but name than its contemporary English counterparts.

Globe Printing involved a certification application filed by the Toronto Newspaper Guild to represent the employees of the Toronto Globe. At the hearing before the Ontario Labour Relations Board, the newspaper’s counsel sought to cross-examine the union’s secretary on the issue of whether since the date of filing of the application, a number of the employees had resigned from union membership. On the basis of its interpretation of the certification provisions of the Act, the Labour Relations Board refused the request on the grounds of irrelevancy and it issued the certification order.

Section 5 of the *Ontario Labour Relations Act* of 1948¹²⁵ contained an extraordinarily broad privative clause:

Subject to such right of appeal as may be provided by the regulations,¹²⁶ the orders, decisions and rulings of the Board shall be final and not shall be questioned or reviewed nor shall any proceeding before the Board be removed, nor shall the Board be restrained, by injunction, prohibition, *mandamus*, *quo warranto*, *certiorari* or otherwise by any court

¹²³ [1953] 2 S.C.R. 18.

¹²⁴ This phrase was adopted by the Federal Government in the late 1960s and employed to justify the severing of links with Great Britain and the rest of the Commonwealth. In light of what the Court did, I use it with some deliberate irony.

¹²⁵ S.O. 1948, c. 51.

¹²⁶ No such right was, in fact, provided.

One would be hard pressed to come up with an exclusion clause which could more clearly express the Legislature's desire that the courts let the Labour Relations Board alone. Yet, despite this, at each level the courts intervened without any hesitation whatsoever.¹²⁷

In the High Court, Mr. Justice Gale (as he then was) conducted an extensive review of the authorities dealing with judicial review, and in a remarkable moment of judicial candour, stated: "When I first looked at the authorities which deal with "no-*certiorari*" clauses, I was inclined to the view that, in the circumstances of this case, the Board's certification would be protected by section 5."¹²⁸

After considering cases which held that *certiorari* would nonetheless lie to quash decisions made in excess of jurisdiction, however, he continued:

However, upon a close study of ... authorities which have been since decided upon the subject, it becomes apparent that the phrase "*want of jurisdiction*" is extremely flexible and has been extended to include imperfections which ordinarily might not be regarded as pertaining to jurisdiction at all.¹²⁹ [Emphasis added].

In the end, he concluded that the opportunity to be heard was a condition precedent to the proper exercise of jurisdiction and that the failure to allow cross-examination amounted to a denial of an opportunity to be heard and thus, a jurisdictional error.

The Ontario Court of Appeal, for its part, upheld Mr. Justice Gale's conclusion, but its judgment¹³⁰ is notable for the fact that it did not even mention the existence of the privative clause.¹³¹

The Supreme Court of Canada, on the other hand, drew attention to the existence of section 5 of the *Labour Relations Act*, but Mr. Justice Kellock, writing for the majority, said simply: "It is well settled that any order pronounced by an inferior tribunal in such circumstances is

¹²⁷ Although one should note that it does seem that the union admitted that *certiorari* would lie to quash a decision in excess of jurisdiction. (See: [1953] 2 S.C.R. at 36). One assumes that the result in the case would have been the same even if the Union taken the "high ground" and argued that the Ontario Legislature had meant what it said in s. 5.

¹²⁸ [1951] O.R. 435 at 463.

¹²⁹ *Ibid.* at 464.

¹³⁰ [1952] O.R. 354.

¹³¹ In this regard, see the disdain heaped on the Court of Appeal's decision by the then Professor Laskin in "*Certiorari to Labour Boards: The Apparent Futility of Privative Clauses*" (1952) 30 Can. Bar Rev. 986 at 993.

subject to the supervising jurisdiction of the superior courts, exercisable by way of *certiorari*.¹³² The Court held that by refusing to allow the information on union resignations to be adduced, the Board was declining jurisdiction on a question the Act had placed before it, i.e. whether a majority of employees were in favour of certification. It is submitted, though, that the judgment makes clear that what loomed most large in the Court's mind was not whether the Board had erred in failing to determine whether the employees who had signed the certification application had resigned, but rather the fact that the employer had been denied the opportunity to cross-examine on the point.

This stance of strict scrutiny of tribunal decisions — the “dark era” as Professor Langille has described it¹³³ — was continued by the Court when it had occasion to revisit the issue over the next twenty years. It reached its apogee in two decisions issued in 1969 and 1970, *Port Arthur Shipbuilding v. Arthurs*¹³⁴ and *Metropolitan Life Insurance v. International Union of Operating Engineers*.¹³⁵

In the former, the Court overturned a reinstatement order issued by an arbitration board which had found that certain employees had been wrongfully dismissed. Though subsection 34(1) of the Ontario *Labour Relations Act*¹³⁶ provided that disputes were to be resolved by “final and binding settlement by arbitration,” the Court concluded that judicial review would lie nonetheless to ensure correctness on a question of law. In the latter case, the Court overturned a decision of the Ontario Labour Relations Board not unlike that in issue in *Globe Newspapers*, i.e. a conclusion by the Board that a flexible definition of union membership was appropriate for purposes of the certification

¹³² [1953] 2 S.C.R. at 35. Even Mr. Justice Rand, who was perhaps the most sympathetic of all Canadian judges to the goals of organized labour, and who would have allowed the appeal, expressed agreement as to the general availability of judicial review: “In the absence of a clear expression to the contrary, we are bound by the principle that ultra vires action is a matter for the superior courts; the statute is enacted on that assumption. Any other view would mean that the legislature intended to authorize the tribunal to act as it pleased, subject only to legislative supervision: but that is within neither our theory of legislation nor the provisions of our constitution. (*Ibid.* at 28).

