ADMINISTRATIVE LAW IN CANADA

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This paper was written for the conference of British, Canadian and American law teachers held at New York University at the beginning of September 1960. The title and the topics to be discussed under it were prescribed by the organizers of the conference who felt, and rightly so, that they had to establish some common ground between the Englishman, the American and the Canadian who had been asked to do papers on administrative law in their respective countries; also prescribed was the length, which was restricted to three thousand words, more or less. That is why the paper deals, and then only briefly, with only some aspects of only one sector of administrative law in Canada, namely administrative justice, and entirely disregards all other sectors, including administrative legislation, the legal position of the federal and provincial governments and their public corporations and the powers, duties and liabilities of public authorities. What I tried to do in writing on the topics assigned to me was to *describe* in a dead-pan and non-polemical way for non-Canadians what seemed to me to be distinctively *Canadian* approaches, attitudes and methods. Because I was describing for non-Canadians, I tried to be fair and objective and refrained from either lambasting or glorifying Canadian legislatures, governments, civil servants, boards or courts.[1] Because it was distinctively Canadian approaches, attitudes and methods that I wanted to point up, I ignored the whole body of so-called Canadian jurisprudence on judicial review of administrative action. Like the so-called Canadian law of contracts, torts, trusts and so on, there is nothing distinctively Canadian about it; it is just English law imported and applied to particular Canadian statutes. I have made a few additions and corrections to cover things that have

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[1] Robert F. Reid's paper on "Administrative Tribunals and their Function in a Legal System" to the Commonwealth and Empire Law Conference, Ottawa, September 1960, is a board-lambasting job. I understand that some other Canadians took the same line there.

happened since the paper was written. I have also added some necessary footnotes.

I. *Some Comparisons.*

Once a Canadian interested in administrative law leaves the soothing security of his law reports—in which he finds the English law of judicial review, that is, the law clustering round the "forms of action" called mandamus, certiorari, prohibition, habeas corpus and action for a declaration being applied against the background of particular Canadian statutes—he is in eleven uncharted seas, a federal sea and ten provincial seas. Unlike the Englishmen and the Americans who have the Donoughmore, Franks, Acheson and Hoover reports with their voluminous and illuminating minutes of evidence, he has almost nothing to tell him what the heterogeneous mass of Canadian bodies other than courts—"independent commissions", civil service departments and other statutory authorities—deciding issues between the state and the individual, in fact do, or how they in fact do it, or to what extent they are in fact supervised, checked or controlled or what are in fact their attitudes and behaviour towards the people they deal with. Until the release in January 1960 of the report of the Gordon Committee on the Organization of Government in Ontario,[2] he had nothing except a handful of rather general articles on particular boards and a book on immigration practices and policy.[3] The Gordon Report is only eighty-eight pages long and it deals with only one of the ten provinces; no minutes of evidence were published and the 400 odd pages of appendices which purport to describe the work of the various departments and boards were drawn up by business consultants and give no picture of their day to day work. There has been no such official inquiry at the federal level or in any of the other nine provinces.

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[2] (Toronto, 1959). The Gordon Report is now being considered by the Select Committee of the Ontario House of Assembly on the Administrative and Executive Problems of the Government of Ontario; the Select Committee made an Interim Report in November 1960. Both Reports will be discussed in forthcoming issues of the following periodicals: in Canadian Public Administration by Professor A. S. Abel; in Faculty of Law Review by Mr. J. G. Coleman; in University of Toronto Law Journal by myself.

[3] The book on immigration is Canada's Immigration Policy: A Critique (1957), by D. C. Corbett. Things may be getting better. We now have a book of readings on Canadian public administration which contains excellent bibliographies: Canadian Public Administration (1960), by J. E. Hodgetts and D. C. Corbett. We have also just got our first law book on an administrative law subject: Securities Regulation in Canada (1960), by J. Peter Williamson.

