SOME PROBLEMS ON CANADIAN ADMINISTRATIVE LAW

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The author contends that the law controlling the exercise of administrative discretion in Canada is in an embryo stage of development. Its satisfactory evolution requires much thought, patience and effort on the part of legislatures, administrators and the judiciary. He examines numerous judicial attempts to clarify some of the problems in Canadian administrative law. His study concludes that Canadian law and procedure respecting the conduct of the various administrative agencies now fall somewhere between their English and American counterparts; their evolution poses the challenge of developing Canadian law to meet peculiar Canadian needs.

I. INTRODUCTION

The growth of government during the past fifty years has been phenomenal. Its growing influence and activities now reach into every corner of social and economic life. The individual is in a labyrinth of governmental regulation from cradle to grave. Among the multitudinous fields of governmental enterprise, boards, commissions and agencies regulate fiscal and monetary policy, control public utilities, supervise the exploration, manufacture and marketing of raw materials, institute country-wide rehabilitation schemes, build projects and subsidize industries to stimulate regional economies. The legislature bestows upon them many and varied administrative, judicial, legislative and advisory functions. Probably the greatest array of functions may be found in the agencies that regulate vast economic undertakings, such as broadcasting, gas and oil pipe lines and national transportation in Canada. Others may be created to adjudicate on the rights of individuals to compensation or other entitlements under certain circumstances. Many have only powers of recommending to a higher governmental authority a particular course of action. Highly specialized agencies of government serve as marketing agencies for goods from a particular area or of a particular kind. Still more operate as boards to control labour-management relations and boards of appeal from rulings of governmental officials on such matters as taxation and immigration.

The individual needs protection in this complicated age. Somehow the concepts of freedom, justice and equality must be preserved; freedom in

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the sense that everyone has the privilege of doing what he pleases provided that he does not infringe the law of the land; justice in the sense that disputes must be settled according to established laws, principles and procedures; equality in the sense that no one man, official or governmental agency of any kind, perhaps even Parliament itself, is above the law.

According to Montesquieu's doctrine of separation of powers, good government rests on the strict distinction of functions of the three component parts, the legislative, the executive and the judiciary, and on the idea that freedom, justice and equality are only preserved if these functions are exercised by different authorities. The doctrine is still extant, particularly in the United States, where the functions of government are controlled by an elaborate and effective system of "checks and balances" which operates to confine the branches of government to their respective functions as far as practical. In Canada, as in other Commonwealth states, the separation of governmental functions is not so sharply defined, mainly because of the system of responsible government and conventions of the constitution. Indeed, the doctrine was never generally applicable to the English constitution, as W. Ivor Jennings points out in his celebrated treatise, *The Law and the Constitution*, [1] but it does have an impact on legal thinking in Canada and the evolution of Canadian administrative law. However, as Jennings so well illustrates, the differences in the legislative, judicial and executive functions are only a matter of degree. They should not be delimited or gauged by arbitrary standards but rather by the criterion of good government. As so well stated by Griffith and Street : "Thus, the real argument is not whether the Executive, for example, is exercising legislative or judicial powers which properly belong to Parliament or the courts (for no kind of power belongs to any particular authority) but whether the power is being exercised by the authority best suited to exercise it and whether the exercise is sufficiently controlled by political and legal action." [2]

This is the problem in Canada today. Parliament cannot legislate all the law, the executive administer or execute all the law or the judiciary interpret and apply all the law. Because of the growth of governmental activities, a fourth branch of government has emerged, the administrative branch, a little part of each of the three parent branches. The law that this branch makes, judges and administers is special in the sense that more often than not special rules pertain to its promulgation, to its interpretation and to its enforcement. Besides the inability of the three original branches of government to cope with the quantity, experts with peculiar knowledge of particular conditions are better qualified than the regular members of Parliament, ministers of the Crown and members of the judiciary to make, execute,

[1] At 1-8 (1933).

[2] PRINCIPLES OF ADMINISTRATIVE LAW 16 (1963).

interpret and apply this type of law. Not only do they not have the time or the know-how but, in many cases, they do not have the man-power or the flexibility; besides, they are often hindered by conventions and precedents that preclude the evolution of workable concepts in the light of modern conditions.

Perhaps the hallmark of the administrative agency is the necessity for independent investigation before remedial action is taken. We now realize that much investigation, patient exploration of facts and assimilation of opinion must be undertaken before effective action is forthcoming. Thus the evolution of the fourth branch of government not only represents the recognition of expertise, celerity and flexibility but also the principle that it is good government to correct evils before they arise rather than legislate or adjudicate with respect to them after they have arisen.

