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Article 17

Guay v. Lafleur, [1965] S.C.R. 12

J. W. Mik

TAXATION

Guay v. Lafleur, [1965] S.C.R. 12.

INCOME TAX — INVESTIGATION — INQUIRY BY PERSON AUTHORIZED BY MINISTER INTO THE AFFAIRS OF TAXPAYER — WHETHER TAXPAYER ENTITLED TO BE PRESENT AND REPRESENTED BY COUNSEL AT HEARINGS.

There is no equity in a taxing statute.
(*Anon.*)

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19 That is exactly what happened in this case.
20 *Supra*, footnote 18.
21 *Supra*, footnote 18.
* J. Ronald Smith, LL.B. (Osgoode), is a member of the 1966 graduating class.

In an action heard before the full court,[1] it was decided, Hall J. dissenting, that a person whose activities were the subject of an inquiry under s. 126(4) of the Income Tax Act[2] had no right to cross examine witnesses at the inquiry, give evidence on his own behalf, be represented by counsel or even to be present at the hearings.

The facts of the case were not disputed. Guay, an officer of the Department of National Revenue, was authorized by the Deputy Minister, under the provisions of the Act, to investigate the affairs of Lafleur and thirteen other individuals, corporations and estates.[3] Hearings were scheduled and witnesses called for various dates. Although Lafleur was not officially advised of the inquiry, he discovered that it was to take place and, at the opening sitting, attorneys presented themselves on his behalf asking that he be allowed to be present and to be represented by counsel during the examination of all persons summoned. Guay refused. Lafleur obtained an injunction from Mr. Justice Brossard, suspending the hearings,[4] and the latter's judgment was affirmed by the Court of Queen's Bench.[5]

The issue raised by this case is whether there is a common law right—or a principle of natural justice—which entitles a person who is the subject of an inquiry to be represented by counsel at the hearings. The Supreme Court of Canada decided that there was not. The basis of this decision is the distinction drawn between hearings which involve a disposition of the rights of the parties, and hearings in the nature of an inquiry where the conducting officer does not have the power immediately to dispose of any rights. It is a deeply rooted principle of the common law, embodied in the maxim *audi alteram partem*, that a tribunal, in performing quasi-judicial functions, "must act in good faith and fairly listen to both sides";[6] however, "the maxim *audi alteram partem* does not apply to an administrative officer, whose function is simply to collect information and make a

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1 Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

2 R.S.C. 1952, c. 148, s. 126(4). "The Minister may, for any purpose related to the administration or enforcement of this Act, authorize any person, whether or not he is an officer of the Department of National Revenue, to make such inquiry as he may deem necessary with reference to anything relating to the administration or enforcement of this Act."

126(8). "For the purpose of an inquiry authorized under subsection (4), the person authorized to make the inquiry has all the powers and authorities conferred on a commissioner by sections 4 and 5 of the *Inquiries Act* or which may be conferred on a commissioner under section 11 thereof."

3 René Lafleur, Marie-Marthe Lafleur, François Fournelle, Dame Henriette Lafleur-Fournelle, Jean Fauvier, Jean Chapolard, Raoul Dasserre, P. Sutter, Henri Clouard, Luc Lemaire-Lafleur Ltée, Les Placements Montcalm Limitée, Edifice Lafleur Ltée, Succession Leonard Lafleur, and the Estate of Hermas Fournelle.

4 (1962), 31 D.L.R. (2d) 575.

5 [1963] Que. Q.B. 623, [1963] C.T.C. 201, 63 D.T.C. 1098, (1964), 42 D.L.R. (2d) 148.

6 *Board of Education v. Rice*, [1911] A.C. 179, at p. 182; *Wood v. Woad* (1874), L.R. 9 Ex. 190; *Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montreal*, [1906] A.C. 535; *L'Alliance des Professeurs Catholiques de Montreal v. Labour Relations Board*, [1953] 2 S.C.R. 140; *Errington v. Minister of Health*, [1935] 1 K.B. 249 (C.A.).

report, and, who has no power either to impose a liability or to give a decision affecting the rights of parties."[7]

