

## The Sovereignty of the Judiciary

Terence G. Ison



Volume 27, Number 3, 1986

URI: <https://id.erudit.org/iderudit/042761ar>

DOI: <https://doi.org/10.7202/042761ar>

[See table of contents](#)

Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)

1918-8218 (digital)

[Explore this journal](#)

Cite this article

Ison, T. G. (1986). The Sovereignty of the Judiciary. *Les Cahiers de droit*, 27(3), 503–541. <https://doi.org/10.7202/042761ar>

Article abstract

Cet article discute d'abord des problèmes que pose le contrôle judiciaire en général. Il explique pourquoi l'expansion de celui-ci ne peut se justifier pour les raisons habituellement invoquées à cet effet.

Depuis l'avènement de la Charte canadienne des droits, ces problèmes se sont accrus. Selon l'auteur, la Charte est une erreur : elle est source de gaspillage et elle menace l'intérêt public sans vraiment protéger les droits de la personne. En même temps, explique l'auteur, nous avons raté une occasion des plus propices d'utiliser les cours de justice de façon conforme à l'intérêt public.

# The Sovereignty of the Judiciary \*

---

Terence G. ISON \*\*

*Cet article discute d'abord des problèmes que pose le contrôle judiciaire en général. Il explique pourquoi l'expansion de celui-ci ne peut se justifier pour les raisons habituellement invoquées à cet effet.*

*Depuis l'avènement de la Charte canadienne des droits, ces problèmes se sont accrues. Selon l'auteur, la Charte est une erreur : elle est source de gaspillage et elle menace l'intérêt public sans vraiment protéger les droits de la personne. En même temps, explique l'auteur, nous avons raté une occasion des plus propices d'utiliser les cours de justice de façon conforme à l'intérêt public.*

---

	<i>Pages</i>
<b>Introduction</b> .....	504
<b>1. The problems with judicial review</b> .....	504
<b>2. Explanations for judicial review</b> .....	515
<b>3. The realities of power</b> .....	519
<b>4. The Charter of Rights</b> .....	523
<b>5. The need for extended use of the judicial process</b> .....	538
<b>Conclusion</b> .....	540

---

---

\* This article is a slightly modified version of one which was first published in the University of Adelaide Law Review, and which was the opening address given by the author at the conference of the Australasian Universities Law Schools Association held at Adelaide in 1985.

\*\* LL.D., Professor, Osgoode Hall Law School, York University.

## Introduction

My subject is systems of appeal and review in relation to public administration, and in particular the uses and limitations of courts.

Let me begin with the background context. A matter that must surely be of concern is the gulf, and possibly the widening gulf, between our political ideology and the realities of the political process. Our governments are self-proclaimed democracies, and yet the democratic component within them is subject to such enormous pressures that the key decisions in public policy seldom appear to be the output of any democratic choice.

The world is threatened with annihilation by weapons of genocidal magnitude; yet the perceived solution is more weapons of even greater genocidal magnitude. Despite the manifest insanity of the Star Wars program, we are being drawn inexorably into it, and no opinion among the electorate would be likely to make any difference.

Similarly with regard to pollution, the majority of the population has wanted tighter controls<sup>1</sup> yet the Great Lakes have become the toxic cesspools of North America just as the Baltic Sea has become the toxic cesspool of Europe, and even the peaks of the Rocky Mountains are now shrouded by air-borne pollution.

We have massive unemployment, largely the predictable result of advancing technology, and yet all political parties seem dedicated to the absurdity that the solution to unemployment is more jobs.

The theme that I want to develop is that the same irrational pressures that have produced these results have also threatened and constrained the democratic process in other ways, including the widespread expansion of judicial review<sup>2</sup>. In Canada, this has now been enhanced by the *Charter of Rights and Freedoms*<sup>3</sup>, which expands judicial review in relation to legislation and executive action.

### 1. The problems with judicial review

The main concern is that judicial review rests upon a misconception of the basic problems in public administration, and that it tends to aggravate

---

1. This is supported by various opinion polls. See e.g., *Reduce Canadian-Made Acid Rain — 86 Percent*, The Gallup Report, 19<sup>th</sup> December 1983.

2. As well as court decisions over-riding the privative clauses, judicial review has received an impetus from legislative changes. See e.g., *Judicial Review Procedure Act*, R.S.O. 1980, c. 224; *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484.

3. *Canada Act*, U.K. Statutes, 1982, c. 11, Part I, Schedule B.

rather than mitigate those problems. With regard to the regulatory agencies and tribunals, judicial review could make sense if they consisted of enthusiastic people wielding power and who were carried away with excessive zeal, pursuing public policy objectives regardless of the extent to which they trampled on private rights. That, however, is not the way it is. A conscientious public servant who faithfully strives to fulfil his mandate, perhaps by controlling pollution, can expect to face challenges or obstruction from budget committees, from legislative counsel, from officials of the Ministry of the Attorney-General, from the Auditor-General, from the media, possibly from the Ombudsman, from various vested interests, and perhaps from the courts. A public servant in an environmental protection agency who is more disposed to inertia and who engages in a program of minimal or useless activity may face some criticisms, but not usually from powerful sources, and he probably has a better prospect of a quiet life.

The main problem in public administration is not the excess or abuse of power; it is inertia and under-achievement through the under-use of power; the failure to engage in the conscientious pursuit of public policy objectives. By focussing on the control of excess or abuse, and failing to control under-achievement, we have promoted to new heights the old common law view that misfeasance could be condemned in damages while non-feasance was immune. Judicial review tends to enhance the problem of under-achievement by adding another opportunity for obstruction by those against whom public power ought to be exercised. If we are to create a remedy for the basic problems in public administration, it must be one that induces the proper exercise of power, not one which, for the most part, simply adds another veto.

Of course problems of excess and abuse of power exist. They are commonly found in the revenue departments and in those agencies that are intended to serve ordinary people, such as those administering social insurance and social security, and those that provide services to the elderly and the disabled. Yet even here, judicial review tends to aggravate rather than to correct the problems.

Unfortunately, the judicialization movement has also spilled over into legislation. Judicial review has been so elevated to the status of a grand panacea and supported by such powerful interests that elected governments no longer feel that they have any choice but to allow appeals or reviews of tribunal decisions by courts of general jurisdiction.

Examples can be seen in licensing systems, such as those relating to real estate agents, used car dealers, mortgage brokers, itinerant salesmen and

collection agencies. A classic Canadian case<sup>4</sup> on licensing involved an alleged abuse by a provincial Premier resulting in the non-renewal of a liquor licence which the court concluded ought to have been renewed.

The widespread problem with licensing, however, is not the refusal, revocation or non-renewal of licences. It is the failure to achieve the objectives of the licensing statute by granting and renewing licences as a standard routine without adequate systems of inspection or enquiry to generate possible suspensions or revocations. This widespread problem is commonly aggravated by legislative provisions for appeals against the refusal, revocation, suspension or non-renewal of a licence, but no appeal or comparable procedure when a licence is granted or renewed<sup>5</sup>. The influence of the judicial process on the licensing administrator then operates only one way: protecting private interests, but not protecting the public interests for which the licensing statute was passed in the first place. Similar examples can be found in relation to pollution control, and similar examples may exist in Australia<sup>6</sup>.

Because it commonly operates only one way, and against the pursuit of public policy objectives, judicialization can tend to induce timidity in public administration and can enhance regulatory capture. As one of my colleagues put it:

[...] the requirement of trial-type hearings and full-scale appeals may well have, from the point of view of a regulated industry, the desired effect of discouraging all but the most determined administrator by forcing him to focus his scarce resources on a relatively small number of cases so clear that they are likely to survive even judicial scrutiny. The public's interest in attaining regulatory objectives is, in the end, not likely to be served by appeals to ordinary law.<sup>7</sup>

The negative influence of the judicialization movement has not only spilled over into legislation; it has also spilled over into the legislative process, inducing a negative bias in the work of legislative drafters. For example, the regulations proposed by the line departments of government receive external scrutiny to ensure that they do not exceed the perceived authority of the enabling statutes or other constitutional constraints<sup>8</sup>; but there is no comparable provision for any external scrutiny to determine

4. *Roncarelli v. Duplessis*, [1959] S.C.R. 121. This case went to the court as a tort claim for damages.

5. See e.g., *Consumer Reporting Act*, S.N.S. 1973, c. 4, as amended, s. 7(3).

6. See e.g., *Second Annual Report of the Administrative Review Council*, 1978, Canberra, para. 48.

7. H.W. ARTHURS, *Without the Law*, University of Toronto Press, 1985, p. 200.

8. See e.g., *Second Report on the Standing Joint Committee of the Senate and of the House of Commons on Regulations and Other Statutory Instruments*, 1977, Ottawa, heading B, para. 10.

whether the regulations proposed by the line departments are sufficient to achieve the public policy objectives of the enabling legislation.

A key factor in the judicialization of public policy making is the dominance of the legal profession, and particularly the bench, in the control of value choices. The point was made by John Griffith in the English context.

The higher judiciary comprises some one hundred persons, but the truly effective number of policy-makers in the Divisional Court, the Court of Appeal, and the House of Lords is fewer than thirty. *These judges have, by their education and training and the pursuit of their profession as barristers, acquired a strikingly homogeneous collection of attitudes, beliefs and principles, which to them represent the public interest.*<sup>9</sup>

Even apart from socio-economic background, the career orientation of the judiciary militates against the pursuit of public policy objectives. They have generally been involved in individual cases for corporate or individual clients rather than in policy planning. Except for those whose careers have been in criminal law, few come from the public service. This may help to explain why the values primarily espoused in the court system appear to be private rights, and particularly private property rights. As a leading scholar has put it in relation to pollution control :

The basic purpose of private civil actions and judicial review actions is to vindicate private property rights that are infringed or threatened by some other person, corporation, or public authority.<sup>10</sup>

Not only does the judicial process tend to prefer concentrated corporate interests over more dissipated public interests, but it also tends to prefer short-term over long-term interests. For example, a pollution control official who takes aggressive action to protect an immediate downstream or downwind interest from demonstrable harm can expect more support from the legal system than one who takes the same action to prevent the same pollution source from damaging human health by adding to the continental or global aggregate of toxic contamination.