The experiences of other countries in their treatment of governmental administrative bodies are of little value in resolving the Canadian problems of administrative law due to the peculiar social, economic, political and legal conditions found in Canada. For example, however commendable, it is unlikely in the foreseeable future that a predominantly common-law state, such as Canada, will adopt a complete system of public law administered by administrative courts as in many of the civil-law states. Professor Willis says: "In terms of administrative law we have inherited from England the principle of ministerial responsibility and the common law of judicial review, but have borrowed the institution of the 'independent regulatory commission' and many of the matters regulated from the United States and have modified them to suit our own peculiar conditions." [3]

Canadian governmental agencies would appear to lie somewhere between their English and American counterparts. In line with English constitutional convention, they are part of the executive, that is, the Crown and, excepting statutory alterations, in theory at least, are only answerable to Parliament. On the other hand, many of the larger Canadian agencies have many characteristics of the American regulatory tribunal. Canadian members are appointed, not elected, as many incumbents of English agencies. They may constitute courts of record which, in theory at least, grant them an independence analogous to that of the regular judiciary. Also the wide statutory powers of appeal to the regular courts from many of the major Canadian boards indicate the American approach of subordinating governmental institutions to the constitution, that is, in effect, the law as interpreted by the judiciary.

The Canadian experience in determining responsibility for administrative action is premised on no borrowed groundwork, and we must mould our

[3] *Administrative Law in Canada*, 39 CAN. B. REV. 251, at 254 (1961).

laws and institutions to suit Canadian needs. Although we may profit by observing the best principles in each system, in essence, therefore, we are presented with problems in a new field of regulation that require all our political, legal and judicial ingenuity to solve. It is the intention of this article to survey the major functions of Canadian administrative agencies, their political and legal controls, the principles which guide controlling bodies and some of the difficulties which must be overcome to incorporate a coherent system of administrative law into our social system.

II. Administrative (Ministerial, Executive) and Judicial Functions

It is often judicially expressed that the advisers of the Crown, that is, the principal ministers or the higher echelons of the executive branch of government, are not subject to any power except to the legislative body and, through this body, to the people. For example, the Water Resources Act [4] of Alberta empowers the minister to make a decision by way of executive order in expropriating land and he is required by statute neither to give notice nor a hearing prior to the expropriation itself. "His decision is as a Minister of the Crown and, therefore, a policy decision taking into account the public interest, and for which he would be answerable only to the Legislature." [5] But the courts will review acts of the principal ministers or higher executive when they are exercised arbitrarily or in bad faith. Thus in the famous case of *Roncarelli v. Duplessis*, [6] the Supreme Court of Canada held that the act of cancellation of a licence by the then Premier of Quebec was not in accordance with established law and therefore was unlawful. [7]

Generally, such executive acts are beyond the pale of judicial review. They operate in the realm of policy in the sense that, although private rights may be effected, they are made in the public interest, for the good of the commonwealth. The better control of such acts should be by the legislature and not the judiciary. But the line may be thin between a "policy" act and consequent responsibility of the actor to the legislature and an act which amounts to an unauthorized invasion of the civil rights of individuals and subject to judicial control.

Many of the functions performed by the larger administrative agencies, such as the National Energy Board and the Board of Transport Commissioners, would appear to be a judicially recognized as falling into the "policy" category and subject to political control only, except in those special areas where the statute provides for appeal to the regular courts. [8] As Pro-

[4] Alta. Rev. Stat. c. 362 (1955).

[5] Calgary Power Ltd. v. Copithorne, [1959] Sup. Ct. 24, at 33 (per Martland, J.).

[6] [1959] Sup. Ct. 121.

[7] *See also* Shawn v. Robertson, 46 D.L.R.2d 363 (Ont. High Ct. 1965) where it was clearly pointed out that the intervention of the courts was not dependent on the judicial nature of the act.

[8] *See* Memorial Gardens Ass'n v. Colwood Cemetery Co., [1958] Sup. Ct. 353.

fessor Willis states : "[They] at first sight look like courts in that they hold hearings and apply statutory standards—such as 'fit and proper person', 'public convenience and necessity', 'just and reasonable rates', 'in the public interest' and so on—to the facts of individual cases coming before them but they are, in reality, minor 'legislative' bodies pricking out a policy." [9] Even political control of many of these bodies would seem incongruous if they are constituted courts of record, such as the National Energy Board and the Board of Transport Commissioners, as they then have the powers, privileges and immunities of superior courts. The essential difference is that the regular tribunals deal primarily with disputes involving established rights but the larger administrative agencies are primarily concerned with granting or withholding rights in ever-widening economic fields.