Administrative law has never raised in Canada the storms of public controversy that it did in England and the United States. The reason may be that Canada has never been, is not and never could be a laissez-faire state; it depends for its continued national existence on government action and Canadians have had to accept government regulation as one of the facts of life. Two well-known illustrations will be enough. The quasi-public Canadian Pacific and the wholly public Canadian National railways (and the Transport Board which regulates them both) and the Canadian Broadcasting Corporation (and the Board of Broadcast Governors which regulates both it and the private stations) were, as a matter of historical fact, designed and still exist as bulwarks against "American influence". Nor have the Canadian legal profession or law teachers shown as much interest in administrative law as their opposite numbers in England and the United States. The President of the Canadian Bar Association recently urged the members to take an interest in administrative law and "not be content with our tendency to be a generation or so behind English and American developments". The lack of interest shown by practising lawyers is probably due to the fact that—although many of them run into it at a common sense and so unremunerative level, for instance, a municipal licensing board in connection with a taxi or restaurant licence or a planning authority in real estate transactions—only a handful of specialists in such things as immigration, rate-fixing for railways and performing rights, or airline route and broadcasting channel allocation run into it at the level where law counts and will be paid for. The law-review writing by law teachers on specifically Canadian problems is almost non-existent, for these lie outside the realm of law report law and in the shadowy and arduous borderland between law, political science and public administration, where you have to use your feet as well as your head.[4]

From the standpoint of comparative law, there is one important generalisation that can and must be made. Why, when we Canadians look at English or American administrative law, do we feel that

[4] Why haven't law teachers used their feet? One reason is geography. Until very recently all the Canadian law schools were a long way from the national capital; nearest were the Montreal schools (126 miles) and the Toronto schools (256 miles). Note that in England the productive work in administrative law has all been done in London (Carr, Robson, Griffith, Street and de Smith) and not in Oxford or Cambridge. Another reason is that most Canadian law teachers have done their graduate work in the United States and have there acquired the curious notion that the most important part of administrative law is to be found in the law reports. K. C. Davis's monumental four-volume Administrative Law Treatise (1958), is symptomatic of the general American approach to the subject.

both these worlds are at once familiar and strange—so that we seem to be standing somewhere between them? Because, of course, the British North America Act has given us "a constitution similar in principle to that of the United Kingdom" when socially, economically and culturally we are almost a part of the United States. In terms of administrative law, we have inherited from England the principle of ministerial responsibility and the common law of judicial review, but have borrowed the institution of the "independent regulatory commission" and many of the matters regulated from the United States and have modified them to suit our own peculiar conditions. Thus, the most frequent kind of administrative law court-case in Canada is certiorari for denial of natural justice (governed by the English common law of judicial review) by a provincial labour relations board (composed of a full-time chairman and an equal number of representatives of employers and employees and not, as with the corresponding United States boards, of full-time professionals) when hearing an application by a union for certification as the exclusive bargaining agency in a plant (a matter not regulated in England at all). Again, like the United States we have workmen's compensation boards, an unemployment insurance commission, public utility boards, oil and gas conservation boards and securities commissions to deal with matters which in England are either handled by an ordinary civil service department or not regulated at all—so that in terms of what they do our boards are more like their counterparts in the United States than the tribunals in England.

II. *Canadian Attitudes to Judicial Review.*

The extent to which judges in any community are allowed to review administrative action depends on many factors, but chief among them is what the community thinks of its judges and expects of them. For constitutional reasons, the judges in the United States are masters of the legislatures and tower over the whole field of government; they are regarded as priestly oracles, expected "to know all the answers", and as prophetic guardians of the eternal values against "Leviathan". It is therefore quite natural that judicial review of the decisions of administrative agencies has there, in general, been assimilated to appellate review of the lower courts.[5] In Canada, the constitution, the British North America Act, 1867, does not, as the United States constitution does, say

[5] See Schwarz, American Administrative Procedure Act (1947), 63 L.Q. Rev. 45.

