

A Response to the Suggested Amendment Relating to Provincial Administrative Tribunals

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Article abstract

L'objet de cette étude est de proposer les changements qui pourraient être apportés à l'article 96 de la *Loi constitutionnelle de 1867* et d'examiner les propositions du Gouvernement canadien à cet effet. L'accent est mis sur une vision équilibrée des facteurs suivants: un examen du rôle légitime des tribunaux administratifs et des cours inférieures dans notre système judiciaire, le respect et la sauvegarde du rôle des cours supérieures et la nécessité d'indépendance et d'impartialité des tribunaux.

L'article 96 de la Loi
constitutionnelle de 1867

A Response to the Suggested Amendment Relating to Provincial Administrative Tribunals

THE CANADIAN BAR ASSOCIATION *

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* This Response of the C.B.A. was originally a Report of a Committee of the C.B.A. chaired by Leslie Blond, of the British Columbia Bar.

Preface

The Canadian Bar Association formed a Committee to respond to the Discussion Paper which proposes an Amendment to the Judicature Provisions of the *Constitution Act*, 1867. A letter was sent to all Provincial Branch Presidents and National Section Chairmen in September outlining the issues and asking for submissions to be made by the widest possible cross-section of the Bar. Copies of that letter were sent to each Law Society or governing professional body and Deans of law schools.

In October and November a Committee of the Canadian Bar Association was established to study and report on the proposed Amendment. The composition of the Committee was as follows :

L.M. BLOND, Chairman

National Chairman of the Constitutional and International Law Section, in Private Practice in Civil Litigation in Vancouver with Harper, Grey, Easton and Company

DAVID MATAS, Past National Chairman of the Constitutional and International Law Section, Winnipeg Practitioner in Immigration and Administrative Law

JAMES MacPHERSON, Formerly Professor of Law, University of Victoria, now Director, Constitutional Law, Government of Saskatchewan

BERNARD COURTOIS, Former National Chairman of the Administrative Law Section, Practitioner in Administrative Law in Ottawa-Hull with the Firm of Lavery, O'Brien

C.W. MacINTOSH, Q.C., National Chairman of the Corporate Law Section, Legal Advisor to the Council of Maritime Premiers in Halifax

ARTHUR GANS, National Chairman of the Civil Litigation Section in Private Practice with Miller, Thomson, Sedgewick, Lewis and Healy in Toronto

The Committee met twice on December 4 and 5, 1983 and January 29, 1984. There was a telephone conference discussion on February 15, 1984.

The President of the C.B.A. Robert H. McKercher, Q.C. attended the first meeting of the Committee and provided valuable assistance throughout. He was aided in this by Alec C. Robertson, Esq., a Member of the Executive Committee. The Committee considered a wide range of responses from other Members of the Bar and was particularly assisted by correspondence with

Professor Noel Lyon of Queens University. There were discussions with members of the bench, notably the Canadian Judges Conference and its Committee studying this issue and a similar Committee for the Canadian Judicial Council. The Canadian Bar Association is fortunate to also have a Paper recently published by a Joint Committee of the Quebec Branch of the C.B.A. and the Quebec Bar.

This Paper represents the best effort of our Association to study this proposal given the limited time available and the numerous issues that it raises.

Introduction

Provincial Governments, acting pursuant to the authority vested in them by section 92 of the *Constitution Act, 1867*, enact laws in many substantive areas. The effectiveness of many of these laws requires that somebody interpret and apply them. Traditionally, courts have been a central institution for performing those functions. In recent years, however, in Canada and in most other western democracies, governments have often turned to so-called « administrative tribunals » to perform these functions in many fields — labour relations, public utilities, human rights and environmental protection, to name but a few.

The assignment of powers of interpretation, application and adjudication by provincial governments to administrative tribunals has raised important issues of constitutional law. Although some of those issues have not yet been resolved, the case law seems to mark out two clear starting points. First, there is no question that provincial legislatures have the jurisdiction to establish administrative tribunals to interpret and apply provincial laws. Secondly, it is also apparent that provincial legislatures can give judicial powers to those tribunals.

There is, however, an important restriction to this picture of general provincial jurisdiction and freedom to establish administrative tribunals and endow them with judicial powers. That restriction is by operation of section 96 of the *Constitution Act, 1867*, which provides :

96. The Governor General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

In spite of its seemingly clear and relatively innocuous wording, by a long process of judicial interpretation section 96 today seems to consist of three components.

