

## SELECTIVE LEGALITY: THE COMMON LAW JURISDICTIONAL APPEAL

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*Courts of Appeal in Canada are subject to the pressure of increasing case loads. Must their jurisdiction inevitably expand, to the extent now known in civil law jurisdictions and the United States? The common law tradition of selective appellate control may provide no remedy for injustice in the individual case. This increases the pressure, over time, for generalized, non-selective, appellate review. The common law jurisdictional appeal, developed originally in Quebec law as a means of limiting a generalized right of appeal, offers a means of appellate review which is compatible with the tradition of selective legality and the inherent authority of decisions of first instance.*

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*Le nombre croissant de dossiers des cours d'appel au Canada devient un fardeau de plus en plus lourd. La compétence de ces cours doit-elle pour autant être inéluctablement élargie, au point de la rendre comparable à la situation qui prévaut dans les pays de droit civil et aux États-Unis? Il se peut que la tradition de common law d'exercer un contrôle sélectif des appels n'offre pas de remède à l'injustice dans certains cas individuels. Cette situation risque, à long terme, de favoriser un droit d'appel général et sans sélection. L'appel de droit commun aux fins juridictionnelles, initialement développé au Québec comme moyen de limiter le droit d'appel général, offre un moyen de contrôle qui est compatible à la fois avec la tradition de contrôle sélectif de la légalité et de l'autorité inhérente des jugements de première instance.*

Appellate review is meant to ensure the legality of decisions of courts of first instance. In jurisdictions in which courts of first instance have not enjoyed inherent prestige, such as France, the right of appeal has historically been very broad and appeal courts are today overwhelmed with cases.<sup>1</sup> The control of legality in these jurisdictions is non-selective. Criteria for adjudication are legislative in origin and all courts are expected to comply with them. Any judgment of any court of first instance may fail to do so and the right of appeal therefore allows all disappointed litigants, in principle, to invoke illegality before a court of appeal. The judgment at first instance is often seen as a simple pre-condition of appeal. Efforts are now being made in such circumstances to enhance the value of decisions at first instance.<sup>2</sup>

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<sup>1</sup> E. Tailhades, *La modernisation de la justice [:] Rapport au premier ministre* (Paris: La documentation française, 1985) at 36 (deficit of cases before French courts of appeal increased from 100,000 in 1971 to more than 300,000 in 1983).

<sup>2</sup> R. Perrot, *L'appel et l'Europe*, *Gaz. Palais* 27-29 December 1987 at 23, 24.

In the common law tradition the control of legality has historically been selective. Courts of first instance have enjoyed great prestige and sources of legality external to them have been difficult to invoke. Three means of review have however existed. The writ of error existed at common law (with no statutory basis) to allow correction of demonstrated error on the face of the record. If the writ was generally available the control of legality was nevertheless selective, since the error was necessarily one of law. The prerogative writs ensured control of the law establishing jurisdiction of inferior courts and tribunals. Again, while the writs were generally available the criteria for control were selective and limited in principle to questions of jurisdiction. Finally, appeal was created by statute in the 19th century. While grounds of control were extended here to matters of both fact and law, the appeal was made available only where authorized by statute and control of legality, in fact and law, could be selectively conferred upon certain classes of litigants.

The common law tradition of selective control of legality is challenged, however, by the statutory right of appeal. If control of legality exists in some circumstances, why not in others? Are courts of first instance, now overshadowed by higher judicial authority, to be allowed to act in an uncontrollable manner in some circumstances? The United States of America provides a good example of the result of such pressure on the common law tradition. Appellate case load burdens in the U.S. now approximate those of civil law countries and most U.S. states have created two courts of appeal. This has been brought about through multiplication of the grounds of appellate review. In the U.S. the traditional common law ground of error has continued to exist, alongside statutory rights of appeal. As well, supervisory control of jurisdiction has come to be exercised by state appellate and supreme courts such that all decisions at first instance are subject to review through use of the prerogative writs. In the result, distinctions between error, appeal and review have declined in importance and final judgments of first instance have become recognized as generally subject to appellate control.<sup>3</sup> The control of legality has become non-selective. Judgments at first instance have little inherent value.

In Canada the common law tradition of selective review of legality remains alive. Error has been abolished; appeal granted by statute does not extend to all first instance decisions; and judicial review, in the provincial court structures at least, remains the prerogative of superior courts of first instance.<sup>4</sup> There remains some vitality in the notion of a judgment of a superior court of first instance which definitively states the law for the parties and has precedential

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<sup>3</sup> See generally for U.S. developments, 20 Am. Jur. 2d "Court" §108; E. Sunderland, "The Problem of Appellate Review" (1927) 5 Tex. L. Rev. 126; R. Pound, *Appellate Procedure in Civil Cases* (1941) at 106-117, 260-393; Note, "Appellate Review in California with the Extraordinary Writs" (1948) 36 Cal. L. Rev. 75; F. James Jr., *Civil Procedure* (Boston: Little, Brown, 1965) at 50, 51, 522, 523, 534-537.

<sup>4</sup> The Federal Court of Appeal, however, exercises judicial review in place of the Federal Court, Trial Division, in some circumstances. *Federal Court Act*, R.S.C. 1985, c. F-7, s. 28(1) as am. 1990, c. 8, s. 8.

value. The tradition of quality first instance justice and selective review of legality is, however, subject to major contemporary pressures, similar to those which have already had effect in the United States. Statutory rights of appeal have been broadened;<sup>5</sup> appellate case load burdens have become a problem;<sup>6</sup> the superior court at first instance is becoming a local and sedentary one, increasing the pressure in favour of review by a province-wide authority; and the recognition of constitutional rights has given rise to increased theoretical pressure towards appellate review, if necessary through invocation of the remedial provision found in s. 24(1) of the *Canadian Charter of Rights and Freedoms*.<sup>7</sup>

Do we need a right of appeal in all cases, as in civil law jurisdictions, or a functionally equivalent mixture of error, appeal and review as in the United States? The Supreme Court of Canada, in *Kourtesis v. M.N.R.*,<sup>8</sup> has now moved significantly in the latter direction in authorizing proceedings for a declaration, itself giving rise to an appeal, where no appeal lies against an initial order object of the declaratory proceedings. This process of moving most cases to a second level of adjudication is expensive, time-consuming and, given the volume of cases involved, no guarantee of superior justice. Statutory limits on rights of appeal will always appear arbitrary, however, and may cause real injustice in individual cases where a first instance court has acted improperly. If a tradition of quality first instance justice and selective appellate review of legality is to be maintained, there must be both appellate review, as defined by statute, and some means of guarantee that injustice is not done in cases excluded from the appeal process. A system of selective legality needs two levels of screening. The first is the broad gauge one effected by statute, which denies the right of appeal in an entire range of cases. The second is a more refined one which allows some form of review within the excluded range of cases. Only the existence of such a second form of review will allow the system as a whole to escape the charge of arbitrary toleration of injustice.<sup>9</sup> The notion of a common law jurisdictional appeal provides such a second form of review.