The rights asserted by Lafleur were not expressly recognized by either the Income Tax Act[8] or the Inquiries Act[9] and this was acknowledged by the trial judge. He based his judgment on the ground that, in refusing to permit Lafleur to be present and represented by counsel, Guay had contravened s. 2(e) of the Canadian Bill of Rights.[10]

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to . . .
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> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

In the Supreme Court of Canada, the Canadian Bill of Rights[11] was summarily dismissed as inapplicable since no rights and obligations were determined by the person appointed to conduct the investigation.[12]

Mr. Justice Abbott agreed with the reasons given in the dissenting judgments of Hyde and Montgomery JJ. in the Court below[13] and added merely the observation that the power given to the Minister under s. 126(4)[14] is only one of a number of similar powers of inquiry which are granted in the Act to enable the Minister to obtain the facts he considers necessary to discharge the duty of assessing and collecting taxes payable. The taxpayer's right is not affected until an assessment is made and then the appeal provisions of the Act are open to him. Abbott J. did not think that the power conferred on Guay to compel witnesses to attend and testify under oath[15] changed the nature of the inquiry.

Cartwright J. agreed but also added some observations. First,

> The function of the appellant under the terms of his appointment is simply to gather information; his duties are administrative, they are neither judicial nor quasi-judicial.[16]

Then he concluded:

> Generally speaking, apart from some statutory provision making it applicable, the maxim *audi alteram partem* does not apply to an administrative officer whose function is simply to collect information and make a report

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7 *Guay v. Lafleur*, [1965] S.C.R. 12, at p. 18, *per* Cartwright J.
8 *Supra*, footnote 2.
9 R.S.C. 1952, c. 154, ss. 4, 5, 11.
10 S.C. 1960, c. 44.
11 *Ibid.*
12 *Supra*, footnote 7, at p. 16, *per* Abbott J., at p. 19, *per* Cartwright J., and was not even referred to by Spence J.
13 *Supra*, footnote 5.
14 Income Tax Act, R.S.C. 1952, c. 148.
15 *Ibid.*, c. 126(8).
16 *Supra*, footnote 7, at p. 17.

> and who has no power either to impose a liability or give a decision affecting the rights of parties.[17]

Spence J. approached the issue from an examination of *St. John v. Frazer*[18] which stood for the proposition that persons who might be affected by an investigation under the British Columbia Securities Fraud Prevention Act[19] did not have the right to cross examine all witnesses giving evidence in the inquiry. He adopted the words of Lord Shaw in the *Arlidge* case,[20] and applied in *St. John v. Frazer*,[21] that "it is natural that lawyers should favour lawyer-like methods but it is not for the judiciary to impose its own method on administrative or executive officers". His Lordship did, however, think that the investigator was bound "to act judicially in the sense of being fair and impartial"[22] but this did not require him to permit Lafleur and his counsel to be present at every examination whether or not he were to attempt to cross-examine witnesses.

In view of the brevity of the majority judgments in the Supreme Court of Canada, which did not delve into the meaning to be attributed to the phrase "acting judicially in the sense of being fair and impartial", it would be in order to examine the dissenting judgments of Hyde and Montgomery JJ. in the Court of Queen's Bench, which were affirmed on appeal. Hyde J. accepted the statement of Davis J. in *St. John v. Frazer*[23] that any person or body acting in a judicial capacity must act fairly and impartially, but, he suggested, that it would be going too far to apply that requirement fully to a person exercising an administrative function. In reply to Lafleur's argument that it was unfair that witnesses should be obliged to testify under oath in his absence, because, even though that testimony was inadmissible in subsequent proceedings, it could be used to test credibility and as a threat of a perjury charge, Hyde J. answered:

> Regardless as to whether it is "fair" or not, with respect, "fairness" is not the test. As a purely administrative matter where the person holding the inquiry neither decides nor adjudicates upon anything, it is not for the courts to specify how that inquiry is to be conducted except to the extent if any, that the subject's rights are denied him.[24]

Mr. Justice Montgomery also concedes that there are circumstances when the Court might intervene in the exercise of an administrative function.

