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Some Observations on the Canadian Regulatory Agency

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Articles

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1. The Fourth Branch of Government

Government is growing at a rapid rate and its growth will continue in the foreseeable future. The quest for more and more social security, the growing awareness of the necessity for central regulation, particularly of our environment and natural resources, the inevitable decelerating of a economic activity, all call for increased governmental enterprise. This increase in governmental functions means a consequent curtailment of individual liberty and this curtailment must be carefully weighed in the light of the common good. In this uncertain day and age of rapid change, it is most imperative that our politico-legal processes be kept under constant review.

Boards, commissions and other administrative agencies[1] called by various names now regulate nearly every phase of the individual's social and economic conduct. Federally, administrative agencies have considerable powers of control over such wide-ranging enterprises as broadcasting, telecommunications, tariffs, transportation and energy. Provincially, a host of conciliators, assessors, examiners, referees and trustees operate under provincial statutory authority to regulate such areas as labour relations, education and the use of property. Municipally, an assortment of fire marshalls, engineers, inspectors and registrars, to name a few, operate under municipal ordinances to require individuals to maintain their property in a certain way, to regulate how, when and where they build and, in many circumstances, how, when and where they carry on their businesses.

The validity of the controls over the conduct of the individual's activities, depends on the powers bestowed on the functions utilized by the administrative agency. These powers and functions vary

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1. I use the term "administrative agency" in its widest sense. It includes all individuals and groups of individuals operating under statutory authority.

from agency to agency. Agencies generally act by applying the facts to prescribed standards set forth in the enabling legislation, although some may be given considerable discretion. Some may perform advisory roles, such as coroner's juries, conciliators and boards of inquiry. After inquiry into the relevant circumstances, their job is to ascertain the facts and to recommend a course or courses of action, but they have no power to enforce their recommendations. Some agencies may adjudicate upon claims, such as workmen's compensation boards and unemployment insurance boards. They perform a judicial function analogous to the regular courts. Still others may operate primarily in the field of legislation by recommending policy and standards to be followed.[2]

The greatest array of powers and functions are found in those administrative agencies that regulate vast economic undertakings, such as broadcasting, transportation and oil and gas. They embrace in one body all the usual functions of government. It is trite to say that in the complex economy of today it is not possible for the regular legislature, the regular executive and the regular judiciary to legislate, execute (administer) or interpret all the law of a modern community. Some delegation is necessary. The characteristic of the regulatory agency, as I will call this type of administrative agency, is that the regular governing body has granted considerable powers of government, that is, powers of legislating, executing (administering) and adjudicating to these bodies. They may be likened to little governments complete in themselves inasmuch as they are compact legislating, executing (administering) and adjudicating units. It is noteworthy that the regulatory agency and its resultant action more directly concern individuals than the regular government as licences, certificates, orders and other expressions of the will of these powerful bodies are often more crucial to individuals than the enactment of the general authority under which they are made.

The reasons for the growth of this method of governing — this so-called fourth branch of government — are many. In addition to the obvious and foremost reason — that is, the inability of the three branches of the regular government to cope with quantity — highly specialized experts are required to adequately deal with intricacies of such magnitude and depth as evince themselves in broadcasting, transportation and oil and gas operations. The regulatory agencies in these fields require trained and skilful personnel who, in general,

2. Such as the Fisheries Research Board of Canada (see R.S.C. 1970, c. F-24) and the Science Council of Canada (see R.S.C. 1970, c. S-5).

are better qualified than the people's representatives in Parliament, ministers of the Crown and members of the judiciary to make, execute (administer) and interpret the peculiar laws required for the regulation of these segments of the economy.

In addition, the duties of representatives, ministers and members do not permit the great amount of time needed with the problems that will arise. In a few words, they do not have the necessary man-power or organization. Further, in many cases, they do not have the flexibility that is so necessary for satisfactory solutions in the fields in which the regulatory agencies operate. For example, conventions of the legislatures, effectiveness of executive action and the system of precedent in the courts may often hinder practical solutions and make difficult, if not impossible evolution of workable concepts. The ways of the regulatory agency are, for the most part, empirical and many, if not most, of the ways have not been trodden before.

Another reason for the growth of the administrative agency and, in particular, the regulatory agency is the need for intensive, independent investigation before action is taken. Should a broadcasting medium be established in a certain area? Is it in the public interest? Should or should not an established railway line be abandoned? What are the criteria to be applied in determining this question? Should the Mackenzie Valley Pipeline be built? Is this in the public interest? Before persuasive answers can be given to these and similar questions, much investigation, patient exploration of facts and assimilation of many opinions are required. Thus the regulatory agency not only provides celerity, expertise and flexibility but also represents the principle that it is good government to correct evil before it arises rather than to legislate or adjudicate with respect to the evil after it arises.

Furthermore, the regulatory agency provides an effective political arm for ascertaining the effectuating policy in particular areas where government, for some reason, does not act. With respect to this reason, Professor John Willis has said:

> (They) at first sight look like courts in that they hold hearings and apply statutory standards — such as "fit and proper person", "public convenience and necessity", "just and reasonable rates", "in the public interest" and so on — to the facts of individual cases coming before them but are in reality minor "legislative" bodies pricking out a policy.[3]

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3. *Administrative Law in Canada* (1961), 39 Can. B. Rev. 251 at 260.

The regulatory agency does not primarily decide rights between individuals and other legal entities in the sense of adjudicating competing claims to rights recognized by statute or by common law. Nor are the regulatory agencies mainly concerned with the determinations under the usual rubrics of tort, contract, property or criminal law. They are for the most part concerned with policy matters such as the proper content of programs of television and radio, the operation of airlines in particular areas and the construction of gas and oil pipelines in Canada. In general, they deal with granting or withholding privileges of operating in particular fields of enterprise. The determination of these questions and the consequent granting or refusing of permits (called by various names) involve the consideration of far-ranging policy questions of social, economic and political import in Canada. When the agency grants the permit, it grants a privilege after these policy considerations have been taken into account. In result, the privilege is granted if the regulatory agency deems it a matter of public policy to grant it.[4]

The powers and functions of three major regulatory agencies in Canada — the Canadian-Radio Television Commission, the Canadian Transport Commission and the National Energy Board — will be briefly outlined and referred to from time to time for illustrating points under discussion.

The *Broadcasting Act*[5] establishes the Canadian Radio-Television Commission. As expressed in section 15 of the Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this Act. Section 3 sets forth a broadcasting policy for Canada which includes among its principles

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4. In determining the validity of certain increases in tariffs of fees to be paid for licences for private commercial radio broadcasting stations *Procureur Général du Canada* v. *Compagnie de Publication La Presse,* [1967] S.C.R. 60; 63 D.L.R. (2d) 396, Abbott, J. said, at 76 (63 D.L.R. (2d) at 408):— ". . . such a licence merely involves a permission to trade, subject to compliance with certain conditions. In the present case, there is no contractual relationship between the Crown and the respondent, and the latter had no vested or property right in the licence which it held. What it did have was a privilege granted by the state, conferring authority to do something which without such permission would be illegal." He continues (at 77(408))' "In view of the nature of the right held by a person licensed to operate a private commercial broadcasting station, I am of opinion that the Governor in Council can validly increase or decrease the fees payable by such a licensee at any time during the currency of the licence."

5. R.S.C. 1970, c. B-11.

a single broadcasting system owned and controlled by Canadians, varied programming in English and in French and the establishment of a corporation (the Canadian Broadcasting Corporation) to provide a national broadcasting service that will be predominantly Canadian in content.

An Act, called the *National Transportation Act,*[6] to define and implement a national transportation policy for Canada, received vice-regal assent on the 9th day of February, 1969. It declared in Section 3 that an economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost is essential to protect the interests of the users of transportation and to maintain the economic well-being and growth of Canada.[7] The Canadian Transport Commission carries out this policy for the most part through eight committees each operating within a defined jurisdiction set out in the General Rules of the Canadian Transport Commission.[8]

The National Energy Board was established in June, 1959, by the *National Energy Board Act,*[9] to regulate the construction of oil and gas pipelines and international power lines and to control the exportation and importation of oil and gas and the exportation of power.

It is submitted that the regulatory agency accomplishes three general types of acts, — the administrative act, the advisory act and the regulatory act. Administrative acts are analogous to those performed by the higher echelons of the executive branch of government. These acts are a consequence of the execution of parliamentary policy.[10] They are decisions made in accordance with a statutory mandate or prerogative power.[11] Advisory acts include

6. R.S.C. 1970, c. N-17.

7. The Prime Minister said prior to the election of 8th July, 1974, that the government would be abandoning the structure which was based on the belief that competition would result in lower rates for the consumer of railway services. Apparently Canadians may now expect a system where freight rates will be based on costs rather than on competition.

