ADMINISTRATIVE LAW: 1923-1947

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Administrative law in Canada, as a recognized branch of public law, is no older than the Canadian Bar Review; it has emerged from neglect and obscurity only within the past quarter century. Prior to that time legal principles existed and were applied by the courts to the Crown, the Executive and the Civil Service, which are now included in the scope of administrative law, but these principles were considered merely as a part of constitutional law. Even today one may search Canadian digests in vain for the title "Administrative Law".[1] The wide and rapid growth in the functions and powers of public authorities, however, and in particular the entrusting of judicial functions to government departments and agencies, have so enlarged the area of public administration, and so increased the daily relations between the individual and the state, that we now accept the body of applicable rules as a distinct legal category and recognize it as a major field of law. It is thus true to say of Canada, as Professor Robson has recently said of England, that

> In this way a new body of administrative law has been introduced into the British Constitution; for although it may be regarded from one point of view as a revival, in the sense that administrative law has existed in previous periods of English history, the form and circumstances in which it appears today are so peculiar to our own time that the whole movement must really be regarded as a new development.[2]

I. *Canadian Writing on Administrative Law*

It is hardly to be expected that so rapid a change would have found expression in established treatises and in clearly formulated legal doctrine. The social facts have moved so fast that the law, or at least the systematisation of the law, has lagged behind. No precise definition of administrative law is even agreed upon. Yet the increasing periodical literature on the subject bears testimony to the progress made in understanding the nature of the problem. Canadian writing in this field, except when dealing with special aspects of Canadian federalism, has been largely derivative, having followed closely the lead of English and American scholars and publicists. Dicey's magni-

[1] Beauchamp, in his Repertoire Generale de la Jurisprudence Canadienne (1913), defines administrative law but gives no cases under the title. Later Quebec digests do not mention it, though the Bar of Quebec since 1886 has included it in its required studies for students.

[2] Justice and Administrative Law (2nd ed., 1947), pp. 426-7.

ficently written misinformation on the subject at first led us, as it led so many others, to believe that our system of law was superior to anything so alien and so continental as *droit administratif*. We tended to extol, in uncritical fashion, the Rule of Law, the Separation of Powers and the right of access to the ordinary courts. Then came the new approach in England, founded on Professor J. H. Morgan's admirable introduction to Robinson's Public Authorities and Legal Liability,[3] and more fully formulated in Professor Robson's Justice and Administrative Law.[4] The whole issue was made popular — or unpopular — in the legal profession and in wider circles by Lord Hewart's contentious book, The New Despotism,[5] and was subjected to exhaustive inquiry in the epoch-making report of Lord Donoughmore's Committee on Ministers' Powers in 1932.[6] Other English writers, like Port, Jennings, Carr and C. K. Allen have added their comments and analysis, all of which gave leadership to Canadian students. Nor was American writing without its influence, for not only were the studies of Goodnow, Pound, Dickinson, Freund, Landis and Frankfurter available, but a steady if small stream of Canadian scholars was returning fresh from the stimulating experience of graduate work in American universities. Meanwhile Canadian judges, faced with the practical problem of deciding actual cases, were applying the leading decisions of the English courts, and were keeping our development parallel with that of England. This is true even of Quebec, for administrative law belongs to and has evolved from the public law and does not rest upon civil-law antecedents.

While not a single book has been written in Canada on administrative law,[7] considerable research has been done in particular aspects of the subject. Perhaps the earliest article setting out the basic problem in the modern manner was published in the Canadian Bar Review in 1928 by Nigel B. Tennant, entitled "Administrative Finality".[8] It shows a broad and liberal attitude, free from the emotional and uncritical denunciations which so often enter into these particular discussions. In the same year Professor W. P. M. Kennedy called attention to the

[3] University of London Press, 1925.
[4] London, 1928 (1st ed.).
[5] First published in 1929.
[6] Cmd. 4060.
[7] Canadian Boards at Work (ed. Willis, 1941) treats of particular boards and only briefly of the law in general. Chapters on administrative law will be found in Kennedy, The Constitution of Canada (2nd ed.), Corry, Democratic Government and Politics, and Dawson, Government of Canada.
[8] (1928), 6 Can. Bar Rev. 497.

subject of "Suits By and Against the Crown",[9] contrasting our lack of change with the forward moves made in other parts of the Commonwealth, and R. W. Shannon discussed the important question of "Delegated Legislation".[10] Professor J. A. Corry, in a noteworthy paper read before the Canadian Political Science Association in 1933,[11] drew the attention of the political scientists to the issues involved and thus gave a fruitful lead to the thinking of students of Canadian government. The work of these men, which they themselves have continued, has been followed by the studies of D. M. Gordon,[12] and Professors Willis,[13] Finkelman,[14] Hopkins,[15] Humphrey,[16] and others. The Canadian Bar Association itself has on several occasions devoted time and set up committees to discuss the subject,[17] and most Law Schools now include it in their curricula.[18]

Viewing the writing in Canada, it is interesting to observe the marked difference of approach in the reports and addresses of judges and practising lawyers from that adopted by the teachers and scholars. The former tend to stress the dangers to liberty that lie in the administrative tribunals, the latter emphasize the importance of the new functions of the state and the need for procedures swifter and more expert than those followed in the regular courts of law. As examples of this difference, one might compare the vigorous protest against the transfer of jurisdiction from courts to administrative tribunals expressed by Sir William Mulock,[19] the Hon. J. W. de B. Farris[20] or Mr.

