

**THE CANADIAN CHARTER:**

**THE SCOPE OF FUNDAMENTAL JUSTICE**

THE CANADIAN CHARTER  
AND JUDICIAL REVIEW OF ADMINISTRATIVE ACTION:  
THE SCOPE OF FUNDAMENTAL JUSTICE

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### **ABSTRACT**

In 1982, the Canadian Charter of Rights and Freedoms was entrenched as a part of our Constitution. This thesis attempts to determine what effect the Charter will have on the practice of judicial review of administrative action and on the policy-making role of the Canadian judiciary. In so doing, I focus on the concept of due process of law. Prior to 1982, due process of law in Canada was enforced largely by the application of the principles of natural justice. With the passage of the Constitution Act, 1982, due process will also be enforced through the requirements of fundamental justice in s. 7 of the Charter. While "fundamental justice" in the Charter constitutionalizes the existing preconditions for applying the procedural rules of natural justice, it also empowers the courts to examine legislation or administrative action on the basis of non-procedural or substantive violations. This latter understanding of due process was uncharacteristic of the pre-1982 constitutional arrangement in Canada, and of the principles of natural justice.

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## CHAPTER ONE: INTRODUCTION

The Canadian public sector in the late 20th century has become pervasive in its influence, extending to government regulation of "housing, employment, planning, social security, and a host of other activities."<sup>1</sup> The influence of the public sector also reaches the activities of non-government administrative agencies such as "trade union power,...the decisions of university governing bodies, regulatory bodies, and professional associations".<sup>2</sup> Despite recent efforts to restrain the growth of bureaucracy, the impact of administrative action on individual rights and liberties generates some concern.

This notable growth of bureaucracy has been accompanied by somewhat of a revolution in administrative law.<sup>3</sup> Broadly defined, administrative law is concerned with the legal principles and rules that govern the exercise of executive power, and with the remedies available to those individuals adversely affected by illegitimate exercises of power. The modern administrative state functions on the premise that it is the responsibility of public authorities to furnish the appropriate assistance<sup>4</sup> or impose the necessary restrictions for the welfare of contemporary society. With this purpose in mind, public authorities are, in most cases, granted considerable discretionary powers to implement public policy, since there are too many details and matters that are difficult to anticipate.<sup>5</sup> The general wording and the degree of discretion inherent in the interpretation of such wording is designed to

provide flexibility for implementing policy objectives. Yet, like all authority, the power exercised by administrative agencies is conditional--conditional insofar as it must at least be in accordance with the will and respectful of the values of the general public. The discipline of administrative law recognizes the practical need for discretionary power, as well as the need for mechanisms that will make this power tolerable to affected parties.

Two mechanisms for checking the exercise of discretionary power are political restrictions through the legislatures and legal restrictions through the judiciary.<sup>6</sup> Crucial to the mechanism of political restraints, in a system where parliamentary supremacy reigns, is the assumption that the legislatures understand the policy objectives, and are, in some form or another, held accountable to the populace at large. Legal restrictions exercised through the judiciary, however, are a peculiar form of restraint; with their function based largely on the common law tradition and on the interpretation of statutes, the judiciary does not appear to initiate policy, nor is it expected to since it lacks the accountability that is so integral to societies based on parliamentary supremacy. The idea and practice of judicial review receive at least tacit acceptance in most democratic regimes on the basis that an independent arbiter, interpreting and applying laws, is necessary for upholding the rule of law.<sup>7</sup> Although in a system premised on legislative supremacy there is room for judicial involvement in policy,<sup>8</sup> when this involvement subverts the intent of legislation it is regarded as contrary to the rationale underlying democratic support since it thwarts the desired policy objectives. It is judicial review and the impact of this review in

relation to administrative action that this thesis proposes to examine.

Canada is one country in which judicial review serves to restrain discretionary power. Among the various principles that provide grounds for judicial review of administrative action, one in particular is prevalent. This principle is known as due process of law, and is commonly referred to in Canada as the rules of natural justice. As a common law principle, natural justice protects individuals against arbitrary decisions of administrative agencies by requiring those agencies to comply with procedural rules. Two fundamental precepts of natural justice are the rules nemo iudex in sua causa (that no man shall be a judge in his own cause) and audi alteram partem (that he who judges shall hear the other side).

Nemo iudex has been construed as providing, at minimum, a right to a decision based on an impartial and unbiased tribunal. Any decision-maker who has a financial or any other interest likely to cause suspicion of bias is disqualified from hearing the case before him.<sup>9</sup> For example, in deciding on whether a judge should be disqualified on the basis of his ownership of shares in a company, Lord Campbell suggested: "This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interests, but to avoid the appearance of labouring under such an influence."<sup>10</sup> The concern, evidently, is not only with whether the decision-maker is actually biased, but with the appearance of bias: "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."<sup>11</sup> Whether or not a tribunal appears to be biased depends on what a reasonable person would

suspect as being biased.<sup>12</sup>

There are, however, three exceptions to the application of the nemo judex rule. First, the wrong charged cannot be based on mere conjecture. Second, the administrative act being examined cannot have been "expressly permitted or authorized by a legislature".<sup>13</sup> And third, the rule is not applicable to cases where the decision-maker or judge is the only person available with the statutory power to hear and decide upon the case.<sup>14</sup>

There are several procedural rights that constitute the extension of the audi alteram partem rule. The common ones in Canada are the rights to notice, to an examination of reports and secret evidence, to an oral hearing, to an adjournment, to cross-examination, to counsel, and to an open court hearing. The right to notice requires that the administrative body make a reasonable effort to ensure that the party affected is aware of the accusation and is allowed the opportunity to make a defence. Specifically, the individual concerned must be informed of the "time, date and place of the hearing"<sup>15</sup> and of the case against him. Though nothing should be left to guesswork, the administrative body is not necessarily required to provide every detail. As Lord Denning put it: "Suffice it if the broad grounds are given. It need not name the informants. It can give the substance only."<sup>16</sup> That notification is an important procedure is evident inasmuch as it is a precondition to having one's defence heard.

A second rule of audi alteram partem is the right to examine reports and secret information. Any person "whose interests will be affected by administrative decisions [has] a right to see all evidence that is available to the decision-maker."<sup>17</sup> He or she has a right to be

both informed of, and to deal with, the evidence that appears before the administrative tribunal.<sup>18</sup> However, this does not require that the individual has a right to see every detail or the source of the information, particularly if it may "put their informant in peril or otherwise be contrary to the public interest."<sup>19</sup>

In a court of law, the rule to give the accused a right to an oral hearing has been regarded as a fundamental rule of natural justice. But in administrative tribunals the right to be heard does not necessarily imply a right to an oral hearing since administrative tribunals normally set their own procedures. At minimum, all that is required is that the administrative tribunal be fair insofar as the party is afforded a fair opportunity to meet the charges.<sup>20</sup>

In some circumstances proceedings may need to be delayed on the basis that the individual was not provided with a reasonable opportunity to prepare a defence:

Failure to grant an adjournment, or a sufficient adjournment, may amount to a denial of natural justice, provided it deprived a person of a reasonable opportunity to answer the case against him, and provided further that he showed a good reason for his request.<sup>21</sup>

Nonetheless, if an individual's inability to prepare a defence is due to his own neglect, such as procrastination, then an adjournment in this case will not normally be given. It is necessary for the person affected to provide a reason for the adjournment and he or she must inform the administrative body at a reasonable time beforehand so as not to inconvenience that body.<sup>22</sup>

The right to cross-examination as a "privilege of self-defence" has been described as a basic component of natural justice.<sup>23</sup> Though this right is requisite in a court of law, it is not mandatory in administrative tribunals:

Whether or not a right to cross-examine exists will depend on the particular circumstances of each case. Generally, the question is whether it would serve some useful purpose. Even if it would, however, the tribunal is entitled to consider the convenience to all parties in deciding whether the general utility is better served by permitting or denying cross-examination.<sup>24</sup>

The denial of the right to cross-examination, however, does not mean that one may not correct or rebut opposing evidence. Yet if cross-examination is "the only effective means of presenting a material point, it may well be a reversible error to preclude it."<sup>25</sup>

The right to counsel has not usually been viewed as a part of the procedural requirements for administrative tribunals. Though, if a man's reputation or livelihood is at stake, the claim of an individual for a right to counsel becomes all the more substantiated. According to Lord Denning: "He [the accused] cannot bring out the points in his own favour or the weaknesses of the other side. He may be tongue-tied or nervous, confused or wanting in intelligence."<sup>26</sup> There has been an increasing tendency for the right to counsel to be respected even in administrative tribunals. Despite this, it has been suggested that some serious matters should be left to the courts if the individual affected needs counsel.<sup>27</sup>

The right of an open court hearing is based on the idea that procedures and decisions made in public are more likely to be just and impartial than those made in camera. While in a court of law an open court hearing has been regarded as mandatory, in administrative tribunals

open court hearings are not by and large the common practice because, for the most part, the administrative bodies themselves determine the procedures. The only proviso, here, is that the procedure adopted be fair.<sup>28</sup>

In case law, natural justice has been regarded as prescribing mostly procedural standards. This is fundamentally different than the concept of substantive justice or what is referred to in American jurisprudence as substantive due process. That concept goes beyond procedural standards. With respect to the basis of substantive due process, T.M. Scanlon noted:

[A]n important social institution enabling some to wield significant power over others is unlikely to exist without some public rationale--at the very least an account put forth for public consumption of why this institution is legitimate and rational. This will include some conception of the social goals the institution is taken to serve and the way in which the authority exercised by participants in the institution is rationally related to those goals.<sup>29</sup>

While procedural due process looks at the procedures of an authority's exercise of power, substantive due process looks generally at the results of that power. For instance, Luc Tremblay indicated that three tests have emerged under the "substantive due process" fabric: "(1) [t]he end must be permissible or legitimate; (2) [t]he means must have a substantial relation to the end; and (3) [f]undamental rights must not be infringed."<sup>30</sup> Because of its reference to legitimate ends and to the preservation of rights, substantive due process has historically been associated with written constitutions purporting to guarantee human rights and freedoms.

Although, theoretically, a separation between the procedural and the substantive components of due process can be envisioned, in practice, the two components are inseparable. In this regard, Lon Fuller has argued that "external [moralities or substantive justice] and internal moralities [or procedural justice] reciprocally influence one another; a deterioration of one will almost inevitably produce a deterioration in the other."<sup>31</sup> Since the legislative process is open to public scrutiny, those participating in legislation are less likely to disregard substantive principles of justice. The requirements of due process permeate down to the activities of administrative agencies as well. Affording procedural decencies to individuals who are affected by administrative decisions gives those individuals the opportunity to see that they have or have not been treated arbitrarily. It also serves as an incentive for administrative agencies to be careful that their decisions promote the goals intended by legislation. Moreover, assuming that an administrative agency has conformed to the law or the intent of parliament, if the individual affected perceives that the objectives of legislation violate values that are regarded as essential to one's political society, that individual may choose to challenge the parent law. This is applicable especially in regimes with charters of rights and freedoms.

The forum for entertaining the claims of individuals affected by legislation or administrative action has traditionally been the judiciary. The role of the courts in upholding the claims of individuals depends on the constitutional arrangement governing the political order. If a system of parliamentary supremacy prevails, the judiciary seldom questions the purposes of legislation or administrative action. The judiciary need only



enforce the appropriate procedures for passing legislation and for the making of administrative decisions. But in a society with a written constitution, the judiciary, historically, has enforced the provisions of the constitution. The role of the judiciary is especially significant if the constitution entrenches human rights and freedoms; it would expand the scope of judicial review to ensure that those rights and freedoms have been respected. This could consequently immerse the judiciary in non-procedural matters, since the results of legislative or administrative action could abridge important rights and freedoms.

Prior to 1982, Canada was governed largely by the doctrine of parliamentary supremacy through the Constitution Act of 1867. Such a doctrine in relation to the courts means that they are expected to act in deference to the legislatures and to conform with the intent of legislation when interpreting and applying the law. Although the 1867 Act is a constitutional document, and is regarded as supreme in this respect, the authority that it confers upon the federal and provincial legislatures to pass laws within their own spheres of jurisdiction is a clear manifestation of the rule of parliamentary supremacy. Judicial review took the form of declaring certain acts of government as either intra vires or ultra vires depending on whether or not they accorded with the constitutional powers granted by the provisions in the Constitution Act, 1867. On the condition that the powers exercised by the two levels of government were within their respective jurisdictions, the predominant position of the courts was to not meddle with the content of legislation.

While judicial deference to the purposes of legislation was largely the constitutional rule before 1982, the entrenchment of the Canadian Charter of Rights and Freedoms as a part of the Constitution Act, 1982 has altered the balance of constitutional power in Canada. Section

52(1) of that Act reads:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 52(1) effectively places the provisions in the Canadian Constitution at a supreme level of authority. ) The impact that such a document can have on the doctrine of parliamentary supremacy is clear: the sovereignty of parliament, as it existed prior to 1982, is no longer the prevailing constitutional arrangement; the legislative power of both levels of government is subordinate to the provisions of the Charter.<sup>32</sup> Moreover, the Constitution Act, 1982 has bestowed immense powers on the judiciary, powers not explicitly enshrined before 1982. Given the recognition of judicial authority to review legislative and administrative action and given the necessity to interpret the phraseology within the Charter, the supervisory role of the courts as well as their legislative function is sure to increase. And, as Professor Russell predicts, "a constitutional charter of rights will expand the policy-making role of Canadian courts."<sup>33</sup> \*

Of special relevance to the scope of natural justice after 1982 is s. 7 of the Canadian Charter. It states: "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Fundamental justice is the governing clause of s. 7, and what it means is not exactly clear. Usage of the "fundamental justice" terminology in Canada is recent, its appearance dating back to the Canadian Bill of Rights, 1960. Section 2(e) says:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian 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, and in particular, no law of Canada shall be construed or applied so as to...

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations....

As a federal and constitutionally unentrenched document, the Bill of Rights was limited in applicability and force. Consequently, aside from alluding to the striking similarities between natural justice and fundamental justice in terms of procedural aspects, the courts in the Bill of Rights cases were not prepared to assert unequivocally whether fundamental justice had a substantive content. Nor was there judicial consensus for striking down a statute that was insufficient in procedural guarantees.<sup>34</sup>

With a constitutionally entrenched charter, however, the judiciary will be less reluctant to set aside legislation and import a substantive component under the principles of fundamental justice. Professors Jones and de Villars have argued:

[T]he very words used in section 7 are not restricted to procedural matters, but are equally capable of referring to substantive circumstances in which it would be "fundamentally unjust" to deprive someone of life, liberty or security of the person. Indeed, to insist upon restricting this phrase to procedural questions would largely nullify the

constitutional protection accorded to life, liberty and the security of the person, because it would imply that all of these could be extinguished, provided a proper procedure was followed. For example, suppose that Parliament passed a law stating that "Mr. X shall be executed tomorrow at twelve noon", and further provided that Mr. X would be informed of this law (after enactment), and given the opportunity to say anything he liked about his prospective demise. Mere procedural fairness in this context would be meaningless, because there is no discretion granted under the law to alter its application in light of anything Mr. X might say at his "hearing". Undoubtedly, the principles of natural justice apply to the delegate upon whom Parliament has imposed the duty to execute Mr. X. But the requirement for a fair hearing is little guarantee that "fundamental justice" would be done to Mr. X. Faced with a patently unjust law, perhaps peremptory and not discretionary in its application, what Canadian court would not be sorely tempted to strike down the substance of law on the strength of the reference in section 7 to "fundamental justice"?<sup>35</sup>

They have also suggested that the "fundamental justice" clause of s. 7 is stronger than the "due process of law" clause in the fifth and fourteenth amendments of the American Constitution, and the American experience has been to include a substantive component in due process. "The Canadian courts will [therefore] be tempted to look at the merits of discretionary decisions taken by statutory delegates, as well as the content of the legislation itself."<sup>36</sup>

The purpose of this thesis is to examine, more closely, what impact the Canadian Charter of Rights and Freedoms will have on judicial review of administrative action. Specifically, it sets out to answer the following questions: First, has the Constitution Act of 1982 strengthened the power of judicial review in Canada? Second, what effect do the "principles of fundamental justice" in the Charter have on the common law rules of natural justice and, consequently, on the judiciary's role in reviewing administrative improprieties? In order to answer these

questions, the remainder of this thesis is divided into four chapters.

Chapter two briefly examines the origins of judicial review in Canada and how the institution of judicial review has evolved. It traces two stages of constitutional history in Canada to determine the nature of judicial review under the Constitution Act, 1867, and to identify any changes in the tradition of judicial review after the passage of the Constitution Act, 1982. This chapter will demonstrate that the 1982 Act has fundamentally transformed the Canadian Constitution, conferring upon the Canadian courts a considerable degree of power to influence policy matters.

The third chapter deals exclusively with the principles of natural justice, exploring its historical origins. The main concern of this chapter is to examine British and Canadian case law to determine the availability of judicial review of administrative action on the basis of purported violations of procedural natural justice. It illustrates that the standard for entitlement to procedural decencies has changed from one that is relatively narrow in application to one that is considerably generous in application. In other words, review of procedural improprieties in administrative law is more available today than it was in the past. Moreover, in imposing procedural requirements, the judiciary is more inclined to examine the policy of the law as well as the individual rights and interests affected. Yet in examining matters of policy, the courts were not expected to question those matters, because that which is validly sanctioned by Parliament or a provincial legislature is supreme.

Chapter four examines the principles of fundamental justice in the Charter to determine its meaning. By tracing the legislative history and

reviewing early and recent case law dealing with the "fundamental justice" terminology, this chapter reveals the following: Firstly, those who chose "the principles of fundamental justice" phraseology for the Charter meant to limit those principles to procedural matters. Secondly, the case law that preceded the Charter demonstrates that fundamental justice did not go beyond the review of procedural indecencies. And, thirdly, the principles of fundamental justice in Charter case law do not restrict the courts from reviewing non-procedural matters; nor do they prevent them from striking down legislation on the basis of procedural or non-procedural inadequacies.

Chapter five recapitulates the material in the previous chapters. It argues that the Constitution Act, 1982 has strengthened and extended the scope of judicial review; it has also weakened the tradition of parliamentary supremacy. In addition, there are corresponding changes in the role of judicial review in relation to administrative action. Although the entitlement to procedural justice prior to 1982 has undergone some extension, those standards for application following that year now receive constitutional status under the "fundamental justice" fabric of the Charter. By constitutionalizing those prerequisites to procedural justice, the judiciary can strike down legislation or administrative action that is insufficient in procedural requirements. Furthermore, since the principles of fundamental justice are not limited to procedural matters, the judiciary may go on and question legislation or administrative action on the basis that it violates substantive or non-procedural principles of fundamental justice. This is sure to further expand the policy-making role of the Canadian judiciary.

### Endnotes

<sup>1</sup>Lord Denning, The Discipline of Law cited in W.W. Pue, Natural Justice in Canada (Scarborough: Butterworth and Co., 1981), 1.

<sup>2</sup>W.W. Pue, supra, 1.

<sup>3</sup>See J.H. Grey, "The Ideology of Administrative Law", Manitoba Law Journal, 13 (1983), 35-52.

<sup>4</sup>H.W.R. Wade, Administrative Law, 5th ed. (Oxford: Clarendon Press, 1982), 3.

<sup>5</sup>Id., 4.

<sup>6</sup>Id., 4.

<sup>7</sup>See pp. 18-21 of this thesis.

<sup>8</sup>See Peter H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts", Canadian Public Administration, 25 (1982), 1-33; Maxwell Cohen, "The Judicial Process and National Policy--A Problem for Canadian Federalism", McGill Law Journal, 16 (1970), 297-311.

<sup>9</sup>H.R.W. Wade, Administrative Law, 3rd ed. (Oxford: Clarendon Press, 1971), 175.

<sup>10</sup>Id., 176.

<sup>11</sup>Id., 176.

<sup>12</sup>Id., 179.

<sup>13</sup>Patrice Garant, "Fundamental Freedoms and Natural Justice", Canadian Charter of Rights and Freedoms: Commentary, edited by W.S. Tarnopolsky and G. Beaudoin (Toronto: Carswell Company, 1982), 282.