First and most obviously, it is an appointment power. Section 96 authorizes the federal government to appoint judges to the provincial superior courts.

Secondly, section 96 has been interpreted as preserving the supervisory power of the superior courts to review, on jurisdictional grounds, the decisions of provincial courts and administrative tribunals. This component of section 96 was explicitly enunciated only recently by the Supreme Court of Canada in *Crevier v. Attorney General (Quebec)*¹.

Thirdly, recent decisions of the Supreme Court of Canada indicate that section 96 also reserves a core of subject matters (defined in terms of factors of history and importance) which must be heard by superior courts. For example, in *Re Residential Tenancies Act, 1979*², the Court held that a provincial residential tenancy commission could not make eviction and compliance orders, even though landlord and tenant matters are clearly within provincial jurisdiction. Similarly, in *Reference Re Section 6 of the Family Relations Act*³, the Court held that a provincial family court could not make orders with respect to occupancy of the family residence or non-entry, even though family law matters are clearly within provincial jurisdiction.

It is this third component of section 96 which has frustrated provincial governments and encouraged them to propose that section 96 be amended. The thrust of the proposed amendment is that provincial governments which have the power under section 92 of the *Constitution Act, 1867* to enact substantive laws in particular fields should also have the power to assign the application of those laws to courts and administrative tribunals of their choice. In other words, section 96, as currently interpreted, seriously frustrates the ability of Provincial Governments to provide for the administration of laws which are admittedly within their jurisdiction to enact.

We have sympathy for the concerns expressed by provincial governments about section 96. We believe that section 96 has two detrimental effects on the administration of justice today :

- (1) The current interpretation of section 96 is too restrictive. It does not recognize that for a variety of reasons (*e.g.* speed, cost, informality of procedures, specialized decision-making, experimentation with different models of dispute resolution) administrative tribunals can be a

1. [1981] 2 S.C.R. 220.

2. [1981] 1 S.C.R. 714.

3. (1982) 131 D.L.R. (3d) 257.

preferred mechanism for applying provincial laws in certain categories. The legitimate role of administrative tribunals and provincial courts has been well-described by Estey J. in *Reference Re Section 6 of the Family Relations Act*. In discussing the proper interpretation of section 96, Estey J. said this :

A permissive view is, of course, more easily adopted when the constitutional scan is directed to an administrative tribunal operating under a statute which outlines the policy of the Legislature and which leaves much of the implementation and application of that policy to a board appointed sometimes with a qualifying background related to the regulated field. But it has almost equal importance and value when the programme outlined in the enabling statute lends itself to interpretation and application in the quick and relatively less expensive summary procedures of the so-called inferior tribunals. The rights and duties created by such statutes frequently are of a kind or are directed to a sector of the community so as to be better and more expeditiously realized and interpreted by the less formal and less demanding procedures of the provincial court. It is not to denigrate the role of the superior court or its efficacy in the modern community. It is only to say that the highly refined techniques evolved over profound difficulties arising in the community are unnecessary for the disposition of much of the traffic directed to the magisterial courts by contemporary provincial legislation. That traffic can sometimes bear neither the cost nor the time which sometimes inevitably must be borne or devoted by the parties to causes in the courts of general jurisdiction (the descendants of the Royal Courts of Justice) and the county courts.⁴

- (2) The current interpretation of section 96 imposes serious restrictions on the ability of provincial governments to create administrative tribunals while not imposing similar restrictions on the federal government. If the philosophy underlying the current interpretation of section 96 is that there should be a unitary court system in Canada with superior courts at the apex then it seems strange and unfair that provincial freedom to establish administrative tribunals should be reined in while at the same time the federal government remains free to create a vast array of federal administrative tribunals.

There is a recent decision of the Supreme Court of Canada, *McEvoy v. Attorney General (New Brunswick)*⁵, stating that section 96 also applies to the federal government. But, the fact remains that section 96 has traditionally imposed restrictions on only the provincial order of government. That does not seem appropriate to us.

This then, is the nature of the so-called « Section 96 Problem » as we see it. Governments are attempting to solve the problems by amending Section 96. The Federal Government's discussion paper sets forth one possibility.

4. *Idem*, p. 291.

