STATUTORY REFORM OF ADMINISTRATIVE LAW: THE CANADIAN EXPERIENCE

The preamble to the Canadian Constitution expresses Canada's desire to have a constitution "similar in principle to that of the United Kingdom". At the same time, Canada can never be unaware of the progress of affairs in its neighbour to the south, the United States of America. The pressures of these twin influences frequently lead to the flowering of a Canadian genius for compromise which dwarfs its British counterpart. Then the issue inevitably arises as to how far any particular compromise is satisfactory as a long-term solution. In the area under discussion, would Canada be better off in proceeding to a more wholesale reform of administrative law, such as that represented by the American *Administrative Procedure Act* of 1946, or would it have been better to have left development of the law to the judges, without such statutory interventions as have occurred? The following may provide food for thought.

Canada being a federal country, these statutory interventions are to be found at the hands both of the federal Parliament and of the legislatures of certain of the Provinces i.e. the member units of the Canadian federation. This essay will concentrate on the federal, and the largest of the Provincial, jurisdictions, that of Ontario.[1]

The principal Ontario statutes are the Statutory Powers Procedure Act, 1971[2] (S.P.P.A.), and the Judicial Review Procedure Act, 1971[3] (J.R.P.A.), supplemented by the Civil Rights Statute Laws Amendment Act, 1971.[4]

[1]Reference may also be made e.g. to the *Administrative Procedures Act* of the Province of Alberta (RSA 1980, c.A-2) and the *Judicial Review Procedure Act* of the Province of British Columbia (RSBC 1979, c.209).
[2]R.S.O. 1980, c. 484.
[3]R.S.O. 1980, c. 224.
[4]S.O. 1971, c. 50. The phrase "Civil Rights" does not have the same connotation,

Part I of the S.P.P.A. is entitled "Minimum Rules for Proceedings of Certain Tribunals". These are, in effect, an attempt to codify the rules of natural justice as regards the requirement to have a hearing i.e. rules relating to - notice of the hearing (s.6); public nature of the hearing (s.9); representation by counsel (s.10, 11); calling and cross-examination of witnesses (s.10, 13, 14); admissibility of evidence (s.15); judicial notice (s.16); giving of reasons for a decision (s.17); and the keeping of a record (s.20).

These rules apply to proceedings by a tribunal (as defined in s.1(1)(e), where -

(1) a power of decision is conferred upon it by statute, and
(2) a hearing is required
 (a) by that same statute, or
 (b) "otherwise by law" i.e. by another statute - or by common law.

An aggrieved person alleging that the rules of the S.P.P.A. have been breached in his case will first have to show that the decision affecting him is one which is a "statutory power of decision". Thereafter the remedies are provided by the J.R.P.A.

A "statutory power of decision" is defined in s.1(1)(d) as one "deciding or prescribing, (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or (ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence ...."

S.3(2) gives the types of proceedings to which the Act does not apply e.g. by an arbitrator under the Labour Relations Act.[5]

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as it does in the United States, of "Civil Liberties". It is to be construed in terms of s.92(13) of the *Constitution Act*, 1867 - "Property and Civil Rights", which "comprise primarily proprietary, contractual or tortious rights". (Hogg, *Constitutional Law of Canada* (2nd. Edn., 1985) 455). The statute referred to here, amended a large number of other statutes as regards procedural provisions, exclusion of the application of the S.P.P.A., requirements additional to those of the S.P.P.A., etc.

[5]Additional exemptions have been made from time to time in other statutes.

The provisions of the S.P.P.A. as to its applicability leave quite a measure of uncertainty. In the first place there may be doubt as to just what kind of a hearing is to be provided in particular contexts. The word "hearing" is itself not definitive as to whether a trial-type of procedure or something less rigorous is envisaged, and where the statute concerned uses some other terminology, such as "opportunity to make representations" or "consultation", the difficulty is compounded as to whether the rules of the S.P.P.A. are applicable or not.

Further difficulties are occasioned by the "or otherwise by law" requirement, where this involves the provisions of the common law. It may well be that, in England, the dichotomy between legislative/administrative functions on the one hand and judicial/quasi-judicial on the other has gone by the board since the decision in *Ridge* v *Baldwin*.[6] In Canada, however, despite the decision in *Nicholson* v *Haldimand - Norfolk Regional Board of Commissioners of Police*[7] being commonly viewed for many purposes as a Canadian *Ridge* v *Baldwin*, the older dichotomy has by no means totally disappeared from the judicial vocabulary. Consequently the common law rules as to when a hearing is required can still present elements of uncertainty in their interpretation for the purposes of the S.P.P.A.