<sup>5</sup> In Ontario all final judgments may thus be appealed, either to the Divisional Court or to the Ontario Court of Appeal. Only interlocutory judgments remain subject to a requirement of leave. *Courts of Justice Act*, R.S.O. 1990, c. C-43, as am., s. 19.

<sup>6</sup> See Canadian Judicial Council, Appeal Courts Committee, *First Report [:] Delays Project* (1992).

<sup>7</sup> Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>8</sup> [1993] 2 S.C.R. 53, 102 D.L.R. (4th) 456. In the circumstances, the appellant was thus allowed to appeal against the legality of the issuance of a search warrant by a judge of the British Columbia Supreme Court under s. 231.3 of the *Income Tax Act*, S.C. 1970-71-72, c. 63, in the absence of a right of appeal provided by the *Act* or other relevant Federal legislation. La Forest J. in his judgment also raised the possibility of judicial review of superior court decisions by *certiorari*, at 90-93. The decisions of both La Forest and Sopinka JJ. discuss the obvious difficulties of rooting appeal rights in successive, first instance proceedings and emphasize the discretionary character of the declaratory judgment. See 87, 115-116. Sopinka J. would also have allowed resort to provincial law to ensure the possibility of appeal in the circumstances (at 100-104).

<sup>9</sup> The writ of error thus developed at common law as a means of possible review of decisions not subject to appeal.

## I The Common Law Jurisdictional Appeal

In the United States the extent of appellate review is largely a result of expansion upwards, to courts of appeal, of exercise of the common law remedies of error and the prerogative writs. In Canada the volume of cases has not yet been such that these very broad remedies have been driven upwards to the appellate level. The more focused and precise notion of a common law jurisdictional appeal, as dealt with by the Supreme Court of Canada in *Goodman v. Rompkey*,<sup>10</sup> has arrived through another route, which is that of refinement and narrowing by Quebec judges of the general right of appeal received in Quebec from the civil law.

In *Goodman v. Rompkey* the issue was whether an appeal lay from an approval given by a judge of the Superior Court of Quebec made pursuant to s. 231(4) of the *Income Tax Act*, to an authorization given by the Minister of National Revenue to undertake a search for and to seize documents pertaining to a breach of the *Act*.<sup>11</sup> Neither the *Income Tax Act* nor any other federal statute conferred a right of appeal from such an approval to any provincial appellate court.<sup>12</sup>

At the Court of Appeal, Bernier J.A. for the Court<sup>13</sup> held that such a judicial approval was not a "final judgment" from which an appeal lay pursuant to s. 26(1) of the *Code of Civil Procedure*.<sup>14</sup> Accordingly, there was no right of appeal conferred by any federal or provincial statute. However, the appellant claimed that the Court of Appeal could nevertheless grant an appeal by exercising "the inherent powers which the Court of Appeal possesses to revise decisions of the Superior Court against which no other remedy exists,"<sup>15</sup> citing, however, no authority to such effect. In rejecting the contention, Bernier J.A. relied on the exceptional and statutory nature of a right of appeal.<sup>16</sup>

On appeal to the Supreme Court, Chouinard J. for the Court similarly found that the approval of a judge of the Superior Court to the Minister's authorization

<sup>10</sup> [1982] 1 S.C.R. 589, 137 D.L.R. (3d) 46.

<sup>11</sup> *Ibid.* at 590. Appellate attack against such an order has now been authorized by the Supreme Court of Canada in its decision in *Kourtesis*, *supra* footnote 8, through the cumbersome device of a subsequent, first instance action for a declaration.

<sup>12</sup> *Ibid.* at 593.

<sup>13</sup> *Goodman v. Rompkey* (*Dans l'affaire de la loi de l'impôt sur le revenu*), [1981] C.A. 461 at 468 [hereinafter *Goodman* (C.A.)]. Lajoie and Beauregard J.J.A. concurred. The Court of Appeal also held (at 468) that there could be no recourse, given the federal character of the *Income Tax Act*, to the appeal with leave authorized by s. 26(4) of the *Code of Civil Procedure*.

<sup>14</sup> Art. 26(1) C.C.P. read as follows:

Unless otherwise provided, an appeal lies:

(1) from any final judgment of the Superior Court or the Court of Québec, except in a case where the value of the object of the dispute in appeal is less than \$10,000.

<sup>15</sup> *Supra* footnote 13 at 466 (authors' transl.).

<sup>16</sup> *Ibid.* at 466-7.

did not constitute a "final judgment" from which an appeal lay as of right pursuant to article 26 of the *Code of Civil Procedure*.<sup>17</sup> As an alternative ground of appeal, appellant again suggested that the Court of Appeal had an inherent supervisory jurisdiction over the Superior Court, this time providing Quebec precedents in support of its claim and limiting the supervisory authority to the situation where the Superior Court had exceeded its jurisdiction.<sup>18</sup> While Chouinard J. recognized the weight of authority which had been cited, he declined to give it the explicit approval of the Court. Since there has been subsequent debate as to the effect of the judgment of Chouinard J., his remarks should be cited at some length:

There remains the inherent power which the Court of Appeal is said to have to reform a judgment of the Superior Court when the latter exceeds its jurisdiction. As to the existence of this inherent power, appellant cited the following cases: [cases cited].

However, this power is not universally recognized. It is denied by the decision from which this appeal is brought [...].

This power would in any case only exist in the event that the Superior Court exceeded its jurisdiction.

In view of its conclusion that no such inherent power exists, the Court of Appeal did not go further into the question of whether the judge had exceeded his jurisdiction. In my opinion, even assuming that this power exists it does not apply in the case at bar because there was no excess of jurisdiction. [Grounds of exercise of jurisdiction discussed].

This Court does not have to consider whether the judge committed errors in giving his approval. In so far as it exists, the inherent power of the Court of Appeal would only enable it to intervene in the event of an excess of jurisdiction. [Further consideration of evidence offered to Superior Court judge].

It is in light of this evidence that the judge gave his approval, and in my opinion it has not been shown that he exceeded his jurisdiction in doing so.<sup>19</sup>

Three points appear essential in the remarks of Chouinard J. First, and most clearly, he did not reject the existence of a common law (non statutory) jurisdictional appeal. Second, such an appeal, if it existed, would not extend to simple errors of fact and law on the part of the judge of first instance. Third, and perhaps most importantly, Chouinard J. appeared to exercise the most significant feature of such an appeal - the determination of whether there had been an excess of jurisdiction at first instance. The power of appreciation would therefore exist, but the power to quash would remain of no application - would not exist - in the absence of jurisdictional excess.

<sup>17</sup> *Supra* footnote 10 at 598.

<sup>18</sup> *Ibid.* at 593, 598-99.

<sup>19</sup> *Ibid.* at 598-600, 603, 604. For comment see F. Dorion, "La «persona designata» et l'appel de droit commun [:] voies de réforme des jugements non appelables de la Cour supérieure rendus en vertu de lois particulières" [1983] R.D.J. 125; H. Patrick Glenn, "La responsabilité des juges" (1983) 28 McGill L.J. 228 at 271, footnote 168; G. Pépin, "L'absence de pouvoir des organismes administratifs pour des motifs constitutionnels: l'article 96 de l'A.A.N.B. et la Charte canadienne des droits et libertés" (1983) 43 R. du B. 353 at 371, footnote 34.