¹³³ “Judicial Review, Judicial Revisionism and Judicial Responsibility” (1986) 17 R.G.D. 169 at 189.

¹³⁴ [1969] S.C.R. 85.

¹³⁵ [1970] S.C.R. 424.

¹³⁶ R.S.O. 1960, c. 202.

provisions of the *Labour Relations Act*.¹³⁷ In a unanimous decision, the Court rejected the argument that the privative clause of the Act protected the Board's decision from review. Chief Justice Cartwright, writing for the Court, held that by not asking whether the employees in question were union members at the relevant date, the Board failed to deal with the question remitted to it and was accordingly not protected by the privative clause.

VIII. CUPE V. NEW BRUNSWICK LIQUOR CORPORATION

THE FIRST HINT OF change in the Supreme Court's stance came in its 1975 decision in *Service Employees' International Union v. Nipawin District Staff Nurses Association*,¹³⁸ but it was in *CUPE* that the "new" approach was fully expounded. The case involved a finding by the New Brunswick Public Service Labour Relations Board that the New Brunswick Liquor Corporation had violated the provincial *Public Service Labour Relations Act*¹³⁹ by using management personnel to carry out work which would normally have been done by striking unionized employees. Following the lead set by the earlier Supreme Court decisions, the lower court had held that an error in statutory interpretation by the Labour Relations Board amounted to a jurisdictional error, since the Board could not through an erroneous interpretation confer jurisdiction upon itself. A correct statutory interpretation was, the New Brunswick Court of Appeal held, "preliminary" or "collateral" to the assertion of jurisdiction by the Board over a matter.¹⁴⁰

Mr. Justice Dickson's judgment is of course one of the most often cited in Canadian law, and most administrative lawyers can recite portions by heart, but since it has played such an important part in

¹³⁷ In this case, the issue was whether employees who did not meet the requirements for membership set out in the union constitution could nonetheless be considered members for the purposes of determining the level of union support in a certification application.

¹³⁸ [1975] 1 S.C.R. 382 at 389. Dickson J. stated that if a tribunal "acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably bear, the Court will not intervene." Even earlier than this, however, in his dissent in *Globe Printing*, Rand J had advocated a similar approach: "I doubt that the test can be anything less than this: is the action or decision within any rational compass that can be attributed to the statutory language?" (*Supra* note 123 at 29).

¹³⁹ R.S.N.B. 1973, c. P-25.

¹⁴⁰ (1978), 21 N.B.R. (2d) 441 (*sub nom. New Brunswick v. CUPE*).

the development of the Canadian approach to judicial review, it is perhaps worthwhile to quote his reasons at some length:

With respect, I do not think that the language of 'preliminary or collateral matter' assists in the inquiry into the Board's jurisdiction.

...

The question of what is and is not jurisdictional is often very difficult to determine. The Courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

...

[I]t is important to have in mind the privative clause found in section 101 of the Act, which protects the decisions of the Board made within jurisdiction.

...

Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The usual reasons for judicial restraint upon review of labour board decisions are only reinforced in a case such as the one at bar. Not only has the Legislature confided certain decisions to the administrative board, but to a separate and distinct Public Service Labour Relations Board. That Board is given broad powers — broader than those typically vested in a labour board — to supervise and administer the novel system of collective bargaining created by the *Public Service Labour Relations Act*. The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. Nowhere is the application of those skills more evident than in the supervision of a lawful strike by public service employees under the Act¹⁴¹

As this passage makes clear, not only did Mr. Justice Dickson believe that on principle, the courts should refrain from treading where the legislature did not want them to go, but he also suggested that quite apart from the legislative mandate, the courts were relatively ill-

¹⁴¹ [1979] 2 S.C.R. at 233-236.

equipped to play an active role in labour relations matters. It was for that reason that he defined the test of reviewability as one of "patent unreasonability": "Was the board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation."¹⁴²

It is significant to note, though, that even *he* was not prepared to completely give up any role for the courts. *Only decisions within jurisdiction* were to be given deference, however broadly or narrowly "jurisdiction" was to be defined. So even under Mr. Justice Dickson's formulation, intended as it was to remove the courts from day-to-day labour relations issues, the courts would have to define just how far the tribunal's power could extend, regardless of how wide the legislature had cast its privative clause. And, of course, the question of whether a decision was patently unreasonable was still left to the courts.

IX. JUDICIAL REVIEW POST-CUPE

THE SUPREME COURT OF Canada followed *CUPE* with a series of cases in which it adopted a restrained approach to judicial review. In *Volvo Canada v. United Auto Workers*,¹⁴³ it applied the standard of patent unreasonability to the decision of a consensual arbitrator. In *Douglas Aircraft Ltd. v. McConnell*,¹⁴⁴ it did the same for a statutory arbitrator not protected by a privative clause. And in *Alberta Union of Public Employees v. Board of Governors of Olds College*,¹⁴⁵ it applied the standard to the decision of a labour relations board not protected by a privative clause. Professor Langille has described the four decisions from *CUPE* to *Olds College* as representing a "remarkable achievement." "Over several years and in four distinct cases covering the complete matrix of problems presented to the Court upon judicial review of specialized labour law decision makers," he wrote, the Supreme Court "had constructed a rational and restrained view of its role."¹⁴⁶

¹⁴² *Ibid.* at 237.

