COMMENTS

COMMENTAIRES

DE DRYBONES À LAVELL À CANARD: LES JOIES DU TANGO JUDICIAIRE.—A la suite des affaires *Lavell* et *Bédard,* d'août 1973,[1] il était devenu hasardeux d'épiloguer sur la portée de la Déclaration canadienne des droits.[2] *Drybones*[3] s'oxydait à vue d'oeil et miroitait de moins en moins. Depuis les jugements rendus par la Cour suprême du pays dans les affaires *Canard*[4] et *Prata,*[5] en janvier 1975, c'est la grisaille, sinon l'obscurité. Nous ne commenterons que le premier de ces deux derniers arrêts.

Les faits matériels de l'affaire *Canard* se résument comme suit. En juillet 1969, M. Canard, un Indien du Manitoba, perdit la vie dans un accident. En décembre de la même année, le Ministre des affaires indiennes et du nord canadien, agissant sous l'empire de l'article 43 de la Loi sur les Indiens,[6] nomma un fonctionnaire du ministère administrateur des biens laissés par M. Canard. En conséquence, Mme Canard, le conjoint survivant, a demandé aux tribunaux du Manitoba de déclarer que cet article 43 ne s'appliquait pas à la succession de son mari. Ou, encore, de déclarer que cet article était invalide parce que ne relevant pas des domaines de compétence fédérale et parce qu'incompatible avec la Déclaration canadienne des droits, et de déclarer aussi que la nomination de l'administrateur faite en vertu de cette disposition était nulle parce que contraire à la justice naturelle.

La première prétention de Mme Canard a été rejetée à l'unanimité par la Cour suprême grâce, essentiellement, à une appréciation de la preuve dans le contexte de l'article 4(3) de la Loi sur les Indiens. Quant au premier moyen de la seconde

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[1] *A.-G. Canada* v. *Lavell*; *Isaac* v. *Bédard* (1973), 38 D.L.R. (3d) 481, 23 C.R.N.S. 197 (C. supr.).

[2] S.R.C., 1970, app. III.

[3] *R.* v. *Drybones,* [1970] R.C.S. 282.

[4] *A.G. Canada* v. *Canard* (1975), 52 D.L.R. (3d) 548.

[5] *Prata* v. *Ministre de la Main-d'oeuvre et Immigration* (1975), 52 D.L.R. (3d) 383.

[6] S.R.C., 1970, c. I-6.

prétention de Mme Canard, qui confrontait les articles 91(24) et 92(13) de l'Acte de l'Amérique du Nord britannique,[7] il a également été écarté à l'unanimité, sans faire l'objet d'explications élaborées. Enfin, la troisième prétention, celle portant sur la façon suivant laquelle l'administrateur avait été nommé, a été rejetée pour des raisons de compétence: les cinq juges sur sept qui se sont prononcés sur la question ont tous considéré que les tribunaux du Manitoba, d'où originait l'appel, n'avait pas juridiction pour contrôler un ministre fédéral dans l'exercice d'un pouvoir discrétionnaire.

Comme la Cour suprême s'est presqu'exclusivement arrêtée au deuxième argument fondant la seconde prétention de Mme Canard, les données juridiques qu'il est essentiel d'avoir à l'esprit se ramènent à trois. D'abord, l'article 43 de la Loi sur les Indiens, qui, essentiellement, fonde le pouvoir exercé par le ministre. Ensuite, le fait qu'en vertu du droit provincial normalement applicable en la matière, ce pouvoir de nommer des administrateurs aux successions appartient aux cours de justice. Enfin, le principe de l'égalité devant la loi énoncé à l'article premier de la Déclaration canadienne des droits.

Etant donné que le juge Dickson avait participé à la décision de la Cour d'appel du Manitoba, un banc de sept juges seulement a pu être constitué en Cour suprême pour disposer de l'affaire *Canard,* malgré l'importance de celle-ci. Par une majorité de cinq juges contre deux, la Cour suprême a accueilli l'appel du gouvernement fédéral, renversant ainsi la décision unanime de la Cour d'appel du Manitoba.[8]

Parmi les cinq juges de cette majorité, quatre seulement se sont entendus sur le motif qui allait devoir s'avérer déterminant relativement à l'argument fondé sur la Déclaration canadienne des droits. Ce motif a été exprimé par le juge Pigeon et il loge en un paragraphe. Le juge Ritchie a souscrit à ce motif, de même que le juge Martland qui parlait en même temps pour le compte du juge Judson.

D'une part, le juge Pigeon réaffirme la position prise par la Cour suprême dans l'affaire *Smythe*[9] au sujet des pouvoirs discrétionnaires: ceux-ci ne portent pas atteinte au principe de l'égalité devant la loi. Quant au fait que ce pouvoir discrétionnaire soit confié à un ministre dans le cas des Indiens, alors qu'il appartient aux cours ordinaires de justice dans le cas des blancs, il se contente

[7] 1867, 30 & 31 Vict., c. 3 (U.K.).

[8] *Canard* v. *A.-G. Canada* (1972), 30 D.L.R. (3d) 9.

[9] *R.* v. *Smythe* (1971), 19 D.L.R. (3d) 480.

de se référer au motif qu'il avait énoncé dans l'arrêt *Drybones,*[10] dans la mesure où celui-ci a été cité dans l'arrêt *Lavell,* par le juge Ritchie qui parlait alors au nom de la majorité.[11]

A la question de savoir si l'épreuve de l'égalité devant la loi permet d'opposer la loi fédérale au droit provincial, la Cour suprême n'a toujours pas apporté de réponse. Trois juges (Beetz, Laskin et Spence) ont opiné affirmativement, trois (Ritchie, Martland et Judson) négativement. Le juge Beetz a précisé qu'il était possible de tirer des standards minimums de l'ensemble des droits provinciaux. Pour le juge Laskin, l'inégalité peut résulter d'une loi fédérale prise isolément, si les prohibitions qu'elle contient visent des groupes de personnes identifiées de façon discriminatoire.

Enfin, le juge Beetz fait partie du groupe majoritaire pour l'unique motif qu'il considère que la discrétion confiée au ministre par l'article 43 de la Loi sur les Indiens n'est pas de nature essentiellement différente de celle que les droits provinciaux confient aux cours de justice ordinaires. Ce point de vue est logique et très prometteur au sujet de l'appréciation des pouvoirs discrétionnaires des autorités exécutives. Il est toutefois contredit en l'espèce par les juges Laskin et Spence, et les autres juges ne se prononcent par sur ce point.

Le passage de l'arrêt *Drybones* auquel se réfère le juge Pigeon, et auquel souscrivent les juges Ritchie, Martland et Judson pour former une majorité, est le suivant:[12]

> Si l'un des effets de la *Déclaration canadienne des droits* est de rendre inopérantes toutes les dispositions en vertu desquelles les Indiens en tant que tels ne sont pas traités de la même façon que le grand public, on doit inévitablement conclure que le Parlement, en édictant la *Déclaration*, n'a pas seulement modifié fondamentalement le statut des Indiens par ce procédé indirect, mais aussi qu'il a assujetti l'exercice futur de l'autorité législative fédérale sur les Indiens à l'exigence d'une déclaration expresse "que la loi s'appliquera nonobstant la *Déclaration canadienne des droits*". J'ai peine à croire que le Parlement avait cette intention lorsqu'il a édicté la *Déclaration*. Si l'on entendait supprimer pratiquement la législation fédérale sur les Indiens, on devrait s'attendre à ce que ce changement important soit fait explicitement et non pas subrepticement, pour ainsi dire.

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[10] *Supra*, note 3, à la p. 304.

[11] *Supra*, note 1, à la p. 12, 3ième para. des motifs exprimés par le juge Ritchie pour la majorité. Nous nous référons au texte dactylographié de ce jugement, version française, parce que celle-ci n'a toujours pas été encore publiée. Seule la version anglaise a été publiée dans les D.L.R. et les C.R.N.S. Dans le cas de l'arrêt *Canard*, c'est avec la version anglaise, qu'il nous faut travailler. Ces deux situations ne nous semblent pas compatibles avec une notion, même étroite, d'égalité entre juristes intéressés.

[12] *Supra*, note 3, à la p. 304.

Il faut se rappeler que c'est là la seule *ratio* apparente qui se dégage de cet aspect le plus important de la décision de la Cour suprême.

La difficulté que soulève l'affaire *Canard* découle moins du fait que l'article 43 de la Loi sur les Indiens permet à un ministre de désigner l'administrateur des biens d'Indiens, que du fait que ce pouvoir, dans le cas des blancs, appartient aux cours ordinaires de justice. Principalement, il s'agit de savoir si cette disposition de la Loi sur les Indiens porte atteinte au principe d'égalité devant la loi affirmé par la Déclaration canadienne des droits, pour cause de discrimination raciale. La réponse à cette question devrait normalement découler d'une certaine conception de la notion d'égalité devant la loi, étant donné que la Cour suprême a déjà établi, dans l'arrêt *Drybones,* que la Déclaration canadienne des droits a suffisamment d'autorité pour rendre une disposition législative inopérante.[13] En se référant à l'opinion dissidente qu'il avait exprimée dans *Drybones,* le juge Pigeon, s'exprimant en définitive pour la majorité, réussit pourtant le tour de force de ramener le débat à ce dernier niveau.

Dans ce fameux passage de l'arrêt *Drybones,* le juge Pigeon posait une hypothèse. Il disait que *si* l'égalité devant la loi affirmée dans la Déclaration devait avoir pour effet de rendre inopérantes toutes les dispositions législatives en vertu desquelles les Indiens ne sont pas traités *de la même façon* que le grand public, la Déclaration aurait alors les effets implicites difficilement admissibles de modifier fondamentalement le statut des Indiens et de rendre plus difficile l'exercice *futur* de l'autorité législative fédérale sur les Indiens.

Cette hypothèse, il est important de le souligner, a pour fondement la conception la plus extensive qui soit de la notion d'égalité devant la loi. Elle consiste, essentiellement, à supposer que l'égalité devant la loi pourrait exclure toutes les règles juridiques en vertu desquelles des personnes ou groupes de personnes "ne sont pas traités *de la même façon* que le grand public". Au moment de l'affaire *Drybones,* il était légitime de soulever cette hypothèse: la Cour suprême n'avait pas encore eu à définir l'égalité devant la loi. Mais depuis que la Cour suprême, précisément dans *Drybones,* a opté pour une conception beaucoup plus étroite, voulant que l'égalité devant la loi signifie qu'un individu ou groupe d'individus "ne doit pas être traité *plus durement* qu'un autre en vertu de la loi",[14] il est devenu oiseux de soulever à nouveau cette hypothèse et impertinent de se référer

[13] *Ibid.,* à la p. 295.