> What the authorities do establish is that the mere fact that a board or commission is carrying out an administrative function does not automatically exempt it from judicial control. It may well be that the courts should intervene if there were any evidence of bias or partiality on the part of the appellant, but it appears that he is merely attempting to do his duty and to carry out the inquiry in accordance with the policies of his Department.[25]

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17 *Ibid.*, at p. 18.
18 [1935] S.C.R. 441, 3 D.L.R. 465, 64 C.C.C. 90.
19 S.B.C. 1930, c. 64, ss. 10, 29.
20 [1915] A.C. 120, at p. 138.
21 *Supra*, footnote 18.
22 *Supra*, footnote 7, at p. 23.
23 *Supra*, footnote 18.
24 *Supra*, footnote 5, at p. 209 (C.T.C.).
25 *Ibid.*, at pp. 228-229.

These statements by their Lordships do not resolve the problem but merely bring to a head the fundamental issues in this case: what are the subject's rights in these circumstances? Is an inspector representing the Tax Department, which, depending on the results of the inquiry, may be the prosecutor in a subsequent action, an impartial and unbiased investigator?[26] Is the taxpayer's position affected, in substance, by the inquiry? The answers to these questions merit a thorough examination of the considerations which call for the power in an investigating officer to exclude from the hearings the party whose activities are the very subject of the inquiry, and the weighing of these against the interest of the individual in knowing the case which is being constructed against him, and having an opportunity to reply. In order to give a satisfactory answer to these thorny questions it is essential that the court examine the substance of what is taking place and not merely the form. Such an examination is lacking in the cursory judgments of the Supreme Court of Canada, which contented itself with the repetition of old legal clichés. A hesitant attempt at considering some of these factors was made by Hyde and Montgomery JJ. in the Court of Queen's Bench, but was inadequate to the problem at hand.

Hyde J. recognized that the making of sworn statements is a common every day occurrence and the deponent is frequently examined in subsequent court proceedings where the interest of another may be affected by those statements. His Lordship knew of no requirement in law that any person likely to be affected in such a way was entitled to be present with counsel when such a sworn statement was originally made and he could see little distinction between that case and the present. An example which comes to mind is an information sworn out against a party, which may lead to his being charged with an offence and perhaps arrested. It would be absurd to suggest that the information was of no effect unless the accused were present when it was sworn. Such a course of action would be wholly impracticable. It appeared to His Lordship that if the taxpayer had the right to be present and represented at the inquiry he would have the same right under s. 126(1)(c)[27] with the result that the departmental

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[26] On n'est évidemment pas en presence d'une commission impartiale. Si probe et si sympathique soit-il, l'appellant joue le rôle d'accusateur, d'avocat et de juge, plus que cela celui d'un veritable inquisiteur. Il veut pour des fins ultérieurs étayer sa preuve. Or, qui dit inquisition dit "perquisition rigoureuse mêlée d'arbitraire". Fonctionaire dévoué au département dont il fait partie, il est forcément, même malgré lui préjugé." *Supra*, footnote 5, at pp. 204-205, *per* Bissonette J.

[27] *Supra*, footnote 14. 126(1) "Any person thereunto authorized by the Minister for any purpose related to the administration or enforcement of this Act may, at all reasonable times, enter into any premises or place where any business is carried on or any property is kept or anything is done in connection with any business or any books or records are, or should be, kept pursuant to this Act, and

(c) require the owner or manager of the property or business and any other person on the premises or place to give him all reasonable assistance

[Footnote continued on page 341.]

investigation would be turned into a public inquiry out of all proportion to practical requirements. The argument based on practicability is a cogent one indeed. In enacting the provisions, Parliament must have intended that the Income Tax Act[28] should work. The weakness of this argument lies in fitting it to the facts. Is the analogy between a formal inquiry under s. 126(4)[29] and a common statutory deposition complete, or is this hearing more analogous to a preliminary inquiry rather than the swearing of an information? It is submitted that there is a distinction between a formal inquiry and an informal and spontaneous investigation such as provided for by s. 126(1)(c).[30] In the latter case it would be impracticable to give notice to the taxpayer to attend with counsel while a spot audit of the company books is carried out.

To Hyde J.