A related concern is the inequality of access to judicial review. "The wealthy litigant whose affairs are not disadvantaged by the need to resolve speedily the issue between him and his opponent has available the luxury of multiple opportunities to attempt the resolution of a dispute."<sup>11</sup> The delay,

9. J.A.G. GRIFFITH, *The Politics of the Judiciary*, Manchester University Press, 1977, p. 193.

10. A.R. LUCAS, "Legal Foundations for Public Participation in Environmental Decision-making", (1976) 16 *Natural Resources Journal* 73, p. 93.

11. D. PEARCE, "Judicial Review of Tribunal Decisions — The Need for Restraint", (1981) 12 *Federal Law Review* 167.

which is one factor causing the inequality of access, also produces inequality in the significance of the outcome. In Ontario, for example, it usually takes a year for an application for judicial review to be heard. This may not concern a corporate litigant if the transaction is small in relation to its total business ; but it can be disastrous for a small business person when the transaction in issue involves his total business, or for a pensioner when the issue involves his primary income.

Where an appeal or review lies to a court of general jurisdiction from a specialized tribunal, this can undermine the very purpose of establishing the tribunal. A specialized tribunal may have been established not only to depart from the adversary system but also to develop the expertise in the subject matter required for the intelligent development of policy. Once it is recognized that appellate adjudication is policy making<sup>12</sup>, it makes no sense to develop that expertise in a specialized tribunal and then have its decisions subject to appeal or review by a generalist tribunal, particularly if it is also more constrained in its procedures and resources.

In any event, intelligent policy making cannot be undertaken by a tribunal whose interventions in a system are only episodic, and even then, not of its own choice. Intelligent policy making, which is part of system development, often requires co-ordination with budgeting and executive action. Sometimes it also requires co-ordination with other agencies of government. Above all, it often requires long-term planning. It is this ongoing and co-ordinating responsibility, perception of consequences and awareness of interactions that makes the ordinary courts unsuitable as policy makers in public administration.

What is commonly involved in proceedings that are subject to judicial review is the interpretation of a statute and the development of a branch of public administration through a body of case law. This can only be done intelligently in the context of the universe that is affected by the system. If it is labour law, for example, the case law development must take place in the context of labour relations. The legal structure in other subject areas is much less significant. The crucial point is that statutory interpretation and case law development, if they are to be done intelligently, involve policy making. Thus if most decisions are made by a board, but some trickle through to courts of general jurisdiction, there are then two and sometimes more than two alternative and potentially rival sources of policy development.

---

12. This proposition is gaining recognition, even among the judges. See e.g., D.G. BLAIR, "The Charter and the Judges: A View from the Bench", (1983) 13 *Manitoba Law Journal* 445, p. 449.

Related to this, judicial review or appeal structures also tend to divert legal work from the front line departments of governments to the central crown offices, particularly the Ministries of the Attorneys-General. Taking labour relations again as the example, tribunal cases may be assigned to lawyers in the Ministry of Labour, but once a case goes to a court of general jurisdiction of judicial review, it may then be perceived as a matter of administrative law, and therefore to be conducted by a lawyer in the Ministry of the Attorney-General. The result is likely to be the reinforcement of private law concepts in public administration, and a reduction of focus on public policy objectives.

The propensity in judicial review to classify policy choices as questions of "law" can also tend to undermine consistency and co-ordination in the processes of government. To operate and develop a system intelligently usually requires consistency in the decision-making. To take an example familiar to me, suppose a workers' compensation statute is drafted to ensure that the taxi industry is included. Certain operators in the industry attempt some manipulations to avoid the coverage, but the board affirms that they are covered and consistently maintains that view. Taxi companies pay assessments for many years. Claims for workers in the industry are paid. Several pensions are being paid for permanent disability and some widows pensions are being paid. Then a particular taxi company retains a lawyer who thinks of a new way to argue against the coverage. The board rejects the argument, but on judicial review, the lawyer persuades the court to adopt his interpretation of the Act by referring to dictionary definitions that may make no sense in terms of the purposes of the legislation. The result could be chaotic, and it would elevate an abstract concept to a virtue for anyone to claim that the result was according to "law"<sup>13</sup>. Of course the damage might be repaired by amendment of the Act, but only at substantial cost. Moreover, transitory damage will have been done and the same thing could recur as the courts deal episodically with other topics.

Related to this, a conflict often arises between judges and others responsible for public administration with regard to categorical decision-making. Those responsible for the design of a legislative, regulatory and administrative structure must decide to what extent the statutory provisions should be applied to people or situations classified by pre-determined criteria, and to what extent the decisions should vary according to additional facts present in each case. In making these choices, the system designer must consider problems of administrative feasibility and aggregate cost as well as individual rights.

13. Fortunately, the courts have shown some consciousness of this problem and have shown considerable restraint with regard to workers' compensation. They have, however, not shown the same restraint with regard to labour relations.



This breadth of vision may induce a perceived need for categorical decision-making that is not appreciated subsequently by a judge of general jurisdiction, particularly if he has detailed evidence relating to sympathetic circumstances in the particular case. The result may be a temptation to produce a decision which cannot and probably should not be applied in other like cases, and hence which is incompatible with equality before the law.

Another major problem with judicial review is the tendency to coerce the adversary system on other adjudicating tribunals. For a variety of reasons, a legislature may create a tribunal to adjudicate by an inquisitorial rather than an adversarial process, or to adjudicate in some other way. The government may want to avoid the cost of professional advocacy; it may want to upgrade the quality of investigation by combining that role with adjudication; it may wish to ensure that public policy objectives are not sacrificed to private interests; it may wish to upgrade the sensitivity of adjudication by including field-work in the process; or it may wish to ensure that adjudication is part of an *on-going relationship*. Whatever the reasons, judicial review can operate as a pressure against the legislative choice in favour of an inquisitorial or other system.

Again, a reason for establishing a tribunal in the first place is commonly to permit the development of a structure and a procedure that are suited to the particular subject matter and that differ from the structures and procedures of courts and of other tribunals. Judicial review has a homogenizing influence that tends to defeat that objective. Judicial review does not require all tribunals to conduct their proceedings on an adversary model, but they are safer if they do.

Regardless of the outcome of any proceedings, adherence to the adversary model by a tribunal tends to receive approbation in the courts. For example, where the same person is responsible for initiating and investigating as well as for deciding, this tends to be perceived in the courts as well as in the legal profession as a lower quality of adjudication. Thus in one recent case, the judge of a court labelled "superior" concluded that because an adjudicating tribunal did not always follow the adversary system but sometimes initiated inquiries on its own, its impartiality "may be open to some question"<sup>14</sup>. A tribunal established to proceed on an inquisitorial or other model may have to struggle against the tide if the integrity of that system is to survive the onslaught that it may receive from a legal profession dedicated to the adversarial process.

---

14. Per Hinds J. in *Levy et al. v. Friedmann*, (1985) Supreme Court of British Columbia, unreported, Vancouver Registry No. A 841608, p. 17.

Even when a tribunal is wrong and a court has identified the error on judicial review, the dominating influence of the adversary system in judicial review can still lead to a wrong solution. An example familiar to me is a workers' compensation case in which the board, pursuant to its usual policy, had refused to disclose to a claimant the medical reports on file and which it was using in its adjudication. On judicial review, the court decided that the reports should be shown to the claimant<sup>15</sup>. Of course that decision was right as far as it goes; but it did not address the basic problems with the board policy and for that reason did not prescribe the appropriate solution. The decision only required medical reports to be disclosed to a claimant when there is a conflict requiring adjudication, and even then only at the appeal stage. There was no discussion in the court decision of whether medical reports ought to be disclosed to claimants at any time as a matter of basic human rights, or to facilitate patient choices in medical care, or for other purposes relating to their legal or political rights. When the court decision reached the board it was, predictably, interpreted as requiring that in the event of a medical issue arising on an appeal, the medical reports relating to a disabled worker must be disclosed to the employer as well as to the claimant<sup>16</sup>. Thus disclosure of personal medical information about a worker to his employer came about as an automatic response to the doctrinal and ideological demands of the adversary system without any assessment of the harm that might be done through such disclosure, and without any apparent value judgment on the measure of that harm compared with the benefit of adherence to the adversary model.

The emphasis on the "hearing", which is a normal part of the adversary system, is sometimes inappropriate for tribunals where adjudication is part of a continuing process. For example, the payment of benefits to a compensation claimant and the provision of rehabilitation services may involve co-ordinated decisions made over several months or sometimes years. Similarly, the resolution of a pollution problem may involve integrated decisions made over a significant period of time. The same can be said of the regulation of telecommunications and of other industries where heavy investment depends upon tribunal decisions. Justice, efficiency, and consistency as well as the achievement of public policy objectives can all be threatened if a tribunal, when adjudicating on a particular issue, is expected to confine itself to the evidence adduced at a hearing for the decision only of that case or issue.

In some subject areas, such as social insurance, the concepts inherent in the adversary system may be inconsistent with the statutory structure that

---

15. *Re Napoli and Workers' Compensation Board*, (1982) 126 D.L.R. (3d) 179.

16. *Decision No. 338*, (1981) 5 Workers' Compensation Reporter 109.

was established. For example, if a claimant appeals from an initial decision to a tribunal, there is no general requirement for a "respondent", but the courts impose that requirement on judicial review. There may be no-one to fill that role except the social insurance agency itself, but to cast the agency in that role can be inconsistent with the demeanour and attitude that the agency was intended to adopt in the first place as an adjudicating tribunal in relation to claimants.

