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Judicial Review : How Much Do We Need ?*

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Introduction

For some years now in Canada the tide has been running strongly in favour of increased judicial review of official decisions. It is seen most clearly in the McRuer Report,¹ whose recommendations for increased judicial review were welcomed by the press and enacted by the Ontario legislature.² It is also evident in the new *Federal Court Act*³ which increases the scope of judicial review of federal agencies. The assumption is that judicial review is a good thing, and that if we have more of it we shall be better off. There are two propositions involved in this, and the second does not follow logically from the first. Only if we examine why judicial review is a good thing will we be in a position to determine how much we need: where the reason ends, there the rule should also end. I have just completed a study of all the administrative law cases decided in the Supreme Court of Canada from 1949 to the present,⁴ and

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¹ *Royal Commission Inquiry into Civil Rights* (1968-1971), Queen's Printer, Toronto.

² *The Judicial Review Procedure Act, 1971*, S.O. 1971, c.48 defines the procedure for and scope of review of the agencies.

³ *Federal Court Act*, S.C. 1970, c.1.

⁴ Hogg, *The Supreme Court of Canada and Administrative Law, 1949-1971*, (1973) 11 Osgoode Hall L.J. 187.

will draw on the results of that study to develop the argument which follows.

There is nothing intrinsically good about judicial review — or indeed any other kind of review. On the contrary a review always means that a question decided once has to be decided again. It is a duplication of effort which involves extra expense and extra delay⁵ and should not be undertaken unless there is a strong likelihood of improvement in the quality of decision. When is there a strong likelihood of improvement in the quality of decision? And how do we measure the “quality” of a decision? It would be idle to expect definitive answers to these questions, but a first step in seeking the answers must be to consider the Court’s and the Agency’s qualifications to decide.

The Agency’s Qualifications

There are many kinds of agencies doing a great variety of tasks. The reason why the Legislature assigns a particular task to a particular agency is usually a matter for speculation. And yet the assignment of decision-making power in a regulated area to an agency (or official) offers some or all of the following advantages. First of all, agencies generally provide greater specialization and expertise. A body with relatively continuous experience with the regulated area will acquire more knowledge and understanding of it than would be possessed by a court. Secondly, an impetus is given to greater innovation. If the regulatory scheme is new or experimental, an agency may be given a broad area of discretion to develop new policies and remedies; a court would normally be unsuited to this kind of policy innovation. Thirdly, an agency may be allowed more initiative. It may be given power to initiate proceedings, to undertake its own investigations, to do research and to feed information and recommendations back to the government or to other agencies. A court traditionally plays a less active role: it relies on the parties to initiate the process of adjudication and to adduce all relevant information; it is preoccupied with the disposition of the single case before it; and it makes no systematic effort to synthesise its experience and make it available to legislators or anyone else. Fourthly, an active agency may help to close the flood-gates of litigation before the courts. If adjudication is required frequently, the volume of cases may cast an unacceptable burden

⁵ See Abel, *Appeals against Administrative Decisions*, (1962) 5 Can. Pub. Admin. 65, 65.

on the court system, requiring a specialised tribunal. Fifthly, agencies are more economical. Adjudication by an agency is likely to be quicker, less formal and therefore somewhat less expensive than adjudication by a court.⁶

These advantages of the Agency as a decision-maker suggest that the scope of judicial review should be narrow. The Agency will be better qualified than the Court to decide most questions coming before it. In most cases there is little likelihood that the Court will be able to improve upon the Agency's decision. Therefore the desirability of bringing a controversy to a final conclusion should dictate that review be unavailable.

The Decision in Metropolitan Life

The 1970 decision of the Supreme Court of Canada in *Metropolitan Life Insurance Co. v. International Union of Operating Engineers*⁷ is a good example of a case where judicial review was inappropriate. The Ontario Labour Relations Board had the power to certify a union as the bargaining agent of the employees where the Board was "satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union". The Board, acting under this power, certified the International Union of Operating Engineers as the bargaining agent for the maintenance workers in Metropolitan Life's Ottawa office. The Board acted on the basis of uncontradicted evidence that more than 55 per cent of the employees had applied for membership in the union, had paid an initiation fee and had been accepted by the union as members. The difficulty in the case was caused by the fact that the union's constitution provided only for membership by operating engineers and the employees in this bargaining unit were maintenance workers. The Supreme Court relied on this fact to quash the decision of the Board. The Court reasoned that the Board had no power of certification unless it was satisfied that the maintenance workers were "members" of the union. A maintenance worker could not be a "member" because he did not fulfil the eligibility requirements of the union constitution. Therefore the Board had no power to certify the union, and its decision was void.

⁶ I appreciate, of course, that agency proceedings are not always informal, quick and cheap; and that court proceedings are not always formal, slow and expensive.

⁷ [1970] S.C.R. 425. I have discussed this case in a previous article, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada*, (1971) 9 Osgoode Hall L.J. 203, 212.