Although the principle of answerability to the legislature applies to most acts of the higher executive, the courts have asserted a limited jurisdiction to review the acts of the great mass of officialdom under their inherent power to interpret and apply the statutory law. They have jealously guarded this inherent power notwithstanding repeated attempts by the legislatures to limit or abnegate it by the so-called privative clauses.

The traditional methods of controlling the functions of governmental agencies have been by the prerogative writs. The main writs are certiorari and prohibition, and among the conditions required for their issue is the requirement that the function sought to be reviewed or prohibited be judicial in nature. Thus the major determination of reviewability by the courts is that the agency is exercising a judicial function. That the judicial function (and especially the consequent judicial act) is difficult to distinguish from an administrative one is illustrated in the following paragraphs. The distinction rests in degree only and, although various tests are set forth in decisions, the determination rightfully depends on the judicial characterization of functions that are being exercised.

A. *Judicial Acts*

The approach of the judiciary to the characterization of functions is clearly illustrated in cases where the acts of administrative agencies are subject to the approval of the Governor in Council.

The Queen v. Board of Broadcast Governors [10] is a case in point. Section 12(1) of the Broadcasting Act [11] requires the Minister of Transport, before dealing with an application for a radio licence, to refer it to the Board of Broadcast Governors, who shall make such recommendations as it deems fit. Section 12(3) provides that no recommendation shall be made by the board unless it has held a public hearing.

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[9] *Supra* note 3, at 260.
[10] 33 D.L.R.2d 449 (Ont. 1962).
[11] Can. Stat. 1958 c. 22.

The board, after a public hearing, recommended to the minister that an applicant be granted a licence, subject to the proviso that it submit to the Department of Transport a satisfactory revised technical brief for reduced radiation. The license was issued and was approved by the Governor in Council. An affected party then commenced proceedings to prohibit the Minister of Transport from issuing the licence.

Mr. Chief Justice McRuer in the Ontario High Court [12] held that as a fair opportunity to be heard was not given to the parties and as the board had a duty to decide a matter that may affect rights, the minister should be prohibited from issuing the licence. He asserted that this case came within the principle laid down in *The King v. Minister of Health.* [13] The result of any other conclusion than that an order of prohibition against the minister should be granted would be "that the Minister could go through the form of referring an application for a broadcasting licence to the Board and issue a licence free from control by the courts as long as the Board made a recommendation even though it disregarded every procedural provision of section 12 and notwithstanding that the interests of other licensees might be destroyed. This I do not think was the intention of Parliament." [14]

On appeal, the appellant maintained, *inter alia,* that the board was not empowered to determine any question in issue and was required only to make a recommendation to the Minister of Transport. The Ontario Court of Appeal held that although there was "no doubt that the Board was under a duty to conduct the hearing in good faith and in a fair manner free from prejudice or bias and also to give 'the applicant, the Corporation and other interested licensees and applicants for licences' a proper opportunity of being heard . . . there was no *lis inter partes.* The Board was not intended to adjudicate or determine by judgment, order or decision the rights of any person." [15] The recommendation was administrative in character.

In another case, [16] the appellant was an officer of the Department of National Revenue and was authorized in writing by the deputy minister to "investigate the affairs" of the respondent and others. Witnesses were subpoenaed and questioned under oath. The respondent, during the course of the investigation, requested that he and his counsel be present during the examination of all persons. This was refused by the investigating officer, and the Supreme Court upheld his right to so refuse by stating that his duties were essentially administrative and that he determined no rights and obligations.

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[12] The Queen v. Board of Broadcast Governors, 31 D.L.R.2d 385 (Ont. High Ct. 1961).
[13] [1929] 1 K.B. 619.
[14] 31 D.L.R.2d at 401-02.
[15] 33 D.L.R.2d at 461.
[16] Guay v. Lafleur, [1965] Sup. Ct. 12, 47 D.L.R.2d 226 (1964).

Mr. Justice Cartwright stated that "generally speaking, apart from some statutory provision making it applicable, the maxim *audi alteram partem* does not apply to an administrative officer whose function is simply to collect information and make a report and who has no power either to impose a liability or to give a decision affecting the rights of parties." [17]

Thus it would appear that in Canada reports, recommendations and other non-final acts are not subject to judicial control when the actual decision is made or given by another authority if the acts are interpreted as not affecting the rights of the parties.

It is apparent that the answers to the following questions depend on statutory interpretation and that differences of legal opinion would abound : Who makes the actual decision ? Is it in effect the recommendation ? Are acts judicial merely because they result from a hearing that follows judicial procedure ? [18] Are other attributes required to make the decision a judicial act ? Cannot rights be affected incidentally without a final determination ? What, in this context, do we mean by rights ? These questions are typical of those the courts must face in determining the true nature and character of the function exercised.