8. General Order, 1967-1, dated 20 September 1967, as amended.

9. R.S.C. 1970, c. N-6 as amended by R.S.C. 1970 (1st Supp.) c. 10, c.27 and c. 44 and R.S.C. 1970 (2nd Supp.) c. 10.

10. The courts have recognized for some time the right of administrative agencies to make administrative (policy) decisions. For example, in *Re Electric Power Act; Re West Canadian Hydro Electric Corp.*, [1950] 3 D.L.R. 321 (B.C.S.C.) at 411, it was stated: "The cases reveal an increasing tendency on the part of the Courts to concede to bureaux such as the Public Utilities Commission, the right to arrive at conclusions on the basis of policy and expediency rather than at law."

11. I will not adhere to the distinction between an administrative act and a judicial

the important function of advising the Crown on all matters of state. There is no apparent reason why this role is reserved to Ministers of the Crown.[12] Indeed, as already noted,[13] it may be considered as another reason for the regulatory agency. For example, the Canadian Radio-Television Commission may, after hearing, issue, amend or renew any broadcasting licence. But the wide powers of the Governor-in-Council to issue directions to the Commission and to refer back to the Commission decisions for rehearing[14] places the Commission theoretically in an advisory role.

The regulatory acts are those acts concerned with the actual administration of the enabling legislation and the policy decisions made thereunder. Thus the Canadian Transport Commission (through its Railway Committee) regulates the construction, maintenance and operation of railways, including matters of engineering, locations of lines, crossings, operating rules, investigations of accidents, accomodation for traffic and facilities for service, freight and passenger tariffs and rates and railway accounting. The wide administrative powers exercised by the Commission (through its Air Transport Committee) are well illustrated in the regulations that the Commission may make.[15] They may, to mention a few, prescribe the forms of accounts and records to be kept by air carriers. They may require air carriers to file with the Commission returns with respect to their assets, liabilities, capitalization, revenues, expenditures, equipment, traffic and employees. They may provide for uniform bills of lading and other documentation, govern minimum insurance requirements and disallow, suspend, substitute and prescribe tariffs and tolls to be

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act insofar as the principles of natural justice or fair dealing have been judicially held not to apply to administrative acts but only to acts which are characterized as judicial. The distinction is not accurate as applied to the regulatory agency. As will be shown some administrative acts are subject to the quasi-judicial function. See also the *Federal Court Act,* S.C. 1970-71-72, c. 1, s. 28; *infra,* note 54.

12. "This function is one peculiarly reserved to Ministers of the Crown. It covers a great variety of matters which the legislature and constitutional usage have left within the discretion of the Crown. At the core of constitutional monarchy is the principle that the Crown must accept the advice of Ministers who have the confidence of the legislature. What the advice shall be is a matter solely for the Crown's advisers, provided they can maintain that confidence". B.L. Strayer, *Injuctions Against Crown Officers* (1964), 42 Can. B.Rev. 1 at 29.

13. I am referring particularly to the expertise of the regulatory agency.

14. *Broadcasting Act,* s. 27.

15. *Aeronautics Act,* R.S.C. 1970, c. A-3, s. 14. Other regulations may be made by the Minister and by the Governor in Council but they are almost invariably made on the recommendation of the Commission.

charged by licensed air carriers. Statutory provisions may confer judicial duties on the agency, such as the power to award compensation in certain defined instances.[16]

Administrative, advisory and regulatory acts may be performed by legislative, administrative, judicial or quasi-judicial functions. In other words, the agencies' acts may be the result of the use of either one or more of these functions. As Sir W. Ivor Jennings so clearly points out, these functions differ only in degree.[17] Thus regulations and rules made under the enabling legislation may differ from orders made under administrative powers only in scope of operation and effect. One is of general application and the other applies to one entity only. Similarly decisions made after a judicial inquiry only bind the parties concerned but their practical effect may be much more far-reaching. However, the major consequences of the method employed in accomplishing the act are to be found in the legal incidents attached to each method or function.

Little elaboration is needed on the legislative function. Within the confines of the enabling statutes, the agencies issue their own rules of practice and procedure and various regulations in respect to carrying out the purposes of the statute. Somewhat analogously to this delegated legislation, they issue written decisions, policy statements and other types of general directions that serve as guides for the conduct of their jurisdictional entities. However, their discretion to perform the acts required by their statutory mandate must not be unduly curtailed by such decisions, statements or directions.[18]

The employment of the administrative, judicial or quasi-judicial function as the method of arriving at the resultant act is dependent on the nature of the decision to be rendered by the agency in light of all circumstances. This is a matter of interpretation and classification.[19]. Like any decision-making body, the regulatory agency must first ascertain the facts and then render its decision

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16. See e.g. *National Energy Board Act*, s. 72.
17. *The Law and the Constitution* (5th ed. London: University of London Press, 1959), particularly Chapter 1 and Appendix I.
18. *Infra.*
19. That the determination depends on the characterization of functions of the administrative agency and the broad nature of the inquiry is illustrated in the following judicial expressions:

> "The true test therefore is to see what the function of the tribunal is. Is it to ascertain legal rights and liabilities or to create them? Is it to apply the law or policy as expediency? Is it to be guided by law or is it a law unto itself?" *(Re*

after applying prescribed rules or standards or, if no rules or standards exist, in accordance with the dictates of its own discretion. Thus our regular courts generally find rules or standards that they will apply to individual cases that come before them in previously decided cases. Sometimes they may be guided by the provisions of a statute. However, at times they may have neither of these sources to turn to and "[i]n such cases the judges have usually created their new rules in harmony with what they have believed to be "the contemporary common sense and needs of the nation."[20] If the standards or rules are prescribed, obviously less discretion is utilized in proportion to their detail. If the statute prescribes that certain financial, economic and market conditions must exist before a certificate is issued, there is some curtailment of discretion. If the statute further decrees that only those companies which have been incorporated before a certain date shall be issued a certificate, the discretion is further curtailed. Agencies that apply such general standards as "public convenience and necessity", "just and reasonable rates" obviously exercise a greater discretion than an agency that determines whether a workman is entitled to a money payment if he fulfills certain conditions. Herein, it is said,[21] lies the distinction between the administrative, judicial and quasi-judicial function. A purely administrative function involves no exercise of discretion. It is the automatic application of definite standards to undisputed facts. Many of the regulatory acts fall into this category as when a safety inspector makes routine checks of a pipeline or a railway. The fact-finding process also is generally classified as an exercise of the administrative function as illustrated by reports of

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Brown and Brock and Rentals Administrator, [1945] O.R. 554 (C.A.) at 564 (*per* Roach, J.A.); [1945] 3 D.L.R. 324 at 333).

"In each case the Court must examine the duty imposed on the tribunal and in doing so no great assistance is derived from decisions that fall on one side of the line of the other unless these cases state principles." (*R.* v. *Board of Broadcast Governors, Ex parte Swift Current Telecasting Co.*, [1962] O.R. 190 at 200 (*per* McRuer, C.J.H.C.); (1961) 1 D.L.R. (2d) 385 at 395, *rev'd* [1962] O.R. 657; 33 D.L.R. (2d) 449).

"In determing whether or not a body or an individual is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions and then to determine whether or not there is imposed a duty to act judicially." (*Calgary Power Ltd.* v. *Copithorne,* [1959] S.C.R. 24 at 30 (per Martland, J.); 16 D.L.R. (2d) 241 at 247.

20. Horace E. Read, *The Judicial Powers in Common Law Canada* (1959), 37 Can. B. Rev. 265 at 285.

21. See, for examples, notes 25,26, *infra.*

examiners and other officials to ascertain facts and report thereon.[22] But it is difficult to envisage the exercise of a purely administrative function. There will invariably be some element of discretion in the official who applies the standard or makes a report. Although somewhat analogous to the exercise of the quasi-judicial function, such acts are better categorized as resulting from the administrative function as they do not involve matters of policy and are more in the nature of recommendations. However, it is evident that the line is indistinct.

The judicial function is generally confined to questions which affect the established rights of the parties as found in statute or in the common law. Standards for guidance can usually be found but the discretion involved in the exercise of the judicial function is often considerable. This raises highly jurisprudential questions of how far the judiciary makes the law which are beyond the scope of this paper.