The *Metropolitan Life* case is an illustration of what is sometimes called the "jurisdictional fact doctrine". According to this doctrine, once a "fact" found by an Agency has been classified by the Court as jurisdictional, a wrong finding by the Agency makes its decision invalid. The Agency is then acting outside the powers conferred upon it. In this case the existence of the requisite percentage of "members" was classified as jurisdictional. Therefore the Board's wrong determination that maintenance workers could be "members" made its decision void. I have criticized the jurisdictional fact doctrine elsewhere⁸ and do not propose to go over the same ground again. It suffices to say that there is nothing inevitable about the doctrine. The statute requires the Board to make a finding whether or not the requisite percentage of members exists before it can exercise its powers. The only issue is whether the Board's opinion should be treated as authoritative, or whether the Court should treat its own opinion as the authoritative one.

If one considers the qualifications of the Board to decide the question, it is clear that its decision is likely to be the better one. The Ontario legislature had established by statute a framework for collective bargaining which required that certain recurring questions be adjudicated. One of these was the certification of unions as bargaining agents for groups of employees. This adjudicatory function, which could have been given to the ordinary courts, was given instead to an administrative agency. That agency acquired a specialized and expert knowledge of the questions of labour relations which regularly came before it. One such question was whether employees who did not satisfy the eligibility requirements of a union constitution could be treated as "members" of that union for certification purposes. The Board had encountered this problem before and had evolved a policy to meet it. It had decided to formulate and apply a uniform criterion of membership for certification purposes: if the evidence indicated that an employee had applied for membership in the union and had paid an initiation fee, and that the union would in fact accord him all the rights and privileges of membership, then the Board's policy was to treat that employee as a "member" of the union. In other words the Board had deliberately decided not to accept the requirements of the union constitution as controlling, but to apply its own uniform rule. There seem to have been two main reasons for the Board's adoption of a uniform rule. The first was its view that every employee who was claimed as a member by a union seeking certification should have

⁸ (1971) 9 Osgoode Hall L.J. 203, 209-217.

made a financial sacrifice in addition to merely signing an application card. If a union in its constitution were free to abolish its initiation fee for the purpose of an organizational drive, then its list of "members" might lack credibility, and the union might have an unfair advantage over a competing union which did require an initiation fee. The second reason for a uniform rule was that the unions for a number of reasons find it difficult to keep the membership qualifications in their constitutions up-to-date with new work patterns, new job classifications and even with their own organizational initiatives. To insist on amendment of the union constitution so as to accord with its actual organizational activity would have involved serious delays in certification and therefore in collective bargaining. These reasons led the Labour Board to develop the uniform standard of membership and to certify the union in *Metropolitan Life*.⁹ No doubt there is room for argument about the wisdom of the rule, but it is doubtful if anyone unversed in labour relations would have much to contribute to the argument. When the court rushes in to substitute its legalistic solution for the Board's pragmatic one, it is seriously disturbing the expectations and practices of those regulated by the Labour Relations Act. The Board's view is likely to be the better one; the less well-informed court should have deferred to it.¹⁰ In fact the Supreme Court's decision in *Metropolitan Life* was immediately and retrospectively corrected by the legislature.¹¹ The total cost of review in *Metropolitan Life* was high indeed.

The Court's Qualifications

What special qualifications does a Court then have? One obvious one is that its judges are lawyers. If one concentrates on this qualification it is easy to conclude that the Court should always have the power to review questions of law which come before the Agency. This is a theory which surfaces from time to time in the United States. But how are questions of "law" to be identified? It is a truism among administrative lawyers that "law", "fact" and "poli-

⁹ See O.L.R.B. Monthly Report, August 1967, 437 for the decision of the Board; and see Norwood, Comment, (1970) 28 U. of T.Fac.L.R. 109 for discussion.

¹⁰ The commentary on the Supreme Court's decision in *Metropolitan Life* has generally been critical: (1970) 28 U. of T.Fac.L.R. 109 (Norwood); (1971) 9 Osgoode Hall L.J. 1, 30 (Weiler); (1971) 9 Osgoode Hall L.J. 203, 212 (Hogg); (1971) 49 Can. Bar Rev. 365 (Lyon).

¹¹ S.O. 1970, c.3, ss.1, 2.

cy" are inextricably bound up together in the process of decision-making. A judicial power to review questions of law will leave few agency decisions invulnerable to attack. In Canadian administrative law at present there is no general judicial power to review questions of law.¹² The issue for the reviewing court is not whether an error of law has been made, but whether the Agency has acted within its powers. This leaves many problems, as we shall see, but the fact-law dichotomy is no improvement.¹³ Unfortunately, the new *Federal Court Act* and the new *Ontario Judicial Review Procedure Act* have both extended the judicial power to review for error of law,¹⁴ so that our courts will be increasingly invited to review decisions which they should leave well alone.