In each case, the determination depends on the characterization of functions of the administrative agency and the broad nature of the inquiry is illustrated in the following judicial expressions :

> The true test therefore is to see what the function of the tribunal is. Is it to ascertain legal rights and liabilities or to create them ? Is it to apply the law or policy as expediency ? Is it to be guided by law or is it a law unto itself ? [19]
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> In each case the court must examine the duty imposed on the tribunal and in doing so no great assistance is derived from decisions that fall on one side of the law or the other unless cases state principles. [20]
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> In determining whether or not a body or an individual is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions and then to determine whether or not there is imposed a duty to act judicially. [21]

B. *Judicial Review*

Unless otherwise directed by statute, the courts review the acts of administrative agencies under three general principles, namely, excess of jurisdiction (which includes lack or denial of jurisdiction), breach of the rules of natural justice and error of law on the face of the record. They disclaim an inherent power to review the merits of the administrative decision and inquire into

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[17] *Id.* at 18.
[18] In this regard *see* Regina v. Minister of Labour, 47 D.L.R.2d 189 (Alta. Sup. Ct. 1964).
[19] *Re* Brown, [1945] 3 D.L.R. 324, at 333 (Ont.) (per Roach, J.).
[20] *Supra* note 12, at 395 (per McRuer, C.J.H.C.).
[21] *Supra* note 5, at 30 (per Martland, J.).

subordinate conduct only to ensure that it does not transgress limits of jurisdiction, that it complies with minimum standards of fair play and that it does not disclose an apparent error of law in certain documents which constitute the record of a decision. The judicial inquiry into facts only goes so far as to determine whether there are some evidentiary facts on which the conclusion is based and that the tribunal acted within its statutory powers. [22] But these principles of judicial review often demand judicial innovations and fictions which have led one writer recently to decry "the prevailing confusion of thought and the want of any clearly defined principle on which to base judicial review." [23]

(i) *Excess of Jurisdiction*

An administrative agency may exceed its jurisdiction even though the statute would appear to authorize it to make the decision complained of. For example, most Canadian labour relations acts empower the labour boards to decide the question whether a person is an employee for the purposes of the act. In *Re Canada Safeway Ltd.*, [24] the provincial board found that certain persons were not to be classed as employees. The court held on application that the definition of employee was a collateral matter, preliminary to jurisdiction, and that it would be possible for the board to exceed its jurisdiction in making its determination. Although the board had jurisdiction to determine whether a particular person was an employee, the jurisdiction of the board was dependent on the correct determination of the general relationship, that is, whether the particular employee stood in the proximate relationship of employee in accordance with general legal principles even though this was the very question which the board was empowered by the legislature to decide. Being a collateral matter, it is a question of jurisdiction and is reviewable by the courts.

But, it may be asked, is this not a question of law and privative clauses of many acts specifically exclude such questions from judicial review? This question was answered by the Supreme Court of Canada in *Jarvis v. Associated Medical Services*, in which it was held:

> [T]he effect of this section [section 80 of the Ontario Labour Relations Act [25]]... is to oust the jurisdiction of the superior Courts to interfere with any decision of the Board which is made in exercise of the powers conferred upon it by the Legislature; within the ambit of those powers it may err in fact or in law.... I cannot take the section to mean that if the Board purports to make an order which, on the true construction of the act, it has no jurisdiction to make the person affected thereby is left without

[22] On the point of legal sufficiency of evidence, see the comments of McAllister, *Administrative Law*, 6 CAN. B. J. 439, at 468 (1963).

[23] Millward, *Judicial Review of Administrative Authorities in Canada*, 39 CAN. B. REV. 351 (1961).

[24] [1952] 3 D.L.R. 855 (B.C. Sup. Ct.).

[25] ONT. REV. STAT. c. 202 (1960).

> a remedy... the extent of the Board's jurisdiction is fixed by the statute which creates it and cannot be enlarged by a mistaken view entertained by the Board as to the meaning of that statute. [26]

In some cases, however, the legislature may give the agency power to determine facts upon which the jurisdiction is based. [27] Thus the Supreme Court of Canada in *Labour Rel. Bd. v. Canada Safeway Ltd.*, [28] overruled the provincial court and decided that the question whether workmen were employed in a confidential capacity was not one relating to a collateral matter but was for the board to decide finally as part of the main issue and its decision thereon was not reviewable. The difficulty, of course, is to determine whether a matter is collateral to or is part of the original jurisdiction.