[9] *Ibid.*, p. 329.
[10] *Ibid.*, p. 245.
[11] Proceedings, 1933, p. 190.
[12] *E.g.*, his Administrative Tribunals and the Courts (1933), 49 L.Q.R. 94, 419.
[13] *E.g.*, Three Approaches to Administrative Law (1935-6), 1 U. of Tor. L. J. 53; also, Administrative Law and the B.N.A. Act (1939), 53 Harv. L. Rev. 251. Other articles are cited *infra*.
[14] *E.g.*, Government by Civil Servants (1939), 17 Can. Bar Rev. 166; Separation of Powers: A Study in Administrative Law (1935-6) 1 U. of Tor. L. J. 313.
[15] *E.g.*, Administrative Justice in Canada (1939), 17 Can. Bar Rev. 619.
[16] *E.g.*, Judicial Control over Administrative Action (1939), 5 Can. Journal of Economics and Political Science 417; also, The Theory of the Separation of Functions (1946), 6 U. of Tor. L. J. 331.
[17] *E.g.*, The Crown as Litigant: Report of Committee on Comparative Provincial Legislation and Law Reform (1936), 14 Can. Bar Rev. 606; Trends in New Brunswick Legislation Affecting the Executive and Governmental Agencies (1943), 21 Can. Bar Rev. 810; Report of Committee on Civil Liberties (1944), 22 Can. Bar Rev. 598.
[18] As late as 1934 Professor Kennedy said, "As far as I know, the University of Toronto alone in the Empire provides special undergraduate and graduate courses in administrative law". See, Aspects of Administrative Law in Canada (1934), 46 Jur. Rev. 203.
[19] Address on his ninetieth birthday, 1934, in 12 Can. Bar Rev. 35.
[20] Justice of the Courts (1938), 16 Can. Bar Rev. 509.

Walter Johnson[21] with the broader and more sympathetic treatment of such students as Professors Willis, Finkelman and Hopkins.[22] A form of battle between the courts and the legislature seems to have been joined, with the academic writers siding, on the whole, with the purposes of the legislature. Senator Farris goes so far as to say, "Whatever menace there is today to the justice of the courts comes from Parliament", while Professor Willis points out that the judges have recourse to their "antiquated ideal constitution" because of the intensely individualistic nature of the common law and its emphasis on private property rights. In this debate, joined between those who would conserve the old and those who welcome the new, which occurs in the English and American literature also, lies the vitality and energy of administrative law; the discussion provides the thesis and antithesis out of which we may find in due course the synthesis appropriate to Canadian needs.

II. *The Growth of the Law*

A. *Fundamental Constitutional Setting*

In the evolution of administrative law, Canadian legislatures have the upper hand even if courts have the last word. First comes the need and the public demand for a new form of social activity by the state; then comes the enactment by the legislature of a law providing for it, delegating various powers to some administrative agency for the purpose; finally there comes the judicial interpretation and application of the law. The legislatures, being sovereign parliaments, may create special administrative tribunals to settle all disputes arising out of the new law. It is never possible in Canada, however, to oust the jurisdiction of the courts completely, no matter how the legislatures may try, since the fundamental constitutional question as to whether the law is *intra vires* the legislature which enacted it must always remain open until final determination, and this inquiry cannot be removed from the ordinary courts.[23] If the law under examination is held *intra vires*, the scheme will stand even though it now ousts the jurisdiction of the courts. In other words, the courts must at least be allowed to say whether the transfer of jurisdic-

[21] The Rule of Law under an Expanding Bureaucracy (1944), 22 Can. Bar Rev. 380. See also his article, The Lawyer and Administrative Boards (1943), 3 Revue du Barreau 233, in which he proposes positive action by the Bar Association.

[22] See articles cited in footnotes 13, 14 and 15, *supra*.

[23] *A.G. for Alberta and Winstanley* v. *Atlas Lumber Co.*, [1941] S.C.R. 87, *per* Davis J. at p. 105; *Home Oil Distributors* v. *A.G. of B.C.*, [1939] 3 D.L.R. 397.

tion from themselves to an administrative tribunal is contained in a valid law. But having found it to be so they cannot then prevent transferred jurisdiction from operating. We have come to accept in Canada — despite some comment to the contrary[24] — the fact that no doctrine of separation of powers is a bar to legislative action. The mixing together of various functions of powers of government in a single agency is not contrary to the fundamental law of the constitution.