<sup>14</sup>Id., 282.

<sup>15</sup>W.W. Pue, Natural Justice in Canada (Scarborough: Butterworth and Co., 1981), 94.

<sup>16</sup>Id., 98.

<sup>17</sup>Id., 98.

<sup>18</sup>Id., 102.

<sup>19</sup>Lord Denning M.R. cited in W.W. Pue, supra, 102.

<sup>20</sup>Id., 104.

<sup>21</sup>R.F. Reid and H. David cited in W.W. Pue, supra, 105.

<sup>22</sup>Id., 106.

<sup>23</sup>Id., 107.

<sup>24</sup>Id., 108.

<sup>25</sup>F.A. Laux cited in W.W. Pue, supra, 109.

<sup>26</sup>Id., 110.

<sup>27</sup>Id., 112.

<sup>28</sup>Id., 115.

<sup>29</sup>T.M. Scanlon, "Due Process", Nomos XVIII: Due Process, edited by J.R. Pennock and J.W. Chapman (New York: New York University Press, 1977), 102.

<sup>30</sup>Luc Tremblay, "Section 7 of the Charter: Substantive Due Process?" University of British Columbia Law Review 18 (1984), 221.

<sup>31</sup>Lon L. Fuller cited in S.D. Drury, "The Resilient Core of Natural Law", Law and Politics, edited by S.D. Drury (Calgary: Detselig Enterprises Ltd., 1980), 23.

<sup>32</sup>See pp. 25-26 of this thesis.

<sup>33</sup>Russell, supra, note 8, 2.

<sup>34</sup>See pp. 86-89 of this thesis.

<sup>35</sup>D.P. Jones and A.S. de Villars, Principles of Administrative Law (Toronto: Carswell Co., 1985), 192-193.

<sup>36</sup>Id., 193.



## CHAPTER TWO: THE ORIGINS AND SCOPE OF JUDICIAL REVIEW IN CANADA

### Introduction

This chapter serves two purposes: first, to explore the tradition of judicial review existing in Canada before the Constitution Act, 1982 and, second, to trace the changes in this tradition following the entrenchment of that Act. The first section juxtaposes the Canadian Constitution with the British, examining the principle of parliamentary sovereignty and the place of judicial independence in Canada prior to 1982. It also reviews how the judiciary has evolved from pre-Confederation to the formation of the Supreme Court of Canada. The second section of this chapter examines the important provisions of the Constitution Act, 1982 to determine whether there has been any change in the status and scope of judicial review, and to ascertain what impact this will have on the policy-making role of the courts and the doctrine of parliamentary supremacy.

### Judicial Review Prior to 1982

A large part of the constitutional framework of the Canadian regime is set up in the Constitution Act, 1867. The preamble to the 1867 Act posits the Canadian Constitution as based essentially on the British Constitution, that Canada was established with a "constitution similar in Principle to that of the United Kingdom."<sup>1</sup> Fundamental to the British Constitution is the doctrine of parliamentary supremacy. Theoretically, Parliament can establish or repeal any law whatsoever and no body or

person may override or strike down the laws of Parliament.<sup>2</sup> Parliament stands as the highest authority, and other authorities are subordinate to its legislation. In Canada, however, Parliament and the provincial legislatures are themselves bound by what is commonly referred to as "manner and form" requirements. An entrenched provision itself can have an obligating effect on the procedure for amending legislation: "'Entrenching' a provision refers to the notion that that provision may not be altered by simple majority. A 'manner and form' is the requirement, other than simple majority, which must be satisfied in order to alter an 'entrenched' provision."<sup>3</sup> Two examples of manner and form requirements are the appropriate procedures for (1) amending human rights legislation, and (2) passing any valid Act of Parliament or a Legislature. It has been noted that "where a written Constitution governs the process of legislation, the courts may require the legislature to observe the essential conditions laid down in that constitution for making the laws."<sup>4</sup>

The Canadian Constitution has also inherited the tripartite division of government characteristic of the British Constitution. The three branches of government are as follow:

- (1) the legislative branch (parliament, which creates laws);
- (2) the executive branch (the cabinet with its ministers, which administers laws through the machinery of a civil service bureaucracy); and
- (3) the judiciary (the courts of law, which apply and interpret laws in private disputes or disputes between government and the people).<sup>5</sup>

Though the lines between the separation of functions appear clearly delineated, in practice, the functions of the three branches of government

are very much interwoven. For instance, members of the executive branch sit in as members of the legislature and members of the executive often anticipate laws that will be acceptable to the legislature. The judicial branch, particularly its composition, is certainly not independent of the laws of the legislative branch. And laws that are struck down by the judiciary are often amended in the legislatures, either to reformulate laws acceptable to the standards laid down by the judiciary, or to somehow circumvent those standards. Also, the executive branch of government often assumes functions which are judicial in nature.

Arguing in support of an independent judiciary in Canada, Professor Lederman has adopted, as governing the Canadian Constitution, four principles designated by Sir Arthur Goodhart as integral to the English Constitution: first, that the rule of law supersedes the rule of man; second, and related to the first, that "those who govern Great Britain do so in a representative capacity and are subject to change"; third, that there be freedom of thought, speech and assembly; and, fourth, that there be independence of the British judiciary.<sup>6</sup> With respect to this fourth principle, Goodhart stated:

It would be inconceivable that Parliament should today regard itself as free to abolish the principle which has been accepted as a cornerstone of freedom ever since the Act of Settlement in 1701. It has been recognized as axiomatic that if the judiciary are placed under the authority of either the legislative or the executive branches of Government then the administration of the law might no longer have that impartiality which is essential if justice is to prevail.<sup>7</sup>

The Act of Settlement, 1701 entrenched the rule that a judge's function be made quamdiu se bene gesserint (for life, during good behaviour) as well as providing for their salaries. Nevertheless, a judge could be removed

from the bench if, upon address to both houses of Parliament, the judge was found to violate the good behaviour requirement.<sup>8</sup>

The relevant sections of the Constitution Act, 1867 pertaining to the Canadian judiciary are:

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick) and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

Sections 99 and 100 of the 1867 Act are similar to the "good behaviour" and salary provisions of the Act of Settlement. It is argued, consequently, that in Canada the independence of the judiciary is applicable to at least the appellate courts. Despite the absence of any explicit reference to the independence of courts other than those alluded to in ss. 99 and 100, Lederman maintained that

security of tenure and salary for judges in Canada, as a matter of basic constitutional law and tradition, is not limited to the strictly literal reach of sections 99 and 100 of the B.N.A. Act....[T]he independence of the judiciary has long been deeply rooted as an original principle in the basic customary law of the constitution. In Britain herself, the explicit provisions about judicial security are in the ordinary statutes--but these ordinary statutes, including the Act of Settlement itself, manifest the more fundamental unwritten constitutional principle [of judicial independence]. The same point can and should be made about the status of Canadian judges.<sup>9</sup>

Since the principle of judicial independence is part of the British Constitution, and since it is provided that Canada has a constitution similar in principle to that of the United Kingdom, then the Canadian

Constitution implicitly supports the independence of the Canadian judiciary and, at minimum, ensures a role for judicial review in Canada.

Further evidence regarding the role of judicial review in Canada appears upon examination of the practice prevailing before the Constitution Act, 1867. One document before the 1867 Act is of special relevance to judicial review, namely, the Colonial Laws Validity Act, 1865. While the practice of judicial review was in existence prior to the passage of the Colonial Laws Validity Act, this statute clarified the status of colonial law in relation to British law. Accordingly, if any colonial law conflicted with "any Act of Parliament extending to the colony to which such law may relate, or ... to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act", the colonial law would be struck down on the grounds of such repugnancy.<sup>10</sup>

Though the Colonial Laws Validity Act implicitly endorses a role for judicial review, what is especially significant is that the 1865 Act remained in effect after Confederation as a consequence of its applicability to the Constitution Act, 1867.<sup>11</sup> The force of the Colonial Laws Validity Act, however, was formally repealed in 1931 with the passage of the Statute of Westminster. With this statute, the Parliament of Britain relinquished its authority to pass laws applicable to Canada, "unless it is expressly declared in [the particular law] that the dominion has requested, and consented to, the enactment thereof."<sup>12</sup> In spite of the effect of the 1931 Statute, Barry Strayer argued that the spirit of the Colonial Laws Validity Act was still operative:

While the Statute of Westminster, 1931, released both Parliament and the provincial legislatures from the general prohibition of the Colonial Laws Validity Act against passing laws repugnant to Imperial statutes, the B.N.A. Acts were kept under the protection of the 1865 Act. When a Canadian court struck down a statute for constitutional invalidity, it was inarticulately applying the Colonial Laws Validity Act, holding void the Canadian statute for repugnancy to the provisions of the B.N.A. Act distributing power between Parliament and Legislatures. It may be noted in passing that neither the Colonial Laws Validity Act nor the B.N.A. Acts specifically empowered the courts to exercise this power. The judiciary simply continued a practice which was implicitly permitted by earlier charters and statutes of the Imperial system.<sup>13</sup>

With Confederation, the courts continued their former role of enforcing the doctrine of vires by measuring legislation against the division of power inherent in a federal structure. Such an arrangement indicates that the doctrine of parliamentary supremacy does not exist as it does in Britain; it is qualified inasmuch as the federal and provincial legislatures are restricted to passing laws within their own jurisdiction. Sections 91 and 92 of the Constitution Act, 1867 respectively provide for the separation of powers between Parliament and the provincial legislatures. Hence, while Parliament and the Legislatures are supreme in their assigned jurisdictions, neither Parliament nor the Legislatures may enact laws outside their jurisdictions.

Yet the procedure for resolving possible conflicts arising between the jurisdictions of the two levels of government received, at first, little consideration. For example, the question was considered by the framers of the Constitution in the Parliamentary Debates on the Subject of Confederation. Sir John A. Macdonald argued that the legislative powers were so clearly delineated that jurisdictional disputes were unlikely.<sup>14</sup> However, such optimism was conceivably expressed for the sake of

expediency, so that those in favour of Confederation could avoid any disputes that would postpone the union of the British North America colonies. From the discussions that ensued, there nonetheless appeared to be two options for the resolution of jurisdictional disputes.

One possibility was that Parliament could adopt the system of determination that prevailed in England at the time; the position of the Imperial Parliament was that if there was a conflict between Parliament and any inferior legislative body, the legislation of Parliament would prevail through the exercise of the power of disallowance.<sup>15</sup>

The other avenue for resolving jurisdictional conflicts was through the judiciary. In 1875, Parliament put into effect the power to establish a general appellate court by invoking s. 101 of the Constitution Act, 1867:

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws in Canada.

Parliament thereby enacted the Supreme and Exchequer Courts Act, 1875 which authorized the creation of the Supreme Court of Canada with general appellate jurisdiction. Clause 52 of that Act provided that the Governor-in-Council could refer to the Court for advice on "any matter whatsoever as he may think fit", as opposed to an opinion.<sup>16</sup> This is known as the reference provision. The role that the Supreme Court would assume was similar to that of the Judicial Committee of the Privy Council; s. 11 of the Constitution Act, 1867 provided that the Privy Council would function as an advisory body for the Government of Canada. Although the advice was

not binding, it was effective in influencing the decisions of Parliament. In practice, the reference case provision of the Supreme and Exchequer Courts Act certainly had its advantages: not only could the reference procedure be used as an "instrument for federal supervision of provincial legislation",<sup>17</sup> but it could also be used to avoid the political ramifications of invoking the power of disallowance in controversial matters.

In addition to the reference clause, the Supreme Court clearly acknowledged its role as an appellate court and arbiter in matters of constitutional law, and to therefore render decisions that are binding on the parties involved. This was expressed in a number of cases<sup>18</sup> following the 1875 Act, most notably by Ritchie C.J. in Valin v. Langlois (1879):

In view of the great diversity of judicial opinion that has characterized the decisions of tribunals in some provinces, and the judges in all, while it would seem to justify the wisdom of the Dominion Parliament, in providing for the establishment of a Court of Appeal such as this, where such diversity shall be considered and an authoritative declaration of the law be enunciated, so it enhances the responsibility of those called on in the midst of such conflict of opinion to declare authoritatively the principles by which both federal and local legislation are governed.<sup>19</sup>

This position was similar to that adopted by the Privy Council immediately following 1867. The Privy Council had decided that it could review the validity of legislation and set aside any statute repugnant to the Constitution Act, 1867.<sup>20</sup> The Privy Council was thus the highest appellate court in Canada until 1949 when Parliament established that the final court of appeal for any case commencing after that year was the Supreme Court of Canada.<sup>21</sup>



## Judicial Review following the Constitution Act, 1982


1982 marks an important year for matters of constitutional law. While the constitutional arrangements envisioned by the 1867 Act reflected the doctrine of parliamentary supremacy, the courts nonetheless assumed a crucial role in the resolution of constitutional disputes inasmuch as they could examine the content of law in order to determine the vires of the respective spheres of legislative power. In 1982, a resolution adopted by the Parliament of Canada, with the consent of the provinces (save Quebec), was granted royal assent by the United Kingdom Parliament.<sup>22</sup> This Act is referred to as the Canada Act or the Constitution Act, 1982. Included in that Act is the Canadian Charter of Rights and Freedoms.

A question that emerges is: What impact will the Constitution Act, 1982 have on the pre-existing constitutional framework? In particular, what effect will the Charter have on the doctrine of parliamentary supremacy and the scope of judicial review? An examination of the key sections of the Constitution Act, 1982 should provide some insight as to whether there has been a shift from the spirit of parliamentary supremacy (as it existed prior to 1982) to a system that increases the scope of judicial review and encourages judicial assertiveness.

### (i) Primacy of the Constitution

Section 52(1) of the Constitution Act, 1982 endorses the supremacy of the Constitution and consequently provides for the overriding force of the 1982 Act:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the



provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The unequivocal wording in s. 52(1) clearly indicates that the Canadian Constitution is intended to be authoritative.) The primacy of the Constitution applies to all existing and future laws<sup>23</sup> whether they be "federal statutes, provincial statutes, common law, pre-Confederation statutes, [or] imperial statutes."<sup>24</sup> By virtue of s. 52(1)(a) the overriding force of the Constitution applies also to the Canadian Charter of Rights and Freedoms. The significance of this inclusion is "that a constitutional challenge can now be based not only on whether a legislative body has exceeded its power under ss. 91 and 92, but also on whether it has violated substantive rights."<sup>25</sup>

The United States also has a written constitution, and the inherent right of judicial review has long been established since the landmark Supreme Court decision in Marbury v. Madison (1803). Marshall C.J. had this to say on the "essence of judicial duty":

If an act of a legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory....<sup>26</sup>

...

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow

limits. It is prescribing limits, and declaring those limits may be passed at pleasure.<sup>27</sup>

The position of the American courts has therefore been that they have a duty to enforce the primacy of the Constitution, a duty based essentially on the authority of written constitutions.

Similarly, in Canada it is the duty of any court or tribunal to disregard and nullify any law that is inconsistent with the provisions of the Constitution. Professor Hogg noted:

No special authority is needed for this mode of enforcement: it follows inexorably from the fact that the inconsistent law is of no force or effect. Thus, the provisions of the Charter may be relevant and applicable and therefore enforceable in any proceeding before any court or tribunal in which one side relies on a statute and the other side claims that the statute is a nullity because it is contrary to the Charter.<sup>28</sup>

The role of the courts as authoritative enforcers of the Charter is made explicit in s. 24(1) which stipulates that anyone whose rights or freedoms have been abridged "may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Although s. 52(1) does not expressly provide for judicial review to determine the validity of laws, it is assumed that, given the judiciaries' function prior to 1982, it is the courts that would take on such a role.<sup>29</sup> Moreover, s. 24(1) refers to the courts as the institution that may grant the remedy. Sections 52(1) and 24(1), therefore, combine to constitutionally entrench the institution of judicial review, a status not conferred upon the Canadian courts prior to 1982.

While the role of the courts to review and nullify laws that are inconsistent with the Charter is constitutionally entrenched, it is not clear whether this constitutional status extends to the composition of the

courts.<sup>30</sup> With respect to the Supreme Court of Canada, the Constitution Act, 1982 relates to the highest court only insofar as it prescribes amending procedures for that Court. The relevant sections are as follow:

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and the legislative assembly of each province:

...

(d) the composition of the Supreme Court of Canada....

42.(1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

...

(d) subject to paragraph 41(d), the Supreme Court of Canada....

On the basis of s. 41(d), Professors Snell and Vaughan have argued that "[t]he amendment formula specifically provides that the composition of the Supreme Court" can be altered only with the unanimous consent of the federal Parliament and the ten provincial legislative assemblies."<sup>31</sup>

Yet, aside from the provision of s. 41(d) for amending the Supreme Court, another enactment that specifically refers to the composition of the Court, namely the Supreme Court Act, is not included as part of the Schedule of the Constitution Act, 1982. As such, Hogg and Strayer have contended that Parliament can still legally alter the composition of the Supreme Court by invoking s. 101 of the Constitution Act, 1867.<sup>32</sup> This is significant inasmuch as a strong and independent judiciary is indispensable to the enforcement of Charter guarantees. Politically,

however, any attempt to erode the power of the judiciary may appear publicly as an endeavour to undermine the guarantees of the Charter.

Despite this, reference to the Supreme Court of Canada in s. 41(d) indicates that there is some expectation that the composition of that Court would be entrenched in the near future. This appears to be a likely course given the supremacy of the Canadian Constitution as well as the need for some independent body to supervise the activities of the legislative and executive branches of government. Indeed s. 24(1) explicitly identifies the court as the institution that will assume this supervisory role, and since impartiality is essential to judicial review it would be reasonable to constitutionally guarantee the independence of the judiciary by entrenching, at minimum, a composition of the Supreme Court that is acceptable across Canada.<sup>33</sup>

(ii) Enforcement of the Charter Guarantees

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Enforcement of the rights and freedoms guaranteed in the Charter is exercised through s. 24 of the Constitution Act, 1982. The first part of s. 24(1) which states that "[a]nyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied" addresses the

requirements of legal standing. In the interpretation of the first segment of s. 24(1), there are three expressions to note. First, the word "[a]nyone" is likely to take on the same meaning as "everyone", and "everyone" has been construed to include natural persons as well as bodies corporate and other collective associations.<sup>34</sup> In fact, this is consistent with the definition of "everyone" provided in s. 2 of the Criminal Code. Secondly, the word "whose" suggest that the affected party may apply for a remedy only in the case of a violation of his or her Charter guarantees; an application may not be made in the way of an infringement of someone else's rights.<sup>35</sup> Thirdly, the phrase "have been infringed or denied" should not be given its literal meaning. If its literal meaning was strictly construed then no person or body would be capable of making an application because it is not possible to demonstrate a denial of rights or freedoms unless the issue is brought before a court.<sup>36</sup>

In addition to application through s. 24(1), there are two other forms of application. A second can be made through s. 24(2), namely, the section relating to the exclusion of evidence "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter." Evidence obtained in a manner that "would bring the administration of justice into disrepute" would be struck down by the courts as inadmissible.<sup>37</sup> A final form of application can be made throughout s. 52(1) which entrenches the primacy of the Constitution and the subsequent overriding force of the Charter. An applicant referring to s. 52(1) could rely on the courts to invalidate legislation on the basis of its inconsistency with the Charter.<sup>38</sup>

During the 1970s, access to the courts was extended considerably. In Thorson v. A.G. Canada (1974)<sup>39</sup> and Nova Scotia Board of Censors v. McNeil (1975)<sup>40</sup> the Supreme Court broadened legal standing prerequisites from strictly private individuals to include those who are affected as part of the public at large.<sup>41</sup> In a recent Bill of Rights case, Minister of Justice v. Borowski (1981), the plaintiff contested the validity of federal law on abortion. Borowski's application was based on the argument that he was a federal taxpayer and a concerned citizen. In his decision, Martland J. refers back to Thorson and McNeil and adopts the "genuine interest" test:

I interpret [Thorson and McNeil] as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its validity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion the respondent has met this test and should be permitted to proceed with his action.<sup>42</sup>

Yet, standing in the Thorson, McNeil and Borowski cases is based merely on broad discretionary privilege. Section 24(1) of the Charter extends this discretionary privilege to a constitutional right.<sup>43</sup> Moreover, given the constitutional status of s. 24(2), in addition to the legal right to standing, the extent of standing is likely to be expanded further because of the generous interpretation usually given to constitutional documents.