What then is the quasi-judicial function? The term is obsure in precise definition and, it is submitted, no better explanation can be found than in the "Report of the Committee on Ministers' Powers", presented by the Lord High Chancellor to Parliament by Command of His Majesty, April, 1932. The Lord Chancellor said:[23]

> The word 'quasi' when prefixed to a legal term generally means that the thing which is described by the word has some of the legal attributes denoted and connoted by the legal term, but that it has not all of them. For instance, if a transaction is described as a *quasi*-contract it means that the transaction has some of the attributes of a judicial decision, but not all. In order, therefore, to define the term *quasi*-judicial decision', as it is used in our terms of reference, we must discover which of the attributes of a true judicial decision are included and which are excluded.
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> A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) the presentation (not necessarily orally of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an

22. *Infra.*

23. Generally referred to as the Donoughmore Committee Report. Cmd. 4060 (1932) at 73-4.

> application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.
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> A *quasi*-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4) The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.
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> For example, suppose a statute empowers a Minister to take action if certain facts are proved, and in that event gives him an absolute discretion whether or not he will take action. In such a case he must consider the representations of the parties and ascertain the facts — to that extent the decision contains a judicial element. But, the facts once ascertained, his decision does not depend on any legal or statutory direction for *ex hypothesi* he is left free within his statutory powers to take such administrative action as he may think fit: that is to say, the matter is not finally disposed of by the process of (4). Whereas it is of the essence of a judicial decision that the matter is finally disposed of by that process and nothing remains to be done except the execution of the judgement a step which the law of the land compels automatically, in the case of the *quasi*-judicial decision the finality of (4) is absent; another and a different kind of step has been taken; the Minister — who for this purpose personifies the whole administrative Department of State — has to make up his mind whether he will or will not take administrative action if so what action. His ultimate decision is 'quasi-judicial', and not judicial, because it is governed, not by a statutory direction to him to apply the law of the land to the facts and act accordingly, but by a statutory permission to use his discretion after he has ascertained the facts and to be guided by considerations of public policy. This option would not be open to him if he were exercising a purely judicial function.
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> It is obvious that if all four of the above-named requisites to a decision are present, if, for instance, a Minister, having ascertained the facts, is obliged by the statute to decide solely in accordance with the law, the decision is judicial. The fact that it is not reached by a court so-called, but by a Minister acting under statutory powers and under specialized procedure, will not make the decision any the less judicial.

This excellent explanation of the quasi-judicial function illustrates that though similar it is not the judicial function; that only some of the attributes of a judicial inquiry are present and that the "decision does not rest on any legal or statutory direction". Although described as a quasi-judicial decision, its main difference is the method by which the decision is reached. It is an administrative act reached by "quasi-judicial" means.

The explanation was stated in England over forty years ago and the principles are still very much alive today. Although statutory standards may be found in a general way guiding the regulatory agencies, they are indefinite and do not circumscribe to any great degree their mandate to make "policy" decisions. Thus the *National Energy Board Act* prescribes certain indefinite standards for the issue of certificates "if the Board is satisfied that the line is and will be required by the present and future public convenience and necessity", after taking "into account all such matters as to it appear to be relevant".[24] The statute then lists certain matters, such as supply, markets, financibility, economic feasibility to determine the viability of the enterprise to which the Board may have regard in reaching its decision. Here, it is true, some standards are prescribed but there is little doubt that the decision is arrived at by quasi-judicial means.[25] The discretion is considerable, if not complete; it is a decision characterized as policy or administrative; it is a decision based on expendiency rather than formalized standards.[26]

Further insight into the character of the administrative act of the regulatory agency and the attributes and consequences of the quasi-judicial function may be found in an Ontario case decided in the Court of Appeal. In *Re Cloverdale Shopping Centre Ltd. and Township of Etobicoke*[27] the respondent sought an amendment to an

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24. S. 44. See also note 88, *infra*.

25. See *Royal Commission Inquiry into Civil Rights*, (Hon. J. C. McRuer, Commissioner) Report No. 1 Vol. 1, (Toronto: Queen's Printer, 1968) at 29:

> The terminology in this branch of the law of Ontario is further complicated by a subdivision of administrative powers. In legal parlance it is said in some cases administrative powers must be exercised by "acting judicially". That is, the decision, although administrative because it is arrived at on grounds of policy, is to be made after compliance with certain minimum standards of fair procedure, somewhat resembling judicial procedure. For example, the tribunal exercising the power may be required to hold a hearing not unlike a trial before it reaches its decision. In these cases, the administrative power is termed "quasi-judicial".

26. But it is recognized that this is a sandy foundation for the distinction between "judicial" and "quasi-judicial" functions. See, for example, Griffith and Street, *The Principles of Administrative Law* (5th ed. London:Pitman, 1973) where, at 149, it is stated: "this word "policy" must be looked at circumspectly: it has an emotive force which conjures up a vision of some matter which should be settled at Cabinet Level . . . . Properly understood. policy should be limited to the ultimate value judgments. There is a graduated scale of decisions at one end of which the ethical judgment is all important, and at the other end of which is a factual proposition, and all issues between are a blending of the two."

27. [1966]2 O.R. 439; 57 D.L.R. (2d) 206 (Ont. C.A.).

official plan to permit commercial development of certain property. The Planning Board approved the amendment in principle and town council adopted the report and then enacted a by-law amending the official plan and the appropriate zoning by-laws. The zoning by-laws came before the Ontario Municipal Board and the by-law amending the official plan was submitted to the Minister as required by sections 12 and 14 of the *Planning Act*.[28] He referred it to the Municipal Board pursuant to section 34 (1).[29] The Ontario Municipal Board held extensive hearings and, in essence, approved the amendments. The decision was attacked on the ground, *inter alia,* "that the Board misunderstood its function and in its decision does violence to the "standards or principles" governing official plans and amendments thereto as allegedly expressed in the Act and as allegedly governing its decision".[30] In other words, it is claimed that the Board was governed by other than usual judicial considerations in reaching its conclusion.

The question posed to the Court was whether the "functions of the Municipal board in determining the question of an amendment to the official plan proposed by council are precisely those of the Minister when the matter has been referred to the Board by the Minister under s. 34 . . . ".[31]

The Court held that "[i]n all such cases [amending the official plan and zoning by-laws] broad questions of policy come into play. The function of the Board as well as the function of the Minister is administrative in character. The decision to be made transcends the interests of the immediate parties. In my view, a consideration of provisions of the *Planning Act* taken as a whole makes this abundantly clear".[32]

The Court fortified its conclusion by referring to,[33] first, *Union Gas Co of Canada* v. *Sydenham Gas and Petroleum Co.*[34] in which

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28. R.S.O. 1960, c. 296, as am. by S.O. 1961-62, c. 104 (Now R.S.O. 1970, c. 349).
29. Section 34(1) (now section 15 (i)) then read: "When under this Act the approval or consent of the Minister is applied for, the Minister may, and upon application therefore shall, refer the matter to the Municipal Board in which case the approval or consent, as the case may be, of the Municipal Board has the same force and effect as if it were the approval or consent of the Minister".
30. [1966]2 O.R. at 444; 57 D.L.R. (2d) at 211.
31. *Id.* at 448; 57 D.L.R. (2d) at 215.
32. *Id.* at 449; 57 D.L.R. (2d) at 216.
33. *Id.* at 450; 57 D.L.R. (2d) at 217.
34. [1957] S.C.R. 185; 7 D.L.R. (2d) 65; 75 C.R.T.C. 1. See also *Memorial Garden Association (Canada) Ltd.* v. *Colworth Cemetery Co.*, [1958] S.C.R. 353;

the Supreme Court held that the grant of a franchise for natural gas by the Ontario Fuel Board was an administrative act and not subject to review. It was not a question of "fact or law" and the jurisdiction of the Court of Appeal does not include substitution of the Board's views of public convenience and necessity. The Court also made extensive reference to a judgment in the Court of Appeal in England[35] in the case of *Johnson & Co. (Builders)* v. *Minister of Health.*[36]

In this case owners of land comprised in a compulsory purchase order made by a local authority under the *Housing Act,* 1936, and confirmed under the Act by the Minister of Health, applied to the Court to quash the order on the grounds that the Minister, in considering objections to it, was bound to act in a quasi-judicial manner.

With respect to the character of the decision, the Court held:[37]

> The administrative character in which he acts reappears at a later stage because, after considering the objections, which may be regarded as the culminating point of his quasi-judicial functions, there follows something which again, in my view, is purely administrative, *viz.*, the decision whether or not to confirm the order. That decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objections, *vis-a-vis* the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue . . .
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> In a nutshell, the decision of the Minister is a thing for which he must be answerable in Parliament, and his actions cannot be controlled by the courts . . . If the phrase "quasi-judicial" is not

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13 D.L.R. (2d) 97, which held that the determination of "public convenience and necessity" is a matter of opinion (policy) and not of law or of fact. It is stated at 357 (101):

> As this Court held in the *Union Gas* case, *supra,* the question whether public convenience and necessity requires a certain action is not one of fact. It is predominately the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.

35. [1966] 2 O.R. at 450; 57 D.L.R. (2d) at 217.
36. [1947] 2 All E.R. 395 (C.A.).
37. *Id.* at 399-400.