Part of the blame for this dominance of the adversary system in legal process must surely rest on the faculties of law. Traditionally, the emphasis in the curriculum has been on private law subjects, and the contemporary pressure is to enhance the traditional view. The adversary system is commonly treated as a universal good, a model of decision-making for all subject areas and all adjudicating institutions. For the most part, graduating law students and those called to the bar are untrained in any other adjudicative model.

Central to much of this subject area is the lawyer's perception of virtue in the separation of powers; and yet many problems, including the control of toxic waste, will not be solved without a blending of investigation, regulation making, executive action and adjudication. It is hopeless to regulate and then leave the imposition of sanctions to the ordinary criminal courts<sup>17</sup>.

Like other legal concepts, the separation of powers can be useful and positive in result if used discriminately to achieve articulated goals and with advertence to the consequences of its use. When broadened to a principle of universal application, however, it is bound to be destructive. Among other things, the resulting dispersal of responsibility can tend to facilitate useless political decisions involving hypocrisy and resulting in waste. In particular, it enables governments to pass regulatory legislation with the appearance of doing something to resolve a problem while the predictable result is no significant achievement<sup>18</sup>.

The separation of powers is related to other propensities in government to avoid a concentration of authority and to prefer decision-making processes that involve co-ordination among different people, departments and agencies. Yet as the chief executive of any major corporation could tell us, that is not the way to achieve efficiency. The history of personal injury compensation in Canada, New Zealand, Australia, and the U.K. illustrates

---

17. See e.g., T.G. ISON, "The Uses and Limitations of Sanctions in Industrial Health and Safety", *Item No. 158*, (1975) 2 *Workers' Compensation Reporter* 203.

18. Perhaps the classic example is legislation in Canada and perhaps other commonwealth countries relating to monopolies, mergers, and combinations in restraint of trade.

the point. Great progress has been made when one key figure on the government side with the imagination and the initiative has also received the power and authority to design and implement a major reform while the vested interests that have to be overcome have lacked a strategic command. Conversely, significant reform in this subject area has not been achieved when responsibility on the government side has been shared among different people, departments and agencies.

The multiplicity of proceedings generated by judicial review, and by structures created in response to the risk of judicial review, can require co-ordination by people in different departments and agencies. This can extend the number and range of people from whom an affirmative decision is required for any effective action, and of course this dispersal of veto powers among government officials can increase the lobbying opportunities for vested interests. Moreover, the multiplicity of proceedings can multiply the total of decision-making costs.

In many systems of public administration, consistency and integrity can be retained when the chairman of the final appeal tribunal also has executive authority in relation to primary adjudication. This can help to ensure that decisions made at the final level of appeal are followed in primary adjudication. Conversely, where the final appeal lies to a court of general jurisdiction, its decisions might be perceived by those operating the system as aberrational. Hence to prevent system deterioration or for other reasons, the agency may implement the decision in the particular case while carrying on as before in every other case<sup>19</sup>. When that happens, consistency and equality before the law have been sacrificed, and the system of appeal or review by a court of general jurisdiction is only a way of greasing a few squeaky wheels.

The negative influence of judicial review can also be seen in the general legislation under which many tribunals must function. For example, in Ontario the *Statutory Powers Procedure Act*<sup>20</sup> provides that a tribunal must, upon request, give reasons for its decision. The apparent purpose is to facilitate judicial review. To require reasons for decision only upon request ignores and detracts from the primary purpose of giving reasons, i.e., to ensure that reasons are articulated in the mind of the decision-maker *before* the decision is made, thereby enhancing the prospect that decisions will be made for reasons that can withstand reflection, at least in the mind of the decision-maker.

---

19. An example of this is *Re Proc and Minister of Community and Social Services*, (1974) 53 D.L.R. (3d) 512, dealing with the "man in the house rule" in welfare administration. (For an Australian case that might be similar see *Re Waterford and Director General of Social Services*, (1980) 3 Administrative Law Decisions 63.

20. R.S.O. 1980, c. 484, s. 17.

In other ways too, judicial review is detrimental to the public interest. For example, it is common for a statute establishing a new area of law to be cast in the style of skeleton legislation. The expectation is that the administering and adjudicating tribunal will recognize the statute as a skeleton structure, and that as the tribunal gains experience it will add the flesh and blood to produce a workable system<sup>21</sup>. That is the approach that an intelligent court will normally take when a statute establishes the court as the adjudicating tribunal. Yet when courts are reviewing the decisions of tribunals that they have labelled "inferior", they take a more restrictive approach, reading the statute not as a skeleton structure to be fleshed out by the tribunal, but as a perimeter confining the jurisdiction of the tribunal.

Another major concern in relation to tribunals that have a pyramid structure is that judicial review can tend to undermine rather than enhance the quality of primary adjudication. For example in social insurance and social security systems, there is often political pressure to constrain the aggregate payout. This pressure can filter through the system to emerge in irresponsible, curt and negative decisions reached without adequate inquiry. Those who complain and persist, and their legal or political representatives, can be placated by having a proper inquiry conducted in the appeal system. In this way, the administering agency can accommodate the political pressures both ways. Because judicial review only comes into play, if at all, after the final level of appeal within the system, it tends to entrench rather than dismantle that practice, and hence tends to increase, rather than reduce, the overall incidence of injustice.

Judicial review, and particularly the assault on privative clauses, has probably had a negative influence on primary adjudication in another way too. I think, for example, of the decisions of welfare administrators, pensions adjudicators, and tax officials. The courts have labelled these decisions as "administrative", and that characterization has generally been accepted in the public service. Public expectations as well as expectations within the public service would surely be different if the decisions made at the primary level of adjudication were perceived as "judicial". That term, however, is reserved for decisions made by those in more exalted positions. Thus judicial review has tended to discourage, rather than encourage, the development of a judicial posture at the level of adjudication at which it could have the greatest utility.

Judicial review also encourages the perception of a tribunal, or the upper echelon of a tribunal, as the lower level of a judicial hierarchy. This can be a negative influence on the hiring of tribunal members. For example,

---

21. See e.g., *Decision No. 134*, (1975) 2 *Workers' Compensation Reporter* 137, p. 138.

it may be important to the efficacy of a statutory system that a board chairman should have a mixture of executive, judicial and legislative roles, which would probably include policy planning, co-ordination and implementation. The demands of that position may require a person of an intellectual calibre higher than that normally found among judicial appointments; but it surely makes no sense to have appeals from a higher to a lesser intellect, particularly when the former also has the expertise in relation to the subject matter. Thus judicial review may well be a downward influence on the calibre of people willing to accept appointments to a tribunal which the courts have been allowed to label and treat as "inferior".

A final concern is the significance of judicial review in the distribution of political power. When governments established a variety of adjudicating tribunals they decided, among other things, that judicial power should be more broadly distributed, that adjudicative decision-making should be more pluralistic. The goals, values and methods to be brought to bear in these adjudicative processes were to be drawn from broader sections of the community and not confined to those of a small legal elite. Judicial review tends to defeat that democratizing move by establishing a pyramid structure with judges in courts of general jurisdiction at the apex.

## 2. Explanations for judicial review

The expansion of judicial review cannot be explained or justified by the reasons given in the advocacy in support of it. At least since Lord Hewart wrote *The New Despotism*<sup>22</sup>, much of that advocacy has consisted of emotional rhetoric, claiming that, for example, "[...] the power of judicial review constitutes the last bulwark of the citizen against the arbitrary decisions of the state"<sup>23</sup>. Such rhetoric might pass muster on ceremonial occasions or in after-dinner speeches, but it cannot withstand serious reflection in the light of day.

The main problem with such claims is that they misrepresent the distribution of power in society. Such claims have created a conventional wisdom in relation to judicial review that bureaucrats wield power, and that they seek to expand that power. The reality is that power rests predominantly outside the public service, and predominantly in the corporate sector. Judicial review does little to restrain the abuse of that power. Indeed, it ranks among the negative influences that restrain government departments and tribunals from controlling the exercise of corporate power.

---

22. New York, Cosmopolitan Book Corp., 1929.

23. J. DESCHENES, *The Sword and The Scales*, Toronto, Butterworths, 1979, p. 29.

In any political society, one would expect that if allegations of excessive power are being made by people in establishment institutions, those allegations would be levied not against those who wield the power that controls that society, but against those whose accrual of some degree of power is perceived as threatening. It may be partly for this reason that many judges have seen the civil service and tribunals as a threat to be controlled. Thus judicial cries for the judicial protection of the citizen against the state may be no more than special pleading for the power and privilege of judicial law-making and its supremacy over the democratic process. The decisions of legislatures to confer upon tribunals a range of remedies and sanctions that were not bestowed upon the courts may have been another factor contributing to jurisdictional jealousy.

Much of the enthusiasm for judicial review has rested upon a respect for the "rule of law", and yet that concept has surely been undermined more than it has been enhanced by judicial review. It has been undermined primarily by being narrowed. "Law" has been defined as "ordinary law", which has been defined as the law created or applied by courts of general jurisdiction<sup>24</sup>. Thus instead of being perceived as applying to all tribunals and departments of government, the "rule of law" was defined in a way that would justify a judicial power grab. The resulting judicial message to tribunals and departmental decision-makers is that the "rule of law" is not relevant to their own law-making responsibilities. It is hardly surprising that, despite decades of judicial review, many public officials, including tribunal members, perceive of the statutes which have created their tribunals or departments and which have conferred their powers as a form of decorative literature rather than as a body of law to be implemented.

The assertion that only courts can determine "law" is a notion born of wizardry and power politics, not of any rational analysis of public need, or of any choice made in the democratic process. It reflects an attempted ideological rationalization for judicial review that is oriented in private law, not in public law. It perceives of a legal system that is an authoritarian pyramid structure with the appellate courts as the apex. A more democratic perception of the nature of law might well see legislatures as the apex with courts and other adjudicating tribunals functioning in parallel with each other, exercising the authority that the legislature has delegated to them, and acting in relationships of superiority to each other only when the legislature has so determined.