The expression "a court of competent jurisdiction" has been construed by Collins M.R. in Fay v. Garrett (1907) as being "a compendious expression covering every possible Court which by enactment is made competent to entertain a claim."<sup>44</sup> In an extrajudicial statement

concerning the Charter, McDonald J. has argued that a court of competent jurisdiction is one that has the authority to grant the remedy being sought:

If the remedy sought is a ruling that the evidence is inadmissible, then the court which hears the trial would be competent. If the remedy sought is a declaratory judgement that the evidence is inadmissible, or an injunction restraining a person from pursuing a course of conduct that infringes or denies guaranteed rights or freedoms, then the only court competent to grant such a remedy would be a superior court. If the remedy sought is damages, then either a superior court or a county court would be competent.<sup>45</sup>

Prior to the Constitution Act, 1982 there was no equivalent to the remedial guarantees of s. 24(1). Professor Tarnopolsky makes this observation with regard to the Bill of Rights.

Ordinarily one would expect that when a Bill of Rights sets out certain rights and freedoms, that a remedy would be presumed. In other words, our courts would not be moved to assert there is a right unless there is a remedy, but if I could take you back briefly to the Supreme Court decisions in the Hogan case, you will note that the majority of our Supreme Court has not followed that kind of logical conclusion.<sup>46</sup>

now  
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The Bill of Rights made no provision for remedial measures for purely administrative denials and hence the Courts decided that they were not obliged to devise such measures.<sup>47</sup> Section 24(1) of the Charter, however, is explicit in empowering and obliging the courts to give a remedy it regards as fitting and just in the circumstances. In so doing, the courts will likely rely on those remedies it has customarily provided in the past.<sup>48</sup> The remedies would include damages, injunctions and declarations, as well as the prerogative remedies of habeas corpus, mandamus, prohibition and certiorari.<sup>49</sup>



The impact of s. 24 becomes clear when it is juxtaposed with s. 52(1). Constitutionally authorized to have the last say,<sup>50</sup> the courts are not only in a position to diminish the doctrine of parliamentary supremacy, but they are also in a position to indirectly assess or override policy considerations on the grounds of limitations imposed by the Charter. Conceivably, any government decision or policy could be contested by concerned parties on the basis of its constitutional validity. As Professor Morton suggested, if the American experience is any guide, "the 'losers' in the legislative arenas are almost certain to take advantage of this new forum to challenge government policy they oppose", and that it will consequently "be difficult for the courts to avoid becoming entangled in the major political controversies of the day."<sup>51</sup> The increased participatory role that the Charter provides for affected interest groups is certainly bound to increase the policy-making role of the courts in Canada.

### (iii) Application of the Charter

Section 32(1) addresses the extensiveness of the Charter's application:

32.(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Hogg has suggested that, by virtue of the terms "Parliament" and "legislature", any statute enacted by any of these legislative bodies that

contradicts the Charter provisions is ultra vires and therefore invalid.<sup>52</sup>

Furthermore, it follows that

any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down a chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority. That is the way in which limitations on statutory authority imposed by ss. 91 and 92 of the B.N.A. Act (and other distributions-of-powers rules) work. There is no reason to treat limitations on statutory authority imposed by the Charter any differently.<sup>53</sup>

The term "government", however, has been classified by Hogg as functioning as a separate standard for determining applicability: it would be operative when governments act under common law or prerogative powers (i.e., appropriation and management of property, contracting, issuances of passports, and so on). Accordingly, use of the term "government" as a standard would come into effect only when some governmental activity violated the Charter guarantees without statutory power.<sup>54</sup>

Since the Charter is a constitutional document, the word "government" in s. 32(1) will more than likely be given a generous interpretation. Moreover, the wording in other sections of the Charter reinforce the broader construction of "government". For instance, the equality clause of s. 15(2) states that an individual's equal status may

not be violated by "any law, program, or activity." The "any law, program, or activity" phraseology seems to entail more than merely statutes and regulations. The same observation may be made with respect to ss. 6(3)(a) and 6(4) which respectively refer to "any laws or practices" and "any law, program, or activity". Similarly, the legal rights (ss. 7 to 14) contain a number of guarantees against arbitrary action which are clearly applicable to police officers as well as other administrative officials. Section 1, which guarantees the rights and freedoms of the Charter "subject only to such reasonable limits prescribed by law", indicates that administrative action is subject to scrutiny, unless such action has been authorized by a law in conformance with the "reasonably necessary" standard.<sup>55</sup> The whole issue of subordinate legislation is significant inasmuch as it authorizes administrative action. If such legislation is contrary to the Charter and represents an unreasonable limit, it is clear that the power to pass the law is nonexistent.

In addition to the Charter's application to purely administrative action, it has been argued that s. 32(1) extends to the judicial branch of government. The application of s. 32(1) to the judiciary is based on the protection provided in the way of procedural requirements characteristic of courtrooms. With regard to this, Hogg noted:

Several of [the Charter's] provisions imply that the courts are bound, for example, most of s. 11 (rights of person charged with offence), s. 12 (cruel and unusual treatment or punishment), s. 13 (self-incrimination), s. 14 (interpreter), and s. 19 (language in court proceedings). In my view, these provisions supply a context in which it is reasonable to interpret the word "government" in s. 32(1) as including the judicial as well

as the executive branch. This interpretation is reinforced by the use of the phrase 'executive government of Canada' in s. 44 (one of the amending provisions).<sup>56</sup>

The judicial branch of government in its traditional sense, however, clearly has undergone some expansion; this is especially evident with the adoption of quasi-judicial functions by bodies not customarily characterized as judicial. Though a distinct line between the functions of the executive and the judiciary has never existed, the line between the two branches of government has certainly become more hazy ever since the advent of the welfare state. Because of the extension of the state's activities into the public sphere, many judicial functions have been assumed by administrative agencies who, in addition to their adversarial duties, also implement the policy objectives of the executive. The rationale behind the executive's adoption of quasi-judicial functions is that the administrative officers have developed expertise from their very involvement in administrative affairs--expertise not within the usual scope of the judiciary's activities. On the basis that many administrative functions overlap with judicial functions, it is appropriate that administrative tribunals be governed by procedural rules similar to those that govern the courts themselves, though these rules need not be quite as extensive.

In short, since s. 32(1) applies to the judicial branch of government, it is likely that the Charter will also apply to executive functions that take on a judicial character. Whether administrative bodies acting in a judicial capacity should be governed by procedural rules similar to those found in the courts, and, if so, how extensive these rules ought to be, are questions that have been given considerable

attention by the judiciary in several cases regarding breaches of natural justice. Indeed the Supreme Court of Canada has made several rulings,<sup>57</sup> all of which indicate that procedural rules are not limited strictly to the judiciary, and that depending on the severity of the administrative decision on the individual concerned, the procedural requirements can be rather extensive. There is no reason why the provisions of a constitutional document should not be given as broad an interpretation as that provided in common law.

(iv) The Limitation Clause

That the guarantee of rights and freedoms in the Charter is not absolute is made plain by the wording in s. 1:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 is designed to incorporate those values that Canadians support in a free and democratic society.<sup>58</sup> The reason for the limitation on the Charter guarantees is that substantive rights are not absolute, since a collective goal may be so important as to override the guarantee of those rights.<sup>59</sup>

Section 1 is paradoxical inasmuch as it strengthens the paramountcy of the rights and freedoms as well as allowing for limitations on those rights and freedoms. The words "guarantees" and "subject only" combine to strengthen the Charter provisions; "guarantees" is a strong active verb and "subject only" ensures that no further exceptions or limitations are added.<sup>60</sup>

While the first part of s. 1 functions to reinforce the supremacy of the Charter, the phrase "such reasonable limits" clearly serves to qualify the absolute guarantee of rights and freedoms therein. "[S]uch reasonable limits" requires that a reason be provided for the infringement of the guarantees in the Charter. Hogg has argued that a limitation "would be 'reasonable' only if it were a reasonable means of accomplishing a legitimate governmental purpose" and that "both the purpose and the means of achieving the purpose would have to pass the test of being able to be 'demonstrably justified in a free and democratic society.'"<sup>61</sup> McDonald has suggested that the "reasonable limits" test is one in which the limitation is "regarded as being within the bounds of reason by fair-minded men and women accustomed to the norms of a free and democratic society."<sup>62</sup>

A significant procedural requirement in s. 1 is that the onus is on the authority who limits the rights and freedoms to demonstrate the reasonableness of the limitation. In the Special Joint Committee on the Constitution, acting as Assistant Deputy Minister for the federal Department of Justice, Strayer stated:

Mr. Chairman, it was the belief of the drafters that by going to these words demonstrably justified or can be demonstrably justified, it was making it clear that the onus would be on the government or whoever is trying to justify the action limiting the rights set out in the Charter, the onus would be on them to show that the limit which was being imposed not only was reasonable, which was in the first draft, but also that it was justifiable or justified, and in doing that they would have to show that in relation to the situation being dealt with, the limit was justifiable.<sup>63</sup>

The judiciary has, since then, adopted the s. 1 provision the way in which the Assistant Deputy Minister has suggested, although the standard of

justification is a high one.

For example, in Re Federal Republic of Germany v. Rauca (1982), Evans C.J. claimed that "[b]ecause the liberty of the subject is in issue I am of the view that the evidence in support [of the limitation] must be clear and unequivocal. Any lesser standard would emasculate the individual's rights now enshrined in the Constitution."<sup>64</sup> Furthermore, in the Supreme Court case of Re Singh and Minister of Employment and Immigration (1985) Wilson J. stated:

It is important to bear in mind that the rights and freedoms set out in the Charter are fundamental to the political structure of Canada and are guaranteed by the Charter as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in a free and democratic society" it is important to remember that the courts are conducting the inquiry in light of a commitment to uphold the rights and freedoms set out in other sections of the Charter.<sup>65</sup>

Since there is a presumption in favour of the rights and freedoms of the individual, a high standard of persuasion is required and the evidence must be incontrovertible.

As to where this evidence will be obtained, there is some indication that the courts will not be restricted to historical evidence, i.e., "events that have transpired between the parties to a lawsuit." The "demonstrably justified" terminology suggests that the courts will rely more heavily on extrinsic evidence and that this will likely require an increase in the use of judicial notice to those parties concerned.<sup>66</sup> Extrinsic evidence is proof that takes into account socio-economic and legislative facts as contrasted with facts that rely strictly on the dispute between the parties concerned.<sup>67</sup> As Morton has noted,

[t]he adjudicatory view of the judicial function, the influence of the decision and style of the British Privy Council, and a deference to the tradition of parliamentary supremacy have all led Canadian judges to use a textually oriented form of judicial reasoning. The written opinions accompanying the Court's decisions have tended to be highly conceptual and poorly grounded in the socio-economic contexts which gave rise to the cases.<sup>68</sup>

The use of extrinsic evidence can be found in American cases of constitutional law, most notably in Muller v. Oregon (1908) wherefrom the practice of the "Brandeis brief" originated. The Brandeis brief was composed of studies that demonstrated a high rate of maternal health problems for women working lengthy hours in certain jobs.<sup>69</sup> Since the Canadian Reference Re Anti-Inflation Act (1976) the judicial attitude towards the use of extrinsic evidence in Canada has changed. In that case, the tests of "national emergency" and "inherent national importance" both necessitated the consideration of empirical questions of how serious inflation had become.<sup>70</sup> It has been recommended that the courts should admit "statements by members of legislative bodies, reports of royal commissions and parliamentary committees and like matters"<sup>71</sup> in cases of constitutional law. Given that the phrase "demonstrably justified" is suggestive of extrinsic evidence, it is likely that the courts will rely increasingly on socio-economic and legislative facts when rendering decisions regarding purported breaches of Charter guarantees.

#### [v] The Notwithstanding Clause

To a document intended to guarantee valuable rights and freedoms, s. 33 is certainly anomalous to the spirit of charters:

33.(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the



legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

While s. 1 gives a legislative body the opportunity to exercise the doctrine of parliamentary supremacy by demonstrably justifying the reasonableness of a particular limitation, s. 33(1) advances the notion of parliamentary supremacy still further: it permits Parliament and the provincial legislatures to act notwithstanding the provisions of a substantial portion of the Charter guarantees, namely, those regarding fundamental freedoms, legal rights and equality rights. Section 33(3) stipulates that there is a five year limitation on the duration of the "declaration made under subsection (1)". Nonetheless, s. 33(4) states that "Parliament or a legislature of a province may re-enact a declaration made under subsection (1)." If s. 33 is exercised frequently the effect of it will certainly be to narrow the scope of judicial review and undermine the guarantee of rights and freedoms in the Charter. } *Bad.*

Hence, one interpretation of the Constitution proposes that the spirit of parliamentary sovereignty is indeed preserved. This argument, as indicated, can be made with reference to the reasonableness of the limitation clause (s. 1) or with reference to the opting out clause (s. 33(1)). Despite the fact that s. 52 has empowered the courts with the constitutional power to review and invalidate legislation infringing Charter guarantees, s. 1 requires that the courts act in deference to the reasonableness of any limitation and, at the extreme, s. 33 provides an avenue through which Parliament and the provincial legislatures may assert their supremacy with regard to a significant part of the Charter. A

similar argument is made by Professor Smith:

More important still is the fact that the Charter itself...contains a provision enabling the legislative bodies of both levels of government to override some of its guarantees....[I]ts very appearance in the context of the Charter strikes an incongruous note and is testimony to the strength of the lingering tradition of parliamentary supremacy. [Also,] there is the first clause of the Charter which subjects its guarantees to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Ultimately, it is up to the Supreme Court to stake out the "reasonable limits." In the meantime, we do know that they are held to exist, that there is thought to be something higher than, or beyond [sic] the Charter's guarantees to which appeal can be made in order to justify their denial or restriction. And the initiative in this regard is secured to governments. While the court's power of judicial review has undoubtedly surmounted the rather narrow, partisan function envisaged for the new Supreme Court in 1875 by Macdonald, the principle of parliamentary supremacy persists.<sup>72</sup>

Smith has further argued--in spite of s. 41(d) of the Constitution Act, 1982--that the composition of the Supreme Court remains subject to alteration through s. 101 of the Constitution Act, 1867. Parliament therefore is still capable of undermining the power and independence of the judiciary. In the words of Smith, "the Court is still a creature of Parliament."<sup>73</sup>

The argument that ss. 1 and 33(1) combine to reinforce the tradition of parliamentary supremacy and thereby undermine the supremacy of the Constitution ignores, however, both legal and political realities. First, it ignores [the legal fact that the Charter is a constitutionally entrenched document, and that because of this status the courts are reluctant to treat its guarantees lightly.] Thus, with regard to [s. 1, any limitations on the rights and freedoms will have to be reasonably justified and this has been construed as meaning that the evidence must be

*argue it limits judiciary power*

"clear and unequivocal.") Moreover, the burden of proof is on the authority abridging the rights and freedoms. To satisfy the standard of reasonableness for any serious violation of the Charter will surely be a difficult endeavour.

Secondly, the contention that the existence of s. 33 is a clear indication that the doctrine of parliamentary supremacy persists fails to recognize the difference between what Parliament or a provincial legislature is legally authorized to do on the one hand, and what is politically sensible to do on the other. Although the power to act notwithstanding a Charter provision is specified in the Constitution, the political ramifications of expressly invoking s. 33 will likely discourage the government from proposing to override any of the Charter guarantees.<sup>74</sup>

As Strayer noted, a legislative assembly will have to "expressly identify the specific rights or freedoms they are abridging."<sup>75</sup> And Professor

Russell argued:

Legislators who contemplate recourse to the notwithstanding clause will face some powerful political disincentives. Experience with judicial interpretation of statutes and judicial development of the common law demonstrates how difficult it may be for a legislature to counter the policy fall-out of judicial decisions. Access to the crowded agenda of modern legislatures is never easy and may be especially difficult when influential groups have a vested interest in a position adopted by the judiciary. In proposing a legislative override, government will be committing itself to a policy position which is almost bound to be labelled by the media as "subverting civil liberties." This is bad politics, even for a government with a clear legislative majority.<sup>76</sup>

The effect of s. 33 in significantly reducing the power and scope of judicial review remains to be seen.

Only  
P.V. has  
used  
override  
clause

## Conclusion

The Canadian Constitution prior to 1982 was characterized by a qualified form of legislative supremacy. Sections 91 and 92 of the Constitution Act, 1867 stipulate that Parliament and the Legislatures are supreme in their own spheres of jurisdiction. The principle of judicial independence does appear essential to the Canadian Constitution inasmuch as it has been regarded as a principle applicable to Britain itself. Yet, while various sections of the Constitution Act, 1867 make provisions for legislating in respect of the judiciary, there is no provision that constitutionally entrenches the judiciary as a separate and independent branch of government in Canada. Even the British Parliament may still legally alter the composition of their courts. It was no different in Canada. Legally, Parliament could use ss. 91 to 101 of the 1867 Act to alter the nature of Canadian courts in such a way as to diminish the power and independence of the judiciary.

Acceptance of judicial review in Canada is based, among other things, on the need for some institution to resolve jurisdictional disputes inherent in the nature of federalism. Judicial review was in operation prior to 1867; its perpetuation after 1867 illustrates the acceptance of judicial review as a suitable means for arbitrating between conflicts in jurisdiction. The initial reasoning underlying the creation of the Supreme Court was to give advice on disputed claims of jurisdiction and to give Parliament an alternative to invoking the controversial power of disallowance. Indeed, the Supreme Court, shortly following the passage of the Supreme and Exchequer Courts Act, saw itself as an impartial arbiter that could decide authoritatively on constitutional disputes. The

process of adopting the judiciary as an institution for the resolution of conflicts in constitutional law did not begin in 1867; the acceptance of judicial review thereafter is, in effect, the continuation of "a practice which was implicitly permitted by earlier charters and statutes of the Imperial system."

Has the Constitution Act, 1982 in any way altered the status of judicial review in Canada? Examination of the various sections of the 1982 Act reveals that the judiciary has been granted immense powers. Section 52(1) declares that the "Constitution of Canada is the supreme law of Canada" and s. 24(1) refers to the courts as the institution for enforcing the Charter guarantees. The combination of ss. 52(1) and 24(1) therefore enshrine, at minimum, the institution of judicial review. However, whether the Constitution Act, 1982 has entrenched the composition of the Supreme Court of Canada is another question. On the one hand, the Supreme Court Act does not appear as a part of the Schedule in the 1982 document, and s. 101 of the Constitution Act, 1867, relating to the composition of a general court of appeal, remains operative. On the other hand, s. 94(d) of the 1982 Act appears to constitutionally entrench the composition of the Supreme Court. Moreover, when s. 94(d) is regarded in light of ss. 52(1) and 24(1), the case for this entrenchment emerges as all the more convincing.

Section 32(1) indicates that the Charter's application extends to the activities not only of both Parliament and the Legislatures, but also to those of the executive and judicial branches of government. It extends further to administrative action, including subordinate legislation as

well as the decisions of tribunals affecting the rights and freedoms contained in the Charter. Judicial review under the Charter therefore encompasses a broad range of affairs. {

Two sections of the Charter, however, appear to undermine the paramountcy of its guarantees. Section 1 permits the abridgement of the Charter guarantees if the authority purporting to limit those guarantees can prove, to the satisfaction of the court, that the limitations are reasonable and "demonstrably justified in a free and democratic society." Section 1 also encourages a new role for the courts. The "demonstrably justified" clause is suggestive of extrinsic evidence, and this invites the courts to review evidence typically reserved to and characteristic of legislatures. If the courts venture down this path--and the Anti-Inflation Reference reveals that they have in the recent past--it seems certain that there will be an increase in the number of cases where judges will evaluate policy matters. In short, while s. 1 provides for the deprivation of the Charter guarantees, it also encourages the courts to review socio-economic and legislative facts, further transforming the Canadian judiciary from a "dispute settling" institution to a "policy-settling" institution.