We encounter also, something of a *circulus inextricabilis* in situations where the S.P.P.A. is not made applicable expressly. The S.P.P.A. may turn out to be saying not much more than - in situations where a tribunal is required to hold a hearing, then it is required to hold a hearing. We may still have to decide when a "hearing" in terms of the S.P.P.A. is appropriate. It may also be that if we do make the more modern, post - *Ridge* distinction between "fairness" and "natural justice", then "fairness" may not require compliance with all the natural justice requirements spelled out in the various sections of the S.P.P.A.

Further problems arise where the rules of the S.P.P.A. are expressly excluded from applying. This was so in the

[6] [1964] A.C. 40.
[7] [1979] 1 S.C.R. 311.

case of *Re Downing* and *Graydon,*[8] which involved the Ontario *Employment Standards Act,* 1974,[9] a statute dealing with such things as minimum wages, non-discrimination, etc. The three members of the Court of Appeal were unanimous in declaring,[10] -

> The exclusion of the *Statutory Powers Procedure Act,* 1971, does not by itself affect the employee's common law right to be heard. An express and unmistakable statement by the Legislature would be required before the exclusion of such a fundamental and deeply rooted concept as the right to be heard could be presumed. The *Statutory Powers Procedure Act,* 1971, merely provides rules for the conduct of hearings which are more rigid and formal than the general and more flexible prescriptions of the common law. There is nothing in the Act which expressly or by necessary implication excludes or is repugnant to the continued operation of the *audi alteram partem* rule in cases where the *Statutory Powers Procedure Act,* 1971, does not apply.

The language employed in this case also raises the issue of the significance of the word "minimum" in the title of Part I of the S.P.P.A.- "Minimum Rules for Proceedings of Certain Tribunals". Does this contemplate more rigorous standards being imposed in later statutes? Again, what is the ranking of the common law rules in relation to these 'minima'?

The objective of the *Judicial Review Procedure Act*[11] is conveniently summarised in the Report of the Royal Commission on an Inquiry into Civil Rights in Ontario (the McRuer Report), published in 1968, which led to the enactment of the S.P.P.A. and the J.R.P.A., -

> Instead of a multiplicity of forms of applications to compel, prohibit or set aside the exercise of statutory powers, there should be a single application to the court in which all the relief obtainable under any of the existing remedies would be available without the technical complexities, provoking much legalistic debate, which often obstruct, delay and sometimes defeat a decision on the merits.[12]

[8](1978) 92 D.L.R. (3d.) 355 (Ont. C.A.).
[9]S.O. 1974, c. 112.
[10]*Supra,* note 8, at 370-71.
[11]*Supra,* note 3.
[12]*McRuer Report,* No. 1, Vol. 1, p. 325.

Contemporaneously with the enactment of the new remedy, the Judicature Act was amended so as to establish a division of the High Court of Ontario called the Divisional Court, with a view to the development of a measure of specialisation by judges in administrative law matters.[13]

The J.R.P.A., by s.2(1)1, creates a new remedy called "Application for Judicial Review". This combines the former prerogative remedies of *mandamus*, prohibition and *certiorari* which are, in effect, with one or two exceptions relating principally to criminal law matters, abolished by s.7.

The abolition of the three older remedies is in the procedural sense only. The substantive law of judicial review remains unchanged. Thus the intent of the J.R.P.A. was described by Mr. Justice Lambert of the British Columbia Court of Appeal as follows,[14]

> That Act was not intended to modify the substantive law relating to judicial review of judicial and administrative action. It was intended, as its title proclaims, only to deal with procedure. It was designed to simplify the procedure for obtaining the same remedies as before, on the same grounds as before.

The discretion of the court to refuse to grant relief is preserved by s.2(5). Another basis for refusal of relief is contained in s.3. Where the sole ground for relief is a defect in form, or a technical irregularity, but the court finds no substantial miscarriage of justice has occurred, relief may be refused.

In some respects the reach of the J.R.P.A. is not as extensive as a casual reading might lead one to suppose.