By way of parenthesis it is perhaps worth adding that I certainly would not accept the American doctrine that agency findings of fact are reviewable to see if they are supported by "substantial evidence" on the whole record.¹⁵ This formula allows the Court to examine and weigh the evidence before the Agency. It permits a costly re-examination of all findings of fact, and by a Court which has not the same specialised knowledge and understanding as the Agency. The analogy to a review of a jury's findings, which is often made by American judges and writers,¹⁶ seems to me to be inapt because administrative agencies are rarely *ad hoc* amateur bodies comparable to a jury. I am therefore sorry that the new Federal Court of Appeal has been given the power to review findings of

¹² The present relevance to Canadian law of the distinction between "law" and "fact" is that certiorari will lie for error within jurisdiction if the error appears on the face of the record and is one of "law". In Ontario this anomalous ground of review has been extended to the "application for judicial review": *The Judicial Review Procedure Act, 1971*, S.O. 1971, c.48, s.2(2). Statutory appeals are occasionally granted from an agency to the courts for error of "law". The new Federal Court of Appeal has been given power to review for error of "law": *Federal Court Act, S.C. 1970, c.1, s.28*.

¹³ Wade in *Anglo-American Administrative Law: More Reflections*, (1966) 82 L.Q.R. 226 argues that the U.S. law is better than the English law. He states that the "substantial evidence" rule for questions of fact and the "rational basis" rule for questions of law are so similar that it is unnecessary for the U.S. courts to characterize questions as being of "fact" or "law". But, as he admits, the courts still often assert a power of full review of findings of law, even if there is a "rational basis" for the agency's finding. The rational basis test is not firmly established, and Jaffe for one rejects it: Jaffe, *Judicial Control of Administrative Action* (1965), 576; and see f.n.35, *infra*.

¹⁴ See *supra*, f.n.12.

¹⁵ Jaffe, *supra*, f.n. 13, ch. 15; Davis, *IV Administrative Law Treatise* (1958), ch. 29.

¹⁶ See Jaffe, *supra*, f.n.13, 616.

fact in language which bears a close resemblance to the American substantial evidence rule,¹⁷ and that there is a provision in the new Ontario *Judicial Review Procedure Act* which could develop into a similar power.¹⁸

Albert S. Abel makes an appealing argument. He would not support full review of all questions of law coming before an agency. He agrees that the Court should leave to the Agency decisions which turn on technical terms or which concern matters of policy. But he reasons from the premise that judges are lawyers to the conclusion that the task of interpreting statutory language should rest finally with the courts "where the statutory terms by themselves or in their context are standard legal terms common to many acts or where they are everyday popular terms with no colour of special usage".¹⁹

The difficulty with this formulation is that it seems to allow the Court to be the sole judge of when statutory language is a "standard legal term" or an "everyday popular term". The meaning of statutory language (or any language for that matter) always depends upon its context. It will be rare indeed to find a term in a statute which does not draw some colour from the purposes and policies of the statute of which it is a part. Judges who are not familiar with those purposes and policies or with the expectations of those familiar with the field of regulation may give a term its "standard legal meaning" or its "everyday popular meaning" in ignorance of the technical or policy implications of their decision. The field of labour law is replete with examples of judges assigning meanings to what they believed were everyday or standard legal terms, and thereby disturbing the longstanding and rational expectations of those working in the field.²⁰

The *Metropolitan Life* case is a good example of this. The misleading term "jurisdictional fact"²¹ should not conceal that what was in issue in that case was the meaning of the statutory phrase "members of the trade union". This looks like a phrase which a lawyer is eminently well-qualified to define by the application of

¹⁷ *Federal Court Act*, S.C. 1970, c.1, s.28(1)(c). The Court may review a decision based on "an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

¹⁸ S.O. 1971, c.48, s.2(3).

¹⁹ Abel, *supra*, f.n.5, 74.

²⁰ There has been a great deal of criticism of the role of the courts in reviewing the decisions of labour relations boards. Cf. Weiler, *The 'Slippery Slope' of Judicial Intervention*, (1971) 9 Osgoode Hall L.J. 1. I am much indebted to this excellent study.

²¹ For criticism of the term, see Hogg, (1971) 9 Osgoode Hall L.J. 203, 215.

ordinary legal techniques. However, if one is to judge by the speedy legislative reaction and the critical commentary, the lawyer's solution turned out to be inappropriate to what was essentially a problem of labour relations policy. The same kind of point may be made about other cases where the court has used the "jurisdictional fact doctrine" as the basis for judicial review.²² The question whether Barbara Jarvis is a "person" looks quite easy — until it is seen to be a question about the scope and policy of labour relations regulation.²³ The question whether Kenneth Bell's flat is a "self-contained dwelling unit" looks like the meat and drink of any competent lawyer — until it is seen as depending upon the purposes and policies of an anti-discrimination law.²⁴ It is no part of my thesis that the Court is incapable of giving sensible answers to these questions. If there were no Agency the Court would have to give the answers. But when there is an Agency it seems only realistic to recognize that the questions have a component of technicality and policy which lies beneath their surface, and which the Agency is better equipped than the Court to identify, to evaluate and to consider in its decision.

General Values

Is there then any room whatsoever for judicial review? My answer is yes, and it stems from the premise that the judges are not merely lawyers but generalists. There are dangers in allowing a specialist agency to operate completely free from review. The very qualities which make the Agency well suited to determine questions within its area of specialization may lead it to overlook or underestimate general values which are fundamental to the legal order as a whole. The generalist Court is ideally suited to check the specialist Agency at the point where these general values are threatened.

First and foremost among these general values are those which are associated with the Canadian commitment to a democracy based

²² There are a few cases which may be capable of analysis in Abel's terms, e.g., *The Queen v. Leong Ba Chai*, [1954] S.C.R. 10; see also Jaffe, *Judicial Control of Administrative Action* (1965), 631.