¹⁴³ [1980] 1 S.C.R. 178.

¹⁴⁴ [1980] 1 S.C.R. 245.

¹⁴⁵ [1982] 1 S.C.R. 923 [hereinafter *Olds College*].

¹⁴⁶ *Supra* note 133 at 196.

Yet even as the Court was working the pieces of the puzzle,¹⁴⁷ there was evidence that its mind was not fully committed to a non-interventionist role. In his article,¹⁴⁸ Professor Etherington analyzed the first seven years of the Supreme Court's post-CUPE administrative law jurisprudence in detail, but for present purposes, I will refer only to a few of the more recent cases in illustration of my hypothesis that regardless of their stated position, the Supreme Court will substitute its views for those of an administrative tribunal whenever it is moved to do so.

In *Yellow Cab Ltd. v. Alberta Board of Collective Relations*,¹⁴⁹ which was decided just a short while after *CUPE*, for example, the Court struck down a ruling by the Alberta Board of Industrial Relations that taxi drivers were employees for the purposes of certification simply on the basis that the Board was wrong in law. In this sense, the decision is reminiscent of *Globe Newspapers* and *Metropolitan Life*. Significantly (although it should be noted that the case was heard by a Bench that did not include Mr. Justice Dickson), the Court gave no consideration of the question of relative institutional competence to decide labour relations issues.

Similarly, the decision in *National Bank of Canada v. Retail Clerks' International Union*¹⁵⁰ is a throwback to *Port Arthur Shipbuilding*. The case involved the review of a remedy imposed on the National Bank of Canada by the Canada Labour Relations Board to rectify unfair labour practices committed by Bank officials. With respect to the conclusion that the unfair labour practices had in fact occurred, the Court showed deference to the Board's conclusion *à la CUPE*, but as to the remedial issue, which included an order by the Board that the Bank set up a trust fund from which money would be spent to counter the effects of the unfair labour practices, the Court showed no reluctance at all to strike it down on the basis that there was no connection between the wrong committed and the remedy imposed by the Board — despite a provision of the *Canada Labour Code* which

¹⁴⁷ *Ibid.* at 195, Professor Langille described *CUPE*, *Volvo* and *Douglas Aircraft* as three of the four necessary parts to a unified theory of judicial restraint. The "missing part of the puzzle" was *Olds College*.

¹⁴⁸ *Supra* note 3.

¹⁴⁹ [1980] 2 S.C.R. 761.

¹⁵⁰ [1984] 1 S.C.R. 269.

specifically conferred a virtually unlimited remedial power upon the Board.¹⁵¹

Without doubt, however, the decision which has done the most direct violence to the spirit of *CUPE* is *l'Acadie*.¹⁵² The case involved an application by the Canadian Broadcasting Corporation for a cease and desist order against French language production employees who had been refusing to work overtime. Whether or not overtime work was compulsory or voluntary had long been a subject of contention between the CBC and the union, and during a round of collective bargaining, the union decided to make a stand and refuse to work extra shifts. As an aside, the issue was even more urgent than it might normally have been since the union's refusal took place during the Christmas season and there was a danger that without employees available to work overtime, some of the holiday programming might not be able to go forward. In wonderfully dry language, the Canada Labour Relations Board noted the concern in the CBC's mind:

Anyone who is familiar with Québec customs knows that the cancellation of the [New Year's Eve] special production alone, which has become a New Year's Eve tradition and whose ratings we are told are the pride of the Corporation, would create more than a little consternation.¹⁵³

Having regard to the potential for consternation, one supposes, the Board issued the cease and desist order sought by the CBC and ordered that both parties submit the question of compulsory versus voluntary overtime to expedited arbitration. When the case arrived before it, the Supreme Court of Canada upheld the Board's cease and desist order, but it quashed the order of expedited arbitration. As in *National Bank*, the Court subjected the remedial provision to a close, pre-*CUPE* type of scrutiny. It went further, however, in that it revived the concept of preliminary or collateral jurisdictional error as being grounds for review — something which *CUPE* had meant to bury.¹⁵⁴ As Professor Etherington has written, the Court's approach in *l'Acadie*

¹⁵¹ Now contained in R.S.C. 1985, c. L-2, s. 99(2). The Board can: "require an employer ... to do anything that it is equitable to require the employer ... to do ... in order to rectify or counteract the unfair labour practice"

¹⁵² *Supra* note 2.

¹⁵³ [1981] 2 Can. L.R.B.R. 52 at 53 (quoted also in Langille, *supra* note 133 at 172–173).

¹⁵⁴ For a discussion of the details of the Court's decision, see Etherington, *supra* note 3 at 424–435, and Langille, *supra* note 133 at 172ff.

is "devastating to any suggestion that it had embraced a uniform and restrained approach to judicial review."¹⁵⁵

In more recent cases, the Court has continued to insist that it is incompetent to deal with labour relations issues while in fact doing that very thing. In *Re Public Service Employees Act*, for instance, Mr. Justice McIntyre stated that "general experience" had shown "that the courts as a general rule are not the best arbiters of disputes which arise from time to time,"¹⁵⁶ as he was in the process of deciding whether a right to strike existed in Canada.¹⁵⁷ And in a series of cases decided between 1988 and 1990, the Court made serious inroads into Mr. Justice Dickson's functional argument for judicial deference in the guise of proclaiming fealty to it. The decision in *Union des employés de service v. Bibeault*¹⁵⁸ provides an illustration in point.