Case law which has subsequently considered *Goodman v. Rompkey* has treated it in diverse ways. In Quebec the Court of Appeal has reconsidered the existence of the common law jurisdictional appeal, stating that it permits correction only of jurisdictional excess at first instance, through allowing the Court of Appeal to quash and remand in the event of such excess.<sup>20</sup> In the common law provinces the New Brunswick Court of Queen's Bench on two occasions has taken *Goodman v. Rompkey* as denying any supervisory power on the part of a court of appeal, a conclusion which appears to overstate the language of Chouinard J.<sup>21</sup> The Federal Court of Appeal has stated, citing *Goodman v. Rompkey* with no discussion, that a ministerial authorization to search and seize under the relevant provision of the *Income Tax Act* could not be appealed.<sup>22</sup>

Since the common law jurisdictional appeal may be an important remedy in a particular case, and since the present state of case law appears unsettled, it appears useful to trace the history of the appeal in greater detail. It is perhaps helpful to recall that it was articulated by Quebec courts as a means of *limiting* appellate review at a time when courts elsewhere, notably in the United States, were unable to resist calls for generalized appellate review.

### (1) *The Origins of the Common Law Jurisdictional Appeal*

In 1876 the Privy Council stated, on a question relating to the existence of an appeal in Quebec law:

It must be borne in mind that the rule of law in this country that an appeal does not lie unless given by express legislative enactment, does not prevail in French or Canadian law, where the presumption is in favour of the existence of what one of the Judges of the Queen's Bench in Canada, terms the "sacred right of appeal."<sup>23</sup>

Appeal rights being thus generalized in Quebec law, the existence of a common law (i.e., non-statutory)<sup>24</sup> jurisdictional appeal would tend to be submerged in

<sup>20</sup> *Levinson v. Royal Victoria Hospital*, [1982] C.A. 548; *Bernstein v. R.*, [1989] R.D.J. 202 (C.A.).

<sup>21</sup> *R. v. Y.D.* (1985), 22 C.C.C. (3d) 464, 67 N.B.R. (2d) 269 (Q.B.); *R.(M.) v. Nouveau Brunswick (Ministre de la Santé et des Services communautaires) et H.R.* (1990), 104 N.B.R. (2d) 87, 261 A.P.R. 87 (Q.B.). In both cases, however, the question being addressed was that of control of one superior court judge by another through use of prerogative writs or orders for judicial review.

<sup>22</sup> *M.N.R. v. Kruger*, [1984] 2 F.C. 535, 13 D.L.R. (4th) 706 (C.A.).

<sup>23</sup> *Mayor & Aldermen of the City of Montreal v. Brown* (1876), L.R. II Appeal Cases 168. Also noted in J.J. Beauchamp, *The Jurisprudence of the Privy Council* (Montreal: A. Periard, 1891), para. 105 at 86. For the existence of appellate jurisdiction throughout the history of New France, see E. Deleury & C. Tourigny, "L'organisation judiciaire, le statut des juges et le modèle des jugements dans la Province du Québec", in H. Patrick Glenn (ed.), *Droit québécois et droit français [:] communauté, autonomie, concordance* (Cowansville, Que: Yvon Blais, 1993) 191 at 193.

<sup>24</sup> The appeal is referred to in Quebec as an "appel de droit commun", in the sense that it is based on generally applicable law and not on particular legislative texts, including those of the Code of Civil Procedure. While there are surely differences between the concepts

the general availability of appellate review. It appears to emerge with clarity in Quebec law as legislation increasingly denied the right of appeal in particular cases, and served both as a means of articulating all that the "*droit commun*" provided by way of appeal and as a means of ensuring some form of limited control over illegality at first instance.

The leading case on the appeal *de droit commun* (though not yet so labelled), appears to be *McShane v. Brisson*.<sup>25</sup> This was an appeal to the Court of Queen's Bench (sitting in Appeal) from part of a judgment of the Superior Court sitting in Review as an election court under the Quebec *Controverted Elections Act*.<sup>26</sup> Under this *Act*, the Superior Court sitting in Review was empowered to hear the parties to an election petition as a court of first instance. Its jurisdiction included the hearing of charges of corrupt practices, but only against a certain class of persons. In this case, the Superior Court sitting in Review had condemned a party who was neither an elector, nor a returning officer, nor a candidate at the election, and who thus did not fall into the class of persons who could be a party to an election petition under the *Act*. Dorion C.J. speaking for the Court of Appeal had no difficulty finding that the Court of Review had exceeded its jurisdiction in condemning a party not covered by the *Act*.<sup>27</sup> More problematic, however, was whether an appeal lay from this judgment, since section 90 of the *Act* provided that judgments of the Superior Court sitting in Review "shall not be susceptible of appeal".

Dorion C.J.'s comments in response to this question are illuminating and set out what have come to be the major characteristics of the common law jurisdictional appeal. He stated first that since the court of first instance was the Superior Court its decision was not subject to review by *certiorari*. Second, he held that the ordinary procedure of appeal was therefore appropriate and had to extend to the quashing of a judgment rendered by a court having no jurisdiction, even in the case of the Superior Court.<sup>28</sup> Dorion C.J. went on to apply the remedy appropriate to an appeal on a question of jurisdiction: he declared the order of the Court of Review "null and void",<sup>29</sup> and ordered "the record sent back to the

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of "*droit commun*" and "common law", we take the two as being broadly equivalent in designating residual sources of law in any jurisdiction, whether of the continental civilian or Anglo-American tradition. See generally for discussion of the idea of *droit commun* in Quebec civil law, J.E.C. Brierley, Quebec's 'Common Laws' (*Droits Communs*): How Many Are There?, in *Mélanges Louis-Phillipe Pigeon* (Montreal: Wilson & Lafleur, 1989), at 109; *ibid.*, "La notion du droit commun dans un système de droit mixte: le cas de la province de Québec", in *La Formation du droit national dans les pays de droit mixte [:] Les systèmes juridiques de common law et de droit civil* (Presses Universitaires D'Aix-Marseille, 1989) at 103.

<sup>25</sup> (1890), 6 M.L.R. 1 (Q.B.).

<sup>26</sup> 38 Vict. c. 8.

<sup>27</sup> *Supra* footnote 25 at 11-12.

<sup>28</sup> *Ibid.* at 12, 13. Dorion C.J. cited the *Code Louis* of 1667 to indicate the "well settled" nature of the "rule that all judgments rendered by a Court having no jurisdiction *ratione materiae* are null and are susceptible of appeal", though the rule does not yet appear to have become entirely settled.

<sup>29</sup> *Ibid.* at 3.

Superior Court, for the case to be proceeded with in the ordinary course.”<sup>30</sup> The *droit commun* thus provided a selective means of review of legality, in cases of excess of jurisdiction, though could no longer provide for full review of the merits in the face of hostile legislation.