[ Section 33(1) allows Parliament or any Legislature to pass laws notwithstanding s. 2 and ss. 7 through 15 of the Charter. The notwithstanding clause represents an obvious repository of the spirit of parliamentary sovereignty. Yet, to invoke s. 33 will be a difficult endeavour because the federal or provincial legislative assembly will have to expressly identify those rights and freedoms it intends to abridge,

and, what is more formidable, it will have to face the possibility of popular disrepute. Despite s. 33(1), on the whole, the Charter has strengthened the judiciary and expanded its scope of review, and the doctrine of parliamentary has indeed been substantially diluted.

## Endnotes

<sup>1</sup>Gordon F. Henderson and Emilio S. Binavince, "Doing Business in Canada and the Judicial Review of Wrongful Government Statutory and Regulatory Action", Canadian-United States Law Journal, 7 (1984), 3.

<sup>2</sup>Gerald L. Gall, The Canadian Legal System, 2nd ed. (Toronto: Carswell Legal Publications, 1983), 69.

<sup>3</sup>Id., 70.

<sup>4</sup>A.W. Bradley, "The Sovereignty of Parliament", The Changing Constitution, edited by Jeffrey Jowell and Dawn Oliver (Oxford: Clarendon Press, 1985), 26.

<sup>5</sup>Perry S. Millar and Carl Baar, Judicial Administration in Canada (Kingston: McGill-Queen's University Press, 1981), 43.

<sup>6</sup>W.R. Lederman, "The Independence of the Judiciary", Law, Politics and the Judicial Process in Canada, edited by F.L. Morton (Calgary: University of Calgary Press, 1984), 103.

<sup>7</sup>Id., 104.

<sup>8</sup>Supra, note 5, 46.

<sup>9</sup>Supra, note 6, 104.

<sup>10</sup>Barry L. Strayer, The Canadian Constitution and the Courts, 2nd ed. (Toronto: Butterworths and Company, 1983), 7.

<sup>11</sup>Id., 7.

<sup>12</sup>Peter W. Hogg, Constitutional Law of Canada, 1st ed. (Toronto: The Carswell Company, 1977), 16.

<sup>13</sup>Supra, note 10, 7-8.

<sup>14</sup>Id., 16.

<sup>15</sup>Id., 17.

<sup>16</sup>Jennifer Smith, "The Origins of Judicial Review in Canada", Canadian Journal of Political Science, 16 (1983), 125. See also J. Snell and F. Vaughan, The Supreme Court of Canada (Toronto: University of Toronto Press, 1985), chapter five.

<sup>17</sup>Smith, supra, 126; Snell and Vaughan, supra, 7.



<sup>18</sup>See Valin v. Langlois [1879] 3 S.C.R. 1, affd. 5 App. Cas. 115 (P.C.); Ottawa Valley Power Co. v. Hydro Electric Power Comm. (1936) 4 D.L.R., 574 (C.A.); A.-G. for Quebec v. Farrah [1978] 2 S.C.R. 638; and Crevier v. A.-G. for Quebec [1981] 2 S.C.R. 220.

<sup>19</sup>Valin v. Langlois [1879] 3 S.C.R., 9-10.

<sup>20</sup>Supra, note 12, 43.

<sup>21</sup>Id., 129.

<sup>22</sup>Peter W. Hogg, Canada Act 1982 Annotated (Carswell Company, 1982), 3.

<sup>23</sup>Herbert Marx, "Entrenchment Limitations and Non-Obstante", Canadian Charter of Rights and Freedoms, edited by W.S. Tarnopolsky and G. Beaudoin (Toronto: Carswell Company, 1982), 71.

<sup>24</sup>Supra, note 22, 105.

<sup>25</sup>Id., 61.

<sup>26</sup>Marbury v. Madison 1 Cranch 137 (1803) cited in Jay A. Sigler, Courts and Public Policy (Homewood: Dorsey Press, 1970), 10.

<sup>27</sup>Id., 11.

<sup>28</sup>Peter W. Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights", Canadian Charter of Rights and Freedoms: Commentary, edited by W.S. Tarnopolsky and G. Beaudoin (Toronto: Carswell Company, 1982), 13.

<sup>29</sup>Supra, note 10, 33.

<sup>30</sup>Barry L. Strayer, "Comment on 'The Origins of Judicial Review in Canada'", Canadian Journal of Political Science, 16 (1983), 595.

<sup>31</sup>Snell and Vaughan, supra, note 16, 252.

<sup>32</sup>Supra, note 22, 92-93. See also Barry Strayer, "Comment on 'The Origins of Judicial Review in Canada'", Canadian Journal of Political Science, 16 (1983), 595-596.

<sup>33</sup>Professors Snell and Vaughan indicate that there "will undoubtedly be calls for changes to the method of appointment to the Supreme Court in order to provide provincial output", supra, note 16, 252.

<sup>34</sup>A. Anne McLellan and Bruce P. Elman, "The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24", Charter of Rights--Up-Date 1983, chaired by Timothy J. Christian (Toronto: Osgoode Hall Law Library, [1983]), 140.

<sup>35</sup>Supra, note 22, 65.

<sup>36</sup>David C. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms (Toronto: Carswell Company, 1982), 128.

<sup>37</sup>Further consideration of this type of application is beyond the scope of this thesis. However, see Lord Godard C.J. in Kuruma, Son of Kaniu v. The Queen [1955] A.C. 204; Martland J. in Regina v. Wray [1971] S.C.R. 272; and Rothman v. R. [1981] 1 S.C.R. 640.

<sup>38</sup>Supra, note 22, 63.

<sup>39</sup>Thorson v. A.G. Canada [1975] 1 S.C.R. 138.

<sup>40</sup>Nova Scotia Board of Censors v. McNeil [1976] 2 S.C.R. 265.

<sup>41</sup>Peter H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts", Canadian Public Administration, 25 (1982), 17.

<sup>42</sup>Minister of Justice v. Borowski [1981] 2 S.C.R. 575, 598.

<sup>43</sup>F.L. Morton, Law, Politics and the Judicial Process in Canada, edited by F.L. Morton (Calgary: University of Calgary Press, 1984), 126.

<sup>44</sup>Fay v. Garrett [1907] 1 K.B. 881 (C.A.), 886.

<sup>45</sup>Supra, note 36, 128.

<sup>46</sup>Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution, Minutes of Proceedings and Evidence, Thirty-second Parliament, First Session, 1980-81, 7:15 (November 18, 1980).

<sup>47</sup>Supra, note 34, 140.

<sup>48</sup>Supra, note 36, 128.

<sup>49</sup>Supra, note 22, 65.

<sup>50</sup>This is qualified by s. 33. This section allows Parliament or a provincial legislature to act notwithstanding s. 2 or ss. 7 to 15 of the Charter.

<sup>51</sup>Supra, note 43, 126.

<sup>52</sup>Supra, note 22, 75.

<sup>53</sup>Id., 75.

<sup>54</sup>Id., 76.

<sup>55</sup>Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms", Canadian Charter of Rights and Freedoms, edited by W.S. Tarnopolsky and G. Beaudoin (Toronto: Carswell Company, 1982), 52.

<sup>56</sup>Supra, note 22, 76.

<sup>57</sup>See Nicholson v. Haldimand-Norfolk Regional Police Commissioners [1979] 1 S.C.R. 311; Martineau v. Matsqui Disciplinary Board [1980] 1 S.C.R. 118. See also the following chapter on natural justice.

<sup>58</sup>Supra, note 22, 71.

<sup>59</sup>For a discussion on rights and policy see Ronald Dworkin, Taking Rights Seriously (Cambridge: Harvard University Press, 1977), 90-100.

<sup>60</sup>William E. Conklin, "Interpreting and Applying the Limitation Clause: An Analysis of Section 1", The Supreme Court Law Review, 4 (1982), 76.

<sup>61</sup>Supra, note 22, 10.

<sup>62</sup>Supra, note 36, 14.

<sup>63</sup>Supra, note 46, 38:45 (January 15, 1981).

<sup>64</sup>Re Federal Republic of Germany v. Rauca (1982) 141 D.L.R. (3d) 412, 423-424 (Ont. H.C.J.).

<sup>65</sup>Re Singh and Minister of Employment and Immigration (1985) 17 D.L.R. (4th) 422, 468. See also Regina v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295, and pp. 94-95, 100-101, 102, 105 of this thesis.

<sup>66</sup>Donald C. Horowitz, "Fact Finding in Adjudication", Law, Politics and the Judicial Process in Canada, edited by F.L. Morton (Calgary: University of Calgary Press, 1984), 178.

<sup>67</sup>Supra, note 2, 88.

<sup>68</sup>Supra, note 43, 172.

<sup>69</sup>Muller v. Oregon 208 U.S. 412 (1908) cited in Morton, supra, note 43, 172-173.

<sup>70</sup>Reference Re Anti-Inflation Act [1976] 2 S.C.R. 373 cited in Morton, supra, note 43, 173.

<sup>71</sup>Supra, note 2, 257-258. However, see Lamer J. in Re B.C. Motor Vehicle Act [1985] 2 S.C.R. 486; see also p. 99 of this thesis.

<sup>72</sup>Supra, note 16, 258.

<sup>73</sup>Jennifer Smith, "Reply to the Comments of Knopff and Strayer", Canadian Journal of Political Science, 16 (1983), 598.

<sup>74</sup>The National Assembly of Quebec, however, has passed An Act Respecting the Constitution Act, 1982, S.Q. 1982, c.21, to override s.2 and ss. 7 to 15 of the Charter.

<sup>75</sup>Supra, note 10, 60.

<sup>76</sup>Supra, note 41, 19.

## CHAPTER THREE: THE PRINCIPLES OF NATURAL JUSTICE

### Introduction

The previous chapter has demonstrated that the nature of judicial review has undergone significant alteration since the Constitution Act, 1982. It is clear that the entrenchment of the Canadian Charter of Rights and Freedoms has given the courts a firmer mandate to review a wide range of legislative and executive activity. With this expanded scope of judicial review, the courts will find it difficult to avoid becoming immersed in important questions of policy.

The main objective of this chapter is to focus on what can be regarded as a subdivision of constitutional law: judicial review of administrative action. In particular, the principles of natural justice or due process of law serve as an effective basis for the review of administrative improprieties. The scope of due process of law, however, depends on the constitutional arrangement of a certain country. The purpose here is to explore the concept of due process of law as it exists in a regime governed by parliamentary supremacy. The first section therefore reviews early case law on the principles of natural justice in Britain. The second section examines the prerequisites for the application of natural justice and the third traces the development of the "duty to be fair" requirement of procedural justice. Whether it appears under the heading of "due process of law", "natural justice" or a "duty to be fair", this chapter will demonstrate that, in the British Constitution

and pre-1982 Canadian Constitution, judicial review of administrative action is limited to procedural matters and is subservient to the intent of legislation.

### Natural Justice in Early British Case Law

One requirement of natural justice is known as the audi alteram partem rule, that is, the requirement of hearing the other side. In an 18th century British case, R. v. Chancellor of the University of Cambridge (1723), Fortescue J. referred to Genesis chapters 2 and 3, where Adam and Eve ate from the forbidden tree of knowledge:

[T]he objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence.<sup>1</sup>

While the wording "[t]he laws of God and man" indicates divine derivation of the audi alteram partem rule, the inclusion of the words "and man" allude to the secular origin of the rule as well as its universality.

The decisions of Sir Edward Coke in 17th century case law reflected the early natural law tradition. Coke derived natural justice from the concept of due process, which he traced as far back as the Magna Carta. Chapter 29 of the 1225 Charter states:

No freeman shall be taken, or imprisoned, or be disseised of his freehold or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him but by the lawful judgement of his peers or by the law of the land.<sup>2</sup>

Coke equated the phrase "law of the land" with due process, and maintained the position that no person could be condemned or imprisoned without

invoking the procedures required by common law, statute law, and the customs of England.<sup>3</sup>

The underlying concerns in many of Coke's pronouncements were the basic rules of the British Constitution. Two of these fundamental rules were that no man should be a judge in his own case and that "[no] man should be condemned without answer."<sup>4</sup> Reference to the nemo judex rule appeared in one of Coke's earlier judgments: Dr. Bonham's Case (1609). In this case, Dr. Bonham was denied the privilege of practising physics in London by both the president and the censors of the College of Physicians. Despite this, Dr. Bonham continued practising physics and was eventually imprisoned at the judgment of the censors. The College of Physicians was accordingly authorized by letters patent from Henry VIII. In support of Dr. Bonham, Coke stated:

And it appears in our books that in many cases the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such a law to be void.<sup>5</sup>

This statement was based on the violation of the rule of impartiality and unbiasedness: "[T]he censors cannot be judges, ministers and parties. Judges to give sentence, ministers to make summons, parties to have the moiety of the forfeiture. One cannot be judge in his own case."<sup>6</sup>

Although Coke's decision in Dr. Bonham's Case was sufficiently controversial to almost force him to step down from the judiciary, it was not until a later case that Coke was actually dismissed as Chief Justice of the King's Bench. In Burrowes and Others v. The High Commission (1616), Coke developed the contemporary principles of due process and

alluded to the minimum requirements of natural justice. Burrowes and others were imprisoned for their refusal to take an oath in fear of thereby criminating themselves for the offence of libel against the Ecclesiastical Court.<sup>7</sup> They sought release through habeas corpus, since their desire to have their counsel answer to the charge and their request for a copy of the statement of libel against them were both refused.<sup>8</sup> Coke argued that a copy of the libel should have been delivered to the accused parties for three reasons:

First, that by this, they may know, whether the matter, for which they are questioned, be within their jurisdiction or not.

Secondly, that by this they may know what answer they are to make to the matters against them.

And for these two reasons they ought to have a copy delivered to them. The denial of which is against the law....

A third reason may be drawn from the liberty of the subject, the which is very great as to the imprisonment of his body, and therefore before commitment, the party ought to be called to make his answer, and if he be committed, yet this ought not to be perpetually; if one shall have remedy for his land and goods, a multo fortiori, he shall have remedy here for his body, for delivery of him out of prison; being there detained without any just cause.<sup>9</sup>

All three reasons refer to procedural justice: the first because without a copy of the offence, the affected parties cannot contest the validity of jurisdiction; the second because without knowing the offence, the affected parties cannot answer to the offence against them; the third because each individual has a substantive right to the liberty of his or her own body and, at the very least, that individual must be afforded the procedural decency of knowing the charge levied against him or her. In short, insofar as Coke argued for the right to notice and the right to answer to



an offence, he can be accredited for developing the minimum requirements of the audi alteram partem rule of natural justice.

Coke's decisions, though contentious in his time, gradually became accepted by the judiciary in the centuries that followed. For example, Holt C.J. in City of London v. Wood (1725) expressly endorsed the nemo judex rule adopted by Coke in Dr. Bonham's Case:

And what my Lord Coke says in Dr. Bonham's Case in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party or between the Government and the party....<sup>10</sup>

And in Cooper v. Wandsworth Board of Works (1863), Willis J. said that a "tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that is of universal application, and founded upon the plainest principles of justice."<sup>11</sup> Procedural natural justice following Coke's decisions was premised on the substantive rights to liberty and property. Although these substantive rights were not absolute, any violation of such rights could be tolerated only in accordance with fundamental rules of procedural decency.

By the late 19th century, government activities began to change from a laissez-faire approach to increasing state intervention. The cause of the expansion of the state into the private sector can be traced to the enfranchisement of larger sections of the population in Britain. Such an extension of voting power to a large number of people, who were

traditionally denied political sway, significantly altered the character of the House of Commons, and, consequently, lower class concerns began to receive more attention. Increasingly, much of the political agenda became directed at state intervention designed to regulate important sectors of the economy.<sup>12</sup> In dealing with this shift in government activities, the courts relied heavily on the body of common law that existed at the time, namely, a common law based on the tradition of laissez-faire which sanctified private property and thus discouraged any encroachment of property rights.<sup>13</sup> As a result, in the late 19th century, the courts eventually withdrew from the public welfare concerns of the Commons. In Professor Macdonald's words, "[t]he courts accustomed to applying the rules of an individualistic common law which served the upper class, and to exercising little control over Parliamentary law, failed to respond quickly to the evolving bureaucratic state."<sup>14</sup> Since the courts were applying traditional standards to administrative bodies whose functions were to regulate or limit traditional rights and liberties, the courts took on an activist role--activist inasmuch as they were adverse to administrative action that undermined the traditional view of property rights.

Around the turn of the 19th century, however, the courts proceeded to retreat from their activist position. The Board of Education v. Rice (1911) marks this point of transition. In this case the House of Lords decided that an administrative body could set up its own procedures of fairness.<sup>15</sup> According to Professor Loughlin, Rice symbolizes a "transition between an activist approach of the judiciary towards a

nascent administrative power and a formalist approach in a period during which the hegemony of administrative power was firmly established."<sup>16</sup> Since judicially created and enforced procedural requirements could alter the policy objectives of government, the courts wished to avoid becoming entangled in controversies that could potentially undermine their legitimacy. Hence, they backed away from their former activist role, and indicated that ultimately the check for the abuse of administrative action would be the function of ministerial responsibility.<sup>17</sup> The courts' adoption of the classification of function approach can be best appreciated in this context.

### **The Classification of Function**

The judiciary in the early 20th century adopted the classification of function as a narrow standard of entitlement for judicial review of administrative improprieties. The terms "judicial" and "quasi-judicial" are central to the classification of function. In order for any administrative decision to be subject to court review, it needed to embody characteristics that would fall within the classification of either judicial or quasi-judicial. Whether an administrative body functions in a judicial or quasi-judicial manner depends largely on the degree to which its function resembles that of the courts.

Four tests may be used to ascertain whether a statutory body functions in a judicial or quasi-judicial manner. One test depends on whether the decision rendered has a conclusive effect. Specifically, it means that a "body exercising powers which are of a merely advisory, deliberative, or investigatory character, or which do not have effect

until confirmed by another body, will not normally be held to be acting in a judicial capacity."<sup>18</sup> To have conclusive effect a decision must be supported by the force of law, that is, there is no "need for confirmation or adoption by any other authority",<sup>19</sup> and the decision is final inasmuch as it cannot be easily altered.

A second test for identifying judicial capacity relies on the existence or non-existence of certain procedural characteristics which are operative in the courts themselves. For example, an administrative body may be classified as a tribunal if it holds "sittings", makes "decisions" in "cases" before it, compels the attendance of witnesses and administers oaths, conducts public hearings, prohibits members from sitting if there is a chance of personal bias, or has the power to impose sanctions or award costs.<sup>20</sup> A lis inter partes (dispute or suit between parties) is especially significant because it is the most visible characteristic of a court. Any proceeding resembling a lis inter partes will likely impose procedural rules with which the tribunals are obliged to conform.<sup>21</sup>

Discretion is the focus of the third test. Whether the discretion exercised by the statutory body is of a judicial nature will determine the procedural obligations imposed upon that body. As Professor de Smith notes, "'judicial' refers to the exercise of discretion in accordance with 'objective' standards [based on 'reasonably well-settled principles'] as opposed to 'subjective' considerations of policy and expediency."<sup>22</sup> Some have referred to this classification of discretion as the "declaratory test"--the implication being that if there is policy content in the statutory function and the discretion is classified as purely administrative, then the case is not reviewable by the courts. This test,

however, is rather narrow and should not be used at the exclusion of other tests for determining judicial capacity;<sup>23</sup> the identification of policy content or expediency could lead to the classification of function as purely administrative, and this would have the undesired effect of excluding judicial review even with respect to minimum requirements of procedural natural justice.