The Act makes a distinction between a "statutory power" (defined in s.1(g)) and a "statutory power of decision" (defined in s.1(f)). The latter is identical with the definition of the same term contained in s.1(1)(d) of the S.P.P.A.[15] and in

[13]Now see the *Judicature Act*, R.S.O. 1980, c. 223, ss.7 and 46. Development of this specialisation has been sporadic, although since 1987 the Chief Justice of the High Court has been making a more determined effort to facilitate it.
[14]*Culhane* v. *A.G. of British Columbia* (1980) 108 D.L.R. (3d.) 648, 662-63 (B.C.C.A.). His Lordship was, of course, speaking as regards the J.R.P.A. of his own Province, but for purposes here, there is no material difference between the two statutes.
[15]q.v. *supra*.

both statutes means a statutory power that affects the legal rights or privileges of a person to receive a benefit or a licence. Thus a "statutory power of decision" is a narrower term than that of "statutory power".

S.2 requires that there be brought before the Divisional Court, -

(a) proceedings for *mandamus*, prohibition or *certiorari* (which, at common law, may involve non-governmental bodies which are not exercising a statutory power); and

(b) proceedings for a declaration or injunction relating to the exercise of a statutory power (which includes the making of regulations or other subordinate legislation).

Consequently, in the first place, the J.R.P.A. does not apply to all statutory powers of decision, but only to those that affect legal rights, and secondly, the benefit of its summary procedure are restricted to the public law uses of the remedies of declaration and injunction, since s.2(1)2 requires a "statutory power" to be in question before these remedies can be sought under the J.R.P.A.[16]

Thus, in *Re McGill and City of Brantford,*[17] the decision of a municipal council to close a road under the *Municipal Act* was held not to be a "statutory power of decision" affecting the legal rights of persons, (although it was held to be amenable to review as a "statutory power" under s.1(g) of the J.R.P.A.). Similarly the decision of a school board to close a school was, in *Re Robertson and Niagara South Board of Education*[18] held not subject to review as the right or privilege of the applicants to have their children attend a particular school is not a legal right or privilege. Professor J.M. Evans has commented on this case that, -

[16]The former prerogative orders of *mandamus,* prohibition and *certiorari* are, of course, applicable only to the discharge of public functions.
[17](1980) 111 D.L.R. (3d.) 405 (Ont. Div. Ct.).
[18](1973) 41 D.L.R. (3d.) 57 (Ont. Div. Ct.).

> It is ironical that just as the availability of certiorari on any ground became identified with the applicability of the rules of natural justice, so the Divisional Court appears here to limit its power to set aside a decision of a public authority by reference to a statutory term ... [I]t is implicit in the judgments ... that there is no room for the imposition of procedural duties to be derived from any more pervasive notion of a duty to act fairly.[19]

At common law, Canadian courts, until quite recently, gave narrow scope to the remedy of *certiorari*, maintaining the traditional requirements of a duty to act "judicially", and that the impact of the administrative decision involved had to be on the interests of individuals. The effect of s.2(2) of the J.R.P.A. is to extend the scope of judicial review slightly by empowering the court to set aside, for error of law on the face of the record, a decision made in the exercise of a statutory power of decision, even although the decision-making body might not have been characterised at common law as amenable to *certiorari* because of its non-judicial nature. In this connection we may also note that the definition of "statutory power of decision" contained in s.1(f) specifically comprehends "a decision deciding or prescribing ... (ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence ..."

S.2(3) of the J.R.P.A. deals with the "no evidence" issue - and has changed the scope of common law judicial review in Ontario. Decisions required to be made on a judicial basis may be quashed for no evidence, and the section does not limit the court's power to review, to what is apparent on the face of the record.

Formerly *R* v *Nat Bell Liquors Ltd*[20] was the principal authority for the view that a tribunal does not exceed (or 'lose') its jurisdiction simply by making totally unsupported findings of fact, and therefore is not reviewable on that ground by *certiorari*. In Ontario, however, we now have the case of *Re Keeprite Workers' Independent Union and Keeprite*

[19] J.M. Evans, *Judicial Review in Ontario - Some Problems of Pouring Old Wine into New Bottles*, (1977) 55 Can. Bar Rev. 148, 152, 154.
[20] [1922] 2 A.C. 128 (P.C.).