> very closely watched, it is apt to lead to the fallacious view that, the decision of the Minister is in some sense a quasi-judicial decision which can be challenged on the ground of lack of evidence, for instance, in the courts in the same way as a judicial decision might be challenged. In this hybrid mixture of administrative and quasi-judicial function the two elements are closely intermingled, but, as I have said, the basic element is the administrative act which begins, or may begin, before, and ends after, the quasi-judicial stage has been completed. The word "quasi-judicial" again leads to a temptation to import into the area which that expression covers conceptions which are very suitable to the conduct of an ordinary piece of litigation, but which are quite unsuitable to the performance the acts which have been entrusted to the Minister by Parliament.

From this expression the view is upheld that an administrative act is subject to the control of Parliament unless, by the enabling statute, judicial controls are intended. But the question whether the decision is to be performed by means of an administrative, judicial or quasi-judicial function is one of interpretation. The Ontario Court of Appeal in *Re Cloverdale* said:

> In discharging some of these functions the Board throughout the proceedings will be required to act judicially, in others to act administratively and in still others to discharge the "hybrid" functions as described . . . [38]

In summation, the acts of the regulatory agency may be either administrative, advisory or regulatory. Administrative acts may result of an exercise of the administrative function, that is, performed by means of an order that does not require a hearing by statute or by the common law.[39] Administrative acts may also be performed in accordance with the quasi-judicial function.[40] Because they involve considerations of policy, they do not involve the judicial function.

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38. [1966] 2 O.R. at 453; 57 D.L.R. (2d) at 220.

39. Thus the National Energy Board may, pursuant to section 16 of the *National Energy Board (Part VI) Regulations,* S.O.R./59 - 435, as am by S.O.R./74-391, s.1, made by the Governor-in-Council, issue orders for the export of ethylene. But see *infra.*

40. All the regulatory agencies under study require that public hearings shall be held for certain types of applications. See section 19 of the *Broadcasting Act* and section 17 of the *National Transportation Act.* Section 20 of the *National Energy Board Act* (as am. by R.S.C. 1970 1st Supp.), c. 27, s.8) reads:

> (1) Subject to subsection (2), hearings before the Board with regard to the issue, revocation or suspension of certificates or of licences for the exportation of gas or power or the importation of gas, or for leave to

The questions now arise when a regulatory agency is required to exercise the quasi-judicial function and what are its incidents. These points were brought up and answered with respect to the application of the *National Energy Board Act* and regulations made thereunder in *Re A.-G. of Manitoba and National Energy Board*[41], decided by Cattanach J. in the Trial Division of the Federal Court.

In 1971, Dome Petroleum Limited applied to the National Energy Board for a licence for the export of ethane and to increase the amounts of propane and butane being exported under existing contracts pursuant to an arrangement with a company in the United States of America. At the same time Cochin Pipe Lines Limited applied for a Certificate of Public Convenience and Necessity for the construction of a pipeline. No decision was given on these applications and the National Energy Board, in May 1973, requested additional evidence which resulted in further hearings before the Board in July, August and September of that year.

In the meantime, Dow Chemical of Canada Limited had undertaken and committed itself to the construction of a large ethylene manufacturing plant in Fort Saskatchewan, Alberta, and Cochin Pipe Lines Limited now made application to construct twin piplines, one to carry the light hydrocarbons, such as propanes and butanes, and the other to transport ethylene.

As a result of its decision issued in January, 1974, the Board approved the export of ethane for a lesser period than requested. The Board also approved construction of the two pipelines.

Although there was some doubt at the time of the hearings, the Board asserted jurisdiction over ethylene in April, 1974, and Dow Chemical of Canada Limited consequently made application for the export of ten (10) billion pounds of ethylene over a ten-year period.

With respect to this application, the Board sent out a telex message to all the parties at the two previous hearings of the applications by Dome Petroleum Limited and Cochin Pipe Lines

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abandon the operation of a pipe line or international power line shall be public.

(2) When the Board revokes or suspends a certificate or licence upon the application or with the consent of the holder thereof, a public hearing need not be held if the pipeline or international power line to which the certificate or licence relates had not been brought into commercial operation under that certificate or licence.

(3) The Board may hold a public hearing in respect of any other matter if it considers it advisable to do so.

41. (1974), 48 D.L.R. (3d) 73 (F.C.T.D.).

Limited. Cattanach, J. said in his judgment with respect to this message:[42]

> The significant content of that message was that the Board would hear "publicly" the Dow application *ex parte* and that the Board would "consider written representations" subject to the conditions that the representations established that the representator was "directly interested in" or "affected by" the application . . .

The learned Judge continued:

> It was moved before the Board, when it convened on June 25, 1974, that the Board should alter its decision "to hold an *ex parte* hearing" in the format set out in the telex message and instead to hold a public hearing by which was meant that all interested parties should be afforded the opportunity of cross-examining the witnesses called by the applicant in support of its application and to introduce oral evidence in contradiction thereof at the conclusion of which the applicant would be permitted to make argument as would counsel for the interested parties who opposed the application

His decision continues:[43]

> After having heard argument on the request to so vary the format of the hearing of the application, the Board announced its decision, on June 26, 1974, not to vary its prior decision to hold an *"ex parte"* public hearing.
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> In short, the Board denied the motion made before it on the grounds that "the procedure it has selected in disposing of the Dow application is consistent with the requirements of the *National Energy Board Act* and with the requirements of the rules of natural justice".

Dow Chemical and the Board raised two matters, *inter alia,* in their argument against the ruling by the Board in the action initiated by the Attorney-General for Manitoba. First, the act of the Board was characterized as administrative and consequently outside the purview of the judicial arm. Although Cattanach, J. did not attempt to characterize the act, he said:[44]

> Regardless of how the Board may be characterized, that is as exercising administrative or executive functions as opposed to judicial or *quasi*-judicial functions, Parliament did impose procedural duties on the Board.

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42. *Id.* at 80.
43. *Id* at 80-1.
44. *Id.* at 85.

In answering the argument that the Board is master of its own procedure, the Court said:[45]

> If the Board complies with the express procedural provisions, it is the master of its own procedure, but, where there is a complaint, as is here the case, then the Court must decide whether there has been a failure to observe the principles of natural justice by being unjust or unfair in some material away to the persons who complain.

In other words, the Board must abide by the terms of the enabling statute, by its rules and regulations and by the principles of fundamental law. In this case, the Court first looked at section 20 and concluded that[46]:

> The word "public" in the context, in my opinion, means that every member of the public, subject to the qualification that such person has a demonstrable interest in the subject-matter before the Board over and above the public generally, shall have the right to participate in the hearing.

And,[47]

> The crucial question, therefore, is whether the meaning to be ascribed to the word "hearing" as used in s. 20 of the Act is that of a normal "oral hearing" by which I mean a hearing at which the Board would be prepared to hear both sides to comment upon or contradict any information that the Board has obtained, to permit the parties to adduce oral evidence, to be represented by counsel, to permit cross-examination of witnesses adverse to their position and for the Board to act only on information of probative value.

The learned Judge concluded:[48]

> Because the *National Energy Board Act* has bestowed upon the Board the attributes of a Court and because the statute and the Regulations contemplate the panoply of a full adversary hearing it follows that the word "hearing" in 20 of the Act must have attributed to it the same meaning as it has in a Court of law.
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> In that sense, a "hearing" before the Board is analogous to and imports a "trial" before a Court of law

When the Board decided to assert jurisdiction over the ethylene in April, 1974, it recommended that the Governor in Council pass a regulation empowering the Board to permit such exports by means

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45. *Id.* at 84.
46. *Id.* at 86.
47. *Id.* at 89.
48. *Id.* at 91.

of an order rather than by a licence. The major effect of proceeding by order would be to avoid section 20 of the Act and possibly the Board need not hold a hearing. The Court made no pronouncement on the validity of the Order in Council or the authority of the Board pursuant thereto to authorize the export of ethylene without a public hearing. In this regard the Court said:[49]

> Assuming the enactment is procedural only, as it appears to be, but which question it is not incumbent upon me to decide for reasons I shall outline, then the Board could by order authorize an applicant to export ethylene and it is clear from the language of the amendment, that the Board can make that order *ex parte* within the correct meaning of these words.

However, even if a hearing might not be required by the statute and the regulations, it would seem that the fundamental law might dictate an oral hearing, as the learned Judge said:[50]

> I fully appreciate that in many instances a hearing need not be an oral one but may be on written representations. If a tribunal is left by the legislation creating it with unfettered discretion as to how to proceed then the tribunal can work out an acceptable procedure that does not include an oral hearing, but even then there may be cases where fairness may dictate an oral hearing.