[14] *Ibid.,* aux pp. 296-297.

aux conséquences que son existence pourrait entraîner. Ajoutons que cette démarche est devenue doublement oiseuse et impertinente depuis que la même Cour suprême, dans l'affaire *Lavell,* semble avoir réduit sa notion d'égalité devant la loi au concept bien plus étroit encore de *rule of law.*[15]

Dans les circonstances de la présente affaire, la Cour suprême aurait dû seulement se demander si l'égalité devant la loi de la Déclaration, telle qu'elle l'interprète, rendait inopérant l'article 43 de la Loi sur les Indiens. Ce faisant, elle n'aurait pas dû pouvoir davantage s'appuyer sur la partie du fameux passage du juge Pigeon consacrée aux effets que pourrait avoir la Déclaration sur la législation fédérale adoptée postérieurement à la Déclaration. Il s'agit là d'une pure opinion, qui ne s'appliquait pas aux circonstances de l'affaire *Drybones* dans laquelle elle a été exprimée. Et elle ne s'applique pas davantage aux circonstances de la présente affaire: l'article 43 de la Loi sur les Indiens existait en effet avant que la Déclaration canadienne des droits ne fut adoptée. De plus, les principes de droit applicables à l'une et l'autre situations sont essentiellement différents. En ce qui regarde les effets de la Déclaration sur les lois existantes, il n'y a qu'à savoir si et dans quelle mesure le Parlement fédéral, par la Déclaration, voulait modifier le droit antérieur. Nul ne mettra en doute le pouvoir du Parlement fédéral d'abroger sa législation, explicitement ou tacitement. C'est à cette question précise que la Cour suprême a apporté une réponse claire dans l'arrêt *Drybones.* En ce qui regarde les effets de la Déclaration sur les lois adoptées postérieurement à la Déclaration, il s'agit par contre de savoir si le Parlement fédéral a pu, de façon efficace, se rendre l'entreprise législative plus difficile pour l'avenir, par l'insertion d'une disposition de dérogation expresse ou "clause nonobstante" dans la Déclaration. Les principes constitutionnels en jeu dans ce dernier cas ne le sont pas dans le premier.

A cet égard, il ne semble pas qu'il puisse être de quelqu'utilité d'invoquer "l'autorité législative fédérale sur les Indiens" ou, plus précisément, l'article 91(24) de l'Acte de l'Amérique du Nord britannique. Ce que fait le juge Pigeon dans l'extrait de l'arrêt *Drybones* auquel il se réfère, et ce que font explicitement les juges Ritchie, Martland et Judson avant d'exprimer leur adhésion aux motifs du juge Pigeon. Nous ne voyons pas pourquoi cette faculté que possède indéniablement le Parlement fédéral, de modifier la législation fédérale existante, n'aurait pas pour

[15] *Supra,* note 1, aux pp. 18, 3ième para. et 26, 2ième para., des motifs exprimés par le juge Ritchie pour la majorité.

objet une disposition législative isolée, une loi entière ou encore, *in abstracto,* toute la législation adopté sous un titre de compétence énuméré à l'article 91 de l'Acte de l'Amérique du Nord britannique. De la même façon que nous ne voyons pas pourquoi l'article 91 de l'Acte de l'Amérique du Nord britannique pourrait servir à libérer le Parlement fédéral de l'obligation virtuelle de n'exercer à l'avenir un titre de compétence qu'en respectant la disposition de dérogation expresse de la Déclaration canadienne des droits. La question, dans l'un et l'autre cas, est de nature fédérale et non de nature fédérative: sa réponse doit découler de règles constitutionnelles relatives aux seuls organes législatifs fédéraux. La Déclaration canadienne des droits, si on lui reconnaît quelque valeur, doit nécessairement affecter un ou des titres de compétence fédérale énoncés à l'Acte de l'Amérique du Nord britannique. On pourrait douter qu'elle ait pu abroger ou empêcher toute législation sous un de ces titres. Mais ce n'est pas l'article 91 de l'Acte de l'Amérique du Nord britannique qui pourrait nourrir ce doute. L'invoquer nous apparaît aussi saugrenu que d'invoquer l'article 92 pour prétendre que les parlements des membres de la fédération ne peuvent consulter leur population avant de légiférer sur un point, parce que, selon cet article, ils jouissent de leurs compétences en exclusivité.[16] Les articles 91 et 92 de l'Acte de l'Amérique du Nord britannique partagent les compétences étatiques entre le fédéral et les membres de la fédération, alors que la Déclaration vient dire si et comment le fédéral peut exercer ses compétences. Et comme le fédéral, par rapport aux membres de la fédération, n'est pas obligé d'exercer ses compétences, les deux questions sont en définitive sans lien.

Il serait possible, il est vrai, de prétendre que l'argument, quelle que soit sa valeur intrinsèque, a été accrédité par la Cour suprême dans l'arrêt *Lavell*[17] et que, partant, il devenait légitime de l'utiliser dans la présente affaire. Il semble pourtant y avoir, sur ce point, une base de distinction essentielle entre l'affaire *Lavell* et la présente affaire. Dans *Lavell,* il fait partie des données essentielles du raisonnement du juge Ritchie, qui s'exprime alors au nom de la majorité, que la disposition législative incriminée porte sur un objet essentiel à l'exercice d'un titre de compétence fédérale.[18] Il s'agissait en l'occurence d'un élément de la définition de l'Indien auquel la Loi sur les Indiens doit s'appliquer. Or il semble bien qu'il ne soit pas possible de soutenir que l'article 43 de la Loi sur les Indiens soit ainsi essentiel

[16] Voir *Nat Bell Liquors* v. *R.,* [1922] 2 A.C. 128.

[17] *Supra,* note 1, à la p. 12, 3ième para. des motifs du juge Ritchie.

[18] *Ibid.,* aux pp. 9, 3ième para. et 19, 3ième para.

à l'exercice par le fédéral de son titre de compétence sur les Indiens.

La décision rendue par la Cour suprême dans l'affaire *Canard* nous apparaît en définitive insolite. La question portait sur l'égalité devant la loi; la réponse consiste en un renvoi à un point de vue révolu sur la portée de la Déclaration canadienne des droits.

Après l'arrêt *Lavell,* nous pensions que la législation fédérale antérieure à la Déclaration était immunisée à l'endroit de cette dernière, dans la mesure seulement où cette législation pourrait apparaître essentielle à l'exercice par le Parlement fédéral d'un des titres de compétence que lui confie l'Acte de l'Amérique du Nord britannique. Même si nous saisissions mal la pertinence de ce critère, il nous semblait que là devait s'arrêter le retour en arrière sur ce point, par rapport à *Drybones.*[19] Avec l'arrêt *Canard,* c'est l'incertitude la plus entière. Il ne semble pas que toute la législation antérieure à la Déclaration se trouve immunisée contre la Déclaration par l'effet du paragraphe introductif de l'article 1 de cette dernière, comme la chose fut affirmée dans l'arrêt *Rosetani,*[20] niée dans l'arrêt *Drybones*[21] et évoquée comme motif surabondant l'arrêt *Smythe.*[22] Mais il semble que toute législation antérieure à la Déclaration puisse être virtuellement soustraite à l'application de la Déclaration, sans qu'il soit possible de dire pour quel motif précis. Peut-être parce que cette législation serait alors (tacitement) considérée comme portant sur un élément essentiel à l'exercice d'un titre de compétence fédérale.

Pour ce qui est de la portée de la Déclaration face aux lois adoptées postérieurement à elle, la Cour suprême n'a toujours pas eu à se prononcer sur la question.

Enfin, l'arrêt *Canard* n'ajoute rien en matière d'égalité devant la loi. Il laisse donc tacitement celle-ci au niveau auquel elle était au sortir de l'affaire *Lavell*: l'égalité devant la loi ne signifierait rien de plus que la bonne vieille *Rule of Law.*[23]

Depuis 1970, la Cour suprême semble s'adonner à un joyeux tango ayant pour thème la portée de la Déclaration canadienne des droits. Trois pas en avant dans *Drybones,* un petit pas de côté dans *Lavell* et un grand pas en arrière dans *Canard.* Le juge Pigeon mène le bal et les collègues prouvent leur souplesse.

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[19] Voir (1973), 14 C. de D. 541.

[20] *Robertson and Rosetani* v. *R.*, [1963] R.C.S. 651, aux pp. 654, 656 et 658.

[21] *Supra,* note 3, à la p. 295.

[22] *Supra,* note 9, à la p. 485.

[23] Voir Jean-K. Samson, (1973), 14 C. de D. 354; voir aussi, *op. cit.,* note 19.

Il est toutefois difficile d'admettre qu'on puisse répondre à une question aussi fondamentale, comme on le fait dans l'arrêt *Canard,* par une référence de deux lignes à un point de vue dissident, doublement hypothèque et ne s'appliquant pas aux données de l'affaire en cause. Et, à nos yeux, il semble inconvenant que l'auteur de cette référence, faite en définitive au nom de la majorité, soit en même temps l'auteur de ce point de vue. Personnellement, nous aurions préféré que le juge Pigeon, au lieu de récidiver sèchement,[24] fasse en termes explicites le lien qui semble s'imposer à son esprit entre le fameux passage de la dissidence qu'il a exprimée dans *Drybones* et les circonstances de l'affaire *Canard.* Ou, encore, qu'il démontre autant de respect pour la règle du *stare decisis* qu'il en a démontré dans l'arrêt *Howarth* qu'il a récemment rendu au nom de la majorité.[25]

Pour l'avenir, il reste à espérer qu'on se rendra compte que la *ratio* de ce jugement n'en est peut-être pas vraiment une, puisqu'elle ne semble pas avoir grand lien avec les circonstances en cause. Outre les juges Laskin et Spence, il devrait être possible de compter, à cette fin, sur les juges Beetz et Dickson. Et le juge Ritchie reviendra peut-être un jour à *Drybones.*

HENRI BRUN*

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EXERCISE OF QUASI-JUDICAL STATUTORY POWER BY POLICE COMMISSION — *audi alteram partem* RULE — FAIR HEARING — NATURAL JUSTICE. — The recent decision of the Supreme Court of Canada in *Saulnier* v. *The Quebec Police Commission*[1] is as intriguing for what it does not decide as for what it does. On the one hand, the judgment provides yet another example of a statutory power whose exercise the courts have characterized as "quasi-judicial", and to which the rule of *audi alteram partem* applies. On the other hand, Pigeon J. (writing for a unanimous nine-member court) does not really deal with the interesting questions raised by the trial judge concerning bias and the discriminatory use of a statutory power. And, finally, the court does not consider the increasingly virile line of cases which hold that the principles of natural justice (or, at least, a general "duty to

[24] Voir les notes du juge Pigeon dans l'arrêt *Lavell, supra,* note 1.

