Natural Justice Prevails: A Comment on Bachinsky and Cantelon v. Sawyer

The decision of Shannon J. in *Bachinsky and Cantelon* v. *Sawyer*[1] is of interest to an Administrative lawyer for three reasons. First, it deals with the applicability of the principles of natural justice even in the face of a broad statutory power allowing a police chief to make a comprehensive code of discipline for his force. Secondly, it deals with the right to counsel. And thirdly, it considers whether *The Alberta Bill of Rights*[2] in fact has entrenched the principles of natural justice.

The facts of the case are straightforward. A complaint had been lodged against Constables Bachinsky and Cantelon concerning their arrest of Margaret Unger. This complaint was investigated by Inspector Brown as the nominee of Chief Sawyer. The proceedings were taken pursuant to the "Code to Regulate the Conduct and Discipline of the Calgary Police Service" which was itself very detailed (note the numbering system), very formal, and authorized by section 26 of *The Police Act, 1973*.[5] An appeal from any decision made at this hearing lay to the Law Enforcement Appeal Board. Clause 036.04 of the Code sets out the accused's rights to be represented at the hearing:

> *Representation by Counsel or Agent*
>
> An accused member [of the police force] has the right to be represented by an agent in proceedings before the Chief of Police or his designated officer, and by counsel or agent in proceedings before the Law Enforcement Appeal Board.

Clause 030.02 defines "agent" as "a member of the Calgary City Police Department or a member of the Alberta Federation of Police Associations", and "counsel" as "a barrister or solicitor authorized to practise in the courts of Alberta". Inspector Brown, reading these clauses literally, refused to permit the constables' lawyer to participate in the proceedings before him. The constables applied to the

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[1] [1974] 1 W.W.R. 295 (Alta. S.C.). This style of the cause of action is somesomewhat unorthodox. An application for a prerogative order would generally be styled "*R.* v. *Sawyer, ex p. Bachinsky and Cantelon*".

[2] S.A. 1972, c.1.

[3] S.A. 1973, c.44; s.26 reads as follows:

> 26. Except when inconsistent with the provisions of this Act, the direction of the police force with respect to discipline within the force... is the responsibility of the Chief of Police or any person acting for him.

Trial Division of the Supreme Court of Alberta for an order prohibiting Inspector Brown from continuing with the hearing.

Despite the very broad powers given by section 26 of *The Police Act* to Chief Sawyer to implement a disciplinary code for his force, Shannon J. held that the Act itself did not oust the principles of natural justice and that any attempt by the Code to do so was *ultra vires*. Further, because the wording of the Alberta *Police Act* differs from the similar provisions in the federal *R.C.M. Police Act*,[4] the decisions in *R. and Archer* v. *White*[5] and *Re Walsh and Jordan*,[6] cited by the respondent, did not apply. Nevertheless, counsel for the respondent made a strong submission that this was a proper case where the court's residual discretion not to issue the order should be applied.[7] Counsel argued that this involved a para-military force, and therefore the courts should not interfere lightly; that ample provision was made for an appeal, and therefore a prerogative order should not issue; that being a policeman was a "privilege" and not a "right"; and that being represented by an agent (*i.e.*, another policeman) did not deprive the accused of their right to a fair hearing. To his credit, Shannon J. was not seduced by these arguments (which are continually raised in Administrative Law) and held that his discretion had to be exercised judicially.

Only one point in Shannon J.'s reasoning on this question should be queried. He stated:

> In the course of argument counsel for the applicants claimed that the hearing before Inspector Brown is a quasi-judicial hearing. Counsel for the respondent conceded that it is such a hearing and no further argument was pressed on that point. I find that it is a quasi-judicial proceeding and that the presiding officer has an obligation to act judicially. It is, therefore, subject to the control of this Court through prohibition or *certiorari* if intervention is justified.[8]

Shannon J. appears to assume that a hearing must have a quasi-judicial nature before the rules of natural justice apply, or before the orders of prohibition or certiorari may issue. While it may be that this particular hearing was obviously of a quasi-judicial nature (as even the respondent's counsel conceded), an examination of the authorities in this area of the law indicates that prohibition and certiorari will lie even where there is no duty to act judicially or quasi-judicially. Prohibition and certiorari will lie whenever a body is

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[4] R.S.C. 1970, c.R-9.
[5] [1956] S.C.R. 154, 114 C.C.C. 77, [1956] 1 D.L.R. (2d) 305.
[6] [1962] O.R. 88, 132 C.C.C. 1, 31 D.L.R. (2d) 88.
[7] *Cf. R.* v. *Aston University Senate, ex p. Roffey* [1969] 2 Q.B. 538.
[8] *Supra*, f.n.1, 300.

under a duty to act fairly,[9] even if it is not under the more rigorous duty to act judicially or quasi-judicially.[10] Nor is the tautological separation of merely "administrative" functions from "judicial" or "quasi-judicial" ones any longer valid in Canada.[11] Indeed, one might suppose that the decision of the Supreme Court of Canada in *Calgary Power Ltd.* v. *Copithorne*[12] would be different today.