## (2) *Ascent and Orthodoxy*

Although it was argued above that the common law jurisdictional appeal was first recognized and stated in terms susceptible of forming a rule of general application in *McShane v. Brisson*, to our knowledge the first case to refer explicitly to the “*droit commun* right of appeal” was *La Cité de Montréal v. Hénault*.<sup>31</sup> This was an appeal to the Court of King’s Bench, sitting in appeal, from a decision of the Superior Court homologating a report of several municipal commissioners in expropriation pursuant to the Charter of the City of Montreal. While the Charter empowered the Superior Court to confirm that various “proceedings and formalities hereinbefore provided [had] been observed”,<sup>32</sup> it did not authorize any enquiry into the merits of the expropriation award. However, this is what the Superior Court had done, “changing the basis of the award and eliminating part of the grounds thereof”.<sup>33</sup> When the decision of the Superior Court was appealed, the respondent raised an objection to the jurisdiction of the Court of King’s Bench, sitting in appeal, to hear the appeal, noting that article 439 of the Charter provided that the homologation of the Superior Court “shall be final as regards all parties interested, and shall not be subject to any appeal.” Speaking to this objection, Lamothe C.J. stated the principle of the denial of appeal and then continued:

There are exceptions, however, to every rule. It appears to me that there is an exception in those cases, which are very rare, where the court of first instance has exceeded its jurisdiction. The judgment which has been rendered in such a case is null and void, such that it is practically non-existent. The Court of Appeal is competent to declare the nullity and to annul the judgment. This is the common law appeal.<sup>34</sup>

In these comments we have an explicit statement of all the elements of the *droit commun* appeal as involving an inherent right of appeal going to jurisdiction, not merits, even in the face of a clear statutory provision barring appeal. The Chief Justice had no doubt that one of the functions of the Court of Appeal was to supervise *all* lower courts, including the Superior Court, and to judicially declare a judgment rendered without jurisdiction to be a nullity.

<sup>30</sup> *Ibid.* at 14.

<sup>31</sup> (1920), 26 R.L. 270. Reprinted at [1968] R.L. 385.

<sup>32</sup> *Ibid.* at 274, *per* Martin J.A.

<sup>33</sup> *Ibid.* at 275.

<sup>34</sup> *Ibid.* at 271-2 (authors’ transl). Carroll and Martin J.J.A., concurring in the result, both invoked, at 273 and 275-6, Viscount Haldane’s statement in the House of Lords in *National Telephone Company v. Postmaster-General*, [1913] A.C. 546 at 549 to the effect that: “If the Court of Appeal wrongly usurped jurisdiction surely there must be an appeal to this House on that point.”

<sup>35</sup> (1920), 29 B.R. 195.

One year after *McShane v. Brisson*, the jurisdictional element of the *droit commun* right of appeal was highlighted in *Dostaler v. Lalonde*.<sup>35</sup> This was an appeal to the Court of King's Bench, sitting in appeal, from a decision of the Court of Review reviewing an order of the Superior Court annulling the candidacy of two persons in a municipal election. The Court of King's Bench, sitting in appeal, divided as to whether the Court of Review had exceeded its jurisdiction, and thus as to their own jurisdiction to hear the appeal. Lamothe C.J., for the majority, held that the Court of Review had abused its jurisdiction in usurping the function of the court of first instance by allowing certain electoral lists into evidence. The Chief Justice assimilated this *abuse* of jurisdiction to an *excess* of jurisdiction. He thus found that the decision of the Court of Review was *ultra vires* and null and void.<sup>36</sup> Consequently, it was possible to invoke *Mayor and Aldermen of Montreal v. Brown, National Telephone Company Ltd. v. Postmaster-General*, and *McShane v. Brisson* for the *droit commun* appeal to exist, again in spite of an explicit legislative provision barring an appeal.<sup>37</sup> The Chief Justice applied the remedy appropriate to a *droit commun* appeal on a question of jurisdiction, namely, quashing and annulling<sup>38</sup> the decision of the Court of Review and ordering the intervenor to the court having jurisdiction, the Superior Court.

The dissenting judges, Carroll and Martin J.J.A., acknowledged that the *droit commun* right of appeal formed part of Quebec law but did not agree that the Court of Review had exceeded its jurisdiction. They therefore concluded that no appeal existed in such a case. The formulation of their judgment is of interest and appears to be the origin of the statement of Chouinard J. in *Goodman v. Romkey* that the "power" of the Court of Appeal exists only in the event of an excess of jurisdiction by the court of first instance.<sup>39</sup> The "power" in question is that of quashing or declaring null the judgment of first instance; the appeal exists however in all cases, to allow the court of appeal to determine whether there has been excess of jurisdiction.

For the thirty years or so after *Dostaler v. Lalonde*, recognition of the existence of the *droit commun* right of appeal was the orthodox view. It was repeatedly affirmed that the judgment of a court, including the Superior Court,<sup>40</sup>

<sup>35</sup> *Ibid.* at 198.

<sup>37</sup> The relevant provision of the legislation dealing with municipal elections provided: "The judgment of the Court of Review shall be final" (cited by Martin J.A., *ibid.* at 207).

<sup>38</sup> *Ibid.* at 218.

<sup>39</sup> *Supra* footnote 19, as cited.

<sup>40</sup> See, e.g., *Hamelin v. L'hon. F.-J. Leduc* (1939), C.B.R. 366 at 369, *per* Rivard J.A., and at 370, *per* Bond J.A.; *Cité de Montréal v. A.P. Stores Ltd.*, [1949] B.R. 789 at 797-98 [hereinafter *A.P. Stores*]. Most notably, in *Lévesque v. Benoit*, [1952] B.R. 431 at 439, Casey J.A. described the *droit commun* appeal as follows:

[T]he common law appeal [...] exists when a Judge of the Superior Court purports to render a judgment in a matter which goes beyond his jurisdiction. [...] The Superior Court does not cease to be the Superior Court, nor does it become a Court of inferior jurisdiction simply because the Code of Civil Procedure denies the right to appeal from some of its judgments or because a special law which

if rendered without jurisdiction was an absolute nullity which could be so declared by the Court of Appeal in the exercise of its inherent power, even in the absence of a statutory appeal. It was thus a commonplace proposition that the Superior Court had a limited jurisdiction *ratione materiae* which could be exceeded. Further, it was also explicitly affirmed that the source of the right was the *droit commun*, which reflected the mandatory character of subject matter jurisdiction, and not any text of the *Code of Civil Procedure*.<sup>41</sup> The Court of King's Bench, sitting in appeal, was even referred to as a "common law court of appeal."<sup>42</sup> The integrity of the appeal as going only to jurisdictional review was also maintained. The Court of Appeal exercised a self-denying ordinance, limiting its remedial power to quashing the decision rendered without jurisdiction and remitting the case to the competent court.<sup>43</sup>

Thus, by mid-century, the *droit commun* right of appeal had been invoked and acknowledged several times in appellate litigation. Justice Adjutor Rivard, in his magisterial treatise on the jurisdiction of the Quebec Court of Appeal, published in 1941 after twenty years' experience on that Court,<sup>44</sup> acknowledged the existence of the Quebec *droit commun* right of appeal in cases of jurisdictional excess, while also recognizing that the French concept of a generalized right of appeal no longer represented Quebec law.<sup>45</sup> The characterization of the nature of the system of appeals in Quebec had thus moved away from the French generalized and "sacred" right of appeal, existing unless taken away by statute, to the common law concept of an appeal as an exceptional right. The *droit commun* jurisdictional appeal provided the means of transition, ensuring selective review of legality while limiting generalized rights of appeal.

