THE SUPERVISORY JURISDICTION IN QUEBEC

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Developments within the last five or six years affecting the supervisory jurisdiction which the Quebec Superior Court exercises over inferior courts and administrative authorities have done much to sharpen the issues of law and policy which underly the legislative and judicial attitudes on this subject. A feature of this period has been the increasingly lenient attitude of the courts on questions of procedural technicality touching the means by which the supervisory jurisdiction can be invoked. This attitude has resulted in what, in the opinion of some, has been a radical alteration of the procedural economy of judicial control. Certiorari, prohibition and the ordinary, or as it is called in Quebec, "direct" action to annul (to distinguish it from the "prerogative" remedies in which the initiating writ can only issue upon authorization of a judge) appear to have become alternative means of attacking the decisions of administrative tribunals. There is technically a difference between the function of proceedings to quash, as all of these now are in Quebec, and the action for a declaration, which since the case of *Barnard* v. *National Dock Labour Board*[1] has aroused such interest in England as a means of reviewing administrative decisions, but it may make the procedural development of recent years in Quebec more meaningful to readers in common-law jurisdictions if that development is described as reflecting the increasing importance which the declaration of *ultra vires* or nullity has assumed as a form of relief in Quebec administrative law. This is true not only of its use in the extended application of the direct action in nullity to such administrative bodies as the Labour Relations Board, but in the use of the traditional remedies, to broaden their utility in a way that has, for example, encouraged resort to prohibition rather than certiorari as a means of attacking administrative decisions. Beyond, however, the extent to which

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[1] [1953] 2 Q.B. 18.

it may be permissible to regard the direct action in nullity as in essence a form of declaratory action, it cannot be said that the declaratory judgment has as yet received any real measure of recognition as a public-law remedy in Quebec. There are indications, however, that we may be on the threshold of important developments in this respect.

The liberalization of the procedure of judicial control which has taken place in recent years has made the path of the complainant in administrative law a smoother one, which is a good thing, but it also raises serious questions concerning the general effect of judicial remedies on the administrative process. These questions call for legislative attention. It is now possible to avoid recourse to the writ of certiorari as a means of attacking administrative decisions, and the safeguards (so important not only from the point of view of the administration but also often from that of other individuals involved in the case) with which the legislature has surrounded this remedy, namely, its expeditious character and the absence of a right of appeal, can now be completely circumvented. The avenue to justice has been made not only broader but longer, and while many of the traps and pitfalls on it have been removed, it has perhaps been made a little too attractive as a means of escaping from distasteful impingements of the administrative process. The answer to this would seem to be not to reverse what the courts have done, but to give a legislative recognition to it that will remove some of its more regrettable features.

On the legislative side what has chiefly attracted attention in the last five or six years has been the emphasis placed upon the privative clauses which are now a feature of regulatory legislation in Quebec. Although the legislature has not gone as far as to use language which expressly covers cases of want or excess of jurisdiction, there has been a certain amount of legislative activity with the apparent purpose of reinforcing privative clauses. And since some of it, at least, appears to have been in response to certain judicial decisions, whatever may be said about legislatures elsewhere, it cannot be said that the Quebec legislature has given the impression that it has "acquiesced" [2] in the interpretation which the courts have given to such clauses. As a matter of fact, what has perhaps chiefly characterized the Quebec situation with re-

[2] Cf. Lord Summer in *Rex* v. *Nat. Bell Liquors*, [1922] 2 A.C. 128, at p. 160 (P.C.); Rand J. in *Toronto Newspaper Guild* v. *Globe Printing Co.*, [1953] 2 S.C.R. 18, at p. 28; Laskin, Certiorari to Labour Boards: The Apparent Futility of Privative Clauses (1952), 30 Can. Bar Rev. 986, at p. 1002.

spect to privative clauses in recent years is that for a time at least judicial opinion on the effect to be given to such clauses was by no means uniform. Despite the uncertainty, however, which may have been engendered by the pronouncements of certain judges, some of them in the Court of Appeal, in the last two or three years there has been a series of Superior Court judgments adopting the approach of the common-law courts on this question.

Another legislative development of recent years which may have attracted less attention than the preoccupation with privative clauses, but which offers a more serious challenge to the superior courts, is the enactment of provisions of law which purport to confer portions of the supervisory jurisdiction on tribunals presided over by judges appointed by the province.

A recent amendment to article 50 of the Quebec Code of Civil Procedure[3] serves to focus renewed attention on all of these developments. While the amendment itself may add little to the existing provisions of law to which it makes reference and will probably have little or no effect on the application which the courts would otherwise give to such provisions and to article 50 C.C.P., as most lawyers on a cursory examination of its terms are likely to conclude, a consideration of its significance and possible effect affords a convenient framework in which to examine the developments of recent years and the issues involved in them a little more closely.

Before the amendment, article 50 C.C.P. read as follows:

> Excepting the court of King's Bench and the judges thereof all courts, judges and magistrates and all other persons and bodies politic and corporate within the province are subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof in such manner and form as by law provided.

As amended it now reads:

> Excepting the Court of King's Bench,[4] the courts within the jurisdiction of the Legislature of Quebec, and bodies politic and corporate within the Province are subject to the supervision and reforming power of the Superior Court, in such manner and form as by law provided, save in matters declared by law to be of the exclusive competency of such courts, or of any of the latter, and save in cases where the jurisdiction resulting from this article is excluded by some provision of a general or special law.

[3] 1956-57, 5-6 Eliz. II, c. 15, s. 1.

[4] Art. 40 C.C.P. lists as the first of the courts having civil jurisdiction in the Province "The Court of King's Bench sitting in appeal, which, during the reign of a queen, is called "Court of Queen's Bench", and art. 42 C.C.P. provides that the court when exercising civil jurisdiction may be designated as the "Court of Appeal".

The first question which is suggested by the amendment to article 50 C.C.P., in particular, by the words "the jurisdiction resulting from this article", is the extent to which the supervisory jurisdiction in Quebec depends upon the terms of this article, for it is only in so far as it does that the amendment can be expected to have any effect upon the exercise of that jurisdiction. After this question has been examined an attempt will be made to consider the implications of the three principal alterations in the wording of the article: the removal of the words "judges and magistrates and all other persons"; the addition of the words "save in matters declared by law to be of the exclusive competency of such courts, or any one of the latter"; and the addition of the words "save in cases where the jurisdiction resulting from this article is excluded by some provision of a general or special law."

I. ". . . *the jurisdiction resulting from this article* . . . ."

Prior to 1849, the supervisory jurisdiction of the Quebec superior courts, the former courts of King's Bench in the several districts of the province,[5] was based on common law just as that of the English Court of King's Bench[6] on which they were modelled. The law of judicial control was part of the English public law introduced into Quebec as a result of the cession. In early cases we find Quebec courts stating that, "Every Court of limited jurisdiction must be subject to control, for where there is no control there can be no limited jurisdiction",[7] and citing English decisions on two questions which are still with us: the kind of administrative authorities to which certiorari will lie; and the effect to be given to terms of administrative finality.[8]

There is a legislative reference to the supervisory jurisdiction prior to 1849 in an ordinance of the Governor General and Special Council passed in 1840,[9] which provided that the new Court of

[5] (1793), 34 Geo. III, c. 6.

[6] *Groenvelt* v. *Burwell* (1700), 1 Ld. Raym 454, at p. 469. Jaffe & Henderson, Judicial Review and the Rule of Law: Historical Origins (1956), 72 L.Q. Rev. 345.

[7] *Hamilton* v. *Fraser*, Stuart's Reports, p. 21. (A decision of the Court of King's Bench in 1811 allowing a prohibition against the Court of Vice Admiralty.)

[8] *King* v. *Gingras*, Stuart's Reports, p. 560. (A decision of the Provincial Court of Appeals in 1833 allowing certiorari against commissioners for the erection of churches.)

[9] Ord. 4 Vic., c. 45, s. 39 (1840), Ordinances of the Governor General and Special Council (Fifth Session), vol. 5, p. 448. See also Ord. 4 Vic., c. 1, s. 6 (Sixth Session of the Special Council), which directed that cases involving writs of certiorari, mandamus and quo warranto should be transferred from the court of King's Bench in the several districts of the

Queen's Bench, to be established under the terms of the ordinance as a court with appellate jurisdiction in civil matters, would exercise the same supervisory jurisdiction as the English Court of Queen's Bench and have the same power to issue writs of mandamus, certiorari, procedendo, prohibition, quo warranto and error as the courts of King's Bench in England and the several districts of Lower Canada had at the time. Although this ordinance was never put into effect and was finally repealed in 1842,[10] it is of historical interest because its terms obviously served as a model for those who drafted the provision which eventually became article 50 C.C.P., and they may be regarded as declaratory of the supervisory jurisdiction which was exercised by the Court of King's Bench in the several districts of the province when that jurisdiction was expressly conferred on the present Superior Court by the statute which established it in 1849.[11]

As originally worded, the provision which eventually became article 50 C.C.P. conferred on the Superior Court the same supervisory jurisdiction as the courts of Queen's Bench in the several districts of the province had exercised immediately before their abolition, which, as we have seen, was one patterned on that of the English Court of Queen's Bench. It may be presumed therefore that the intention in enacting the provision was not to make any change in the nature of the supervisory jurisdiction, but to indicate the court that should henceforth exercise it. This was probably felt particularly necessary to avoid any uncertainty which might result from the former association of the supervisory jurisdiction with courts bearing the title of "Queen's Bench", one of them being a court of appeal, for along with the Superior Court the present court of Queen's Bench was established in 1849 with appellate jurisdiction in civil matters and an original and appellate jurisdiction in criminal matters.

On the other hand it was not to be expected that the supervisory jurisdiction of the Superior Court should be tied indefinitely to that which was exercised by the courts of Queen's Bench in 1849. By another statute of the same year[12] the prerogative writs were

province to the new Court of Queen's Bench as soon as the ordinance establishing it was put into force.

[10] 6 Vic., c. 13. The changing conditions of its coming into force may be traced through Ord. 4 Vic., c. 45, s. 65; 4 Vic. c. 1, s. 9 and 4 Vic., c. 19, s. 10, ordinances of the sixth session of the Special Council, and 4-5 Vic., c. 20, s. 93. No proclamation for bringing the ordinance into effect was ever issued. This ordinance has often been referred to, and legal arguments drawn from its terms, as if it went into effect and the new Court of Queen's Bench had actually been established.

[11] 12 Vic., c. 38, s. 7.

[12] 12 Vic., c. 41.

given a statutory basis in the local law. Provision was made in varying degrees of detail for certiorari, prohibition, mandamus and scire facias, proceedings in the nature of quo warranto, and, under the eighth section of the statute, special proceedings to be taken by the Attorney-General where persons illegally acted as a corporation, or where any "Corporation, Public Body or Board" violated the provisions of the law governing it or exercised any franchise or privilege not conferred on it by law. In the consolidation of the statutes of Lower Canada in 1861 the reference to the former courts of Queen's Bench in the original provision conferring the supervisory jurisdiction on the Superior Court was replaced by the controversial words "in such sort, manner and form as by law provided". In the form which the provision assumed in this consolidation (there were other alterations of wording which are not of concern here) it passed down through the successive revised statutes[13] with occasional changes in wording that were for the most part unimportant until it became section 36 of the Courts of Justice Act in the revised statutes of 1941. Meanwhile the statutory provisions governing the extraordinary remedies had been incorporated, with certain modifications, into the first Code of Civil Procedure of 1861, and with further modifications had been included in the revised Code of Civil Procedure of 1897.

It was in the revision of 1897 that the present article 50 first appeared in the Code of Civil Procedure among preliminary provisions dealing with the jurisdiction of the courts. Presumably it was placed there for the convenience of judges and lawyers. In any event it was an almost exact reproduction of the first paragraph of article 2329 of the revised statutes of 1888. Although our law contained this duplication until 1952, after the enactment of article 50 C.C.P. reference was rarely made to the corresponding provision in the revised statutes.[14] It became the practice to cite article 50 C.C.P. as the statutory basis of the court's supervisory jurisdiction. Following a decision of the Superior Court in 1952 in which it was held that the privative clause in the Labour Relations Act excluding the application of article 50 C.C.P. did not affect the corresponding provision in the first paragraph of section 36 of

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[13] C.S.L.C. 78, s. 4; R.S.Q., 1888, art. 2329; R.S.Q., 1909, art. 3085; R.S.Q., 1925, c. 145, s. 36; R.S.Q., 1941, c. 15, s. 36.

[14] For one of the last references before 1952 see *Piché* v. *La Corp. du Comté de Portneuf* (1900), 17 S.C. 589 (C.R.). See also *Dame Rose Mercier* v. *Plamandon* (1901), 20 S.C. 288; *Zimmerman* v. *Burwash* (1906), 29 S.C. 250; *Cournoyer* v. *Corp. de Richelieu* (1915), 21 R. de J. 212 (S.C.).

the Courts of Justice Act,[15] the latter provision was repealed.[16] Although there remains a dangling reference to the supervisory jurisdiction of the Superior Court in the last paragraph of what is now left of this section, it is extremely doubtful that in its truncated form the section can have any further bearing on the questions being considered in this article, and for purposes of this study it is presumed that it can not. Article 50 C.C.P. is therefore the logical place to make any further legislative change affecting the supervisory jurisdiction of the Superior Court.