that there are some things no legislature can do; all it does is to divide between the federal legislatures on the one hand and the provincial legislatures on the other hand all possible subjects of legislation. So long, therefore, as they legislate upon the subjects assigned to them, our legislatures are the sole masters of policy, of the courts and of the whole administrative process. Our constitutional tradition therefore is that, although the judges have the duty of keeping administrative authorities within the powers granted by the legislature, they must be careful not to meddle in policy or interfere unduly with the business of government. The ordinary Canadian does, however, deeply believe that the judges are independent, impartial and respecters of private rights—it is for this reason that they are in great demand as chairmen of conciliation boards in labour matters and as chairmen of royal commissions of inquiry—and likes to assign to them, as far as possible, the decision of issues arising between the citizen and the state. We are torn between this tradition and this belief—now one predominating and now the other—and our common law of judicial review (which, as was said earlier, is English) and its Canadian statutory modifications vacillate uncertainly between them. In the final analysis, the nature and scope of judicial review of administrative action in Canada has been, and will probably continue to be, settled on an *ad hoc* and empirical basis.

III. *Effect of the British North America Act.*

The British North America Act does not affect the law of judicial review of administrative action as such. A legislature can render an agency immune from judicial review, can, subject to section 96, give to it any kind of powers, whether legislative, executive or judicial, that it desires and can prescribe for it, or leave it to prescribe, any kind of procedure, or absence of procedure that it likes—in these respects the legislatures are the masters of the courts. It does, however, affect in two respects the machinery which governments may use in carrying out schemes of regulation. In the first place, the federal and provincial legislatures may only legislate on the subjects respectively assigned to them. Governments now regulate matters not dreamt of in 1867 and the courts can, and do, hold regulatory legislation invalid if the subject matter of it does not fall within one of the ill-defined subjects assigned to the legislature that passed it. This sometimes means that, as a practical matter, effective regulation is impossible or very difficult. The reason why there is in Canada no federal regulation of in-

surance and no federal counterparts of the federal Trade Commission and the Securities and Exchange Commission in the United States is that the courts have held that these matters are within provincial (ten of them) and not federal competence.[6] In the second place, section 96 of the British North America Act has been interpreted, rather oddly, to mean that a province cannot confer upon a provincially appointed tribunal judicial power analogous to that exercised by a superior district or county court in 1867. This is a substantial fetter on the ability of a province to create and shape administrative tribunals as it wishes. Provincial workmen's compensation boards, public utility boards and labour relations boards, all having powers to decide issues important to the ordinary citizen, have survived challenge but the powers of provincial assessment tribunals to decide questions of disputed liability to assessment, as opposed to questions of quantum, and of local government boards to determine the legal validity of by-laws have been held invalid. Neither section 96 nor any other section imposes any similar restriction on the power of the federal government with respect to its administrative tribunals.[7]

IV. *The Courts' Inherent Supervisory Power.*

In the absence of a section giving an appeal of some sort to the courts, the English law of judicial review applies in Canada. It covers a wide variety of activities but certiorari to labour relations boards and habeas corpus in immigration matters are the most frequent kind of case. As will be seen from de Smith on *Judicial Review of Administrative Action*[8] — which refers to many Canadian cases — the principles are simple to state but difficult to apply and the Canadian case law is as bewildering and complex as the English.

In order to bring out the contrast between the Anglo-Canadian law and the American, it is necessary to state those simple principles in an over simple-way as follows. The jurisdiction of the courts is very limited and no more than supervisory. They have no power to review the substance of the deciding authority's decision except (and it is becoming an important exception) questions of law on the face of the record, but they do have power to review the process whereby the decision is arrived at. They require that the authority

[6] As to insurance, see MacDonald, The Regulation of Insurance in Canada (1946), 24 Can. Bar Rev. 257; as to fair trade, see Blair, Combines, Controls or Competition (1953), 31 Can. Bar Rev. 1083; as to securities, see Williamson, *op. cit., supra*, footnote 3, pp. 189-201.

[7] See Laskin, Canadian Constitutional Law (2nd ed., 1960), pp. 761-801 for leading cases, notes and articles on s. 96.