[25] *L. J. Howarth* v. *Commission des libérations conditionnelles* (1975), 50 D.L.R. (3d) 349, et (1975), 53 R. du B. Can. 92.

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[1] Not yet reported.

be fair") may apply even in circumstances which cannot properly be called "quasi-judicial".

The facts in *Saulnier* are straight-forward. In 1967, while Jacques Saulnier was an ordinary policeman in the City of Montreal, a colour television set was delivered to his home by the proprietor of a hotel. Mr. Saulnier did not immediately return this (perhaps improper) gift, nor did he inform his superior. Nevertheless, the episode apparently was drawn to the Mayor's attention in 1968. Three years later the same Mayor appointed Mr. Saulnier Chief of Police for the City of Montreal. In 1971, the Montreal Urban Community was formed, and the police forces of the constituent municipalities also became federated.

On January 12th and 13th, 1972, the Montreal newspaper, *Le Devoir*, published articles about Mr. Saulnier's performance as Police Chief, and referred to the television episode. On January 18th, the Quebec Minister of Justice instructed the Police Commission to hold an inquiry into Mr. Saulnier's conduct, pursuant to section 20 of the Police Act.[2]

The Commission issued its report on July 17th, 1972. Among its six recommendations, it concluded that Mr. Saulnier was incompetent and lacked the ability to discharge the responsibilities of his senior position. Further, the Commission suggested a novel way for the Minister to proceed. Under section 31 of the Act establishing the Montreal Urban Community Police Department[3], the Commission was empowered to evaluate the personnel of the federated forces, and to standardize their ranks and duties. These powers, however, did *not* apply to the Montreal City Police Force (which was only one of the forces amalgamated into the Urban Community's Police Department), or to its members, unless (and to the extent) that the Minister so directed. The Commission therefore recommended that the Minister direct it to evaluate Mr. Saulnier's qualifications — which the Minister obligingly did.

At this point, Mr. Saulnier applied to the Superior Court[4] for and obtained a writ of evocation[5] prohibiting the Commission

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[2] S.Q., 1968, c. 17, as am. by S.Q., 1971, c. 16, s. 5.

[3] S.Q., 1971, c. 93.

[4] The judgment of Paré J. is unreported.

[5] Under art. 846 of the revised Code of Civil Procedure, S.Q., 1965, c. 80. The Code has amalgamated the remedies of certiorari and prohibition into one, called "evocation". The precise circumstances in which evocation is available of course depend upon the wording of art. 846, and may differ slightly from the availability of certiorari and prohibition in the various common law jurisdictions. Further, art. 33 of the Code of Civil Procedure

from proceeding further, and declaring its recommendations to the Attorney General to be null and void for breach of the principles of natural justice. The Commission appealed, and by a three to two decision (Tremblay C.J., Turgeon and Crête JJ. in the majority; Casey and Rinfret JJ. dissenting) the court of Appeal[6] reversed — on the sole ground that the Commission's inquiry under section 20 of the Police Act was not quasi-judicial in nature. Rather, the Commission was said to be merely gathering information and making recommendations, upon which the Attorney General might or might not act. Therefore the majority of the Court of Appeal applied the *ratio* of the Supreme Court's decision in *Guay* v. *Lafleur*.[7]

In the Supreme Court, on the other hand, Pigeon J. clearly holds that the Police Commission's first inquiry into Mr. Saulnier's conduct was quasi-judicial. Therefore the *audi alteram partem* rule applied, and the policeman should have been given a hearing by the Commission before it made its recommendations to the Attorney General. Pigeon J. reaches this conclusion for two reasons. First, section 24 of the Police Act itself provides that:[8]

> The Commission shall not, in its reports, censure the conduct of a person or recommend that punitive action be taken against him unless it has heard him on the facts giving rise to such censure or recommendation....

Therefore, the statutory scheme of the Police Act[9] clearly differs from the provisions of the Income Tax Act[10] in *Guay* v. *Lafleur*,[11] which did not expressly provide for any hearing of the taxpayer whose affairs were being investigated.[12] Secondly, Pigeon J.

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may provide a general revising power in the Superior Court, which would be available even if the strict requirements for evocation are not fulfulled. See *Fekete* v. *The Royal Institution for the Advancement of Learning (McGill University)* (1969), 2 D.L.R. (3d) 129; *cf. Cité de Trois-Rivières* v. *Brière*, [1974] Que. C.A. 82. Finally art. 20 of the Code of Civil Procedure provides that "whenever this Code contains no provision for exercising any right, any proceeding may be adopted which is not inconsistent with this Code or with some other provision of law". In any event, the strict requirements for a writ of evocation were not at issue in *Saulnier*.

[6] [1973] R. de J. 757.

[7] [1965] S.C.R. 12.

[8] *Supra*, footnote 2.

[9] *Ibid.*

[10] R.S.C., 1952, c. 148, as am.

[11] *Supra*, footnote 7.

[12] In fact, s. 231(15) of The Income Tax Act, S.C., 1970-71-72, c. 63, now has effectively reversed *Guay* v. *Lafleur*, *ibid.*

perceived that the Commission's inquiry impinged upon Mr. Saulnier's rights:[13]

> ... [J]e n'arrive pas à comprendre comment on peut soutenir qu'il ne s'agit pas d'une décision qui porte atteinte aux droits de l'appelant, alors ... [que la Commission] ... veut qu'il soit dégradé de son poste de directeur de service de police de la ville de Montréal et que les procédures ultérieures ont pour seul but de fixer le grade inférieur auquel il doit être assigné, c'est-à-dire l'ampleur de la dégradation.

Therefore, even in the absence of the specific statutory right to a hearing, the common law right to a fair hearing should have been observed. These findings were the basis for the Supreme Court's allowing Mr. Saulnier's appeal.

Yet, a more searching scrutiny of the Supreme Court's decision raises a number of unanswered questions. Precisely which hearing was at issue? Both the Supreme Court and the Court of Appeal concentrated upon the defective nature of the *first* hearing by the Commission. Both the Supreme Court and the dissenting minority in the Court of Appeal concluded that therefore the subsequent standardization procedures undertaken by the Commission should be prohibited. Neither answered the argument adopted by the majority of the Court of Appeal that standardization procedures under section 31 of the subsequent Police Department Act[14] could be instituted by the Attorney General himself, and in no way depended upon a proper (or any) hearing into the conduct of the officer under section 20 of the Police Act.[15] What would be the result if the Attorney General now (for whatever reason) directed the Commission to apply section 31 to Mr. Saulnier?

Further, suppose the Commission's first inquiry had included a proper hearing, but the Commission had nevertheless made the same recommendations to the Attorney General. Would the Commission, if then directed to apply the standardization procedures, also have been prohibited from doing so by the other branch of natural justice, *nemo judex in sua causa*? Certainly, any reasonable man would have perceived that the Commission was

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[13] The English version of the Supreme Court's decision has not yet been issued but an unofficial translation of this part of the reasons is: "... I cannot understand how one can submit that the decision did not affect the rights of the appellant — in light of the fact that ... [the Commission] ... wished him to be demoted from his position as Police Chief of the City of Montreal, and that the sole aim of all of the subsequent proceedings would be to determine the lower rank to which he should be demoted."

[14] *Supra*, footnote 3.

[15] *Supra*, footnote 2.

biassed, in the sense of already having made up its mind to demote Mr. Saulnier. Indeed, the trial judge foresaw this danger:[16]

> Mais c'est ici que survient un paradoxe inconciliable avec l'esprit de la loi et les règles de la justice élémentaire. Le tribunal devant lequel le requérant pourrait porter en appel la décision de l'enquêteur est précisément celui qui l'a jugé en première instance par le truchement d'une commission d'enquête.[17]

On the other hand, both statutes expressly do require the Commission to exercise the powers in question — a much clearer statutory framework than existed, for instance, in *The Law Society of Upper Canada* v. *French*,[18] where the Supreme Court managed to eke out from The Law Society Act[19] a statutory implication that nothing prevented members of a discipline committee from sitting on a further hearing of the same matter before Convocation. Perhaps the doctrine of parliamentary sovereignty is now so firmly entrenched that the Supreme Court could not have heeded Coke's dicta in *Dr. Bonham's* case,[20] but it does seem objectionable for a legislature to establish a statutory scheme which permits the *nemo judex* rule to be circumvented.

Of course, it is always possible that the National Assembly of Quebec, when it passed the two statutes in question, did not foresee their use in tandem, as in fact occurred in *Saulnier*. Again, as the trial judge notes, the application of section 31 by the Attorney General to Mr. Saulnier alone was peculiar:

> Je ne crois donc pas que l'exception de l'article 31 qui exclut les policiers de la Ville de Montréal de la procédure de normalisation, sauf

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[16] Per Paré J. as quoted by Pigeon J. in the Supreme Court's decision. An unofficial translation of this passage is: "But here one finds an irreconcilable paradox between the spirit of the statutory scheme and the principles of natural justice. The board before whom the appellant could appeal from the inspector's decision is precisely the one which judged him in the first instance by way of the Commission of Inquiry."

[17] Paré J.'s reference to an inspector refers to s. 31 of the Police Department Act, *supra*, footnote 3, which provides that the standardization procedures shall first be applied by an inspector, from whom an appeal lies to the full Police Commission — which had already conducted the statutory inquiry under s. 20 of the Police Act, *supra*, footnote 2.

[18] (1975), 49 D.L.R. (3d) 1.