When the amendment to article 50 added the words "the jurisdiction resulting from this article", it did not attach a significance to the provision contained in this article that the courts had not already ascribed to it. On the whole it has been treated since 1849 as the basis of the Superior Court's supervisory jurisdiction.[17] Undoubtedly if the provision had not been enacted the Superior Court would have assumed such jurisdiction as an inherent or common-law one, but despite the odd statement suggesting the contrary,[18] the provision is not a mere reference to a common-law jurisdiction or simply the declaration of a general principle such as the Rule of Law, although it may certainly be regarded as embodying this principle. Its specific terms have frequently been invoked by the courts to justify particular exercises of the supervisory jurisdiction which they might have had greater difficulty in justifying if the provision had not existed. They have been used, for example, to justify the direct action in nullity as a means of attacking the illegal acts of municipal corporations and other administrative authorities and on certain occasions the judgments of inferior courts.[19] Indeed the direct action is now generally referred to as the recourse of article 50 C.C.P.[20] The particular terms of the

[15] *Canadian Copper Refiners Limited* v. *Labour Relations Board of the Province of Quebec & Oil Workers International Union*, [1952] S.C. 295.

[16] 1952-53, 1-2 Eliz. c. 29, s. 1.

[17] See Mignault J. in *La Ville St. Michel* v. *Shannon Realties Limited* (1922), 64 S.C.R. 240, at pp. 458-459; Lord Shaw in the Privy Council decision in the same case, [1924] A.C. 185, at p. 194, speaking of the "superintending and reforming power, order and control of the Superior Court under art. 50 of the Code of Civil Procedure."

[18] See Cross J. in *Laberge* v. *La Cité de Montréal* (1918), 27 K.B. 1, at pp. 7-8. Cf. *Canadian Copper Refiners Limited* v. *Labour Relations Board of the Province of Quebec & Oil Workers International Union, ante*, footnote 15, at p. 306 (Choquette J.).

[19] *Zimmerman* v. *Burwash, ante*, footnote 14; *Riberdy* v. *Tremblay* (1918), 27 K.B. 385; *The Shannon Realties Ltd.* v. *Les Commissaires d'Ecoles pour la Municipalité de St. Bernardin de Montreal* (1922), 24 P.R. 305, (1926), 40 K.B. 245; *Lamontagne* v. *Rivard* (1929), 67 S.C. 351, (1929), 47 K.B. 259.

[20] *La Ville de la Tuque* v. *Desbiens* (1921), 30 K.B. 20, per Lamothe C.J. at p. 21.

article have been invoked to justify the exercise of the supervisory jurisdiction by means of prohibition or certiorari over the Circuit Court,[21] the Magistrates' Court[22] and courts and judges exercising jurisdiction in penal and criminal matters.[23]

Although there is an occasional statement in the cases from which one might draw a different conclusion,[24] the supervisory jurisdiction is not exercised in virtue of article 48 C.C.P. which sets forth the general original jurisdiction of the Superior Court, but in virtue of article 50 C.C.P. Since it applies to institutions and persons empowered to exercise jurisdiction or lawful authority over others, the supervisory jurisdiction is of an exceptional nature, midway between the ordinary original jurisdiction and an appellate jurisdiction, and it is logical that it should be given separate treatment in the law.

Nor do the special provisions elsewhere in the Code of Civil Procedure which regulate the extraordinary remedies, prescribing not only their procedure, but the cases in which they lie, afford a separate or independent basis for the exercise of that jurisdiction. They merely determine the proceedings by which it may be invoked and exercised in particular circumstances, as well as the scope of review in such cases. The right of the Superior Court to entertain such proceedings results from the jurisdiction conferred on it by article 50 C.C.P. It is true, of course, as has been pointed out, that the terms of article 50 C.C.P., the general basis of jurisdiction, must not be used to extend the scope of review which has been laid down by the special provisions governing a particular remedy.[25]

Probably because of the manner in which it has been particularly associated with the direct action in nullity, article 50 C.C.P. is sometimes spoken of as if it conferred a jurisdiction which is supplementary to one existing by virtue of the particular provisions governing the extraordinary remedies, but this view, if it has ever been entertained, is a wrong one. It is a view which could

[21] *Robillard* v. *Blanchet* (1901), 19 S.C. 383 (Andrews J.), but Cf. *Stanimir* v. *Slobodzian* (1940), 43 P.R. 85 (S.C. Fortier J.).

[22] *Desormeaux* v. *Corporation de Ste. Thérése* (1910), 19 K.B. 481; *Lynch* v. *Poisson*, [1955] S.C. 20 (Challies J.); but Cf. *Hough* v. *l'Honourable judge J-E Cadotte & Crompt*, [1955] P.R. 390 (S.C. Brossard J.).

[23] *Drolet* v. *Desriviéres* (1926), 64 S.C. 87 (Gibsone J.); *Dame Bartha Boucher* v. *J. E. Magnan et la Corporation Municipale du Village de Pointe-Calumet*, [1957] P.R. 90 (Brossard J.).

[24] Cross J. in *Laberge* v. *La Cité de Montréal, ante*, footnote 18; *Beaudry* v. *Le Club St. Antoine* (1900), 6 R.L. n.s. 224 (S.C.).

[25] *Segal* v. *City of Montreal*, [1931] S.C.R. 460, per Anglin J. at pp. 462-463. Cf. *Montreal Street Railway Co.* v. *The Board of Conciliation and Investigation* (1913), 44 S.C. 350 (C.R.).

conceivably be fostered by the form of the standard privative clause in Quebec,[26] which, after expressly barring recourse by the extraordinary remedies, excludes the application of article 50 C.C.P. The specific reference to the extraordinary remedies is necessary because of the judicial statements that they can only be taken away by express words, and the reference to article 50 C.C.P. was probably added to the privative clauses to cover the case of the direct action in nullity and to block any other avenues of escape, but it does not follow from this that the article deals only with the supervisory jurisdiction as exercised through the direct action in nullity.

The purpose of the recent amendment seems to be to limit or qualify the supervisory jurisdiction at its source. Since the supervisory jurisdiction is exercised in virtue of article 50 C.C.P., and the courts have in the past invoked the broad terms of that article to justify particular exercises of the jurisdiction, it is not unreasonable to assume, as a matter of statutory interpretation at least (without considering for the moment any possible question of constitutionality), that they should be bound by any limitations introduced into the article.

Before discussing the implications of the three main changes of wording effected by the amendment, it is proposed that we should consider for a moment an apparent limitation which has been in this legislative provision since 1861 in the form of the words "in such manner and form as by law provided." Such difference of opinion as there has been as to the proper interpretation of article 50 C.C.P. has turned mainly around the significance of these words and, in particular, the right to invoke the supervisory jurisdiction by a direct action in nullity.

At the outset it is probably well to make the point that despite the extent to which the general jurisdiction and procedure have been codified, there is a common law of judicial control in Quebec which continues to be an important source of principles and rules. The supervisory jurisdiction of the Superior Court is part of the public law of Quebec, and as Quebec judges have often pointed

[26] For instance, the one in the Quebec Labour Relations Act, R.S.Q., 1941, c. 162A, as amended by 1952-53, 1-2 Eliz., c. 15: "Notwithstanding any legislative provision inconsistent herewith, a. the decisions of the Board shall be without appeal and cannot be revised by the courts; b. no writ of *quo warranto*, of *mandamus*, of *certiorari*, of prohibition or injunction shall be issued against the Board or against the members thereof acting in their official capacity; c. the provisions of article 50 of the Code of Civil Procedure shall not apply to the Board, or to its members acting in their official capacity." With minor variations this clause is the one that is always used now.

out,[27] in the absence of a statutory provision governing a particular point,[28] or a settled Quebec jurisprudence to which the courts may conveniently turn, it is proper to apply the common-law principles found in the decisions of English courts and those of the other provinces, the latter often being more applicable because of the peculiarities of the Canadian constitution. In so far as the rule of *stare decisis* may not apply in strict theory in Quebec[29] (though generally adhered to in practice), judicial decisions may not be considered to be "law" in the sense that they are not rules binding on the courts; but they are in this field a source of legal principles which the courts may legitimately apply. An attempt has been made above to show how at one time in Quebec practically the whole of the law of judicial control was common law, and this must be understood to mean not merely the decisions of English courts, but those of Quebec courts as well, although as would be expected, in the early years, when there was not yet a considerable body of Quebec jurisprudence, the courts relied heavily on English decisions. Even after the enactment of the statute of 1849 on procedure, a good deal was left to be determined by the common law.[30] That this is still true under the Code of Civil Procedure is indicated by its article 1307, which refers to "all other cases in which the writ of certiorari will lie, and against any other inferior court not referred to by Article 1292. . . ". These other cases and other inferior courts must be determined by judicial decisions,[31] and the writ which issues in such cases is sometimes called the "common-law" writ, although it is subject to the same procedure as the writ which lies in virtue of article 1292 to certain specified inferior courts. In the same way the courts must determine

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[27] *La Corporation du Comté d'Arthabaska* v. *Patoine* (1886), 9 L.N. 82, per Ramsay J. at p. 84 (Q.B.); *Mathieu* v. *Wentworth* (1899), 15 S.C. 504 (Lemieux J.); *Silverberg* v. *Caron*, [1951] S.C. 131, at p. 135 (Tyndale A.C.J.); *Lynch* v. *Poisson*, *ante*, footnote 22.

[28] See *Bastien* v. *Amyot* (1906), 15 K.B. 22, per Lacoste J., at p. 42; *Drolet* v. *Desrivières*, *ante*, footnote 23, at p. 100 (Gibsone J.); *Vaillancourt* v. *City of Hull & A.-G. of Quebec*, [1949] K.B. 680, per Barclay J. at p. 685.

[29] *Bellefleur* v. *Lavallée*, [1957] R.L. 193, per Bissonnette J., at pp. 204-205 (C.A.). Cf. Friedmann, Stare Decisis at Common Law and under the Civil Code of Quebec (1953), 31 Can. Bar Rev. 723.

[30] In addition to certain specific cases mandamus was to lie "in all cases in which a writ of mandamus will lie and may be legally issued in England." Certiorari and prohibition were to be applied for in the same manner as mandamus, but otherwise the procedure and cases in which they would lie were left to be determined by the common law.

[31] For recent applications of art. 1307 C.C.P. see *Lynch* v. *Poisson*, *ante*, footnote 22; *Dame Bartha Boucher* v. *J.-E. Magnan et la Corporation Municipale du Village de Pointe-Calumet*, *ante*, footnote 23.

the other bodies exercising judicial or quasi-judicial powers to which the writ of prohibition is applied by an extensive construction of the words "court of inferior jurisdiction" in article 1003 C.C.P. It is possible to view the direct action in nullity as having been provided by the common law of judicial control. While there is no provision of law which expressly creates the right, there is none which expressly denies it, and the courts have felt justified in allowing it because of the broad jurisdiction which they are entitled to assert in virtue of article 50 C.C.P. Whether this is a sound rationale of the admission of this remedy into the Quebec system of judicial control can only be judged in the light of the relevant texts of law and the cases.

For some time after the establishment of the Superior Court it appears to have been assumed that the remedies provided by the statute 12 Vic. c. 41 were the only ones by which its supervisory jurisdiction could be directly invoked. In two of the early cases, proceedings to have municipal by-laws declared null and void were taken by the Attorney-General under the eighth section of that statute.[32] In the case of *McDougall* v. *Corporation of St. Ephrem d'Upton*,[33] which must be considered to be one of the landmarks in Quebec *jurisprudence*, because it appears to have been largely responsible for opening the way for the direct action in nullity as an administrative-law remedy, the plaintiff attacked an illegal attempt by the municipal corporation to sell his land by means of an ordinary action in which he concluded for a declaration that the proceedings were illegal, an order in the nature of injunction, and damages. The contention that the only way of invoking the supervisory jurisdiction over municipal corporations was in accordance with the provisions of the statute 12 Vic. c. 41 was maintained by the Superior Court and the action dismissed. This judgment was reversed in appeal, and the reasoning which seems to have been implicit in the Court of Appeal's decision is that since the Superior Court had been given a supervisory jurisdiction over municipal corporations by the broad terms of section 7 of the

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[32] *A.-G.* v. *County of Two Mountains* (1855), 5 L.C.R. 155 (S.C.); *A.-G.* v. *County of Shefford* (1855), 5 L.C.R. 200 (S.C.). The last such reported case, taken under arts. 997 *et seq.* of the Code of Civil Procédure of 1867, appears to have been *Irvine* v. *Ville d'Iberville* (1874), 6 R.L. 241, cited by Faribault, L'Article 40, C.P.C., et les Procedures Municipales (1925-26), 4 R. du D. 582, at p. 591. For later opinion that this was still a proper remedy against acts of municipal corporations where the public interest was involved: *Hunt* v. *Corporation of Quebec* (1878), 4 Q.L.R. 275 (S.C.); *Robertson* v. *City of Montreal* (1915-16), 52 S.C.R. 30.