To state this rule, however, without immediate qualification would be misleading. For the courts have another weapon lying in the armoury of the B.N.A. Act — that of saying whether or not a particular administrative agency established by a valid provincial statute is or is not a "Superior, District or County Court" within the meaning of section 96 of the Act. This question can only arise with regard to provincial laws, since the Governor-General-in-Council anyway appoints to federal administrative agencies,[25] and only of course in provincial laws which are otherwise valid. But the law may be valid in the sense that it relates to a provincial matter within section 92 and yet the agency established under it may be invalid as being a "court" whose judges must be appointed by Ottawa under section 96. Hence all the cases dealing with section 96 are a fundamental part of our administrative law. As Professor Willis has pointed out, the constitutional line of attack against "encroachments upon the courts" is of necessity directed through the seemingly innocuous section 96.[26] A full review of the law on this difficult point would be out of place here, but it is important to note that despite all the litigation to which the section has given rise most of the various provincial administrative Boards and Commissions have managed to survive, and so far this article of the constitution has been insufficient to prevent the rapid growth of administrative tribunals on the provincial plane.

On these two basic points therefore — the testing of the constitutionality of the Act setting up the administrative agency and the testing of the validity of appointments to provincial agencies — the courts have maintained their right of preliminary inquiry. No legislature in Canada can oust these grounds of jurisdiction. Are there any further limitations on Canadian legislatures when setting up administrative agencies? It appears that

[24] *E.g.*, Report of Committee on Civil Liberties (1944), 22 Can. Bar Rev. at p. 602; *per* Cannon J. in *Reilly* v. *King*, [1932] S.C.R. 597, at p. 601.

[25] *Quaere*, whether a federal law would be invalid if it set up an agency which was a "court" and the members thereof were appointed or chosen other than by the Governor-General-in-Council.

[26] Section 96 of the B.N.A. Act (1918), 18 Can. Bar Rev. 517.

there may be one more, to be found in the doctrine of delegation. Every sovereign parliament may delegate its powers to subordinate authorities. This is true of the Dominion Parliament, whose most famous and extreme example is the War Measures Act,[27] and of the provincial legislatures.[28] Without such a power modern government could not be carried on. But limitations appear to exist (a) in that no legislature could abolish itself,[29] substituting some totally different kind of body *in perpetuo*, and (b) in that neither the Dominion Parliament nor provincial legislatures can delegate powers to one another. Proposition (a) is hypothetical and need not detain us, though it might be a useful principle with which to oppose — should the occasion arise — the setting-up of some dictatorial, unparliamentary government, perhaps serving for Canada something of the purpose of Article IV, Section 4 of the United States Constitution, which guarantees to every state of the Union a republican form of government.

It is proposition (b) which is of more practical importance. Can the provincial legislatures, for example, declare in a statute that if any portion of a Dominion statute is *ultra vires*, that portion shall be valid within the province? And can the legislature go further and validate prospectively any future changes in the Dominion law? With such a power, many constitutional difficulties might be overcome through Dominion-provincial co-operation; without it, another barrier to legislative action exists and Canadian federalism becomes that much more unworkable. Three cases in 1935-6 held that such a device was unconstitutional.[30] None of these reached the Supreme Court of Canada or the Privy Council, so the point is unsettled. It is worth noting that three commentators in the Canadian Bar Review take the opposite view (with which the present writer agrees) that there is no valid ground for precluding any legislature from selecting whomsoever it wishes in Canada to be its delegate *ad hoc*,[31] even

[27] Held valid in *Re Gray* (1918), 57 S.C.R. 150; *Chemicals Reference*, [1943] S.C.R. 1. Even the power to deport Canadian citizens was delegated: see *Co-operative Committee on Japanese Canadians* v. *A.G. for Canada*, [1947] A.C. 87.

[28] *Hodge* v. *The Queen* (1883), 9 App. Cas. 117.

[29] *Queen* v. *Burah* (1876), 3 App. Cas. 889; *Re Initiative and Referendum Act*, [1919] A.C. 935, at p. 945; *Re Gray*, *supra*, at p. 12.

[30] *Rex* v. *Zaslavsky*, [1935] 3 D.L.R. 788; *Rex* v. *Brodsky*, [1936] 1 D.L.R. 578; *Rex* v. *Thorsby Traders*, [1936] 1 D.L.R. 592.

[31] R. W. Shannon, Delegated Legislation (1928), 6 Can. Bar Rev. 245, at p. 251; Ian G. Wahn, note on the *Zaslavsky* case (1936), 14 Can. Bar Rev. 353, at p. 356; Raphael Tuck, Delegation — A Way Over the Constitutional Hurdle (1945), 23 Can. Bar Rev. 79, at p. 93. Professor Corry considers the question as open: see his comment in Difficulties of Divided Jurisdiction, Appendix 7 to Sirois Report, pp. 37 ff.

if it be another legislature. If this latter view be correct, the recommendation of the Sirois Report that a two-way power of delegation be added to the B.N.A. Act would be largely implemented without the need of constitutional amendment.

While this question remains debatable, the courts have another method of control over Canadian legislatures which are seeking to establish administrative agencies. If it is a rule of constitutional law that delegation of this type is contrary to the B.N.A. Act, then no court can be barred from inquiring into the point.

We may conclude this part of our review of the law with the comment that the courts remain masters of the legislature to this extent, that no statute establishing an administrative agency can escape judicial scrutiny designed to see that it fits into the general framework of the constitution.