²³ *Jarvis v. Associated Medical Services Inc.*, [1964] S.C.R. 497.

²⁴ *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756; see also *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18; *Labour Relations Board (B.C.) v. Canada Safeway Ltd.*, [1953] 2 S.C.R. 46; *Commission des Relations Ouvrières de Québec v. Burlington Mills Hosiery Co. of Canada Ltd.*, [1964] S.C.R. 342; *Jarvis v. Associated Medical Services Inc.*, [1964] S.C.R. 497; *Galloway Lumber Co. Ltd. v. Labour Relations Board (B.C.)*, [1965] S.C.R. 222.

on the English parliamentary system. The most obvious feature of a democracy is that its laws are made by legislatures whose members are elected. If officials were free to act outside the authority of those laws, the democratic principle would be subverted. The principle that official action must be authorized by law in order to be valid is perhaps the kernel of Dicey's much criticized "rule of law". Regarded simply as a requirement of validity it is no special cause for pride, since no civilized community would accept as valid whatever was done by an official or whatever bore the trappings of an official act. In a democratic country the principle of validity has special significance, since the laws which authorize official action must be made by a freely elected legislature. Every exercise of official power must therefore have a democratic root. In countries which have inherited the English common law it has fallen to the Court to apply the principle of validity, and thereby insist upon the democratic character of the government.

The role of the courts as "guarantors of the integrity of the legal system"²⁵ may be illustrated by a well-known trilogy of civil actions brought by Jehovah's Witnesses in Quebec during the 1950's. In *Chaput v. Romain*²⁶ police had broken up an assembly of Jehovah's Witnesses who were meeting peacefully in a private house. In *Lamb v. Benoit*²⁷ police had arrested a Jehovah's Witness who was distributing pamphlets on a street corner, held her in custody for a weekend, and then laid charges which proved to be without foundation. In *Roncarelli v. Duplessis*²⁸ the Premier of Quebec had ordered the cancellation of restaurateur Roncarelli's liquor licence because he was a Jehovah's Witness who had made a practice of acting as bondsman for the numerous Jehovah's Witnesses who were arrested for distributing their literature in breach of municipal by-laws. In each case the Supreme Court of Canada held that the official decision complained of was made without any legal authority, and awarded damages against the defendant officials. The officials were not allowed to shelter behind the trappings of their office because their decisions did not satisfy the principle of validity: they were not authorized by any statute.

It is clear that Canadians could not accept a legal system in which there was no avenue of redress for Roncarelli and his fellow Witnesses. Furthermore, it is not easy to see how any tribunal other

²⁵ Jaffe, *supra*, f.n.13, 589.

²⁶ [1955] S.C.R. 834.

²⁷ [1959] S.C.R. 321.

²⁸ [1959] S.C.R. 121.

than the ordinary courts would be as well equipped to adjudicate disputes of this kind between the individual and the State or its officials. The ordinary courts offer as good an assurance of neutrality as is reasonable to expect in an imperfect world. The judges are still human, of course,²⁹ but they are immeasurably strengthened by their high standing in the community, their security of tenure and their long tradition of independence.

The experience of France shows that the ordinary courts could be replaced by a specialist tribunal for the purpose of deciding controversies between the citizen and the State. However, the French Conseil d'Etat has evolved slowly over a period of more than a century and a half. An attempt to establish it in one stroke in a country with quite different constitutional arrangements and traditions would be likely to fail. The risk is that a more specialized tribunal would lack the detachment from the administrative process which in my judgment is appropriate to judicial review. On the one hand, it might acquire so much sympathy for the administrative point of view as to lose sight of competing democratic or civil libertarian values. On the other hand, it might acquire so much confidence in its own expertise as to lose sight of legitimate official claims to autonomy and finality. The kind of limited review which can appropriately be provided by a generalist court is, to my mind, exactly what is required.

Kenneth Culp Davis tells us that judicial review should depend upon the "comparative qualifications" of Court and Agency,³⁰ and Albert S. Abel states that "the fittest should finally decide".³¹ This approach to judicial review throws much light in dark places, as I hope my earlier discussion of the jurisdictional fact doctrine has shown. But it is incomplete. If the Agency decides a matter which has not been assigned to it, the Court should strike down the pur-

²⁹ In each of the three cases the official decision was upheld in the highest Quebec court; and in two of the three cases the Supreme Court of Canada was divided, with the French-Canadian members in dissent. In *Lamb v. Benoit*, [1959] S.C.R. 321 Taschereau, Fauteux and Abbott, J.J. dissented on the basis that the action had been brought outside a six-month limitation period. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121 Taschereau and Fauteux, J.J. again dissented on the similar ground that a statutory notice had not been given to the defendant one month before the issuance of the writ; Cartwright, J. also dissented, but on a different point. *Chaput v. Romain*, [1955] S.C.R. 834 was a unanimous decision in which Taschereau and Fauteux, J.J. participated; there were similar privative provisions there too, but they were held unavailing.

³⁰ IV Davis, *supra*, f.n.15, s.28.21.