[8] (1959), reviewed in (1960), 38 Can. Bar Rev. 432.

honestly apply its mind to deciding the question it is empowered to decide and no other question but that question. They also require that the procedure the authority adopts for hearing the dispute conform to the fundamental rules of fair play and, in effect, set minimum standards of fairness for the process of adjudication. In a word, the courts have an inherent quasi-constitutional power to guarantee the citizen against arbitrary decision and that is all the power they have.

Both in England and in Canada they can however—and sometimes do and sometimes do not—go far beyond that or stop far short of it. The main jokers in the area of controlling "substance" are the vague and uncertain distinctions between "fact" and "jurisdictional fact"[9] and between "deciding wrongly within its jurisdiction" and "taking into account extraneous considerations"[10] and in the area of controlling "procedure" the unworkable distinction between "judicial" and "administrative" acts.[11] Looming over the whole field is the law of statute interpretation with its two equally valid but conflicting "rules", the literal rule and the purpose rule. Because the leading English cases they use as authorities deal with administrative procedures and topics (for instance, housing cases like the *Errington* case[12]) which are unfamiliar and so hard to understand, Canadian courts and practitioners move even more awkwardly and erratically through these mysteries than the English do. Subject to this comment, any criticisms of the English "law-in-books" are equally applicable to the Canadian. To what extent have particular English or Canadian citizens in fact suffered "administrative injustice" because of it? This question is the only one worth asking and it is rarely asked in either country. As to Canada, I have no information. We do, of course, have our causes célèbres—we can match the Englishmen's Crichel Down affair[13] with our *Roncarelli* case[14]—but even those cases turn out on examination to be far from clear cut.

[9] See, in the labour relations board field, the decisions discussed by MacDonald J. in *Re Certification of District No. 26* (1960), 23 D.L.R. (2d) 328.

[10] Consider *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121; *Smith & Rhuland Ltd.* v. *The Queen*, [1953] 2 S.C.R. 95 and *Toronto Newspaper Guild* v. *Globe Printing Co.*, [1953] 2 S.C.R. 95. There are excellent notes on the last case in (1953), 31 Can. Bar Rev. 679, 1158.

[11] Contrast *Alliance des Professeurs Catholiques* v. *Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140 with *Calgary Power Co.* v. *Copithorne*, [1959] S.C.R. 29 and see critical note in (1959), 1 U.B.C. L. Rev. 304.

[12] *Errington* v. *Minister of Health*, [1935] 1 K.B. 249.

[13] For a summary of this affair, see book review in (1955), 33 Can. Bar Rev. 1099.

[14] *Supra*, footnote 10.

V. *Statutory Exclusion of Supervisory Power.*

Like the Franks Committee, the Gordon Report recommended that privative clauses, that is, clauses purporting to take away from the courts even the limited supervisory power sketched out above, should be repealed in Ontario.[15] The courts have so emasculated their effect already, that their repeal would probably make little difference; the technique they have used does not matter, but in the absence of any constitutional provision outlawing them, the job was done, as it could only be done, by what amounts to a shameless misinterpretation of their wording.[16] It is significant that the legislatures could have acted to render them judge-proof but did not. The courts, the "ordinary men" who sit in the legislature and the Gordon Committee are apparently at one in regarding the courts, whether rightly or wrongly, as being an important safeguard for the citizen against possible arbitrariness in administrative action and in being reluctant to remove that safeguard altogether.

The best known privative clauses are to be found in the various provincial Workmen's Compensation and Labour Relations Acts and in the federal Immigration Act.[17] Neither those who wish to abolish them nor those who wish to preserve them seem to realize how small their legal effect is. The federal government is not likely to remove the clause from the Immigration Act. It wants to preserve as far as possible its freedom of action in this area. It regards immigration as a privilege, not as a right, and wants to avoid having to disclose to a court its sources of information about the political colour of immigrants. On the other side of the ideological fence, a court, with the sweating immigrant before it, sometimes sets aside a deportation order on very flimsy grounds, for instance, that it was made on a Sunday.[18] Organized labour in Ontario has protested against the suggested removal of the clause from the two Ontario Acts.[19] It associates the courts with expense, delay and, it must be added, hostility. One of the avowed reasons why workmen's compensation boards—state-run industrial accident insurance offices whose unfettered power to decide whether

[15] *Supra*, footnote 2, at pp. 24-25. The Interim Report of the Select Committee, dated November 17th, 1960, is not shocked by privative clauses, but has reserved the matter for further consideration (Para. 17).