B. *Judicial Control over Administrative Acts*

Assuming the administrative scheme or agency has survived the three special tests outlined above, the question then most debated is the degree to which its actions should be open to judicial review. More and more frequently the legislature excludes review by the courts and creates a special statutory right of appeal through administrative channels. It is against this practice that judges and practitioners have so frequently protested, to little avail. The justifications for and fulminations against this trend have echoed in Canada, as elsewhere in the common-law countries.

An examination of the cases over the past twenty-five years would seem to indicate that the courts have maintained a very wide area of control despite all the legislature has done to exclude them. The prerogative writs are still potent weapons against administrative action, even though their use is rendered uncertain and precarious in particular instances and is sometimes taken away altogether. It must be remembered that the "act" of an agency exercising delegated powers may fall into one of a number of categories. It may be "legislative", "executive", "administrative", "judicial", "quasi-judicial", "ministerial" — these are the terms most frequently used. In these concepts lies the heart of the problem of administrative law as at present practised. Which acts belong to which categories? What is the essence of each? It cannot yet be said that we have achieved much clarification of this problem. There is no authoritative definition of the respective qualities of governmental acts though there are *dicta*

innumerable. Some writers doubt whether distinctions are possible; Dr. Jennings points out that it is quite impossible to draw a distinction between "judicial" and "administrative" functions in terms of the nature or substance of the functions actually exercised by the courts and the administrative authorities of Great Britain.[32] Yet there can not be much certainty in the field of administrative law until either a greater verbal exactitude is achieved or we devise remedies that do not depend at all upon the distinctions. For though we have no doctrine of the separation of powers as such in the Canadian constitution, we are now forced to distinguish types of governmental powers for two reasons: (1) to discover whether an administrative agency is a "court" within the meaning of section 96 of the B.N.A. Act; and (2) to discover whether certain prerogative writs will apply to compel review of the act in question. The Court of Appeal in Quebec, for example, thought that the Quebec Workman's Compensation Commission was not a "court"; so able a commentator as D. M. Gordon thought that it was.[33] Certiorari is supposedly available to review "judicial" but not "administrative" decisions, yet Professor Finkelman has shown how, because the distinction is difficult to draw, the courts have been able to extend their control.[34] So long as uncertainty reigns in the terminology the courts have a wider discretion; just as formerly the imprecision in the concept of the royal prerogative helped to increase the power of English kings, so today the imprecision here increases the opportunities for judicial control. The looser the meaning of words, the more they can be made to cover.

The result is that, contrary perhaps to a prevailing belief, judicial control of administrative acts is increasing rather than declining. Professor Willis has noted and gives ample authority for the following development over the past fifty years: (1) an increase in the class of discretions which the court is prepared to control; (2) the inclusion of procedural error in the class of facts which deprive the tribunal of jurisdiction; and (3) the evasion by the courts of sections of the enabling acts which apparently purport to deprive them of their power of review.[35] So too a Canadian commentator notes that:

[32] The Law and the Constitution (3rd ed.), Appendix 1.

[33] *A-G. of Quebec* v. *Slanec*, [1933] 2 D.L.R. 289, and note in (1933), 11 Can. Bar Rev. 510.

[34] In Separation of Powers (1935-6), 1 U. of Tor. L. J. 313, at pp. 321 ff. See also Willis, Three Approaches to Administrative Law, *ibid.*, at p. 62. A useful discussion of the nature and classification of powers is in Wade & Phillips, Constitutional Law (3rd ed.), pp. 248 ff.

[35] In article cited *supra* in footnote 34, at pp. 61 ff.

> In the development of administrative law, judicial review of administrative adjudication has become a commonplace with respect to matters of law, of jurisdiction, of adequacy of procedure, of procedural fairness, and even of the question of sufficiency of evidence. The finality of administrative determinations has in a real sense, and this regardless of statutory provisions, been dependent on judicial approval.[36]

In the light of this trend, and in view of all that has been said against depriving the citizen of his access to the courts, the refusal of the Chief Justice of Quebec to allow the taking of an action by Roncarelli against the Chairman of the Quebec Liquor Commission on the cancellation, without hearing or charge of illegality, of his liquor licence is all the more difficult to explain, because here the discretion was in judicial and not administrative hands.[37]

Nevertheless, while the regular courts of law are still in command of much of the battle-ground and seem indeed to be widening their bridgehead, it is true that administrative tribunals also are on the increase. Obviously they fulfil a vital social function and mere diatribes against them, larded with quotations from Magna Carta, are of no avail. The important thing is not to try to stop the development of administrative justice but to discover the principles which will make it good administrative justice. The courts must not forget that they evolved out of the executive and still exercise administrative powers themselves. Nor must the legal profession forget that the costs and delays of litigation today are in themselves sufficient to make the Rule of Law unworkable in its ancient manner, if indeed it is possible to give precise meaning to that hardy slogan. The courts have contributed much already by enunciating and establishing certain rules, such as that a person must not be condemned unheard, that he must not be a judge in his own cause, that the administrative decision must be in good faith and not malicious or arbitrary. But there has been prevalent a notion, false and dangerous, that it is a function of the courts to correct all the mistakes made by administrative agencies, much as a court of appeal corrects an inferior court. This is an untenable position. "Courts are not the only agency of government that must be assumed to have a capacity to govern", as Judge Stone remarked in *United States* v. *Butler*.[38] Legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts and interference by the courts, Judge Frankfurter reminds us,

[36] In (1942), 20 Can. Bar Rev. at pp. 465-6.