The decision is doubtlessly a landmark in the evolution of Canadian regulatory tribunals. It has emphasized the predominance of the public interest aspect; it has the effect of confining the regulatory agency more strictly to its statutory mandate and regulations lawfully made thereunder; it has brought into focus the importance of a judicial procedure, like a "trial" in the regular court of law. This the regulatory agency may find confining. However, there is some scope for alleviation of procedural rules in special circumstances, for example, in respect of the export of small quantities of gas, oil and electricity by means of "order" rather than the more formal "licence." The degree of formality or incidents of the quasi-judicial procedure depends on the statute or, if silent, on the determination of the court.[51] Regulatory acts, however, may be performed by use of the administrative, judicial or quasi-judicial function. Thus the regulatory agency may make orders pursuant to a general regulation (administrative): it may make an order pursuant to a judicial function, such as the award of compensation pursuant

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49. *Id.* at 83.
50. *Id.* at 89.
51. That is, in defining principles of natural justice or of "fair play".

to section 68 of the *National Energy Board Act*. Also it may make regulatory decisions using the quasi-judicial procedure, such as when the Board member reports back to the Board pursuant to section 14 of the *National Energy Board Act*.

The enabling statutes of the regulatory agencies contain provisions respecting both political and legal controls. The political controls constraining the agencies differ. Section 23 of the *Broadcasting Act* prescribes that the decisions of the Canadian Radio-Television Commission may be set aside or referred back to the Commission for reconsideration. Section 64 of the *National Transportation Act* provides that the Governor in Council may rescind any decision of the Commission. Section 44 of the *National Energy Board Act* provides that the issue of a certificate of public convenience and necessity by the Board must be approved by the Governor in Council. The Governor in Council would appear to have almost complete control over the decisions of the Canadian Radio-Television Commission whereas its control over the decisions of the Canadian Transport Commission and the National Energy Board is limited to rejection in the case of the Commission and to either approval or rejection[52] in the case of the Board, although the difference is somewhat whimsical.

With respect to legal controls, the three enabling statutes of the regulatory agencies under study provide for an appeal from decisions or orders of the agencies to the Federal Court of Appeal upon questions of law or jurisdiction "upon leave therefor being obtained from the Court upon application made within one month after the making of the decision or order sought to be appealed from."[53] It would appear that procedural questions involving breaches of natural justice are referrable to the Federal Court under sections 18 and 28 of the *Federal Court Act*.[54] At all times, of

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52. The phrase "subject to the approval of the Governor in Council" as set forth in section 44 of the *National Energy Board Act* would appear to be clear. The statute empowers the Governor-in-Council to approve or not to approve, nothing more. See *R.* v. *Huntingdon Confirming Authority, Ex parte George and Stanford Hotels Ltd.*, [1929] 1 K.B. 698.

53. *Federal Court Act*, S.C. 1970-71-72, c. 1 Annex B.

54. Jackett, C.J. of the Federal Court in *The Federal Court of Canada — A Manual of Practice* (Ottawa: Information Canada, 1971), writes, at 22: "Unlike the jurisdiction conferred by section 18 on the Trial Division, which is a jurisdiction in respect of pre-existing well-known remedies, the jurisdiction conferred by section 28 on the Court of Appeal would seem to be defined in the statute itself. It is a jurisdiction to review and set aside a decision made by a tribunal on the ground that the tribunal did one of three things . . . There is here no cross-reference to

course, administrative and regulatory acts when performed by means of the administrative function are subject to judicial surveillance. Such acts, expressed as orders, must fall within the statutory mandate, be reasonable and comply with all conditions precedent and subsequent.[55]

2. The Separation of Functions

According to the Montesquiean doctrine, good government requires a distinct separation of powers and functions between the legislature, the executive (administrative) and the judiciary. Although in England and in Canada the doctrine is not as sharply defined as in the United States of America, it has a definite impact on legal thinking in Canada and particularly on the evolution of Canadian administrative law.[56]

By traditional definition, the legislature makes the law, the executive (administrative) enforces the law and the judiciary

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pre-existing remedies and it is to be hoped that his law will turn out to be free of those rules developed in earlier times that were not based on obvious principles of justice."

Section 28 of the *Federal Court Act* reads:

> Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal
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> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
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> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

55. See generally, E.A. Driedger, *Subordinate Legislation* (1960), 38 Can. B. Rev. 1.

56. "It were curious to follow out the historical growth of the whole theory as to the "separation of powers". It rests apparently upon Montesquieu's *Esprit des Lois,* Book XI, c. 6, and is in some sort the offspring of a double misconception; Montesquieu misunderstood on this point the principles and practice of the English constitution, and his doctrine was in turn, if not misunderstood, exaggerated and misapplied by the French statesman of the Revolution . . . All that we need note is the extraordinary influence exerted in France, and in all countries which have followed French examples, by this part of Montesquieu's teaching . . . " A.V. Dicey, *The Law of the Constitution,* (10th ed. London: MacMillan, 1959) at 338-39.

interprets it. In the United States, Articles I, II and III of the American Constitution provide that all legislative powers shall be vested in a congress, that the executive power shall be vested in a president and that the judicial power shall be vested in a supreme court and in such inferior courts as the Congress may from time to time ordain and establish. Three distinct branches of government were thus provided for, each endowed with functions of a peculiar kind. These functions are controlled by an elaborate system of "checks and balances" which operate to confine the three branches to their respective functions as far as practicable. Thus the Senate was given the power to confirm or reject the President's appointments and to approve or to disapprove the ratification of treaties. The President was entrusted with the power of vetoing bills passed by the Senate and House of Representatives. The judicial branch was given, at least by implication, the power to determine the constitutionality of acts of Congress and to review administrative acts of the executive branch.[57] These powers place the judiciary in the United States system of government in a predominant position *vis-a-vis* the other branches.

In England, the exercise of keeping the powers and functions of government in separate compartments was never practised, as Sir W. Ivor Jennings so well shows in his treatise.[58] He points out the indistinct line between a law passed by Parliament, the regulations and orders issued by the administration and the decisions handed down by the judiciary. They are essentially the same in operation and enforcement. They differ in degree only and in the fact that they are made by different agencies of government. Similarly, when an administrative agency enforces any of its own orders, it is performing a function more or less analogous to the enforcement of a judicial decree; the distinction is one of machinery.

> The truth is that every decision involves the element which I have mentioned: the general rules, the ascertainment of the facts, the exercise of the discretion. Sometimes the important question is the question of law, what general rules do apply to this case. Sometimes the facts are important. And sometimes the discretion is the most important. It depends entirely on the particular case.[59]

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57. For example, see *Schechter* V. *United States* 295 U.S. 495 (1935), overthrowing the *National Industrial Recovery Act*.
58. W. Ivor Jennings, *The Law and the Constitution, supra,* note 17, particularly Chapter 1 and Appendix I.
59. See 1st ed. London: University of London, 1933 at 19.

The basis of the distinction is well-stated by Griffith and Street:[60]

> Thus the real argument is not whether the Executive, for example, is exercising legislative or judicial powers which properly belong to Parliament or the courts (for no kind of power *belongs* to any particular authority) but whether the power is being exercised by the authority best suited to exercise it and whether the exercise is sufficiently controlled by political and legal action.

Three similar but distinct consequences of governmental action have flowed from the English experience. First, the English have insisted on the complete independence of the judiciary as the best means of assuring an effective government. Consequently, English law assures the members of the judiciary considerable immunity from proceedings in their official capacity and adequate salaries and security of tenure not enjoyed by other government officials. They must be chosen from a milieu as completely untainted with bias and social prejudice as is humanly possible. Although no judge is entirely free from bias and social prejudice, the English judiciary has enjoyed a most enviable reputation in the calibre of judges appointed to this branch of the government.

The second consequence was expressed at any early stage of English legal development; namely, that no man should be a judge in his own cause.[61] But again this consequence is more readily observable in the United States than in England in respect to its application to administrative agencies. Thus the United States federal *Administrative Procedure Act*[62] does not attempt to separate the internal functions of the American regulatory agency as much as it attempts to prevent contamination of judging by other functions, particularly those of investigating and prosecuting. It also prescribes certain procedural rules to be followed by these agencies, such as the requirements of notice, opportunity for submission and consideration, facts and representation of the parties by counsel. The Act provides that the transcript and records constitute the entire

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60. *Supra*, note 26 at 15-16.

61. De Smith, *Judicial Review of Administrative Action* (3d ed. London: Stevens and Sons, 1973) at 217, says: "And it was Coke himself who had elevated to a fundamental principle of the common law the proposition that no man should be a judge in his own cause . . . In *Dr. Bonham's* case, [(1610) 8 Co. Rep. 114 b]" However, the learned author continues, at 218: "The common-law disqualifications for interest and bias may be waived. They may also be removed by statute, by express words or necessary intendment."