---

24. For example, this theme runs through *The New Despotism*, *supra*, note 22.

An alternative assertion is that judicial review is needed to prevent tribunals from abusing their powers or otherwise behaving in irresponsible ways. One difficulty with that assertion is that the remedy is unrelated to the scope of the problem. The neglect of power and the failure to act are seldom controlled by judicial review, and where the abuse of power exists, it may be systematic. Hence it may require a system-oriented response and one that does not depend upon private action for its initiation. Moreover, the history of administrative law has probably seen more abuse of power by the judiciary than by the tribunals. Indeed, the ultimate affront to the democratic process is surely the judicial decisions that have over-ridden or ignored the privative clauses. With judicial review, the risk of arbitrary or irresponsible conduct on the part of those who are more or less answerable to parliament is replaced by the risk of arbitrary or irresponsible conduct on the part of those who are virtually immune from any form of democratic scrutiny.

The expansion of judicial review can only be explained by looking beyond the ostensible reasons. One factor has been the power and influence of the legal profession, promoting a reverence for courts as decision-making institutions. One of my colleagues has described this influence as “[...] largely stimulated by self-interest and rooted in an ideology of self-importance”<sup>25</sup>. While that unkind phrase may be harsh, there is no doubt that the legal profession has tended to elevate courts of general jurisdiction and to disparage other tribunals, though the profession has been more divided and more accepting of a tribunal if it is one in relation to which a specialist bar has developed.

Another factor supporting judicial review has been that the source material for the literature on the subject creates an over-estimate of its achievements. Part of the blame lies with the case method of legal education and with the production of textbooks by using the law reports as primary source material. The cases most commonly used in legal education and legal literature are not representative. They include a disproportionate number in which the decision of a tribunal, minister or department was disturbed by the court on review. Nor are they written by an impartial observer. For example, one would expect the interaction between a court and a tribunal to be described differently if the reported account had been written by a tribunal member. Perhaps most important, the law reports tell us little or nothing about the real impact of judicial review. Commonly they do not include even the end result in the particular case.

---

25. Voir *supra*, note 7, p. 164.



In some subject areas, the decisions on judicial review have been counter-productive partly because the value orientation of the judiciary has been different from that of the tribunal and partly because the intellectual quality of the court decisions has been inferior to those of the tribunal. An example is the decisions relating to the Labour Relations Board in Ontario, and in some other provinces.

There are other subject areas in which the intellectual quality of the court decisions has commonly exceeded that of the tribunal decisions, but even in those subject areas, the overall impact of judicial review is still probably negative. For example, in cases where the decision of a workers' compensation board has been disturbed by a court on appeal or review, it is my impression that for the most part, the board was obviously wrong and the court obviously right. Part of the explanation is that in workers' compensation, as in other systems of social insurance and social security, the incidence of political power in the legislative process differs from what it is in subsequent administration and adjudication. The result is that the administering and adjudicating department or tribunal is under constant pressure not to fulfil the terms of the Act. Judicial review can serve a purpose here, and indeed, a few examples can be found to support the assertion that judicial review operates to protect the citizen against bureaucracy. Despite this assessment, I would see judicial review as counter-productive even in this subject area, and for these reasons.

1. The disturbance of a board decision by a court does not always indicate the result in the case. Often the court decides simply that the board reached its conclusion by the wrong criteria. It may then be open to the board to reach the same conclusion by other criteria; and if it does, the results may well have included a substantial waste of public and private funds, additional frustration for the claimant, and a delay in rehabilitation (sometimes with permanent damage to rehabilitation prospects).
2. For every case in which a court has disturbed a board decision, there were probably twenty other applications for judicial review in which it declined to do so. Those court decisions will have taken months or years, sometimes with damaging delays in the commencement of rehabilitation. Moreover, the protraction of a litigious atmosphere and the consequential increases in the number of professionals interacting with the claimant can be causes of therapeutic harm<sup>26</sup>.

---

26. See e.g., T.G. ISON, "The Therapeutic Significance of Compensation Structures", forthcoming in the *University of Toronto Law Journal*.

Also substantial amounts of private and public funds will have been spent on an unproductive process.

3. For each case in which a court has disturbed a board decision, there were probably a hundred or more other board decisions that were just as wrong, but which were not corrected because of the variety of factors that can deter or divert a claimant from seeking judicial review. If there is to be a system of outside intervention to prevent injustice by a workers' compensation board, it should not be a process that involves damaging delays, and which even at its best only provides unequal justice by greasing a few squeaky wheels. Any outside intervention should be by way of systematic supervision that includes spot checking on the primary level of adjudication to ensure consistency and to ensure that the response to systematic injustice is a systematic remedy.

Similar concerns arise in relation to social security. The decision of a particular case on judicial review may result in a welfare recipient receiving the benefits to which she was entitled, but what is the aggregate effect?

The appeal to ordinary law does not add a penny to the total welfare budget, but it may divert some part of that limited budget from the benefits account to administration and litigation.<sup>27</sup>

### 3. The realities of power

Underlying the widespread expansion of judicial review has been a mythology that misrepresents the incidence and use of political power. The target has been the public servant, "the departmental despot" whose unbridled power requires that his encroachments upon our human rights and civil liberties must be constrained by judicial review.

The reality, of course, is that few public servants ever rise above the mid-range in the power structure. The power of some public servants is significant in relation to the under-privileged but is still slight in relation to those who really wield power.

To a large extent, power lies in the hands of those who control a few multi-national conglomerate oligopolies. This corporate power in relation to the political process and public administration is assured by the scale of modern production, finance, and marketing, creating as it does an inevitable

---

27. Voir *supra*, note 7, p. 200.

coincidence between economic and political power. This corporate power is nurtured and exercised through the financial and other support of political parties, professional peer group affiliations and job interchanges, the control of much economic information in the corporate sector, the continuous monitoring of government action, control of the media through ownership and advertising, the establishment of satellite "research" institutions, the control of boards of governors of public institutions (including universities), and other social, recreational and residential connections that contribute to the dynamics of elite accommodation<sup>28</sup>.

A significant incident of the power is the threat to withdraw, or not to provide, something that only the corporate world is portrayed as able to furnish. For example, proposals for government action are supported or resisted by reference to the need to attract foreign capital, or to retain domestic capital.

[...] business and its representatives are part of a high level, interactive business-government-civil service network that is not duplicated in the same way for any other interest group in society.<sup>29</sup>

Even at the high points of public disapproval of corporate conduct, the political clout of business has always kept really threatening intervention outside the realm of practical politics<sup>30</sup>.

Perhaps what is most crucial is not so much the power to control the outcome of decisions as the power to determine the agenda; the power to determine what issues are debateable. "Definition of the alternatives is the choice of conflicts, and the choice of conflicts allocates power"<sup>31</sup>. For this reason, the incidence of political power cannot be measured by counting the winners and losers in the outcomes of public controversies.

Influence on governmental decisions is only a part, and perhaps the lesser part, of corporate power. Even more important is the power of independent action.

[...] the largest corporations [...] are political systems that exercise power within spheres that extend far beyond their ostensible functions of efficient producers of goods and providers of services. Notwithstanding the rise of manifold regulation and the alleged play of pluralist, countervailing forces, the

---

28. See e.g., R. PRESTHUS, *Elite Accommodation in Canadian Politics*, Cambridge U.P., 1973.

29. S. M. BECK, *Corporate Power and Public Policy*, Lecture delivered at Osgoode Hall Law School, York University, Toronto, April 1985, p. 35.

30. E. S. HERMAN, *Corporate Control, Corporate Power*, Cambridge U.P., 1981, p. 296.

31. E. E. SCHATTSCHNEIDER, *The Semi-Sovereign People*, Holt, Rinehart, 1960, p. 68.

large corporation wields power of a governmental kind that commands, directs and influences large segments of society.<sup>32</sup>

and

[...] those citizens attempting, individually or collectively, to protect themselves from the impacts of corporate policy on their life and health are consistently forced to play against a stacked deck.<sup>33</sup>

The power is exercised too by the infiltration of other organizations. Even in faculties of law, for example, we have seen the offer to law faculty members of free indoctrination programs in attractive resort areas aimed at resurrecting 19<sup>th</sup> century market theory under the guise of “law and economics”. When commercial activity is clearly operating against the public interest, this is labelled as “market failure”, as if it were some exceptional and unexpected deviation from the blissful state that should result naturally from unrestricted corporate activity.

The multi-national conglomerates, with satellites of professional firms in support roles, constitute gigantic organizations. Organization is (among other things) the mobilization of bias,<sup>34</sup> and massive organization is the mobilization of bias on a massive scale.

Of course corporate interests coincide to a large extent with public interests. Even where they conflict, examples can be found of a corporation compromising its own interests to accommodate public policy objectives. Also of course multi-national conglomerates often play the role of “good corporate citizens” in other ways, particularly by charitable contributions and by patronage of the arts. The hard reality remains, however, that there is to a large extent a structural, natural and inevitable conflict between corporate goals and the public interest. This conflict emerges in relation to such matters as pollution, occupational health, subsidies from tax-payers money to corporations, and other ways of externalizing cost. Perhaps above all, the conflict relates to the definition of the gross national product.

It is surely this power structure that explains why the Great Lakes have become the toxic cesspools of North America, why deregulation and reduced enforcement are perceived as progress in relation to occupational health, why the solution to unemployment is perceived as more jobs, and why the solution to the arms race is perceived to lie in more genocidal weapons. It is surely this power structure that explains too why species of animals that have

---

32. *Supra*, note 29, p. 3.

33. T. F. SCHRECKER, *Political Economy of Environmental Hazards*, Law Reform Commission of Canada, 1984, p. 78.

34. *Supra*, note 31, p. 71.

inhabited the earth for millions of years are being extinguished by corporate activity, why buildings that have stood as monuments for centuries are being destroyed by acid rain, and why in Europe even the Black Forest is disappearing. It is surely this power structure that also explains why primitive peoples who have lived in harmony with nature for generations are now being trained to pollute and destroy. It is this power structure that helps to explain too the expansion of judicial review.