[33] (1861), 5 L.C.J. 229, 11 L.C.R. 353 (Q.B.).

statute 12 Vic. c. 38, there must be a suitable means available to a plaintiff for invoking that jurisdiction. Proceedings depending upon the intervention of the Attorney-General did not afford an adequate remedy, at least in the particular circumstances.[34] Moreover, as was argued by the plaintiff, certiorari and prohibition, although they have been used against municipal authorities on a number of occasions, do not afford an adequate remedy against the majority of municipal acts which are of a legislative or administrative rather than a judicial or quasi-judicial nature.[35] Mandamus and quo warranto are only suitable in certain rather narrow circumstances.

Although this case, in view of the conclusions of the plaintiff's action (declaration, restraining order and damages), all of which were granted, did not present in its pure form the issue of whether a private individual had the right to proceed against a municipal corporation by an ordinary action for a declaration of *ultra vires* or nullity, it was subsequently cited as a precedent on this point.[36] It may be that the admission of the direct action in nullity into Quebec law was facilitated to some extent by the fact that in some of the early cases the conclusion for a declaration was combined with a demand for consequential relief.[37] In such cases it would appear as the ordinary and logical manner of proceeding for one whose rights were affected by an illegal act. Indeed there was no other way of obtaining damages. Be that as it may, after the *McDougall* case the courts never looked back, and within a very few years the direct action in nullity had become the accepted means of attacking the *ultra vires* by-laws and other acts of municipal corporations before the enforcement stage. In time it came to be recognized as a recourse against the decisions of school

[34] Since under the terms of arts. 978 C.C.P. and following these proceedings lie ". . . Whenever any corporation, public body, or board, violates any of the provisions of the acts by which it is governed . . . or exercises any power . . . which does not belong to it or is not conferred upon it by law", and may now be taken by any person interested in his own name, they are probably a suitable means of invoking the supervisory jurisdiction over administrative bodies, though in practice they are not used as such.

[35] For an early case which may be said to have foreshadowed the use of the direct action in municipal affairs, because of the uncertainty surrounding the application of certiorari, see *Beaudry* v. *The Mayor, Aldermen and Citizens of Montreal* (1856), 6 L.C.R. 328 (CA), (1858), 8 L.C.R. 104 (P.C.).

[36] *Hunt* v. *Corporation of Quebec*, *ante*, footnote 32.

[37] See *Corp. de Ste. Anne du Bout de l'Isle* v. *Reburn* (1885), M.L.R., 1 Q.B. 200, 4 D.C.A. 192 in which damages were refused; *La Corporation du Comté d'Arthabaska* v. *Patoine*, *ante*, footnote 27, 12 Q.L.R. 57, 4 D.C.A. 364 in which nominal damages were allowed. Cf. Borchard, Declaratory Judgments (2nd ed., 1941), p. 348.

commissioners[38] and parochial authorities,[39] as well as those of a variety of other administrative authorities and domestic tribunals.[40] In several cases in recent years the courts have recognized it as a means of attacking the decisions of the Labour Relations Board.[41] On a few occasions it has been held to lie against the judgments of courts subject to the supervisory jurisdiction.[42] But as a recourse against judgments (particularly those of the Superior Court itself, where it is not an aspect of the supervisory jurisdiction and appears to be allowed now when the plaintiff is within the conditions for one of the remedies especially provided by the Code of Civil Procedure, as a harmless alternative form of proceeding that preexisted the Code as a common-law remedy and was not abolished by it),[43] the direct action in nullity has never gained as firm a footing as it has in administrative law. In fact, most of the criticism of it appears to have been directed to its use against judgments, and it is this criticism which seems to have prompted one commentator to say in 1939: "Any attempt to build a system of judicial control on this action would, therefore, be building on sand".[44] Since then, however, the direct action in nullity has steadily increased in importance as an administrative-law remedy.

It is a little late in the day now to question the antecedents of a recourse that has behind it a *jurisprudence* of almost one hundred years. In one of the early cases it was referred to as "the right at

[38] See footnote 68, *post*. In such cases the courts have often emphasized that the direct action must not be used to obtain an appeal, *Les Commissaires d'Ecoles de St. Adelphe* v. *Charest*, [1944] S.C.R. 391, but its relation to the special appeal to the Magistrate Court under sections 508 *et seq.* of the Education Act gives rise to problems similar to those which exist under the Municipal Law. *Deblois* v. *Commissaires d'Ecoles de Beauceville*, [1953] Q.B. 576. *Laviolette* v. *Les Commissaires d'Ecoles de Saint-Jean l'Evangeliste*, [1956] R.L. 215.

[39] *Riverside Mfg. Co. Ltd. & Catelli Food Products Co. Ltd.* v. *Curé & Marguilliers... St. Francois d'Assise*, [1944] K.B. 153 revg., [1942] S.C. 369.

[40] *Payment* v. *Academie de Musique de Quebec* (1935), 59 K.B. 121, reversed by the Supreme Court on another point, [1936] S.C.R. 323; *Boismenu* v. *Syndicat des Maitres-Barbiers* (1940), 43 P.R. 345; *Collège des Pharmaciens* v. *Cloutier*, [1949] K.B. 121.

[41] *Canadian Copper Refiners Limited* v. *Labour Relations Board of the Province of Quebec and Oil Workers International Union, ante*, footnote 15; *Gagnon et al* v. *Labour Relations Board of the Province of Quebec and Warden King Ltd., and International Moulders and Foundry Workers Union*, S.C.Q. No. 66, 499 rendered by Savard J. on June 6, 1953. *Cousins Dairy Employees Assoc.* v. *La Commission de Relations Ouvriéres de la Province de Quebec and Ernest Cousins Limited*, [1957] S.C. 97.

[42] *Ante*, footnote 20.

[43] *Jacques* v. *Paré* (1939), 66 K.B. 542, revg. (1939), 77 S.C. 261; *Lamarche* v. *Cardin*, [1949] Que. S.C. 384; *Maranda-Desaulniers* v. *Peckham et al & Debaron Realties Ltd.*, [1953] Q.B. 163.

[44] Humphrey, Judicial Control Over Administrative Action, With Special Refence to the Province of Quebec (1939), 5 Can. J. Econ. & Pol. Sc. 417, at p. 427.

common law",[45] and this expression seems to have been used in the English sense and not as the French "recours de droit commun",[46] which, as applied to the direct action in nullity, appears for the most part to have been used in the continental sense to distinguish a recourse of the general procedural law in the Code of Civil Procedure from the special recourses to quash that exist under municipal law. That the right to attack the acts of municipal corporations by a direct action in nullity was a creation of the *jurisprudence* or the common law of judicial control appears to be as good a rationale as any of its existence. The problem, of course, has been to reconcile the direct action with the words "in such manner and form as by law provided." Those who have taken what may be called the strict view of article 50 C.C.P.[47] have contended in effect, laying particular stress on the history of the supervisory jurisdiction in Quebec, that these words limit the jurisdiction to that which can be effectively exercised by means of the remedies especially provided for the purpose in the Code of Civil Procedure or in particular statutes. The courts have tended rather to see in the opening words of the article a requirement that they should exercise an effective supervisory jurisdiction over municipal corporations, and to take the view that since they always have the right to pronounce the nullity of municipal acts in enforcement proceedings, there is no reason why they should not do so at an earlier stage in a direct action.[48]

After article 50 C.C.P. was enacted it became the practice to refer to the direct action as the recourse of article 50 or as it is sometimes put, the recourse in virtue of, or authorized by article 50. Although, as was pointed out on one occasion, it is inaccurate to speak of article 50 C.C.P. as if it expressly creates recourses or rights of action,[49] this manner of referring to the direct action in nullity appears to have been an expression of the sense in which the courts have felt justified in allowing it because of the broad

[45] *Hunt* v. *Corporation of Quebec, ante*, footnote 32, at p. 277.

[46] *La Ville de la Tuque* v. *Desbiens, ante*, footnote 20, at p. 24.

[47] Beaudry J. in *Ouimet* v. *Gray* (1871), 15 L.C.J. 306; Brodeur J. in *La Ville St. Michel* v. *Shannon Realties, ante*, footnote 17, at p. 449; Bruneau, De l'Article 50 du Code de Procedure Comme Moyen de se Pourvoir Contre les Jugements (1924-25), 3 R. du D. 403, Un arrêt erroné de la Cour d'appel (1925-26), 4 R. du D. 75; *Shannon Realties Ltd.* v. *Les Commissaires d'Ecoles pour la Municipalité de St. Bernardin* (1922), 24 P.R. 305; Humphrey, *op. cit., ante*, footnote 44 at pp. 427-428; See unpublished notes of Marchand J. in *Lefrancois* v. *La Corporation de la Paroisse de Saint-Didace*, K.B.M. No. 2528, Oct. 14, 1944. The formal judgment of the court is reported at [1945] K.B. 197.

[48] Cf. Dorion J. in *Corporation de la Riviére du Gouffre* v. *Larouche* (1925), 39 K.B. 267, at pp. 275-276.

[49] Cross J. in *Laberge* v. *La Cité de Montréal, ante*, footnote 18.

terms of the article. Perhaps it has been the instinct of judges trained in the civil law to see the general principle rather than the procedural interstices from which the law of judicial control has grown. It is not possible here to go into the extent to which such provisions in the Code of Civil Procedure as articles 3,76 and 117 may provide a statutory basis for the direct action in nullity. In the final analysis it seems better to concede that while the right to have the *ultra vires* acts of municipal corporations and other administrative authorities set aside may be inferred from the terms of article 50 C.C.P., the right to do so by direct action is the creation of the *jurisprudence* in a developing law of judicial control. Although the word "law" in article 50 C.C.P., as translated by the French "la loi", would in a civil-law context indicate legislation, it seems reasonable in view of the nature and history of the supervisory jurisdiction in Quebec to give it the broader interpretation to include the Quebec common law of judicial control.

It is one thing, however, to argue that a direct action should lie where there is no other adequate means of invoking the supervisory jurisdiction, another thing to allow it where there is a suitable remedy specially provided by law. Here at least, one might expect the words "in such manner and form as by law provided" to have some restrictive effect. The relation of the direct action in nullity to other recourses arose soon after its early recognition as a means of attacking the acts of municipal corporations, when special proceedings to quash such acts on the ground of "illegality" were provided by the Municipal Code and the Cities and Towns Act. These were designed to be more expeditious and less expensive remedies for complainants, and in the interest of security in municipal affairs they had to be taken within a delay of three months. In the case of municipalities governed by the Code they were to be taken in the Circuit or Magistrate's Court; in the case of those governed by the Cities and Towns Act the special recourse was for many years by petition in the Superior Court. Today, in both cases, it lies to the Magistrate's Court. From the very beginning the Superior Court maintained that the existence of the special statutory recourses did not exclude the right to bring a direct action in nullity beyond the three months delay in appropriate cases. From 1897 to 1925 the Municipal Code contained an express reservation of the right to do so (an early statutory recognition of the direct action in nullity), and since 1925 such a reservation has existed in the Cities and Towns Act for acts other than by-laws. The cases in which a direct action would lie despite the existence

of the special recourses came to be defined very broadly as those involving absolute nullities as opposed to the relative nullities which would be covered by failure to take the special recourse within the prescribed delay.[50] The celebrated decision of the Privy council in *Shannon Realties Limited* v. *Ville de St. Michel*[51] contained general statements about the importance of not allowing complainants to by-pass the special recourses established in the interest of security in municipal affairs which, taken out of the context of the particular facts of that case, appear to lend strong support to the view that the special proceedings to quash provided by the Municipal Code and Cities and Towns Act should bar recourse by the direct action, when that remedy has not been expressly reserved by law. The Privy Council refused to allow a direct action under article 50 C.C.P. to set aside a valuation roll for excessive over-valuation on the ground that the plaintiffs should have availed themselves of the "remedy expressly given and prohibitively fenced" under the Cities and Towns Act. The remedy referred to was the special appeal from a valuation roll to the municipal council and from the council to the Circuit Court, and not the petition to quash in the Superior Court. Their Lordships did not deny that in certain cases of fraud a direct action might lie to the Superior Court, but even here they expressed reservations.