The *Bibeault* case involved what in labour relations jargon are known as "successorship provisions," i.e. statutory provisions whereby in certain circumstances, a non-unionized company can effectively "inherit" the collective bargaining obligations of a unionized employer. The intent is to combat the so-called practice "double-breasting," i.e. the forming of new companies by employers as soon as they are unionized. In simple terms, it is a form of piercing the corporate veil.

Section 45 of the Québec *Labour Code*¹⁵⁹ set out the circumstances in which successorship would operate, while section 46 of the Code gave the Labour Commissioner the power to "make any order deemed necessary to record the rights and obligations" arising out of a successorship situation and to "settle any difficulty arising out of the application" of section 45. The issue was whether the Labour Commissioner had committed reviewable error by ordering that a company which provided janitorial services to schools had "stepped into the shoes," as the expression goes, of two previous unionized janitorial companies.

Mr. Justice Beetz delivered the unanimous decision of the Court, and he used it as an opportunity to reiterate the point made in *l'Acadie* that preliminary questions going to jurisdiction had a lower standard of review than decisions made within jurisdiction. For the latter, the test continued to be patent unreasonability, but with

¹⁵⁵ *Supra* note 3 at 476.

¹⁵⁶ [1987] 1 S.C.R. 313 at 416.

¹⁵⁷ It does not, the Court held.

¹⁵⁸ [1988] 2 S.C.R. 1048.

¹⁵⁹ R.S.Q. 1977, c. C-27.

respect to the former, i.e. a question concerning "a legislative provision limiting the tribunal's powers," "a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review."¹⁶⁰ As will be remembered, this was the very same type of language used by Chief Justice Holt in *Groenvelt v. Burwell* in 1700.¹⁶¹ Nonetheless, the theoretical basis for it was, in Mr. Justice Beetz's view, "unimpeachable."¹⁶² He noted, though, the ever-existent quandary: "The principle itself presents no difficulty, but its application is another matter."¹⁶³

Thus far, he had acted contrary to the spirit, if not the letter of *CUPE*, but no more so than had been done before. In the next step of his judgment, however, he added a twist to the analytical process which seems as perplexing as does the House of Lords' reliance upon parliamentary intent as authority for ignoring the plain wording of legislative enactments.¹⁶⁴ "The chief problem in judicial review," Mr. Justice Beetz stated, "is determining the jurisdiction of the tribunal whose decision is being impugned."¹⁶⁵ But rather than resolving this through a "formalistic analysis," he preferred a "pragmatic and functional analysis."¹⁶⁶ This involved examining "not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal."¹⁶⁷ He went on to note that one of the main advantages of this approach is that "it focuses the Court's inquiry directly on the intent of the legislator rather than on an interpretation of an isolated provision."¹⁶⁸ With all due respect to his Lordship, one fails to see how this is any different from *normal* statutory interpretation - the goal of which in any situation is to discover the legislative intent.

¹⁶⁰ *Supra* note 158 at 1086.

¹⁶¹ See, *supra* notes 56 and 57.

¹⁶² *Supra* note 158.

¹⁶³ *Ibid.*

¹⁶⁴ See, *supra* note 91, and accompanying text.

¹⁶⁵ *Supra* note 158 at 1087.

¹⁶⁶ *Ibid.* at 1088.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.* at 1089.

Whatever the case, using this pragmatic and functional test, Mr. Justice Beetz then proceeded to carry out what is submitted to be a most legalistic and formalistic analysis. In determining the "intent of the legislator," he referred only to the words of the provision in question and a comparison with the wording of successorship provisions in other jurisdictions. The Court did not, to use its own yardstick, consider "the purpose of the statute creating the tribunal" except in the sense of comparing the wording of the statutes and concluding that since Québec's provision was not worded as widely as those of other provinces, the Québec National Assembly must have meant to limit the powers of the Labour Commissioner. Nor did it carry out an in-depth analysis of "the reason for the Labour Commissioner's existence." or even "the area of his expertise."

What the Court *did* do was engage in a lengthy review of the case law dealing with successorship much as it would have done if it were hearing a legal appeal.¹⁶⁹ Looking at what the Court actually did in *Bibeault*, it would seem that the "pragmatic and functional analysis" does not only apply to the legislature's intent in setting up the tribunal in question, but also at least in part to the Court's perception of its own ability to address the matters in issue.¹⁷⁰

In its decision in May of this year in *United Brotherhood of Carpenters and Joiners of America v. Bradco Construction*,¹⁷¹ the Court admitted as much. In concluding that deference was not due to a labour arbitrator's conclusions on questions of law relating to things other than the collective agreement before him,¹⁷² Mr. Justice Sopinka said that "a lack of expertise on the part of the tribunal *vis à vis* the particular issue before it as compared with the reviewing court is a ground for refusal of deference."¹⁷³

The perception by the courts of a superior law-giving proficiency on their part again came into play in *Dayco (Canada) Ltd v. Canadian*

¹⁶⁹ The Court's review of the law of successorship was significantly longer than its discussion of the appropriateness of review: 27 pp. versus 17 pp.