[37] The reasons for the refusal are given in [1947] K.B. 105 (Que.). A second petition, revised in the light of the first rejection, was also refused. The Attorney General of Quebec refused permission to sue the Liquor Commission.

[38] (1936), 297 U.S. 1, at p. 87.

is not conducive to the development of habits of responsibility in administrative agencies.[39]

A major principle applicable here finds clear expression in the cases and in the authors. It is not the function of the courts to control government policy; even if, one might add, that policy be to set up new administrative tribunals. Judges must not substitute their notions of social purpose for those of the legislature; indeed, they are there to see that the policy of parliament is carried out, not that it is altered or frustrated. As a recent writer has said:

> It is submitted that grave legal uncertainty as well as political danger would follow from any attempt of the courts to interfere in administrative policy and discretion and to examine reasonableness as distinct from (a) excess of statutory powers and (b) objectionable motives. Not only would such an attitude be an almost open defiance of clear parliamentary language, it would precipitate a dangerous conflict between the judiciary on the one hand and those responsible for policy on the other hand.[40]

To control excess of jurisdiction (*excès de pouvoir*) or abuse of power (*détournement de pouvoir*) is one thing; to attempt to influence or limit national policy is another. But here again the line is very thin. The courts have shown that policy concepts do engage them. In the first place, they must "interpret" the statute. But how? So as to fulfil its object, according to the rule in *Heydon's* case? Or according to the golden rule or the plain-meaning rule? Or strictly, so as to invade private rights as little as possible? And what if the express purpose of the statute be to invade private rights on behalf of public rights? No one who has read Professor Willis's remarkable analysis of this problem will fail to recognize its enormous importance in the evolution of administrative law.[41] In the second place, if the courts are willing, as they are, to inquire into administrative discretions as to their reasonableness, their motivation, their factual basis, whether they were induced by extraneous considerations and the like, then judges are within the field of policy. The balance between controlling excesses and abuses, and taking part, even if a negative part, in the formation of public policy is extremely delicate. Just how delicate it is can be seen by com-

[39] *Federal Communications Commission* v. *Pottsville Broadcasting Co.* (1940), 60 S. Ct. 437; cited at (1940), 18 Can. Bar Rev. 230.

[40] W. Friedmann, The New Public Corporation (1947), 10 Mod. L. R. at pp. 384-5.

[41] Statute Interpretation in a Nutshell (1938), 16 Can. Bar Rev. 1. See also Corry, Administrative Law and the Interpretation of Statutes (1935-6), 1 U. of Tor. L. J. 286.

paring the *Wrights' Ropes* case or *Roberts* v. *Hopwood* [42] where the courts chose to interfere, with cases like *Liversidge* v. *Anderson* or *Poizer* v. *Ward* [43] where they felt they could not.

We seem to have reached the position that the courts, while disclaiming any right or intention to change public policy, have evolved indirect means of doing so. They can quash, even where they cannot initiate. This development has not passed without strong criticism.[44] Some writers have suggested that we should set up a system of true administrative courts, perhaps after the French model,[45] rather than let the ordinary courts creep up upon a jurisdiction they are ill designed to exercise. On the other hand a recent writer in England argues that our system of judicial review is already about as complete as and runs parallel with that of France.[46]

C. *Administrative Regulations and Statutory Remedies*

So far most attention has been paid to the functioning of the courts. What of the administrative agencies themselves? What forms of law and behaviour have they evolved? Certainly they have been receiving a mounting wave of criticism, even from those who are their best friends. To begin with, the rules and regulations they make, exercising their delegated powers, are still extremely difficult to find. No organized and uniform system of publication exists. Some progress has been made as a result of the report of the Conference of Commissioners on Uniformity of Legislation in 1942; Ontario and Manitoba have adopted a Regulations Act,[47] while Nova Scotia requires certain regulations to be laid before the legislature.[48] Alberta and Saskatchewan list all the regulations in force in their annual volume of statutes. There is still no proper central register, however, which each province should possess. Nor is there yet a Federal Regulations Act. A welcome advance was made in 1947 with the establishment, by Order in Council P.C. 5355 of December 30th, 1946, of

[42] [1947] 1 D.L.R. 721; [1925] A.C. 578.

[43] [1942] A.C. 206; [1947] 4 D.L.R. 316, and note by Stanley E. Edwards in (1947), 25 Can. Bar Rev. 1156.

[44] D. M. Gordon, *op. cit.*, in 49 L.Q.R. at p. 427.