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extends its jurisdiction, denies, explicitly or by implication, the right to appeal from its decisions. By the same token, a Judge of the Superior Court who has been designated to exercise the extended jurisdiction, or if one prefers, the special jurisdiction created by the Act, does not cease to be a Judge of the Superior Court nor does he become a Court of inferior jurisdiction simply because the special Act makes his decisions final.

We have in these comments once again a clear acknowledgment of the limited jurisdiction *ratione materiae* of the Superior Court. More importantly, Justice Casey refused to accept that a Superior Court judge acting under a legislative jurisdiction acts as *persona designata* rather than as a Superior Court judge, an approach consistent with the Supreme Court of Canada's disapproval of the concept of *persona designata* in *Canada (Minister of Indian Affairs and Northern Development) v. Ranville*, [1982] 2 S.C.R. 518, 139 D.L.R. (3d) 1. Similarly, in *Reference re: Judicature Act (N.B.)* (1988), 54 D.L.R. (4th) 430 at 463, 46 C.C.C. (3d) 203 (N.B.C.A.) Stratton C.J.N.B. stated: "Whenever a statutory power is conferred upon a superior court judge, that power is deemed exercisable in his official capacity unless there is a clear statutory provision to the contrary".

<sup>41</sup> See notably *A.P. Stores*, *ibid.* at 803-4, *per* Marchand J.; and *Lahaise v. Rémillard*, [1952] B.R. 752 at 759, *per* Bissonnette J. (dissenting).

<sup>42</sup> *Quebec Apartments Ltd. v. Cité de Québec* (1938), 70 B.R. 51 at 63, *per* St-Jacques J. (authors' transl).

<sup>43</sup> See, e.g., *Desrochers v. J.-L. Perron* (1930), 48 B.R. 427.

<sup>44</sup> A. Rivard, *Manuel de la Cour d'appel* (Montreal: Variétés, 1941).

<sup>45</sup> *Ibid.* at 38.

### (3) *Decline*

The rule that the *droit commun* is a source of jurisdiction of the Quebec Court of Appeal when the Superior Court exceeds its jurisdiction has never been formally overturned. The doctrine did, however, shift slowly from majority judgments into dissents, and came to be exercised less and less. This process was so gradual that by the time of *Goodman (C.A.)*, appellate counsel could pray that the Court of Appeal invoke its inherent jurisdiction and find the argument rejected for lack of cited authority.<sup>46</sup>

*Lahaise v. Rémillard*<sup>47</sup> perhaps marks the beginning of the decline of this doctrine in Quebec. This was an application for *habeas corpus* sought by a mother against the father of her illegitimate child. A judge of the Superior Court dismissed the petition on the ground that the petitioner had not first obtained a judgment granting her custody of the child. At issue was whether an appeal lay from this judgment. Article 1125 of the Code of Civil Procedure denied any appeal from a decision refusing to issue a writ of *habeas corpus*. Barclay J.A. and Bissonnette J.A., in dissent, both would have allowed the appeal based on the *droit commun* right of appeal. They opined that the Superior Court had exceeded its jurisdiction in deciding that the petitioner could not have custody without first obtaining a judgment of the Superior Court, since this was not the matter in dispute. They argued that the mother had made a *prima facie* case, so the writ should have been issued.

By contrast, the majority held that at most the Superior Court judge had erred in law in holding that the mother would need to obtain a custody order from the Superior Court, and that this judgment was not appealable. McDougall J.A. noted:

I can see no reason to invoke the common law appeal, firstly because there was in my opinion no excess of jurisdiction. The Superior Court judge had jurisdiction to order the issue of the writ or refuse it. If his reasons for refusing the writ include reasons which would apply to the merits, surely this is nothing more than a badly reasoned judgement. [...] Such being the case I am not prepared to admit a remedy by the "back door" of common law appeal.<sup>48</sup>

In these contrasting judicial responses we see the fluidity of the concept of jurisdiction. Judicial characterization of whether an error of law was jurisdictional determined the availability of a remedy. Yet while the majority dismissed the appeal, they nevertheless did so only after rejecting the argument that there had been an excess of jurisdiction. While the power to quash a Superior Court judgment was being used less frequently, there remained a forum of appeal where the question of excess of jurisdiction could be raised.

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<sup>46</sup> *Supra* footnote 13 at 466.

<sup>47</sup> [1952] B.R. 752.

<sup>48</sup> *Ibid.* at 754.

In *Ministre du Revenu National pour le Canada v. Lafleur*,<sup>49</sup> the common law jurisdictional appeal received even shorter shrift by the majority of the Court. The case involved an appeal from a judgment of the Superior Court, upon respondent's motion, declaring itself competent to intervene by way of prohibition to challenge the constitutional validity of a provision of the *Income Tax Act*. Taschereau J.A., for a majority of the Court,<sup>50</sup> examined a number of legislative provisions before deciding that there was no statutory appeal from such a judgment. Nowhere in his judgment did he raise the possibility of a non-statutory right of appeal. In a lone dissent, Casey J.A. noted that he would have found the jurisdiction of the Court to hear the appeal in the *droit commun*. He suggested that searching for a right of appeal in various legislative texts:

reveals a misunderstanding of the problem presented by this case and a wrong approach to the question of this Court's jurisdiction.

To understand this view one must recall these facts: the Superior Court by authorizing the issue of the writ assumed a jurisdiction *ratione materiae* that it may or may not enjoy; this jurisdiction was immediately attacked and the Superior Court disposed of this attack by declaring itself competent. With these facts in mind we may proceed to the following proposition of law: whenever the jurisdiction of the Superior Court is questioned, there is an appeal to this Court from the judgment that maintains or dismisses the exception and this without regard to the matter in which the question is raised.

[...] I regard this proposition as no longer, if it ever was, open to discussion and as not requiring demonstration [...] [and] it has long been recognised by this Court.<sup>51</sup>

Despite Casey J.A.'s insistence that the *droit commun* appeal unquestionably existed, a fact he regarded as "not requiring demonstration", he nevertheless went on to provide a detailed overview of the history of the right. The fact that he felt the need to do so, coupled with the majority's complete eclipse of this basis of the Court's jurisdiction, suggests that the *droit commun* appeal was fading into disuse.

Until *Goodman v. Rompkey*, the last case giving judicial imprimatur to the *droit commun* appeal, if only in dissent, was *Éducateurs de Chicoutimi v. La Commission des écoles catholiques de Chicoutimi*.<sup>52</sup> This was an appeal from a judgment of the Superior Court deciding that it had jurisdiction to hear an action taken against a school commission by a union of teachers and 251 of its members, praying that their collective agreement be declared void, and that the commission be condemned to pay an aggregate amount of \$27,717 to the members. Each member had claimed less than \$200. Article 54 C.C.P. declared

<sup>49</sup> [1962] B.R. 327.