(ii) *Natural Justice*

The concept "natural justice" lacks precision. Simply stated, it connotes those rules of fair play with which the regular courts require the agencies to comply in reaching their decisions. In order to support their intervention in many cases, the courts will declare that failure to comply with generally accepted standards of judicial conduct operates as an excess of jurisdiction. [29]

The courts do not and, in all cases, should not require subordinate tribunals to conduct their proceedings analogous to a court. Although the conduct of proceedings, unless directed by statute, does not require the right to proceedings in camera nor to proceedings in open court, a public hearing is generally held. [30]

The fundamental prerequisites of procedural conduct required of Canadian administrative agencies are (a) adequate notice to all parties whose rights may be affected, (b) a full hearing and (c) an impartial decision by the agency.

(a) It is a cardinal principle of our law that adequate notice must be given to all parties whose rights are or may be affected by the decision, and this principle needs no further comment. It must be clear and definite to enable the recipient to be apprised of the issues he must meet. [31]

(b) The components of a hearing by governmental agencies depend on the nature of the question [32] but, it is submitted, it would appear from recent

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[26] [1964] Sup. Ct. 497, at 502.

[27] See *Re* United Mine Workers Dist. 26, 23 D.L.R.2d 328 (N.S. Sup. Ct. 1960) (per MacDonald, J.), for a review of the authorities in this regard.

[28] [1953] 2 Sup. Ct. 46.

[29] See Millward, *op. cit. supra* note 23, at 373. For an excellent summary of the problem, see GRIFFITH & STREET, *supra* note 2, at 225-28.

[30] For example, although § 75(9) of the Ontario Labour Relations Act, ONT. REV. STAT. c. 202 (1960), only requires that the board "give full opportunity to the parties... to present their evidence," the board has instituted the practice of a full, open hearing in all controverted matters. See J. FINKELMAN, THE ONTARIO LABOUR RELATIONS BOARD AND NATURAL JUSTICE 3-4 (1965).

[31] Forest v. Caisse Populaire, 37 D.L.R.2d 440 (Man. 1962).

[32] MacLean v. Workers' Union, [1929] 1 Ch. 602.

judicial pronouncements an onus is being placed on administrative agencies for increasingly stricter compliance with judicial procedures.

A hearing has been defined as : "[A] real hearing, at which the charge is made known, the evidence in support of it is adduced, the supposed offender is given an opportunity of meeting that evidence by cross-examination, or by the calling of witnesses, or otherwise, as may be requisite, and it is against all ordinary principles of the administration of justice to call anything less than that a hearing." [33]

A strict compliance with this definition presents a foremost problem as an administrative agency is generally not bound by ordinary rules of evidence. In *C.N.R. v. Bell Telephone Co.*, the Supreme Court held :

> The Board is not bound by the ordinary rules of evidence. In deciding upon questions of fact, it must inevitably draw upon its experience in respect of the matters in the vast number of cases which come before it as well as upon the experience of its technical advisers. Thus, the board may be in a position in passing upon questions of fact in the course of dealing with, for example, an administrative matter, to act with a sure judgment on facts and circumstances which to a tribunal not possessing the board's equipment and advantages might yield only a vague or ambiguous impression. [34]

The question follows : How far must the board confine its decision to the actual evidence presented at the hearing? As two practitioners succinctly stated recently : "Once the hearing is concluded, it seems only logical that the decision of the tribunal be based on evidence recorded in the transcript. Otherwise . . . what is the point of having a hearing in the first place?" [35] Doubtless, the general rule infringes on the common-law right of cross-examination. Judicial treatment will, in the first instance, depend on the words of the enabling statute. Thus in *Banks v. C.L.R.B.*, [36] the court dismissed an application by way of a certiorari to quash an order of the Canada Labour Relations Board. The enabling statute, the Industrial Relations and Disputes Investigation Act, [37] authorized the board to prescribe the nature of the evidence to be furnished to it. Mr. Justice Hughes stated : "It is not for me, however, to consider whether the findings of the board in this matter were justified by the evidence given at the hearing and indeed if no evidence had been given at the hearing and the board relied on what I have called extracurial inquiries, I would still have no jurisdiction to consider the merits of the applications before it." [38] But, in most instances, when the

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[33] Forsyth v. Children's Aid Soc'y, 35 D.L.R.2d 690 (Ont. High Ct. 1962), *quoting* Rose, C.J.H.C., *in Re* Fairfield Modern Dairy Ltd. & Milk Control Bd., [1942] Ont. W.N. 579, at 582 (High Ct. 1942).

[34] [1939] Sup. Ct. 308, at 317.

[35] Englander & Morantz, *Required for Canada : (1) An Administrative Procedure Act, (2) A Council on Tribunals, in* 1965 CAN. B. ASS,N PAPERS 8, at 17 (1966).

[36] 19 D.L.R.2d 765 (Ont. High Ct. 1959).