¹⁷⁰ Taking the decision at its best, one could say that in *CUPE*, Mr. Justice Dickson *did* emphasize the relative institutional disability of the courts as one of the bases for judicial deference.

¹⁷¹ (19 May 1993) [unreported].

¹⁷² Which in and of itself was not particularly startling. In *MacLeod v. Egan*, [1975] 1 S.C.R. 517, Chief Justice Laskin had made the same point.

¹⁷³ *Supra* note 171 at 19.

Auto Workers.¹⁷⁴ In his judgment, Mr. Justice LaForest made clear that at the end of the day, the factor which would drive the courts' decision to intervene or not was the matter of relative expertise. Among other things, the case involved the question of whether a legislative provision which said that an arbitrator's decision was to be "final and binding" amounted to a privative clause. In holding that it did not, he distinguished the decisions in *National Corn Growers*¹⁷⁵ which had in fact so held, by saying that "the driving factor" "was not the clause alone but deference to the relative expertise of the administrative tribunal over the specialized questions involved."¹⁷⁶ In Mr. Justice LaForest's view, the trump card clearly remained with the courts. "I cannot accept," he said, "that courts should mechanically defer to a tribunal simply because of the presence of a 'final and binding' or 'final and conclusive' clause. These finality clauses can clearly signify deference, but they should also be considered in the context of the type of question and the nature and expertise of the tribunal."¹⁷⁷

In *Canada (Attorney General) v. Mossop*,¹⁷⁸ the case dealing with the entitlement of gay couples to spousal benefits, Chief Justice Lamer held that a tribunal set up under the *Canadian Human Rights Act*¹⁷⁹ "does not have the kind of expertise that should enjoy curial deference on matters other than findings of fact."¹⁸⁰ In his concurring reasons, which the majority adopted on this point, Mr. Justice LaForest styled human rights tribunals as less than expert, in part because they are *ad hoc* in nature.¹⁸¹ But even then, in Mr. Justice LaForest's view, they were to be accorded less judicial respect than those other *ad hoc* entities, labour arbitrators: "a human rights tribunal does not appear to me to call for the same level of deference as a labour arbitrator."¹⁸² The Court has accordingly set up its own

¹⁷⁴ (6 May 1993) [unreported].

¹⁷⁵ *Supra* note 9.

¹⁷⁶ *Supra* note 174 at 35.

¹⁷⁷ *Ibid.* at 39.

¹⁷⁸ (1993), 149 N.R. 1.

¹⁷⁹ R.S.C. 1985, c. H-6.

¹⁸⁰ *Supra* note 178 at 22 (relying in part on the dissent of Madame Justice L'Heureux-Dubé in *Zurich Insurance Co. v. Ontario*, [1992] 2 S.C.R. 321).

¹⁸¹ *Ibid.* at 30.

¹⁸² *Ibid.*

hierarchy of deference. At the top are labour boards. To them, "and other similar specialized tribunals responsible for the regulation of a specific industrial or technological sphere," a "greater degree of deference is due their interpretation of the law notwithstanding the absence of a privative clause."¹⁸³ Falling next are labour arbitrators, operating "in a narrowly restricted field," and "selected by the parties to arbitrate a difference between them under a collective agreement the parties have voluntarily entered."¹⁸⁴ Hindmost comes the human rights tribunal, "whose decision is imposed on the parties and has direct influence on society at large in relation to basic social values."¹⁸⁵ Now as a matter of policy, this pecking order may have some logic to it, but with the greatest of respect to the Justices of the Supreme Court, one searches the statutes in vain for any indication that something of this nature was intended by the legislators.

The Court went even further in cutting out the underpinnings of *CUPE* when it revisited the successorship issue in a case dealing with the equivalent provisions of the Newfoundland *Labour Relations Act*¹⁸⁶ in *W.W. Lester Ltd. v. United Association of Plumbers and Pipefitters, Local 740*.¹⁸⁷ The majority opinion, this time written by Madam Justice McLachlin, approached the case in much the same way as Mr. Justice Beetz had done in *Bibeault*, as a review for correctness by reference to other case law, but there is a wrinkle in the case which is of tremendous significance in considering the present state of the doctrine of judicial deference in Canada. In *Bibeault*, as will be recalled, Mr. Justice Beetz was reviewing the decision of the Labour Commissioner on the basis of jurisdictional error, i.e. for correctness. But in *W.W. Lester*, Madam Justice McLachlin said that she would assume that the decision was one made within jurisdiction,¹⁸⁸ i.e. that the standard of review was patent unreasonability.

In her judgment, she quoted from the familiar passages of *CUPE*, yet she, too, reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland

¹⁸³ *Bradco Construction*, *supra* note 171 at 21 (*per* Sopinka J.).

¹⁸⁴ *Mossop*, *supra* note 178 at 30-31.

¹⁸⁵ *Ibid.* at 31.

¹⁸⁶ S.N. 1977, c. 64.

¹⁸⁷ [1990] 3 S.C.R. 644.

¹⁸⁸ *Ibid.* at 668.

Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively equated *patent unreasonability with correctness at law*.