> [w]hat is important is that the taxpayer is entitled to his day in court where he is assured of a fair and impartial hearing with all evidence for the purpose of determining his case being submitted under the ordinary rules of proof.[31]

Mr. Justice Montgomery adopted the same approach when he stated:

> While the *Income Tax Act* confers upon the Minister wide powers of investigation and assessment, there is nothing final in any such assessment. On the contrary, express provision is made whereby the taxpayer may protest the assessment and appeal to the Tax Appeal Board and to the Exchequer Court. . . . There is, therefore, no question of the taxpayer being denied the opportunity of explaining his position or making a full defence.[32]

Brave words! but what course of action can Lafleur expect will follow upon the report? The report will be submitted to the Department where a decision will be made on the basis of the recommendations of the Commissioner. In a busy Department the effect of the recommendations of the Commissioner, who conducted the inquiry, on forming the decision are decisive. If the evidence collected by the Commissioner, which Lafleur had no opportunity to explain, indicates that taxes have not been paid, a re-assessment by the Minister automatically issues. The onus then rests upon Lafleur to establish the essential facts upon the basis of which the assessment should be varied or upset.[33] If the taxpayer is successful, upon the Minister appealing to the Exchequer Court of Canada, he is afforded a second opportunity

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with his audit or examination and to answer all proper questions relating to the audit or examination either orally or, if he so requires, in writing, on oath or by statutory declaration and, for that purpose, require the owner or manager to attend at the premises or place with him, . . ."

28 *Supra*, footnote 14.

29 *Ibid.*

30 *Ibid.*

31 *Supra*, footnote 5, at pp. 209-210 (C.T.C.).

32 *Ibid.*, at p. 228.

33 Income Tax Act, *supra*, footnote 14, s. 46(7) "An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a re-assessment, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this Act relating thereto." See also *Dezura v. M.N.R.*, [1948] Ex. C.R. 10, [1948] 1 D.L.R. 465, 3 D.T.C. 1101; *McGladdery v. M.N.R.*, 13 Tax A.B.C. 330, 55 D.T.C. 471.

to vindicate himself at a trial *de novo*.[34] Thus, without any "adjudication" or an opportunity at the inquiry to explain his actions or even to know the nature of the case against him, Lafleur may find himself in the same position as any person whose rights have been adjudicated upon in any court.

In the Court of Queen's Bench Mr. Justice Rinfret recognized the substantive character of the proceedings taken under the Income Tax Act.[35] In answer to the argument that the inquiry did not define the rights and obligations of Lafleur but rather that this was the function of the Minister to whom the report was submitted, he replied that these proceedings constitute a whole, even if they are carried out in two phases. The inquiry and the decision of the Minister on the report are intimately linked and result in the definition or determination by the Minister of the rights and obligations of the person who was the subject of the inquiry.[36] Support for this position can be derived from analogy to those cases where the function of deciding is separated from that of collecting the evidence upon which the decision is to be made.[37] Thus, where a Minister was authorized to approve an order for the demolition of substandard housing, subject to causing a local public inquiry to be held, and consideration of the report, his confirmation was quashed when subsequent to the hearing a municipality applying for the order submitted evidence which parties, who objected, were not given an opportunity to answer.[38] No attempt was made by the Court to delineate between the inquiry and the ministerial decision. Failure to grant one of the parties the opportunity of answering all the relevant evidence vitiated the Minister's decision.[39] It is important to note, however, that in distinction to *Guay v. Lafleur*,[40] the Minister was obliged to hold an inquiry and his decision did "affect" the rights of the parties. But ought this to make a difference?

Rinfret J. was of the opinion that the inquiry was of a quasi-judicial character.[41] This same problem of what is administrative and

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[34] *M.N.R. v. Simpsons Ltd.*, [1953] Ex. C.R. 93, where Thorson P. held that since an appeal to the Exchequer Court is a trial *de novo* in which the validity of an *assessment* is called into question, the assessment must be presumed to be valid until the taxpayer establishes the contrary. A judgment of the Tax Appeal Board becomes worthless when the Minister appeals to the Exchequer Court. The original assessment is automatically revived in all its former vigour.

[35] *Supra*, footnote 14.

[36] *Supra*, footnote 5, at p. 212 (C.T.C.).

[37] *M.N.R. v. Wrights' Canadian Ropes Limited*, [1947] A.C. 109 (P.C.); *Alward v. McIntosh*, [1938] 1 W.W.R. 690 (Alta. S.C.). The Ontario Municipal Board makes frequent use of s. 15 of The Ontario Municipal Board Act which permits the chairman to authorize one member of the Board to conduct the hearing of an application and to report to the Board.