Although the decision in this case has been the subject of much comment, and a certain respect is still paid to some of the dicta in it because of the importance of the general issue of policy which they emphasize, it has not had much of an apparent effect on the Quebec *jurisprudence*. In two decisions rendered immediately after it, the Supreme Court of Canada did not much to set at rest the initial fears that the Privy Council had repudiated the previous *jurisprudence*. In the first of these cases[52] the Court held that the *Shannon Realties* decision did not apply to a case where under the provisions of the Municipal Code the direct action had been expressly reserved; in the second,[53] the court held that it did not apply to a case of *ultra vires*, such as the assessment of property which was non-assessable. In 1925 the express reservation of the right to take a direct action under article 50 C.C.P. was removed from the Municipal Code but inserted in the Cities and Towns Act for acts of municipal corporations other than by-laws. The courts do not appear to have attached any particular significance

[50] *La Ville de la Tuque* v. *Desbiens*, *ante*, footnote 20.
[51] [1924] A.C. 185, (1929), 47 K.B. 416 (P.C.).
[52] *Coté* v. *County of Drummond*, [1924] S.C.R. 186.
[53] *Donohue* v. *St. Etienne de la Malbaie*, [1924] S.C.R. 511.

to these changes; they continued to hold that a direct action would lie beyond the delays for taking the special recourse in cases which they deemed to fall within a very broad and somewhat vague definition of their scope of review on this remedy: "dans le cas d'incompétence, ou excès de pouvoir de la part d'une corporation, dans le cas de fraude, et aussi, lorsqu' une violation de la loi ou un abus de pouvoir équivalant à fraude a pour résultat une injustice flagrante".[54] Nevertheless, the judgment in the *Shannon Realties* case did bring home to the courts the seriousness of allowing the acts of municipal corporations (particularly valuation rolls on which the financial stability of a municipality depends) to be exposed to attack by the direct action for as long as thirty years, which is the only prescriptive period applicable to this remedy.[55] The judgment may well have induced a certain strictness in the application of the criteria for allowing a direct action, for there have been many cases in which the courts have held that the complaint revealed at most the kind of "illegality" which would justify the special recourse, but not the action under art. 50 C.C.P. Moreover, since the Privy Council decision there have been intimations in both the Supreme Court [56] and the provincial Court of Appeal[57] that in particular circumstances the delay in bringing a direct action may very properly be one of the factors influencing the exercise of that wide discretion which the courts have given themselves by the manner in which they have defined their scope of review on this remedy.

The approach which the courts have adopted on this whole question appears to have been a sound one. Where there has been an express reservation of the right to bring the direct action there has obviously been no problem, except to determine the cases in which it will lie and the interest which a plaintiff must have to bring it. Where there has been no such reservation, but the recourse has been to a court other than the Superior Court, the words "in such manner and form as by law provided" have had no application. Where, moreover, such a court was one whose members were appointed by the provincial government, which is the case under both the Municipal Code and Cities and Towns Act today, there appears to have been good constitutional reasons, to which further reference will be made in a later section of this article, for not

[54] *Roy* v. *Corp. d'Aubert Gallion* (1929), 46 K.B. 15, per Rivard J. at pp. 29-30. For a complete review of the authorities see Hyde J. in *Bergeron* v. *St. Charles de Mandeville*, [1953] Q.B. 558.

[55] *Coté* v. *County of Drummond*, *ante*, footnote 52.

[56] *Ibid.*, at pp. 188 and 191.

[57] *Bergeron* v. *St. Charles de Mandeville*, *ante*, footnote 54, at p. 566.

recognizing a transfer of a portion of the supervisory jurisdiction from the Superior Court to such a tribunal. Although, as has been said in cases involving the special recourse by petition to quash in the Superior Court which formerly existed under the Cities and Towns Act, a case of *ultra vires* is necessarily an "illegality",[58] it is very doubtful under the present state of the law whether a Magistrate's Court should have any jurisdiction whatever to entertain an action to quash on grounds which would justify a direct action in the Superior Court. It is less easy, in view of the words "in such manner and form as by law provided", to find satisfactory reasons for the *jurisprudence* which continued to allow the direct action beyond the three months delay although the special recourse was by petition to quash in the Superior Court and the right to take the direct action was not expressly reserved. The reasoning in such cases would seem to be that the correction of excesses of jurisdiction and frauds by municipal authorities is so much a matter of public order that it must always be open to an interested person to bring an action for this purpose.

How should the words "in such manner and form as by law provided" be applied to other administrative authorities, in cases, for example, where it could be argued that certiorari would be an appropriate remedy? The availability of certiorari has been made a ground in the common-law provinces for denying the right to attack administrative proceedings by an ordinary action,[59] although other grounds have been relied on as well, such as the non-suability of a particular administrative authority.[60] In England there is precedent for allowing an administrative decision to be reviewed by declaratory action despite the existence of certiorari,[61] and although the case of *Barnard & others* v. *National Dock Labour Board*[62] may not be conclusive on this point because of its particular circumstances, the weight of opinion seems to conclude from the present case law that while the declaratory action is a discretionary remedy, the availability of certiorari is not a ground for refusing it.[63]

[58] *Dechéne* v. *City of Montreal*, [1894] A.C. 640, at p. 643; *Trudeau* v. *Devost*, [1942] S.C.R. 257, at p. 265.

[59] *Credit Foncier-Franco-Canadien* v. *Court of Review*, [1940] 1 D.L.R. 182; *Hollinger Bus Lines Ltd.* v. *Ontario Labour Relations Board*, [1952] 3 D.L.R. 162, [1952] O.R. 366, [1951] O.R. 562.

[60] *Hollinger Bus Lines, supra*; *Retail, Wholesale and Department Store Union, Local 580* v. *Baldwin*, [1953] 4 D.L.R. 735.

[61] *Cooper* v. *Wilson*, [1937] 2 K.B. 309.

[62] *Ante*, footnote 1.

[63] Griffith & Street, Principles of Administrative Law, p. 234; Glanville Williams, Crown Proceedings (1948), p. 93; Schwartz, Forms of Review Action in English Administrative Law (1956), 56 Col. L. Rev. 203, at p. 217, note 66. Cf. Borrie, The Advantages of the Declaratory Judgment in Administrative Law (1955), 18 Mod. L. Rev. 138, at p. 146; Allen, (1956), 72 L.Q. Rev. 28; Wade, (1957) Camb. L.J. 6.

The relation of the direct action in nullity to certiorari in administrative-law cases has never been expressly dealt with in Quebec. The question was raised by one judge of the Court of Appeal in a case involving an administrative tribunal but was left unanswered.[64] From the cases in which the direct action in nullity has been recognized as a means of attacking decisions of the Labour Relations Board one must conclude that it is now allowed as an alternative to certiorari. Of course, it could always be argued, if somewhat inconsistently, that in such cases certiorari has been taken away by the privative clause, but so has the direct action in nullity by the paragraph barring the application of article 50 C.C.P. In the present state of uncertainty surrounding the type of administrative function to which certiorari is applicable — an uncertainty which if anything has increased in recent years as a result of certain English decisions[65] — it would be very unsatisfactory to make the availability of this remedy a ground for denying the direct action against an administrative authority. Moreover, in Quebec the courts are not likely to do so for the same reason that has encouraged resort to prohibition rather than certiorari as a remedy after the judgment of an inferior court or the decision of an administrative tribunal, namely, that like prohibition, the direct action in nullity carries a right of appeal which certiorari does not. (Sometimes, of course, a plaintiff may prefer the absence of an appeal, and perhaps for this reason certiorari is still resorted to fairly often in cases involving inferior courts).

Where, however, the law has provided an assured recourse in the Superior Court for the particular case, the words "in such manner and form as by law provided" should have the effect of excluding recourse by the extraordinary remedies and the direct action. The recent judgment of the Court of Appeal in *Commission des Accidents du Travail* v. *Forbes Dubé Lumber Ltd.*[66] dismissing a direct action against a decision of the Workmen's Compensation Commission on the ground that the proper means of attacking such a decision in the Superior Court is to contest the petition for its homologation appears to be a justifiable application of the terms of article 50 C.C.P. Admittedly, it may be a little hard on the first person to raise the issue since the answer in this case is not as ob-

[64] Bissonnette J. in *Collége des Pharmaciens* v. *Cloutier, ante*, footnote 40, at p. 130.

[65] See Schwartz, *op. cit., ante*, footnote 63, at pp. 207 *et seq.*

[66] [1955] Q.B. 573. The judgment of the Court of Appeal was subsequently questioned by the judge whose decision had been reversed, in *Workmen's Compensation Commission* v. *Dubé Lumber*, [1956] S.C. 353, at pp. 355-356.

vious as where a direct statutory appeal to the Superior Court has been provided from the decisions of a particular administrative authority. It must obviously be open to the legislature to bar recourse by the extraordinary remedies and the direct action by providing a special statutory recourse to a superior court, and this includes another superior court like the Court of Appeal, to which a special appeal has been given in several cases in Quebec.[67] (The legislative attitude on the subject of judicial control has not been an entirely negative one as the preoccupation with privative clauses might suggest). In fact, the provision of a special appeal to a superior court, subject to certain protective limitations, is probably the only way in which the purpose behind privative clauses can in some measure be realized.

For cases where, for one reason or another, it is not deemed advisable to provide a statutory appeal from the decisions of an administrative authority, the present system of remedies should be completely replaced by one simple, comprehensive recourse. This would be less a radical innovation or reform than a legislative recognition of the way in which the courts have allowed the procedural law to develop in recent years. This development seems to point logically to a reform that will replace the present system consisting of the extraordinary remedies and the direct action, a system full of anomalies, illogical differences and archaic peculiarities with resulting uncertainty, injustice and at times abuse of process, by one simple, summary recourse to the Superior Court in which it is possible to obtain a declaration of *ultra vires* or nullity and appropriate coercive relief in the form of a mandatory or restraining order where that is deemed necessary. (It is probably desirable that in such cases there should be no appeal from the judgments of the Superior Court except by leave).

That this reform would answer practical needs is suggested by the way in which the demand for a declaration of *ultra vires* or nullity is now combined in practice with a demand for coercive relief, not only in an ordinary action when occasionally combined with injunction,[68] but when grafted on to the extraordinary remed-

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[67] See, for example, the Transportation Board Act. R.S.Q., 1941, c. 16 (as enacted by 1949, 13 Geo. VI., c. 21), ss. 48 *et seq.*

[68] *Commissaires d'Ecoles de la Municipalité de St. Jean Baptiste* v. *Meunier et al.*, [1954] Q.B. 30; *Trahan* v. *Cloutier*, [1954] Q.B. 785; See also *Saumur* v. *City of Québec and A.-G. of Quebec*, [1953] 4 D.L.R. 641, at p. 728 and *Cousins Dairy Employees Assoc.* v. *La Commission de Relations Ouvrières de la Province de Québec and Ernest Cousins Limited*, *ante*, footnote 41, in which the judgments contained a restraining order in addition to a declaration.

ies of mandamus[69] and prohibition. In many of these cases what is principally sought is to quash an administrative decision; the mandatory or restraining order, although it characterizes the proceedings, is ancillary and follows as a matter of course. Sometimes it has little object; in any event it should not be necessary as a general rule against administrative authorities. Since the decision of the Supreme Court of Canada in *L'Alliance des Professeurs catholiques de Montréal* v. *Labour Relations Board of the Province of Quebec and the Montreal Catholic School Commission*,[70] where a majority of the court declined to grant the union's request for prohibition, but maintained the proceedings for a declaration that the decertification order of the Labour Relations Board was *ultra vires*, prohibition appears to have become the most popular means of attacking the decisions of inferior tribunals.[71] It is difficult to say how much resistance is left in the Court of Appeal among those judges who in recent years have opposed what they have felt to be the gradual usurpation of the functions of certiorari by prohibition, whether used before or after judgment,[72] but in a recent case the court gave notice that however unimportant may have become the technical requirement that there be something further to prohibit, they were not going to allow a complainant to ignore the demand for an order in the nature of prohibition altogether, as the petitioner in this case had done.[73] Thus prohibition promises to assume in Quebec administrative law, at least for functions that can be characterized as judicial or quasi-judicial, a relative importance comparable to that which injunction has acquired as a means of obtaining a declaration in American law, with a similar

[69] *Bouchard* v. *Cité de Longueuil*, [1942] S.C. 303; *City of Verdun* v. *Sun Oil Co. Ltd.*, [1952] 1 S.C.R. 222, confirming [1951] K.B. 320. Cf. *Regina ex rel. F. W. Woolworth Company Limited* v. *Labour Relations Board* (1954), 13 W.W.R. 1.

[70] [1953] 2 S.C.R. 140. See the author's comment (1953), 31 Can. Bar Rev. 821.

[71] *Lalonde* v. *Commission Conjointe des Coiffeurs*, [1953] Q.B. 499; *Gagnon* v. *Le Barreau de Montréal*, [1954] Q.B. 621; *Miron et Frères Limitée* v. *La Commission de Relations Ouvrières de Québec*, [1956] S.C. 389; *L'Alliance des Professeurs Catholiques de Montréal* v. *Commission de Relations Ouvrières de Québec*, [1954] S.C. 465; [1955] P.R. 36 (Choquette J.); *John Murdock Limitée* v. *La Commission de Relations Ouvrières de Québec*, [1956] S.C. 30; [1956] R.L. 257; *Dionne* v. *The Municipal Court of the City of Montréal*, [1956] S.C. 289; *La Commission de Relations Ouvrières de la Province de Québec* v. *The E. B. Eddy Company et al.*, [1956] Q.B. 306.