Products Ltd., where Mr. Justice Morden for the Court declared,[21] -

> "... I think that it now can be said, at least in this jurisdiction, that entire absence of evidence may properly be characterised as jurisdictional error in a tribunal. No doubt the cases have gone both ways on the issue and *Nat Bell* has had a checkered history. None the less there are valid logical and policy grounds for regarding absence of evidence as jurisdictional error in a judicial tribunal:"

Alternatively, the Court held that, without characterising the kind of error referred to in s.29(3) of the J.R.P.A. as either jurisdictional or non-jurisdictional, that section provided a statutory ground of judicial review, designed to overcome defects in the common law.

Finally we may note the reference in s.2(2) of the J.R.P.A. to "judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent that it is not limited or precluded by the Act conferring such power of decision". This, coupled with s.12(1), maintains the efficacy of privative clauses (although these are nowadays limited to a relatively small number of tribunals, principally in the field of labour law; statutory rights of appeal are increasingly common). The current judicial attitude in Ontario is revealed in the recent Court of Appeal judgment in *Re Ontario Public Service Employees Union (O.P.S.E.U.) and Forer*, where Mr. Justice Blair, for a unanimous court declared,[22]

> Where "finality" clauses appear in statutes the court has ... refrained from interference with tribunal decisions for which there is a "rational basis" or which are "not plainly unreasonable". In doing so it has cut across the older distinctions between law and jurisdiction ... The judicial attitude to tribunals has changed. Restraint has replaced intervention as judicial policy. Courts now recognise the legitimate role of administrative tribunals in the development and execution of economic, social and political policies ordained by the Legislature ... The new judicial attitude towards tribunals is sometimes described as

[21](1980) 114 D.L.R. (3d.) 162, 168 (Ont. C.A.).
[22](1985) 23 D.L.R. (4th.) 97, 109, 112, 114 (Ont. C.A.).

"curial deference" ... In this Province the new attitudes have achieved greater prominence because of the rationalisation and the institutionalisation of the procedure for judicial review resulting from the passage of the Judicial Review Procedure Act 1971 ...[23]

S.101 of the *Constitution Act, 1867*,[24] provides that, -

The Parliament of Canada may ... provide for the constitution ... of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

Under this authority there was enacted the *Supreme and Exchequer Courts Act, 1875*[25] which established these two courts.

The Exchequer Court initially had a very limited jurisdiction, principally in regard to cases involving federal revenues and the federal crown. This was gradually increased to include such matters as copyright, trademarks and patents, admiralty, tax and citizenship. The Exchequer Court did not, however, possess any general judicial review jurisdiction, serving as an appellate court from the decisions of only certain federal statutory agencies.

In 1971 the Exchequer Court was replaced by the Federal Court of Canada.[26] This new court inherited the judisdiction of the Exchequer Court and in addition was given power to review the decisions of federal agencies and officials. This is a wide jurisdiction, exercised virtually to the exclusion of the superior courts in the Provinces, which prior to 1971 had substantial jurisdiction.[27]

[23]Some commentators, however, consider that while the Ontario courts are applying "a consistent and coherent approach of judicial restraint", the Supreme Court of Canada, on the other hand, is demonstrating some "judicial schizophrenia" in its most recent decisions. See e.g. P.J.J. Cavalluzzo, *The Rise and Fall of Judicial Deference* in Finkelstein and Rogers, (eds.), *Recent Developments in Administrative Law*, (Toronto, Carswell, 1987) 213, 235.

[24]Formerly known as the *British North America Act*, 1867, but re-titled by s.53(2) of the *Constitution Act, 1982*, which is incorporated as Schedule B of the *Canada Act*, 1982, (U.K. Stats., 1982, c. 11) by s.1 thereof. The 1867 Act is now referenced as R.S.C. 1970, Appendix II, No. 5.

[25]S.C. 1875, c. 11. As regards the former, see now the Supreme Court Act, R.S.C. 1970, c. S-19.

[26]Federal Court Act, R.S.C. 1970, c. 10 (2nd. Supp.).

[27]See particularly ss.2(g), 18, 28 and 29.

S.4 of the *Federal Court Act* provides that the Court shall consist of two divisions - a Trial Division and an Appeal Division "which may be referred to as the Court of Appeal or Federal Court of Appeal". This latter sits in panels of three judges.