[19] R.S.O., 1970, c. 238.

[20] (1610), 8 Co. Rep. 113b, at p. 118: "When an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul [sic] it, and adjuge such Act to be void."

> dans la mesure qu'indique le Ministre, permette au Ministre d'isoler un policier en particulier et de le soumettre à un régime spécial distinct de l'ensemble.[21]

If this issue had been a focal point of the Supreme Court's decision, imagine what a jewel would have been added to the crown of *Roncarelli* v. *Duplessis*,[22] *Padfield* v. *The Minister of Agriculture, Fisheries and Food*,[23] and Lord Atkin's dissent in *Liversidge* v. *Anderson*![24]

Instead, the Supreme Court concentrated solely on the question of whether or not the Commission was exercising a quasi-judicial function. Unfortunately, however, the court did not really examine the characteristics of a quasi-judicial power, nor indicate how to distinguish such a power from a purely administrative one. Pigeon J. does imply that the fact that the applicant's rights are being affected denotes the existence of a quasi-judicial function. But if this is the hallmark of the distinction, how does one determine what constitutes a "right"? Surely, no one would suggest that Hohfeld's[25] definition of a right could, in practice, be employed by the courts in this context. Nor would anyone with an historical perspective suppose that the concept of "rights" remains constant over time. Indeed, one has only to compare the decision in *Saulnier* with *Guay* v. *Lafleur*[26] (particularly Hall J.'s dissenting judgment) or to ask whether *Calgary Power* v. *Copithorne*[27] would be decided the same way today to underline the court's shifting perception of what "rights" are.

Further, the judgments at all levels in the *Saulnier* case tend to equate the existence of a quasi-judicial power with the application of the principles of natural justice. In fact, the cases indicate no necessary identity between these two concepts. On the one hand, a large number of powers can clearly affect people's "rights" (in any everyday sense of that word) without possibly

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[21] Unofficial translation: "I do not believe that the exception to section 31 which excludes members of the City of Montreal Police Force from the standardization procedures, except to the extent indicated by the Minister, permits the Minister to identify one particular policeman and apply to him alone a system distinct from what applies to the whole force."

[22] (1959), 16 D.L.R. (2d) 689 (S.C.C.).

[23] [1968] A.C. 997 (H.L.).

[24] [1942] A.C. 206 (H.L.).

[25] Fundamental Legal Conceptions (4th print., 1966).

[26] *Supra*, footnote 7.

[27] [1959] S.C.R. 24.

being considered subject to the principles of natural justice. Should the Queen consult everyone who might be affected before declaring war? Should the Prime Minister give notice to every member of Parliament whose right to a pension may be affected by a dissolution of the House? Or must a policeman consult the suspect he intends to arrest (assuming he has other reasonable and probable grounds for making the arrest)? Should the Attorney General of a province give a hearing to an accused against whom an indictment is to be preferred?[28] There may be very good policy reasons why the principles of natural justice should not be applied in these types of cases. But to conclude that *therefore* "rights" are not being affected is to pervert the ordinary meaning of that word. And then to argue that (1) *because* "rights" are not affected, *therefore* (2) no quasi-judicial function is being exercised, and *therefore* (3) the principles of natural justice do not apply is (to use the phrase of the minority in the Court of Appeal in *Saulnier*) pure sophistry.

On the other hand, the principles of natural justice may well apply even where there is no quasi-judicial function. There is a strong line of fairly recent authority in both Canada and the United Kingdom which resuscitates Lord Loreburn's dictum in *Board of Education* v. *Rice*[29] that anyone who decides anything has a duty to listen fairly to both sides. Indeed, the Supreme Court of Canada itself in the *Posluns* case[30] adopted Lord Reid's analysis in *Ridge* v. *Baldwin*[31] of this precise point. And the Federal Court of Appeal has clearly accepted this proposition[32] in *Blais* v. *Basford*[33] and *Lazarov* v. *Sec. of State*.[34] It is too bad that all of the judges in *Saulnier* (perhaps still following the Privy Council's decision in *Nakkuda Ali*[35]) linked their conclusions on the *audi alteram partem* issue inexorably to the existence of a quasi-judicial power — and did not firmly seize the opportunity to implant the more general "duty to be fair" into Canadian soil.

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[28] See *R.* v. *Morgentaler*, [1973] Que. S.C. 824.

[29] [1911] A.C. 179, at p. 182 (H.L.).

[30] *Posluns* v. *Toronto Stock Exchange*, [1968] S.C.R. 330.

[31] [1964] A.C. 40 (H.L.).

[32] Despite the wording of s.28(1) of the Federal Court Act, S.C., 1970-71-72, c.1, which limits the Federal Court of Appeal's review jurisdiction to decisions or orders *other than* "of an administrative nature not required by law to be made on a judicial or quasi-judicial basis".

[33] [1972] F.C. 151; see also *Blais* v. *Andras*, [1973] F.C. 182.

[34] (1973), 39 D.L.R. (3d) 738.

[35] *Nakkuda Ali* v. *M. F. De S. Jayaratne*, [1951] A.C. 66 (P.C.).

It is, of course, possible to argue that the duty to be fair in fact differs from the *audi alteram partem* rule. Clearly, everyone who exercises a statutory power must do so in good faith, and not for an ulterior purpose — and in this sense must act "fairly".[36] But the concept of fairness which has developed in the cases[37] entails some type of hearing or opportunity to make representations before a decision is made. A good deal of the jurisprudence on the *audi alteram partem* rule is devoted to determining exactly what constitutes a "fair hearing" — and, in many cases, the courts have said that the "hearing" may be exceedingly brief, not necessarily oral, without cross-examination — and otherwise quite diluted from the paradigm of an adversarial court-room trial. Does such a diluted *audi alteram partem* differ from the duty to be fair?

Further, there are good policy reasons for supposing that *audi alteram partem* does (and should) apply to merely administrative decisions. The rationale for the existence and application of the principles of natural justice surely rests in the dictum of Lord Hewart C.J., that "it is of fundamental importance that justice should manifestly and undoubtedly be seen to be done".[38] Justice cannot be done if it is closed, secretive, arbitrary or dispensed without reasons.[39] And the same basic requirements apply to almost all governmental actions which affect people — even if "merely administrative" in nature. Why should affected persons not at least have the opportunity to make their views known before their property is expropriated,[40] their trading licence suspended[41] or their liability to tax assessed?[42]

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[36] See the decisions in *Roncarelli* v. *Duplessis* and *Padfield* v. *Minister of Agriculture, Fisheries and Food*, cited *supra*, footnotes 22 and 23.

[37] For example, see: *In re H(K)*, [1967] 2 Q.B. 617; *R.* v. *Gaming Board for Great Britain, ex p. Benaim and Thaida*, [1970] 2 Q.B. 417; *Re Pergamon Press Ltd.*, [1971] Ch. 388; *Pearlberg* v. *Varty*, [1972] 1 W.L.R. 534, at p. 547 (H.L.), per Lord Pearson; *Bates* v. *The Lord Chancellor*, [1972] 1 W.L.R. 1373, at p. 1378 (Ch. D.); *R.* v. *Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association*, [1972] 2 Q.B. 299, at pp. 307-308, per Lord Denning M.R., at p. 310, per Roskill L. J.; *Lazarov*, *supra*, footnote 34; *Blais* v. *Basford* and *Blais* v. *Andras*, *supra*, footnote 33.

[38] *R.* v. *Sussex JJ., ex p. McCarthy*, [1924] 1 K.B. 256, at p. 259.

[39] Notwithstanding, the decision of the House of Lords in *Local Government Board* v. *Arlidge*, [1915] A.C. 120.

[40] *Calgary Power* v. *Copithorne*, *supra*, footnote 27.

[41] *Nakkuda Ali* v. *M. F. De S. Jayaratne*, *supra*, footnote 35.

[42] *Guay* v. *Lafleur*, *supra*, footnote 7.

Of course there is the question of who should be able to make this type of intervention in the administrative process. And there are, undoubtedly, many circumstances affecting large numbers of people, or where very broad questions of policy are involved, or where a complete trial will be provided at a later stage, or where Parliament is considering a particular law — and in all of these circumstances it may be that the courts should not intervene to "judicialize" the proceedings by requiring the application of the principles of natural justice. Where to draw the line is obviously an extremely difficult problem. But the courts have adopted the totally unsatisfactory subterfuge of trying to avoid the policy issues involved by employing the sterile and unworkable characterization of legislative, judicial and administrative powers.

If only the Supreme Court could find a better test to justify judicial review!

DAVID PHILLIP JONES*

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IMMIGRATION—DEPORTATION—BILL OF RIGHTS—*audi alteram partem* RULE—NATIONAL INTEREST AND THE IMMIGRANT'S RIGHT TO A HEARING.—The recent Supreme Court decision in *Prata* v. *Minister of Manpower & Immigration*[1] further entrenches the "valid federal objective" doctrine as a canon for construing and applying the guarantees contained in the Canadian Bill of Rights.[2] It also raises important questions concerning the place of individual safeguards and equality before the law in the context of immigration and national security.

Prata was ordered deported from Canada on October 29th, 1971. He appealed to the Immigration Appeal Board under section 11 of the Immigration Appeal Board Act.[3] His appeal was unsuccessful and the validity of the deportation order was affirmed. Ordinarily, an appellant's failure to substantiate an alleged error of law or fact is not the end of an immigration appeal, because the Board possesses a broad discretion under section 15 of the Act empowering it to stay or quash a legally valid deportation order, *inter alia* having regard to the existence of "compassionate or humanitarian considerations that in the

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[1] (1975), 52 D.L.R. (3d) 383 (S.C.C.).

[2] R.S.C., 1970, Appendix III.

[3] R.S.C., 1970, c. I-3, as am. by S.C., 1973-74, c. 27.

opinion of the Board warrant the granting of special relief".[4] It is this relief at which most appeals to the Board, including that of Mr. Prata, are in fact aimed. However, another provision in the Immigration Appeal Board Act bars certain persons from access to the Board's section 15 discretionary jurisdiction. Specifically, the Board may be precluded from exercising its section 15 powers by the filing under section 21[5] of the Act of a certificate signed by the Minister of Manpower and Immigration and the Solicitor General, stating that based upon criminal intelligence reports received and considered by them, it would be contrary to the national interest for the Board to stay or quash a deportation order.