³¹ Abel, (1962) 5 Can.Pub.Admin. 65, 72.

ported decision. One may describe this as an application of the principle of validity, or of legislative supremacy, or of the "rule of law", but however described it is basic to our constitutional law and will not and should not change. It is not enough to say that the Agency was well qualified to make the decision; it must also be legally authorized to do so.

Interpreting the Empowering Statute

In the three Jehovah's Witnesses cases the defendants were unable to point to any statute which authorized their actions. In most cases, however, the official is able to rely on an enabling statute which gives him power to do some things, and the question is whether the statute gives him power to do the very thing which is complained of. How is the Court to handle these cases, where there is a genuine question of statutory interpretation concerning whether the Agency was authorized to do what it did? The principle of validity (or of legislative supremacy or rule of law) seems to require that the Court interpret the empowering statute to decide whether or not the Agency has acted within its legislative mandate. But the principle of comparative qualifications, which led me to condemn the decision in *Metropolitan Life*, seems to insist that the Court accept the Agency's interpretation of its own legislative mandate. Can one not, after all, assume that the Agency will be better informed than the Court of the purposes and policies of its own statute?

Obviously a compromise must be worked out between the competing claims of the principle of validity and the principle of comparative qualifications. So far as possible the ultimate decision should be both valid and well-informed. And, to introduce a new element into the argument, the ultimate decision should also reflect civil libertarian values basic to our legal order. Is there any way in which this can be accomplished? Again, I believe that it can, and I shall try to demonstrate this with examples of the kind of cases in which I believe judicial review is appropriate.

The first example is *Beatty v. Kozak*,³² decided in the Supreme Court of Canada in 1958. Saskatchewan's *Mental Hygiene Act* included a power to arrest a person who was "apparently mentally ill" where the person was "conducting himself in a manner which in a normal person would be disorderly". The plaintiff in *Beatty v. Kozak* was arrested while working peacefully in her office, and was

³² [1958] S.C.R. 177.

then detained for 44 days. She sued the policeman and police matron who had made the arrest for damages for false imprisonment. The majority of the Supreme Court of Canada held that the plaintiff was entitled to damages. Since she was not, at the time of her arrest, "conducting [herself] in a manner which in a normal person would be disorderly", it followed that the statutory power of arrest had not arisen. Therefore the decision to arrest her was unauthorized by the statute and was invalid.

The decision in *Beatty v. Kozak*, as described, may appear to have been inevitable. That it was not so is made clear by the dissent of Rand, J., who did not content himself with a literal reading of the statutory language. He pointed out that the language did not have to be read as confined to disorderly conduct at the time of the arrest, but could extend to "*past* persistent disorderly conduct".³³ Rand, J. did not go so far as to decide that he agreed with that interpretation. What he did decide was that he would defer to the official view. In essence he held that when a statutory provision will reasonably bear the meaning which its administrator has placed upon it, the Court should not substitute a different meaning.³⁴

To ask, as Rand, J. did, whether a statutory power will reasonably bear the meaning which its administrator has placed upon it is very different from seeking the one and only "correct" meaning of the statute. In the United States some courts and writers have asserted a similar doctrine of restraint by the Court: an Agency finding should be respected if it has a "reasonable" or a "rational" basis in law.³⁵ The test of "reasonableness", as opposed to "correctness", does offer a good likelihood of a decision which is informed by agency expertise, and which is nevertheless responsive to democratic and civil libertarian values. It forces the Court to treat the Agency as a partner (albeit a junior partner) in interpreting the scope of the Agency's powers. However, the Court may still overrule the Agency if its use of power cannot be sustained on a reasonable

³³ *Ibid.*, 187 (my italics).

³⁴ *Ibid.*

³⁵ See IV Davis, *supra*, f.n.15, s.30.05. This is not a universally accepted doctrine in the U.S.A., however: see IV Davis, *supra*, f.n.15, ss.30.06, 30.07; and f.n.13, above. Jaffe argues for a "clear statutory purpose" test, which accords a much stronger role to the Court: "where the judges are themselves convinced that a certain reading, or application, of the statute is the correct — or the only faithful — reading or application, they should intervene and so declare": Jaffe, *supra*, f.n.13, 572. In his view a "competent and responsible judiciary" should assert its view of the statute, even where the agency's construction is a "sensible" one: *ibid.*, 576.

interpretation of the statute. What is reasonable must be decided by the Court. It should depend to some extent upon the nature of the power. In *Beatty v. Kozak* the power had enabled the defendants to imprison the plaintiff for 44 days. In interpreting a statute which confers a power of this order, it is necessary to weigh the official claim to effective government against the individual's claim to personal liberty. The danger is that the Agency, if unchecked by the Court, may place too great an emphasis on its perception of the needs of government and too little on the competing claim to personal liberty. And yet our legal order places a high value on the claim to personal liberty. It is for the generalist Court to see to it that this value is not overwhelmed by a distorted interpretation of governmental power. The Court is justified in insisting that invasions of fundamental civil liberties should be authorized by relatively clear language. The range of reasonable interpretations is limited by the competing civil libertarian values. In *Beatty v. Kozak* it seems to me that Rand, J. uncharacteristically gave insufficient weight to these values. The police interpretation of the power was certainly not absurd; but it did strain the statutory language. I believe that, taking all considerations into account, it was outside the "reasonable" range. (It may be possible to support Rand, J.'s view on the footing that there was a privative clause in the statute; the privative clause would certainly justify greater judicial restraint.)