[72] Not only has there been criticism of the joinder of a conclusion for a declaration of *ultra vires* or nullity but also of the allowance of prohibition on the ground that a statute or by-law is *ultra vires*. Several articles have been written in recent years in *La Revue du Barreau* on the last point, particularly with respect to the jurisdiction of an inferior tribunal to consider this question of *ultra vires*.

[73] *Gagnon* v. *Le Barreau de Montreal, ante*, footnote 71.

tendency on the part of the courts to minimize the technical criteria for the issue of the writ. While the direct action does not depend on the nature of the functions being performed by an administrative authority, and if it lies against one type of authority it should logically lie against another,[74] prohibition has certain distinct advantages over it at the present time. It is subject to summary delays, has precedence over other cases in appeal and entitles the petitioner to a temporary order of *sursis* at the time of the issue of the initiating writ of summons.[75] The function of certiorari in bringing the record before the court can be achieved by a motion for production of documents.[76]

The least that can be said in fairness to those judges who in recent years have had serious misgivings about the use to which prohibition was being put in order to obtain a right of appeal is that the situation calls for some legislative clarification. The proposal of the committee for revision of the Code of Civil Procedure that the writ of prohibition be abolished and a right of appeal be given on certiorari would have the merit in administrative-law cases of putting an end to what is becoming an abuse of process, in paralysing administrative proceedings before they have had a chance to function and to make that contribution which by their very nature they are often able to make to the adjustment of differences when the parties are not yet locked in more expensive and ritualistic forms of legal combat. But the proposal does not go far enough for purposes of administrative law. While certiorari with a right of appeal may be adequate for the control of inferior courts of justice where the problem of classifying functions does not arise and a case may be evoked by certiorari before judgment, what is needed in administrative law as pointed out above, is to replace the existing remedies by a single form of proceeding. Moreover, it should be possible in such a proceeding not only to have

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[74] There are indications that the non-suability of an authority by an ordinary action, which has been made a ground for denying it in the common-law provinces, would probably not meet with the same success in Quebec. The point was raised against a direct action in *Syndicat des Employes du Service Exterieur de la Cité de Quebec*, [1951] P.R. 85 (Boulanger J.), where the Quebec Municipal Commission, although not declared to be a corporation, was held to be suable. The terms of Article 50 C.C.P. (See the French version making "corps politiques" as well as "corporations" subject to the supervisory jurisdiction) might be invoked on this point.

[75] *L'Alliance des Professeurs* v. *Commission de Relations Ouvrières*, *ante*, footnote 71. For a description of the procedure on prohibition in Quebec see Casey J. in *Levesque* v. *Benoit*, [1952] K.B. 430, at pp. 434 *et seq.*

[76] *La Commission de Relations Ouvriéres de la Province de Quebec* v. *The E. B. Eddy Company et al.*, *ante*, footnote 71.

administrative acts of all kinds set aside with ancillary coercive relief if that is deemed necessary, but to obtain declaratory rulings in the early stages of a dispute where the prompt clarification of a legal question can often prevent the emergence of bitterness and deadlock, with consequent paralysis of the administrative process and great social loss such as that occasioned by some recent labour disputes.

Under the present system, is there any basis in Quebec law for the development of the declaratory judgment as a public-law remedy? Two issues must be distinguished here: the general right of the courts to grant declaratory judgments without consequential relief in appropriate cases, and the legal interest which a plaintiff must have to entitle him to such a judgment. The Quebec law provides for the procedure of the joint case whereby persons who are in agreement upon the facts may submit a question of law to the courts for decision,[77] but there is no general provision of law expressly authorizing declaratory judgments such as is found in Order XXV, rule 5 of the Supreme Court Rules of 1883 and the rules of court, judicature acts or declaratory judgment statutes which have adopted this provision in the common-law provinces and the United States. The opinion has been expressed that because of the lack of a similar provision in Quebec there is probably no right to grant such judgments,[78] but an eminent American authority in this field has said that "the power granted by declaratory judgment statutes is more strictly a direction to use an existing power than an authorization of new power",[79] and many continental writers have taken the view that even though there is no express authorization,[80] as long as there is no express prohibition,[81] the

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[77] Art. 509, C.C.P.

[78] Humphrey, *op. cit., ante*, footnote 44, at p. 428.

[79] Borchard, *op cit., ante*, footnote 37, at p. 238, citing Bankes L.J. in *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1915] 2 K.B. 536, at p. 568. *Cf.* McRuer C.J. in *Gruen Watch Company of Can. Ltd.* v. *A.-G. of Can.*, [1950] O.R. 429, at pp. 444-445.

[80] Borchard, *op. cit., ante*, footnote 37, at p. 113, expresses the opinion that art. 77 C.C.P. requiring that a person have an interest to bring an action, even though it may be "merely eventual", "authorizes a wide range of declaratory actions."

[81] Does art. 541 C.C.P., which provides that "Every Judgment must be susceptible of execution", prohibit declaratory judgments? See *Rousseau* v. *Commissaires d'Ecoles de la paroisse de St. Michel de Mistassini* (1938), 65 K.B. 200. These words were not in the draft code of 1866, but were added afterwards, and there is no explanation of them. They would seem to mean, not that every judgment must order the defendant to do something, but that every judgment which does so must be susceptible of execution. Cf. *The Montreal Harbour Commissioners* v. *The Record Foundry & Machine Company* (1910), 38 S.C. 161, 21 K.B. 241, at p. 247.

courts should not hesitate to grant such judgments in cases in which they feel there is a sufficient legal interest.[82]

Declaratory judgments have been granted in a number of civil-law cases in Quebec, most of them cases of landlord and tenant involving the determination of rights under a lease,[83] though occasionally other types of contract have been involved.[84] There is one judgment of the Court of Appeal[85] which could be interpreted as a denial of the right to obtain a declaratory judgment in Quebec, and this appears to have been the way it has been interpreted by some,[86] but it is possible also to regard it as simply a finding that the particular circumstances of the case did not disclose a sufficient interest in the plaintiff. In view of subsequent pronouncements in the Court of Appeal, particularly those of Bissonnette J., who has often affirmed the right to bring an action *ad futurum*, as it is called, this seems to be the better interpretation of the case.

In the field of public law the direct action in nullity would seem to have prepared the way for a development of the declaratory judgment. Since the judgment on a direct action always contains a declaration of ultra vires or nullity and deals with a case of absolute nullity, this recourse bears a strong resemblance to a declaratory action,[87] although it is technically a proceeding to quash or annul, more like the French *recours en annulation pour excès de pouvoir* than an action for a mere declaration.[88] The case of *Saumur* v. *Quebec*,[89] however, is an instance of a direct action which resulted in a declaratory judgment in the strict sense. Since the majority of the Supreme Court could not agree that the by-

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[82] Borchard, *op. cit. ante*, footnote 37, at pp. 113, 114, 120-121.

[83] *Belisle* v. *Labranche* (1917), 51 S.C. 289 (C.R.); *Briard* v. *Choquette* (1923), 61 S.C. 332. *Robert* v. *Demontigny*, [1947] S.C. 282; *Larouche* v. *Bellehumeur*, [1956] P.R. 262; *Dugas* v. *Mastelak*, [1957] Q.B. 72. See also statements by Bissonnette J. in *Alexander Furs Ltd.*, v. *Sadosky*, [1947] K.B. 53, at p. 55, and *Baril* v. *Bolduc*, [1952] K.B. 611, at p. 620.

[84] *Laliberté* v. *Jean* (1934), 72 S.C. 438; *Hyde* v. *Webster & La Communauté des Soeurs de la Charité de l'Hopital Général* (1914-15), 50 S.C.R. 295; *Town of Coaticook* v. *Hopkins*, [1949] S.C.R. viii, [1947] K.B. 78. (See unreported notes of Bissonnette J., K.B.M., No. 2960, December 20, 1946.)

[85] *La Corporation du Village de la Malbaie* v. *Warren* (1924), 36 K.B. 70.

[86] Martin, The Declaratory Judgment (1931), 9 Can. Bar Rev. 540, at p. 545. *Cf. Rochefort* v. *Godbout*, [1948] S.C. 310.

[87] See *Henry Birks & Sons et al.* v. *Montreal*, [1955] S.C.R. 799 revg. [1954] Q.B. 679, revg. [1952] S.C. 380, [1952] 4 D.L.R. 245.

[88] Under both the Municipal Code and the Cities and Towns Act by-laws remain in force until amended, repealed, disallowed or "annulled" by competent authority. The judgment does not merely have the force of *chose jugée* between the parties, although sometimes a municipal act such as a valuation roll may be annulled only in so far as it affects the plaintiff.

[89] [1953] 4 D.L.R. 641, at p. 728. The Supreme Court of Canada has power under its own rules to grant declaratory judgments.

law should be set aside as *ultra vires*, the formal judgment of the court contained a declaration that it did not prevent the plaintiff from carrying on certain activity.

An action was recently brought in Quebec against the Attorney-General of the province for a declaration that a statute was *ultra vires* and an order enjoining him from enforcing it against the plaintiffs.[90] The Attorney-General took an exception to the form, claiming that he was improperly impleaded and that the plaintiffs should have proceeded by petition of right. The exception to the form was maintained by the Superior Court against the conclusion for an injunction, the court invoking article 87a C.C.P. which bars injunction against provincial Ministers of the Crown, but was dismissed for the rest. Here the court cited *Dyson* v. *Attorney-General*[91] and *Greenless* v. *Attorney-General*[92] and held that the provisions of the Quebec Code of Civil Procedure governing petition of right did not apply to a declaration of the kind which was being sought. The court stated, however, that it was not pronouncing on whether a declaratory action of this kind was admissible in law. The judgment of the Superior Court was confirmed in appeal. Gagné J., one of the three judges who heard the appeal, also pointed out that he was not expressing an opinion as to whether such an action was permissible in Quebec. Martineau J. held that in the absence of a statutory provision rendering them inapplicable, the English and Canadian decisions reviewed in *Gruen Watch Company Ltd.* v. *Attorney-General*,[93] recognizing the right of a person with a sufficient interest to bring a declaratory action against an attorney-general, should be followed in Quebec. But since the issue on the exception to the form was whether the plaintiffs ought to have proceeded by petition of right, his remarks too must be interpreted as having been directed to this particular point. It remains to be seen whether the courts, when faced directly with the question, will take the view that a sufficient reason for not maintaining such actions in Quebec is the absence of an express authorization such as is found in the rules of court or judicature acts of common-law jurisdictions, or whether in view of the extent to which the Quebec *jurisprudence* appears to have laid the foundation for an enlarged

[90] *Procureur Général de la Province de Québec* v. *Saumur*, [1956] Q.B. 565, (1956), 5 D.L.R. (2d) 190, affg. [1956] P.R. 331. See *R.* v. *Central Rly. Signal Co.*, [1933] S.C.R. 585, at 568, where Duff C.J. spoke as if the right to bring such an action in Quebec was open to discussion.

[91] [1911] 1 K.B. 410.

[92] [1945] O.R. 411; [1945] 2 D.L.R. 641.

[93] *Ante*, footnote 79. Revd. *Sub. nom. Bulova Watch Co.* v. *A.-G. Can.*, [1951] 3 D.L.R. 18, O.R. 360.

recognition of the declaratory action, they will allow the issue to turn in particular cases on the question of interest. If the latter, it is not to be expected that they will take as broad a view of the requirement of interest, where statutes are concerned, as the Quebec courts have taken on the whole with regard to the direct action against the acts of municipal corporations.[94]

II. *The removal of the words "judges and magistrates and all other persons"*

With the substitution of the words "the courts within the jurisdiction of the Legislature of Quebec and bodies politic and corporate within the province" for the former "all courts, judges and magistrates and all other persons and bodies politic and corporate within the province", the description of those who are subject to the supervisory jurisdiction loses some of the comprehensiveness which has been one of the outstanding features of the provision since it was enacted in 1849, and one which on many occasions appears to have had an important influence on the application which the courts have felt justified in giving to article 50 C.C.P. One can only speculate as to the purpose behind the removal of the words "judges and magistrates and all other persons" and as to the effect, if any, which it is likely to have on the judicial interpretation of the article. It is difficult to speak of either with any degree of confidence. Was the intention simply to remove what was considered to be unnecessary verbiage?[95] Or was the intention actually to remove certain persons from the supervisory jurisdiction?