5. (1983) 148 D.L.R. (3d) 25.

We are sympathetic with the need for reform. However, we believe that any solution to the problem must be based on a proper balancing of three important factors :

- (1) An appreciation of the legitimate role of administrative tribunals and inferior courts in our legal system ;
- (2) Respect for and safeguarding of the traditional and valuable role of superior courts in our legal system ;
- (3) The desirability of insuring that courts and tribunals established to resolve disputes according to the law are independent and impartial.

1. The Solution

Once it is accepted that section 96 poses unacceptable problems in the justice system, the question then becomes, what is the solution? We have considered whether any options short of a constitutional amendment might solve the problems. Unfortunately, because the problems are created by a constitutional provision, ordinary statutory solutions or solutions involving some form of federal-provincial agreement or delegation of powers are not likely to be sufficient. An amendment to section 96 of the *Constitution Act, 1867* is necessary.

The question then becomes, what form should the amendment take? Should the amendment be a list (perhaps in the form of a schedule) of provincial administrative tribunals (e.g. residential tenancy commission) or perhaps provincial legislative subject matters (e.g. landlord and tenant) which would not be subject to the constraints of section 96? Or should the amendment be expressed in general language and attempt to articulate general principles which would structure the ability of provincial governments to establish administrative tribunals?

We have considered this matter and believe that an amendment of the second type is preferable. A Constitution is a framework document; it should paint in broad brush strokes. A Constitution should, therefore, state general principles which should then be applied in individual instances. A « laundry list » of non-section 96 tribunals or subject matters would not fit that format.

2. Fundamental Organizing Principles

If section 96 is to be amended, the amendment must take account of and reflect several important goals. In its discussion paper entitled *A Suggested Amendment Relating to Provincial Administrative Tribunals* the federal government has set out five fundamental principles that should be promoted

by any amendment to section 96. These principles were that section 96 (or other provisions in the Constitution) should :

1. guarantee the existence of a superior court of general jurisdiction in each province ;
2. guarantee the independence of the judiciary ;
3. enable a province to establish bodies to administer the application of its laws ;
4. enshrine the power of judicial review in the superior court of general jurisdiction ; and
5. provide that there not be a dual system of courts.

We agree with these principles and would simply add a sixth :

6. Section 96 restrictions should be applied equally to tribunals created by both orders of government.

3. Analysis of Suggested Amendment 96B(1)(2)

The suggested amendment in the discussion paper published in August by the Minister of Justice is :

96B. (1) Notwithstanding section 96, the Legislature of each Province may confer on any tribunal, board, commission or authority, other than a court, established pursuant to the laws of the Province, concurrent or exclusive jurisdiction in respect of any matter within the legislative authority of the Province.

(2) Any decision of a tribunal, board, commission or authority on which any jurisdiction of a superior court is conferred under subsection (1) is subject to review by a superior court of the Province for want or excess of jurisdiction.

96B. (1) Par dérogation à l'article 96, la législature d'une province peut, dans les domaines ressortissant à son pouvoir législatif, attribuer compétence concurrente ou exclusive à tout tribunal, organisme ou autre autorité non judiciaire constituée en vertu d'une loi de la province.

(2) Les décisions des autorités à qui a été attribuée compétence de cour supérieure en vertu du paragraphe (1) sont susceptibles de révision par une cour supérieure de la province pour défaut ou excès de pouvoir.

It is our view that the language is unsatisfactory. Some of the problem areas we have identified are as follows :

— The Hierarchy of Courts

The proposal concentrates upon but one part of the section 96 «problem» (administrative tribunals) and overlooks the relationship that

does and might well exist between provincial courts (civil and criminal) and provincial superior courts.