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[4] Immigration Appeal Board Act, *ibid.*, s. 15(1): "Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph 14(c), it shall direct that the order be executed as soon as practicable, except that the Board may,

a) in the case of a person who was a permanent resident at the time of the making of the order of deportation, having regard to all the circumstances of the case, or

b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to

i) the existence of reasonable grounds for believing that the person concerned is a refugee protected by the Convention or that, if execution of the order is carried out, he will suffer unusual hardship, or

ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

direct that the execution of the order of deportation be stayed, or quash the order and direct the grant of entry or landing to the person against whom the order was made."

[5] *Ibid.*, s. 21:

"(1) Notwithstanding anything in this Act, the Board shall not,

a) in the exercise of its discretion under s. 15, stay the execution of a deportation order or thereafter continue or renew the stay, quash a deportation order, or direct the grant of entry or landing to any person, or

b) render a decision pursuant to s. 17 that a person whose admission is being sponsored and the sponsor of that person meet the requirements referred to in that section.

if a certificate signed by the Minister and the Solicitor General is filed with the Board stating that in their opinion, based upon security or criminal intelligence reports received and considered by them, it would be contrary to the national interest for the Board to take such action.

(2) A certificate purporting to be signed by the Minister and the Solicitor General pursuant to subsection (1) shall be deemed to have been signed by them and shall be received by the Board without proof of the signatures or official character of the persons appearing to have signed it unless called into question by the Minister or the Solicitor General, and the certificate is conclusive proof of the matters stated therein."

A certificate was filed with the Board under section 21 of the Act in the *Prata* case, prompting the appellant to seek the production of the reports which had served as the basis for its issuance. Observing that under section 21(2), "the certificate is conclusive proof of the matters stated therein", the Board felt constrained to deny his request.[6] Prata unsuccessfully appealed the Board's decision to the Federal Court of Appeal[7] and then took a further appeal which was dismissed by the Supreme Court of Canada in a unanimous decision.[8]

The procedure whereby access to the Board's discretionary powers could be pre-empted by the government through the filing of a section 21 certificate was challenged in *Prata* on two grounds. It was contended first that the issuing of a certificate without a hearing offended against the *audi alteram partem* rule, one of the major precepts of natural justice. Secondly it was suggested that the section 21 procedure had deprived the appellant of safeguards guaranteed by the Canadian Bill of Rights, particularly the right to equality before the law under section 1(b).

Audi Alteram Partem

The first question considered by the Supreme Court involved the contention that the section 21 certificate was invalid because the appellant had not been afforded any opportunity to be heard before it was filed with the Immigration Appeal Board. The *audi alteram partem* principle enjoys a well-established place in the rubric of natural justice. It embodies an expectation that an individual will not be deprived of a right, interest or position until he has had an opportunity to answer the case against him.[9] Although initiated by the common law courts, the idea of a right to a hearing is now statutorily entrenched in many areas of administrative law, including immigration. Thus, the Immigration Act itself recognizes[10] that deportation should normally be preceded by an inquiry at which the person concerned may answer the charges against him.

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[6] "With respect to the Board's discretionary powers under s. 15, the Board finds that by virtue of the fact that a certificate has been filed under the provision of s. 21 of the Immigration Appeal Board Act, the Board has been stripped of jurisdiction to consider the appellant's appeal that the order be executed as soon as practicable." Per Martland J., *supra*, footnote 1, at p. 385.

[7] (1972), 31 D.L.R. (3d) 465, per Jackett C.J.F.C., Sweet D.J. concurring. Thurlow J., dissenting, would have allowed the appeal.

[8] *Supra*, footnote 1.

[9] S.A. de Smith, Judicial Review of Administrative Action (3rd ed., 1973), pp. 134 *et seq.*

[10] R.S.C., 1970, c. I-2, ss 23-28.

In his approach to the question of *audi alteram partem* and its place in the statutory scheme established by section 21 of the Immigration Appeal Board Act, Martland J. was at some pains to emphasize that the appellant was not seeking to vindicate a right but merely to obtain a "discretionary privilege".[11] As he was not questioning the validity of the deportation order, the only interest which he was attempting to protect was that of a possible review of his case by the Immigration Appeal Board under its section 15 discretionary powers.[12] However, this was a limited and defined jurisdiction which was effectively circumscribed by section 21 of the Act and accordingly the Board had no choice but to reject any suggestion that it should review the appellant's case under section 15.[13] Mr. Justice Martland cited with approval a 1973 English Court of Appeal decision in which Lord Denning M.R. had observed:[14]

> At common law no alien has any right to enter [the United Kingdom] except by leave of the Crown; and the Crown can refuse leave without giving any reason.... If he comes by leave, the Crown can impose such conditions as it thinks fit, as to his length of stay, or otherwise. He has no right whatever to remain here. He is liable to be sent home to his own country at any time if, in the opinion of the Crown, his presence here is not conducive to the public good; and for this purpose, the executive may arrest him and put him on board a ship or aircraft bound for his own country.... The position of aliens at common law has since been covered by various regulations; but the principles remain the same.

Martland J. concluded[15] that the effect of section 21 of the Immigration Appeal Board Act was to reserve to the government of Canada a power analogous to the Crown prerogative referred to by the Master of the Rolls. It is suggested, however, that care needs to be exercised in transposing this prerogative into the context of contemporary Canadian immigration law. There can be little doubt that every state may exclude or remove an alien from its territory.[16] Such authority is an obvious concomitant of the concept of national sovereignty. But it remains open to a country to modify through its domestic legal system the scope of this authority and the precise manner in which it may be exercised. In the United Kingdom the traditional prerogative has been reinforced by express statutory provisions which

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[11] *Supra*, footnote 1, at p. 385.

[12] *Ibid.*

[13] *Ibid.*, at p. 387.

[14] *R.* v. *Governor of Pentonville Prison, ex p. Azam*, [1973] 2 All E.R. 741, at p. 747. Cited *ibid.*, at p. 385.

[15] *Ibid.*, at p. 386.

[16] See Castel, International Law (1965), p. 477.

empower the Secretary of State to deport or exclude any person whose presence would not be conducive to the public good.[17] The situation in Canada is less clear. There is a Supreme Court decision[18] emphasizing the basic proposition that immigration into Canada is a privilege, but the present Immigration Act states[19] that a person who satisfies the requirements for admission to Canada *shall* be admitted. No reserve power is found in the Canadian Immigration Act which corresponds directly to the "conducive to the public good" concept in the United Kingdom.[20] Therefore, while the policy underpinning a section 21 certificate may bear certain similarities to that underlying the prerogative right of the Crown to remove an undesirable alien, the Canadian statutory provision is less far-reaching. It operates only at the immigration appeal stage, and there extends only to preclude access by the person concerned to certain discretionary relief; it does not empower the Crown to order his deportation unless he faces a deportation order which meets the substantive and procedural requirements of the Immigration Act as well as the safeguards subsumed within the concept of natural justice.

At the same time, the *audi alteram partem* rule has never been of unlimited application. It does not operate in a situation involving a purely administrative or policy decision and it is subject to exclusion by Parliament.[21] Either of these restrictions would appear to rule out application of *audi alteram partem* in the context of the issue presented in *Prata*. Section 21 of the Immigration Appeal Board Act clearly states that the certificate may issue once the Ministers concerned have formed an opinion that based upon security or criminal intelligence reports it would be contrary to the national interest for the Board to consider an

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[17] See now Immigration Act, 1971, c. 77, s. 3(5)(b) (U.K.).

[18] *Vaaro* v. *R.*, [1933] 1 D.L.R. 359 (S.C.C.).

[19] Immigration Act, *supra*, footnote 10, s. 19(3): "Unless the examining officer is of the opinion that it would or may be contrary to a provision of this Act or the regulations to grant admission to or otherwise let a person examined by him come into Canada, he *shall*, after such examination, immediately grant admission to or let such person come into Canada." (Emphasis added).

[20] Certain residual powers are found in our Immigration Act, but these appear to be of a more limited scope. Thus, the Minister of Manpower and Immigration may at any time cancel a permit under which a person has been admitted to Canada and make a deportation order against him or her (ss 8(3) and (4)). Under s. 7(4) of the Act, the Minister may declare that any individual admitted as a non-immigrant has ceased to be a non-immigrant and may order his deportation. The preceding ministerial powers have rarely been exercised and were not applicable to the appellant in *Prata*, who was a landed immigrant.

[21] See de Smith, *op. cit.*, footnote 9, pp. 161, *et seq.*

appellant's case under its section 15 jurisdiction. No standards of proof are prescribed, and in spite of the desirability—recognized elsewhere in the Immigration Act—of informing an individual to the maximum extent possible of the case he has to meet, there would seem to be no basis for the courts to engraft a particular procedural refinement when such was clearly not envisaged by Parliament.

In other areas of the law, courts have from time to time declined to extend the *audi alteram partem* principle to situations where a privilege and not a right was at stake[22] and similar reasoning is evident throughout Martland J.'s judgment. However, this approach, which has been criticized as overly conceptualistic,[23] often serves to hide rather than illuminate the real issues presented and was not essential to the decision arrived at in *Prata*. Unfortunately, little attempt was made by the Supreme Court to inquire into the precise nature of the benefits which had been denied to the appellant as the result of ministerial foreclosure of the section 15 avenue. In particular, consideration might appropriately have been given to the position consistently taken by the Immigration Appeal Board that although section 15 is expressed in discretionary terms—that is the Board *may* stay or quash a deportation order on humanitarian grounds—it nonetheless regards itself as obliged to review every unsuccessful appeal in the framework of section 15 when requested to do so.[24]

The Canadian Bill of Rights

The second contention of the appellant in *Prata* was that he had been denied equality before the law as guaranteed by section 1(b) of the Canadian Bill of Rights.[25] The thrust of this argument was, of course, that he and other persons facing deportation who were the subject of a section 21 certificate were denied the possibility of being allowed to remain in Canada on compassionate grounds under section 15 of the Immigration Appeal Board Act.

It may be suggested that there was at least some initial plausibility in this argument. Undoubtedly the legislation had established a sub-group of appellants who were subject to a

[22] See de Smith, *op. cit., ibid.*, p. 149.

[23] See de Smith, *op. cit., ibid.*, p. 150. See also, Reid, Administrative Law and Practice (1971), pp. 47-48 and cases cited thereat.