The words "within the jurisdiction of the Legislature of Quebec" do not appear to add anything to the existing state of the law, because it has always been held that federal courts are not subject

[94] Despite the holding of the Supreme Court of Canada in *Robertson* v. *City of Montreal*, *ante*, footnote 32, requiring a special interest distinct from that of the other ratepayers generally, subsequent Quebec *jurisprudence*, although there has remained considerable difference of opinion over the years, has tended on the whole to regard the status of ratepayer as sufficient, so that the direct action could be truly called in one case *l'action populaire* (*Ville de la Tuque* v. *Desbiens*, *ante*, footnote 20). See *St. Saveur-des-Monts* v. *Hebert*, [1947] K.B. 581.

[95] This was presumably the case with the change in the description of the court's jurisdiction from "the superintending and reforming power, order and control" to "The supervision and reforming power". The courts have never attached any special importance to the particular words in the original description, other than the general one that it is a supervisory as opposed to an appellate jurisdiction. The character of the jurisdiction remains sufficiently indicated by the new wording. The absence of the strong words "order and control" should not influence the courts to exercise a less vigorous supervisory jurisdiction than they have hitherto done.

to the supervisory jurisdiction of the Superior Court,[96] although federal administrative authorities within the province are.[97] The addition of these words might, however, be held by the courts to remove all doubt on a question that has been a controverted one in Quebec, whether the supervisory jurisdiction of the Superior Court applies to provincial courts only when exercising a civil jurisdiction, or whether it applies as well to such courts in penal and criminal matters.[98] On the other hand, did the importance which a Superior Court judge attached to the words "judges and magistrates" in a case involving this question have any bearing on their removal from article 50 C.C.P.[99] On one occasion the broad terms of the former article were invoked to support the exercise of the supervisory jurisdiction over a judge acting as a *persona designata*,[100] where he would clearly not be a court within the jurisdiction of the legislature of the province. But it is likely that in such cases the courts, when they feel that it is appropriate to exercise jurisdiction,[101] will continue to hold that such a judge is an inferior tribunal for purposes of prohibition and certiorari, without attaching too much significance to the apparently restricted terms of article 50 C.C.P. Of course, the courts may end up by giving the word "courts" in the new article 50 C.C.P. the same broad construction that they have given to the word "court" in article 1003 C.C.P. concerning prohibition, but in the context of article 50 C.C.P., with the words "bodies politic and corporate" following it, they are probably forced to give the word "court" a strict interpretation.

Was the removal of the word "persons" intended to remove individual public officers who fall neither into the category of courts within the jurisdiction of the legislature of the province nor into that of public bodies and corporations[102] from the supervisory jurisdiction? Notwithstanding what has been said about the rela-

[96] *Gaynor* v. *Lafontaine* (1905), 14 K.B. 99.

[97] *Ouimet* v. *Gray*, *ante*, footnote 47; *Montreal Street Railway Co.* v. *The Board of Conciliation and Investigation*, *ante*, footnote 25.

[98] See *ante*, footnote 23. The courts have sometimes assimilated a provincial court administering federal law to a federal court, *Lafleur* v. *La Cour du Recorder et la Cite de Montréal* (1925), 63 S.C. 128, at p. 134.

[99] *Levesque* v. *Dubé*, [1948] R.L. 367, at pp. 370-371.

[100] *Plante* v. *Forest & Cormier* (1936), 61 K.B. 8, at pp. 20-21. Flld. in *Poulin* v. *Casgrain*, [1950] P.R. 91.

[101] Despite the decisions in the preceding note the courts have on the whole declined to exercise the supervisory jurisdiction over Superior Court judges acting as *persona designata*. *Gagnon* v. *Savard & Bergeron* (1939), 77 S.C. 529. *Silverberg* v. *Caron*, [1951] S.C. 131; *Levesque* v. *Benoit*, [1952] K.B. 430.

[102] Note this distinction in the French version "les corps politiques et les corporations".

tion of the special provisions governing the extraordinary remedies to article 50 C.C.P., in view of the continued existence of such remedies as quo warranto, mandamus, habeas corpus and injunction, which clearly apply to individuals, the courts can be expected to hold that no such intention can be presumed from the removal of the word "persons" in the article. And where, as with members of a council of arbitration, there is a privative clause purporting to immunize individuals against the supervisory jurisdiction, the courts can always argue from the existence of such a clause that the individuals are deemed to be otherwise subject to the jurisdiction.[103] Nor is the removal of this word likely to have any effect on that most important exercise of the supervisory jurisdiction over public officers through the ordinary action in damages. It is possible, however, that the absence of the word "persons" in article 50 C.C.P. might one day prove an embarrassment in trying to take a direct action for a declaration of ultra vires or nullity against the acts of a public officer, a remedy of potential convenience because it is not covered by the terms of article 87a C.C.P. But in such a case the courts would probably adopt a position that they have taken with respect to privative clauses: it is not to be presumed that it was the intention of the legislature by removing this word to make it possible for public officers to exceed their lawful authority with impunity. As always in these matters, the result will depend very much on whether in the particular case the court wishes to intervene or not. Whether any reduction in the supervisory jurisdiction which the Superior Court has hitherto exercised in virtue of the provision in article 50 C.C.P. can be ignored on constitutional grounds is left to a consideration of the constitutionality of privative clauses generally.

III. ". . . *save in matters declared by law to be of the exclusive competency of such courts* . . ."

In so far as these words purport to remove the supervisory jurisdiction over inferior courts in matters of their regular, original jurisdiction, it is obviously open to the superior courts to adopt an approach similar to that which they have adopted towards privative clauses generally, namely, that these words apply only where the inferior court is in fact acting within its competency. On the other hand, judicial opinion in recent years has not been uniform as to whether the Magistrates' Court should be subject to the supervisory jurisdiction, and the addition of these words,

[103] *Lynch* v. *Poisson*, *ante*, footnote 22, at p. 23.

reinforcing the privative clause in favour of the Magistrates' Court in article 1149a C.C.P., may be seized on as additional support for the view that it should not. In so far as these words refer to provisions of law which purport to confer an exclusive *supervisory* jurisdiction on courts whose members are appointed by the provincial government, the approach of statutory interpretation which is presently applied to privative clauses does not appear to have any application, and the issue must be handled as one of constitutionality.

At Confederation, the Circuit Court, which had originally been established in 1843, appears to have been a court of the kind contemplated by section 96 of the British North America Act. If it was not strictly speaking a superior court, nor even as a federal Minister of Justice once called it, "in one sense a branch of superior court",[104] it was of sufficient importance to be classified as one of the other courts within section 96. It was presided over by Superior Court judges and had with the Superior Court a concurrent supervisory jurisdiction by means of certiorari over Commissioners' Courts and Justices of the Peace, which together with Recorders' Courts were clearly not courts within the meaning of section 96 of the B.N.A. Act. In 1869, an act of the provincial legislature provided for the appointment by the Lieutenent-Governor in Council of district magistrates with a mixed jurisdiction that was quite limited in civil matters except for certain cases where there was no quantitative limitation. The jurisdiction of district magistrates was gradually increased both quantitatively and qualitatively. The federal government allowed the acts of 1869, 1870 and 1871 to go into operation, and for this reason the federal Minister of Justice recommended that the Act of 1874 not be disallowed, although he said he had "grave doubts as to the constitutionality of this Act."[105] There were further amendments in 1875, 1876, 1878 and 1885. In 1876, the provincial Court of Appeal held that a "district magistrate" was not a district judge within the meaning of section 96 of the B.N.A. Act.[106] (If names mean anything, those who preside over the Magistrate's Court are now called "District Judges"). Then in 1888, an act which provided for the abolition of the Circuit Court in the District of Montreal, and

[104] Hodgins, Dominion and Provincial Legislation (1867-1895), p. 356. Cf. decisions in note 21 as to whether Circuit Court was subject to the supervisory jurisdiction.

[105] *Ibid.*, p. 260.

[106] *Regina* v. *Horner*, Cartwright's Cases on the B.N.A. Act (1883), vol. II, p. 317. This case cannot, however, be said to contain a very thorough analysis of the question.

its replacement by a District Magistrates' Court of Montreal whose members should be appointed by the provincial government, was disallowed by the federal authorities.[107] A similar statute in 1889, except for the provision concerning the abolition of the Circuit Court in the District of Montreal, was also disallowed by the federal government.[108] A Magistrate's Court for the District of Montreal continued to function until 1893, when it was abolished and the Circuit Court sitting in the district of Montreal was replaced by a "Circuit Court of the District of Montreal". The District Magistrate's Court was reorganized in 1922 with substantially the same jurisdiction as the Circuit Court, and provision was made, except in the district of Montreal, for the automatic suspension of the Circuit Court's jurisdiction in any district or county in which a Magistrate's Court had been established to the extent that such jurisdiction could be exercised by the Magistrate's Court. In 1945, this provision was made applicable to the District of Montreal, when a Magistrate's Court was established there. In 1953, the provisions of law governing the Circuit Court were repealed and the process of clothing the Magistrate's Court with all its jurisdiction and powers was completed. Today the Magistrate's Court has a greater jurisdiction than the Circuit Court ever had. Since 1889, however, there has been no further disallowance of provincial legislation affecting the Magistrate's Court, although what was unsuccessfully attempted in 1888 and 1889 for one judicial district has now been achieved for all.

The concern of this article is not with the ordinary civil jurisdiction of the Magistrate's Court in the light of sections 96 and following of the B.N.A. Act, but with those provisions of law, most of them enacted in recent years, which purport to transfer the supervisory jurisdiction in certain areas from the Superior Court to the Magistrate's Court. The supervisory jurisdiction by means of certiorari over Commissioners Courts and Justices of the Peace, which the Circuit Court exercised concurrently with the Superior Court, has been given exclusively to the Magistrate's Court.[109] A recent Superior Court decision held that this exclusive jurisdiction only applied to Justices of the Peace when exercising civil jurisdiction but it did not consider the question of constitu-

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[107] Hodgins, *op. cit., ante*, footnote 104, at pp. 345 *et seq.*

[108] *Ibid.*, p. 430. The citations for much of the legislation up to 1949 which is referred to in the text of this article may be found in Nantel, Cour de Magistrat de District et Court de Circuit (1949), 9 R. du B. 241.

[109] Art. 56 C.C.P.

tional validity.[110] Of course, it is still open to the Superior Court to control these inferior courts by prohibition, but this does not make the jurisdiction given to the Magistrate's Court a valid one. The Magistrate's Court has been given an exclusive jurisdiction over all actions to annul valuation rolls of immovables which are taxable for municipal or school purposes.[111] Whereas the Superior Court formerly had exclusive original jurisdiction in cases of petition of right, the Magistrate's Court now has exclusive jurisdiction in such cases when the sum claimed or the value of the thing demanded is less than two hundred dollars. None of these grants of jurisdiction may appear to be very important in itself, but they indicate a trend which calls for some comment.

There are few areas of Canadian constitutional and administrative law in which it is more difficult to speak with any degree of certainty than that which involves the interpretation and application of article 96 of the B.N.A. Act, which provides that "The Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia".[112] It may be easy enough to formulate the theoretical test for determining whether a particular piece of jurisdiction can be validly exercised by judges appointed by the province, but its application in particular cases is often very much a matter of rule-of-thumb. In the judgment of Duff C.J. in *Reference re Adoption Act, etc.*,[113] a judgment which received the highest approval of the Privy Council in *John East Iron Works*,[114] there are remarks which go very far (indeed much farther than was necessary for the decision of the case) in their recognition of the right of a provincial legislature gradually to increase the jurisdiction of a non-section 96 court which was in existence at the time of Confederation. But without in any way reflecting on these general remarks of Duff C.J. subsequent decisions appear to have taken a stricter view of the application of section 96 than these

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[110] *Dame Bartha Boucher* v. *J. E. Magnan et la Corporation Municipale du Village de Pointe-Calumet*, *ante*, footnote 23.

[111] Art. 57 C.C.P. See also art. 430 Municipal Code.

[112] See Willis, Section 96 of the British North America Act (1940), 18 Can. Bar Rev. 517; Shumiatcher, Section 96 of the British North America Act Re-examined (1949), 27 Can. Bar Rev. 131; Laskin, Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case (1955), 33 Can. Bar Rev. 993; Lederman, The Independence of the Judiciary (concluded) (1956), 34 Can. Bar Rev. 1139, at pp. 1158 ff.

[113] [1938] S.C.R. 71.

[114] *Labour Relations Board* v. *John East Iron Works Ltd.*, [1949] A.C. 134, at p. 152.

remarks might have led some to hope for.[115] The recent decisions only serve to reinforce what appears to be obvious, that supervisory (and appellate) jurisdiction is typical superior court jurisdiction, and because of its importance under the Canadian constitution is probably, of all superior court jurisdiction, that which makes the safeguards of judicial independence found in sections 96 and following of the B.N.A. Act of the most obvious importance. Surely if these provisions have any application they must prevent the gradual transfer of the supervisory jurisdiction of superior courts to tribunals presided over by provincially appointed judges. On any test, historical or otherwise, it is submitted that the provisions of Quebec law referred to above, which purport to confer an exclusive supervisory jurisdiction in certain cases on the Magistrate's Court are *ultra vires* of the provincial legislature. Indeed the jurisdiction which the Magistrate's Court has been given over actions to quash for "illegality" under both the Municipal Code and the Cities and Towns Act is itself highly questionable, and the least one can say is that the Superior Court has been on sound constitutional ground in refusing to allow its supervisory jurisdiction to be ousted by it.