A rather odd aspect of the *Federal Court Act* is that judicial review jurisdiction is divided between the Trial Division and the Court of Appeal by virtue of ss.18 and 28. Ostensibly, s.18 gives the Trial Division "exclusive original jurisdiction" to grant *certiorari*, prohibition, *mandamus*, declaratory or injunctive relief against any federal tribunal. S.28 gives the Court of Appeal jurisdiction over any application "to hear and determine" i.e. 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;

The overlap of review jurisdiction is acknowledged in the statute by its provision in s.28(3) that where the Court of Appeal has jurisdiction, the jurisdiction of the Trial Division is displaced. Thus a matter that could otherwise fall within the scope of both sections must be dealt with by the Court of Appeal.

Accordingly, the Trial Division exercises its supervisory jurisdiction by granting the common law remedies on the traditional grounds. The supervisory jurisdiction of the Court of Appeal is, however, exercised through a new statutory remedy - the application to hear and determine and set aside - created by s.28, with its own grounds.

Determination of the boundary line between s.18 and s.28 has resulted in a large amount of case law. Litigants tend to seek resort to s.28 since the scope of review for error of law is wider under that section than under the common law remedies administered by the Trial Division under s.18.

The trial judges have tended to be traditional in their interpretation of these common law remedies, with but little expansion of their scope, admittedly due to the limiting influence of s.28. Ostensibily s.18 confers exclusive original *certiorari* jurisdiction on the Trial Division. However, a

prerequisite for the issue of *certiorari* has always been that the decision, in respect of which it is sought, be one made in the exercise of a judicial function. Now s.28(1) gives the Court of Appeal exclusive jurisdiction whenever an administrative tribunal is exercising a judicial or quasi-judicial function. As Professor Mullan has noted,[28] -

> It therefore appears that, despite the power conferred on the Trial Division by section 18 to issue certiorari, the Trial Division in fact has no jurisdiction to award this remedy. The terms of section 28 completely exclude what section 18 apparently granted.

It is true that in *Martineau* v *Matsqui Institution Disciplinary Board,*[29] the Supreme Court of Canada purported to say that the remedies provided for in s.18 are not frozen at their pre-1971 state, and will be expanded to cope with new dimensions in the substantive law of judicial review. However, the precise nature of these expanded limits is very uncertain.

It would appear that s.18 applies principally to "administrative" tribunals and officials rather than to "judicial" or "quasi-judicial". In view of the very wide scope of the definition of "federal board, commission or other tribunal" contained in s.2(g) of the Federal Court Act, which in effect includes "any exercise of power by anybody under federal statute",[30] the potential here is large.

The reasoning behind the inclusion of both s.18 and s.28 in the Act is partially revealed in the evidence given by the then Deputy Minister[31] of Justice to the House of Commons Standing Committee on Justice and Legal Affairs during the bill's passage through Parliament, -

[28]D.J. Mullan, *The Federal Court Act: A Misguided Attempt at Administrative Law Reform?* (1973) 23 University of Toronto Law Journal 14, 26.
[29][1980] 1 S.C.R. 602, 630, 629.
[30]Mullan, op.cit., supra note 28 at p. 28. See also id. at p. 29, citing *Padfield* v *Minister of Agriculture, Fisheries and Food,'* [1968] A.C. 997.
[31]In Canada, the term 'Deputy Minister' refers to the Civil Service Head of a Government Department.

> Clause 18 is based on the philosophy that we want to remove the jurisdiction in prerogative matters from the Superior Courts of the provinces and place them in our own federal Superior Court ... Having got them there, we think they are not entirely satisfactory. We feel that there should be improvements made on these remedies of *certiorari* and prohibition. That is what we are endeavouring to do in Clause 28.[32]

The net result is that the bulk of original jurisdiction on these issues, that over *certiorari* proceedings, goes to the Court of Appeal, while prohibition and *mandamus* applications go to the Trial Division - a 'back door' abolition and replacement by the simplified form of application for review, in an effort to deflect criticism of the change.