Despite its protestations to the contrary, the Supreme Court's recent decision in *Université du Québec à Trois-Rivières v. Syndicat des employés professionnels (UQTR)*¹⁸⁹ seemed to breathe life back into *Globe Printing*.¹⁹⁰ In that decision, it will be recalled, the Supreme Court had held that by refusing to allow one of the parties to adduce evidence, the Ontario Labour Relations Board had in effect declined jurisdiction, and therefore its decision could be overturned on review. In *UQTR*, Chief Justice Lamer expressly disavowed the holding in *Globe Printing*.¹⁹¹ In his view, an arbitrator has the power to determine to scope of a case before him and "only an unreasonable error on his part in this regard" could amount to a jurisdictional error.¹⁹² But at the same time, he said that a refusal to admit relevant evidence *could* amount to a denial of natural justice.¹⁹³ Put another way, one can no longer attack an arbitrator's ruling on the admissibility of evidence on jurisdictional grounds, but one is now free to allege that it amounts to a denial of procedural fairness and a breach of natural justice. When one considers that practice and procedure is the bread and butter of common law courts, one is left with the feeling that the repudiation of *Globe Printing* will in the end be cold comfort for administrative decision-makers.

In another new case, the Supreme Court made what in time may prove to be the greatest inroad into the *CUPE* doctrine of non-intervention into the substance of administrative decisions.¹⁹⁴ In

¹⁸⁹ (1993), 148 N.R. 209.

¹⁹⁰ *Supra* note 123.

¹⁹¹ *Supra* note 189 at 226-227.

¹⁹² *Ibid.* at 227.

¹⁹³ *Ibid.* at 230-231.

¹⁹⁴ In discussing these recent cases, I must mention that I am indebted to Mr. John Richard, Q.C. who kindly provided me with a copy of a paper entitled "The Judicialization of Administrative Tribunals?" which he delivered to the Canadian Bar Association 15 May 1992.

CAIMAW v. Paccar of Canada,¹⁹⁵ Mr. Justice Sopinka, in a concurring decision, suggested that it was appropriate to look at the merits of an administrative decision on review. "I cannot agree that it is always necessary for the reviewing court to ignore its own view of the merits of the decision under review," he said:

Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is "reasonable" or "patently unreasonable" it is making a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made.¹⁹⁶

In light of this, one must ask what, other than hollow rhetoric, remains of *CUPE*?

X. CONCLUSIONS

TO SUM UP, THE cases show that despite their pronouncements, Canadian courts have consistently displayed the attitudes towards executive discretion that began to be developed by the emerging "superior" courts during the thirteenth century, and which were solidified during the constitutional crises of the Stuart reigns. *Application* of these attitudes has of course varied from time to time, but the prejudices themselves — chief of which is an overarching sense of responsibility towards the individual — have remained constant. It is for that reason that in *Yellow Cab*, decided within a year of *CUPE*, the Supreme Court of Canada felt just as comfortable in overruling a labour relations board's interpretation of its constituent statute as it had in *Globe Printing* over thirty years beforehand. And it was for the same reason that in *Bibeault*, Mr. Justice Beetz found that the logic for review espoused by Chief Justice Holt in the year 1700 was "unimpeachable."

What can one conclude from all of this? First, and most important in my view, is that our method of analysis of the judicial reaction to the administrative state has been woefully inadequate. Canadian administrative scholarship is replete with criticism of Dicey and his formulation of the Rule of Law, but as I have shown, the blame — if "blame" is the right sentiment — should not go to Dicey, but rather to his forerunners of centuries earlier. Dicey's writings have indeed been

¹⁹⁵ [1989] 2 S.C.R. 983.

¹⁹⁶ *Ibid.* at 1017–1018.

influential, but our failure to appreciate the historical depth of the sentiment which he expressed has meant that whatever steps we have taken to assess the proper relationship of the judiciary to the administration have been half-informed at best.

In a sense, our judges have been playing a role in the administrative process over which they have had no control. As Cardozo wrote:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos', which, when reasons are nicely balanced, must determine where choice shall fall.¹⁹⁷

The second point of conclusion was also hinted at by Justice Cardozo: that the law of judicial review is a product of the wishes of ordinary Canadians. Our courts are passive in nature. They only react to issues brought before them by aggrieved persons, whether they be public or private. One can say, therefore, that at any given time, at least half of the litigating population is content with an activist judiciary which will freely reconsider decisions made by administrative agencies at first instance.

In a word, judicial reconsideration of administrative decision-making might be inefficient, it might be costly, it might not be bureaucratically rational, *but it is what people want*. Anyone with personal experience at the administrative law bar can attest to the difficulty in trying to convince a private citizen that it makes sense that while he can appeal his entitlement to, say, an inheritance under a will through two or three levels of court, if he is dismissed from his employment, he should be restricted to a single hearing. The system of administrative law conceived by those who favour the exclusion of reconsideration may well be logical, but we would be wise to bear in mind Holmes's observation about the relative weights of logic and history in the development of a legal system.¹⁹⁸ In short, ours is a

¹⁹⁷ *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 12.

¹⁹⁸ In *The Common Law* (Boston: Brown, Little & Co., 1881) at 1, Holmes wrote: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many

history of distrust of uncontrolled executive power. We might — as we undoubtedly do — favour government initiatives aimed at implementing large-scale programs for the distribution of wealth, but we dislike the exercise of centralized authority.¹⁹⁹ We might be fooling ourselves to think that Parliament will be truly responsible to the population at large, or that the Cabinet is accountable to Parliament, or even that the courts can protect us from government, but the belief that they do is of tremendous importance to us. If one were to describe the rule of law as a sort of “confidence game,” public faith is the ante.