In *Beatty v. Kozak* the Court had to decide when the police power arose, and it did so by interpreting the empowering statute. The Court is often asked to decide on issues of this kind: an official decision is rendered, and the question whether the statute authorizes that kind of decision is raised. For example, the Governor-in-Council expropriates wheat to prevent profiteering from the end of price controls;³⁶ the municipality of Metropolitan Toronto enacts a by-law providing for the fluoridation of drinking water to diminish tooth decay;³⁷ the Ontario Racing Commission orders an owner to rename horses whose names are "in bad taste";³⁸ the Department of National Revenue orders a bank to produce the records of its dealings with a customer whose taxation liability is under investigation;³⁹ the Board of Transport Commissioners orders Bell Telephone to supply service in an area served by another telephone

³⁶ *Canadian Wheat Board v. Nolan*, [1951] S.C.R. 81; *revd sub. nom. A-G. Can. v. Hallet & Carey Ltd.*, [1952] A.C. 427 (P.C.). (The case had commenced before the abolition of appeals to the Privy Council.)

³⁷ *Metropolitan Toronto v. Village of Forest Hill*, [1957] S.C.R. 569.

³⁸ *Wm. F. Morrissey Ltd. v. Ontario Racing Commission*, [1960] S.C.R. 104.

³⁹ *Canadian Bank of Commerce v. A-G. Can.*, [1962] S.C.R. 729.

company;⁴⁰ the Department of Immigration grants a period of "probation" to an illegal immigrant;⁴¹ the Department of Transport as pilotage authority classifies pilots into grades with different salaries and responsibilities;⁴² and the Canadian Radio-Television Commission instead of revoking a radio broadcasting licence renews it for a terminal period.⁴³ Each of these cases (and there are many others) is essentially similar to *Beatty v. Kozak*. A decision is made by an official (or agency) acting in good faith in what he believes is the due execution of his powers. In each case the Court must decide whether the empowering statute authorized the decision. In each case the result depends upon whether the Court is willing to give the statute a broad construction in support of the official interest, or whether it will choose a narrow construction in support of the individual interest. My study of the cases in the Supreme Court between 1949 and 1971⁴⁴ discloses no clear pattern of result, which is to be expected, bearing in mind the great variety in the cases. On the whole, however, the tendency is in favour of the administrative construction. The Court rarely articulates any policy of deference to a reasonable administrative interpretation, but its practice does generally accord with that policy.

Abuse of Discretion

Is there any scope for judicial review where the Agency has made a decision which falls literally within the language of the empowering statute? If we incorporate the "reasonableness" test into this question, the question becomes whether it is ever unreasonable for the Agency to rely on the clear language of the empowering statute. Usually, of course, the answer is no. But there are exceptions and *Smith and Rhuland v. The Queen*⁴⁵ is one of them. In that case the Nova Scotia Labour Relations Board refused certification to a union on the ground that the union was dominated by an official who was a Communist. The Supreme Court of Canada, by a majority, quashed the decision.⁴⁶ Rand, J.'s majority opinion agreed that the empower-

⁴⁰ *Metcalfe Telephones Ltd. v. McKenna*, [1964] S.C.R. 202.

⁴¹ *Violi v. Superintendent of Immigration*, [1965] S.C.R. 232.

⁴² *Jones and Maheux v. Gamache*, [1969] S.C.R. 119.

⁴³ *Confederation Broadcasting (Ottawa) Ltd. v. Canadian Radio-Television Commission*, [1971] S.C.R. 906.

⁴⁴ (1973) 11 Osgoode Hall L.J. 187.

⁴⁵ [1953] 2 S.C.R. 95.

⁴⁶ Rand, J.'s opinion, discussed in the text, was concurred in by Kerwin and Estey, J.J. Kellock, J. concurred in the result, but on the ground that the

ing statute gave to the Board a discretionary power not to certify a union even when the union enjoyed the support of a sufficient number of employees in the bargaining unit. But that discretion was not unfettered. It was not open to the Board "to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization".⁴⁷ An exercise of discretion based on that ground was outside the empowering statute and invalid.

Can this result be accommodated within a theory of judicial review which insists upon restraint on the part of the Court? More specifically, why is this case different from *Metropolitan Life*, which I criticized earlier?⁴⁸ In both cases a Labour Board made a considered determination of an issue having elements of fact and law, and having a strong labour relations policy component. If the Court was wrong to intervene in *Metropolitan Life*, can it have been right in *Smith and Rhuland*? I believe that it was. In *Smith and Rhuland* the Board's policy was in violation of freedom of association, a general value of the highest importance to the Canadian democratic legal order. This value had to be weighed in the balance with the Agency's perception of a desirable labour relations policy. In rejecting that policy the Court was insisting that such a serious invasion of democratic and civil libertarian values be clearly authorized by the empowering statute.⁴⁹ The generalist Court was reminding the specialist Agency that the Agency was not "an island entire of itself", and that its work had to be brought "into harmony with the totality of the law".⁵⁰