Mr. Justice Dickson (as he then was) of the Supreme Court of Canada, stated in *Minister of National Revenue* v *Coopers and Lybrand*,[33] that, -

> The convoluted language of s.28 of the *Federal Court Act* has presented many difficulties, as the cases attest, but it would seem clear that jurisdiction of the Federal Court of Appeal under that section depends upon an affirmative answer to each of four questions:
>
> (1) Is that which is under attack a "decision or order" in the relevant sense?
>
> (2) If so, does it fit outside the excluded class, i.e. is it "*other than* a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis"?
>
> (3) Was the decision or order made in the course of "proceedings"?
>
> (4) Was the person or body whose decision or order is challenged a "federal board, commission or other tribunal" as broadly defined in s.2 of the *Federal Court Act*?

[32]Minutes of Proceedings and Evidence of the Committee for 7 May 1970: 28th. Parliament, 2nd. Session, No. 26 at 25-26, quoted in D.J. Mullan, op.cit., *supra* note 28, at p. 27.
[33][1979] 1 S.C.R. 495, 499-500.

This case also confirms that the threshold for the application of s.28 still depends upon the distinction between "purely administrative" functions on the one hand and "judicial/quasi-judicial" functions on the other hand.[34]

The Court of Appeal's grounds of review are stated, in s.28(1), as being 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;
>
> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; and
>
> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Let us look at these in a little more detail.

S.28(1)(a) states the standard ground of jurisdictional error. Sub-sections (b) and (c) may then be viewed as broadening the scope of judicial review beyond the common law limits.

S.28(1)(b) specifically removes the common law remedy of *certiorari's* restriction of review to the content of the record. Similarly, the power under s.28(1)(c) to review for gross error of fact is not limited to what is apparent on the face of the record.[35]

The view can also be advanced, of course, that review of a decision on the ground of non-jurisdictional error appearing on the face of the record is no longer an exception to a system of review based on 'jurisdiction' but is, rather, an element in such a system.[36] In that case these provisions of the Federal Court Act may be considered to be not so much reformative as codificatory.

[34] Id. at 500-501. See also *Martineau v Matsqui Institution Disciplinary Board*, supra note 29, [1980] 1 S.C.R. at 629.
[35] Cf. *Re Keeprite Workers' Independent Union and Keeprite Products Ltd.*, supra note 21, in relation to s.2(3) of the Ontario J.R.P.A.
[36] See e.g. Mullan, op,cit., supra note 28 at 38-39, and its reference to the views of Professor H.W.R. Wade. See also Evans, Janisch, Mullan and Risk, (Eds.) *Administrative Law : Cases, Texts and Materials*, (2nd. Ed., 1984, Toronto, Emond Montgomery Publications Ltd.,) 461-62, 464, for the development of a hypothesis to explain the relationship between s.28(1)(b) and s.28(1)(c).

As regards the topic of privative clauses, s.28(1) of the *Federal Court Act* declares that it is to apply "Notwithstanding ... the provisions of any other Act ..." This has been held to nullify exclusionary clauses contained in pre-*Federal Court Act* statutes and subsequent re-enactments or consolidations thereof. The position as regards statutes enacted after the *Federal Court Act* is probably the same.[37] It may however be noted, as noted above in relation to the Ontario *Judicial Review Procedure Act*,[38] statutes creating major federal administrative tribunals now tend to grant wide-ranging rights of appeal, thus obviating the need for recourse to the prerogative writs.[39]

The *Constitution Act*, 1982[40] made a major change in the Canadian Constitution by adding to it a Charter of Rights and Freedoms. While this does not specifically set out to reform administrative law, nevertheless it has potential for substantial impact thereon. It is too early to measure the precise dimensions of this, but a general comment can be made.

Although not initially foreseen as such, the likely agent of change appears to be s.7 of the Charter, which provides, -

> 7. 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.

The view of the Federal Ministry of Justice prior to the coming into effect of the Charter was that "fundamental justice" simply means "natural justice", and does not go

[37]See *Minister of National Revenue* v *MacDonald*, [1977] 2 F.C. 189 (C.A.); *A.G. of Canada* v *Public Service Staff Relations Board*, [1977] 2 F.C. 663 (C.A.). For a contrary approach, recall s.2(2) and s.12(1) of the *Judicial Review Procedure Act* of Ontario, under which privative clauses continue to be effective.
[38]Supra. note 22 and related text.
[39]S.29 of the *Federal Court Act* gives pre-eminence to statutory appeals over the original judicial review authority of the Federal Court; a decision of a federal tribunal is not subject to judicial review to the extent that it may be appealed. The Federal Court of Appeal has recently held that where a statutory appeal is provided, prerogative relief under s.18 is unavailable in virtually all cases - *C.N.R.* v *Canadian Transport Commission* [1986] 3 F.C. 548 (C.A.).
[40]Supra note 24.

beyond the procedural requirements of fairness.[41] The phrase "due process of law" was deliberately not used in s.7, in the intention that the American concept of "substantive due process" (as contrasted with "procedural due process") should not be applicable in Canada.