<sup>50</sup> Tremblay, Rinfret, and Owen J.J.A. concurring.

<sup>51</sup> *Ibid.* at 334.

<sup>52</sup> [1964] B.R. 282. The *droit commun* case law was mentioned obliquely in *Myiow v. P.-G. du Canada*, [1958] R.P. 212 at 215 (C.S., per Deslauriers J.); *Dagenais v. City of Montreal*, [1962] B.R. 941 at 943 (per Montgomery J.A.), and in *Amyot v. Dame Laurenza Amyot*, [1964] R.P. 350 at 354 (C.S., per Langlois J.).

actions less than \$200 to be within the exclusive jurisdiction of the Magistrate's Court; but the Superior Court characterized the action as one contract with one quantum payable, and held that the fact that this was later to be split up into amounts each less than \$200 was not relevant. The Superior Court therefore decided that it had jurisdiction to hear the case, and rejected the action on the merits.

One of the grounds of appeal was whether the Superior Court had jurisdiction to hear the case. Article 43 *C.C.P.* set a floor of \$500 for appeals to the Court of Appeal. The majority<sup>53</sup> affirmed the decision of the Superior Court. They held that the mere fact that the Union would later divide the award into 251 portions each less than \$200, was not enough to deny the Superior Court jurisdiction. Thus, the Court of Appeal also had jurisdiction to hear the appeal since the amount claimed was greater than \$500. Taschereau J.A.<sup>54</sup> and Hyde J.A.<sup>55</sup> separately dissented. They would not have allowed the aggregation of the awards, so neither the Superior Court nor the Court of Appeal had jurisdiction. But they noted that while lacking jurisdiction to enter into the merits of the case, the Court nonetheless possessed the *droit commun* power to quash and declare null the decision of the Superior Court for excess of jurisdiction, and to remit the case to be reheard by the competent court, namely the Magistrate's Court.<sup>56</sup> By contrast, the majority did not mention the *droit commun* appeal, even for the purpose of dismissing it.

#### (4) *Rediscovery*

*Goodman v. Rompkey* thus represents the rediscovery of a fully developed concept which had emerged over the course of a century of case law as a means of reconciling limited rights of appeal with the need to ensure adherence to legality. It declined in Quebec as Quebec courts moved closer to the model of the courts of the common law provinces, and to the limited rights of appeal which existed in those provinces. In the common law provinces today, however, the pressure towards expanded rights of appeal is such that the U.S. model of generalized appellate review has already been the object of recommendation.<sup>57</sup> The common law jurisdictional appeal provides an alternative to generalized appellate review. Its implementation, however, raises a number of questions.

### II *Implementation of the Common Law Jurisdictional Appeal*

The principal justification for the common law jurisdictional appeal is that it

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<sup>53</sup> Choquette, Montgomery and Owen J.J.A.

<sup>54</sup> *Ibid.* at 290-3.

<sup>55</sup> *Ibid.* at 293-4.

<sup>56</sup> *Ibid.* at 293, *per* Taschereau J.A.

<sup>57</sup> See Ontario Courts Inquiry, *Report* (Toronto: Ontario Ministry of the Attorney General, 1987) (Chair: T.G. Zuber) at 120 (appeals to be allocated to two appeal courts, one of which would also exercise judicial review). See also the decision of the Supreme Court of Canada in *Kourtesis*, *supra* footnote 8, with accompanying text.

reinforces the principle of quality justice at first instance - through rendering general appellate review unnecessary - while providing a limited form of review in cases where appeal is unavailable. Its acceptance requires consideration, however, of a number of related principles governing the jurisdiction of superior courts and courts of appeal.

(1) *The Immunity of Superior Courts to Judicial Review by Prerogative Writs*

Control of jurisdiction in Commonwealth jurisdictions has been the exclusive preserve of superior courts of first instance. They themselves have not been the object of judicial review through use of prerogative writs or their contemporary equivalents. The finality and infallibility of superior court judgments in matters of jurisdiction has not, however, survived the emergence of courts of appeal. Absent appeal, a superior court judgment remains final and correct, but the possibility of appeal has rendered superior courts susceptible of error in jurisdictional matters, including matters of their own jurisdiction. Superior courts now are the repository of judicial review as much by the effect of statute and tradition as by the residual effect of their general jurisdiction.<sup>58</sup>

Where a superior court errs as to its own jurisdiction or in its determination of the jurisdiction of another court or tribunal, its jurisdictional error may be quashed where there is a jurisdictional appeal.<sup>59</sup> Review of superior courts has become possible, through appeal. The immunity of superior courts is no longer from review, but from review in the form and manner which it alone has had authority to exercise. In the United States superior courts have even lost exclusive authority to exercise review in the form and manner of the prerogative writs.<sup>60</sup>

Can a superior court now susceptible to error wrongfully extend its jurisdiction in a manner uncontrollable by higher judicial authority? Can it unlawfully tolerate excess of jurisdiction by another tribunal in a manner which cannot be corrected? The concept of legality in the exercise of jurisdiction is now an obstacle to such illegal extension of jurisdiction. If the superior courts remain immune to judicial review through exercise of the prerogative writs, they are clearly susceptible to review by other means.<sup>61</sup> These are the arguments which underlay the decision of the Quebec Court of King's Bench in *McShane v. Brisson*,<sup>62</sup> which concluded that while the prerogative writs were unavailable

<sup>58</sup> See generally D. Lantham, "The Reviewability of Superior Court Orders" (1988) 16 *Melb. U. L. Rev.* 603; and for the history of notions of jurisdiction and illegality, A. Rubinstein, *Jurisdiction and Illegality [:] A Study in Public Law* (Oxford: Clarendon, 1965).

<sup>59</sup> See, on the appeal on questions of law and jurisdiction, R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, vol. 4 (Toronto: Carswell, 1986) at 374.

<sup>60</sup> See *supra* footnote 3.

<sup>61</sup> The susceptibility of superior courts to review by *certiorari* was mooted by La Forest J. in his judgment in *Kourtessis*, *supra* footnote 8 at 90-93.

<sup>62</sup> *Supra* footnote 25.

against the Superior Court, this remaining immunity did not exclude review of Superior Court decisions. The question then becomes one of the jurisdiction of the Court of Appeal, notably to exercise the common law jurisdictional appeal.

## (2) *Jurisdiction of the Court of Appeal*

As creations of statute, courts of appeal have the jurisdiction which is conferred upon them by statute. Courts of appeal are also, however, superior courts of record and as such exercise inherent powers.<sup>63</sup> In the United States it appears to be this underlying status which explains the movement upwards to courts of appeal of the power of exercise of the prerogative writs. Inherent powers are those which a court has "simply because it is a court of a particular description."<sup>64</sup> The inherent powers include notably the power to control abuse of process.

