THE SUPREME COURT OF CANADA AND ADMINISTRATIVE LAW

DAVID PHILLIP JONES*

The speaker observed that the Supreme Court of Canada has not been innovative in its approach to Administrative Law, although the fact that Canada has a written constitution and the U.K. has not should provide a fertile area for distinctive Canadian contributions in Administrative Law. Although the Roncarelli *decision required the Court to look at policy in protecting individual rights against the state, the Court has generally failed to formulate policy and clear precedent and has not yet evolved a coherent body of Administrative Law.*

The purpose of our meeting this afternoon is to look at the rôle which the Supreme Court of Canada has played in shaping and developing our Administrative Law. I propose to take a broad, sweeping view of the Court's contribution in this area, and do not purport to undertake a detailed or empirical study of the Court's decisions. Some of the other commentators will compare the Court's contribution to this area of the law to the contributions made by the final courts in other jurisdictions.

At the outset, an observation might be made about the phrase "Administrative Law". The term really has only come into common usage since about the end of the Second World War—even though Dicey much earlier used the phrase to compare French *droit administratif* with the Rule of Law. Therefore, an appraisal of the Court's work in this area of the law during the first fifty years of its existence is not easy. Indeed, it was only in 1948 that Professor F. R. Scott, writing in the Canadian Bar Review, undertook what appears to be the first survey of Canadian Administrative Law. Professor Scott's article covered the period from 1923 to 1947, but did not specifically concentrate on the rôle of the Supreme Court of Canada. Nevertheless, I submit that Professor Scott's general appraisal of the behaviour of the Canadian courts to the subject is equally applicable to the behaviour of the Supreme Court of Canada itself:[1]

> Meanwhile Canadian judges, faced with the practical problem of deciding actual cases, were applying the leading decisions of the English courts, and were keeping our developments parallel with that of England.

Of course, in retrospect, this comment might be explained easily by reference to the existence of appeals from the Supreme Court of Canada to the Judicial Committee of the Privy Council. But I tend to discount the importance of the theory that the Supreme Court of Canada was judicially "chained" to the Privy Council, and was only liberated in 1949 with the abolition of the appeals thereto. I do not think it completely fortuitous that one of the most influential—indeed notorious—Canadian cases in Administrative Law from this era, *Nat Bell Liquors* v. *The King*,[2] almost entirely by-passed the Supreme Court of Canada. Further, I detect little evidence that the Supreme Court of Canada has exerted its liberty to develop Canadian Administrative Law in any novel direction since 1949. Indeed, I submit that it is still true that there is no substantial area of Canadian Administrative Law which differs from the laws of England or of most of the Commonwealth.

This is not to say, however, that the Supreme Court of Canada has not decided very important cases—some of which, in fact, could only have been

---

* Of the Bars of the Province of Alberta and of the Northwest Territories, and of the Faculty of Law, McGill University, Montreal.

[1] F. R. Scott, [1948] Can. Bar Rev. 268, 269.

[2] [1927] A.C. 128.

decided in Canada. Clearly, the decisions in *Hodge* v. *The Queen*,[3] *The Attorney-General for Canada* v. *The Attorney-General for Nova Scotia*,[4] *Re Initiative and Referendum Act*,[5] and the *John East Iron Works*[6] case are all of constitutional significance, even though they also belong to the field of Administrative Law. This raises the question of the relationship between Administrative and Constitutional Law, a question which never really arises in England. To the extent that Canada has a written constitution which limits the powers of any or all levels of government in the country, the ambit of potential challenge of governmental action by the subject is thereby increased. In my view, Administrative Law encompasses at least this part of Constitutional Law; and I suspect that this will be the most fertile area for distinctive Canadian contributions to Administrative Law in the future.

Probably the one decision of the Supreme Court of Canada which is cited by courts throughout the English common law world is *Roncarelli* v. *Duplessis*[7]—a case which centered not on the peculiar written provisions of the British North America Act, 1867 but rather on the very nature of our form of constitutional government. This case is doubly important to our study this afternoon. First, it was decided by the Supreme Court of Canada after the abolition of the appeals to the Privy Council in 1949 (even though the action itself was susceptible to be appealed to the Judicial Committee since the original writ was issued before 1950). Therefore, this decision is solely the handiwork of the Supreme Court of Canada. Secondly, the subject-matter of the case forced the Court to rise above its normal task of detailed statutory interpretation, and wrestle with a question of principle that was laden with grave political overtones: namely, whether the premier of a province had overstepped his lawful authority and thereby violated the rule of law. It is not frequent that a dramatic case of this kind arises for judgment by any court. But, it is submitted, it is important for the Court to remember its rôle as one of the principal protectors of citizens' rights—and it should be mindful of this even when deciding far less dramatic cases that involve only highly technical questions of law. After all, people go to court to vindicate their rights, and it is exceedingly important for the court to have some vision of what it is doing, and not merely for it to be a mechanical contraption which churns out judgments—however correct each one of them might be. Undoubtedly, the decisions in *Roncarelli*, *Lamb* v. *Benoit*,[8] *Chaput* v. *Romain*,[9] *Smith and Rhuland Ltd. v. The Queen*,[10] *Switzman* v. *Elbling*,[11] and the *Saumur* case[12] represent the high-water marks of the Supreme Court's protection of individuals' inherent rights and of Canadian Administrative Law.