The doctrine which was applied in *Smith and Rhuland* is the familiar one that statutory discretion must not be exercised in bad faith, or for an improper purpose, or upon irrelevant considerations. Bad faith, in the sense of dishonesty or corruption or the deliberate use of power to accomplish a private end, is virtually non-existent, at least in the cases which come before the Supreme Court of Canada. The problems concern the proper definition of "improper purpose" or "irrelevant considerations". In theory the answer is simple: these are purposes or considerations which lie outside the scope of the

Board had no discretion not to certify a union which satisfied the conditions of certification. Taschereau, Cartwright and Fauteux, J.J. dissented on the ground that the Board had exercised its statutory discretion, and the Court should not intervene.

⁴⁷ [1953] 2 S.C.R. 95, 100.

⁴⁸ See text accompanying f.n.7, *supra*.

⁴⁹ See especially [1953] 2 S.C.R. 95, 98 *per* Rand, J.

⁵⁰ Jaffe, *supra*, f.n.13, 590.

empowering statute. In practice, however, there is usually room for disagreement on whether a given purpose or consideration is within the scope of the empowering statute. Here, as elsewhere, the Agency should be given the benefit of any reasonable doubt. I have explained why I think *Smith and Rhuland* was rightly decided. The majority of cases in which an exercise of discretion is attacked are more like that of *Metropolitan Life*: the Agency's perception of its role is a reasonable inference from the empowering statute, and therefore the Court should defer to it. My study of the Supreme Court decisions⁵¹ shows that, while the results are not uniform, on the whole the Court has chosen the path of deference.

Natural Justice

The Court will also review a decision which falls literally within the language of the empowering statute in cases where the Agency has reached its decision by an unfair procedure. Thus a Board of Health with the power to evict the occupants of a dwelling on grounds related to health may issue an eviction order without disclosing the grounds to the occupants and without giving them an opportunity to be heard.⁵² A Labour Relations Board with the power to revoke a union's certificate of representation "for cause" may revoke the certificate of a teachers' union without giving the union an opportunity to be heard.⁵³ An immigration officer with the power to deport certain aliens may make a deportation order against a man and his wife without giving the wife a separate opportunity to establish that she should not be included in the order.⁵⁴

It is not necessary to multiply examples. It is trite law that the Court will require an adjudicatory agency with the power to affect "the rights of subjects" to observe the rules of natural justice. The Court's reasoning is that, even if the empowering statute is silent on the procedure which its Agency must follow, the Legislature could not have intended the Agency to exercise its powers in breach of fundamental principles of justice. And so, as was said in 1863, "the justice of the common law will supply the omission of the legisla-

⁵¹ (1973) 11 Osgoode Hall L.J. 187.

⁵² *Board of Health (Saltfleet Township) v. Knapman*, [1956] S.C.R. 877.

⁵³ *Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140.

⁵⁴ *Moshos v. Minister of Manpower and Immigration*, [1969] S.C.R. 886.

ture".⁵⁵ In short, the Court interprets the statute as impliedly requiring that the rules of natural justice be complied with.

This interpretation is not available, of course, where the Legislature has made clear that the Agency need not afford any hearing, or need not be unbiased.⁵⁶ But the Court insists that the statute should be clear on the point. This would not seem an unwarranted intrusion by the Court. An Agency with the power to determine questions affecting property rights or personal liberties obviously must decide how to ascertain the information upon which its decisions will be based. In many cases the values of efficiency and fairness will not conflict. Both will dictate that the person affected should give his version of the facts before a final decision is made. But there is always a danger — amply substantiated by the decided cases — that the Agency will make its decision without affording an adequate hearing to the person affected. The Agency may decide that this would cause too much delay, or that it would be a waste of time; or it may simply be insensitive to the anxieties of the persons subject to its jurisdiction. It is clear that the Court should here, as elsewhere, defer to a reasonable Agency judgment on the Agency's own procedures. To insist upon courtroom rules of procedure and evidence would defeat some of the reasons for establishing the Agency in the first place. But at the point where the Agency's procedure ceases to be merely informal and becomes unfair, judicial intervention is justified. The Agency's decision then comes into collision with the general value of procedural fairness which runs throughout the legal order, and judicial intervention is justified.

It must be remembered too that the courts themselves have developed a considerable expertise in matters of procedure. Centuries of concern about their own procedures and about those of the agencies which prerogative writs have brought before them have taught that there are principles of procedural fairness which apply to a large number of otherwise different institutions, which are therefore capable of generalised statement, and which only the courts have the breadth of experience to formulate. It is true that the courts have not been conspicuously successful in laying down workable rules on when the rules of natural justice are applicable, and what precisely they entail. But some of the criticism of the courts stems from an irrational hostility to any legal concept which

⁵⁵ *Cooper v. Wandsworth Board of Works* (1863), 14 C.B.N.S. 180, 194; 143 E.R. 414, 420 *per* Byles, J.