For similar reasons a statutory appeal such as that which has been given by the recent Newsprint Act[116] from decisions of the Newsprint Board to a special tribunal composed of three district judges, whose appointment is provincial, cannot exclude the supervisory jurisdiction of the Superior Court. In the light of the majority judgment of the Supreme Court of Canada in *Toronto* v. *Olympia Edward Recreation Club Ltd.* and the decision of the Ontario Court of Appeal in *Inglis* v. *A. E. Dupont*[117] it might even be argued that the jurisdiction of such a tribunal should extend only to questions of fact, in so far as these can be separated from questions of jurisdiction and law.[118]

The provision of an appeal on the facts to a tribunal appointed by the province can, however, be a very worthwhile and desirable

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[115] *Quance* v. *Thomas A. Ivey & Sons Ltd.*, [1950] 3 D.L.R. 656, O.R. 397; *Toronto* v. *Olympia Edward Recreation Club Ltd.*, [1955] 3 D.L.R. 641; S.C.R. 454; *Inglis* v. *A. E. Dupont* (1957), 8 D.L.R. (2d) 193 (Ont. C.A.), revg. (1957), 8 D.L.R. (2d) 26.

[116] 1955-56, 4-5 Eliz. II, c. 26, s. 18. The part of the Act which provides for the Newsprint Board and contains this section has not yet been put into force by proclamation. Apart from the limitation commented upon in the text, the appeal provided in this case has several good features.

[117] *Ante*, footnote 115.

[118] For an excellent recent statement of the fact-law-jurisdiction distinction in application, see Pennington, Judicial Review of Administrative Action on the Merits (1954-55), 1 Br. J. Admin. Law 111.

thing in particular cases, especially if it is complemented by a simple and speedy manner of obtaining final decisions on questions of jurisdiction and law from the superior courts. It is probably safe to say that what the average citizen desires most often in the way of recourse from administrative acts is a simple appeal on the facts to an independent tribunal rather than a protracted and expensive battle in the courts, often involving narrow questions of legal technicality quite remote from the general merits of the case. It would not appear to be practical, however, to establish a general administrative appeal tribunal to hear appeals on fact from all administrative tribunals. Such appeals are better handled on an *ad hoc* basis in the manner which appears most appropriate to each case. For questions of jurisdiction and law, if there seems to be no other way to remedy the major defects of the present system of judicial control, attributable in large measure to unwieldly procedure and congestion in the courts, both of which could be urged in justification of some of the recent transfers of jurisdiction, there would appear to be no reason why the province, if it so desired, should not be able to establish an administrative court of general jurisdiction, as long as the appointment of its judges is left to the federal authorities. But a special division of the Superior Court to hear appeals on questions of law as well as jurisdiction, where that is deemed advisable, and to handle other cases by a simplified procedure such as that which has been suggested above, should be sufficient.

IV. "*. . . save in cases where the jurisdiction resulting from this article is excluded by some provision of a general or special law . . .*"

These words refer, of course, to privative clauses, and the obvious comment on them is that they may be expected to have no effect in practice, because, when confronted by a particular privative clause, the courts can continue to hold, applying the present interpretation of such clauses, that it does not in fact exclude the jurisdiction resulting from article 50 C.C.P. To appreciate whether they can do so with any show of consistency and logic it is necessary to recall briefly the approach which Canadian courts in general and Quebec courts in particular have adopted towards such clauses.

The basic approach to privative clauses has so far been one of statutory interpretation. As yet no court has made the ground of its decision an explicit assertion that they are unconstitutional. The approach of statutory interpretation based on presumed legislative intention is well stated by Rand J. in *Toronto Newspaper*

Guild v. *Globe Printing Co.*,[119] now the leading Canadian decision on privative clauses: "In the absence of a clear expression to the contrary," it is not to be presumed that "the legislature intended to authorize the tribunal to act as it pleased, subject only to legislative supervision"; and "The acquiescence of the legislatures, particularly during the past fifty years, in the rejection by the courts of such a view confirms the interpretation which has consistently been given to the privative clause". This presumption of legislative intention results not only from the fact that the inferior tribunal has been given a circumscribed or limited authority by statute, but from the generally recognized importance which judicial control has assumed in our political system. It has been argued that merely because the legislature bars recourse to the superior courts, it does not follow that the intention is that an administrative authority may do as it pleases.[120] But the courts have taken the practical view that, as it was put as long ago as 1811 in the Quebec case of *Hamilton* v. *Fraser*,[121] "where there is no control there can be no limited jurisdiction."

Quite often, and this is true of some of the other opinions in the *Globe Printing* case, the judges do not even bother to relate their conclusion to presumed legislative intention, but content themselves with the simple assertion that privative clauses cannot have effect when an administrative authority has exceeded or declined its jurisdiction. This assertion can be made with some confidence because of a formula of statutory interpretation, which once accepted as valid, appears to be fool-proof: where there is a want, excess or declining of jurisdiction, the administrative authority does not bring itself within the terms of the statute barring recourse to the courts. Whether this formula is based on some notion savouring of the law of contract, that an administrative authority which does not comply with the statute cannot claim the benefit of it,[122] or whether it is based on the somewhat far-fetched idea "that the 'decision' of the 'Board' is not a 'decision' since it was made without jurisdiction and that the 'Board' is not a 'board' because it acted without jurisdiction",[123] is not too clear and does not much matter so long as legislatures lack the political courage, at least in peace-time, to state in plain, unequivocal language that

[119] *Ante*, footnote 2.
[120] Anderson, (1952), 30 Can. Bar Rev. 933, at p. 936.
[121] *Ante*, footnote 7.
[122] On this view a distinction might be made between a privative clause in a general law, like articles 87a and 1149a C.C.P., and one in the special statute governing a particular authority.
[123] Sutherland (1952), 30 Can. Bar Rev. 69, at pp. 75-76.

there is to be no judicial recourse from an administrative authority even on the ground that it has exceeded its jurisdiction.[124] Although the formula had been used many times before, in the particular form in which it was stated by Martin C.J.S. in *Bruton* v. *Regina City Policemen's Ass'n. Local 155*[125] it has been quoted in many subsequent cases, and it was referred to by Schultz J. of the Manitoba Court of Appeal in the recent case of *Town of Dauphin* v. *Director of Public Welfare and Close*[126] as supporting the conclusion that, "where an inferior court exceeds its jurisdiction nothing Parliament says to the contrary is effective in restricting the power of the superior court to grant *certiorari*." This comes very close to an admission that the present formula of statutory interpretation is nothing more than the disguised assertion of a constitutional principle.

That there is no reason why Quebec courts should not adopt the same approach to privative clauses as other Canadian courts was recently emphasized by Challies J. in the case of *Lynch v. Poisson*.[127] There have been other Superior Court judgments in a similar vein in the last few years, but this one is especially noteworthy because in the course of a detailed review of common-law and Quebec opinion on this question, attention is drawn to a few of the occasions in the past when Quebec judges have expressed the opinion that full effect should be given to such clauses. After stating the result of the common-law decisions to be that, "Privative clauses are not effective and do not prevent a Superior Court from hearing a *certiorari* against a judgment of an inferior tribunal if there is defect or excess of jurisdiction", Challies J. said:

> With great respect for the learned judges who have held to the contrary, I can see no reason why the principles applied in the common law provinces and in England and set forth above should not apply equally to the Province of Quebec where the principles of public law are substantially the same if not identical to the principles of public law in the other nine Canadian provinces. . . . The least that can be said in the Province of Quebec is that a privative clause restricting the recourse to *certiorari* or the other prerogative writs must be so clearly expressed as to leave no doubt that the access to the remedy is denied.

The privative clause probably has as old a history in Quebec

[124] A privative clause in these terms in the federal wartime mobilization regulations was given effect to in *Rex ex rel Sewell* v. *Morrell*, [1944] 3 D.L.R. 710, Roach J. of the Ontario High Court making special reference to the "manifest purpose of the Regulations".

[125] [1945] 3 D.L.R. 437.

[126] (1956-57), 20 W.W.R. 97, at pp. 101-102. See also *Re Ontario Labour Relations Board, Bradley et al* v. *Canadian General Electric Company Ltd.* (1957), 8 D.L.R. (2d) 65, at p. 78.

[127] *Ante*, footnote 22.

as in any other part of Canada. There are several early examples of no certiorari clauses, and from the beginning the Quebec courts appear to have followed English decisions on the interpretation of these clauses. In *Ex parte Mathews*, a decision rendered in 1875,[128] we find Meredith C.J. adopting substantially the same approach as that stated by Martin C.J.S. in the *Bruton* case: "If the Recorder had no jurisdiction in the present case, then he cannot be said to have acted under the statute taking away the writ of certiorari. . . ." Subsequent decisions asserted in the broadest and most emphatic terms that even express words could not take away certiorari where there was excess of jurisdiction.[129] Then a statement by Lord Sumner in *Rex* v. *Nat. Bell Liquors, Ltd.*,[130] persuaded two Quebec judges in the cases of *De Wafer* v. *Perrault*[131] and *Dubé* v. *Lamonde*[132] that they should give effect to the no certiorari clauses in the Quebec Alcoholic Liquor Act and Canada Temperance Act respectively. These decisions may account for the vehemence with which the late R. L. Calder in 1935 attacked the denial of the prerogative writs in the Alcoholic Liquor Act[133] (apparently the first of the modern, comprehensive type of privative clause in Quebec) in his little book entitled *Comment s'éteint la liberté*. He also singled out for censure the enactment of article 87a C.C.P. which bars recourse by injunction, mandamus or other special or provisional measure (which would include prohibition[134] but not, it is said, certiorari)[135] "against the Government of this Province or against any Minister thereof or any officer acting upon the instructions of any such Minister for anything done or omitted or proposed to be done or omitted in the exercise of the duties thereof including the exercise of any authority conferred or purporting to be conferred upon same by any Act of this Legislature." In *Johnson Woolen Mills Ltd.* v. *Southern Canada Power Co. and Sec. of Province*,[136] the Court of Appeal held that this provision barred an injunction against an officer carrying out an investigation under the instructions of the Provincial Secretary, although this result does not pre-

[128] (1875), 1 Q.L.R. 353 (S.C.).
[129] *Mathieu* v. *Wentworth* (1899), 15 S.C. 504 (Lemieux J.); *Demetre* v. *City of Montreal* (1911), 12 P.R. 232 (S.C., Bruneau J.).
[130] *Ante*, footnote 2, at p. 162.
[131] (1923), 61 S.C. 205. [132] (1929), 32 P.R. 151.
[133] 1921, 11 Geo., V c. 24, s. 131. Now R.S.Q., 1941, c. 255, s. 139.
[134] On the theory presumably that a council of arbitration may be considered to consist of officers acting upon the instructions of a minister, this article appears to have been on at least one occasion invoked against the use of prohibition against such a council: *Price Brothers Ltd.* v. *Letarte*, [1953] K.B. 307, at p. 316.
[135] Humphrey, *op. cit.*, *ante*, footnote 44, at p. 427.
[136] [1945] K.B. 134.

sent enough of a contrast, if any, with the common-law rule[137] and statutory provisions elsewhere[138] concerning injunction against the Crown and its servants, to excite much comment. In *McFall* v. *Lafleche*[139] Marier J. of the Quebec Superior Court referred to *Dubé* v. *Lamonde* as representing "a more recent jurisprudence . . . to the effect that when the proper authority has by special law taken away the recourse to certiorari or injunction, etc., effect must be given to that special law." Since then, other Quebec judges have held that full effect should be given to privative clauses,[140] but the majority have followed the approach of the common-law authorities.[141] In this, as we have seen, they have only taken up the position which the Quebec courts originally adopted, long before the modern, comprehensive type of clause was introduced.

Does the amendment to article 50 C.C.P. necessitate any change in the approach which the courts now adopt on this question? Its purpose in relation to privative clauses would appear to be to underline the intention behind such clauses by showing that the legislature does contemplate the possibility of the supervisory jurisdiction resulting from article 50 C.C.P. being excluded. This recalls the argument of Stein J., in *Dubé* v. *Lamonde* from the terms of article 1292 C.C.P., which provides that certiorari will lie to certain inferior courts "unless this remedy is also taken away by

[137] Canadian cases have followed the holding in *Nireaka Tamaki* v. *Baker*, [1901] A.C. 561, at pp. 575-576 that an injunction may in certain circumstances lie against servants of the Crown. *Rattenbury* v. *Land Settlement Board*, [1929] S.C.R. 52, at p. 63; *C.P.R.* v. *A.-G. Sask.*, [1951] 3 D.L.R. 362, at 372 *et seq.*

[138] The Crown Proceedings Act, 1947 (U.K.), s. 21 (1).