62. *Administrative Procedure Act*, (1946) 60 Stat. 237-244, as revised (1966) 80 Stat. 381.

record. But mainly the Act provides for detachment of the decision-makers from the administrative processes of the agency.

The third consequence of the development of governmental functions from the English experience is the doctrine of supremacy of Parliament. Not only does this doctrine mean that the legislature is supreme but also that all governmental officials are responsible to it. Unlike in the United States, the judiciary is subordinate to the Parliament and recognizes its inferior position in many circumstances, particularly in its control of ministers of the Crown.[63]

We now turn to the Canadian position. Considering the first consequence, the Canadian regulatory agencies are more closely akin to their American prototypes than to those in England. They are constituted courts of records with powers analogous to those of civil courts.[64] Their acts are ostensibly free from direct ministerial control.[65] Their members have defined salaries, tenure and status somewhat similar to appointments to the judicial branch of government. However, their relationship with the political branch of government lies somewhere in between the English and American experiences.

The second consequence, namely that of separation of investigatory powers from those of decision-making are not so evident. The close connection between the investigatory personnel and the Minister in the English experience has not provided much case law on this point. The Canadian position is well illustrated in a recent Ontario decision.[66] In this case, a member of an administrative agency, the Ontario Securities Commission,[67] concerned himself actively with the form of certain charges against registered voters

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63. See generally, B.L. Strayer, *Injunctions against Crown Officers* (1964), 42 Can. B. Rev. 1.

64. In *Montreal Street Railway Co.* v. *Montreal Terminal Railway Co.* (1905), 36 S.C.R. 369, Nesbitt, J. stated that "the fullest possible effect should be given to the language" (at 385) of the equivalent wording of subsection (3) of the *National Transportation Act,* which makes the Canadian Transport Commission (at that time the Board of Railway Commissioners) a court of record.

65. Generally, in England, the effective power with respect to such matters as slum clearances, new housing and transport is given to the Minister, who must satisfy himself, either by the inquiry or by independent investigation, whether the order should be made. See Griffith and Street, *supra,* note 26 at Chapter 4 for a general outline of the powers and functions of major administrative agencies in England.

66. *Re W.D. Latimer Co. and A.-G. for Ontario* (1974), 2 O.R. (2d) 391; 43 D.L.R. (3d) 58 (Ont. H.C.-D.C.).

67. Created under the *Securities Act,* R. S.O. 1970, c. 426.

and then sat on the panel which heard the evidence in the matter. He was not disqualified nor was the decision upset. The court held that it depended on the circumstances whether the act constituted a breach of the common law and of natural justice and, here "I do not think that in all these circumstances unfairness should be apprehended by reasonable or right-minded persons."[68]

The third major consequence of this evolution of governmental powers is that of parliamentary supremacy and, in particular, administrative and judicial subordination to parliament. At first sight the doctrine may appear to conflict with the concept of judicial independence, but, in reality, it only means that the legislation passed by Parliament transcends all other laws. It does not in any form connote administrative control of the judiciary.[69] However parliamentary control over the acts of the administration, which includes the acts of the regulatory agency, is another matter.

3. Possible conflict of powers, functions and interests and their legal and political controls.

We have noted that one of the consequences of the doctrine of separation of functions is that policy-making should be divorced from policy-interpreting (enforcing). That is, one man or body

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68. (1974) 2 O.R. (2d) at 405; 43 D.L.R. (3d) at 72. However the court continued: ". . . I am of the opinion that the statute makes it clear that the hearing contemplated in s. 8 of the *Securities Act* may be conducted by the Commission as it may be constituted at its inception whether or not the Commissioners then sitting have been present at previous meetings of the Commission where duties of the Commission under the Act concerning the hearing on the matters of which the hearing arises have been considered." (*Id.*)

69. By a fundamental principle of our constitution, those to whom the administration of justice is entrusted are not responsible to Parliament except for actual misconduct in office. A. Todd, *On Parliamentary Government in England* (2d ed. London: Longmans, 1887) at 574, states: Complaints to Parliament in respect of the conduct of the judiciary, or the decisions of courts of justice should not be lightly entertained. 'If there is a failure in the administration of justice, from whatever cause, affecting any judge, both Houses of Parliament may address the crown, to remove that judge from office.' But 'nothing could be more injurious to the administration of justice than that the House of Commons should take upon itself the duties of a court of review of the proceedings of an ordinary court of law;' or of the decisions of a competent legal tribunal, or, that it should 'tamper with the question whether the judges are on this or that particular assailable', and endeavour 'to inflict upon them a minor punishment' by subjecting their official conduct to hostile criticism. Parliament should abstain from all interference with the judiciary, except in cases 'of such gross perversion of the law, either by intention, corruption, or incapacity, as to make it necessary for the House to exercise the power vested in it of advising the crown for the removal of the judge'.

should not be enabled to declare what the policy is and then enforce it. Essentially the rule exists because one man's interpretation will be flavoured and influenced by his preconceptions in framing it. This would be a form of bias, and impartiality — the goal of interpreting — is thereby sacrificed. We will now observe some areas of possible conflicts of powers, functions and interests in the Canadian regulatory agency and then briefly consider legal and political curbs thereon.

Administrative and advisory acts have been defined as those performed by the higher echelons of governments, operating in the policy field with no, or if some, indefinite standards to guide them. They may be performed by the administrative function — in which case, the major criterion is whether the power to do the act has been validly granted to the body or individual. Thus the National Energy Board may be empowered to grant orders authorizing the export of ethylene. If so, no hearing may be required. It is an administrative act validly accomplished within the agency's legal powers.[70] Such acts are subject to the political control of the legislature although the courts will review acts of the higher executive when they are exercised arbitrarily or in bad faith.[71] Generally such administrative acts are beyond the pale of judicial review. They operate in the realm of policy in the sense that, although private rights may be affected, they are made in the public interest, for the common good.

Similar observations may be made with respect to the advisory powers given to the regulatory agency by the legislature. The advisory acts given in pursuance of this power receive their validity from the fundamental principle of responsible government. These acts are reviewable by the legislature and not by the courts.[72] But when the regulatory agency is also empowered to decide questions relative to the given advice, it may be argued that such advice may be considered a prejudgment and that the impartiality of the agency is brought into question.

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70. See, for example, *Calgary Power Ltd.* v. *Copithorne,* [1959] S.C.R. 24; 16 D.L.R. (2d) 241, where, at 33 (250), Martland, J. said: "His decision is as a Minister of the Crown and, therefore, a policy decision, taking into account the public interest, and for which he would be answerable only to the Legislature."
71. See, for example, *Roncarelli* v. *Duplessis,* [1959] S.C.R. 121; 16 D.L.R. (2d) 689, where the Supreme Court of Canada held that the act of cancellation of a licence by the then Premier of Quebec was not in accordance with established law and therefore was unlawful.
72. See B.L. Strayer, *Injunctions Against Crown Officers* (1964), 42 Can. B. Rev. 1 at 29-31.

Is there a conflict here in the regulatory agency? First, it is to be noted that legislative acts are beyond the application of rules respecting bias and interest.[73] We do not question the motives of our legislators, at least on the basis of bias and interest. Second, advisory acts are recommendations only. As illustrated in Part II of the *National Energy Board Act,* this power takes the form of recommendations to the Minister. In order to arrive at the advice to be given, the Board may, and often does, consult with other departments and agencies of government, hold conferences with industry and intra-governmental agencies and generally obtain its information from whichever sources it deems best. The very reasons for the regulatory agency — its flexibility, expertise and celerity — place it in a foremeost postion to give advice. This source of expertise should not be denied to the government because it might, on granting privileges to private parties, be influenced by the advice it has given. Finally, it is a recognized judicial function in Canada.[74]

But the administrative act may be and most often is performed and the advice may be given after a hearing. This fact does not, it is submitted, alter the fundamental nature of the act; that is, that the act is one of policy based on expediency in the light of the public interest.

With respect to the exercise of advisory powers, if the advice is given after a public hearing, it is an opinion and a final decision. No rights are affected directly but there may be reasons for the application of certain principles of natural justice. Thus, in *R.* v. *Minister of Labour, Ex parte General Supplies Ltd.*[75] when the minister requested the Board for certain information prior to granting permission to prosecute, ostensibly an administrative function, the Board refused the applicant permission to view documents and to cross-examine on affidavits. On application to the court for certiorari, it was held that the documents should have been tested by cross-examination. Similarly all forms of information gathering hearings may be subject to judicial control. They are exercises of the quasi-judicial function and the attributes prescribed

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73. S.A. de Smith, *supra,* note 61 at 219.