[16] See a note by Sutherland in (1952), 30 Can. Bar Rev. 69, and an article by Laskin entitled Certiorari to Labour Boards: the Apparent Futility of Privative Clauses in (1952), 30 Can. Bar Rev. 986.

[17] R.S.C., 1952, c. 325.

[18] See *Attorney-General for Canada* v. *Hirsch* (1960), 24 D.L.R. (2d) 93, Laidlaw J. A. dissenting.

[19] R.S.O., 1960, cc. 202, 437.

the accident "arose out of and in the course of the employment" is merely one aspect of paying claims—were set up was "*to get rid of the nuisance of litigation*".[20] What labour asks of labour relations boards—usually consisting of an equal number of employer's representatives and employee's representatives headed by an independent chairman—is *speedy* decision of the issue on whether a union is entitled to exclusive bargaining rights in a plant. Following the English tradition, Canadian courts do not seem to give the "real reasons" for their decisions and commentators do not keep "box scores" of judges' records, but I think it is fair to say that some provincial courts have borne down rather harshly on decisions of their labour relations boards certifying unions.

VI. *Scope of Statutory Appeals.*

The most frequent Canadian formula giving a statutory appeal to the courts from the decision of an administrative authority is "a question of jurisdiction or law" but there are some wide-open appeals and some mavericks. About all one can say is that the nature and scope of such appeals has, as a matter of history been, and will continue to be, shaped by all the circumstances that brought the particular authority into being, including the kind of subject it deals with and the current "ideology" applicable thereto. Furthermore, legislative draftsmen do not seem to have given much thought to the question of what is the "correct" scope of court review. The picture is therefore confused. On ideological grounds one would, for instance, expect the widest possible scope of review in cases involving taxes and the liberty of the subject. But in immigration cases it has been kept to the minimum, because the government wants to keep control of its immigration policy. In the federal income tax field, on the other hand, the technical and complex accounting and "business practice" questions of the proper allowances to be made for depreciation and executives' compensation actually rested with "the discretion of the minister" until 1948 when, as a result of an impassioned campaign by the lawyers and accountants for the abolition of "ministerial discretion" and the establishment of "the rule of law", they were in effect transferred to the ordinary courts.[21]

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[20] This oft-quoted remark was made by Sir William Meredith, later Chief Justice of Ontario, who drafted the first Ontario Workmen's Compensation Act. See Eades, The Administrator as Judge as Applied to Workmen's Compensation, in Hodgetts & Corbett, *op. cit., supra*, footnote 3, p. 525.

[21] See my article, Recent Trends in Canadian Income Tax Law (1951), of 9 U. of T.L.J. 46.

The most interesting area is the many licensing and regulatory tribunals which at first sight look like courts in that they hold hearings and apply statutory standards—such as "fit and proper person", "public convenience and necessity", "just and reasonable rates", "in the public interest" and so on—to the facts of the individual cases coming before them but are in reality minor "legislative" bodies pricking out a policy. Under our constitutional theory the appropriate tribunal of appeal would be either the cabinet or a committee of the legislature, but they have neither the time nor the energy for hearing appeals by aggrieved Joe Doakes's. A general administrative court of appeal would, even if appropriate, be a luxury that most of the ten provinces could not afford—and it has never been suggested. The actual Canadian solutions to the problem of how to reconcile the citizen's "right" to appeal a licensing or regulatory board's decision to *someone* and the "rule" against letting the courts meddle in policy are disorganized and empirical. Sometimes a limited right of appeal is given to the courts, occasionally there is a limited right of appeal to the courts plus a wide-open appeal to a political superior but sometimes there is actually a wide-open appeal to the courts, the last being quite frequent in the case of municipal licensing boards. The courts usually construe the appeal to them as giving them no power to dictate to the board on questions of economic or other policy.