[139] [1951] P.R. 378.

[140] St. Jacques J. in *Commission de Relations Ouvrières de la Province* v. *Alliance des Professeurs Catholiques*, [1951] K.B. 752, at p. 769; Jean J. in *Coca Cola Ltée* v. *Ouimet*, S.C.M. No. 312514, judgment rendered May 13, 1952, cited by Beaulieu, Les Conflits de Droit dans les Rapports Collectifs du Travail (1955), p. 401; Bertrand and Marchand JJ. in *Price Bros. & Co. Ltd.* v. *Letarte*, *ante*, footnote 134; Prevost J. in *Cortler* v. *Lamarre*, [1954] S.C. 225. Belleau J. in *Transport Boischatel Limitée* v. *La Commission de Relations Ouvrières de la Province de Québec & Association des Employés du Transport Boischatel.* S.C.Q., judgment rendered June 29, 1956; St. Jaques J. in the Court of Appeal in the same case, [1957] Q.B. 589, at p. 590.

[141] *Canadian Copper Refiners Limited* v. *Labour Relations Board of the Province of Quebec & Oil Workers International Union*, *ante*, footnote 15; *St. Aubin* v. *Courchesne*, S.C.M. No. 318315, Judgment of Montpetit J. on July 24, 1952; Barclay J. in *Price Bros. & Co. Ltd.* v. *Letarte*, *ante*, footnote 134; *La Brique Citadelle Ltée* v. *Gagné*, [1954] S.C. 262 (Dion J.) reversed on another point by the court of appeal, [1955] Q.B. 384; *Lynch* v. *Poisson*, *ante*, footnote 22; *John Murdock Limitée* v. *La Commission de Relations Ouvrières*, *ante*, footnote 71; *Miron & Frères Limitée* v. *La Commission de Relations Ouvrières de la province de Québec*, *Ibid.*; *Gaspé Copper Mines, Limited* v. *Commission de Relations Ouvrières de la Province de Québec et United Steel Workers of America, Local 4881*, S.C.Q. No. 82, 558 rendered by Morin J. on September 24, 1957.

law." Since, said Stein J. this article contemplates that there may exist a law which takes away the right to certiorari, it is not to be wondered at that a judge should give effect to such a law when he is confronted by it. On the other hand, Bruneau J. in the earlier case of *Demetre* v. *City of Montreal*[142] had noted the same words in article 1292 C.C.P., but had held that even the express prohibition of certiorari did not take away this remedy where there was want or excess of jurisdiction, where the court was illegally constituted, or where the conviction had been obtained by fraud. In the same way it could be argued that if the issue is one of legislative intention a sufficiently clear expression of such intention must be deemed to result from the combined effect of the terms of article 50 C.C.P. as amended, which contemplates that the supervisory jurisdiction may be "excluded by some provision of a general or special law", and the concluding paragraph of the standard privative clause, which appears to exclude such jurisdiction by the words "the provisions of article 50 of the Code of Civil Procedure shall not apply to the Board, or to its members acting in their official capacity".[143] Yet the courts can continue to hold, as in all probability they will, that in the absence of more explicit language than this, referring specifically to jurisdictional defects, it cannot be presumed to have been the intention of the legislature to exclude the supervisory jurisdiction when there is a want, excess or declining of jurisdiction. Whether the courts will recognize that the supervisory jurisdiction has been excluded for any purposes (the scope of review on the direct action has been defined in very broad terms that make no pretence of being restricted to the concept of jurisdiction) remains to be seen.

The experience of recent years in Quebec has tended only to confirm the importance of judicial control, despite its present imperfections. Many of the cases have involved violations of natural justice of a fairly blatant kind. Although some self-restraint may reasonably be expected from the courts in the face of privative clauses it is not to be expected that they will draw the line at such

[142] (1911), 12 P.R. 232 (S.C.).

[143] The words "in their official capacity" introduced into the present privative clause by an amendment of 1952 offer an obvious basis for restrictive interpretation, but appear to qualify the members of the Board rather than the Board itself, unlike the words "relating to the exercise of their functions" in the original clauses enacted in 1951. See *L'Association Patronale des Manufacturiers de Chaussures de Quebec & The John Ritchie Co. Ltd.* v. *De Blois & L'Union Protectrice des Travailleurs en Chaussures de Quebec*, [1951] S.C. 453; Barclay J. dissenting in *Price Bros. & Co. Ltd.* v. *Letarte*, *ante*, footnote 134, at p. 324; and *John Murdock Limitée* v. *La Commission de Relations Ouvriéres de la Province de Québec et al.*, *ante*, footnote 71, which appears to have overlooked the amendment.

cases. Quebec courts have not been called upon yet to exercise anything like the extensive reviewing power in the face of privative clauses on questions of jurisdictional fact, error of law and rulings on evidence that has attracted some criticism elsewhere,[144] and the issue of whether a privative clause is to place any limits in fact on the supervisory jurisdiction which would otherwise be exercised has not yet been squarely presented to them. Probably we shall look in vain for any definition from a court of the situations in which it will "abstain from exercising a reviewing power in the face of a privative clause where it would have reviewed in the absence of a privative clause", although error of law on the face of the record,[145] that point at which the supervisory jurisdiction most closely approximates an appellate jurisdiction, would appear to be a logical break-off point[146] that would not involve the courts in the process of trying to unscramble the concept of jurisdiction. For the rest, the most that can probably be expected from the courts is an approach similar to that which appears to have been adopted by Australian courts in the face of strong privative clauses[147] and which seems to be implicit in the test offered by Rand J. in the *Globe Printing* case:[148] *Is the action or decision within any rational compass that can be attributed to the statutory language?* The practical result of this, as suggested by the dissenting judgments of Rand and Cartwright JJ. in this case, can be judicial self-restraint along fairly flexible lines that goes far to satisfy a policy objective underlying privative clauses with which most defenders of judicial control would presumably agree: that apart from clear instances of *ultra vires* in the strict sense, administrative decisions should not be set aside on narrow grounds of technicality but only where there is a real case of injustice.

If the Quebec legislature were to try to force the issue beyond

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[144] Laskin, *op. cit.*, *ante*, footnote 2.

[145] *Rex* v. *Northumberland Compensation Appeal Board*, [1951] 1 K.B. 711, [1952] 1 K.B. 338, [1952] 2 All E.R. 122. Though this case has been followed in the common-law provinces, *Re Marshall-Wells Co. Ltd. and Retail, Wholesale Department Store Union* (1955), 15 W.W.R. 577, [1955] 4 D.L.R. 591 (C.A.) it has not yet been referred to in a reported case in Quebec. Error of law on the face of the record would appear to be excluded by the terms of art. 1293 C.C.P., which lists the grounds for certiorari against inferior courts (Cf. *Wingender* v. *Paquin and the Corporation of the Parish of Ste. Eustache*, [1956] S.C. 9), but there seems to be no reason why it should not be a ground of review with the "common law writ" under art. 1307 C.C.P.

[146] See *Re Ontario Labour Relations Board, Bradley et al* v. *Canadian General Electric Company Ltd.*, *ante*, footnote 126.

[147] Anderson, *ante*, footnote 120; S.A. de Smith, Statutory Restriction of Judicial Review (1955), 18 Mod. L. Rev. 575, at p. 579.

[148] *Ante*, footnote 2, at p. 29.

this point by introducing language into privative clauses that would explicitly cover cases of excess of jurisdiction, it is not at all improbable that a Quebec court would be the first to hold a privative clause to be unconstitutional. Some judges may very well feel that the issue has been brought to this point by the amendment to article 50 C.C.P. In some of the Quebec cases in recent years there have been references to the constitutionality of privative clauses from which one may infer that the judges who made them would have welcomed the opportunity to rule on this question,[149] but it has not yet been necessary to do so. Certainly it is but a short step from the position already adopted by Canadian courts, which reminds one of Coke's judgment in *Dr. Bonham's* case, to proclaiming that the principle of judicial control is part of the fundamental law of the constitution. However this might strike legal theorists, it would only be a recognition of current legal reality. The view which is taken of our democratic legal order today is that it presupposes two things: a sovereign legislature and superior courts to see that those on whom statutory authority has been conferred keep within their jurisdiction. The right to judicial control can be regarded as the one qualification of parliamentary sovereignty because it is the *sine qua non* of a parliamentary legal order. Whether a completely satisfactory legal rationale for such a conclusion, if it is felt to be necessary, can be found in the nature and terms of the Canadian constitution is, however, another question. Although for long periods of time the notion of "fundamental law" exercised an important influence on political and legal thinking in Great Britain,[150] there would appear to be no one today who would seriously argue that there is any legal limit to the sovereignty of the British Parliament. Even Professor Goodhart in his book, English Law and the Moral Law, when speaking of his fundamental principles which by their moral or social restraint may effectively limit the exercise of state power, concedes that these are not principles which the courts can enforce as rules of law, at least in a unitary state.[151] On the other hand, a federal constitution like Canada's presupposes a system of judicial review to determine legislative jurisdiction, and it is clear that a legislature cannot

[149] Rinfret C.J. in *L'Alliance des Professeurs Catholiques de Montreal* v. *Labour Relations Board of the Province of Quebec and the Montreal Catholic School Commission*, *ante*, footnote 70, at p. 155; Caron J. in *Miron & Frères Limitée* v. *La Commission de Relations Ouvrières de la Province de Québec*, *ante*, footnote 71, at p. 389a.

[150] Gough, Fundamental Law in English History (1955).

[151] At pp. 54-55. See the Report of the Committee on Ministers' Powers, p. 108, declaring privative clauses to be "contrary to the constitutional principle underlying the rule of law".

exclude review on this question.[152] A case can also be made for the point of view that it must always be possible by judicial control to determine whether a particular exercise of executive or administrative power can be related to an authorization which a legislature has the jurisdiction to give, or to the prerogative. It is admittedly difficult to see how one can derive from the nature of the Canadian constitution a guarantee of judicial control on the ground of a violation of natural or substantial justice, but we have come to the point where this may very well be regarded as quibbling. It would be a great relief and might avoid a lot of further embarrassment if the reality were declared to be what it is. Here some such general idea as Professor Lederman's,[153] that from the importance which the constitution attaches to superior courts in section 96 and following of the B.N.A. Act we may conclude that it presupposes the continued existence of such courts with a guaranteed core of jurisdiction, including supervisory jurisdiction, might serve a useful purpose. His notion of a guaranteed core of jurisdiction appears, however, to go much farther in its implications than the cases, which are concerned not with whether the jurisdiction of the Superior Court has been reduced, strictly speaking, but with whether it has been conferred on tribunals whose members are appointed by the province. (Removing a particular administrative body from the application of the supervisory jurisdiction does not make it a superior court [154]). It would be going very far to argue as a general proposition from sections 96 and following of the B.N.A. Act that a provincial legislature cannot reduce the jurisdiction of a superior court or make it inapplicable in certain cases, but it may be reasonable to make such a statement of the supervisory jurisdiction because of its essential function in the operation of the constitution. Thus it might be argued that in so far as the recent amendment to article 50 C.C.P. and the provisions of law to which it refers purport to prevent the exercise of the supervisory jurisdiction which is essential under the Canadian constitution they are *ultra vires.*

It is doubtful, however, that the courts will find it necessary

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[152] *Ottawa Valley Power Co.* v. *A.-G. Ont. et al.*, [1936] 4 D.L.R. 594, at p. 603; *I.O.F.* v. *Bd. Trustees Lethbridge Nor. Inv. Dist.*, [1937] 2 D.L.R. 109; *Same*, [1937] 4 D.L.R. 398, [1938] 3 D.L.R. 89, [1940] A.C. 513. Cf. the terms of art. 87a C.C.P.: ". . . including the exercise of any authority conferred or purporting to be conferred upon same by an Act of this Legislature."

[153] Lederman, *op. cit.*, *ante*, footnote 112.

[154] *Labour Relations Board* v. *John East Iron Works Ltd.*, [1949] A.C. 134, at pp. 151-152.

to go this far. And it is to be hoped that the Quebec legislature, recognizing that judicial control has now come for practical purposes to be treated by our courts as a fundamental principle of the constitution, will not attempt to drive the courts from their present position of statutory interpretation. A far better distinction awaits the legislature, and that is to be the first in the Anglo-Canadian world to introduce a thoroughgoing reform of the procedural means for invoking the supervisory jurisdiction.

Freedom Under the Law

Our procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions, and actions for negligence: and, in judicial matters, by compulsory powers to order a case stated. This is not a task for Parliament. Our representatives there cannot control the day to day activities of the many who administer the manifold activities of the State: nor can they award damages to those who are injured by any abuses. The courts must do this. Of all the great tasks that lie ahead, this is the greatest. Properly exercised the new powers of the executive lead to the welfare state: but abused they lead to the totalitarian state. None such must ever be allowed in this country. We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge. (Sir Alfred Denning, Freedom under the Law (1949), p. 126.)