— « Other than a Court »

The words « ... other than a court... » found in line 2 of subsection 96B(1) may engender confusion in that :

- (1) The draftsman's intention probably was to permit the existence of tribunals or boards, etc., whose sole or central function is judicial. The words used may be interpreted by courts to disallow the creation of such a body if it is found to be « a court » ;
- (2) A distinction is created between « courts » on the one hand and « tribunals, boards, commissions or authorities », on the other hand, without a definition for either ;
- (3) A limitation is created by exempting « courts » (however created) from assuming any section 96 type powers. These words, on their face, appear to prevent provincial governments from assigning any new matter to provincial courts. This would be a startling and undesirable result because obviously provincial courts may be an appropriate forum for many matters. We believe an amendment to the Constitution should not preclude this ;
- (4) Perhaps, as a corollary to the *McEvoy* decision, the wording of the government draft precludes assignment of powers to federally appointed adjudicative tribunals. This should be considered for any amendment. There are four possible ways power can be assigned to administration tribunals. Provinces may confer powers to either provincially appointed or federally appointed tribunals, and Parliament may confer its power to either provincially or federally appointed tribunals. The Government draft deals with only one of these possibilities, a Province conferring powers on a provincially appointed tribunal. Both orders of Government should be permitted to assign to any tribunal.

— 96B(2) Judicial Review

We have found the question of judicial review poses serious difficulties. On the one hand, administrative tribunals should be allowed to function without appeals which can by their very nature frustrate the purposes for which those tribunals were created. On the other hand, the Rule of Law should be recognized and the supervisory jurisdiction of superior courts should not be unduly restricted. The concept of judicial review for « want or excess of jurisdiction » is a developing concept that does include a review for

« denial of natural justice and fairness » and for « errors of law which are fundamental ». Review for « error of law », simply, may be open to wide interpretation with the result that the review assumes the character of an appeal. For guidance, we looked at the general supervisory powers of superior courts.

The Government proposes and we accept the proposition that administrative tribunal should be subject to entrenched judicial review. We believe the Government proposal is incomplete because it entrenches judicial review for Provincial tribunals, but not for Federal tribunals.

4. A Redraft of Section 96 of the Canada Act

We have attempted to redraft section 96 of the *Constitution Act* to meet the objections to the Government draft. The drafting attempt has served as an exercise in analyzing the problems with the section and with the proposed amendment. We felt it would be hollow to criticize the Government effort without making an effort of our own to solve current problems and avoid creating greater ones.

— Maintaining Tribunals

The Government proposal was necessitated by the failure of the courts to uphold tribunals whose sole or central function was judicial. These tribunals serve a purpose of specialization, speed, low cost, informality, and experimentation. The Committee felt they should not be invalidated categorically.

We propose :

96A(1) The Legislature of each province may confer on any adjudicative tribunal jurisdiction in respect of any matter within the legislative authority of the province.

— Federal Tribunals

The Government proposal assumed that federal tribunals were not threatened by section 96, that only provincial tribunals were. Since the *McEvoy* decision that assumption may no longer be valid. In order to preserve federal tribunals, and our sixth principle, we propose :

(2) Parliament may confer on any adjudicative tribunal jurisdiction in respect of any matter within the legislative authority of Parliament.

— Definition of « Adjudicative Tribunal »

Because « adjudicative tribunal » is a new term, it needs to be defined. The Government proposal referred to « tribunal, board, commission or authority, other than a court », but left open the question of what these entities are.

We considered including in the proposed amendment a description of certain procedural trappings that distinguish many administrative tribunals from courts, in the form of simpler procedure and accordingly less elaborate procedural protection for parties. We concluded that it would not be appropriate to do so since this might encourage legislators, with a view to ensuring compliance with the proposed amendments, to prescribe a more reduced form of procedural protection than would otherwise be appropriate.

We have two objectives in setting out the definition below. One is to encompass those tribunals that have to date been invalidated, *i.e.*, those whose sole or central function is judicial.

The second is to prevent the provinces and Parliament from transferring *holus bolus* to their own tribunals all matters within their own jurisdiction. New courts, in all but name, should not be created, to circumvent the appointment power now in section 96. We attempt to achieve this requirement by providing that there be a regulatory legislative scheme before jurisdiction can be transferred. Where the law is only a statement of rights and liabilities, tribunals should have no jurisdiction. Where the law establishes a system of administrative discretion and regulation, tribunals may have jurisdiction.

We propose :

(3) An «adjudicative tribunal» is a tribunal, board, commission, or authority:

- (a) whose sole or central function is judicial ; and
- (b) which is an element in a scheme for the administration or application of a regulatory statute in a specialized field.