A court of appeal is empowered by legislation to hear appeals and has the inherent power to control abuse of process. Subject matter jurisdiction of courts is mandatory in character and cannot be evaded by parties, by public authorities or by courts. Can a court of appeal, as a hierarchically superior court, declare itself incapable of remedying excess or abuse of jurisdiction by a court inferior to it, where no appeal has been explicitly authorized by law? Does a court of appeal not have the responsibility to enforce mandatory jurisdictional rules applicable to courts or tribunals inferior to it? Is not the enforcement of such rules a power which attaches to a court of appeal because of its particular description, as a hierarchically superior court? Since jurisdictional rules are mandatory in character they must be enforced, by someone. Since the jurisdictional excess in question has been committed by a superior court, the enforcement agency must be the court of appeal. The common law jurisdictional appeal must be part of the court of appeal's inherent jurisdiction.

This is the reasoning which would locate the common law jurisdictional appeal within the jurisdiction of the courts of appeal. It is parallel to the process

<sup>63</sup> See *Craig v. Kanssen*, [1943] K.B. 256 at 262 (C.A.), *per* Lord Greene M.R., Lord Goddard concurring ("... the court in its inherent jurisdiction can set aside its own order...."); *Aviagents Ltd. v. Balstravest Investments Ltd.*, [1966] 1 All E.R. 450 at 452 (C.A.), *per* Willmer L.J., Davies and Russell L.J.J. concurring ("It appears to me inconceivable that this court should not have inherent power to control its own proceedings by striking out a notice of appeal in a case where an appeal is clearly not a competent appeal."); *Rocket v. Royal College of Dental Surgeons of Ontario* (1988), 66 O.R. (2d) 73, 29 O.A.C. 260, *per* Grange J.A. at 77 (O.R.) ("... this court ... has also recognized the inherent jurisdiction of the Court of Appeal to control its own process."); *Van Rheeden v. Natte* (1990), 104 N.B.R. (2d) 101 at 104, 261 A.P.R. 101 (C.A.); K. Mason, "The Inherent Jurisdiction of the Court" (1983) 57 Aust. L.J. 449; A. Arnall, "Does the Court of Justice have Inherent Jurisdiction?" (1990) 27 Common Mkt. L. Rev. 683 at 701-2; 4 Am. Jur. 2d "Appeal and Error" § 487 at 930; and for the inherent jurisdiction of even inferior courts see S.S. Sugunasiri, "The Inherent Jurisdiction of Inferior Courts" (1990) 12 Advocates' Q. 215. Cf. *La Forest J. in Kourtestsis*, *supra* footnote 8 at 69-71.

<sup>64</sup> *R. v. Forbes: Ex parte Bevan* (1972), 127 C.L.R. 1 at 7, *per* Menzies J., cited in Mason, *ibid.* at 456.

in the United States which led to the exercise by courts of appeal of prerogative writs. It is less radical in character, however, since it leaves untouched the supervisory power of the superior courts and simply develops existing appellate jurisdiction. The writ of error developed at common law in this way, without explicit statutory support.<sup>65</sup> The appeal is moreover a restricted one, since it is limited to instances of jurisdictional excess. Absent existence of an appeal or a common law jurisdictional appeal, challenge to a superior court judgment becomes an impossible or perilous enterprise, with collateral attack the only possible alternative.

### (3) *Collateral Attack of a Superior Court Judgment*

Superior court judgments are traditionally said to be immune from collateral attack.<sup>66</sup> This has followed from the historical finality and infallibility of superior court judgments, prior to the emergence of courts of appeal. If the judgment could not be overturned through resort to a higher judicial authority, it could not be overturned through resort to the same authority, through challenge in different though related proceedings. Immunity from collateral attack is not an independent concept, however. It is entirely dependent on the historical concept of the superior court as a final and infallible authority. Since the emergence of courts of appeal has put this latter concept into question, so necessarily is the notion of immunity from collateral attack one which can no longer be automatically accepted.<sup>67</sup> It supports the proposition that an uncontrollable judicial authority may act illegally in violation of mandatory rules of jurisdiction. The existence and mandatory character of such rules is incompatible with their uncontrollable violation. In the United States, where first instance courts of general jurisdiction have become subject to the prerogative writs, the judgments of such courts have thus become subject to collateral attack on grounds of absence of jurisdiction.<sup>68</sup>

Collateral attack of a superior court judgment has therefore become conceptually possible. Can it be used however by itself, absent appeal or a common law jurisdictional appeal, as a means of controlling superior court judgments? Some such control is necessary, since the superior court judgment cannot be regarded as a nullity which does not exist; it benefits at least from a presumption of validity. If collateral attack is the only means of challenging a superior court judgment rendered without jurisdiction, however, the affected party must run the risk of contempt of court through refusing to act in conformity with the judgment. A private person must risk imprisonment, however briefly,

<sup>65</sup> Pound, *supra* footnote 3 at 116.

<sup>66</sup> See generally Rubinstein, *supra* footnote 58, ch. III.

<sup>67</sup> This is implicit in the suggestion of La Forest J. in *Kourtessis*, *supra* footnote 8 at 90-93, that superior court judgments may be reviewable by *certiorari*.

<sup>68</sup> See generally American Law Institute, *Restatement of the Law Second: Judgments*, vol. 1 (Philadelphia: The Institute, 1982), s. 12 at 115-129; K. M. Moore, "Collateral Attack on Subject Matter Jurisdiction: A Critique of the *Restatement (Second) of Judgments*" (1981) 66 Cornell L. Rev. 534; Lanham, *supra* footnote 58 at 625-6, with references.

in order to ensure respect for mandatory rules governing the structure of adjudicative authority. Collateral attack has therefore rightly been described as a "dangerous and inconvenient remedy,"<sup>69</sup> and while it may be available its existence does not obviate the need for the common law jurisdictional appeal.

#### (4) *The Limits of Jurisdictional Error*

The common law jurisdictional appeal allows the quashing of superior court judgments which have been rendered in excess of jurisdiction. It is not an appeal based on error of fact or error of law. Its acceptance in Canadian law does not create a situation parallel to that existing in the United States, since there is no appellate jurisdiction in Canada based on the common law writ of error (allowing all assigned errors, at least of law,<sup>70</sup> to be brought before the appellate jurisdiction, even absent a statutory right of appeal or resort to prerogative writs) and since Canadian appeal courts would not issue the range of prerogative writs. Is acceptance of the common law jurisdictional appeal nevertheless the "thin edge of the wedge," since the concept of jurisdictional error is so fluid that it will allow appeal on essentially any ground?

What constitutes jurisdictional error is subject to judicial determination. Error of fact will not constitute jurisdictional error. There have been suggestions that error of law goes to jurisdiction, and while this idea has been accepted as a means of control of administrative tribunals,<sup>71</sup> it has been definitively rejected with respect to superior courts.<sup>72</sup> Errors of law do not constitute in all instances violations of mandatory rules relating to the structure of judicial authority.<sup>73</sup> A superior court judgment not susceptible to appeal on the merits must still be taken to be free of error. Violation of mandatory jurisdictional rules is therefore a distinct phenomenon and the common law appeal does not constitute an unlimited right of appeal. It is a residual, selective control of legality.