The following illustrations may help to bring the disorganized picture to life. The public utilities boards of the various provinces hold hearings on applications for licenses, for instance, to operate buses or cemeteries, where "public convenience and necessity" so requires and an appeal lies to the provincial court of appeal but only on "a question of jurisdiction or law". The Supreme Court has recently held that what is "necessity" is a question of "opinion" or "policy", and so one for the board alone, and not a question of "law" for the court[22]—so that here there is no appeal to anyone on the policy issue. The federal Transport Board holds hearings to fix "just and reasonable rates" for railways, and some shipping. An appeal lies on questions of jurisdiction and law to the Supreme Court but the court has not attempted to direct the Board on the principles of rate fixing—as the Supreme Court of the United States at one time directed the Interstate Commerce Commission and so earned the title of "the most powerful economics faculty in

[22] *Memorial Gardens Assn. (Can.) Ltd.* v. *Colwood Cemetery Co.* (1958), 13 D.L.R. (2d) 97. Nor is it a question of "fact", *Union Gas* v. *Sydenham Gas*, [1957] S.C.R. 185.

the world".[23] An appeal also lies on the whole merits to the federal cabinet, and is often exercised during the general revisions of railway freight rates; this is an unusual type of appeal but it is explained by the fact that the job the Board now does was done by the railway committee of the Cabinet until 1905 and also by the national importance of the question in issue. The Ontario Securities Commission holds hearings, if necessary, to grant or renew registrations of brokers, dealers, salesmen and so on in the securities field where "in its opinion the applicant is suitable for registration" and may suspend or cancel such registration "where in its opinion such action is in the public interest" and a straight appeal lies from its decision to a single judge of the court of appeal. The Gordon Report regarded this court appeal as anomalous but left it as is, saying that "as against the possibility of restricting appeals unduly we regard it as preferable that the courts themselves be trusted to confine their review to the judicial aspects of the cases before them" and noted that in the past, where an appeal turned on a matter of policy, the courts usually returned the case to the Commission.[24] The Liquor Licence Board of Ontario holds hearings to grant licenses to sell liquor by the glass to the public; the appellant must be a "fit and proper person" to hold one; there is no appeal from its decision. The Gordon Report took notice of the fact that the liquor licensing policy of the Ontario Government was restrictive and because the act of refusing a licence might therefore involve an exercise of discretion thought that it should not be possible by means of an appeal to have the court substitute its discretion or view of policy for that of the Board.[25]

VII. *Extent to which Administrative Process Judicialized.*

The Canadian administrative process is more judicialized than the English. In Canada, as in the United States, the administrative law scene is dominated by the "boards and commissions" of the Gordon Report—the so-called "administrative tribunals" which exercise regulatory and licensing powers over many types of busi-

[23] This witty remark is referred to by Hanson, Rate Fixing Methods of Public Utility Commissions, in Proceedings of The Institute of Public Administration of Canada (1958), p. 86.

[24] *Ibid.*, pp. 71-72. See *Re Securities Act and Morton*, [1946] 3 D.L.R. 724.

[25] *Ibid.*, p. 68. Because, however, "the livelihood of a large section of the population depends on the holding of a licence," the Interim Report of the Select Committee, *supra*, footnote 2, has recommended—following another suggestion in the Gordon Report—that all decisions affecting *cancellation* of a licence should be appealable to the courts (Para. 18).

ness, for instance, railways, broadcasting, natural gas, securities, taverns, and so on—and not by the "minister's powers" of the Donoughmore Report. Many matters affecting the citizen's property are, as in England, left to the "discretion of the Minister" without any statutory standard being imposed or any hearing, formal or informal, being required; the one most likely to surprise an Englishman, accustomed as he is to his "local inquiry", is expropriation of land for public purposes, where neither the law nor the practice gives the owner any opportunity to object to the taking. And we do have a few specialized "quasi-courts" designed, like the English tribunals, to give cheap and speedy justice to little people with small claims against the government, for instance, the Income Tax Appeal Board which is, in effect, a poor man's travelling income tax court of first instance.[26] But it is of the "administrative tribunals" as defined above that the ordinary Canadian lawyer thinks when you say "administrative law".