A fourth test provides that "[a]n authority acts in a judicial capacity when, after investigation and deliberation, it performs an act or makes a decision that is binding and conclusive and imposes obligations upon or affects the rights of individuals."<sup>24</sup> Clearly, this test is the broader of the four, especially if the term "rights" is given a generous interpretation. In R. v. Legislative Committee of the Church Assembly; ex parte Haynes-Smith (1928) Lord Hewart C.J. brought into question the applicability of the fourth test as a basis for imposing procedural requirements:

In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially.<sup>25</sup>

Martland J. in the Canadian case Calgary Power Ltd. v. Copithorne (1959) adopted the position of Lord Hewart C.J., that is, the idea of the "super-added" test. The proposition that having the authority to affect rights or interests necessarily carries with it the duty to act judicially "goes too far in seeking to define functions of a judicial or quasi-judicial character."<sup>26</sup> What the super-added test entails is not exactly clear. There is some indication that the super-added test is meant to encompass

other tests for determining judicial capacity, namely, that the decision of the administrative body must have a conclusive effect, and that a lis inter partes and judicial discretion is necessary.<sup>27</sup>

In the midst of the growing tensions between a larger bureaucratic state and individual rights, this formal classificatory approach was intended to serve as a solution to bureaucratic encroachment on individual rights and liberties, as well as to accommodate the policy objectives of administrative bodies. Yet in application it generated more confusion than anything else. First, natural justice and the test as to whether it ought to apply was not as simple as it first appeared. As Pennell J. noted in Voyageur Explorations Ltd. v. Ontario Securities Commission (1970) "[t]he test to distinguish between an administrative act and a judicial or quasi-judicial act is almost as elusive as a Scarlet Pimpernel".<sup>28</sup> In addition, Professor Wade argued that

[t]his was one of the law's most mystifying lapse. Fundamentally it seemed to rest on a simple verbal confusion. It began to be said that if a function was administrative, or "purely administrative", it could not be judicial or quasi-judicial, and was not therefore subject to the principles of natural justice.<sup>29</sup>

Administrative action was subject to judicial review, in the first place, for the reason that an administrative body could function in a judicial capacity. The result of the classification of function, however, was that it distinguished between administrative activities and judicial activities, forgetting that its initial design was to determine whether a particular administrative act was reviewable. This form of reasoning had a "tendency to lead the courts to an all or nothing approach."<sup>30</sup> On the one hand, if the decision was classified as judicial or quasi-judicial,

the courts could over-judicialize the administrative process of decision-making. On the other hand, if the decision was classified as purely administrative, the aggrieved party could be denied even the most fundamental procedural decencies.

The courts' adoption of such a formal and non-activist approach was based essentially on the presumption that ministerial responsibility was sufficient to correct the excesses of administrative action. In fact, ministerial responsibility proved miserably inadequate for this purpose. Although ministers are politically accountable to the legislatures for problems in administration, "the truth", argued Wade,

was that some of the supposed corollaries of ministerial responsibility had become an abuse, sheltering mistakes and injustices and making it impossible for complainants and their members of Parliament to find out what had really happened. The minister would make a defensive answer in Parliament, where he would be most reluctant to admit any mistake, and nothing more could be done....As one member of Parliament complained, "ministerial responsibility is a cloak for a lot of murkiness, muddle and slipshodderly within the departments."<sup>31</sup>

Moreover, given the limited time for debate and the cumbersome processes, "Parliament cannot possibly control the ordinary run of daily governmental acts except by taking up occasional cases which have political appeal."<sup>32</sup> In the act of drafting bills themselves, the provisions of the bills are often driven through without sufficient time for adequate consideration of their legal consequences.<sup>33</sup> As de Smith stated, "the opportunities afforded for parliamentary proceedings on subordinate legislative instruments invariably fall short of those provided for debate on Bills, and for this reason ministerial responsibility cannot be regarded as an adequate substitute for judicial review."<sup>34</sup>

### **The Classification of Function Repudiated**

In 1963, a landmark decision was delivered by the House of Lords in Ridge v. Baldwin,<sup>35</sup> wherein the fairness doctrine was developed. In this case, a chief constable was dismissed from his office with neither notice of the offence committed nor an opportunity to make his defence. This dismissal was contrary not only to the principles of natural justice but also to a statute regarding police discipline that required both notice and opportunity for defence. The House of Lords decided four to one that such procedural requirements were necessary. While the judgment followed clearly from the breach of statutory regulations, three members of the majority found it significant to consider what the judgment would have been if there was no express statutory requirement. Lord Reid asserted the principle that "a power to decide...carries with it, of necessity, the duty to act judicially."<sup>36</sup> Accordingly, there was no need to distinguish between administrative or judicial functions; it was sufficient that the power exercised affected rights or interests, and consequently the principles of natural justice could apply in such a case.<sup>37</sup> This pronouncement resurrected the 1863 case of Cooper v. Wandsworth Board of Works in which it was decided that, where statutory law was silent, "the justice of the common law shall supply the omission of the legislature"<sup>38</sup> in cases where basic rights and liberties of citizens are affected.

At the initiative of Ridge v. Baldwin, the Canadian Supreme Court substantially altered its approach of applying natural justice in Nicholson v. Haldimand-Norfolk Regional Police Commissioners (1978). This is a case concerning the dismissal of a probationary police officer by the



Board of Commissioners of Police, affording Nicholson no notice, no reason, nor an opportunity to respond.<sup>39</sup> Chief Justice Laskin, delivering the decision for the majority, found in favour of Nicholson:

In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination.<sup>40</sup>

As a public officer, the constable had a significant interest and, as the Chief Justice noted, this "case is one where the consequences to the appellant are serious indeed in respect of his wish to continue in a public office."<sup>41</sup>

The decision in Nicholson was based fundamentally on the repudiation of the classification of function and on the subsequent adoption of the effect-orientation of natural justice. That is, the determination of whether the rules of natural justice would apply depend on the effect the exercise of statutory power would have on the individual. In arriving at this decision, Laskin C.J. provided two major arguments. Before reaching the Supreme Court, Hughes J. of the Ontario Court of Appeal applied the expressio unius, exclusio alterius (the expression of one thing implies the exclusion of others) rule of construction. This resulted in the assertion that "the Legislature has expressly required notice and hearing for certain purposes and has by necessary implication excluded them for other purposes",<sup>42</sup> in respect of police officers who have served less than eighteen months. In other words, Hughes J. interpreted The Police Act, which governed the dismissal

of probationary police officers, to mean that the Commission could dismiss such an officer at pleasure and without giving notice or a hearing. Laskin C.J. overruled the Ontario Court of Appeal's interpretation of The Police Act:

The effect of the judgment below is that a constable who has served eighteen months or more is afforded protection against arbitrary discipline or discharge through the requirement of notice and hearing and appellate review, but there is no protection at all, no halfway house, between the observance of natural justice aforesaid and arbitrary removal in the case of a constable who has held office for less than eighteen months. In so far as the Ontario Court of Appeal based its conclusion on the expressio unius rule of construction, it has carried the maxim much too far.<sup>43</sup>

The Chief Justice concluded that the common law principle which provides "that a person engaged as an office holder at pleasure may be put out without reason or prior notice ought itself to be re-examined."<sup>44</sup>

The second argument, in its final stage, emerges as a critique of the classification of function approach. This argument, ironically, unfolds with Laskin C.J.'s reference to Megarry J.'s statement in Bates v. Lord Hailsham (1972) which Laskin C.J. says he will accept "for present purposes."<sup>45</sup> Therein, Megarry J. lays down the precept "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness."<sup>46</sup> With regard to the Nicholson case, two difficulties immediately come to the forefront with such an admission. First, usage of the terms "natural justice" and "fairness" seem to suggest that the two terms represent separate and different standards, and that the "duty of fairness" is not as encompassing as the rules of natural justice. A second and more visible problem is the expression of the terms "quasi-

judicial" and "administrative" or "executive". To quote Professor Mullan, the statement of Megarry J. suggests

that procedural fairness and natural justice are different standards, one lesser applying to administrative decisions and one higher and applying to judicial and quasi-judicial decisions. Such an approach also raises the daunting possibility that judges will start describing functions as quasi-administrative in an endeavour to differentiate those administrative functions which have some implied procedural content from those which do not.<sup>47</sup>

The adoption of the Megarry J. rule represents a definite departure from the doctrine established in Ridge v. Baldwin wherein the application of the rules of natural justice would depend on whether it affected rights or interests. The very purpose of Ridge v. Baldwin was to avoid the conceptual difficulties inherent in the classification of function approach. Moreover, it was designed to circumvent the unfortunate result of producing injustice.

With respect to the first problem--the usage of the terms natural justice and fairness--what follows in the Nicholson case appears to clarify what the Chief Justice meant. The learned justice refers to a statement made by de Smith, that "[g]iven the flexibility of natural justice, it is not strictly necessary to use the term 'duty to act fairly' at all."<sup>48</sup> De Smith mentions that "it may be...less confusing" to use "fairness", but he also asserts that its usage has resulted in confusion:

[F]or sometimes one judge will differentiate a duty to act fairly from a duty to act judicially [or to observe natural justice] and another will assimilate them, both judges being in full agreement as to the scope of the procedural duty cast on the competent authority.<sup>49</sup>

While Laskin C.J. refers to the dictum in Bates v. Lord Hailsham, he alludes to natural justice and fairness as being synonymous and thereby

indicates that it is not necessary to use separate terms. If this is so, then Laskin C.J.'s interpretation of Megarry J.'s dictum would read: "In the sphere of the so-called quasi-judicial as well as the administrative or executive the rules of natural justice or fairness run."

With respect to the second problem, namely, the apparent reversion back to the classification of function approach through usage of the terms "quasi-judicial", "administrative" and so on, Laskin C.J. had this to say:

[T]he classification of statutory function as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected....<sup>50</sup>

The statement reveals clearly that the Chief Justice is dubious about applying the classificatory approach. He then draws attention to Mullan's article, "Fairness: The New Natural Justice".<sup>51</sup> A reading of this article demonstrates that Mullan's position is a critique and rejection of the entitlement of procedural justice on the basis of classification, and instead recommends an approach similar to a continuum where there are no clear cut divisions. In cases where the effect on the individual is serious enough, the following rule is developed. As a case moves towards the "straight law/fact" extreme, the principles of natural justice or fairness would be more extensive and, hence, many court-like procedures would be invoked; whereas when a case moves towards the "policy-oriented" extreme, the principles of natural justice or fairness would be less extensive and, thus, minimum procedural requirements would suffice.<sup>52</sup> As Mullan points out,

[t]he more important the issue, the higher the degree of fact determination and assessment that is involved, the more serious the sanctions and the closer the function being performed is to that traditionally performed by the courts, the greater becomes the legitimate demand for procedural fairness.<sup>53</sup>

The primary focus of such an approach is on the effect of statutory power on the rights or interests of an individual and not on whether the function is judicial, quasi-judicial, or administrative.

Although Laskin C.J. has adopted the rule of Megarry J. in Bates v. Lord Hailsham, he accepts that rule "for present purposes."<sup>54</sup> This is because the rule suffices in the Nicholson case to afford the minimum procedural requirements of notice and an opportunity to respond. It also gives the Court's decision some grounding in precedent. Nevertheless, the reasoning that follows demonstrates unequivocally that Laskin C.J. has not relied exclusively on Bates v. Lord Hailsham. Indeed, his reference to both de Smith and Mullan reveals that he repudiates any of the conceptual difficulties associated with differentiating natural justice from fairness and also those difficulties inherent in the classificatory approach. Quoting de Smith clarifies the usage of the concepts of natural justice and fairness, and demonstrates that the concepts are identical. The implication is that procedural justice would apply to both quasi-judicial and administrative functions. This, therefore, indicates that the determination of function is irrelevant as a standard for endowing procedural protections.

Moreover, Laskin C.J.'s assertion that the classification of function could work injustice, as well as his reference to Mullan's article, amount to a direct assault on the classification of function

approach. Instead of relying on classification of function as judicial or quasi-judicial, the requirements of natural justice or fairness will depend largely on the effect that the exercise of statutory power will have on the individual concerned. Subsequent reference was made to a statement by Lord Morris of Borth-Y-Gest in Furnell v. Whangarei High Schools Board (1973): "[N]atural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it leaven to be associated only with judicial or quasi-judicial occasions."<sup>55</sup> Laskin C.J. also quoted Lord Denning in Selvarajan v. Race Relations Board (1976): "[B]ut that which fairness requires depends on the nature of the investigations and the consequences which it may have on the persons affected by it."<sup>56</sup> In short, the thrust of the Chief Justice's decision is based on the effect-orientation of natural justice. The fact that the statement, "the consequences to the appellant are serious indeed",<sup>57</sup> is made by Laskin C.J. just prior to his pronouncement, confirms this point.

Further dissatisfaction with the classification of function approach is expressed by the Supreme Court in Coopers and Lybrand (1978) where Dickson J. is explicit in his denunciation of it. This was a case in which the Minister of National Revenue sought to have a decision from the Federal Court of Appeal set aside on the grounds that the Court was not empowered to entertain the case brought before it.<sup>58</sup> Coopers and Lybrand applied to the Federal Court of Appeal through s. 28(1) of the Federal Court Act.<sup>59</sup> That section authorizes the Court of Appeal to hear the case inasmuch as it involves "a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of

proceedings before a federal board, commission or other tribunal".

Accordingly, one of the issues on which the Supreme Court had to decide was whether the act of the Minister was judicial or quasi-judicial. As such, a standard for making such a determination was necessary. In spite of the classificatory characteristics of s. 28(1), Dickson J., speaking for the majority, had this to say:

Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for judicial review. At the other end are such matters as the appointment of the head of a Crown corporation, or the decision to purchase a battleship, determinations inappropriate to judicial intervention.<sup>60</sup>

The statement is reminiscent of one made by Mullan in the article<sup>61</sup> to which Laskin C.J. referred in the Nicholson case. In addition, the majority decision in Coopers and Lybrand recognized that the extent of procedural requirements varies and will depend on the weight of the public interest, or on the "obligation to implement social and economic policy in a broad sense",<sup>62</sup> as Dickson J. put it. The flexibility of the "spectrum approach" encourages due consideration of individual rights to procedural decencies, while simultaneously balancing the claims of individuals with those of society at large.

In Martineau v. Matisqui Disciplinary Board (1979) the Supreme Court referred to the majority judgment in the Nicholson case. The authority of the Trial Division of the Federal Court to review and quash the decisions of lower tribunals through certiorari was the primary issue examined in Martineau.<sup>63</sup> The relevant sections of the Federal Court Act

are as follow:

18. The Trial Division has exclusive original jurisdiction
  - (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grand declaratory relief, against any federal board, commission or other tribunal; and
  - (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against a federal board, commission or other tribunal.

Section 28 deals with Federal Court of Appeal jurisdiction:

- 28.(1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal
  - (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction...
  - (3) Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

The problem with the Federal Court Act is that, while s. 18 grants the Trial Division authority to issue various prerogative and common law remedies, s. 28(3) literally excludes the Trial Division from hearing such cases, transferring them to the Federal Court of Appeal. These provisions, as one commentator noted, "coupled with the traditional limitations on the utilization of certiorari, particularly where applied to purely administrative decisions, have resulted in a number of cases



effectively deciding that section 18 is, for practical purposes, inoperative in the face of section 28."<sup>64</sup>

The Supreme Court, in Martineau, disagreed with the position that s. 28 of the Federal Court Act nullifies s. 18 of that same act. Because the wording in s. 28(1) gives the Federal Court of Appeal jurisdiction to review cases regarding "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis", the Court endeavoured to identify the procedural standards for ss. 28 and 18. Speaking for the majority, Pigeon J. accepted the rule of Megarry J. in Bates v. Lord Hailsham; namely, "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness."<sup>65</sup> Pigeon J. then referred to Laskin C.J.'s position in Nicholson and interpreted it to mean that there is "a common law duty to act fairly which fell short of the duty to act quasi-judicially but nevertheless could be enforced by judicial review."<sup>66</sup> Specifically, the majority decision in Martineau was that s. 28 applied to decisions made on a judicial or quasi-judicial basis while, by implication, s. 18 applied to decisions made in accordance with the duty of fairness. To quote Pigeon J.:

The requirements of judicial procedure are not to be brought in and, consequently, these are not decisions which may be received by the Federal Court of Appeal under s. 28 of the Federal Court Act, a remedy which, I think, is in the nature of a right of appeal. However, this does not mean that a duty of fairness may not be enforced by the Trial Division through the exercise of the discretionary remedies mentioned in s. 18 of the Federal Court Act.<sup>67</sup>

The minority decision was delivered by Dickson J., with Laskin C.J. and McIntyre J. concurring. Although the minority of the Court agreed with the result of the majority, the reasoning of the minority was fundamentally different, and warrants attention. One notable difference is Dickson J.'s interpretation of Laskin C.J.'s position in Nicholson. He indicated that the approach adopted by Laskin C.J. is based on the English "fairness" doctrine,<sup>68</sup> and that Nicholson was marked by "its differentiation from traditional natural justice."<sup>69</sup> Instead of the rigid classificatory approach, Dickson J. encourages the adoption of a more flexible approach to natural justice, suggesting that this is the approach supported by Laskin C.J.:

Between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad decision making process with flexible gradation of procedural fairness through the administrative spectrum. That is what emerges from the decision of this Court in Nicholson.<sup>70</sup>

...In general, courts ought not to distinguish between the two concepts [namely, fairness and natural justice], for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework.<sup>71</sup>

Dickson J.'s position in Martineau is that application for certiorari does not depend solely on whether the public body exercises a judicial or quasi-judicial function; rather, "certiorari avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person."<sup>72</sup>

That the Federal Court Act reinforces, in fact requires, the adoption of the classification of function approach, particularly in regard of s. 28, is manifest in its reference to making a decision on a

"judicial or quasi-judicial basis". If access to the Federal Court was based exclusively on s. 28, and this attitude appears to have been pervasive prior to Martineau, then the number of cases qualifying for review would be reduced substantially. Moreover, in matters regarding federal administrative law, the Federal as well as the Supreme Court would revert back to the confusion inherent in the traditional classificatory approach. Both the majority and the minority decision indicate that this need not be the case; s. 18 can function to provide review for those administrative decisions where there is a duty to act fairly, and this may work to incorporate those cases that do not meet the "judicial or quasi-judicial" requirement of s. 28. Dickson J. in Martineau put it this way:

A widening of the ambit of certiorari beyond that of a s. 28 application will undoubtedly, at times, present a problem in determining whether to commence proceedings in the Court of Appeal or in the Trial Division. However, the quandary of two possible forums is not less regrettable than complete lack of access to the Federal Court.<sup>73</sup>

## Conclusion

Early British case law reveals that the British judiciary (at the initiative of Coke) derived the natural justice concept from the procedural aspect of due process. Coke goes as far as suggesting that natural justice is a necessary precondition to safeguarding substantive rights. He does not appear to say that natural justice avails as a standard for examining the substantive principles of the law which incriminate the affected party.

The classification of function emerged in the early 20th century as a standard for applying the procedural rules of natural justice. This

classificatory approach appears as a reaction to the courts' former and broad application of natural justice, which was used to discourage administrative interference with private property. But the classification of function presented many conceptual difficulties. The most unfavourable result was its tendency to either over-judicialize administrative procedures or work injustice by denying affected parties even the most basic procedural decencies.

In Britain, repudiation of the classificatory approach was the result of the "fairness" doctrine in Ridge v. Baldwin. Instead of relying on the traditional approach to applying natural justice, the Court decided that the major criterion for the entitlement of natural justice is the effect that the authority's power has on the individual's rights or interests. In short, the consequences of the administrative action on the individual is the major determinant, as opposed to whether the administrative body functions in a judicial or quasi-judicial capacity.

The same approach was adopted by the Canadian judiciary in Nicholson v. Haldimand-Norfolk Regional Police Commissioners, and in Coopers and Lybrand and Martineau v. Matisqui Disciplinary Board the Supreme Court was critical of the rigid characteristics of the classification of function. The consequences of an administrative decision on the individual were regarded as essential to the application of natural justice. Acceptance of the "continuum" approach to natural justice was a response to the need for some "half-way house" between the total observance of natural justice and the negation of even minimal procedural requirements. The new approach took into account considerations of both policy and individual rights. While the later case

of Martineau follows the initiative of the earlier Canadian cases, the Court nonetheless had to contend with some of the difficulties inherent in the Federal Court Act inasmuch as s. 28 of the Act perpetuates the classificatory approach. The Court appears to have circumvented this problem by construing s. 18 of the Federal Court Act to mean that the Trial Division would serve as a forum for entertaining purported breaches of the "duty to be fair" or the "fairness" doctrine.