[37] CAN. REV. STAT. c. 152, § 9(4) (1952).

[38] *Supra* note 36, at 768.

statute is silent on the type of evidence the board is to receive, the general requirement is that a party must be given an opportunity to meet the evidence although, of course, it is not a judicially confirmed right in all circumstances. [39] Also, the Crown may not be ordered to produce documents in evidence. [40] However, after the hearing has commenced a different rule would appear to apply and the document would be subject to cross-examination. [41]

Carried to its logical conclusion the requirement for cross-examination in all cases would not only require the agency to act on evidence presented to it but would require cross-examination of staff members and even members of the decision-making panel itself. To apply a general rule of cross-examination in all circumstances would, in many cases, stultify examination, delay proceedings and defeat many of the purposes of the tribunals.

Another problem is the reception by administrative tribunals of hearsay and opinion evidence. In *Wilson v. Esquimalt & Nanaimo Ry.*, [42] the Privy Council held that the admission of hearsay evidence was not incompatible with the judicial nature of the inquiry being held before it. In view of the prime function of our present tribunals to obtain all the facts, the nature of most inquiries would permit it but in proceedings of a penal nature, for example, the admission of such evidence, it is submitted, would be dangerous.

(c) An impartial decision means, firstly, no bias or interest on the part of any member of the decision-making panel. Bias may take two forms. The first is pecuniary interest and the second is where "there is a real likelihood, arising from circumstances such as would give rise to a challenge to the favour that a judge or justice would have bias." It is interesting to note that Canadian labour relations statutes make provision for appointees to the labour relations boards in equal number as representatives of the interests of the employers and employees. Dealing with challenges to their impartiality, the courts have closely scrutinized the circumstances in three cases in Ontario. No bias has been found in two [43] but sufficient likelihood of bias in the third [44] prevented the questioned appointee from acting. We can never, of course, achieve total absence of preconceptions but the oath, character and responsibility of members generally override their alleged attachments.

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[39] Kortyko v. City of Calgary, 42 D.L.R.2d 717 (Alta. Sup. Ct. 1963). This is true notwithstanding Wilson v. Esquimalt & Nanaimo Ry., [1922] 1 A.C. 202 (P.C.), where the Privy Council held that there was no failure of natural justice when a party about to be deprived of his property was refused the right to cross-examine or to produce rebuttal evidence.

[40] Reese v. Queen, [1955] Can. Exch. 187; Longo v. Queen, [1959] Ont. W.N. 19; Local Gov't. Bd. v. Arlidge, [1915] A.C. 120. In the latter case, it was held that the tribunal did not need to disclose an inspector's report to any party in the proceeding.

[41] Stafford v. Minister of Health, [1946] 1 K.B. 621.

[42] *Supra* note 39.

[43] *Re* Ontario L.R.B., Bradley & Canadian Gen. Elec., [1957] Ont. 316 (1957), and *Re* Ontario L.R.B., Toronto Newspaper Guild, [1951] 3 D.L.R. 162 (Ont. High Ct. 1951).

[44] Regina v. Ontario L.R.B. *ex parte* Hall, 39 D.L.R.2d 113 (Ont. High Ct. 1963).

Lobbying may hint of bias in certain circumstances, but it is probably sufficient to say that, as lobbying is an accepted concomitant of our democratic system, only excesses of personal contact by lobbyists with agency members should be disturbing.

Secondly, an impartial decision means that all members who participate in the final decision must hear the presentation of all the evidence. "He who decides must hear" is a revered common-law rule. [45] This rule would appear to be inviolate and raises questions concerning the use of examiners and other ad hoc appointees for taking evidence in general or under special circumstances. The exigencies created by heavy workloads on administrative agencies may transgress on this rule more and more in the future and ultra-precaution must be taken where it might appear to be offended.

(iii) *Error in Law on the Face of the Record*

Courts may quash the decision of subordinate governmental tribunals if error of law appears on the face of the record and if the error goes to the jurisdiction of the agency, a privative clause removing errors of law from the court's jurisdiction then will be ineffective to preclude judicial review. [46]

The record which the court will consider consists of the order of disposition and "all matters recited" therein, and to quash the order there must be "error of law on its face." [47] In *Rex v. Northumberland Compensation App. Tribunal*, Lord Denning said : "I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision." [48] However, in *Baldwin & Francis Ltd. v. Patents App. Tribunal*, [49] their Lordships suggested that the question of precisely what documents constitute the record of the court may require decision at some future date.

C. *Fact-Finding Functions*

A long line of cases has established that when fact-finding functions are conferred on an administrative agency or officer, such findings are not reviewable. [50] The difficulty, of course, lies in the determination of what

[45] *See* Regina v. Committee on Works of Halifax City Council, 34 D.L.R.2d 45 (N.S. Sup. Ct. 1962) and authorities cited in this case.