One of the main pillars of our faith is the concept of an impartial adjudication process. The notion that it was a good thing to place an emphasis on fairness and to have disputes resolved by neutral parties is not something that was conjured up out of the air, or the result of some sort of conspiracy, as some administrative scholars might have it. Indeed, it was Chief Justice Dickson himself who wrote one of the most forceful descriptions of the role of an independent judiciary in Canadian society:

Canadian constitutional history and current Canadian constitutional law establish clearly the deep roots and contemporary vitality and vibrancy of judicial independence in Canada. The role of the courts as resolver of disputes, interpreter of law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.²⁰⁰

Unless one is to adopt an extremely formalistic interpretation of the expression “justice system” (such formalism being something one in favour of the *CUPE* approach to administrative law could hardly be in favour of doing), it is difficult to conceive why the courts should defend the Constitution any less resolutely when it comes to decisions of a labour relations board than it should when it deals with decisions of the provincial criminal courts.

In fact, a review of the cases makes the situation quite clear: the Canadian courts will not abdicate the role they have cultivated and refined over the centuries any more than have the British, Australian or American courts. It may have taken twelve years after *CUPE* for the Supreme Court to have come out of the closet on the issue, but in *Paccar*, when he noted that a determination of patent unreasonability

centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”

¹⁹⁹ Rabkin, *supra* note 5 at 243.

²⁰⁰ *R. v. Beauregard*, [1986] 2 S.C.R. 56 at 73.

required an independent and informed judgment on the part of the court, Mr Justice Sopinka finally admitted what the courts have been really doing all along — asserting a *de facto* right to review the substance of administrative cases beyond their constitutional right to do so *de jure*.

I frankly think that this is a good thing. I am speaking here purely on the basis of personal prejudice, but in my view, the system of administrative review can only improve through more openness in judicial review. As it stands at present, the process of judicial review reeks with dishonesty. Lawyers will argue in court using the language of *CUPE*, and briefs will contain quotations from *Volvo*, *Douglas Aircraft* and *Olds College*, but in reality all a lawyer trying to obtain review wants to do is to shock the judge. If he can succeed in this, the judge will find whatever happens to be in issue to be patently unreasonable and overturn the administrative action. If he cannot, the judge will write a decision phrased in terms of judicial deference and dismiss the application.

Viewed in realistic rather than theoretical terms, there is in my view very little about the current system to commend itself. Despite the Supreme Court's intention to increase administrative finality by adopting a hands-off stance, the open-ended language in which their standard of review was enunciated has left the system even more uncertain. It is now thirteen years since the Court intended to settle the question of reviewability in *CUPE*, but since then not a year has gone by when it has not had to issue a judicial review decision!²⁰¹

²⁰¹ A partial listing of some of the cases since the decision in *CUPE* in 1979 includes: *Northern Telecom v. CWC*, [1980] 1 S.C.R. 115, *Volvo Canada v. United Auto Workers*, [1980] 1 S.C.R. 178, *Douglas Aircraft v. McConnell*, [1980] 1 S.C.R. 245, *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602, *Yellow Cab Ltd. v. Alberta Board of Collective Relations*, [1980] 2 S.C.R. 761, *Crevier v. A.G. Québec*, [1981] 2 S.C.R. 220, *Teamsters v. Massicotte*, [1982] 1 S.C.R. 710, *Alberta Union of Public Employees v. Board of Governors of Olds College*, [1982] 1 S.C.R. 923, *Canada Labour Relations Board v. Halifax Longshoremen's Association*, [1983] 1 S.C.R. 245, *Shalansky v. R. Pasqua Hospital*, [1983] 1 S.C.R. 303, *Blanchard v. Control Data*, [1984] 2 S.C.R. 476, *Syndicat des professeurs du collège de Lévis-Lauzon v. Collège d'enseignement général et professionnel de Lévis-Lauzon*, [1985] 1 S.C.R. 596, *Canada v. Valois*, [1986] 2 S.C.R. 439, *Canada v. N.B. Tel*, [1987] 2 S.C.R. 485, *TWU v. B.C. Tel*, [1988] 2 S.C.R. 564, *U.E.S. v. Bibeault*, [1988] 2 S.C.R. 1048, *Bell Canada v. Canada*, [1989] 1 S.C.R. 1722, *Syndicat des employés de production du Québec et de l'Acadie v. Canada*, [1989] 2 S.C.R. 879, *CAIMAW v. Paccar Canada*, [1989] 2 S.C.R. 983, *IWA v. Consolidated Bathurst Inc.*, [1990] 1 S.C.R. 282, *National Corn Growers Association v. Canada*, [1990] 2 S.C.R. 1324, *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570, *W.W. Lester v. United Association*, [1990] 3 S.C.R. 644, *PSAC v. Econosult*, [1991] 1 S.C.R. 614, *Cuddy Chicks Ltd. v. Ontario Labour Relations Board*, [1991] 2 S.C.R. 5,

That alone should suggest that our approach has been a failure. Having said this, one admittedly balks at the idea of the common law courts regularly being called upon to decide mundane things like whether a given employee is a lead-hand, and therefore to be placed in the bargaining unit as part of the workforce, or a foreman, and to be excluded as part of management. Judicial resources are simply too scarce to require the full majesty of a common law adjudication in such cases. Instead, I think that an intermediate form of administrative review should be instituted.