[24] *Agouros* (1974), 5 I.A.C. 58.

[25] *Supra,* footnote 2, s. 1: "It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely . . . b) the right of the individual to equality before the law and the protection of the law."

distinct and, from their point of view, disadvantageous procedure. However, in pursuing this line of reasoning, the appellant encountered two formidable obstacles. First, the present Chief Justice —the member of the court generally regarded as most sympathetic to a liberal interpretation of the Bill of Rights—had earlier signalled that only compelling reasons should persuade the court to deny operative effect to a substantive measure duly enacted by Parliament.[26] Secondly, and looming even more formidably, was the "valid federal objective" canon of construction which had found favour in several earlier Supreme Court decisions, most notably in the 1974 case of *Burnshine*.[27]

It seems beyond dispute that to infringe section 1(b) of the Bill of Rights, the inequality alleged need not involve discrimination on any of the grounds specifically adverted to at the beginning of section 1—that is race, national origin, religion or sex. The Supreme Court had indicated in *Curr*[28] that while discrimination based on one or more of the enumerated factors will serve to strengthen a challenge to the law concerned, other manifestations of unequal treatment may also be susceptible to attack under section 1(b).

In *Burnshine*,[29] the Supreme Court of Canada in a six to three decision upheld the validity of provisions of the Prisons and Reformatories Act[30] which authorized the imposition of indeterminate sentences upon young offenders in British Columbia, but did not apply to adult offenders or to juveniles outside of that province (and Ontario). In the result, the appellant had incurred a definite and indeterminate sentence which in combination exceeded the maximum term imposable upon an adult or upon youthful offenders elsewhere than in British Columbia or Ontario. The majority judgment (delivered, incidentally, by Mr. Justice Martland) rejected arguments under section 1(b) of the Bill of Rights and emphasized that the purpose of the provision in question was not to impose harsher punishment but rather to benefit young offenders by subjecting them to more effective rehabilitative techniques in the two provinces where these were available.[31] In a strong dissent, Laskin J. argued[32] that this laudable objective could not salvage a provision which nonethe-

[26] *Curr* v. *The Queen* (1972), 26 D.L.R. (3d) 603, at pp. 613-614.

[27] *R.* v. *Burnshine* (1974), 44 D.L.R. (3d) 584.

[28] *Supra*, footnote 26, at p. 611, per Laskin J.

[29] *Supra*, footnote 27.

[30] R.S.C., 1970, c. P-21.

[31] *Supra*, footnote 27, at pp. 593-594.

[32] *Ibid.*, at pp. 600-601.

less operated to deny a particular group equality before the law under section 1(b) of the Canadian Bill of Rights.

In the light of *Burnshine,* a successful appeal in *Prata,* based on section 1(b) was always doubtful. Admittedly, there was no place for any suggestion that the law in question was intended to *benefit* the group to which the appellant in *Prata* belonged. But if the Supreme Court was prepared to countenance the subjection of certain groups within Canada to lengthier terms of detention than those applicable to the populace as a whole, it was unlikely to strike down a provision which applied to any alien—no matter whence he came or what his other characteristics—who was regarded as a national security threat. Such indeed was the conclusion reached, as the Supreme Court, applying *Burnshine,* declared that:[33]

> The purpose of enacting s. 21 [of the Immigration Appeal Board Act] is clear and it seeks to achieve a valid federal objective. This Court has held that s. 1(b) of the Canadian Bill of Rights does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective.

There were two further prongs to the appellant's Bill of Rights challenge. The first of these involved a contention that the procedures to which he had been subjected infringed the guarantee against "arbitrary detention, imprisonment or exile" found in section 2(a) of the Canadian Bill of Rights. Understandably, this argument received short shrift from the court. It may be doubted whether exile as a concept is applicable to non-citizens at all,[34] but even if we assume for the purpose of section 2(a) that exile and deportation are the same, it is difficult to sustain an allegation of arbitrariness when the lawfulness of the deportation order itself is conceded, as was the case in *Prata.*

The appellant attempted finally to obtain some succour from section 2(e) of the Bill of Rights, which provides that no law of Canada shall be construed or applied so as to "deprive a person of the right of a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations".

Professor Tarnopolsky has indicated[35] that the term "fundamental justice" is synonymous with natural justice. If this is so,

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[33] *Supra,* footnote 1, at p. 387, per Martland J.

[34] See Tarnopolsky, The Canadian Bill of Rights (2nd rev. ed., 1975), pp. 236-237.

[35] *Op. cit., ibid.,* p. 264.

and there does not appear to be any judicial authority to the contrary, we are back with the *audi alteram partem* requirements discussed earlier. However, an additional dimension in the Bill of Rights claim is that while the requirements of natural justice can undoubtedly be overridden whenever Parliament evinces an intention to do so either through express words or by creating a clearly incompatible statutory scheme, such is not the case with the guarantees expressed in the Canadian Bill of Rights. Provision is made in the Bill of Rights itself[36] for a specific declaration to be included in any legislation which is not to be subject to the Bill of Rights in its operation. No such declaration is found in the Immigration Appeal Board Act.

Section 2(e) of the Bill of Rights refers of course to "rights" and opens the door to a revival of the right–privilege distinction. However, the practical importance to a deportee of a review of his case under section 15 of the Immigration Appeal Board Act has already been stressed. Furthermore, it scarcely needs emphasis that the removal of a person from Canada will ordinarily operate to extinguish most if not all rights which he may have in this country. Although deportation has consistently been viewed as civil rather than criminal in nature,[37] its effect—particularly where the person concerned is a landed immigrant, as in *Prata*—will often be of greater significance, in terms of its impact upon life patterns, than all but the most severe criminal sanctions.

Conclusion

Certain doubts must remain concerning the outcome of the *Prata* decision, which saw a landed immigrant denied a possible opportunity to remain in Canada without learning the reason for this denial. Important safeguards otherwise afforded by natural justice were clearly overridden by the certification procedures established under section 21 of the Immigration Appeal Board Act. It is not clear, however, that the constraints imposed upon administrative action by the Canadian Bill of Rights should have been so readily dismissed.

In view of the earlier Supreme Court decision in *Burnshine,* an argument based upon section 1(b), alleging a denial of equality before the law, was not likely to succeed. Moreover, the asserted right to a fair hearing in accordance with the principles of fundamental justice as guaranteed by section 2(e) of the Bill

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[36] Canadian Bill of Rights, *supra,* footnote 2, s. 2.

[37] *Vaaro* v. *R., supra,* footnote 18.

of Rights did not, in the result, advance the appellant's case beyond the point at which it had stalled after unsuccessful invocation of the *audi alteram partem* principle. Undoubtedly section 21 of the Immigration Appeal Board Act was intended to function without any hearing or other opportunity for the person concerned to confront the allegations against him which were contained in security or criminal intelligence reports. Given this intention, it is suggested that Parliament should have included in the legislation an express provision stating that the section 21 procedure was to operate notwithstanding the Canadian Bill of Rights. Such an approach obviously lacks political attractiveness, involving as it does an overt diminution of the safeguards otherwise available to the individual. Nonetheless, the protection of a country's national interest through the use of the circumscribed and rarely invoked powers embodied in section 21 would appear to qualify as a legitimate exercise of governmental authority, and a "notwithstanding" clause, if presented in this context, might well have won general acceptance if not enthusiasm. It would also have meant that the fundamental question of how far individual safeguards may be sacrificed for the perceived welfare of the body politic would, in this instance at least, have received an answer from our elected representatives instead of being left for resolution by the judiciary.

JOHN HUCKER*

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THE SUPREME COURT AND A NEW JURISPRUDENCE FOR CANADA. —*Harrison* v. *Carswell*[1] is a landmark decision of the Supreme Court of Canada, not because it changes the law (which it does not) nor because the court assumes a new role, but simply because the members of the court articulate some of the philosophical premises from which they are working. Mr. Justice Cardozo stated, "Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter." Every judge approaches his task from the perspective of certain explicit or implicit premises about the nature of law and judicial decision-making. As put by one writer:[2]

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* John Hucker, of the Ontario Bar, Ottawa.

[1] (1975), 75 CLLC 14, 286, at p. 15, 306.

[2] F. S. C. Northrop, The Complexity of Legal and Ethical Experience (1959), p. 6.

> In law, as in other things, we shall find that the only difference between a person "without a philosophy" and someone with a philosophy is that the latter knows what his philosophy is, and is, therefore, more able to make clear and justify the premises that are implicit in his statement of the facts of his experience and his judgments about those facts.

It is very encouraging, at least to teachers of jurisprudence, to see the Supreme Court of Canada discussing basic questions about what is or is not a part of the law, how decisions should be reached in hard cases, and the proper respective roles of the courts and the legislature. All these questions are at least touched on in both the majority and dissenting judgments in this case.

Paul Weiler in his book *In the Last Resort*[3] has pointed out the need for the Supreme Court of Canada to develop its own theoretical approach to the law and its role in the legal-political system, and the inadequacies, at least for Canada, of the positivistic approach reflected in the judgments of the House of Lords and the activist, "balancing of interest" approach of the United States Supreme Court. The judgments of the *Harrison* v. *Carswell* decision show that the Supreme Court of Canada recognizes the need for a theoretical approach to the law and is attempting to grapple with the problem. Several members of the court have expressed the opinion that academics can make a useful contribution in regard to this task.[4] It is in response to this invitation that we write this case comment.

The facts of *Harrison* v. *Carswell* present what is commonly known in legal jargon as a "hard case". There are several different kinds of hard cases. One kind, of which this case is a classic example, is where the facts clearly fall within a specific rule, but if the rule is applied we reach an irrational or unjust result. Such a hard case appears to present a court with the Hobson's choice of applying the law and achieving bad consequences, or not applying the law, thus introducing an element of indeterminacy which erodes the stability, predictability, and consistency which is so important to the law and to the public who must know what it is before it can be relied upon.

The relevant facts of *Harrison* v. *Carswell* can be very simply stated. The respondent, Sophie Carswell was an employee of a tenant in a shopping centre and was picketing the premises of her

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[3] (1974).