However, the Supreme Court of Canada, in *Reference re s.94(2) of the Motor Vehicle Act (B.C.)*,[42] made it clear that the phrase "principles of fundamental justice" does have a substantive as well as a procedural content. As Mr. Justice Lamer put it,[43] -

> Thus, it seems to me that to replace "fundamental justice" with the term "natural justice" misses the mark entirely. It was, after all, clearly open to the legislator to use the term "natural justice", a known term of art, but such was not done. We must, as a general rule, be loath to exchange the terms actually used with terms so obviously avoided ... [A]s of the last few decades, this country has given a precise meaning to the words "natural justice" for the purpose of delineating the responsibility of adjudicators (in the wide sense of the word) in the field of administrative law.
>
> It is, in my view, that precise and somewhat narrow meaning that the legislator avoided, clearly indicating thereby a will to give greater content to the words "principles of fundamental justice," the limits of which were left for the courts to develop but within, of course, the acceptable sphere of judicial activity.

This development of the content of the term "principles of fundamental justice" may thus be said to be under way, but it is still too early to state with any precision whether greater procedural protection can now be obtained than heretofore under the common law, that is to say, whether s.7 of the Charter has in some way 'enhanced'[44] common law procedural entitlements, at any rate in certain situations where it might be held to be applicable.

[41]Minutes of Proceedings and Evidence of Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada for January 27, 1981, 32nd Parliament, 1st Session at pp. 46 : 32-46:43, quoted in Hogg, *op.cit., supra* note 4 at p. 747.
[42][1985] 2 S.C.R. 486.
[43]Id. at 550.
[44]For a discussion employing this term, see *Howard v Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution*, (1985) 19 D.L.R. (4th.) 502 (F.C.A.).

In the Malaysian Constitution, the provision most nearly parallelling s.7 of the Canadian Charter of Rights and Freedoms is, one supposes, Article 5(1) - "No person shall be deprived of his life or personal liberty save in accordance with law".

However, the judiciary of Malaysia have not been notably creative or activist in expanding the reach of this provision. Some hopes were raised in *Ong Ah Chuan* v *Public Prosecutor*,[45] when Lord Diplock, commenting on the identical wording of s.9(1) of the Constitution of Singapore declared,[46] -

> In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law" ... in their Lordships' view refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England ...

This was, however, a Privy Council decision and, of course, Malaysia abolished appeals to the Privy Council in 1983.

The more likely approach would appear to be that of Lord President Suffian, in cases such as *Government of Malaysia and Others* v *Loh Wai Kong*,[47] where, as regards s.5 as a whole, he noted, -

> It will be observed that these are all rights relating to the *person* or *body* of the individual ...[48]

[45] [1981] A.C. 648 (P.C.); 1 M.L.J. 64.
[46] [1981] A.C. at 670; 1 M.L.J. at 71.
[47] [1979] 2 M.L.J. 33.
[48] Id. at 35.

or earlier, in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri*[49] where he pointed out that, -

> [D]etention, in order to be lawful, must be in accordance with law, not as in India where it must be in accordance with *procedure* established by law.[50]

Thus, if the Supreme Court is unwilling to expand even procedural due process beyond the literal terms of s.5 of the Constitution, there can be little prospect of development of a concept of substantive due process.

Reform of administrative law, if it is to be undertaken within the foreseeable future, would thus appear to have to be at the hands of the legislature. Should the many political hurdles in the way of this ever be possible to overcome, it will be necessary to consider whether the limited reforms achieved in Canada are better than no change at all, or whether one should nail one's colours to the mast and seek the more wholesale reformation which the approach of the United States represents.

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[49] [1969] 2 M.L.J. 129.
[50] Id. at 150.