[38] *Errington v. Minister of Health, supra*, footnote 6.

[39] See also *Knapman v. Board of Health, supra*, footnote 6.

[40] *Supra*, footnote 7.

[41] *Supra*, footnote 5, at p. 215 (C.T.C.). "Je suis donc d'opinion que l'enquête jugée necessaire pour le Ministre de Revenue National n'est pas exclusivement et purement affaire administrative et qu'en raison des pouvoirs extraordinaires accordés au department elle revêt à plus d'un point de vue un caractère judiciare suffisant pour conférer a l'intimé le droit de s'y faire représenter.

what is quasi-judicial was considered in *Errington v. Minister of Health*[42] where it was strenuously urged that the Minister in confirming the order acted in an administrative capacity. Greer L.J. said:

> . . . [I]n so far as the Minister deals with the matter of the confirmation of a closing order in the absence of objection by the owners . . . he . . . [acts] in a ministerial or administrative capacity, and . . . [is] entitled . . . to make up his mind whether the order would be in the public interest. But . . . where objections are taken by those . . . [parties] . . . affected by the order, . . . in deciding whether . . . [the closing] order should be made in spite of the objections . . . the Minister should be regarded as exercising quasi-judicial functions.[43]

The remarks of Maugham L.J. on this distinction are no less perplexing.

> . . . [A]lthough the act of affirming a clearance area order is an administrative act, the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration, and the Minister is bound to the extent mentioned by the House of Lords in the *Board of Education v. Rice*.[44]

How satisfactory is a criterion which chamelion-like transmutes the character of a given act performed by one party with the change in attitude to that act by another party? The attempt to distinguish between what is judicial and what administrative encounters formidable difficulty in that their most significant feature is shared in common; both functions involve making a decision between alternative course of action. In a judicial action there are generally at least two parties whose interests are affected, whereas in administration no one's interests need necessarily be overtly affected. Both adjudication and administration share the same core but the periphery of the latter is broader. In drawing the distinction the courts associate the former with a *lis inter partes* and the latter with the application of policy. However, the decision of the Supreme Court of Canada in *Guay v. Lafleur*[45] involves the application of policy no less than the determination of an administrator; the superficial distinction is that, in the former case, the focus is fixed on the parties to the action, while in the latter event the focus shifts to a much broader spectrum. Small wonder then that even the Judicial Committee of the Privy Council found it easier to describe rather than define the distinction![46]

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42 *Supra*, footnote 6.
43 *Ibid.*, at p. 259.
44 *Ibid.*, at p. 273.
45 *Supra*, footnote 7.
46 *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1949] A.C. 134, [1948] 4 D.L.R. 673, [1948] 2 W.W.R. 1055. See also S. A. De Smith, Judicial Review of Administrative Action (1959), pp. 37-47; Report of the Committee on Minister's Powers, Cmd. 4060 (U.K.) (1932), pp. 71-82, esp. 81-82, 93. For a criticism of the distinction drawn in the Report of the Committee on Minister's Powers, see Report of the Franks Committee, Cmnd. 218 (1957), p. 6; W. I. Jennings, The Report on Minister's Powers (1932), 10 Public Administration 333; W. I. Jennings, The Law and the Constitution (4th ed.), Appx. I; W. A. Robson, Justice and Administrative Law (3d ed.), pp. 444 *et seq.*; for a favourable comment, see D. M. Gordon, Administrative Tribunals and the Courts (1933), 49 L.Q.R. 94, 419; H. W. R. Wade, 'Quasi-Judicial' and its Background (1949), 10 Camb. L.J. 216.

It is inevitable, therefore, that the attempt to draw a line between quasi-judicial and administrative functions as the border beyond which the Court will not venture is doomed to create confusion and obscurity in the law.[47]

For certain purposes[48] a body exercising powers of an advisory, deliberative or investigatory character only, or which have no effect until confirmed by another body, has in the past been held not to be acting in a judicial capacity.[49] The fact that such a body is not acting

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[47] The difficulty is further compounded by the fact that "the meaning of judicial varies according to the purpose for which the meaning has to be defined. A function that is judicial in so far as it is reviewable by certiorari may become 'administrative' when an attempt is made to establish that it attracts absolute privilege in the law of defamation. (This emerges most clearly in the case of licensing tribunals: see esp. *Royal Aquarium & Summer and Winter Gardens Society v. Parkinson*, [1892] 1 Q.B. 431; *Attwood v. Chapman*, [1914] 3 K.B. 275.) And not only do definitions of 'judicial' vary between different legal contexts, but they not infrequently vary within one individual legal context." See De Smith, *op. cit.*, pp. 35, 36.