— Judicial Review

The grounds of judicial review are many and varied and many of them overlap. For example, with respect to prohibition, Halsbury's *Laws of England*⁶ mentions excess of or absence of jurisdiction, departure from the rules of natural justice, improper delegation, interest, bias, alteration of the judgment. And with respect to certiorari, excess or lack of jurisdiction, error

6. 4th ed., vol. 1, p. 138.

of law on the face of the record, breach of the rules of natural justice, fraud, collusion or perjury⁷. With respect to judicial control generally, Halsbury's refers to the superior courts' «inherent supervisory jurisdiction over inferior courts and tribunals. If such a body has exceeded or acted without jurisdiction, or has failed to act fairly or in accordance with the rules of natural justice, or if it has made a determination exhibiting an error of law on the face of the record, its decision can be set aside.»⁸

Furthermore, the grounds for review are not cast in stone, and they have evolved substantially in recent years. Among recent examples in Canada, one can refer to *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*⁹, with respect to the concept of fairness and *Canadian Union of Public Employees v. New Brunswick Liquor Corp.*¹⁰, with respect to the notions of preliminary or collateral matters or jurisdictional error. Also, section 28 of the Federal Court Act enumerates a number of grounds for judicial review. It was thought to comprise a fairly exhaustive list when the Act was passed in 1970, but it is generally acknowledged to require revision today, and the federal government is proposing to do just that.

Accordingly, it was felt desirable to avoid a confining enumeration of grounds of review in a constitutional provision. We also wished to frame it in terms broad enough to encompass the full scope of the review power as presently applied by Canadian courts, and to allow for its continued evolution.

To this end, it may be useful to briefly examine the historical source of the power being exercised by a superior court in the process of judicial review.

Halsbury's *Laws of England* refers to prerogative writs and orders as the proceedings «by means of which the Queen's Bench Division exercises its ancient jurisdiction of supervising inferior courts, commanding magistrates and others to do what their duty requires in every case where there is no specific remedy (or no equally convenient and effective method of appeal) and protecting the liberty of the subject by speedy and summary interposition.»¹¹

7. *Idem*, p. 150.

8. *Idem*, p. 51.

9. [1979] 1 S.C.R. 311.

10. (1979) 97 D.L.R. (3d) 417.

11. Vol. 11, p. 767.

In *Attorney General of Quebec v. Farrah Laskin*, C.J.C., examines the history of this power in England, in Canada generally and in Quebec, and it may be useful to repeat his comment here :

Ever since its creation in 1849 the Superior Court has been the court of original general jurisdiction in Quebec and has exercised over tribunals of inferior jurisdiction a supervisory power similar to that enjoyed at common law in England by the Court of King's Bench. In *Three Rivers Boatman Ltd. v. Canada Labour Relations Board*, Chief Justice Fauteux speaking for the Court said, at p. 615 :

(TRANSLATION) At its creation 1849, the Superior Court acquired in its entirety the original civil jurisdiction, in particular the supervisory jurisdiction, that had until that time been exercised by the Court of King's Bench : cf. 12 Victoria, c. 38, s. VII. At the same time it was provided that prerogative writs pertaining to the exercise of this supervisory jurisdiction would thenceforth emanate from the Superior Court : cf. 12 Victoria, c. 41, s. XVI. The Superior Court was thus invested with the supervisory power, based on the common law, that was exercised in England by the Court of King's bench on which our Court of King's Bench was modelled. This law of judicial control over courts, legal entities or corporations exercising judicial or quasi-judicial powers comes to us from the English public law introduced into Quebec at the time of and as a result of the cession. This supervisory jurisdiction, which in England was held by the Court of B.R. (*Banco Regis*), is referred to in *Groenvelt v. Burwell*, (1699), 1 Ld. Raym. 454, 3 Salk. 354, 91 E.R. 1202, which involved an appeal by a doctor from a decision of the Censors of the College of Physicians of London sentencing him to a fine and imprisonment. It was objected that the doctor had no remedy, since the statute contained no provision for a writ of error or of *certiorari*. Holt C.J. held :

That a *certiorari* lies, for no court can be intended exempt from the superintendency of the king in this court of B.R. (*Banco Regis*). It is a consequence of every inferior jurisdiction of record that their proceedings be removable into this court, to inspect the record and see whether they keep themselves within the limits of their jurisdiction...

(TRANSLATION) Applications of this law regarding judicial control are found in Quebec prior to 1849 in *Hamilton v. Fraser*, (1811), Stu. K.B. 21, in which the Court of King's Bench, in a decision delivered in 1811, allowed an application for prohibition against the Vice-Admiralty Court, and in *King v. Gingras*, (1833), Stu. D.B. 560, in which the Provincial Court of Appeal, in a decision delivered in 1833, granted an application for *certiorari* against the commissioners for erecting churches.