It should be noted that the recent trend of the effect-orientation to applying the rules of natural justice includes consideration of substantive law only to the extent that the judiciary will need to examine the weight of the public interest underlying the administrative act under question. Depending on the weight of the policy matters, the judiciary will then be inclined to either extend or minimize the procedural requirements. Under no circumstances, however, are the Canadian courts in a position to review the content of law using procedural requirements as a measure of validity. That is, once a law passes the tests of vires and is legitimately enacted, the courts cannot declare the content of a parent law or a subordinate piece of legislation invalid on the basis of procedural insufficiencies; they cannot because they would be usurping legislative intent and the doctrine of parliamentary supremacy. Hence, an answer to the question of why natural justice precludes the judiciary from examining the content of law, whether it be on procedural or on some other ground, is found in the constitutional scheme that preceded the Constitution Act, 1982. Canada was a regime governed largely by the system of parliamentary supremacy. Moreover, it adopted the common law principle of natural justice from Britain--a regime that is itself

governed by the doctrine of parliamentary supremacy.

While judges defer to the intent of legislation in a system of parliamentary supremacy, in a system that constitutionally enshrines certain rights and freedoms judges have the authority to strike down legislation that violates constitutional guarantees. Under such a regime, an administrative decision can be questioned not only on the basis of its violation of legislative intent (better known as abuse of discretion), but also on the ground that the law empowering the administrative act is itself unconstitutional. A system with constitutionally guaranteed rights and freedoms assumes that the doctrine of ministerial responsibility and public accountability is an insufficient safeguard against arbitrary laws and delegated authority; at minimum, it calls upon the judiciary to strike down any of those laws or administrative decisions that grossly undermine the values incorporated in the constitution. This notion of due process is considerably different from the notion existing in Canada prior to the Constitution Act, 1982. The next chapter examines the concept of due process in a setting of constitutionally entrenched rights and freedoms.

# Endnotes

<sup>1</sup>R. v. Chancellor of the University of Cambridge (1723), 1 Str. 557, 567.

<sup>2</sup>Emphasis added.

<sup>3</sup>See Maurice P. Ashley, Magna Carta in Seventeenth Century (Charlottesville, 1965), 45-47; and C. H. McIlwain, "Due Process of Law in the Magna Carta", Columbia Law Review, 14 (1914), 27 for further analysis on the Magna Carta.

<sup>4</sup>Sir Edward Coke's Institute cited in J.W. Gough, Fundamental Law in English Constitutional History (Oxford: Clarendon Press, 1955), 43.

<sup>5</sup>Dr. Bonham's Case 8 Co. Rep. 117b-118b.

<sup>6</sup>Id.

<sup>7</sup>John Burrowes and Others v. High Commission Court [1616] 18 E.R. 42, 43.

<sup>8</sup>Id., 43.

<sup>9</sup>Id., 46.

<sup>10</sup>City of London v. Wood (1725), 12 Mod. 669, 687.

<sup>11</sup>Cooper v. Wandsworth Board of Works (1863), 14 Q.B. (N.S.) 180, 190.

<sup>12</sup>R.A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law: I", McGill Law Journal, 25 (1980), 530.

<sup>13</sup>Id., 531.

<sup>14</sup>Id., 530.

<sup>15</sup>Board of Education v. Rice [1911] A.C. 179.

<sup>16</sup>Martin Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory", University of Toronto Law Journal, 28 (1978), 219.

<sup>17</sup>Id., 219.

<sup>18</sup>S.A. de Smith, Judicial Review of Administrative Action (New York: Oceana Publications, 1969), 37.

<sup>19</sup>Id., 37.

<sup>20</sup>Id., 38.

<sup>21</sup>Id., 38.

<sup>22</sup>Id., 41.

<sup>23</sup>Id., 45.

<sup>24</sup>Id., 45.

<sup>25</sup>R. v. Legislative Committee of the Church Assembly; ex parte Haynes-Smith [1928] 1 K.B. 411, 415.

<sup>26</sup>Calgary Power Ltd. v. Copithorne [1959] S.C.R. 24, 30.

<sup>27</sup>See W.W. Pue, Natural Justice in Canada (Scarborough: Butterworth and Co., 1982), 16-17.

<sup>28</sup>Voyageur Explorations Ltd. v. Ontario Securities Commission [1970] O.R. 237, 242.

<sup>29</sup>H.W.R. Wade, Administrative Law, 5th ed. (Oxford: Clarendon Press, 1982), 458.

<sup>30</sup>David J. Mullan, "Developments in Administrative Law: The 1978-79 Term", Supreme Court Law Review, 1:1 (1980), 11.

<sup>31</sup>Supra, note 29, 75-76.

<sup>32</sup>Id., 30.

<sup>33</sup>Id., 30.

<sup>34</sup>Supra, note 18, 7.

<sup>35</sup>Ridge v. Baldwin [1964] A.C. 40. The subsequent interpretation of this case follows that of H.W.R. Wade, supra, note 29, 461-463.

<sup>36</sup>Id., 74.

<sup>37</sup>Supra, note 29, 463.

<sup>38</sup>Supra, note 11, 194.

<sup>39</sup>Nicholson v. Haldimond-Norfolk Regional Police Commissioners [1979] 1 S.C.R. 311, 314.

<sup>40</sup>Id., 328.



<sup>41</sup>Id., 328.

<sup>42</sup>Id., 319.

<sup>43</sup>Id., 321-322.

<sup>44</sup>Id., 322-323.

<sup>45</sup>Id., 324.

<sup>46</sup>Id., 324.

<sup>47</sup>David J. Mullan, "Fairness: The New Natural Justice", University of Toronto Law Journal, 25 (1975), 303.

<sup>48</sup>Supra, note 39, 325.

<sup>49</sup>Id., 325.

<sup>50</sup>Id., 325.

<sup>51</sup>Id., 325.

<sup>52</sup>Supra, note 47, 300.

<sup>53</sup>Id., 302.

<sup>54</sup>Supra, note 39, 324.

<sup>55</sup>Id., 326.

<sup>56</sup>Id., 327.

<sup>57</sup>Id., 328.

<sup>58</sup>Coopers and Lybrand (1979) 92 D.L.R. (3d) 1, 3.

<sup>59</sup>R.S.C. 1970, c.10 (2nd Supp.).

<sup>60</sup>Supra, note 58, 3.

<sup>61</sup>Supra, note 47, 300.

<sup>62</sup>Supra, note 58, 7.

<sup>63</sup>Martineau v. Matisqui Disciplinary Board [1980] 1 S.C.R. 602, 606.

<sup>64</sup>David Scott, "Judicial Review in the Federal Court of Canada", Charter of Rights and Administrative Law: 1983-1984. The Law Society of Upper Canada Bar Admission Course Materials (Carswell Legal Publications, 1983), 64.

<sup>65</sup>Supra, note 63, 634.

<sup>66</sup>Id., 635.

<sup>67</sup>Id., 637. Emphasis added.

<sup>68</sup>Id., 611. See Ridge v. Baldwin [1967] A.C. 40 for the development of the English "fairness" doctrine. See also p. 64 of this thesis.

<sup>69</sup>Id., 623.

<sup>70</sup>Id., 629. Emphasis added.

<sup>71</sup>Id., 629.

<sup>72</sup>Id., 622-623.

<sup>73</sup>Id., 630.

## CHAPTER FOUR: THE MEANING OF FUNDAMENTAL JUSTICE

### Introduction

Entitlement to procedural guarantees has undergone considerable transformation from the classification of function to the effect-orientation. While both approaches are theoretically derived from the procedural component of due process of law, the prerequisites for judicial review differ one from the other. The classificatory approach depends on the resemblance of the statutory function to the function of judicial bodies, whereas the "fairness" doctrine depends on the effect of the statutory power on the individual's rights and interests. These developments in natural justice reveal that judicial review of procedural impropriety is more available today than it was at the turn of the 19th century.

The purpose of this chapter is to determine what effect the Canadian Charter of Rights and Freedoms is likely to have on the judicial review of the content of legislation. Of special importance to this matter is the "fundamental justice" clause in s. 7 of the Charter. It states: "Everyone has a right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Do the principles of fundamental justice include a substantive component as well as a procedural one, or are they limited only to the review of procedural inadequacies? To answer this question, this chapter is divided into three sections. The first

section examines what meaning the framers of the Charter envisioned when they chose the "fundamental justice" terminology. The second section turns to the case law preceding 1982 to determine how the courts interpreted the principles of fundamental justice. With the same objective in mind, the third section deals with the case law decisions on s. 7 of the Charter.

### Legislative History

The Special Joint Committee of the Senate and the House of Commons on the Constitution reveals unequivocally the intent of the drafters. Speaking on the notion of fundamental justice, Deputy Minister Roger Tasse for the Liberal Government stated: "We assume that the Court would look at that [fundamental justice] much like a court would look at the requirements of natural justice."<sup>1</sup> He added that fundamental justice is meant to incorporate "inherent fairness" and the recent concept of "administrative fairness". Responding to a question asked by John Crosbie of the Progressive Conservatives regarding the procedural extent of fundamental justice, Assistant Deputy Minister Barry Strayer had this to say:

It depends upon the circumstances; but the general concept is that a person has to be notified that his rights are likely to be affected by some action if it is a procedure, if it is a process--what lawyers call a quasi-judicial process involving the determination of rights; then it requires that the person not only should have notice, but should also have an opportunity to be heard and that he should hear the other side of the case prejudicial to him and that he should have a chance to respond to that.

The content will depend somewhat on the nature of the process.

If it is a purely discretionary power being exercised by a government officer, the procedural requirements may be less than if it is a matter involving rights.<sup>2</sup>

The procedural requirements of fundamental justice were therefore regarded by Strayer as being similar to the principles of natural justice developed in case law prior to Nicholson v. Haldimand-Norfolk Regional Police Commissioners (1978);<sup>3</sup> moreover, reference to the phrases "quasi-judicial process" and, later, "nature of the process", imply that Strayer is adverting to the classification of function. Further reference is made to fundamental justice as including the recent "fairness" doctrine developed in Nicholson.<sup>4</sup>

The issue as to whether the principles of fundamental justice embrace a substantive component also emerged. Strayer was explicit in his rejection of the inclusion of substantive standards under the principles of fundamental justice. He stressed that the "fundamental justice" clause would cover the area of procedural due process or fair procedure; "[h]owever, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to the policy of the law in question."<sup>5</sup> The Minister of Justice, Jean Chretien, argued further against the inclusion of substantive standards for the evaluation of legislation:

The point, Mr. Crombie, [sic] that it is important to understand the difference is that we pass legislation here on abortion, criminal code, and we pass legislation on capital punishment; parliament has the authority to do that, and the court at this moment, because we do not have the due process of law written there, cannot go and see whether we made the right decision or the wrong decision in Parliament.

If you write down the words, "due process of law" here, the advice I am receiving is the court could go behind our

decision and say that their decision on abortion was not the right one, their decision on capital punishment was not the right one, and it is a danger, according to legal advice I am receiving, that it will very much limit the scope of the power of legislation by the Parliament and we do not want that; and it is why we do not want the words "due process of law". These are the two main examples that we should keep in mind.

You can keep speculating on all the things that have never been touched, but these are two very sensitive areas that we have to cope with as legislators and my view is that Parliament has decided a certain law on abortion and a certain law on capital punishment, and it should prevail and we do not want the courts to say that the judgment of Parliament was wrong in using the constitution.<sup>6</sup>

There is no question as to the meaning of fundamental justice envisaged by the drafters of the Constitution. Those principles apply strictly to procedural improprieties and do not extend to the evaluation of non-procedural aspects or the policy of the law; that is, the courts may examine the content of the law only to ensure that the procedural requirements are acceptable. Whether the courts will see it only in this sense is another story.

### **The Meaning of Fundamental Justice in Case Law prior to 1982**

The "fundamental justice" terminology appears in an early British case, Hopkins and Another v. Smethwick Local Board of Health (1890). In this case the appellant contested an administrative decision which had resulted in the demolition of his building.<sup>7</sup> Lord Esher M.R. stated that "where there is power to enter and pull down buildings which have been erected in contravention of bye-laws, it would be contrary to fundamental justice to allow that course to be taken without giving the owner notice and an opportunity to shew cause."<sup>8</sup>

Provisions for procedural guarantees also appear in the Canadian Bill of Rights,<sup>9</sup> introduced by the Diefenbaker Government and passed by Parliament in 1960. Section 1(a) guarantees "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law". The "fundamental justice" clause appears in s. 2(e):

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to...

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations....

Curr v. The Queen (1972) is a case concerning failure to produce a breath sample to determine the alcohol content in the blood of the accused pursuant to s. 233 of the Criminal Code.<sup>10</sup> Counsel for the appellant endeavoured to question the content of s. 233 by invoking s. 1(a) of the Canadian Bill of Rights. Though the appellant argued that the requirement to produce a breath sample was substantively unjust, this submission was "not reinforced by any proposed yardstick."<sup>11</sup> After referring to the Magna Carta and to American case law regarding due process, Laskin J. stated that the courts should exercise

extreme caution...when asked to apply [due process of law] in negation of substantive legislation validly enacted by a Parliament in which the majority role is played by elected representatives of the people. Certainly in the present case, a holding that the enactment of s. 233 has infringed the appellant's right to the security of his person without due process of law must be grounded on more than a substitution of personal judgment for that of

Parliament.... Even where this Court is asked to pass on the constitutional validity of legislation, it knows that it must resist making the wisdom of impugned legislation the test of its constitutionality. A fortiori is this so where it is measuring legislation by a statutory standard, the result of which may make federal enactments inoperative.<sup>12</sup>

Because Parliament is authorized with the requisite constitutional power by virtue of s. 91 of the Constitution Act, 1867, the Bill of Rights, as a constitutionally unentrenched statute, is insufficient for challenging substantive law that is legislated in accordance with the Constitution. Once the proper procedures for passing legislation are satisfied, the courts are neither expected nor sufficiently authorized to attack the substance of legislation.

In a related case, Duke v. The Queen (1972), the accused provided a breath sample for the police whereupon, at a later time, solicitor for the accused requested a sample of the breath. When refused, the appellant contended that the denial of the breath sample as evidence prevented the hearing of a fair trial. Fauteux C.J. rejected the argument that such a denial of evidence was contrary to the principles of fundamental justice. "Without attempting to formulate any final definition of those words", the Chief Justice stated, "I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give him the opportunity adequately to state his case."<sup>13</sup>

The Supreme Court was accordingly reluctant in the Bill of Rights cases to give such open-ended concepts as "due process of law" and "fundamental justice" general construction inclusive of substantive standards.<sup>14</sup> In short, British and Canadian case law prior to the



constitutionally entrenched Charter indicates, first, that fundamental justice is limited to procedural requirements regarding government decision-making, and, second, that it precludes the review of validly enacted legislation. Given the constitutional limits of judicial review in a system where parliament stands largely as supreme, it is understandable why the Canadian courts were adverse to giving a non-constitutional document the authority to undermine the content of legislation.

#### **Fundamental Justice in the Charter**

Section 7 of the Canadian Charter of Rights and Freedoms guarantees that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." There is no dispute as to the incorporation of procedural standards within the principles of fundamental justice. However, two issues that remain to be examined concern the position of the Canadian courts after 1982. First, do the principles of fundamental justice empower the courts to examine the content of legislation to determine the sufficiency of procedural requirements? Second, do the principles of fundamental justice include a substantive component permitting the courts to look beyond the procedural content of legislation? Both interpretations of fundamental justice would suggest that the courts can strike down legislation, whether it be on the basis of procedural inadequacies or something other than procedure.

(i) Review of Procedural Provisions within Legislation

In a Supreme Court of Canada decision, Re Singh and Minister of Employment and Immigration (1985), the principles of fundamental justice were referred to by Singh and others in a case regarding refugee status. The appellants contested the inadequacy of the procedural requirements set out in various provisions of the Immigration Act, 1976<sup>15</sup> which govern their eligibility for refugee status. Rather than using the common law principle of natural justice, the applicants contested the validity of the relevant sections of the Immigration Act by resorting to s. 7 of the Charter.<sup>16</sup> The Act precluded any opportunity for an oral hearing.<sup>17</sup> Commenting on the applicability of the Bill of Rights in relation to the Charter, Wilson J. (Dickson C.J. and Lamer J. concurring) stated:

It seems to me...that the recent adoption of the Charter by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitudes which at times characterized their approach to the Canadian Bill of Rights ought to be re-examined.<sup>18</sup>

While Beetz J. (and two others concurring) deemed it fitting to invoke the statutory Bill of Rights for superseding legislation,<sup>19</sup> the ratio of Wilson J. relied on the guarantees in the Charter. As she noted, "since I believe that the present situation falls within the constitutional protection afforded by the Canadian Charter of Rights and Freedoms, I prefer to base my decision upon the Charter."<sup>20</sup> There are four major stages to Wilson J.'s decision: (1) Are the common law principles of natural justice sufficient to support the claim for an oral hearing? (2) If not, is s. 7 of the Charter applicable? (3) Assuming that it is applicable, is there a violation of the principles of

fundamental justice? (4) And if there is a violation, does it constitute a "reasonable limit" pursuant to s. 1 of the Charter?

Reliance on natural justice was not sufficient because s. 71(1) of the Immigration Act, 1976 expressly excludes adopting implied natural justice: "[I]t seems to me that s. 71(1) is precisely the type of express provision which prevents the courts from reading the principles of natural justice into a scheme for the adjudication of the rights of individuals."<sup>20</sup> Wilson J. argued that "if the appellants are to succeed", it must be on the basis of the Charter so that the Court may override the intent of Parliament.<sup>21</sup>

In the second stage of the argument, the view adopted was that "it is incumbent upon the court to give meaning to each" of the substantive rights enumerated in s. 7, namely, the "right to life, liberty and security of the person."<sup>22</sup> Wilson J. focussed on the right to "security of the person" and asserted that this "must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself."<sup>23</sup> In this instance, the fear of persecution was sufficient to entitle the applicants to the protection of s. 7 in the Charter.

Since the applicants were entitled to the substantive rights of s. 7, the next step was to determine whether the infringement of these rights was in accordance with the principles of fundamental justice. Wilson J. appears to have argued that because the procedure of the Immigration Appeal Board was adversarial, the applicants were therefore entitled to fundamental justice:

As I have suggested, the absence of an oral hearing need not be inconsistent with fundamental justice in every case. My greatest concern about the procedural scheme envisaged by ss. 45 to 58 and 70 and 71 of the Immigration Act, 1976 is not, therefore, with the absence of an oral hearing in and of itself, but with the inadequacy of the opportunity the scheme provides for a refugee claimant to state his case and know the case he has to meet. Mr. Bowie [Counsel for the Attorney-General of Canada] argued that since the procedure under s. 45 was an administrative one, it was quite proper for the Minister and the Refugee Status Advisory Committee to take into account policy considerations and information about world affairs to which the refugee claimant had no opportunity to respond. However, in my view the proceedings before the Immigration Appeal Board were quasi-judicial and the board was not entitled to rely on material outside the record which the refugee claimant himself submitted on his application for redetermination....