The obvious criticism of this, of course, is that all it would be doing is adding another step prior to judicial review in the courts. Furthermore, it would be adding to the cost of administration of an already financially strapped bureaucracy. And who is to say that two decisions are better than one?

Answering the last question first, I would say "no one," but the point of legal decision-making is seldom correctness. If it were, we might be more receptive to an inquisitorial system of justice. It is *fairness*. And for whatever illogical reasons, we have as a society, a deeply-held belief that the opportunity for reconsideration is an integral part of a fair system of justice.

As to the first two questions, I would simply answer that whether we like it or not, people will do what they can to have decisions which affect them adversely overturned. In my view, it is better to admit this and deal with review openly, than to wish it away as we have tried to do. Moreover, one wonders whether a part of whatever level of administrative inefficiency that currently exists cannot be explained as a result of the fact that whenever reconsideration takes place today it is done under the guise of "patent unreasonability," "jurisdictional error" or some other similarly tortured expression. If one accepts that it is in our nature to rebel against governmental decisions which go

Tétreault-Gadoury v. Canada, [1991] 2 S.C.R. 22 and *Zurich Insurance v. Ontario Human Rights Commission*, [1992] 2 S.C.R. 321. There has been a particular spate of judicial review decisions in the first six months of this year: *Université du Québec à Trois-Rivières v. Syndicat des employés professionnels* (1993), 148 N.R. 209, *Canada (Attorney General) v. Mossop* (1993), 149 N.R. 1, *Attorney General of Canada v. PSAC* (25 March 1993) [unreported], *United Brotherhood of Carpenters and Joiners of America v. Bradco Construction* (19 May 1993) [unreported], *Berg v. University of British Columbia* (19 May 1993) [unreported], and *Lapointe v. Domtar* (30 June 1993) [unreported].

Even taking into account the number of cases in the years immediately after *CUPE*, when the Court was understandably refining its holding, this is still an awfully heavy caseload.

against our interests, might one not also consider that allowing a more general right of reconsideration may lead to increased rationality and less delay through "dishonest" litigation?

I would also add that while it is constitutionally impossible to formally exclude the courts from the administrative process, Mr. Justice LaForest's discussion of the role of Unemployment Insurance Umpires in his recent judgment in *Tétreault-Gadoury v. Canada*²⁰² shows that the existence of a second level of consideration — particularly where important legal questions are being decided — is a significant factor in the courts' thought process. In our constitutional system, the legislative and executive branches must to a certain degree "play" to the courts. If a judge feels that an individual has not been treated fairly, however imprecise a formulation that may be, his inherited instincts, traditional beliefs and acquired convictions, to use Justice Cardozo's words, will lead him to intervene, whether he understands the case or not. If, therefore, an opportunity for sober second thought were to be added to the administrative system (as, it should be remembered, already exists in a number of situations, including the unemployment insurance scheme as was mentioned in *Tétreault-Gadoury*), the likelihood of uninformed review would almost certainly decrease.

Moreover, I do not think that in this day and age, administrative law need fear review *per se*. Australia, for example, has in recent years introduced a wholesale system of administrative review, and while there have of course been some problems with it, it is generally viewed as a positive development.²⁰³ It is also worthwhile to consider that the present Chief Justice of Canada has commented favourably on the idea:

I find some advantage in an additional stage of administrative review. It is important that the reasonableness of the decisions of administrative tribunals be vetted by some body. An administrative appeal process can be achieved by appointing professional

²⁰² [1991] 2 S.C.R. 31.

²⁰³ See, for example, Aronson and Franklin, *supra* note 104. For a comparative description from the Canadian perspective, see the Law Reform Commission of Canada's study paper entitled *The Administrative Appeals Tribunal of Australia* (1989). For a critical analysis of the system's early years, see D. Mullan, "Alternatives to Judicial Review of Administrative Action — The Commonwealth of Australia's Administrative Appeals Tribunal," in *Judicial Review of Administrative Rulings* (Montréal: Canadian Institute for the Administration of Justice, 1983). As an aside, it seems that the work of the Australian Administrative Appeals Tribunal has been better received in Australia than it has elsewhere.

judges to this supervisory body. The background and training of these individuals would prepare them well for the demands of this role. They will not only be infused with judicial values — they will also maintain a sensitivity to the needs and concerns of the administration in ensuring that its policies are applied effectively.²⁰⁴

It is much easier to criticize a status quo than to propose an alternative. At the end of the day, all one can say is that the system we know at present has proven to be unworkable. This has been apparent for some time, but the continuing caseload of the Supreme Court of Canada in this area should lead us to realize that it is time to give our doctrine of judicial control of administrative decision-making a hard look. It is now up to us to decide whether we will face up to our past, and use it to shape the future, or whether we will carry on in our attempt to deny it, and as a consequence continue to flounder in a sea of judicial ambiguity and administrative uncertainty.

²⁰⁴ The Right Honourable Antonio Lamer, Address (Council of Canadian Administrative Tribunals), (1992) 5 C.J.A.L.P. 107.