Of course any political society must seek to balance and resolve conflicting private and public interests, but it is surely inherent in democracy that this resolution should be achieved through the electoral process. A major problem with judicial review is that after the balance has been struck by the legislature, it may then be shifted, by those who are not answerable to the electorate, in favour of corporate interests. Many examples have been seen in the area of labour law. Our labour relations legislation proclaims as a matter of public policy the promotion of collective bargaining among employees<sup>35</sup>, and that policy is generally pursued by labour relations boards. Yet when issues such as picketing at shopping centres or secondary picketing are considered by courts of general jurisdiction on judicial review or in other ways, there is a propensity to prefer private interests over the public policy proclaimed by the legislature, and the courts have been willing to override or ignore privative clauses to protect those interests. Thus the charisma of judicial review that stems from the elevation of courts and the disparagement of administrative tribunals becomes another device for preferring corporate interests over the democratically proclaimed public policy.

The realities of political power do not have, and perhaps never did have, much in common with the perceptions of power that inspired the expansion of judicial review. The burgeoning of tribunals was seen as threatening. It threatened the corporate sector with restraints upon the corporate role in economic and political planning as well as with other interventions that might allow the democratic process to curtail their activities. It threatened the bench by the establishment of rival jurisdictions; and it threatened the legal profession by creating tribunals in which expertise in the adversary process might not place the profession at an advantage.

Judicial review has done little or nothing to protect the citizen against those who wield power. For example, after several decades of judicial review, one of our leading scholars in the area of environmental law has written that

[...] there are few clearly established rights to participate in environmental decisions available to Canadian citizens. To the extent that citizens are

---

35. For example, *Labour Relations Act*, R.S.O. 1980, c. 228, preamble.

permitted opportunities for participation, these are narrow, formal, and largely ineffective.<sup>36</sup>

Corporate power is relevant to judicial review in several ways. First, as mentioned above, judicial review and other uses of courts have a constraining influence on regulatory processes. Secondly, judicial review tends to shift the balance that has been struck by the legislature between corporate and public interests by moving it in favour of the former. Thirdly, and perhaps most importantly, the ongoing exercise of corporate power requires the submission of governments to the dominance of corporate interests, and the acquiescence of other elites in that submission is more readily secured if governments also accommodate the interests of the professions, including the interests of the bench and bar in judicial review.

These political realities may help to explain why the expansion of judicial review has not taken place in response to any situation by situation or item by item evaluation of its significances and consequences, but rather by broad assertions of its inevitable value. These political realities also help to explain, to a large extent, the impotence of judicial review as a protection of the public interest and even as a remedy for the aggrieved citizen against the state. If we consider, for example, systems of social insurance and social security, the power structure operates on the aggregate, not selectively against individual claims. Of course judicial review might occasionally tip the balance in favour of a claimant in a particular case, and for that individual, might be beneficial; but its overall impact on the system will have been to provide the occasional palliative rather than a systematic remedy large enough to strike the full scope of the injustice.

#### 4. The Charter of Rights

The ultimate step was taken when the government of Canada, without taking any plebiscite of the people, created a new constitution for Canada, including the *Canadian Charter of Rights and Freedoms*<sup>37</sup>. In 1982, this was enacted by the Parliament at Westminster in its last gasp as the Imperial Parliament in relation to Canada. The Charter expanded judicial review in relation to legislation, as well as executive action.

Until this point, the validity of legislation could rarely be challenged except by reference to the distribution of powers between the national and provincial governments. Now the affliction of federalism is compounded by

---

36. *Supra*, note 10, p. 74.

37. *Supra*, note 3.

a constitutional charter that enables legislation to be challenged on a broad range of grounds, such as freedom of religion or expression, mobility rights, rights to life, liberty and security of the person, rights to retain counsel, equality rights, language rights, etc.

The substantive “rights” which were “guaranteed” by the Charter were so manifestly laudable that any questioning of the real significance of the document may have seemed, and may still seem, both irreverent and irrelevant.

The ostensible entrenchment of these civil liberties was part of a package that included the introduction of a constitutional amending formula and the further entrenchment of language rights. The package involved a complicated political manoeuvre which had as one of its objectives the diminution of Quebec separatism and the political consolidation of Quebec in Canada.

The result is a calamity. Almost all of the objections to judicial review mentioned above apply to the Charter, but their significance is greater in this context, and more objections must be added.

The Charter entrenches the right to vote, and yet nothing this century has subverted that right more than the Charter itself. The sovereignty of Parliament, once perceived as the essence of democracy<sup>38</sup>, is now replaced by the sovereignty of the judiciary, and the right to vote is now a right to vote only for the membership of subordinate institutions. The policy making tribunal which now stands at the apex of governmental power is neither elected nor representative. Its membership consists of appointed officials, predominantly male, predominantly drawn from the same generation, and all drawn from the same profession.

Unfortunately, the right to vote has been undermined not only by the Charter but by other developments. First, its significance has been eroded by technological “progress” of enormous magnitude. The development choices confronting society have become so obscure in their far-reaching and permeating consequences that they are no longer visible as choices confronting the electorate at all. Thus technological changes, such as jet travel, nuclear power and the advances in micro-computer mechanisms, have not resulted from any choice of the electorate, nor usually from any known choice of elected officials. Yet they shape the environment and the nature of

---

38. The Chief Justice of Canada is reported as having contended that the doctrine of Parliamentary sovereignty never applied in any event to commonwealth countries outside the U.K., “Justice Dickson Casts New Light on Parliamentary Supremacy”, (1985) 5 *Ontario Lawyers Weekly* No. 13, p. 1. That contention, however, adds to the concern.

the society in which we live. Meanwhile, the role that political parties might have played in the formation of policy has been replaced by campaign imagery, brokerage politics and the dynamics of elite accommodation.

Secondly, the democratic dimension of government has been threatened by the recent adoption of value for money audits and the associated demand for program evaluation<sup>39</sup>. With regard to many government programs, it is close to impossible to develop the research techniques for ascertaining their consequences, let alone attaching any value to them. The demand for periodic program evaluation coupled with the lack of any scientific method of measurement is likely to mean that, in practice:

- (a) With some exceptions, particularly in relation to the military, a structural bias is established against any policy the success of which cannot be demonstrated in dollar amounts or other numerical units;
- (b) Interest groups with ongoing political influence in relation to administration will tend to have even greater power compared with more dissipated groups that only represent the public interest and that can only muster the resources for more episodic political action;
- (c) Yet another vehicle is established through which the value judgments and political influence of a small elite, closely associated with corporate interests, can masquerade as professional output.

These are the developments that, together with the Charter, really threaten the right to vote, but no protection from them will be found in the Charter. Constitutional entrenchment of the right to vote may have its aesthetic attractions, but it is a cruel illusion.

There are two provisions of the Charter which might be seen as attempts to mitigate its anti-democratic nature. The first is a provision that the "rights" which are "guaranteed" by the Charter are not absolute; they are subject "[...] to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"<sup>40</sup>. One might have thought that in a free and *democratic* society, the proper limits on corporate and personal rights should be those prescribed by the elected legislature without being subject to over-ruling by an appointed judge. The second provision is that, with regard to most sections of the Charter, there can be a legislative over-ride<sup>41</sup>. Where the legislature expressly declares that a statute shall

---

39. See e.g., J. M. JORDAN *et al.*, "Assessing the Results of Public Expenditure: Program Evaluation in the Canadian Federal Government", (1979) 22 *Canadian Public Administration* 581; H.G. ROGERS *et al.*, "Evaluation in Practice: the State of the Art in Canadian Governments", (1981) 24 *Canadian Public Administration* 371.

40. *Supra*, note 3, a. 1.

41. *Ibid.*



operate notwithstanding a provision included in the specified sections of the Charter, the statute is not limited by the Charter provisions. As a matter of practical politics, however, it is doubtful whether this legislative over-ride can be used outside of Quebec. It is particularly unlikely that it could be used in any bill that was opposed by a powerful interest having media support. Moreover, the legislative over-ride is subject to expiry in five years, though with the possibility of renewal every five years<sup>42</sup>.

The Charter also undermines the franchise by allowing politicians to dump hot issues, such as abortion, pornography and Sunday closing, into the courts. The likely result is to make the political process even more bland, and to make elected representatives even less responsible.

Another aspect of the right to vote which we have claimed distinguishes "the free world" from eastern block countries is the right of the electorate to switch from one political ideology to another. While that choice may already have gone as a matter of practical politics, it may now be gone as a matter of constitutional law. To a substantial but unmeasurable extent, the Charter entrenches a political posture. Consider, for example, what would happen if a government was elected that wanted to nationalize a major industry, say the banking system. The Charter, on its face, avoids the entrenchment of property rights, and that was a deliberate decision resulting from the compromises made in the parliamentary process. Yet it would take an incredible naivety to feel confident that the courts would not decide that such a nationalization statute is unconstitutional<sup>43</sup>.

Unfortunately, the media coverage prior to the event did not include much analysis of the real significance of the Charter. It focussed on political controversy about particular rules rather than the significance of the aggregate. For example, women's organizations campaigned for the constitutional entrenchment of sex equality and native organizations campaigned for the constitutional entrenchment of native rights. Except in Quebec (and perhaps Saskatchewan), no organization appeared to be campaigning for the constitutional entrenchment of nothing. The debate was usually presented in the media as if somehow the Charter would be a self-executing document. With some exceptions at low profile, there was little recognition in the media of the transfer of legislative power to the judiciary. Yet the terms of the

---

42. *Ibid.*

43. It is not impossible to find statements among some of the judiciary that saving us from socialism is one of the functions of judicial review. *Supra*, note 23. See also H. J. GLASBEEK *et al.*, "The Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms", (1984) 2 *Socialist Studies* 84.

Charter are so broad and general that now as a practical matter the validity of legislation and of executive action are matters of judicial discretion.