[4] This view has been expressed by members of the court in private conversation, and publicly by the Chief Justice in remarks in response to Paul Weiler's address, "Of Judges and Scholars: Reflections in a Centennial Year", delivered at a Joint Plenary Session of the Association of Canadian Law Teachers and the Canadian Political Scientists Association, on June 3rd, 1975, at the Conference of Learned Societies in Edmonton, Alberta. See (1975), 53 Can. Bar Rev. 563.

employer in conjunction with a lawful strike. As shopping centres of this nature are generally located in the middle of very large parking lots, the only way the picketing can be effective is for it to take place directly in front of the struck premises which means on private property. Picketing on the public thoroughfare at the edges of the parking lot would be totally ineffective as it is too far away from the struck premises to exert moral pressure on perspective customers, and as well, to the degree it was effective, would be unfair in that it might adversely effect other businesses not involved in the labour dispute.

The respondent was asked to leave her employer's premises by the appellant, manager of the shopping centre, and on her refusal to leave and cease picketing she was charged under The Petty Trespasses Act of Manitoba.[5]

The dilemma of a court in the face of such a dispute is obvious. If the picketer is asked to leave and then refuses he or she is clearly a trespasser within the rules of law relating to the rights of the owners of land. If the court applies the law, it will rob a trade union of its only method of exerting economic pressure on the employer, and thus deprive it of its "right" to carry out full and effective collective bargaining. The union's bargaining power depends on the right to strike and the effectiveness of the strike depends on the right to picket.

We need only look at the Canadian cases prior to *Harrison* v. *Carswell* to see the torturous ways which courts have taken to attempt to solve this dilemma.[6] In *Zeller's (Western) Ltd.* v. *Retail Food and Drug Clerks Union, Local 1518*,[7] the action was brought against the picketer by the employer. Since the employer was a tenant only of his business premises, he brought on action against his employees for interfering with his easement over the surrounding passages and sidewalks. Mr. Justice Tysoe (with whose judgment Mr. Justice Sheppard concurred) pointed out that the British Columbia Trade Unions Act[8] permits picketing in a legal strike at the employer's place of business "and without acts that are otherwise unlawful". He ruled, however, that the picketing interfered with the easement, and that since this was unlawful, it was not protected by the above provision of the Act, and consequently should be enjoined. He further went on to say that since "the very purpose of picketing in the passageway . . . must be to hinder and deter employees of the respondent

[5] R. S. M., 1970, c. P-50.

[6] H. W. Arthurs, Picketing on Shopping Centers (1965), 43 Can. Bar Rev. 357.

[7] (1963), 36 D.L.R. (2d) 581 (B.C.C.A.).

[8] R.S.B.C., 1960, c. 384, s. 3(1).

and its customers and prospective customers . . ." he could not conceive "that any picketing of the nature which I suspect the appellant desires to engage in would not constitute such an unlawful interference", but if it did not, the restraining order would not stand in the appellant's way.[9] Mr. Justice Wilson, who dissented in part, felt that the injunction was too wide and should enjoin only "illegal picketing". The judgment is not clear as to whether it is the interference with the easement which makes the picketing illegal or whether the picketing becomes illegal only when the acts of interference are in and of themselves illegal.

The union, hoping to have this ambiguity clarified in their favour, continued picketing. A further action resulted in a fine, which was appealed to the British Columbia Court of Appeal.[10] Mr. Justice Davey, speaking for a unanimous court which included Mr. Justice Sheppard held that:[11]

> I have difficulty in understanding how, on the material before us, conduct that would have been lawful upon a public sidewalk and so within the saving clause of the injunction ("nothing in this Order shall be deemed to enjoin or restrain the Defendant . . . from doing the thing set out in Section 3, sub-section (1) of the Trade Unions Act") because it occurred on a private sidewalk over which the respondent had an easement appurtenant to the store that was being picketed. I can see no essential difference between a public road and respondent's private easement that could produce that change in legal result.

The court by seizing on the ambiguity left in the first *Zeller's* case, effectively reversed that decision, in order to implement the aim and purpose of section 3, subsection 1 of the Trade Unions Act which is to permit picketing of an employer's premises during a lawful strike.

In *Grosvenor Park Shopping Centre Ltd.* v. *Waloshin*[12] the owner of a shopping centre sought to restrain the picketing of his tenant's employees during a lawful strike by seeking an injunction against trespass upon his land. The judgment of the Saskatchewan Court of Appeal is a paradigm example of hard cases making bad law. The court ruled that by inviting the public onto its premises, the owners had sacrificed their exclusive possession and therefore could no longer maintain an action in trespass. This inclusion is not consistent with well established principles of the law of real property, and if correct, would mean that no one, no matter how objectionable, could be asked to leave by the owner or occupier, unless perhaps they were committing an illegal act.

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[9] *Supra*, footnote 7, at p. 584.
[10] (1964), 42 D.L.R. (2d) 582.
[11] *Ibid.*, at p. 585.
[12] (1965), 46 D.L.R. (2d) 750 (Sask. C.A.).

The proposition that an owner or occupier who invited the public onto his premises, thereby lost the right to maintain an action in trespass was expressly rejected by the Ontario Court of Appeal in *Regina* v. *Peters*.[13] That court, however, was not caught on the horns of the dilemma as the picketing did not involve a strike but was a protest against the sale of California grapes. The judgment was upheld without reasons by the Supreme Court of Canada.[14] The confusion injected by the Saskatchewan Court of Appeal into the law of trespass was thus corrected.

The dilemma, however, still remained. Chief Justice Freedman of the Manitoba Court of Appeal, in his judgment in *Harrison* v. *Carswell*,[15] tried a different attack. He used the "balancing of interest" technique commonly used by American courts and recommended and defended by American jurisprudes. He viewed the issue as a conflict between the right of the property owner to control who comes onto his premises, and the right of the union and its members to engage in peaceful picketing during a lawful strike. He relied heavily in his judgment on two American decisions, *Schwartz-Torrance Investment Corp'n* v. *Bakery and Confectionery Workers Union, Local 31*,[16] and *Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza Inc.*[17] He concluded that:[18]

> . . . in the conflict between the property right of the owner in the sidewalk, and the policy right of the employee to engage in peaceful picketing in the course of a lawful strike, the latter right should prevail.

Two choices appeared to be available to the members of the Supreme Court of Canada in dealing with the appeal of *Harrison* v. *Carswell*. The first was to apply the existing rules of law relating to the facts, irrespective of reaching an undesirable outcome, and the second was to ignore or set aside the applicable rules respecting the owner or occupier's rights to exclude people from his property, and balance the two conflicting interests. Once this choice was made the outcome would be inevitable. The critical decision for the court, therefore, was as to which technique would be used to resolve the dispute.

The course of applying the law irrespective of consequences, when the law is clear is the technique normally followed (with a few exceptions such as Lord Denning) by judges of the courts of Great Britain. The balancing of interest technique is normally used

[13] (1971), 16 D.L.R. (3d) 143.
[14] (1971), 17 D.L.R. (3d) 128.
[15] [1974] 4 W.W.R. 394.
[16] (1964), 394 P. 2d 921.
[17] (1968), 88 S. Ct 1601, 391 U.S. 308.
[18] *Ibid.*, at p. 399 (U.S.).

in the courts of the United States. These two alternative techniques reflect two alternative traditions of legal theory. The former is a reflection of a view of law often referred to as "legal positivism", while the latter reflects a tradition of legal theory which developed in the United States out of pragmatism, and which has a variety of forms, the two most common being legal realism and sociological jurisprudence.

We say that *Harrison* v. *Carswell* is a landmark case because in attempting to resolve the issue, each judge of the Supreme Court was forced to choose one of two competing theories or views of law and methods of dispute settling. The members of the court are to be commended because they faced the choice openly and stated the reasons for their choice.

The reasons which they give are worthy of careful examination because they cut to the heart of the issue. The majority judgment was written by Mr. Justice Dickson and was concurred in by Justices Martland, Judson, Ritchie, Pigeon and de Grandpré. The majority argued that the court had established in *Regina* v. *Peters* that a landowner or occupier did not give up or lose the right to exclusive possession when the land was open to the public, and therefore could still maintain an action in trespass. The court held further that the picketing was clearly a trespass and consequently fell within the terms of The Petty Trespasses Act of Manitoba.

The court then dealt specifically with the balancing of interest argument used in the majority judgment of the Manitoba Court of Appeal. The court first referred to two American decisions to demonstrate, "the uncertainties and very real difficulties which emerge when a court essays to legislate as to what is and what is not a permissible activity within a shopping centre". *Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza Inc.*,[19] and *Lloyd Corporation Ltd.* v. *Tanner*[20] clearly demonstrate the confusion and inconsistency which can result when courts ignore the rules of the law to engage in balancing interests.

The majority make two basic arguments for rejecting the balancing of interest doctrine. The first is that it requires the court to consider factors which "by their very nature" are "arbitrary and embody personal economic and social beliefs". Consequently the certainty and predictability which are essential for the effective functioning of the legal system, will be lost. The court states:[21]

> The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket

[19] *Ibid.*
[20] (1972), 407 U.S. 551.
[21] *Supra*, footnote 1, at pp. 15,308-15,309.

> raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It raises also fundamental questions as to the role of this Court under the Canadian Constitution. The duty of the Court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a moment doubt the power of the Court to act creatively — it has done so on countless occasions; but manifestly one must ask — what are the limits of the judicial function?

The second argument which the majority make is that the courts would be pre-empting the function of the legislature. The courts, a body not representative of nor responsible to the people would be changing the rights of individuals by changing the law rather than merely applying the law. Mr. Justice Dickson writes:[22]

> Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law. The legislature of Manitoba has declared in The Petty Trespasses Act that any person who trespasses upon land, the property of another, upon or through which he has been requested by the owner not to enter, is guilty of an offence. If there is to be any change in this statute law, if A is to be given the right to enter and remain on the land of B against the will of B, it would seem to me that such a change must be made by the enacting institution, the legislature, which is representative of the people and designed to manifest the political will, and not by the Court.

The minority opinion was written by the Chief Justice with whom Justices Spence and Beetz concurred. The Chief Justice focused his attention on "two areas of concern respecting the role of . . . the final Court in this country in both civil and criminal causes"; whether the Supreme Court of Canada "must pay mechanical deference to *stare decisis* and, second, whether this Court has a balancing role to play, without yielding place to the legislature". Chief Justice Laskin recognized the necessity for the law to deal with new and changing social conditions. "The present case" he states, "involves a search for an appropriate legal framework for new social facts which show up the inaptness of an old doctrine developed upon a completely different social foundation".[23] The Chief Justice found this framework in the balancing of interest doctrine which he applied in reaching the conclusion that the right to picket as a legitimate part of the collective bargaining process outweighed the interest of the property owner or occupier in preserving the right to choose who shall come onto his property after an invitation to enter has already been extended to the public at large.