A few years later, Chief Justice Fauteux expressed the same views in *Séminaire de Chicoutimi v. City of Chicoutimi*, and he said, at p. 687 :

Indeed, it is known that on the eve of Confederation the Superior Court still exercised — as it had done since its creation 1849 — (a) the general jurisdiction which was conferred by s. 6 of the Act of 1849, and extended by s. 2 of c. 78, C.S.L.C. 1860, to hear and determine in the first instance all suits or actions which were not exclusively matters for the Circuit or Admiralty Courts, and (b) the special jurisdiction conferred on it by s. 7 of the Act of 1849, and extended by s. 4 of c. 78, C.S.L.C. 1860, to exercise a superintending and reforming power and control over courts of inferior jurisdiction and, in particular, over bodies politic and corporate within Lower Canada, including of course municipal corporations. This general jurisdiction, which makes the Superior Court the court of original general jurisdiction, is recognized in art. 28 of the 1867 *Code of Civil Procedure*, and while no specific provision is to be found in that Code relating to this special superintending and reforming power and control by the Superior Court, it can be seen that this power was extended before and after 1867, as appears in s. 2329 of the 1888 Revised Statutes, the relevant provisions of which were substantially reiterated in Art. 50 of the 1897 Code and in art. 33 of the present Code.

This supervisory power of the superior courts over inferior tribunals was not exercised by means of an appellate procedure but rather through writs of prerogative like *mandamus*, prohibition and *certiorari*. The action in nullity or

declaratory action was also recognized both in England and here as a proper procedure for the exercise of the control power (*Anisminic Ltd. v. Foreign Compensation Commission*, at p. 196; *l'Alliance des Professeurs catholiques de Montréal v. Labour Relations Board of Quebec*, at p. 167).

At the time of Confederation the control by superior courts over inferior tribunals was effected mostly through the writ of certiorari.

In England and in the common law Provinces, the grounds for certiorari fell into two broad categories — (i) want or excess of jurisdiction; and (ii) failure on the part of the tribunal to observe the law in the exercise of its jurisdiction when such failure was apparent on the face of the record.

Although the « illegalities » of the second category (generally referred to as « error of law on the face of the record ») were within the jurisdiction of inferior tribunals, the courts nevertheless interfered in certiorari proceedings with the erroneous determination of such tribunals.

In *Rex v. Northumberland Compensation Appeal Tribunal*, Singleton L.J. spoke thus, at p. 341 :

Error on the face of the proceedings has always been recognized as one of the grounds for the issue of an order of certiorari.

Lord Denning reached the same conclusion and added, at p. 346 :

... the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a Court of Appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had.

and Morris L.J. said, at p. 357 :

It is plain that *certiorari* will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision, or irregularity, or absence of, or excess of, jurisdiction where shown. The control is exercised by removing an order or decision, and then by quashing it.

That such was also the law in Canada is beyond question. In *Rex v. Nat Bell Liquors Ltd.*, Lord Sumner pointed out the two areas where the control (as opposed to review) could be exercised when he said, at p. 156 :

That supervision goes to two points : one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise ; the other is the observance of the law in the course of its exercise.

and later, at p. 161, he added :

It follows that there is not one law of certiorari before 1848 and another after it, nor one law of certiorari for England and another for Canada.

In Quebec, the situation was not substantially different. The supervisory power of the Superior Court extended beyond questions of jurisdiction to include illegalities committed by inferior tribunals in the exercise of and within their jurisdiction...¹²

12. [1978] 2 S.C.R. 638, p. 649.

We therefore concluded that the most appropriate course for a constitutional provision would be to refer, not to any particular list or enumeration of grounds of judicial review, but to the basic power by which Canadian courts have applied and evolved the concept of judicial review over the years.

We therefore propose :

(4) A provincial adjudicative tribunal is subject to supervision and control by a superior court ; and a federal adjudicative tribunal is subject to supervision and control by a superior court or a court created by Parliament, concurrently or exclusively.