Related to this is the increased technicalization of the debate of public policy issues, with consequential impairment of public participation. The technicalization of public policy decision-making is long standing. Indeed, it can be seen as a natural outcome of the Industrial Revolution, the emergence of the professions, and the Companies Acts. For example, in occupational and public health, the processes of risk assessment are rarely separated from the decisions on acceptable risk, and both are commonly perceived as technical. Even with regard to major developments, such as nuclear power, the risks associated with each alternative strategy were never identified and assessed in any publication that would have enabled a public preference to be expressed about which set of risks the public would rather take. Political questions involving serious value judgments are commonly decided by those with the technical knowledge as if they were purely technical questions. Even when government officials are involved in the decision-making, the mechanization, electrification, automation and chemicalization of modern industry and commerce create complex structures in which the decisions of people in managerial, technical and professional positions translate into an output form that assumes the appearance of inevitable destiny.

Here again, the Charter does more to aggravate than to mitigate the problems. Decisions under the Charter are perceived as "legal". They are not for the instinct of jurors but are made by judges assisted by "legal" advocacy. Not only does this tend to trivialize and technicalize the debate of public policy issues, but almost inevitably, the values espoused in the process will tend to be those of the clientele from which the legal profession derives most of its income.

This last point can be illustrated by reference to the burden of proof in the control of toxic contamination. What position should a government take with regard to the release of potentially toxic substances into the air, into our water, or into our food? If the toxicity of a substance has never been tested by any means that would yield reliable conclusions in relation to human beings, should the substance be assumed safe and its use allowed until harm is demonstrable, or should it be assumed to be harmful and its use prohibited until its safety can be demonstrated? This question, which may involve how much risk should be taken in the pursuit of maximum consumption, is surely one for the elected branch of government, or at least for officials who are answerable to the elected branch of government. Where, however, an administering agency decides in favour of caution, it may run the risk of judicial reversal by a court which, in the exercise of its legislative power,

wants proof of harm as a justification for any government restraint on corporate enterprise<sup>44</sup>.

Another way in which the Charter tends to enhance corporate power is, of course, the inequality of access to legal services. Even before the Charter, the President of the Canadian Federation of Independent Business said this :

I began to see how the system is stacked in favour of those who own all the lawyers. I found out that the big corporations, without being conspiratorial, control the knowledge factory in this country [...]. It's a mandarin-to-mandarin process.<sup>45</sup>

Here again, the Charter does more to aggravate than to mitigate the problem. Unrealistic suggestions are sometimes heard that equality of access might be achieved by the expansion of legal aid, but there is no prospect of that happening on any scale that would produce equality of access. Moreover, any moves towards it can add further to the enormous waste of public money resulting from the Charter. Inevitably, the multiplicity of forums for the debate of controversial political issues tends to increase the cost of participation in that debate, and thus enhances further the political power of those with the greater resources.

Like the older type of judicial review under the prerogative writs, the Charter is counter-productive because it misrepresents the real incidence of political power. It seeks to protect civil liberties, but it rests on a false assumption about where the threats are coming from. On its face, the Charter would seem to constrain everyone. It provides that it applies to the Parliament and Government of Canada and to the legislatures and governments of the provinces. On ordinary principles of interpretation, that would be read in the same way as the traditional clause in a statute that "This Act binds the Crown". The interpretation that appears to be prevailing, however, is that the Charter only binds the legislatures and governments. On this view, the decisions of multi-national corporations are free from challenge. A judicial veto has been created over decisions reached through the democratic process, and over the decisions of those who exercise lesser degrees of power, but no comparable control has been created over those who function outside the democratic process and who exercise greater degrees of governmental power. The Charter is invoked to protect corporations against the elected

---

44. In the United States, this attitude has emerged in cases on judicial review of regulation-making. In Canada, it has emerged in the decisions on prosecutions. See e.g., *R. v. Windsor Board of Health et al.*, (1982) *Canadian Employment Safety and Health Guide* 95.046.

45. Quoted in F. THOMPSON *et al.*, *The Political Economy of Interest Groups in the Legislative Process in Canada*, Montreal, Occasional Paper No. 9 for the Institute for Research on Public Policy, 1979, p. 48.

representatives of the people, but it does nothing to protect the people against the unilateral actions of corporations. In this way, too, it introduces another judicial structure for the further enhancement of corporate power.

Fundamental rights essential to the democratic process, such as freedom of speech, freedom of assembly, and freedom of association have now been formally enshrined in the Charter<sup>46</sup>, but at the same time they have been undermined by technological changes and economic concentration that have subjected the media of communication to the control of a tight oligopoly.

Almost as a sick joke, the Charter provides for “freedom of the press and other media of communication”<sup>47</sup>, but the control and the censorship are not coming primarily from elected governments. The Charter does nothing to require the divestiture of ownership of the media by multinational conglomerates, nor does it even require a separation of the tie-in between advertising and news reporting. Moreover, if any government tried to provide for a genuinely free press, the legislation would be challenged as a violation of the Charter, and it would probably be declared invalid.

Similarly, sex and age equality are more seriously threatened by the nature and the massive scale of technological change than by the decisions of elected representatives. The Charter does more to prevent than to promote the subjection of such changes to democratic scrutiny. At the more trivial level, the Charter protects our homes from the intrusion of meat inspectors<sup>48</sup> (who were never famous for their home visits anyway) while it does nothing to protect us from the daily invasion of hand bills and telephone advertising.

In other ways too, the Charter operates to impair the democratic process and to enhance corporate power. There has been concern in Canada, as in other countries, about the enormous funds spent on election campaigns. A party, candidate, or supporters could swamp the media, gaining a substantial advantage over others with fewer resources. To provide for more equality of opportunity in seeking public office, Parliament passed a common type of statute to limit the amount that could be spent on election campaigns. That was challenged under the Charter and the court decided that a crucial provision of the statute is now unconstitutional as an encroachment upon freedom of speech<sup>49</sup>.

---

46. *Supra*, note 3, a. 2.

47. *Ibid.*

48. S. 20 of Bill C-27 (1985), which is an omnibus bill to bring federal statutes into accord with the Charter, amends the *Meat Inspection Act* to prohibit an inspector from entering a dwelling house without a warrant.

49. *National Citizens' Coalition Inc. et al. v. Attorney general of Canada*, (1984) Alberta L.R. (2d) 249.

It has been suggested, almost as a justification for the Charter, that the judges have exercised their new powers with restraint. Examples can be found either to support or to contradict that view. Even if one accepted the assertion at face value, the creation of a power to undermine the democratic process can hardly be justified because those exercising the power have used restraint. The same could be said about other branches of government, including the legislatures, tribunals and the executive that the judiciary is ostensibly protecting us against. If we are to place our faith in restraint in the exercise of paramount power, my preference would be not to place that faith in the one branch of government that is virtually immune from any kind of democratic recall. Administrative lawlessness, which was so much the concern of Lord Hewart, is subject to at least some controls by parliamentary scrutiny, the Auditor General, the Ombudsman, the media, and the scrutiny of interest groups, apart from judicial review. Judicial lawlessness is now controlled only by defining it out of existence.

The transfer of power to the courts goes beyond the transfer of legislative power. It also disturbs in a haphazard way the role of the executive in deciding the priorities in public spending and the allocation of time in government agencies and departments. For example, if an interest group challenges a statute, this may require an immediate response with a substantial allocation of departmental resources, and hence the diversion of those resources from other matters that might be more crucial.

A pervasive influence will be the allocation of disproportionate amounts to the resolution of those issues that attract the services of the legal profession, and a disproportionate amount to the profession itself. As with every other profession, there is a natural conflict between the legal profession and the public about how much of the professional service is optimum. There is a natural propensity for the profession to generate more refinement in the legal system, and hence to demand that the proportion of the gross national product allocated to legal services should exceed the proportion that, given a chance, the public might determine. The judicial assault on privative clauses and now the Charter have tended to entrench the judgment of the profession on that question. The public interest is always threatened when producer interests are allowed to generate the body of law that determines the demand for the product.

Perhaps it may be of interest to consider more of what is happening in response to the Charter. Most of the court decisions declaring a violation of the Charter have been in criminal proceedings, commonly drug cases<sup>50</sup>, and

---

50. For a review of early Charter cases in the area of criminal law, see M. L. FRIEDLAND, "Criminal Justice and the Charter", (1983) 13 *Manitoba Law Journal* 549.

the conclusions reached could have been reached just as well under the existing law. For example, many criminal proceedings have been declared unconstitutional because of unreasonable delay. The same conclusion could have been reached under Magna Carta. In other cases, evidence has been declared inadmissible under the Charter for having been illegally obtained. The same conclusion could have been reached by traditional case-law development. Many other cases relate to police practice. This could be regulated more effectively<sup>51</sup> by a Bill of Rights passed in the form of an ordinary statute and providing a statutory code of police behaviour, together with enforcement mechanisms and sanctions.

In other moves, inquisitorial proceedings and the powers of inspectorates are being questioned in the cause of "deregulation". This may accommodate producer interests, but it is threatening to those who like to breathe the air, to drink the water, or to eat food without carcinogenic additives. This threat was enhanced by a dictum in a recent decision in the Supreme Court of Canada to the effect that the Charter "[...] embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law"<sup>52</sup>. If that dictum prevails, it is now questionable whether a democratically elected legislature has any power to protect the public interest by establishing a tribunal with a combination of executive, legislative and adjudicative responsibility. Perhaps the ultimate irony is that the separation of powers will have become a part of our constitutional law by the decision of a court in the exercise of its supreme legislative power.