[45] *E.g.*, Willis, *op. cit.*, footnote 63 *supra*, 1 U. of Tor. L. J. at p. 80; Humphrey, footnote 16 *supra*, 5 C.J.E.P.S. at p. 431. Robson has proposed such courts for England: Justice and Administrative Law (2nd ed.), pp. 359 ff.

[46] G. E. Treves, Administrative Discretion and Judicial Control (1947), 10 Mod. L. R. 276.

[47] Ontario, 1944, c. 52; (1944), 22 Can. Bar Rev. 819; Manitoba, 1945, c. 56, and 1946, c. 54. See article by Eric H. Silk in (1942), 20 Can. Bar Rev. 604. The text of the Model Act is in Proceedings of the Canadian Bar Association, 1943, p. 331.

[48] N.S., 1941, c. 9; 1943, c. 42.

a central register in the Privy Council Office, in which will be filed all orders, rules and regulations "of a legislative character or of an administrative character having general effect or imposing a penalty". Such orders are now published in a form analogous to the Statutes of Canada. This Order in Council falls short of the model act, however, and still leaves a wide discretion as to those rules which must be published and those which need not be. The citizen and even the lawyer continue to be put to a quite unnecessary degree of trouble in ascertaining the latest regulations on a particular point.

Then the type of remedy provided by the various boards and agencies needs reviewing in the light of contemporary experience. Most of these have grown without form or plan. Each special state activity seems to develop its own kind of claim and appeal, with infinite variety of process. Some of the newer types of statutory remedy show more careful attention to the requisites of fairness and efficiency; the claims procedure under the Unemployment Insurance Act and the Income Tax Appeal Board established in the 1947 amendment to the Income War Tax Act are interesting experiments. Canada, however, has taken no steps comparable to the American Administrative Procedure Act of 1946, the result of the work of the Attorney-General's Committee on Administrative Procedure. The substantive provisions of this Act have been summarised as follows: (1) it requires the issuance, as rules, of certain specified information as to administrative organisation and procedure; (2) it states the essential requirements of rule making and adjudication; (3) it prescribes the procedure for administrative hearings; (4) it sets forth a simplified statement of the methods and scope of judicial review.[49] While there must necessarily be variations in procedure appropriate to particular agencies, a greater degree of regularity and system is surely possible in Canada. Since both England and the United States have made thorough investigations of their administrative process in the past fifteen years it is to be hoped that our federal government may see fit to follow in this path. What is needed is a creative approach to the problem, free from ancient concepts and shibboleths, designed to bring law and order into this area of human activity without a sacrifice of the efficiency and adaptability which must be inherent in the administration of a modern democratic state. In practical terms, it may be suggested that we should have first a Royal Commission of inquiry, and then a draft bill presented to parliament and apply-

[49] See American Administrative Procedure Act, 1946, by Bernard Schwartz (1946), 63 L.Q.R. 43, at p. 46.

ing to all federal agencies. The provinces would follow in due course.

D. *The Immunity of the Crown*

The Crown, occupying a central position in the administration, dominates a great deal of the field of administrative law. No improvements in the protection of the citizen's rights against the state can occur unless there is an enlargement of his rights of action against the Crown. This is particularly true to-day since many governmental agencies, which to the citizen are simply public utilities and services, to the law are "agents of the Crown". This means that, basking in the Royal Prerogative, they enjoy the Crown's immunities from suit, their property is not liable to municipal or other taxes and they are to a quite unjustified extent beyond the reach of legal process. However much we may feel that the legal concept of perfection is appropriate to the person of His Majesty, it is difficult to believe that it is equally appropriate to the T. and N. O. Railway or to the Quebec Liquor Commission. Yet such is the view of the law.[50] Once again we meet here the familiar difficulty in the evolution of the law: ancient rules designed for a totally different type of society and government remain to bedevil the good administration of a modern democratic federal state.

It would be tedious to detail all the complications and confusions to which the doctrine of Crown immunity gives rise. Some outline of its principal consequences will illustrate the need for reform. First come all the difficulties attending upon the antiquated procedure known as the Petition of Right, whose very existence precludes any notion of a right of action. Australia has abolished it for actions against the Commonwealth; it does not exist for South Africa; Lord Birkenhead's committee, at the suggestion of Lord Haldane, recommended in 1927, and the present Labour Government has completed, its disappearance from English law with the Crown Proceedings Act.[51] Yet we

[50] *Peccin* v. *Lonigan*, [1934] O.R. 701; *Quebec Liquor Commission* v. *Moore*, [1924] S.C.R. 540.

[51] Sir Hartley Shawcross, the Attorney-General, used the following memorable words in speaking to the Bill:

> "I hope it is a pardonable weakness to pat oneself on the back; but, whilst this Bill is in no sense a controversial or political one, I do rejoice that it should have fallen to the present Socialist Government to resolve the doubts and anxieties which have obstructed action in this matter hitherto, and to give to Parliament as a whole the opportunity of enacting what this Bill, in fact, does, that the rights of the little man are just as mighty, and are entitled to just the same protection, as the rights of the mighty State."