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[22] *Ibid.*, at p. 15,309.

[23] *Ibid.*, at p. 15,313.

We do not believe that this case reflects a deep division between those who desire a conservative court and those who seek an activist court along the lines of the Supreme Court of the United States. We do not think the majority of the Supreme Court in *Harrison* v. *Carswell* have a strong intellectual commitment to legal positivism as a legal philosophy. What they have is a strong commitment to the integrity of the law and the legislature as an institution. Nor do we think that the minority are strongly committed to American legal realism or sociological jurisprudence. What they have is a strong desire to keep the law rational and sufficiently flexible to deal with new facts and changing social conditions.

Both sets of aims are legitimate and worth pursuing. The division between the majority and minority as reflected in *Harrison* v. *Carswell* represents not so much a deep philosophical split as much as it does a difference of opinion as to which of these two sets of goals is the most important if one is forced to choose between them.

It is here where the legal theorist may be of some service to the court. If it can be shown that the law already has within it mechanisms for solving these dilemmas or anomalies when they arise, and that the form of the law never forces us to make such a choice, then both sets of goals could be pursued and each achieved without one being at the expense of the other.

We have argued in the *Cambridge Law Journal*,[24] that the law does have such mechanisms. In this case comment we will merely briefly state what these mechanisms are like.

We will set out below three basic assumptions which we have or will later defend more fully elsewhere. If these assumptions are correct, it will be possible to show how hard cases can be decided without making bad law, and without sacrificing justice, rationality, or certainty and predictability.

The first assumption is that the goals of legal rules are as much a part of the law as the rules themselves. Indeed the two ought never to be considered as separate from each other. The policy of allowing the landowner or occupier to control who is to enter his premises, is therefore a part of the law of trespass, and is an implicit part of The Petty Trespasses Act. Equally the policy of permitting effective collective bargaining is one of the purposes of, and therefore a part of The Labour Relations Act.[25] This gives us a basis for distinguishing between "legal" policies, that is, those

[24] Some Structural Properties of Legal Decisions (1973), 32 Camb. L.J. 81.

[25] R.S.M., 1972, c. 75.

which are a part of the law because they reflect the goals of the law, and other kinds of public, community, or government policies which have no basis in law. Legal policies come into the law as a part of the rules and are recognizable and identified through the process of inference from the rules themselves.

The second assumption is that the goals of the law are ordered. While in general these orderings are fairly stable, they may and often do shift when certain conditions are present. The ordering and the conditions under which they shift can be inferred from the rules of law. Every rule, in implementing its goal or goals, gives priority to that goal over the goals of other rules of law which must be modified, limited, or treated as exceptions when the new rule comes into force. When peaceful picketing during a collective bargaining dispute was legalized, priority was thereby given to the goal of making possible effective collective bargaining over other goals such as enabling commerce to be carried out free from intentionally caused interference. From the very fact of the existence of the law of trespass we can infer that the goal of allowing people to enjoy their property in privacy and free from intrusion and intereference takes priority over the goal of freedom of movement, but only under certain clearly specified conditions.

The third assumption is that the law contains rule-like mechanisms for determining the ordering of goals when a potential conflict or anomaly arises. One such anomaly is where new facts arise which brings the goal of two different areas of the law into conflict. Such conflicts can only be resolved by giving one set of goals priority over the other. The facts of *Harrison* v. *Carswell* present just such an anomaly. The goal of The Petty Trespasses Act was brought into conflict with one of the goals of The Labour Relations Act. This conflict arose when the large suburban shopping centres first appeared. One cannot ask what the intent of the relevant legislation is in regard to this situation, because this situation was probably not contemplated by the lawmakers when they passed The Petty Trespasses Act and The Labour Relations Act, nor is a simple generalization of their intentions useful. When we examine the issue in terms of the goals of the legislation, it is no longer a question of whether the court should or should not apply the provisions of The Petty Trespasses Act but rather whether the goals of that Act are to take priority over the goals of The Labour Relations Act where a conflict arises under the conditions of a lawful strike.

The law furnishes us with many examples of such anomalies. When a beneficiary under a will murders the testator in order to

take more quickly, the goal of the law of wills which is to pass title to property to whomsoever the testator wishes comes into conflict with one of the goals of the law of crimes, the deterrence or prevention of murder.[26] When a person trespasses on private property in order to reach safety during the middle of winter because the road is blocked by snow, one of the goals of the law of trespass is brought into conflict with another legal goal, public safety.[27]

Such anomalies are not solved by balancing interests because the law already provides us with their ordering in terms of second order anomaly resolving rules such as "A man shall not profit from his own wrong", *salus populi suprema lex* ("regard for the public welfare is the highest law"), the principle that illegal, immoral contracts, or contracts contrary to the public welfare will not be enforced, and the principle of "abuse of right" recognized in most civil law jurisdictions but not in the common law.

These anomaly resolving rules all have a similar form and from the existence of which we can infer a second-order generative law ("generative" because it is the source of the anomaly resolving rules) which can be stated as:

> When a case, C1, arises which falls clearly under Law 1, but implementation of Law 1, with respect to C1 would clearly tend to interfere with the desired consequences of Law 2, and these consequences of Law 2 are clearly more important to us than the consequences of allowing Law 1 to apply to C1 then Law 1 must lose its aegis over C1, such that C1 now falls only under Law 2.

Elsewhere we argue that the above anomaly resolving rule is only one of a number of mechanisms within the law to allow the law to deal with new facts and changing situations while at the same time keeping harmony and consistency in the goals of the law. All such mechanisms are instances reflecting a particular structure which law has, such that when the law is applied to a particular situation and the goal of the law or a more important goal of another area of the law is frustrated, an exception to the law is generated out to cover those specific facts.

Whether or not the goal of one law is more or less important than the goal or goals of another law is not a matter of discretion. It is not to be determined by balancing or weighing interests. It depends entirely on how the law itself has ordered such goals. The issue in *Harrison* v. *Carswell* is not whether the interest in effective collective bargaining "outweighs" the interest in main-

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[26] *Riggs* v. *Palmer* (1889), 115 N.Y. 506, 22 N.E. 188.
[27] *Dwyer v. Staunton*, [1947] 4 D.L.R. 393 (Alta).

taining the rights of private property, but rather how these goals have been ordered by the law.

The preamble of The Labour Relations Act of Manitoba states the purpose of the legislation as, "to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and unions as the freely designated representatives of employees". The Act sets up procedures which allow for full collective bargaining including a lawful strike. Where a certain kind of activity is a necessary condition for collective bargaining the Act makes that activity lawful, even though it entails a reduction of rights which normally otherwise would prevail. Limitations, for example, are put on the rights to freely contract, or to hire and fire. We can infer from this that under the particular conditions set out in the Act, the goal of permitting full and effective collective bargaining, takes priority over the goals related to these other activities.

Section 16(1) of the Act provides for procedures for union representatives to go on private property under certain conditions "for any purpose relating to the formation, organization, selection or administration of a union or solicitation of membership in the union". Section 16(3) provides, "A representative of a union who visits an employee in the circumstances described in subsection (1) is not, by reason solely of that visit, a trespasser on the land on which the visit is made". From this section we can infer that whatever is necessary for full and effective collective bargaining takes priority over the rights of private property providing that the interference with the rights of private property are only minimal. Section 24 which provides that subject to section 16, nothing in the Act is to be taken as affecting the remedy of an employer in trespass, does not rebut this assumption because the particular kind of problem faced by the courts in *Harrison* v. *Carswell* was probably not in the contemplation of the legislators.

Whatever the outcome in *Harrison* v. *Carswell* should be, is not important for our purposes. What is interesting and critical is the method by which the conclusion is determined. The *Schwartz-Torrance* decision, followed in *Harrison* v. *Carswell*, furnishes us with a paradigm example of the decision-making process which we recommend. The court inferred that the goals of the law of collective bargaining took priority over the goals of the law protecting the rights of the property owner in these particular circumstances on the following grounds:

1. "The Legislature has expressly declared that the public policy of California favours concerted activities of em-

ployees for the purpose of collective bargaining or other mutual aid or protection."[28]

2. In certain amendements to the criminal trespass law "the Legislature in dealing with trespasses . . . has specifically subordinated the rights of the property owner to those of persons engaging in lawful labour activities".[29]
3. "The policy of the state as expressed in the Labour Code accords with that embodied in federal legislation."[30]
4. "Picketing . . . involves an exercise of the constitutionally protected right of freedom of speech."[31]
5. "[T]he countervailing interest which plaintiff endeavors to vindicate emanates from the exclusive possession and enjoyment of private property. . . . Plaintiff suffers no significant harm in the deprivation of absolute power to prohibit peaceful picketing upon property to which it has invited the entire public."[32]

Although the court said that it was balancing interests, it was not doing so. Rather, what it did was to discover the ordering of goals already implicit or explicit in the law.

The moral for courts is that there are inference procedures which would satisfy both the motivations expressed by the majority in the *Harrison* v. *Carswell* decision and those expressed by the minority. If the law has consistency and rectitude in its retained corpus, there are times when we can go to the ordering of goals in related legislation and case law and draw inferences which will allow us just and fully rule-governed resolutions of anomalous cases. An additional form of inference is opened to the court: once laws are seen as embodying goals, and once these goals are seen as *systematically* related by previous legislation and decision, we have available an enormously rich and probably wise bank of fully authorized policy decisions which we cannot overlook. To employ this material is both to remain within the law in a fashion which would satisfy the most scrupulous positivist and very probably the most sensitive moralist. But then they are perhaps never fully satisfied.

If the Supreme Court of Canada is desirous of developing its own jurisprudence rather than following in the paths of their

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[28] *Schwartz-Torrance Investment Corp'n* v. *Bakery and Confectionery Workers Union, Local 31, supra,* note 16, at p. 922.

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*, at p. 923.

[32] *Ibid.*, at p. 924.

American and English counterparts, we suggest that the method outlined above merits consideration.

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