In other areas, the Charter, like earlier judicial review, has become one of the forces that hinder or restrain public officials in the pursuit of public policy objectives. One example relates to the carnage of death and mutilation that occurs on the highways, much of it as a result of drunken driving. The police sought to control this problem by breathalyzer testing. The Supreme Court of Canada has now decided that the demand for a breath sample is a form of detention, and that therefore a motorist has a constitutional right to counsel and must be allowed the opportunity of consulting with a lawyer before being required to blow into the device. In the particular case<sup>53</sup>, the motorist was required to blow at a police station following an accident and suspicion of drunkenness, but it is not clear that any different principle applies when a motorist is required to blow at a roadside spot check. The reasons for

---

51. Typically, the Charter decisions relating to the police still leave uncertainty about how they are expected to behave.

52. *Operation Dismantle Inc. et al. v. The Queen et al.*, [1985] 1 S.C.R. 441, p. 491.

53. *The Queen v. Therens*, [1985] 1 S.C.R. 613.

judgment contain no discussion of the availability of lawyers at the times of day at which these events usually occur, or of whether a sample taken after consultation with a lawyer will be of any validity as an indicator of the alcohol content in the body at the time of driving, or of whether the reduction in the number of drivers who can be tested in this way with the available police resources will reduce the level of public safety. It is predictable that ordinary working people will continue to submit automatically to a police demand for a sample while some business and professional people, accustomed to the services of lawyers, may demand their right to counsel. This result will have been achieved by a decision pursuant to a Charter which purports to guarantee, among other things, that every individual is equal before the law.

Another case relates to the door-to-door selling rackets, such as those involving encyclopaedias, saucepans, vacuum cleaners and frozen food. The public has been subjected to a series of merchandising campaigns that involve salesmen calling at the home, using high pressure sales tactics, fraud, and other predatory practices. Nova Scotia, like other provinces, legislated to constrain these rackets by a licensing system. One concern was the way in which fly-by-night salesmen would sweep an area and then be out of the jurisdiction when disputes arose, or when complaints were made which might have led to criminal proceedings. As a response to that problem, the relevant regulation required that salesmen calling at the home must be residents of the province. The court declared the regulation unconstitutional as violating the right of any citizen to live and work in any province<sup>54</sup>. Here again, there was no impact analysis, and no discussion in the judgment of the likely impact of the decision, compared with the regulation, on the control of fraud or other predatory practices in marketing. Regardless of impact, the right of racketeers to cross provincial boundaries now has constitutional paramountcy over the protection of the public against fraud and other predatory practices.

Another judicial move tending to frustrate the achievement of public policy objectives has been the evolving refusal of the courts to give effect to statutes creating strict liability offences. This became evident when the Supreme Court of Canada enacted a distinction between "strict liability" and "absolute liability". Statutes creating strict liability offences were to be presumed to allow a defence of reasonable care, and these offences were to be labelled "strict liability". Only if the legislature made it clear that no

---

54. *Basile v. Attorney General of Nova Scotia*, (1984) 62 N.S.R. (2d) 410. With regard to the legal profession, however, the court decided that the control of misbehaviour justified some residence requirements. *Black v. Law Society of Alberta*, [1984] 6 W.W.R. 385.

defence of reasonable care was applicable would the court recognize the offence as one of strict liability, and it would then be labelled “absolute liability”<sup>55</sup>. With the Charter, that distinction is now going. Some courts have already interpreted the Charter as creating a constitutional prohibition of strict liability (labelled “absolute liability”) offences<sup>56</sup>.

By making intent or negligence an issue, the courts seem determined to make proceedings under regulatory legislation judgmental in every case, and hence to preclude the legislature from creating a deterrent that will apply automatically in response to structure or conduct. While this may mitigate harshness, those who are bearing the consequences and paying the costs of all this have already decided through the elected government that they prefer more arbitrariness, perhaps with consequential gains in pollution control, highway safety, and the prevention of predatory practices in marketing. It has been suggested that the courts might be willing to allow some exceptions, including pollution control<sup>57</sup>, but this seems doubtful<sup>58</sup>. Even if the courts did allow any exceptions, they would still be unlikely to impose significant sanctions without proof of fault or neglect.

One problem is, of course, that with regard to offences in complex or multi-location industries, a prosecuting agency may never be able to rebut a defence of due diligence without replicating the technical and other knowledge of the industry. Hence the Charter decisions against strict liability may well be another factor giving immunity to large corporate enterprises from any effective regulation to constrain predatory practices<sup>59</sup>, the externalization of cost, or other negative impacts on the public interest<sup>60</sup>.

It has sometimes been suggested that problems of this type may decline as the courts gain experience with the Charter and a new generation of lawyers introduces a more policy-oriented style of advocacy; but that is unrealistic optimism. The political pressures operating upon the universities demand a curriculum that is “relevant”, and in faculties of law, the contemporary pressure favours a “core curriculum” which emphasizes private law subjects, with reduced coverage of the subjects that raise public policy issues affecting the interests of broader sections of the population.

---

55. *The Queen v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

56. E.g., *R. v. Westfair Foods Ltd.*, (1985) 38 Saskatchewan Reports 12; *R. v. Watch*, (1983) 24 M.V.R. 224.

57. *Reference re Section 94(2) of the Motor Vehicle Act*, (1983) 4 CCC (3d) 243, p. 250.

58. The primary case in which the Supreme Court of Canada undermined strict liability was a pollution case; *supra*, note 55.

59. See e.g., T. G. ISON, *Credit Marketing and Consumer Protection*, London, Croom Helm, 1979, p. 374 à 376.

60. See e.g., *Decision No. 167*, (1975) 2 *Workers' Compensation Reporter* (B.C.) 234, p. 251 à 259.



These negative impacts of the Charter have not been counter-balanced by major achievements. Much of the statutory revision work following the Charter has been a process of dotting the i's and crossing the t's. The number of male pronouns in the statutes has been reduced, but that was already happening in response to the women's movement.

Of course some decisions under the Charter might be seen as a success for human rights. For example, a statutory restraint on collective bargaining was declared unconstitutional<sup>61</sup>. My point, however, is not to deny that *some* decisions are made in favour of human rights. It is that when looking at the total picture, any favourable outcomes are nothing like enough to justify the damage.

Other cases in which constitutional rights have been protected are not impressive. For example, as part of the change to metric measures, a regulation prohibited the advertising of gasoline (petrol) in other than metric units. This was declared void as a violation of freedom of expression<sup>62</sup>. There are surely other sufferings of humanity on which the tax-payers money could have been spent with greater achievement. Decisions or challenges of this type, which are an inevitable concomitant of the Charter, add to the concern that it becomes a diversion from rather than a protection of fundamental human rights.

In the majority of cases in which Charter issues are raised, the courts conclude that there has been no violation; but even these cases are not innocuous. Notice of challenges under the Charter must be given to Ministries of the Attorneys-General so that often two government departments or agencies are involved in the case, and sometimes the governments of other provinces and the federal government are involved. The allocation of tax-payers money to the process can be substantial, and with no achievement. At the same time, governments proclaim that they lack the resources to provide adequate income or services for the disabled and other needy sections of the population. Moreover, because of the allocation of departmental resources that may be required to rebut a challenge under the Charter, officials may sometimes feel constrained from taking action in pursuit of public policy objectives, particularly when the threat of Charter litigation comes from a powerful group that is applying other political pressures.

Constitutional entrenchment can create other problems for policy planning. Where a constitutional challenge is predictable, the implementation

---

61. *Re Service Employees' International Union and Broadway Manor et al.*, (1983) 4 D.L.R. (4<sup>th</sup>) 231.

62. *R. v. Halpert et al.*, (1983) 9 CCC (3d) 411.

of a new policy may require affirmation from both the legislature and the courts, but there is a problem of order. A current example in Ontario is a government policy to extend public funding to all years in the Catholic Separate Schools. For the government to go to the courts first would be difficult because there would be no statute that has been debated, amended and passed in the legislature on which the courts could adjudicate. If the government legislates first and implements the funding, there is an obvious risk of widespread dislocation in respect of teachers, students and school buildings if the courts should eventually decide that the legislation is unconstitutional. Even that decision might still leave doubt about what alternatives would be valid. If the government legislates first and then goes to the courts before implementation, there could be years of delay that would be incompatible with the government's political and legislative timetables.

The ex-post facto approach in judicial decision-making, coupled with the pressures which favour judicial discretion over fixed rules, can make it very difficult for governments and others to engage in long-term policy planning. Moreover, Charter litigation can involve an enormous diversion of resources to multiple proceedings. Political battles that have been fought at substantial expense to the tax-payer in and around the cabinet and the legislature may have to be fought again, at further expense to the tax-payer, in and around the courts.

An example can be seen in the administration of medical care. Some years ago, systems of government medical insurance were introduced through federal/provincial co-operation. The same insurance coverage was applied to individuals at all levels of income so that everyone could receive a good standard of medical care. In recent years, that provision has been undermined by the medical profession engaging in the "extra-billing" of patients. The predictable result of that practice is the re-introduction of a double standard of medical care. Also, those at lower levels of income subsidize higher standards of medical care for those at higher income levels.

To avoid these negative consequences, the Federal Government legislated against the practice of extra-billing. Predictably, the Canadian Medical Association has now launched an action claiming that the legislation is unconstitutional, and the claim includes an allegation that the statute violates the Charter. It is no surprise to find the responsible Minister quoted as saying that :

[...] he is disappointed by the CMA's action because it reopens issues that were supposedly put to rest with the act's passage and could detract from efforts to get on with important issues in the health care system.<sup>63</sup>

63. "CMA Challenges Extra-billing Law", *Globe and Mail*, Toronto, 18 July 1985, p. 1.

This is also another example of the Charter being used not to protect the weak from the strong. It is again being used by a powerful vested interest which, having lost in the legislature, now seeks another chance to defeat the democratic process. Of course the C.M.A. may lose in the Supreme Court, but that could be in three years time. Meanwhile, the people will be suffering the health care consequences, vast sums of money will be spent on the Charter litigation, and the government will be under greater pressure to compromise with the vested interests, if only so that it can get on with other matters.