See Hansard, Vol. 439, Column 1675, July 4th, 1947.

still cling to its use throughout Canada. Then there are the various procedural prerogatives, as to discovery, interest, costs and so forth, which place the Crown as litigant in a highly privileged position vis-à-vis the citizen. Few of these have any justification to-day. Most serious of all is the Crown's immunity from actions for damages based on tort or delict. The Canadian Bar Association's Committee on Comparative Provincial Legislation and Law Reform in 1936 [52] recommended a draft bill designed to remove these difficulties and to place the Crown in much the same position as an ordinary litigant, but not a single province has taken the hint. In Quebec by a sudden, new interpretation of the former law the Crown has been found liable in delict on two occasions,[53] but the Petition of Right procedure still prevails. A step forward was taken in 1938 when the Federal Parliament enlarged the liability of the Crown in right of the Dominion by the amendment to section 19(c) of the Exchequer Court Act, bringing the general provincial laws of master and servant liability to bear upon federal public officers, but there is still no right of action, the Petition of Right procedure being unchanged; moreover the procedural prerogatives continue, causing constant difficulties. Thus Canadian law has evolved somewhat in substance, but little in procedure in this field during the past twenty-five years.

E. *Public Corporations*

When the law regarding Crown agencies, boards and corporations is examined the confusion grows even greater. Some publicly-owned utilities and services are liable to suits in both contract and tort; some are liable in contract only; some can only be sued with permission; some are not persons capable of being sued at all. It is often hard to tell whether the claim should be by petition of right or by ordinary action. Innumerable special statutes create variations of liability and procedure where none is required in the nature of the undertaking. The law regarding liability of, and forms of action against, private corporations has long since been settled in a uniform manner, but the concept of the public corporate person has been so interwoven with the concept of the Crown that the immunities of the Crown have blocked the development of a coherent and uniform system of liability. The courts are partly to blame, for they

[52] See 14 Can. Bar Rev. 606.

[53] *The King* v. *Joseph Cliche*, [1935] S.C.R. 561, and note in (1936), 14 Can. Bar Rev. 252; *Sa Majesté le Roi* v. *Z.*, [1947] K.B. 457, Marchand J. dissenting.

have wavered between narrow and liberal interpretations of statutory words[54] when they might have leaned consistently toward a wider liability. The ghostly notion of the "emanation of the Crown" was a judicial invention, fortunately exorcised by the Privy Council in *International Railway Co.* v. *Niagara Parks Commission*,[55] but whether any improvement results through the replacement of this phrase by the alternative "instrumentality of government" or "agent of the Crown" is to be doubted. More responsibility for the present uncertainty rests on the legislatures than on the courts, however, for nothing prevents the legislatures from devising standard forms of procedure for all public bodies under their jurisdiction. Saskatchewan has given a notable lead in allowing its Crown Corporations to be sued without compliance with the provisions of the Petition of Right Act, though these bodies are still defined as agents of the Crown for all purposes.[56] Every argument that can be used to justify a wider liability on the Crown applies *a fortiori* to Crown Corporations and public authorities generally. If the state creates risks of damage it should assume these risks as fully as any private person.

The evolution of the Public Corporation, using the term in its widest sense, is, on the institutional side, the most outstanding administrative development of this century, just as the evolution of the private corporation or limited liability company was the outstanding development during the period 1850-1920 in the way of private legal institutions. These new agencies of government, or at least those with regulatory functions, have well been called "governments in miniature".[57] The wide variety of their powers and duties makes it impossible to classify them neatly, but they tend to fall into certain broad categories related to the following functions of government: (1) direct government services, such as the Bank of Canada, the Foreign Exchange Control Board, The Canadian National Railways, Trans-Canada Airways, Canadian Broadcasting Corporation, Provincial Liquor Commissions, Hydro-Electric and Public Telephone systems, etc.; (2) assistance to needy persons, such as Old Age pensions, Blind pensions, Family Allowances, Widows and Orphans pensions; (3) state schemes for Social Insurance, such as Unemployment Insurance, Hospitalization, Automobile Insurance, Old Age Insurance (proposed); (4) control of competition, such as Com-

[54] See note on recent cases by Bora Laskin in (1944), 22 Can. Bar Rev. 927.

[55] [1941] A.C. 328.

[56] Crown Corporations Act, 1947, c. 13, s. 3.

[57] Willis, Canadian Boards at Work, p. 1.

bines Act, Public Utility Boards, Wheat Board, Tariff Board, Marketing Acts; (5) protection of consumer, such as Insurance Acts, Securities Acts, Weights and Measures, Grading Laws, Farmer Creditors Arrangements; (6) protection for labour, such as Workmen's Compensation, Minimum Wages, Factory Acts, Labour Relations, etc. It is, indeed, a new form of local, regional or functional government whose growth we seem to be witnessing, involving a devolution and decentralisation of state powers into the hands of subordinate authorities. While the trend indicates more power passing into the hands of the state, it indicates also a change in the nature and structure of the state, from a monistic to a pluralistic form. A concept of "public enterprise" continues to grow out of a system of "private enterprise", with legal actions occurring between state agencies much as one private company may sue another.