The second interesting point in Shannon J.'s decision is his consideration of the specific right to counsel. The point turned around whether there was a breach of natural justice because clause 030.02 of the Code restricted the meaning of "agent" to "a member of the Calgary City Police Department or a member of the Alberta Federation of Police Associations". Therefore, at the initial hearing before Inspector Brown, the constables appeared not to have the right to employ the services of a barrister and solicitor. Respondent's counsel argued that this itself should not be held to be a breach of the *audi alteram partem* rule because the accused could employ legal counsel on appeal. Shannon J. did not accept this argument. On appeal, the Law Enforcement Appeal Board was bound by the record of what transpired at the initial hearing. If the accused were deprived of counsel before Inspector Brown, quite likely the record which would have been sent up to the Law Enforcement Appeal Board would not have reflected all of the legal or technical points which the accused were entitled to have made on their behalf at the initial hearing.

Central to this part of the decision is the fact that the appeal was not an appeal *de novo*, but a far more restricted one. Therefore, a breach of natural justice at the initial hearing would likely not be cured on appeal.[13] Indeed this very point was made on strikingly similar facts in an Ontario case heard exactly one month after

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[9] *Board of Education* v. *Rice* [1911] A.C. 179, 182.

[10] *In re H.K.* [1967] 2 Q.B. 617, 630, [1967] 1 All E.R. 226, 231; *R.* v. *Gaming Board for Great Britain, ex p. Benaim and Khaida* [1970] 2 Q.B. 417, [1970] 2 All E.R. 528 (C.A.); *In re Pergamon Press Ltd.* [1971] Ch. 388, [1970] 3 All E.R. 535 (C.A.); *Pearlberg* v. *Varty (Inspector of Taxes)* [1972] 2 All E.R. 6, [1972] 1 W.L.R. 534 (H.L.).

[11] *Lazarov* v. *Secretary of State of Canada* (1973) 39 D.L.R. (3d) 738 (Fed. C.A.).

[12] [1959] S.C.R. 24.

[13] See *King* v. *University of Saskatchewan* [1969] S.C.R. 678, 6 D.L.R. (3d) 120, 68 W.W.R. 745 (S.C.C.); *Posluns* v. *Toronto Stock Exchange and Gardiner* [1964] 2 O.R. 547, 654, 46 D.L.R. (2d) 210, 317 (Ont. H.C.); [1968] S.C.R. 330, 67 D.L.R. (2d) 165 (S.C.C.); *Leary* v. *National Union of Vehicle Builders* [1970] 2 All E.R. 713 (Ch.); and *Ridge* v. *Baldwin* [1964] A.C. 40, 79 (H.L.).

Shannon J. heard *Bachinsky*.[14] While Shannon J. reached his decision on the right to counsel by relying on English authorities, it is submitted that this rationale should be warmly welcomed into Canadian Administrative Law.

In perhaps the most important aspect of his decision, Shannon J. considered whether the principles of natural justice are enshrined in *The Alberta Bill of Rights*.[15] Section 1 of the *Bill of Rights* provides as follows:

> 1. It is hereby recognized and declared that in Alberta there exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely: ...
> *(b)* the right of the individual to equality before the law *and the protection of the law*.[16]

Section 2 of the *Bill of Rights* provides further:

> 2. Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding The Alberta Bill of Rights, be so construed and applied as *not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared*.[17]

In finding that the broad language of section 26 of *The Police Act, 1973* did not authorize the Police Chief to make a disciplinary code ousting the principles of natural justice, Shannon J. held that it would have required specific authority in the Act itself to do so. The Supreme Court of Canada has, of course, construed a similar clause contained in the *Canadian Bill of Rights*[18] in a very different manner.[19] But there is no reason why the Alberta courts must follow *A-G. Canada* v. *Lavell* in interpreting a different statute. The intention of *The Alberta Bill of Rights* is clear; and if the decision of Shannon J. is followed in the future, it will eliminate much argument by inferior bodies that their sweeping actions are authorized by broadly worded statutes which do not contain the express disclaimer mentioned in section 2 of *The Alberta Bill of Rights*.

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[14] *Re Cardinal and Board of Commissioners of Police of Cornwall* (1974) 2 O.R. (2d) 183 (Holland J.).

[15] *Supra*, f.n.2.

[16] *Supra*, f.n.1, 306 (italics added by Shannon J.).

[17] *Ibid.* (italics added by Shannon J.).

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

[19] *A-G. Canada* v. *Lavell; Issac et al.* v. *Bedard* (1973) 38 D.L.R. (3d) 481, 23 C.R.N.S. 197; rev'g [1971] F.C. 347.

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