[46] Jarvis v. Associated Medical Services, *supra* note 26.

[47] Queen v. Nova Scotia L.R.B., 29 D.L.R.2d 449 (N.S. Sup. Ct. 1961).

[48] [1952] 1 K.B. 338, at 352.

[49] [1959] A.C. 663.

[50] *See e.g.*, Regina v. Board of Indus. Rel. (Alta.), 48 D.L.R.2d 259 (Alta. Sup. Ct. 1964). The board found in this case that the applicant trade union was a proper bargaining agent, that the unit of employees involved was appropriate for collective bargaining and that the majority of employees had selected the trade union as their bargaining agent. The court held that these findings were not reviewable.

questions are law or fact. The wide discretion of the courts to review, if inclined to do so, questions of fact is illustrated by the statement of the Supreme Court in *Canadian Lift Truck Co. v. Deputy Minister of Nat'l Revenue* :

> While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact, nevertheless if it appears to the appellate Court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially, could have reached the particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination. [51]

An interesting thought under this heading is the position of examiners appointed to conduct inquiries for the purpose of obtaining information. If the examiners make decisions deciding rights, such decisions would appear to be of a judicial nature and subject to judicial control. But when an examiner only collects information that he passes on to another authority for decision, what is the nature of the function? Is it administrative, judicial or advisory? The form of proceedings would likely provide the answer. The procedure followed by the Ontario Labour Relations Board is outlined by Mr. Finkelman. [52] This procedure requires the examiner to present to the board a written report, a copy of which is sent to all interested parties; a date is set for filing objections and, if necessary, oral argument is heard before the board makes the final decision. It is emphasized that the examiner's function is to ascertain information, not to render a decision, although, as Mr. Finkelman notes, there may be "grey" areas, such as issues of credibility which might have a judicial connotation and which are subject to decision by the board.

III. Legislative Functions

The distinction between a legislative act and an administrative act is only one of degree. All such acts operate as guides for future conduct. The main difference is that the legislative act controls future conduct in a general way, whereas the other types of acts cover specific (ad hoc) situations.

The judiciary prescribes certain rules for the validity of legislative acts of administrative agencies. They are issued by an agency under the authority of the enabling act and must comply with it. They must be reasonable in relation to the purpose that the act is intended to achieve. They must be made in good faith, be reasonable and comply with all conditions subsequent and precedent in the enabling act. [53]

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[51] 1 D.L.R.2d 497, at 498 (Sup. Ct. 1955).
[52] *Supra* note 30, at 10-17.
[53] *See generally*, Driedger, *Subordinate Legislation*, 38 Can. B. Rev. 1 (1960).

The legislative function raises a number of questions. How far does it permit the agencies to take official notice of pre-existing facts? [54] This question delves deeply into all factors that make up the agency's decision but one particular aspect deserves special mention. It would appear desirable that for the purposes of consistency, expediency and uniformity, Canadian administrative tribunals should follow their previous decisions. But the intelligent application of stare decisis in Canadian administrative law would demand written decisions, would probably preclude non-lawyers from acting as counsel before administrative tribunals and, generally, would require much more care in adherence to accepted legal principles. The application of the doctrine in Canadian administrative law needs careful consideration and clarification.

Policy statements by subordinate agencies are in a similar category. S.A. de Smith states : "It is obviously desirable that a tribunal should openly state any general principles by which it intends to be guided in the exercise of its discretion." [55] On the other hand, a tribunal entrusted with a discretion must not, by adoption of a general rule of policy, disable itself from exercising its discretion in individual cases. [56] It may be noted further that this discretion must be exercised by the agency to whom the authority to do so has been entrusted by law. The board must not act under the dictation of some other person or persons to whom the authority is not given by law. [57]

IV. Advisory Functions

Parliament has delegated to some agencies the power to advise the government on specific and general matters. For example, the National Energy Board has been empowered to advise the Minister of Energy, Mines and Resources on matters relating to the "exploration for, production, recovery, manufacture, processing, transmission, transportation, distribution, sale, purchase, exchange and disposal of energy and sources of energy within and outside of Canada." [58] The Board of Broadcast Governors, pursuant to section 12 of the Broadcasting Act, [59] makes recommendations after a public hearing on certain questions referred to it by the Minister of Transport. The Restrictive Trade Practices Commission submits a report

[54] See the excellent discussion on this topic by J. Finkelman, *supra* note 30, at 40-53.

[55] Judicial Review of Administrative Action 184 (1959).

[56] *Re* Hopedale Dev. Ltd., 47 D.L.R.2d 482 (Ont. 1965).