Thus, it is not the same thing to say that a tribunal is performing a judicial function, and that it has a duty to act judicially. This point will be considered *infra.*

[48] E.g. immunity to prohibtion or certiorari, absolute privilege for what is said during the proceedings.

[49] *Re Grosvenor & West End Terminus Hotel Co.* (1897), 13 T.L.R. 309, 76 L.T. 337; *Hearts of Oak Assurance Co. v. A.G.*, [1932] A.C. 392; *O'Connor v. Waldron*, [1935] A.C. 76; *Royal Aquarium & Summer and Winter Gardens Society v. Parkinson*, [1892] 1 Q.B. 431; *Attwood v. Chapman*, [1914] 3 K.B. 275. See also *Godson v. Toronto* (1890), 18 S.C.R. 36, where the issue was whether prohibition lay against a judge exercising the powers of a Commissioner under the Inquiries Act. Sir W. J. Ritchie C.J. held (at p. 40): "The proceeding before the county court judge was in no sense a judicial proceeding. The object of the inquiry was simply to obtain information for the council . . . and to report the result of the inquiry to the council with the evidence taken, and upon which the council might in their discretion, if they should deem it necessary, take action. The judge was in no way acting judicially; he was in no sense a court; he had no powers conferred to him of pronouncing any judgment, decree or order imposing any legal duty or obligation whatever on the applicant for this writ, nor upon any other individual." Gwynne J., who dissented, expressed the following opinion: "It is contrary to the principles of natural justice that any person should be subjected against his will to any jurisdiction in any person to inquire into his conduct in respect of any matter, and to have evidence taken against him, unless he should be given notice of the particular nature of the charge or complaint made against him, and which he has to meet, and of the time and place of the taking of the evidence against him . . . Although the judge was not himself empowered to inflict any punishment upon the accused as a consequence of his being, in his opinion and judgment, guilty of the malfeasance, breach of trust or misconduct charged, still as a result of the conclusion so arrived at by the judge, the accused would be subjected to serious consequences affecting his reputation and his business, and to injuries of a pecuniary nature which the corporation might inflict as the result of the opinion and judgment formed by the judge upon the evidence." It is to be noted that Sir W. J. Ritchie C.J. and Gwynne J. are not addressing themselves to the same problem although both use the word "judicially". See, *supra*, footnote 47. Ritchie C.J. is concerned whether the Commissioner was acting in a judicial (as opposed to administrative) function and Gwynne J. whether he had the duty to act judicially (i.e. in a manner consistent with the principles of natural justice). The issue of natural justice was not squarely raised in *Godson v. Toronto* as it was in *Guay v. Lafleur* and therefore, Gwynne J.'s dissenting judgment, which was not considered by the Court in *Guay v. Lafleur* would have been relevant to that case.

in a "judicial capacity" affects the right of the subject of the inquiry to be present at the hearings[50] and to cross-examine witnesses,[51] but does not mean that the tribunal is released from the duty to act judicially.[52]

In searching for an alternative approach, the judgment of Mr. Justice Owen, in the court below, merits serious consideration. The learned Justice began with the observation that at opposite ends of the scale there are two forms of procedure one of which may be referred to as a private investigation and the other as a court case.[53]

Private investigation involves the obtaining of information by a detective, adjuster or some other investigator who may interview witnesses and take a written statement or even a sworn declaration, and embody the information so obtained in a report. The witnesses are free to supply information or not and do not receive a summons or subpoena which compels them to attend at a certain place to give evidence under oath. In these circumstances the person being investigated cannot claim any right to notice of the investigation nor any right to be present either in person or by counsel when the witnesses are interviewed.