⁵⁶ This may no longer be true in the case of federal statutes because of the *Canadian Bill of Rights*, 8-9 Eliz. II, c.44, s.2(e).

cannot be neatly cut and dried; we manage perfectly well with many concepts which are incapable of precise definition, as, for example, that of negligence.⁵⁷ The courts would be unwise to elaborate unduly the rules of natural justice because of the great variety of agencies to which the rules must be applied. This is not to say that the rules are as clear as they could be. The Supreme Court of Canada, in particular, has thoroughly confused me (at least) by its poorly reasoned holdings. But it is one thing to criticize the craftsmanship of the Court, as I have done elsewhere,⁵⁸ and quite another to deny that the Court should concern itself with procedural justice in the agencies. I believe firmly that it should do so.⁵⁹

Privative Clauses

Privative clauses, on my definition, are all statutory provisions designed to oust judicial review: finality clauses, no-certiorari clauses, as-if-enacted clauses, and also clauses imposing prior notice requirements or short limitation periods. The Court's refusal to give effect to privative clauses is notorious: it clearly flies in the face of the legislative intent.⁶⁰ And yet to interpret such clauses literally, as Bora Laskin has urged in his well-known 1952 article,⁶¹ seems to me to ignore countervailing civil libertarian values. The literal reading of privative clauses would have defeated the plaintiffs in each of the three Jehovah's Witnesses cases, which concerned flagrant abuses of official power.⁶² It is difficult to accept that the Legislature in enacting a privative clause intends to exclude *all* judicial review, no matter how far the Agency appears to exceed its powers, and no matter how severely it invades personal or proprietary rights. I have

⁵⁷ See *Ridge v. Baldwin*, [1964] A.C. 40, 64-65 *per* Lord Reid.

⁵⁸ (1973) 11 Osgoode Hall L.J. 187, 206-211.

⁵⁹ My comments are, of course, addressed to the case where there is no statutory code of procedure. The establishment in Ontario (*The Statutory Powers Procedure Act, 1971*, S.O. 1971, c.47) of such a code, with a committee to tailor the code to each particular agency, is an innovation which will obviously leave little scope for application of the rules of natural justice. For criticism, see Willis, *The McRuer Report: Lawyers' Values and Civil Servants' Values*, (1968) 18 U. of T. L.J. 351.

⁶⁰ See articles in (1952) 30 Can. Bar Rev. 69 (Sutherland); (1952) 30 Can. Bar Rev. 986 (Laskin); (1965) 23 U. of T.Fac.L.R. 5 (Pink); (1967) U.B.C.L. Rev. - C. de D. 219 (Carter); (1969) 34 Sask.L.R. 334 (Norman).

⁶¹ Laskin, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses*, (1952) 30 Can. Bar Rev. 986.

⁶² See text accompanying f.n.26-28, *supra*.

argued elsewhere⁶³ for a compromise between the current judicial approach and the Laskin approach. The compromise, which has been worked out in some of the opinions of Rand, Judson and Abbott, J.J. in the Supreme Court of Canada, and which has become the prevailing doctrine in the High Court of Australia, is to interpret the clause as requiring even more restraint than usual on the part of the Court. The Agency's decision must stand so long as it is a bona fide attempt to exercise the power and is reasonably capable of reference to the power. This formulation should protect most decisions, while leaving the door ajar to review in the rare extreme case.

Conclusions

1. In deciding matters which have to be decided in order to reach a decision, the Agency's findings should normally be treated as conclusive. The costs of judicial review are not justified by the likelihood of a better decision. This is so even where the error alleged may be classified as one of "law", because a ruling of "law" tends to be a compound of law, fact and policy, which lies peculiarly within the expertise of the Agency.

2. Where, however, the Agency's decision is in conflict with a value which is fundamental to the legal order as a whole, the generalist Court is under a duty to consider whether the administrative decision should prevail over the more fundamental value. The administrative decision which is completely unauthorized by statute must never be permitted to prevail, for that would subvert the democratic legal order. The administrative decision which bears some relationship to a statutory power should not be quashed so long as it is a reasonable interpretation of the power. The Court must decide whether the interpretation is reasonable. In order to decide this, the Court should consider the reasons for the administrative assumption of authority, and should balance those reasons against the civil libertarian or proprietary values which are asserted by the individual affected.

3. Where the Agency's decision is authorized by a literal reading of general language in a statute, the Court still retains a power of review; it may in effect cut down the generality of the language to protect fundamental civil libertarian values. Cases such as *Smith and Rhuland*, the natural justice cases and some of the private

⁶³ (1973) 11 Osgoode Hall L.J. 187, 196-204.

clause cases are not unfaithful to the command of the legislature, for it is a reasonable inference that a generally worded provision, whose application to an ordinary case is clear, is not designed to cover an extraordinary case. In effect the Legislature is assumed not to have disturbed values which are basic to our legal order, unless it does so clearly and specifically.

4. There is no institution in our community better equipped than the Court to check the Agency at the point where its action is out of harmony with the legal order as a whole. Judicial review is rarely needed, but when it is needed nothing else will do.⁶⁴

⁶⁴ I am grateful to my colleagues, Professors William Angus, Maurice Cullity and Paul Weiler, and to my wife, Frances Hogg, for reading a draft of this lecture and making suggestions for its improvement.