74. See, for example, *Reference Re Offshore Mineral Rights of British Columbia,* [1967] S.C.R. 792; 65 D.L.R. (2d) 353 (*sub nom. Reference Re Ownership of Off-Shore Mineral Rights.)*

75. (1964) 47 D.L.R. (2d) 189; 49 W.W.R. 488 (*sub nom. Re Labour Act; Re Otjes and General Supplies Ltd.) (Alta. S.C.).*

will depend on the characterization of the act and the nature of all the circumstances.[76]

Administrative acts may result from the employment of the quasi-judicial function. How far do these acts conflict with the advisory act? The answer to this question may be arrived at by considering the legal concept of bias.

Bias comes in many forms. First and probably the most obvious form that bias presents itself in is personal bias; for example, a member of the regulatory agency may have a pecuniary interest in a company applying to the National Energy Board for a licence to export power. This is clear. The member should disqualify himself or be disqualified from the decision-making panel. Similarly any personal interest of a definite, concrete kind should disqualify.

However, everyone has biases in the sense that he or she has preconceived ideas of policy — what it is and what it should be. This is unavoidable. If strong positions on different points of view are a basis for disqualification in the decision-making process, few people of any worth would be available to fill positions on panels or regulatory agencies. Also, adherence to preconceived ideas should not be objectionable as regulatory agencies should issue and often do issue policy statements which they intend to follow in a general way in the future. Certainly bias in the sense of crystallized knowledge about law or policy is not sufficient grounds for disqualification. A person who is biased in this sense might well be the best qualified person for the position. Panel members are human. Each member will bring to the regulatory agency ethics and values that will inevitably be reflected in the decisions in which he participates. The mere fact that he has prejudged the facts and has given advice should not be sufficient to offset the expertise that is required in the complex fields in which he operated so long as his performance does not foreclose inquiry and examination. Otherwise stated, so long as his preconceptions are not of such a nature as to unduly narrow a broad perspective of a subject, his participation in

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76. The United States federal *Administrative Procedure Act* recognizes that a statute may require a hearing without requiring a trial as it distinguishes hearings for the purposes of rule making and adjudication.
K.C. Davis, *Administrative Law Treatise* (St. Paul, Minn.: West, 1958) Vol. 1 at 433 states: "When adjudicative facts are not at issue, so that a trial is not necessarily required, the need often is not for opportunity for hearing but is for opportunity for party participation in the determination of the governmental action."

the advisory act should not disqualify. As our law does not forbid following previously decided cases,[77] or policy directives, the judiciary should take considerable care in defining this incident or attribute of the quasi-judicial function.

However, regulatory agencies are created courts of record by the enabling statutes and the independence of the judiciary is a sacrosanct principle of Canada law. Impartiality, even in matters concerned with granting of privileges, needs to be evident in our regulatory tribunals. They operate in a judicial aura using, for the most part, solemn judicial procedures; the regulatory agency must take care not only to do justice but to be seen to do justice.

The regulatory agency should not be unduly influenced; certainly dictation to the regulatory agency by any body, particularly the government of the day, is not to be countenanced. The agency would soon lose the respect of its jurisdictional entities, lend itself to all forms of criticism and become inept and useless for the purposes for which it was created.[79] There are strong legal precedents in support of the proposition; namely, that the decision must be the result of the exercise of the discretion of the authority to whom the power was given by law.

In *Roncarelli* v. *Duplessis,*[80] the plaintiff, a proprietor of a restaurant in Montreal and the holder of a licence to sell intoxicating liquor, sued Mr. Duplessis, the then Premier of Quebec, personally for damages arising out of the cancellation of his licence by the

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77. Indeed, the doctrine of *stare decisis* is firmly rooted in our case law. Although it would appear desirable that for the purposes of consistency, expediency and uniformity, Canadian administrative agencies should follow precedents, their obligation to exercise discretion in particular cases seems to foreclose a complete adoption of the doctrine by them.

78. "It is obviously desirable that a tribunal should openly state any general principles by which it intends to be guided in the exercise of its discretion." S.A. de Smith, *supra,* note 61 at 276.

79 "The relevant principles formulated by the courts may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to exercise the discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. The authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously." *Id.* at 252-253.

80. [1959] S.C.R. 121; 16 D.L.R. (2d) 689.

Quebec Liquor Commission. It was alleged that the licence had be arbitrarily cancelled at the instigation of the defendant who, without legal powers, had given orders to the Quebec Liquor Commission to cancel it because of his activities on behalf of Jehovah Witnessess.

The defendant contended, *inter alia,* that the provincial Act empowered the Commission to cancel any permit at its discretion and that the judicary could not interfere with the exercise of this discretion.

Generally with respect to "discretion", the late Rand, J. said:[81]

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion" . . . "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

With respect to the Premier's intervention, he continued:[82]

> . . . an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

However, more with respect to our point on dictation by another authority, Martland, J. stated:[83]

> Furthermore, it should be borne in mind that the right of cancellation of a permit under that Act is a substantial power conferred upon what the statute contemplated as an independent commission. That power must be exercised solely by the corporation. It must not and cannot be exercised by anyone else.

He then refers to *Spackman* v. *Plumstead Board of Trade,*[84] where Lord Selbourne Said: . . . .

> He must give notice when he will proceed with the matter, and he must act honestly and impartially *and not under the dictation of some other person or persons to whom the authority is not given by law.*

A rather indefinite direction was given to public authorities to ignore political policy in rendering decisions by the English Court

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81. *Id.* at 140; 16 D.L.R. (2d) at 705.
82. *Id.* at 142; 16 D.L.R. (2d) at 706-07.
83. *Id.* at 156; 16 D.L.R. (2d) at 742.
84. (1885), 10 App. Cas. 229 at 240.

of Appeal in *Monkland* v. *Jack Barclay Ltd.*[85] The question before the Court was whether a certain contract was contrary to public policy and therefore void. A minor argument advanced was that the Government or Government officials had given approval to a general contract scheme which included the offensive clause *sub judice*. The Court held that his consideration was not relevant as public policy was not to be confused with political policy. Political policy changed with each government and was not to be a factor in determining public policy for common law purposes.[86]

Although the cases indicate the conclusion that a strict detachment from outside interferences in rendering discretionary decisions is called for, this does not mean that the regulatory agency must be completely oblivious to the policy of the government of the day. Two of the enabling statutes[87] of the regulatory agencies under study require that the agencies make their decisions having "regard to all relevant considerations."[88] Surely the policy of the existing government is relevant consideration. De Smith says in this regard that:

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85. [1951] 2 K.B. 252 (C.A.) at 265-66.

86. The Courts have also held that the surrender or independent discretion in favour of adopting a policy pursued by a superior authority is no less improper because the superior authority has not sought to impose its policy. In *R.* v. *Stepney Corporation,* [1902] 1 K.B. 317, where the Council of a metropolitan borough, having resolved to abolish the office of a vestry clerk to a local authority, considered that it was bound by an ascertained practice of the Treasury to make certain deductions in compensation, it was held as the Council did not exercise a discretion which the law imposed, there was no real judgment. The Council did not act and mandamus issued to compel them to do so.

In *Buttle* v. *Buttle,* [1953] 1 W.L.R. 1217; [1953] 2 All E.R. 646 (P.D.A.) a husband had deserted his wife and, in attempting to upset a maintenance order, the husband contended that the domestic proceedings court gave consideration in reaching its decision to a Home Office circular issued under authority of the Secretary of State. The Court held in part:

> . . . the magistrates have gone wrong by purporting to follow the advice given in a circular which in itself is not wholly accurate (*per* Lord Merriman. P. at 1221 (649)). It is particularly desirable, in documents such as this, that it should be made clear beyond doubt that the document is not intended to supersede the discretion of the court or its duty to form its own opinion in each particular case as to what is the just order to make on all evidence in that case (*per* Pearce, J. at 1221).

87. *National Energy Board Act,* s. 44; *Transport Act,* R.S.C. 1970, c. T-14, s. 33(3).

88. In *Canadian National Railways* v. *Canadian Steamship Lines Ltd.,* [1945] A.C. 204; [1945] 3 D.L.R. 417 it is stated at 211 (420): "It would be difficult to consider a wider discretion than is conferred on the board as to the considerations to which it is to have regard in disposing of an application for the approval of an

> Authorities directly entrusted with statutory discretions . . . are usually entitled and are often obliged to take into account considerations of public policy, and in some contexts the policy of a Minister or of the Government as a whole may be a relevant factor in weighing those considerations.[89]

In the High Court of Australia's decision of *R.* v. *Mahoney, Ex parte Johnson*[90] the question concerned the discretionary authority of a licensing officer under a statutory provision that he "may cancel a licence issued." He had cancelled certain licences in line with a government policy respecting trade unions and Evatt J. noted:[91]

> In order to show that the respondent's discretion was influenced by irrelevant matters, much has been made of the fact that the respondent has stated, in his very candid affidavit, that he paid regard to Commonwealth Executive policy, although receiving no dictation from the Government.
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> If it is assumed that the licensing officer has a discretion to refuse licences, I think that he is not debarred from considering the existence of such a policy. He would be regarded not as a judicial but as an administrative officer vested with discretionary power. He would have to act honestly, but he might well pay some regard to the preference scheme favoured by the Government. He would be expected to pay special attention to the requirements of the part which, in a sense, is committed to his charge. Above all, the discretion to be exercised would be his discretion and he could not allow the Executive or any other person to exercise it for him. Upon the same assumption of a discretion, there is no reason why he should not be allowed to seek the opinions of persons well experienced in the methods of providing and organizing labour. It cannot be assumed that the well experienced and the well qualified are absent from the responsible Executive of the day. The weight the licensing officer might see fit to attach to any or all of such opinions would be a matter entirely for him.