More recently a new type of public corporation seems to be emerging, called in Canada the Crown Corporation. Its development during the war for federal purposes was remarkable and undoubtedly assisted in the success of the war effort in the way of the organisation of production. A similar tendency toward new types has been observed in England, particularly under the Labour government.[58] Saskatchewan has adopted a standard Crown Corporations Act [59] under which its socialised enterprises are established. The aim in such a development is to preserve the technical efficiency and managerial initiative of the private corporation, under the form of a public agency fulfilling public purposes and subject to general rules of law. There is no reason why many of the older type of public corporation could not be brought under the new form. Whether or not the Crown Corporation, with a more clearly defined status, is the type that will prevail is not important; what is important is that the agencies should possess greater uniformity of structure and greater responsibility under the law. No doubt the powers of individual public corporations will have to vary just as do the powers of private companies as laid down in their charters or articles of association, but this need not prevent the courts applying the well known *ultra vires* controls and general rules of legal liability, if only the legislatures will agree to standardise their types and define their legal status.

It is difficult to think of any reform which would be more conducive than this to a strengthening and democratising of the

[58] W. Friedmann, The New Public Corporations and the Law (1947), 10 Mod. L. R. 233, 377.

[59] *Supra*, footnote 56.

administrative process. We are obviously living today in an age of very rapid development of state activities. The pace, instead of slackening, is accelerating. A major democratic problem of our day, in its legal expression, is that of developing a law that will keep pace with the growing state. The broad outlines of such a law exist in the previously enunciated doctrines and in the wide experience we have had with various types of public authority. No doubt the adaptation of the old law is taking place, but at present the courts are struggling against almost impossible obstacles. The legislatures seldom make specific reference in the statutes to the type of public corporation they are creating, or to the degree of liability to which it should be subject. The courts now have to decide whether a particular public corporation is an "instrumentality of government" or "agent of the Crown", enjoying certain Crown prerogatives, or whether it is a distinct legal person liable both in contract and in tort in the ordinary manner. From among a mass of criteria as to what constitutes an "instrumentality of government" the judge must attempt to select those which are dominant in the particular case. Factors to be considered are whether the Crown appoints the members of the corporation, whether it can levy rates, whether its property is vested in the Crown, whether its funds are received from and must be returned to and audited by the government, whether it has discretionary powers of its own which it can exercise independently without consulting any representative of the Crown, whether the corporation is incorporated as a commercial company under the ordinary company legislation, whether its functions were formerly performed by private enterprises, and so on.[60] Such tests must, and do, leave a great deal to judicial discretion, with resulting uncertainty in the law. This could easily be remedied by properly framed legislation; it can hardly be remedied by judicial interpretation.

It would be quite unrealistic to discuss this basic problem of law and administrative action without treating of an aspect which has received all too little attention. Just as these public corporations are miniature governments, so too are many so-called "private" corporations miniature governments. It becomes increasingly difficult to discover, in our contemporary society, just what is the distinction between "government" and business",

[60] Many cases would have to be cited to support these propositions, but the main outlines will be found in, for example, *Halifax* v. *Halifax Harbour Commissioners*, [1935] S.C.R. 215; *Minister of Supply* v. *British Thomson-Houston*, [1943] 1 All E.R. 615; *The King* v. *City of Montreal and Montreal Locomotive Works Ltd.*, [1945] S.C.R. 621; and cases cited therein. See also, W. Sellar, Government Corporations (1947), 25 Can. Bar Rev. 393, 489.

between the "public" and the "private" corporation. Some private corporations have powers of expropriation; they own "public" utilities; they construct "company towns"; they too may become "agents of the Crown" for certain purposes.[61] Indeed many of them are much more powerful than some of our provincial and municipal governments. They too hold delegated powers from the state and to this political function some have added, often to the point of monopoly, an immense economic power which today becomes more and more an aspect of national policy. If the citizen and the public are to be better protected in the future against abuse of powers, then not all the attention must be directed toward what the state and its agencies are doing. The field of private enterprise also needs control by law in the public interest. Professor Swisher has recently said:

> Indeed, if we view government in the United States in terms of aggregations of power rather than in terms of concepts of sovereignty, we may say that recent years have brought the development of a new type of federalism. At the top, as always, is the federal government. Below that government, however, we find not only the states, but also, and often on lines roughly parallel with the states, the more powerful corporations of the country, with labour unions in some instances not much lower than the same parallel lines.[62]

An allied problem, as he indicates, though historically a later arrival, is that of fitting the position of trade unions into the framework of administrative law.

The interplay of the great economic forces and institutions of the modern industrial state provides a vital element, which is moulding our legal as well as our philosophic concepts, and new state responsibilities for stable employment and stable prices, with new theories of labour-management relations, are rapidly broadening the area of public administration. Perhaps the legal profession can best meet this challenge by assisting in the formulation of positive rules of administrative procedure, rather than by attempting to defend impossible positions with imaginary slogans. For some purposes the courts are needed, for others administrative tribunals are more suitable. A little conscious planning would go far to remove our present difficulties.

[61] *The King* v. *City of Montreal and Montreal Locomotive Works, supra.*

[62] The Growth of Constitutional Power in the United States (1946), p. 238.