These "quasi-judicial" agencies have been given the task of fashioning, upon the general policy standards provided by the legislature, for instance, "in the public interest", "public convenience and necessity", the more detailed policy standards needed to fit the complex circumstances of the cases coming before them. What they do, in effect, is a case by case job of balancing one public interest against another. They legislate (in a minor way) but under an adjudicative form; putting it another way, the decisions they make are (in a minor way) decisions of policy. Why then have Canadians who inherit the English tradition that "the public interest" is best judged by ministers responsible to Parliament, given this power to independent tribunals instead, as would probably be done in England, to civil service departments headed by ministers? Many reasons have been suggested. One of them is "imitating the Americans". Of general over-riding importance is the horror of "politics", "politicians" and "people with government jobs" which the Canadian shares, though less intensely, with the American. Almost equally important is the ordinary citizen's yearning for an independent impartial tribunal to decide issues arising between himself and the public. To these psychological factors in favour of boards must be added two practical ones. From the point of view of the applicant, he is able to put his case at a public hearing to the very men who will decide it instead of to the Minister (who will later consult with his civil servants) or

[26] Another such "quasi-court" is a Court of Referees under the Unemployment Insurance Act. See Relph, Quasi-Judicial Powers under the Unemployment Insurance Act (1948), 26 Can. Bar Rev. 500.

to a civil servant (who will later take the matter up with his Minister). From the point of view of the government, it has found a means whereby what is in effect "minor policy" can be hammered out by what amounts to arbitration—and without involving itself. As the Gordon Report puts it, "quasi-judicial agencies permit flexibility in the administration of broad government policy while providing the safeguards of judicial practices and procedures".[27]

Canadian lawyers usually stress the independence of these regulatory boards and urge measures to strengthen it. But in the policy matters with which they deal a balance has to be struck between independence and responsibility to the cabinet, which wants to ensure that the decisions of a board which affect the national interest are consistent with general government policy. Those board decisions which are "vital" are therefore usually made subject to cabinet approval—for instance, the National Energy Board in granting a licence for the export of natural gas or the Board of Broadcast Governors in granting a licence to a broadcasting station.

Although any particular tribunal is likely to differ widely from the others in function, composition, structure and procedure, Canadian "quasi-courts" and "quasi-judicial agencies" are, in general, less judicialized than the American. As to composition, we have a number of boards deliberately designed to be representative of the interests likely to be affected by the decisions—what is clearly a legislative notion here modifying the judicial ideal of impartiality. Thus in the labour field, labour relations boards, courts of referees under the Unemployment Insurance Act[28] and workmen's compensation boards usually consist of an equal number of representatives of management and labour plus an independent chairman, who is usually a lawyer; and the Board of Broadcast Governors consists of a hard core of three full-time members, plus twelve part-time members chosen to give a composite picture of all Canadian consumers of radio and television. As to structure, a number of our licensing and regulatory boards have quite naturally combined in themselves what lawyers delight to stigmatize as the inconsistent functions of prosecutor and judge—without any separation, even internal. As a result of the protests of lawyers—citing, as usual, the horrible things that might happen to the citizen, but giving no instances of injustice in fact done—this feature is now gradually being eliminated. Those who are more interested in fact than in fancy will not be surprised to hear that the reason why the Royal Commission on Broadcasting

[27] *Supra*, footnote 2, p. 66. [28] S.C., 1955, c. 50, as am.