— Validation

If what has been proposed were to become law, and there were to be no other changes, an argument might be raised that courts and tribunals not within the definition of adjudicative tribunals are invalid. *Expressio unius est exclusio alterius*. By expressly validating adjudicative tribunals, we may have, by implication, excluded all other tribunals. Similarly, it might be argued that, by entrenching judicial review for adjudicative tribunals, we have, by implication excluded judicial review for all other tribunals.

To avoid these implications, we suggest two clauses. One would validate those courts and tribunals that are valid independently of the proposed reform. The second would validate any judicial review that exists independently of the proposed reform.

We propose :

- (5) (a) This section shall not be construed as invalidating any court, tribunal, board, commission, or authority that is otherwise valid.
 (b) This section shall not be construed as invalidating any ground for judicial review that otherwise exists.

— Independence

One justification that has been raised for invalidating adjudicative tribunals is the need to maintain the independence of the judiciary. The federal appointment power, and stringent conditions for removal of superior courts justices, have been seen as safeguards to the independence of the judiciary. Whether, indeed, the federal appointment power helps maintain the independence of the judiciary or not, the concern is a valid one. Adjudicative tribunals should be independent.

The Charter requires that criminal courts be independent (s. 11(d)). There is no comparable statement of principle in our Constitution for civil

courts, and for adjudicative tribunals. The Constitution needs such a statement of principle.

We propose :

(6) Every court and every adjudicative tribunal shall be independent and impartial.

One of the advantages of this proposal is to allow the courts to define the necessary degrees of independence and impartiality appropriate to each adjudicative body. Canadians have inherited a long happy tradition of an independent and impartial judiciary. The judiciary is in a unique position to decide issues between citizens and government, and now some issues will be decided by adjudicative tribunals. It is necessary to maintain the independence of arbiters of such questions so that justice may be seen to be done and may in fact be done in instances of vital concern to the disputants.

Conclusion

We are apprehensive about the government draft amendment. It does not appear to achieve its purpose. Furthermore, this section of the constitution is only a small part of a larger scheme for the distribution of judicial services represented in the judicature provisions of the *Constitution Act, 1867*. The entire system of judicature should be examined in relation to any change which is proposed to section 96. If the proposed amendment were in place, it could result in a dual court system in all but name. Much more thought and effort would be required to arrive at the complete constitutional amendment to those provisions. This would include methods of improving the judicial system, the appointment of judges, the entrenchment of the Supreme Court of Canada and methods of appointment to that court, and the express provision for independence of all judges, not only those appointed to « superior courts ».

We believe that changes to the constitution should be statements of principle and should preserve Canadian concepts of justice and the aforementioned six principles enunciated by the Minister of Justice and this Committee. A system of justice should apply equally to both orders of government. Both orders of government should be entitled to create one common tribunal or court to deal with any common subject matter.

It would be useful to conduct an examination of the differences between boards, tribunals and courts, but these differences or the differentiation of subject matters appropriate to both would involve substantial research and may prove to be too detailed for inclusion in a constitutional document. What is more important is the recognition that we all expect justice to be

seen and to be done in our important civil matters. Our tradition and history dictate that the supervisory jurisdiction of the Superior Courts must be maintained. In an effort to avoid potential problems, we have attempted to redraft section 96. We offer the following draft for discussion purposes. Any draft amendment to the judicature provisions of the *Constitution Act* should be looked at as a part of a dynamic whole and should be tested by reference to those six principles aforementioned.

Proposed Redraft of Section 96

96A (1) The Legislature of each province may confer on any adjudicative tribunal jurisdiction in respect of any matter within the legislative authority of the province.

(2) Parliament may confer on any adjudicative tribunal jurisdiction in respect of any matter within the legislative authority of Parliament.

(3) An «adjudicative tribunal» is a tribunal, board, commission, or authority:

- (a) whose sole or central function is judicial; and
- (b) which is an element in a scheme for the administration or application of a regulatory statute in a specialized field.

(4) A provincial adjudicative tribunal is subject to supervision and control by a superior court; and a federal adjudicative tribunal is subject to supervision and control by a superior court or a court created by Parliament, concurrently or exclusively.

- (5) (a) this section shall not be construed as invalidating any court, tribunal, board, commission, or authority that is otherwise valid.
- (b) this section shall not be construed as invalidating any ground for judicial review that otherwise exists.

(6) Every court and every adjudicative tribunal shall be independent and impartial.