One might have thought that the Canadian Bill of Rights[13] would have provided further incentive to the Court's activities in this area. Yet, aside from the

---

[3] (1883) 9 App. Cas. 117.
[4] [1951] S.C.R. 31.
[5] (1919) 48 D.L.R. 18.
[6] [1948] 4 D.L.R. 673, [1949] A.C. 134.
[7] [1959] S.C.R. 121.
[8] [1959] S.C.R. 321.
[9] [1955] S.C.R. 834.
[10] [1953] 2 S.C.R. 95.
[11] [1957] S.C.R. 285.
[12] [1953] 2 S.C.R. 299.
[13] S.C. 1960, c. 44.

Drybones case,[14] the Court to date really has shunned the legislative invitation of Parliament to build on to the *Roncarelli* line of cases—as witnessed, I submit, by the recent decisions in *Lavell* and *Bedard*.[15] If one considers that any limit to governmental action (including legislation) or method of attacking it forms part of Administrative Law, then one must regret that the Supreme Court of Canada has declined to embrace wholeheartedly this opportunity to expand Canadian Administrative Law.

Of course, not every commentator feels that the courts should adopt an interventionist stance in the affairs of the administration. Professor P. W. Hogg, in what undoubtedly is the most thorough study of the Supreme Court's behaviour in Administrative Law (covering the period 1949 to 1971),[16] believes that the courts should exhibit some restraint in judicial review: if Parliament or the legislatures of the provinces have indicated that particular specialized bodies should exercise certain powers, then why should the courts arrogate to themselves the right to supervise these bodies? There is much merit in this position, but, as statutory tribunals and statutory powers multiply from day to day, there is reason to advocate the existence of some separate and independent body to review the exercise of delegated power. Certainly, neither Parliament nor the legislatures themselves have time or energy to supervise closely the functions which they have delegated to unelected officials. In my view, which I believe is shared by a number of other commentators, the supervisory power of the superior courts serves as an important check or safety valve on the actions of the executive government.

Despite the differences between Professor Hogg's view of the desirability of judicial review and my own, it is instructive to quote from his conclusion:[17]

> But, if the Court's instinct for the proper result in each case is usually sound (as I believe it is), its reasons for judgment are often woefully inadequate. First of all, it is very rare to find the Court enunciating the grounds for what I detect as its tendency towards restraint in review; since there are excellent policy reasons for this tendency it is a pity that they so seldom appear in the reports. Secondly, the Court occasionally does not state the legal rule upon which its decision is based, or (as in the delegation and natural justice cases) it states the rule in terms of meaningless formulae such as the classification of functions. Thirdly, the Court commonly relies on a very narrow base of source material: its own prior decisions, even when they are clearly relevant, and even when they seem inconsistent with the instant decision, are sometimes not referred to; the decisions of inferior courts and of the courts of other jurisdictions are only sparsely referred to; the Canadian periodical literature, which is quite rich in the area of administrative law . . . is never referred to; other secondary sources, such as English texts . . . are referred to very rarely. Fourthly, and I suppose this is the inevitable result of the previous three points, the Court's reasons for judgment tend to be brief and in some cases even perfunctory.

In the three and a half years which have elapsed since the study, very little has changed even though there has been a large number of administrative law cases heard by the Court. For example, in the recent *Saulnier* decision, Pigeon J., writing for a unanimous, nine-member Court, had to decide whether the principles of natural justice were breached during an enquiry conducted by the Quebec Police Commission. One leg of his judgment rested solidly on the statutory framework within which the Commission operated. But the other leg of the judgment rested on the common law requirement that there be a judicial or quasi-judicial function in order for the rules of natural justice to apply. Yet,

---

[14] (1970) 9 D.L.R. (3d) 473.

[15] (1974) 38 D.L.R. 481.

[16] (1973) 11 Osgoode Hall L.J. 187. Note the one year gap which exists in the coverage between Professor Scott's and Professor Hogg's studies; and further, that Professor Hogg examines only the behaviour of the Supreme Court of Canada.

[17] *Id.* at 222.

Pigeon J. did not critically consider what constitutes a "judicial or quasi-judicial function", nor did he indicate how one might determine when such a function exists. Nor did he refer to that other, very recent decision of the Supreme Court, which also considered whether a particular statutory power was judicial or quasi-judicial—*Howarth* v. *The National Parole Board*[18]—even though Pigeon J. himself wrote the majority opinion! As a result, no litigant can safely predict the outcome of any dispute that he may have concerning the proper procedure to be followed in the exercise of an enormous range of statutory powers. Surely, the time of the Supreme Court of Canada could be better spent in providing clear guidelines to help parties to future disputes avoid litigation, rather than deciding an ever-increasing wilderness of first instances!

Likewise, despite its decision in the *Metropolitan Life*[19] case, there is no easy way to predict when the Supreme Court will give effect to a privative clause: see *Pringle* v. *Fraser* and the *Woodward Estate* case.[21]

In summary, therefore, the principal criticism which can be levied against the Supreme Court's treatment of Administrative Law can probably be made in other branches of the law too: namely, that the Court too often decides particular cases on narrow points of law, without much regard to the broader policy aspects of its work, and without really attempting to weave the law into one coherent whole. Of course, it may well be that this is the rôle which the Supreme Court has chosen for itself and which, in its wisdom, it thinks most suitable for its place in our constitutional system. I, for one, think it can do better.

---

[18] (1975) 50 D.L.R. (3d) 349; *Saulnier* is not yet reported.

[19] [1970] S.C.R. 425.

[20] (1972) 26 D.L.R. (3d) 28.

[21] [1972] C.T.C. 385.