recommended the separation of these functions in the case of the Canadian Broadcasting Corporation—which was at once the competitor and the regulator of the private stations—was that the Canadian Broadcasting Corporation was *too* fair; it tended to regulate the private stations rather less than more.[29] As to procedure, there is no legislation at all in Canada comparable to the Administrative Procedure Act[30] or the Tribunals and Inquiries Act.[31] How have Canadians managed to get along all this while without legislation establishing minimum standards of procedure for administrative tribunals and with each body devising its own as it sees fit? The reason may be that Canadians have not had to live, as the English do, with a mass of local citizen-tribunals which did not, apparently, know how to conduct a hearing fairly and they have never shared the American's legalistic passion for debasing general precepts of decency into detailed paper rules. The Gordon Report, however, thinks that Ontario should institute a modified version of the English method of prescribing procedure and we shall probably get it.[32]

VIII. *Probable Course of Future Developments.*

Ontario having led with the Gordon Committee—the report is now being considered by a Select Committee of the Ontario Legislature—"the business press" has been asking the federal government to follow suit with a similar, but more extensive, inquiry of its own. If, as and when there is one,[33] the practical results of it will probably be as unimportant as those of the various English and American inquiries, but at least the Canadian law teacher or political scientist will gain the minutes of evidence and will not have to admit, as he does now, comparative ignorance of the specifically Canadian part of administrative law. Because Canada, until 1940 a mainly agricultural and rural country, is in the throes of becoming industrial and urban, new government responsibilities, and so new civil service departments and quasi-judicial regulatory boards, are now proliferating. For reasons given earlier, quasi-judicial boards on the American model will probably continue to be preferred to the English "civil service discretion", or "minis-

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[29] Report (Ottawa, 1957), p. 25.
[30] (1946), 60 Stat. 237 (U.S.A.).
[31] (1958), 6 & 7 Eliz. 2, c. 66 (U.K.).
[32] The Interim Report of the Select Committee, *supra*, footnote 15, has so recommended, but has eliminated the elaborate machinery of the Council on Tribunals and emphasized that there is no virtue in uniformity for its own sake (Para. 15).
[33] A federal royal commission on this topic, chaired by Mr. J. Grant Glassco, was appointed on September 16th, 1960.

terial", method of regulating. Following a suggestion made in the Gordon Report, however, there may be experiments with various devices for subjecting some of their important decisions to ministerial control, for instance, by reducing what is now a final decision to a mere recommendation to a minister.[34] As to court control, we shall probably have no more "privative clauses", for legislative draftsmen now know that they are both futile and unpopular[35] and sooner or later we shall have legislation, for which Ontario lawyers began pressing in 1956, to resolve the procedural maze that confronts the person seeking judicial review; for instance, he brings an action for a declaration and fails because, and only because, certiorari "lies".[36] The scope of statutory appeals to the courts will probably continue to be settled on an *ad hoc* basis, but it is certain that, as now, the legislatures and the courts themselves will continue to keep judicial hands off the policy of administrative authorities. The following quotation from the Gordon Report[37] makes the point well:

> It is true, as a noted American authority [Louis L. Jaffe] has put it, that "there is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and the Legislatures." It is consistent with this tradition that judicial supervision [*i.e.* by certiorari *etc.*] be facilitated. But this tradition is rooted in the independence and impartiality of our judiciary; both qualities would be endangered by pressing for judicial review [*i.e.* by appeal] where administrative aspects prevail.

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[34] The suggestion in the Gordon Report, *supra*, footnote 2, was, in so far as it concerned approvals of official plans, subdivision plans and zoning by-laws, rejected by the Interim Report of the Select Committee. "Since, in the cases of plans and zoning, important property rights of the individual are directly affected, the function is clearly quasi-judicial. Decisions should not be made administratively without the individual being given every opportunity to develop his case at a public hearing." (Para. 8).

[35] As pointed out in footnote 15, *supra*, the Interim Report has reserved privative clauses for further consideration.

[36] Ontario examples of the maze are: *Hollinger Bus Lines* v. *Ontario Labour Relations Board*, [1952] O.R. 366 and *Border Cities Press Club* v. *The Attorney-General for Ontario*, [1955] O.R. 14.

[37] *Supra*, footnote 2, p. 26.