It seems to me that the basic flaw in Mr. Bowie's characterization of the procedure under ss. 70 and 71 is his description of the procedure as non-adversarial. It is in fact highly adversarial but the adversary, the Minister, is waiting in the wings. What the board has before it is a determination by the Minister based in part on information and policies to which the applicant has no means of access that the applicant for redetermination is not a Convention refugee. The application is entitled to submit whatever relevant material he wishes to the Board but he still faces the hurdle of having to establish to the board that on the balance of probabilities the Minister was wrong. Moreover, he must do this without any knowledge of the Minister's case beyond the rudimentary reasons which the Minister has decided to give him in rejecting his claim. It is this aspect of the procedures set out in the Act which I find impossible to reconcile with the requirements of "fundamental justice" as set out in s. 7 of the Charter.<sup>24</sup>

Insofar as Wilson J. has distinguished between "administrative" and "quasi-judicial" proceedings and has referred to the "adversarial process", she has resorted to the classification of function approach for determining which procedures should have been invoked. It must be noted that this is an application for retrial from the Federal Court of Appeal,

and, as such, the Supreme Court of Canada is restricted to the merits of the decision of that Court. Accordingly, the Federal Court of Appeal is governed by the terms of s. 28 of the Federal Court Act permitting it to review decisions of a "federal board, commission or other tribunal" that were not made in a judicial or quasi-judicial capacity. And s. 24(1) of the Charter states that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."<sup>25</sup> Therefore, the Supreme Court interpreted fundamental justice in s. 7 as affording procedural deficiencies in accordance with the classification of function. This, moreover, explains why Wilson J. distinguished between administrative and quasi-judicial proceedings. In her own words:

The [Immigration Appeal Board] is a quasi-judicial body and without doubt its determinations are subject to review under s. 28. The question the court faces, as I see it, is whether the broader remedial power which it possesses under s. 24(1) of the Charter entitles it to extend its review of possible violations of the Charter to the ministerial determinations made pursuant to s. 45 of the Immigration Act, 1976 [--determinations that must be made on the basis of the "duty to be fair" requirement]. In my view it does not.<sup>26</sup>

Because Singh brought the grievance before the Federal Court of Appeal, and because that court is limited to reviewing decisions that must be made on a judicial or quasi-judicial basis, the Federal Court of Appeal is not, as s. 24(1) of the Charter requires, "a court of competent jurisdiction" with respect to reviewing ministerial determinations made on a purely administrative basis. This, however, does not prevent the affected party from applying to the Trial Division of the Federal Court,

where decisions not of a judicial or quasi-judicial nature must be made in accordance with the "fairness" doctrine. Consequently, the meaning to be given to procedural fundamental justice will depend on which court the grievor applies to. If it be the Federal Court of Appeal, then fundamental justice will refer to the traditional classification of function. If it be the Trial Division, then fundamental justice will incorporate the requirement to be fair.

After deciding that Singh was denied an oral hearing as required by the principles of fundamental justice, Wilson J. went on to consider whether the procedures of the Immigration Appeal Board could be rescued under s. 1 of the Charter. That section states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Wilson J. suggested that the courts ought to invoke s. 1 with a view to upholding "the rights and freedoms set out in the other sections of the Charter."<sup>27</sup> The issue before the Court is

not simply whether the procedure set out in the Immigration Act, 1976 for the adjudication of refugee claims are reasonable; it is whether it is reasonable to deprive the appellants of the right to life, liberty and security of the person by adopting a system for the adjudication of refugee status claims which does not accord with the principles of fundamental justice.<sup>28</sup>

The Minister of Employment and Immigration argued that the procedures required by the Immigration Act, 1976 were accepted as valid by the United Nations High Commission for Refugees and that the Canadian procedure was similar to that of other countries (Commonwealth and Western European). The Minister also argued on the basis of administrative

convenience.<sup>29</sup> However, Wilson J. rejected these claims, and asserted that "[w]hatever standard of review eventually emerges under s. 1, it seems to me that the basis of justification for the limitation of rights under s. 7 must be more compelling than any advanced in these appeals."<sup>30</sup> In short, the Justice is reluctant to give any considerable weight to the defence of legislation limiting s. 7 on the grounds of s. 1. Singh therefore demonstrates that the courts are prepared to override the content of legislation if it violates principles of fundamental justice. Never in the decision, however, did the Court state that fundamental justice precludes the review of the content of legislation for matters other than procedure.

(ii) Beyond the Review of Procedure

The Supreme Court of Canada in Re B.C. Motor Vehicle Act (1985)<sup>31</sup> has decided that the principles of fundamental justice in s. 7 of the Charter are not confined to the review of procedural inadequacies of legislation. This reference revolves around the landmark decision of Dickson J. in Regina v. City of Sault Ste. Marie (1978).<sup>32</sup>

In that case, Dickson J. distinguished between three categories of offences: criminal, strict and absolute liability.

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by

proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability....

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.<sup>33</sup>

Offences which impose severe penalties are those that require proof of both mens rea and actus reus, whereas offences that impose minor penalties with the public good in mind are those that require proof only of actus reus; the first category usually refers to criminal offences and the third to the "protection of social interests [that require] a high standard of care and attention."<sup>34</sup> With regard to this third category, Dickson J. quoted Professor Sayre: "It is fundamentally unsound to convict a defendant for a crime involving a substantial term without giving him the opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent."<sup>35</sup> Hence the introduction and need for an additional category, namely, that of strict liability permitting the accused to demonstrate that he or she exercised due diligence.

Re B.C. Motor Vehicle Act is an appeal from the Court of Appeal of British Columbia to the Supreme Court of Canada. The Lieutenant-Governor in Council of British Columbia sought advice on the following question:

Is s. 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, as amended by the Motor Vehicle Amendment Act, 1982,



consistent with the Canadian Charter of Rights and Freedoms?

With the intention of ridding the road of dangerous drivers, s. 94(2) makes driving with a suspended license an absolute liability offence inasmuch as "guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension." A first offence carries with it a minimum fine of \$300 and a minimum sentence of six days imprisonment. The Court of Appeal of British Columbia held that convicting a person driving with a suspended license "automatically and without notice" is contrary to the principles of fundamental justice.<sup>36</sup> Moreover, the Court adopted the rule in Sault Ste. Marie--that in offences involving imprisonment there is the opportunity to at least prove due diligence--and asserted that fundamental justice "is not restricted to matters of procedure but extends to substantive law and that the courts are therefore called upon, in construing the provisions of s. 7 of the Charter, to have regard of the content of legislation."<sup>37</sup>

The Supreme Court of Canada unanimously upheld the decision of the lower court. Lamer J. stated that it cannot be determined from the judgment of the Court of Appeal of British Columbia "whether the violation was triggered by the requirement of minimum imprisonment as a sentence."<sup>38</sup> The courts, noted Lamer J., have always had the authority to measure the "content of legislation against the requirements of the Constitution";<sup>39</sup> what the Constitution Act, 1982 has done is extend the scope of constitutional adjudication "so as to encompass a broader range of values."<sup>40</sup> Furthermore, it is Parliament and the Legislatures that have conferred this authority upon the courts and who are consequently

responsible for the extension of judicial review.<sup>41</sup> Restricted to the enforcement of constitutional limitations, the Justice insisted that the courts have not been empowered to decide on the wisdom or appropriateness of policy objectives.<sup>42</sup>

Having attempted to clear away any obstacles regarding the legitimacy of expanded judicial review, Lamer J. went on to consider how to interpret the principles of fundamental justice. The question as to how extensive judicial review ought to be appears to be caught up in the dilemma of whether fundamental justice is inclusive of a substantive as well as a procedural component; a procedural component would limit the scope of judicial review, while a substantive component would increase its scope. Lamer J., however, wished to avoid becoming entangled in the procedural/substantive dichotomy because the "task of the Court is not to choose between substantive or procedural content per se but to secure for persons 'the full benefit of the Charter's protection' ...under s. 7, while avoiding adjudication of the merits of public policy."<sup>43</sup> The principles of fundamental justice should accordingly be given a generous interpretation:

As a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. For the narrower the meaning given to the "principles of fundamental justice" the greater will be the possibility that individuals may be deprived of the most basic rights [namely, the rights to life, liberty and security of the person].<sup>44</sup>

The "fundamental justice" terminology was not therefore to be equated with the "natural justice" terminology because of the latter's preclusion of substantive or non-procedural matters. This is especially true since the

framers "so obviously avoided" including the words "natural justice" in the place of "fundamental justice".<sup>45</sup>

While the testimony of federal civil servants in the Special Joint Committee of the Senate and the House of Commons on the Constitution construed fundamental justice as imposing merely procedural requirements,<sup>46</sup> Lamer J. is generally reluctant to admit such evidence for the interpretation of the Constitution. Three reasons emerge as notably significant. First, statements made by officials regarding legislation tend to be unreliable.<sup>47</sup> Second, as far as constitutional documents are concerned, it is not only a few federal civil servants who determine the meaning of legislation; there are other political actors including the provincial legislators and so on.<sup>48</sup> Third, and most importantly, reliance on statements made in the Joint Committee Proceedings could freeze the "rights, freedoms and values embodied in the Charter" allowing "little or no possibility of growth, development and adjustment to changing societal needs."<sup>49</sup> Lamer J. further stated:

If the newly planted "living tree" which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.<sup>50</sup>

Although the common law has been one of remedies and procedures, the "living tree" tradition does not prevent the principles of fundamental justice from expanding beyond procedural guarantees.<sup>51</sup>

In order to answer the question put forth to the Court, Lamer J. adopts a three-stage method of determination. First, it must be demonstrated that a law of absolute liability has the "potential" for

depriving one "of life, liberty or security of the person."<sup>52</sup> If there is a deprivation, the second stage is for examining whether the deprivation is in accordance with the principles of fundamental justice. If fundamental justice is not violated, the courts need go no further and the law stands as legitimate. However, if there is a violation of the principles of fundamental justice, a third stage is necessary for determining whether s. 1 can come to the rescue of the legislation under examination; it requires that the authority limiting the rights in s. 7 demonstrate, to the satisfaction of the court, that the legislation under question is a "reasonable limit" that can be "demonstrably justified in a free and democratic society."

It was Lamer J.'s position that s. 94(2) of the Motor Vehicle Act did indeed violate the substantive rights in s. 7. As to whether s. 94(2) is or is not in accordance with the principles of fundamental justice, the Justice first addressed what the source of those principles are: "[They] are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system."<sup>53</sup> Essential to the system for the administration of justice is the rule: "Do not punish the innocent."<sup>54</sup> This rule is "founded upon a belief in the dignity and worth of the human person and on the rule of law."<sup>55</sup> Lamer J. contended, therefore, that "in penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence."<sup>56</sup>

The legislature remains nonetheless free to pass laws regarding absolute offences if it can demonstrate, under the requirements of s. 1,

that the deprivation of rights in s. 7 is a reasonable limit. As Lamer J. stated,

the combination of imprisonment and of absolute liability violates s. 7 of the Charter and can be salvaged if the authorities demonstrate under s. 1 that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under s. 7.<sup>57</sup>

While considerations of public policy are excluded from the ambit of fundamental justice in s. 7, they are not excluded from the reach of the "reasonable limits" clause in s. 1. In other words, the public interest of making roads safe for travelling may not serve as justification under s. 7, but it may serve as justification under s. 1 of the Charter. Should the excuse of administrative expediency be used for violations of s. 7, it would avail "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."<sup>58</sup> Lamer J. noted, however, that in this case he was not contesting the policy or "desirability of punishing severely bad drivers who are in contempt of prohibitions against driving";<sup>59</sup> he was questioning the reasonableness of the "risk of imprisonment of a few innocent [individuals]".<sup>60</sup> He concluded that the Government of British Columbia had not demonstrated to the satisfaction of the Court that s. 92(2) is a reasonable limit in a free and democratic society.<sup>61</sup>

Wilson J.'s reasoning differed from that of Lamer J. in two respects. First, she argued that the "fundamental justice" clause is not a qualification on the substantive rights contained in s. 7: "Its purpose seems to me to be the very opposite, namely to protect the right against

deprivation or impairment unless such deprivation or impairment is effected in accordance with the principles of fundamental justice."<sup>62</sup> For Lamer J., the purpose of fundamental justice was to modify, or define the parameters of, the substantive rights in s. 7.

Second (and somewhat derived from the first difference in reasoning), Wilson J.'s method of determination was different from that of Lamer J. While Wilson J. agreed with Lamer J. insofar as in the first stage of determination it must be demonstrated that there has been a violation of the right to life, liberty and security of the person, she disagreed with him in the second and third stages. If it is demonstrated that the violation is in accordance with fundamental justice, then the authority limiting the rights must still pass the test of s. 1--that it is a reasonable limit "demonstrably justified in a free and democratic society."<sup>63</sup> (According to Lamer J., once it is demonstrated that there is no violation of fundamental justice, the Court does not have to go any further.) Conversely, if the Court finds that there is a violation of the principles of fundamental justice, "the enquiry...ends there and the limit cannot be sustained under s. 1":

I say this because I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society". The requirement in s. 7 that the principles of fundamental justice be observed seems to me to restrict the legislature's power to impose limits on the s. 7 right under s. 1. It can only limit the s. 7 right if it does so in accordance with the principles of fundamental justice and, even if it meets that test, it still has to meet the tests in s. 1.<sup>64</sup>

According to Wilson J. the principles of fundamental justice are not limited to procedure; they extend to encompass basic tenets of the

judicial system, be they procedural or substantive. The meaning and application of fundamental justice is not contingent on determining whether the issue is a procedural or substantive one, for, as Wilson J. noted, there is no particular virtue in doing so, especially when "in many instances the line between substance and procedure is a very narrow one."<sup>65</sup>

Unlike Lamer J., Wilson J. was not prepared to state unequivocally that absolute liability offences combined with a mandatory term of imprisonment always violate fundamental justice: "We cannot, in my view, simply state as a bold proposition that absolute liability and imprisonment cannot coexist in a statutory context."<sup>66</sup> She went on to explain:

The legislature may consider it so important to prevent a particular act from being committed that it absolutely forbids it and, if it is committed, may subject the offender to a penalty whether he has any mens rea or not and whether or not he had any intention of breaking the law.<sup>67</sup>

Yet the legislation must nonetheless conform with the principles of fundamental justice, and it is here that s. 94(2) of the Motor Vehicle Act fails.

For Wilson J., the main issue was whether the punishment sanctioned by s. 94(2) was in accordance with fundamental justice. In order to determine this, the Justice relied on the five main objectives of a penal system expounded by Nigel Walker:

- 1) to protect offenders and suspected offenders against unofficial retaliation;
- 2) to reduce the incidence of crime;

- 3) to ensure that offenders atone for their offences;
- 4) to keep punishment to the minimum necessary to achieve the objectives of the system; and
- 5) to express society's abhorrence of crime.<sup>68</sup>

The absolute liability provision of s. 94(2) when combined with imprisonment is, according to Wilson J., disproportionate to the crime;<sup>69</sup> "it is not required to reduce the incidence of the offence";<sup>70</sup> it is beyond what is needed for reparation; and society "would not be abhorred by an unintentional and unknowing violation of the sanction."<sup>71</sup> Section 94(2) was therefore regarded as violating the principles of fundamental justice, and the appeal was accordingly dismissed.

The decisions of both Lamer and Wilson JJ. demonstrate that in Re B.C. Motor Vehicle Act, the Court essentially was not questioning the policy to rid the roads of dangerous drivers. The case also indicates that the words "policy of the law" are not synonymous with the words "content of the law." While s. 7 permits the courts to review the content of the law, it does not, according to Lamer J., permit them to examine the appropriateness of the policy underlying the law. Lamer J. suggested, however, that if the Court finds that the particular piece of legislation violates the principles of fundamental justice, it is still open to the authority abrogating the rights to demonstrably justify that it is a reasonable limit in a free and democratic society.

Wilson J., however, appears to argue differently. Once it is proven that the legislation violates the substantive rights and is contrary to fundamental justice, it is not open to the authority abrogating the rights to demonstrate that the limitation is a reasonable



one. For Wilson J., once the legislation violates the principles of fundamental justice, it is automatically rendered unreasonable. Therefore, questions of policy become irrelevant, especially if the Court can find that the law violates fundamental principles of justice of a democratic society.<sup>72</sup> In other words, if legislation violates s. 7, it cannot be saved by considerations of policy via s. 1. What is more important is that the principles of fundamental justice do indeed provide the courts with an avenue to substitute juridical and legal standards for those of a democratically elected body.

### Conclusion

What is the breadth of "fundamental justice" in s. 7 of the Canadian Charter of Rights and Freedoms? According to legislative history, fundamental justice is restricted to the review of procedural improprieties, and does not extend to the review of the policy of the law or non-procedural questions. In brief, it does not include what is known as substantive due process or substantive justice. That the "fundamental justice" terminology is limited to procedural decencies is supported by British case law as well as Canadian Bill of Rights case law prior to the constitutionally entrenched Charter. At the very most, the legislative history reveals that the principles of fundamental justice can be used to strike down legislation or administrative decisions that fail to satisfy the necessary procedural requirements.

The case of Re Singh and Minister of Employment and Immigration not only reinforces the notion that the principles of fundamental justice in the Charter extend to the review of the procedural content of

legislation, it also indicates that the procedural standard for doing so will depend on which court the applicant has the case entertained in. It would therefore include the classification of function for decisions that are obviously judicial or quasi-judicial in nature, or it could include the "duty to be fair" requirement for decisions that are administrative in nature. Since in Singh the case initially went before the Federal Court of Appeal, the Supreme Court was confined to reviewing the merits of a decision that was to be judged on the basis of the classificatory approach.<sup>73</sup>

The decision of Wilson J. in Singh also reveals that the task of defending, through s. 1 of the Charter, a piece of legislation that undermines the rights in s. 7 is a difficult one. Indeed, although Wilson J. took into consideration the arguments of the Minister of Employment and Immigration, her commitment to preserving the rights in s. 7 in accordance with fundamental justice intimates that s. 1 may serve as an impossible avenue for defending limitations on those rights.

In Re B.C. Motor Vehicle Act the Supreme Court was clear in its position that the principles of fundamental justice in s. 7 go beyond the review of procedural improprieties in legislation. Lamer J. was explicit in his rejection of the testimony of federal officials in the Special Joint Committee on the Constitution as evidence in court. It is also clear that both Lamer and Wilson JJ. wished to avoid becoming entangled in the procedural/substantive dichotomy. They stated that there is no virtue in distinguishing between the procedural and substantive components of fundamental justice. All that needs to be asked is: Does the law violate fundamental principles of the system of justice?

However, Lamer and Wilson JJ. differed amongst themselves as to the relationship between the "fundamental justice" clause in s. 7 and the "reasonable limits" provision in s. 1. Lamer J. asserted that if there is a violation of fundamental justice, then the authority limiting the substantive rights in s. 7 still has the opportunity to defend the content of legislation under s. 1 through arguments reflecting the public interest. Conversely, Wilson J. stated that if there is a violation of fundamental justice, the authority abridging the rights in s. 7 does not have the opportunity to resort to s. 1 (although it can invoke s. 33). She suggested that if it is contrary to fundamental justice then it is necessarily unreasonable; it also implies that the violation of s. 7 is against the public interest. This position appears to clarify her view regarding s. 1 in the Singh case.

The difference between the reasoning of the two judges is important. Although Lamer J. stated that the courts are not to decide on the wisdom of policy, it is difficult to see how they can avoid considerations of policy should they adopt Lamer J.'s method of determination. If the legislation in question can be defended under s. 1, the authorities must convince the judges that it is a reasonable limit. In other words, this places the court in a position to either accept or reject the argument presented in defence of legislation. If there is a violation of the principles of fundamental justice, this is because it offends basic principles of our system of justice. This means not only that the courts must weigh matters of policy in relation to s. 7; it means also that policy considerations may or may not supersede the principles of

fundamental justice.

This is not possible with Wilson J.'s method. If the content of legislation violates fundamental justice, then arguments of policy under s. 1 cannot come to the rescue of the scrutinized legislation. Those principles that the court regards as fundamental to our judicial system will override the intent of legislation, whether it be a policy matter or otherwise.

## Endnotes

<sup>1</sup>Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution, Minutes of Proceedings and Evidence, Thirty-second Parliament, First Session, 1980-81, 3:79 (November 12, 1980).

<sup>2</sup>Supra, 46:39 (January 27, 1981). Emphasis added.

<sup>3</sup>Nicholson v. Haldimand-Norfolk Regional Police Commissioners [1979] 1 S.C.R. 311. Prior to this case, judicial review of procedural improprieties of administrative action depended largely on the classification of function. See pp. 59-63 of this thesis.

<sup>4</sup>However, it is not clear from the statements of the federal officials as to which of the two standards will apply in an administrative body or court of law. This is explored on pp. 71-75, 92-94 of this thesis.

<sup>5</sup>Supra, note 1, 46:32 (January 27, 1981).

<sup>6</sup>Id., 46:43 (January 27, 1981).