[57] *See* Roncarelli v. Duplessis, [1959] Sup. Ct. 121; Spackman v. Plumstead Dist. Bd. of Works, [1885] 10 App. Cas. 229, especially at 240. *See also* Reference *re* Anglers Ry. Crossing, [1937] Sup. Ct. 451, at 454, where the Supreme Court of Canada, referring to the "Junior and Senior Rule," stated that "This Court [Supreme Court] has no power, by laying down a rule, nor has the board itself power, by establishing a practice, to limit the discretion with which the board is invested."

[58] Can. Stat. 1959 c. 46 § 22(1).

[59] Can. Stat. 1958 c. 22.

to the Registrar General which may contain recommendations as to the application of remedies under the Combines Investigation Act. [60]

When this advisory function is vested in the same agency that has a judicial function with respect to the same subject matter, it is apparent that the former function may, first, militate from the independence of the agency and the established common-law principle of judicial independence. If the minister, representing the political arm of government, requests advice on certain matters which are or will become sub judice, such advice may be considered a prejudgment. Second, such advice may be open to attack as being in contravention of the fundamental common-law principle that the judge must be strictly impartial and that the participants in the decision have no interest in the final outcome.

If the advice is given without a public hearing, it is essentially an application of the fundamental principle of responsible government—that certain decisions are reviewable by the legislatures and not by the courts. [61] If the advice is given after a public hearing, it is an opinion and not a final decision, and the considerations earlier discussed would appear to apply. There are differences, of course, in giving advisory opinions with or without a public hearing. They were noted in *Regina v. Minister of Labour*, [62] where the minister requested the board for certain information prior to granting permission to prosecute, ostensibly an administrative act. The board refused the applicant permission to view documents and to cross-examine on affidavits. On application to the court for certiorari, it was held that the documents should have been tested by cross-examination. Mr. Justice Milvain of the Alberta Supreme Court said : "The neat legal problem which now confronts the court, is whether an authority with power to do an administrative act without fear of judicial intervention, changes the situation by conducting an inquiry to which the interested parties are asked to appear and make representations." [63] This determination, of course, depends on the true nature of the functions being exercised. [64]

V. Conclusion

From the foregoing remarks, it is apparent that much political, judicial and administrative workmanship is required to control the discretionary powers of administrative agencies in the light of the principles of freedom, justice and equality. But it is to be remembered that the law controlling administrative agencies vis-à-vis the government and individuals is relatively

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[60] Can. Rev. Stat. c. 314 (1952).

[61] Strayer, *Injunctions Against Crown Officers*, Can. B. Rev. 1, at 29-31 (1964).

[62] 47 D.L.R.2d 189 (Alta. Sup. Ct. 1965).

[63] *Id.* at 193.

[64] *See also* Langley Fruit Packers Ltd. v United Packing House Food & Allied Workers, Local 1181, 61 D.L.R.2d 31 (P.E.I. Sup. Ct. 1967).

new. Our law and the constitutional principles we now live under took many centuries to evolve to its present form, and there is little doubt that Canadian administrative law will evolve in a similar manner.

However, much work may now be done in fitting into our present political, legal and constitutional structure the law respecting the administrative process. Legislation could give more precision to definitions of functions. Legislation could more exactly specify the form of review. Should the decision be reviewed by the judiciary, by the Governor in Council, by the minister or by some other body? Legislation would greatly alleviate present indecision by stating in detail the scope of review. For example, should review be confined to questions of fact, of law, or both; or should the review take the form of a trial de novo?

Despite attempts by the legislatures to limit judicial review, the judiciary has, quite properly, avoided its preclusion from the process. It is no doubt true that due to privative clauses, the indefiniteness of the judicial role and limited principles in an unfamiliar field, the courts have reached conclusions that have evoked protests of unpredictability and confusion of thought. But a degree of uncertainty has always characterized judge-made law, particularly in the embryo stage of development. Further, the uncontroverted fact that justice is seldom not done often requires a circuitous route and devious means to achieve the goal. Finally, clarity of principles will be much more pronounced when the judicial role in this branch of law is firmly established and clearly defined.

It is claimed that the common law has lost much of its flexibility, that it is no longer an effective instrument in controlling administrative action and that a new governmental officer, popularly known as an ombudsman, should be appointed with wide powers of review of such action. I heartily dispute these premises. The making, interpreting and executing of this subordinate law are, for the most part, in the hands of experienced, capable and dedicated administrators but, in view of the quantity and relative newness of this growing body of law, an impartial governmental authority might be of service in observing the process, in recommending remedial action in defined areas and, in some limited areas, in controlling and supervising minor officials of the administration.