Another consequence of the Charter is the propensity to trivialize the discussion of public policy issues. Because of the limited capacity of the courts to engage in any systematic analysis of the social impact of legislative options, the judicialization of public policy decision-making leads to results that rest upon an incredibly superficial foundation. It is probably only the incidence of political power and the pageantry and mysticism of legal process that enable us to get away with it. Examples of this trivialization can be seen in the cases mentioned above relating to election campaign expenditures, itinerent selling, and breathalyzer testing.

Another example of the trivialization likely to arise in the near future relates to mandatory retirement. Various people and interest groups are launching court challenges under the Charter claiming that mandatory retirement is a form of age discrimination. Some of those who want to continue working beyond the present retirement age apparently believe that the abolition of mandatory retirement would result in people having a choice. That view, however, ignores any rational analysis of the likely consequences. A right to continue working beyond the present retirement age could well reduce the pressure to maintain retirement pensions, so that in practice, a right to continue working is likely to become a loss of the right to retire. Another predictable result of any right to continue working would be an increase in medical examinations and the dismissal of people whose work output is declining, many of whom would be below the current retirement age. There are a range of other likely consequences that would be and have been discussed in debate on the political scene. It is surely incredible that such a question should be decided by a court whose traditional *modus operandi* does not include that same breadth of debate, that is unrepresentative and consists exclusively of lawyers, that is without the resources for impact analysis<sup>64</sup>, and that receives only a limited range of inputs. It is even

---

64. The judges may well recognize impact analysis as relevant. See e.g., Wilson, J. in *The Queen v. Big M Drug Mart*, [1985] 1 S.C.R. 295. But it is difficult to see how this can be undertaken efficiently in the context of adjudication on an adversary model.

more questionable when the judges may have personal interests in the outcome.

This trivialization of policy making extends beyond court decisions. Consideration of the Charter is perceived as a "legal" matter, and thus one for the Ministries of the Attorneys-General. This tends to increase the powers of those ministries in relation to the line departments and agencies of government which would usually have a clearer perception of public policy objectives. Perhaps for this reason, trivialization has characterized the omnibus amending bills that have been introduced to bring the statutes into accord with the Charter.

The results can be illustrated with regard to sex equality. If one believes in sex equality, what is important is equality in end result, not equality on the face of a statute. It is axiomatic that equal justice will never be achieved by treating everyone alike. When the matter is perceived as one for the Ministry of the Attorney-General, however, the predictable result is the pursuit of sex equality on the face of the statutes regardless of the consequences. Thus the reviews of existing statutes that have taken place appear to have been done by scrutinizing the language of the acts, without impact analysis.

An example can be seen in the benefits payable in fatal cases under the Workers' Compensation Act of British Columbia. They were revised in 1974<sup>65</sup> with a primary goal being sex equality. An impact analysis of the options was undertaken having regard to social and economic circumstances, and the options considered included sex equality on the face of the statute. It was then decided that sex equality could best be advanced by discriminating in the statute in favour of older women. Now, in response to the Charter, an omnibus bill is going through the legislature amending various provincial statutes to bring them into accord with what government lawyers apparently believe to be its requirements<sup>66</sup>. Predictably, the fatal benefits payable under the Workers' Compensation Act are now being amended to provide for sex equality on the face of the statute regardless of how much inequality that produces in result.

The trivialization of debate is aggravated by the problems of classification generated by the Charter and which can only be resolved in arbitrary ways. Consider, for example, legislation requiring that shops and businesses be closed on Sundays. Predictably, this was challenged as an infringement upon freedom of religion<sup>67</sup>; and yet that can hardly be discussed as if it were

65. *Workmen's Compensation Amendment Act*, 1974, s. 14.

66. *Charter of Rights Amendments Bill*, 1985, s. 121. Section 122 contains other provisions likely to result in sex inequality, and to the disadvantage of women.

67. In the event, the court decided that the Lord's Day Act, which provided for Sunday closing, was invalid. *The Queen v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

entirely separate from the regulation of labour relations, competition policy, public health, the promotion of family life, and perhaps even environmental control. Under the Charter, however, certain rights are paramount, and if a court finds any way to accommodate a submission that the infringement of a paramount right is less harmful than the alternative of damage to other interests, it is duplicating the legislative function of political judgment.

To raise questions in Canada now of the kind mentioned here would seem only like a gratuitous lament. Charter litigation is a growth industry which has already spawned its satellite industries. Together they engage a preponderance of the "experts" in the subject area and they constitute powerful interest groups supporting the perpetuation of the Charter. The repeal of the Charter is virtually impossible, and outside the ranks of charter enthusiasts, the prevailing mood seems to be one of cognitive dissonance. The Charter is in place, we must learn to live with it, and perhaps we should try to like it.

## **5. The need for extended use of the judicial process**

The arguments raised above against judicial review are a re-assertion of the case for democracy and legislative sovereignty. They are arguments against placing the judiciary at the apex of public policy decision-making; but they are not arguments against greater use of the judicial process. Paradoxically, one of the consequences of judicial review has probably been the under-use of the judicial process in situations where its use would have been constructive.

First, there are many areas in which the traditional judicial process of fact finding and applying law to facts could well be expanded. I think in particular of those adjudicating tribunals and agencies which already have a pyramid structure, particularly those engaged in the re-distribution of money, such as the income tax system, and the social insurance and the social security systems. Primary adjudication in these systems is often appalling. A decision is made by an adjudicator or other official, commonly without notice of the issues or any opportunity to be heard, and without any other form of adequate inquiry. If an aggrieved citizen wants to appeal, the matter is first referred to a review process within or closely associated with the initial decision-making unit. A predictable consequence is a serious downward influence on the quality of primary adjudication. This structure facilitates the appointment of clerical grade personnel as initial decision-makers, with review officers being selected for the thinking role. The need, however, is for thinking prior to initial adjudication, not upon a review. Bearing in mind that the majority of citizens probably accept even negative

decisions of government departments and agencies without challenge, this type of review structure tends to promote sloppy decision-making at first instance, which then becomes tolerated by greasing the squeaky wheels. Moreover, notification to a claimant of the decision following a review can become, in practice, a form of discouragement from proceeding with an appeal<sup>68</sup>.

If judicial review applies to these situations, it only applies following a decision at the top of the pyramid within the system; but injustice is less likely to be found among those few cases that reach the top of the pyramid than it is among the vast number in which the people have acquiesced in negative initial decisions. It is at the primary and first appeal levels that the judicial process is needed. In many of these systems, there should be provision for prompt and immediate appeal from the initial decision to a tribunal operating on a judicial model, and also spot checking of initial adjudication by that tribunal as a form of quality control.

As mentioned above, the current structure of judicial review is also negative in its impact by encouraging the perception of primary adjudication as "administrative". This tends to excuse those engaged in this process from proceeding in a judicial manner. What is needed here is not the adversary system, but an inquisitorial system which, in addition to enquiries initiated by the adjudicator, includes certain attributes of the judicial process, such as providing an opportunity to be heard, keeping an open mind until all the evidence is in, articulation of the issues, recognition of the applicable criteria, and reasons for decisions.

Secondly, once a decision has been made in the design of a system that appellate adjudication should be by a specialized tribunal, it follows automatically under current thinking that primary adjudication should not take place in a court of general jurisdiction. That is unfortunate. There are probably some subject areas in which primary adjudication in a court of general jurisdiction would make sense, and once it is recognized that appellate adjudication is policy making and that it should be goal-oriented, it would probably be useful in some situations to have appeals from courts of general jurisdiction to specialized tribunals. The incidence of political power, however, including judicial power under the Charter, precludes that idea from being considered on its merits in any particular subject context.

---

68. For further discussion, see T. G. ISON, *Accident Compensation: A Commentary on the New Zealand Scheme*, London, Croom Helm, 1980, p. 107 à 111.

## Conclusion

The prerogative power once claimed by Stuart kings of dispensing with statute law, and which was buried (one used to think forever) by the *Bill of Rights*<sup>69</sup> in 1688, has been revived for use by the judges. Moreover, it is unrealistic to expect that this perception of statute law, as being subject to judicial veto, will be confined to cases in which charter issues are raised.

Of course charter litigation has produced revisions in criminal procedure, many of which might be seen as beneficial : but these benefits could well have been achieved, and with more precision and efficiency, by a new criminal procedure statute. Outside the area of criminal procedure, it is very hard to find cases in which charter litigation appears to have resulted in any public good.

We have undertaken a massive expansion in the judicialization of public policy making. It is dangerous and counter-productive. It enhances the political power of those sectors of society that already wielded the greatest power and it is a drastic curtailment of democratic choice. The damage also includes delays in the decision-making process and a diversion from more realistic ways of protecting human rights. In so far as the impact affects the pursuit of public policy objectives, it tends to be negative, for example, favouring the interests of polluters over the polluted. To the extent that judicialization deals with individuals in their relations with government officials, it seldom produces any system reform. Its more common successes consist only of greasing a few squeaky wheels.

Of course there are enormous problems with the political processes that underlie legislation and executive action. The realities fall short of our more idealistic aspirations. To see a solution in judicial review, however, increases the problems.

Charter litigation and administration increase the problems of judicial review in the ways mentioned above, including the diversion and waste of vast sums of public money. Meanwhile, governments complain of deficit problems which are said to require the curtailment of provisions for the disabled, the elderly, and other disadvantaged groups. At the same time, taxes are being increased.

Judicial review has not been expanded in a discriminating way, following rational analysis of its impact in each context, with the benefits and the damage identified, and the former judged to outweigh the latter. The incidence of political power has militated against the discriminate use of

---

69. 1 Will. & Mar. sess. 2, c. 2.

judicial review, favouring its expansion across the board regardless of the consequences. Thus judicialization has, particularly through the Charter, been perceived as a panacea rather than as a medicine which could have beneficial results if carefully prescribed as a remedy with known consequences for a diagnosed condition.

With regard to the Charter, it is too late now in Canada to do anything except lament and try to minimise the damage. For the communities represented here, however, it may not be too late to utter a warning cry, and to hope that no-one here may become The Scorer's Apprentice.