<sup>7</sup>Hopkins and Another v. Smethwick Local Board of Health (1890) Q.B.D. 712, 712.

<sup>8</sup>Id., 716.

<sup>9</sup>R.S.C. 1970, App. III.

<sup>10</sup>Curr v. The Queen (1972) 26 D.L.R. (3d) 603, 608.

<sup>11</sup>Id., 612.

<sup>12</sup>Id., 616.

<sup>13</sup>Duke v. The Queen (1972) 28 D.L.R. 129, 134.

<sup>14</sup>See Berend Hovius, "The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter", McGill Law Journal, 28 (1982), 31.

<sup>15</sup>1976-77 (Can.), c. 52.

<sup>16</sup>Re Singh and Minister of Employment and Immigration (1985) 17 D.L.R. (4th) 422, 442.

<sup>17</sup>Id., 452.

<sup>18</sup>Id., 462.

<sup>19</sup>Id., 430.

<sup>20</sup>Id., 455.

<sup>21</sup>Id., 455.

<sup>22</sup>Id., 458-459.

<sup>23</sup>Id., 460.

<sup>24</sup>Id., 465-466. Emphasis added.

<sup>25</sup>Emphasis added.

<sup>26</sup>Supra, note 16, 471.

<sup>27</sup>Id., 468.

<sup>28</sup>Id., 468.

<sup>29</sup>Id., 468.

<sup>30</sup>Id., 469.

<sup>31</sup>Re B.C. Motor Vehicle Act [1985] 2 S.C.R. 486.

<sup>32</sup>Regina v. City of Sault Ste. Marie (1978) 85 D.L.R. (3d) 161.

<sup>33</sup>Id., 181-182.

<sup>34</sup>Id., 171.

<sup>35</sup>Id., 173.

<sup>36</sup>Reference Re Section 94(2) of the Motor Vehicle Act (1983) 147 D.L.R. (3d) 539, 546.

<sup>37</sup>Id., 546.

<sup>38</sup>Supra, note 31, 495.

<sup>39</sup>Id., 496.

<sup>40</sup>Id., 496.

<sup>41</sup>Id., 497.

<sup>42</sup>Id., 497.

<sup>43</sup>Id., 499.

<sup>44</sup>Id., 501

<sup>45</sup>Id., 504.

<sup>46</sup>See pp. 83-86 of this thesis.

<sup>47</sup>Id., 508. Lamer J. quotes Barry Strayer who states that "Hansard gives no convincing proof of what the government intended".

<sup>48</sup>Id., 508.

<sup>49</sup>Id., 509.

<sup>50</sup>Id., 509.

<sup>51</sup>Id., 511.

<sup>52</sup>Id., 515.

<sup>53</sup>Id., 503.

<sup>54</sup>This is derived from the rule: actus non facit reum nisi mens sit rea.

<sup>55</sup>Supra, note 31, 513.

<sup>56</sup>Id., 517. Emphasis added.

<sup>57</sup>Id., 515.

<sup>58</sup>Id., 518.

<sup>59</sup>Id., 521.

<sup>60</sup>Id., 521.

<sup>61</sup>Id., 521.

<sup>62</sup>Id., 523.

<sup>63</sup>Id., 523.

<sup>64</sup>Id., 523.

<sup>65</sup>Id., 531.

<sup>66</sup>Id., 525.

<sup>67</sup>Id., 525.

<sup>68</sup>Id., 532.

<sup>69</sup>Id., 533.

<sup>70</sup>Id., 534.

<sup>71</sup>Id., 534.

<sup>72</sup>It is nonetheless still open to the legislatures to invoke s. 33.

<sup>73</sup>It might be noted that this understanding of s. 24(1) of the Charter could conceivably result in the denigration of the rights contained in s. 7. Because the standard for applying fundamental justice, according to Singh, will depend on which court the case is commenced in, the standard also depends on ss. 18 and 24 of the Federal Court Act--a document that is constitutionally unentrenched and that can be altered by a majority in Parliament. This is peculiar for a constitutionally enshrined document intended to guarantee important rights and freedoms.



## CHAPTER FIVE: SUMMARY AND CONCLUSION

In 1982, the Canadian Charter of Rights and Freedoms was entrenched as a part of the Canadian Constitution. As a result, Parliament and the provincial legislatures have given the courts a clear mandate to measure legislative and executive activity against the Charter guarantees. The purpose of this thesis has been to examine one provision of the Constitution Act, 1982, namely, "the principles of fundamental justice" in s. 7 of the Charter. The purpose has also been to determine what effect this provision will likely have on the policy-making role of the judiciary in matters of administrative law.

With this endeavour in mind, the first concern was to determine how the entrenchment of the Constitution Act of 1982 has altered the status and expanded the scope of judicial review in Canada. The judiciary has functioned as a separate branch of government, and its role in examining the vires of legislation preceded Confederation, especially under the Colonial Laws Validity Act, 1865. That Act was preserved by the conditions of the Constitution Act, 1867, and, even though the Statute of Westminster repealed the Colonial Laws Validity Act in 1931, the courts continued to review legislation on the basis of the vires doctrine. Canada was governed by the Constitution Act, 1867, in which ss. 91 and 92 provided for the legislative supremacy of Parliament and the provincial legislatures within their respective spheres of jurisdiction. However, within this division of power there was an increasing concern regarding

conflicts between jurisdictions, as well as disenchantment with the power of disallowance as an avenue for settling these conflicts. The creation of the Supreme Court of Canada is evidence that the institution of judicial review was accepted as an independent forum for the resolution of jurisdictional disputes.

Hence, the role of the Canadian judiciary in matters of constitutional law preceding 1982 was to guarantee that the laws passed by a legislative assembly accorded with its jurisdictional authority. In this effort, the judiciary was not precluded from examining the content of legislation. This was done in order to determine whether the act was intra vires or ultra vires as defined by the Constitution Act of 1867. The practice of judicial review under the recent passage of the Constitution Act, 1982 represents merely a continuation of the judiciary's role to enforce constitutional limitations. The difference in judicial review following the 1982 Act is that it elevates a broader array of values to a level of constitutional authority, and thereby extends the scope of judicial review. Entrenchment of the Charter exemplifies this expanded range of supervision. As a consequence, Parliament and the Legislatures are no longer governed by only the federal separation of powers in which they were free to legislate as they chose; they are bound also by the freedoms and rights of the Charter.

Yet what remains unclear is the status of judicial review following the Constitution Act, 1982: Is there a difference in the status of the judiciary following the 1982 Act that might encourage judicial assertiveness? While Professor Lederman has argued that the independence of the judiciary is inherited from the British Constitution and that this

implicitly guarantees that the Canadian judiciary is an independent branch of government, the institution of judicial review was nonetheless not constitutionally entrenched prior to 1982. In this regard, the Constitution Act, 1982 has clearly altered the status of judicial review in Canada. Sections 52(1) and 24(1) combine to constitutionally entrench the institution of judicial review.

Whether the Canadian Constitution entrenches the composition of the Supreme Court of Canada is, of course, another question. Although s. 41(d) of the Constitution Act of 1982 suggests that the Supreme Court is entrenched, the central document referring to that Court, namely the Supreme Court Act, is not a part of the Schedule of the Constitution. This would appear to leave Parliament free to invoke s. 101 of the Constitution Act of 1867 and legislate by ordinary statute in respect of the Supreme Court. In so doing, however, Parliament is still governed by the conditions of ss. 52(1) and 24(1) which constitutionally entrench the institution of judicial review. Those sections make it clear that judicial review is the machinery for upholding the Constitution. Accordingly, future alterations in the composition of the Supreme Court must not undermine judicial review as an independent, impartial and effective arbiter in constitutional disputes. Furthermore, there will certainly be political disincentives in weakening the independence of the judiciary and its power to uphold human rights. That the Supreme Court is, as Professor Smith stated, "still a creature of Parliament" fails to acknowledge the potential effects of ss. 52(1) and 24(1) as well as the political ramifications of weakening the institution most associated with

the enforcement of the constitutional limits--especially Charter guarantees.

Having distinguished between the nature of judicial review before 1982 and the changes in it after 1982, this thesis then turned to a consideration of corresponding changes in the realm of administrative law and the concept of due process. The principles of natural justice in Britain are derived from the procedural component of due process of law. The reason for a strictly procedural derivation is that parliamentary supremacy is the principal rule of law in Britain. Judicial review in such a constitutional setting is restricted therefore to interpreting and enforcing legislation in accordance with the intent of Parliament. When the intent of validly enacted legislation is clear, the British judiciary has no authority to question the content of legislation on the bases of procedural insufficiencies therein. Even in circumstances where a piece of legislation is silent and "the justice of the common law [could] supply the omission of the legislature", judicial alterations and revisions are still subject to supervision from Parliament. Hence, while the judiciary could examine the content of legislation, they are confined by the tradition of legislative sovereignty.

The practice of judicial review of administrative activity in Canada prior to 1982 is analogous to that of the British judiciary. Despite the existence of a written constitution, Parliament and the provincial legislatures were supreme in their respective spheres of jurisdiction. The tradition of judicial review of administrative action existing in Britain was therefore easily imported into Canada. Whether the phrase was the "principles of natural justice" or the "duty to be

fair", the judiciary was limited to the review of procedural improprieties. Moreover, if legislation was enacted in accordance with the provisions of the Constitution Act, 1867, the judiciary had not the power to examine the content of law to determine the appropriateness of express procedural provisions. Where legislation was silent, however, the Canadian judiciary did compensate for procedural insufficiencies by imposing the rules of natural justice.

With regard to the application of the procedural content of natural justice, two methods of entitlement were developed by the judiciary in the United Kingdom. The first evolved in the early 20th century and is referred to as the classification of function. This approach emerged as a reaction to the British judiciary's former commitment to upholding the right to private property in a laissez-faire political economy. In the midst of an expanding welfare and bureaucratic state, the judiciary abandoned its extensive enforcement of procedural requirements, leaving it largely for the administrative agencies to determine the appropriate procedures. However, in cases where administrative action could be categorized as either judicial or quasi-judicial, the judiciary required that the administrative body abide by the rules of natural justice. Consequently, if the administrative function or decision was not adversarial in nature, aside from the procedural safeguards established by an administrative body or by legislation, the individuals affected were excluded from remedial recourse for purported breaches of procedural justice. Conversely, if the administrative act or decision was characterized as judicial or quasi-judicial, there was the

prospect of over-judicializing the procedures for administrative adjudication. As Chief Justice Laskin noted, the classification of function tended to provide no "halfway house".

The second standard of entitlement for procedural justice is known as the "fairness" or the "duty to be fair" doctrine. This approach resulted partially from an effort to rectify the difficulties inherent in the classification of function. In the 1963 British case of Ridge v. Baldwin,<sup>1</sup> the House of Lords decided that the imposition of procedural requirements should be based on the consequences of administrative action on the individual's rights or interests. It was not until 1978 in Nicholson v. Haldimand-Norfolk Regional Police Commissioners<sup>2</sup> that the Canadian Supreme Court accepted the "fairness" doctrine. In that case, Laskin C.J. was critical of the classification of function, and repudiated any efforts to limit the application of the principles of natural justice to the classificatory approach. This critique was reinforced by Dickson J.'s decisions in Coopers and Lybrand (1978)<sup>3</sup> and Martineau v. Matisqui Disciplinary Board (1980).<sup>4</sup> While Dickson J. sent a clear message of his disenchantment with the classification of function, this approach is codified in s. 28 of the Federal Court Act and obliges its adoption. But, since s. 18 of the Federal Court Act affords a forum for administrative decisions not of a judicial or quasi-judicial nature, the Court decided that there is a duty to act fairly in the making of those decisions. Thus, procedural justice was not dependent solely upon the classification of function.

The "fairness" doctrine has also been associated with the "continuum" approach, and this approach invites the judiciary to balance

considerations of policy with considerations of rights. That is, in order to assess the appropriate extent of procedural requirements, the courts are expected to weigh the consequences of statutory power on individual rights with the policy objectives of administrative action. This necessitates the determination of the importance of policy objectives in relation to its effects on individuals. This also means that the judiciary may examine the content of legislation or administrative decisions so as to measure the inherent policy against its result on individual rights and freedoms. Although this does not authorize the judiciary to subvert the intent of legislation, it does place it in a position to impose procedural requirements where the law is silent or unclear.

The practice of judicial review prior to 1982 indicates that the courts were not precluded from examining the content of legislation in order to ascertain whether it was intra vires or ultra vires. Nor were they prevented from weighing considerations of policy inherent in the law with its effect on individual rights and interests, as the "fairness" doctrine prescribes. During this period of judicial review, however, the courts were circumscribed by the provisions or objectives of legislation. Where statutory provisions for administrative procedures were express or clear, the judiciary could not examine the legislation to determine the adequacy of those procedural provisions. A question which remains is: Has the Constitution Act, 1982 introduced any changes to judicial review of administrative action?

As noted earlier, the 1982 Act has indeed altered both the status and scope of judicial review. The institution of judicial review is constitutionally entrenched and its scope has expanded to encompass a broader range of values. One of the provisions of the Constitution Act of 1982, which is relevant to the principles of natural justice, is the "fundamental justice" clause in s. 7 of the Charter. The principles of fundamental justice have a striking resemblance to the rules of natural justice. By including fundamental justice within the Charter, Parliament and the provincial legislatures have raised the principles of natural justice to a constitutional level--thereby permitting the judiciary to measure express procedural provisions of a statute against s. 7 of the Charter.

Statements made by federal civil servants in the Special Joint Committee on the Constitution reveal that they meant to extend the principles of fundamental justice only to procedural matters. Those principles did not, in their view, embrace a substantive component--or what is known in the United States as substantive due process--which enables a court to question the policy or non-procedural aspects of the law. Yet the Supreme Court of Canada in Re B.C. Motor Vehicle Act (1985)<sup>5</sup> suggested that it is not bound by the testimony of the federal officials. Lamer J. stated that statements from the Special Joint Committee on the Constitution were unreliable and could concretize the provisions in the Charter. This would have the undesired effect of limiting the growth of the Charter and its flexible application to changing societal circumstances. Consequently, the Court was unwilling to restrict the ambit of fundamental justice on the basis of submissions made by the



Special Joint Committee.

If there was uncertainty as to whether the judiciary would strike down the content of validly enacted legislation on the grounds of procedural inadequacies, the case of Re Singh and Minister of Employment and Immigration (1985)<sup>6</sup> resolves this uncertainty. In that case, Wilson J. of the Supreme Court struck down legislation that violated the procedural requirements of fundamental justice. She did not, however, introduce new standards for determining the procedural extent of fundamental justice. For example, in cases before the Federal Court, Wilson J. indicated that the approach adopted will depend on which of the two Courts the proceedings are initiated in: the classification of function will apply to all cases before the Federal Court of Appeal and the "duty to be fair" doctrine will apply to all cases before the Trial Division of the Federal Court. What is noteworthy is that these approaches to applying the principles of natural justice have been given constitutional status through the "fundamental justice" clause in s. 7, and can be used to strike down legislation.

In the Motor Vehicle Act reference, the Supreme Court of Canada indicated that the principles of fundamental justice are to be found in the basic tenets of our legal and judicial system. And, although Lamer and Wilson JJ. claimed that the content of fundamental justice extends beyond procedural matters, they were not concerned with differentiating between the procedural and substantive components of fundamental justice because such a distinction would not exclude the Court from deciding on non-procedural matters. In their view, the issue that needs to be

examined is whether there has been a violation of the principles of fundamental justice.

With respect to s. 94(2) of the Motor Vehicle Act, Lamer J. decided that it was the combination of the minimum six days imprisonment with the absolute liability provision that necessarily violated the principles of fundamental justice. Exclusive reliance on either of those conditions--imprisonment or absolute liability--is insufficient for determining whether there has been a violation of fundamental justice. While imprisonment is a matter of substance and absolute liability a matter of procedure, the result of imprisonment is unjustifiable because the means for imposing the severe penalty offers the accused no opportunity to exculpate himself by proving that the actus reus was due to a reasonable mistake of fact. In short, it is not conceptually feasible to separate the substance from the procedure--each influences the other.

Despite the similarity in results, Wilson J.'s reasoning differed from that of Lamer J. In her view, the Court cannot assert unequivocally that the combination of imprisonment and absolute liability offend the principles of fundamental justice. She approaches the question from the perspective of objectives; that is, "what is the purpose of a penal system?" Even though she does not question the policy of ridding the roads of dangerous drivers, the penalty of imprisonment is considered excessive and unnecessary for reducing the incident of the offence. Accordingly, the co-existence of imprisonment and absolute liability is arbitrary inasmuch as s. 94(2) of the Motor Vehicle Act is inappropriate for and insufficiently connected to the intended policy objective. Wilson J.'s reasoning, therefore, goes beyond procedural standards because she

examines how the combination of absolute liability and punishment relates to the social goal of making highways safer.

One other difference between the two judgments that should be noted is the justices' understanding of the relationship of s. 1 to s. 7 of the Charter. According to Lamer J., s. 1 can be used to salvage a piece of legislation that violates s. 7. Thus, if a statute deprives a person of life, liberty and security of the person in breach of the principles of fundamental justice, the authority abridging those rights has the opportunity to demonstrate that the limitation is reasonable within a free and democratic society. Though the standard for satisfying the judiciary as to the reasonableness of a limitation is a high one, this nonetheless permits the judiciary to pass judgment on the arguments made in defence of legislation. Once the court has determined that there is a violation, it can still entertain arguments under s. 1 and accept or reject them. For example, the policy argument of administrative expediency was rejected both in the Motor Vehicle Act reference and in the Singh case on the grounds that it was unpersuasive in the face of Charter guarantees. In the reference, Lamer J. argued that administrative convenience would avail only in exceptional circumstances. To defend, on the basis of s. 1, legislation that violates s. 7 is therefore an arduous task.

Wilson J. in the Motor Vehicle Act reference went one step further in her understanding of s. 1 in relation to s. 7. Should a statute offend the substantive rights in s. 7, s. 1 can come to its rescue only if the limitation is in accordance with the principles of fundamental justice as well as being "reasonable". If not, then a statute that violates the principles of fundamental justice is inherently unreasonable. The

implications of this position are that the juridical standards that emerge under the "fundamental justice" fabric will override the considerations that emerge under the "reasonable limits" clause in s. 1. Administrative expediency cannot serve as an excuse even under extraordinary circumstances. The authority nevertheless retains the option of invoking s. 33 of the Charter to act notwithstanding s. 7.

It appears, then, that s. 7 of the Charter changes the nature of judicial review of administrative action by elevating to a constitutional level the rules of natural justice, particularly in cases where there has been a violation of life, liberty and security of the person. And ss. 52 and 24 of the Constitution Act, 1982 equip the courts with the power to do so. The principles of fundamental justice therefore encompass the procedural rules of natural justice, and, by virtue of its constitutional status, empowers the courts to strike down any legislation that expressly precludes or insufficiently provides for the appropriate procedural requirements; the classification of function and the "duty to be fair" doctrine receive constitutional sanction. The "fundamental justice" clause in s. 7, moreover, has added a new dimension to judicial review of administrative activity; it permits the courts to question the content of legislation not only on procedural grounds, but also on non-procedural or substantive grounds. Finally, in light of the judiciary's obligation to uphold the substantive rights of s. 7, where these rights are infringed in breach of fundamental justice, the excuse of administrative expediency will be of negligible effect under s. 1 of the Charter. In short, the policy-making role of the Canadian courts in the realm of administrative law has indeed expanded.

**Endnotes**

<sup>1</sup>Ridge v. Baldwin [1964] A.C. 40.

<sup>2</sup>Nicholson v. Haldimand-Norfolk Regional Police Commissioners  
[1979] 1 S.C.R. 311.

<sup>3</sup>Coopers and Lybrand (1978) 92 D.L.R. (3d) 1.

<sup>4</sup>Martineau v. Matisqui Disciplinary Board [1980] 1 S.C.R. 602.

<sup>5</sup>Re B.C. Motor Vehicle Act [1985] 2 S.C.R. 486.

<sup>6</sup>Re Singh and Minister of Employment and Immigration (1985) 17  
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