#### (5) *Appellate Jurisdiction and the Charter*

The importance of the common law jurisdictional appeal is enhanced by the limited impact that the *Canadian Charter of Rights and Freedoms*<sup>74</sup> has had on the structure of appeals. The courts have generally read the *Charter* as being

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<sup>69</sup> Lantham, *ibid.* at 626.

<sup>70</sup> If the English writ of error was essentially confined to errors of law, on the face of the record, U.S. practice, given an expanded record, tended towards extension to errors of fact as well. See Pound, *supra* footnote 3 at 262.

<sup>71</sup> *Anisminic v. Foreign Compensation Commission*, [1969] 1 All E.R. 208 (H.L.).

<sup>72</sup> *Re Racal Communications*, [1980] 2 All E.R. 634 (H.L.); see also *Re Regina and Dubois* (1982), 2 C.C.C. (3d) 77 at 105-6 (*per* O'Sullivan J.A., dissenting, Man.C.A.).

<sup>73</sup> For an overview of recent Supreme Court of Canada case law on the tests of jurisdictional error, see A. Harvison Young and R. Macdonald, "Canadian Administrative Law on the Threshold of the 1990's" (1991) *Queen's L.J.* 31 at 36-43.

<sup>74</sup> *Supra* footnote 7.

silent on the question of appellate jurisdiction.<sup>75</sup> Specifically, neither section 24(1)<sup>76</sup> nor section 52<sup>77</sup> of the *Canada Act, 1982* have been interpreted as providing a right of appeal where no statutory right of appeal exists against an alleged breach of a *Charter* guaranteed right or freedom. Section 24(1) has not been taken as creating courts of competent jurisdiction, but merely as giving additional power to courts which already have jurisdiction independently of the *Charter*. Accordingly, it appears that the existing appeal structure has to be employed for the purpose of *Charter* applications. It has also generally been affirmed that rights of appeal in criminal matters are only statutory, and that there is no inherent right of appeal merely because of the absence of a statutory remedy.<sup>78</sup>

The Supreme Court of Canada has not yet definitively decided whether and under what circumstances breaches of *Charter* guaranteed rights or freedoms give rise to jurisdictional error.<sup>79</sup> To the extent that such breaches do give rise to jurisdictional error, the common law jurisdictional appeal could serve the very useful function of allowing the courts to maintain their position that the *Charter* does not affect the structure of appeals, yet at the same time provide an effective means of questioning the decisions of superior courts on the infringement of *Charter* guaranteed rights or freedoms, where there is otherwise no available right of appeal. Such an approach would also provide a structured and coherent doctrine in place of what would otherwise be an *ad hoc* and 'equitable' assumption of jurisdiction by appellate courts. Given the constrained nature of

<sup>75</sup> *Mills v. R.*, [1986] 1 S.C.R. 863 at 958-9, 29 D.L.R. (4th) 161 (per McIntyre J.), affirmed in *R. v. Meltzer*, [1989] 1 S.C.R. 1764 at 1773, 49 C.C.C. (3d) 453 (per McIntyre J.).

<sup>76</sup> *R. v. Morgentaler, Smoling and Scott* (1984), 14 D.L.R. (4th) 184 at 190, 193, 16 C.C.C. (3d) 1 (Ont. C.A., per Brooke J.A.); *Mills*, *ibid.* at 959; *Meltzer*, *ibid.* at 1773-74; *R. v. Vaillancourt* (1989), 49 C.C.C. (3d) 544, 33 O.A.C. 234 (Ont. C.A.); *Kourtesis v. M.N.R.*, *supra* footnote 8; *Laurendeau v. P.-G. du Québec*, [1983] C.A. 223 at 228, 4 D.L.R. (4th) 702 (per Monet J.A.), leave to appeal to S.C.C. refused (1983), 4 D.L.R. (4th) 702n.

<sup>77</sup> *Morgentaler*, *ibid.* at 192-3, affirmed in *Mills*, *supra* footnote 75.

<sup>78</sup> *Knox Contracting v. Canada*, [1990] 2 S.C.R. 338 at 352-4, 73 D.L.R. (4th) 110 at 127; *Mills*, *supra* footnote 75, at 958; *Meltzer*, *supra* footnote 75 at 1773-74; *Morgentaler*, *supra* footnote 76 at 189; *Kourtesis*, *supra* footnote 8, per La Forest J. at 69-71. Cf. however *Morgentaler*, *ibid.* at 192; McLachlin J. in *Seaboyer v. R.*, [1991] 2 S.C.R. 577 at 640-1, 83 D.L.R. (4th) 193; La Forest J. in *Mills*, *supra* footnote 75 at 978; *R. v. Daniels* (1991), 65 C.C.C. (3d) 366, 6 C.R. (4th) 375 (Sask. C.A.); *Monasterios v. R.* (1991), 6 C.R. (4th) 384, 66 C.C.C. (3d) 572 (Que. C.A.); *R. v. Therrien* (1987), 34 C.C.C. (3d) 395 (per Kaufman and Monet J.A., Bisson J.A. dissenting) (Que. C.A.).

<sup>79</sup> In *Mills*, *supra* footnote 75 at 964-5, McIntyre J. (Beetz and Chouinard J.J. concurring) refused to accept that all *Charter* breaches necessarily give rise to excess of jurisdiction. La Forest J. agreed with McIntyre J. with respect to breaches involving unreasonable delay. By contrast, Lamer J. dissenting (Dickson C.J. concurring, Wilson J. concurring on the jurisdictional issue and in the result) was of the view that if the violation was one which would also go to jurisdiction under the common law, such as a violation of section 11(b) of the *Charter*, then a party ought to be able to apply for a remedy under section 24(1) of the *Charter* in the superior court in addition to or in lieu of being able to apply for the appropriate prerogative writ.

the common law jurisdictional appeal as a check on legality, it would also preserve the integrity and function of lower courts as triers of fact.

### Conclusion

Given renewed authority and national visibility by the judgment of the Supreme Court of Canada in *Goodman v. Rompkey*,<sup>80</sup> the common law jurisdictional appeal provides a means of selective review of legality which does not systematically undermine the authority of judgments of superior courts of first instance. Nor does it entail the use of duplicative proceedings at first instance, undertaken exclusively to open the possibility of appellate review.<sup>81</sup> Given the availability of statutory appeals, it would be used only in exceptional circumstances as a means of jurisdictional control. Its existence would, however, allow all first instance judgments to be subject to some type of review while reducing the pressure towards generalized appellate review. The Supreme Court of Canada, in *MacDonald v. City of Montreal*<sup>82</sup> has decided that its own control of legality should not be definitively excluded. The same general principle underlies the common law jurisdictional appeal.

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<sup>80</sup> *Supra* footnote 10.

<sup>81</sup> Cf. the use of proceedings for a declaration, as authorized by the Supreme Court of Canada in *Kourtesis*, *supra* footnote 8.

<sup>82</sup> [1986] 1 S.C.R. 460, (1986), 27 D.L.R. (4th) 321.