Another and more recent decision of the High Court of Australia lends further light. In *R.* v. *Anderson, Ex parte Ipec-Air Pty.*

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agreed charge. It is to have regard to "all considerations which appear to it to be relevant." Not only is it not precluded negatively from having regard to any considerations, but it is enjoined positively to have regard to every consideration which in its opinion is relevant. So long as that discretion is exercised in good faith the decision of the Board as to what considerations are relevant would appear to be unchallengeable."

89. *Supra*, note 61 at 273.

90. (1931) 46 C.L.R. 131.

91. *Id.* at 145.

Limited,[92] the prosecutor, pursuant to clause 4 of the *Customs (Prohibited Imports) Regulations,* requested "the permission in writing of the Director-General of Civil Aviation" to import certain freight aircraft with which it might operate to carry freight between cities in the six states of the Commonwealth. The prosecutor was informed by the Director-General that he thought it necessary to seek the views of the government on its civil aviation policies before deciding the application and the government did not favour the importation of aircraft as it considered that the provision of further facilities for the operation of trunk route freight services by air at that time could not be justified on economic grounds. The Director-General, having obtained the government's view to this effect, refused the application, having had regard *inter alia,* to the government's policy views.

Two judges (Taylor and Owen JJ.) refused to issue a mandamus on the ground that whether or not permission was to be given was a matter left to the Director-General's discretion which was to be exercised upon broad considerations relating to civil aviation in the Commonwealth.

Kitto J. said:[93]

> It may be conceded that where the law confers a power of discretionary decision upon an officer of the civil service in his official capacity Government policy is not in every case an extraneous matter which he must put out of consideration. Indeed, *Evatt* J. thought that such case existed in R. v. *Mahoney; Ex parte Johnson*. I express no opinion as to whether the relevant provisions of the *Customs (Prohibited Imports) Regulations* provide another instance. Even if they do, the fact is that in dealing with the application in question in this case the Director-General did not arrive at a decision of his own after taking account of some matter of general Government policy. What he did was to seek from his Minister, and then automatically obey, an *ad hoc* pronouncement from the Government as to the direction in which he might decide the matter. That is a very different thing; and none the less so because the Government made its pronouncement in line with a general policy which it considered to be in the best interests of the country.

Menzies, J. said:[94]

> When a discretion to give permission for the importation of some

92. (1965) 113 C.L.R. 177.
93. *Id.* at 192-93.
94. *Id.* at 201-02.

> article has been given to the head of a Commonwealth department, it would, I think, be wrong to deny that the officer who occupies the position could take government policy into consideration in deciding whether to grant or to refuse permission.
>
> There is, nevertheless, a significant difference between a discretion given to a minister and one given to a departmental head. When the latter is nominated, he must arrive at his own decision upon the merits of the application and must not merely express a decision made by the government. The position in which such an officer is put is not an easy one but the sound theory behind conferring a discretion upon a departmental head rather than his minister is that government policy should not outweigh every other consideration. A sound governmental tradition of respect for those who shoulder the responsibilities of their office in making unwelcome decisions makes the choice of a departmental head, rather than his minister, as the one to exercise a discretion conferred by the legislature a real and important distinction.
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> Windeyer, J. said:[95]
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> . . . I think his duty is to obey all lawful directions of the Minister under whom he serves the Crown.

This last expression would appear to be at variance with the intent of Parliament in conferring the discretion at odds with the concept of independence of deciding bodies in English jurisprudence, upsetting to a major reason for the existence of the regulatory agency[96] and, possibly most important, contrary to many judicial expressions.

We turn now to possible conflicts between the powers, functions and interests in respect of the regulatory acts of the agency. They may exist but are not too apparent in this embryo stage of development of the Canadian regulatory agency. Here might be observed in effect some conflict between the regulation-making authority and the regulation-enforcing authority because if the regulations are made either by the Minister, by the Board, or by the Governor in Council, the same official may make them as well as enforce them. Regulations may be made for the safety of pipeline operations, for safety of aircraft and for various financial matters that the regulating authority controls. Thus these regulations may be made and enforced by the same officials. However, there would appear to be adequate political and legal controls to contain this

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95. *Id.* at 206.
96. *Supra*

conduct. At all times the officials may be kept to the letter of the regulations under which they operate even if they are exercising the administrative function.[97] Also the internal procedures for dismissal or supervision are usually adequate to control such conduct.

There remains a brief consideration of conflicts arising from the employment of officials of the regulatory agency to make reports, to inspect and generally to perform administrative and quasi-judicial functions on a subsidiary scale. Examiners may report to the Board or Commission in respect of safety aspects of railways and pipelines. If the examiners merely report facts to the Board, it would apparently be an exercise of the administrative function.[98] If the report affects the rights of citizens in some way, it could be classified as quasi-judicial and incidents of fair play would be attached to the proceeding. What is the nature of the function? If there is any doubt, the form of the proceedings should be conformed to judicial concepts of national justice as far as possible.

4. Conclusion

Although some conflicts of powers, functions and interests exist in the Canadian regulatory agency, they appear to be less than real and political and legal controls appear to be adequate to handle them. Although the Board of Transport Commissioners, the predecessors of the Canadian Transport Commission have been operating since before the turn of the century, the regulatory agency, as a governing device, is relatively new in Canada. With the English and American experiences as guides, the device is thriving and no doubt will be used more and more as time goes on in particular fields of specialized activity. There are, of course, some "grey" areas which, it is submitted, will be satisfactorily clarified only by time, publicity, critical examination and remedial action to suit peculiar Canadian conditions.

The semantic difficulties in making an analysis and assessment of the acts, powers, and functions of the regulatory agency are frustrating. Courts have defined acts in different ways to suit particular situations and we have no generally accepted terminology. For example, the terms "executive" and "administrative" are

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97. *Shawn* v. *Robertson*, [1964] 2 O.R. 696; 46 D.L.R. (2d) 363 (Ont. H.C.).
98. R.F. Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1971) says at 147: "This has become a quite common approach in Canadian jurisprudence."

often used interchangeably; there is no clearly defined line between "judicial" and "quasi-judicial"; administrative acts are often interpreted as including all acts classified as "non-judicial"; and so on.

For the purposes of this paper, the regulatory agency performs three distinct types of acts, — administrative, advisory and regulatory. These acts may be performed by the legislative, administrative, judicial and quasi-judicial functions. The legislative function is generally confined to those acts resulting in rules, regulations and orders of general application. However this distinction is only valid from the point of view of the regulatory agency as from the vantage point of the jurisdictional entity the act might be the result of the exercise of the legislative or administrative, judicial or quasi-judicial functions; the act would have the same effect on the jurisdictional entity.

The administrative function is essentially the fact that an act, either administrative, advisory or regulatory, has been accomplished without any application of the "judicial" or "quasi-judicial" functions. That is, the agency does an act under its statutory powers which does not require any of the "trappings" of a court. Thus a policy act may be done, advice may be given, or a regulatory act performed without any interference with the "privileges", "rights" of or other disadvantages to individuals or jurisdictional entities to which the statute or common law ascribe certain procedural safeguards. This is often called an administrative act but it is more precisely and correctly called a regulatory act that is performed in an administrative manner.

In one sense, there is nothing to be gained by distinguishing between "judicial" and "quasi-judicial" functions. The words appear to be used interchangeably for the most part in the case law. However the distinction would appear to be justified by using the term "quasi-judicial" as connoting those procedural attributes or incidents which the administrative agency employs in accordance with statutory directives and the fundamental law in arriving at its decisions; whereas judicial functions connote those circumstances where all the powers ascribed to a regular court of law must be complied with by the administrative agency. But there is difficulty here, too. Administrative agencies exercising functions most analogous to a court never have all the judicial "trappings" of the regular courts. They are, in reality, exercising "quasi-judicial" functions which the enabling statute and the fundamental law

indicates should be applied. We can hope that another reason for the regulatory agency may be found in providing a vehicle for clarification and precision of terminology in this important and growing branch of the Canadian legal system.