At the other end of the scale are what may be referred to as court cases in which opposing parties put forward their contentions;

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[50] *St. John v. Frazer, supra,* footnote 18; *Re Imperial Tobacco Co. and Imperial Tobacco Sales Co.*, [1939] 3 D.L.R. 750 (Ont. H.C.); aff'd [1939] O.R. 627, 4 D.L.R. 99 (Ont. C.A.).

[51] *Re The Children's Aid Society of the County of York*, [1934] O.W.N. 418 (Ont. C.A.), where it was held that everyone should have the right to cross-examine any witness at a Royal Commission Inquiry whom he believes to be in error or to be suppressing facts, but this right is not to be abused by irrelevant questioning; *Re Ontario Crime Commission, ex parte Feeley and McDermott* (1962), 34 D.L.R. (2d) 451, where parties whose activities came under the scrutiny of the Commission were accorded the right to appear represented by counsel and cross examine witnesses. (The decision is based on the peculiar wording of The Public Inquiries Act, R.S.O. 1960, c. 323, which empowered the Court to review the discretion of the Commissioner; Laidlaw J.A.'s dissenting judgment—apart from the peculiar statutory provision—probably represents the law today.) But *contra,* see *St. John v. Frazer, supra,* footnote 18; *Re Imperial Tobacco Co., supra,* footnote 50.

[52] *St. John v. Frazer, supra,* footnote 18, at p. 452, *per* Davis J. "The investigator was not a court of law nor was he a court in law, but to say that he was an administrative body, as distinct from a judicial tribunal, does not mean that persons appearing before him were not entitled to any rights. An administrative tribunal must act to a certain extent in a judicial manner, but that does not mean that it must act in every detail in its procedure the same as a court of law adjudicating upon a *lis inter partes.* It means that the tribunal, while exercising administrative functions must act 'judicially' in the sense that it must act fairly and impartially.

"In this case the appellant had full opportunity to give evidence before the investigator and his counsel was permitted to make representations and argument on his behalf. Counsel was also given transcripts of all the evidence . . . The absence of the right of cross-examination of every witness is not a denial of justice. . . ."

See also *Re Imperial Tobacco Sales Co., supra,* footnote 50, where in an investigation under the Combines Investigation Act, the Court found that the Commissioner did give reasonable notice to the appellants of the charges alleged against them before any report was made, and allowed them opportunity to be heard in person or by counsel.

[53] *Supra,* footnote 5, at p. 221 (C.T.C.).

evidence and argument are submitted and a decision or judgment rendered disposing of the rights of the parties. In these circumstances a party whose rights are affected generally has a right to be notified, to be present and represented by counsel, to cross-examine witnesses and testify on his own behalf.

Between these two poles are many investigations, inquiries or hearings which are neither private investigations nor court cases but in certain respects resemble one or the other. In dealing with these hybrid cases, Owen J. recommends:

> It is difficult—and probably undesirable—to lay down all-embracing rules regarding the rights of individuals concerned in and the obligation of persons conducting these in-between cases, which vary all the way from something close to a private investigation to something very close to a court action. It seems to me that the best procedure is to look at each particular case and decide it in the light of the nature of the proceeding involved.[54]

Mr. Justice Owen is thus reduced to a case by case approach which is not conducive to an orderly conceptual development of the law, but perhaps, this problem, given the infinite variation of circumstances which may arise in actual life, is no more susceptible of a solution in principle than is the distinction between capital and profit, or the definition of income.[55] However, the learned Justice does make a valuable contribution in pointing out that an inquiry or investigation, even if purely administrative, must be conducted fairly and impartially.[56]

> Although the Commissioner in carrying out his duties, acted as an administrative body and not a judicial body, he was bound to act judicially in the sense that he was obliged to act fairly and impartially, or, in other words, to act according to the dictates of what has sometimes been termed, natural justice.[57]

By bringing administrative acts within the scope of curial review, the obscure and barren distinction between quasi-judicial and administrative acts is avoided, and the promise of justice diffused over a wider base. Judicial review of administrative action requires considerable caution and must be of a limited nature depending upon the circumstances. A court might act beyond its competence in reviewing on its merits the decision of an administrative tribunal or agency peculiarly qualified to deal with matters of a particular nature, but to require the administrator to exercise his discretion fairly and in a judicial temperament is a task pre-eminently suited to the courts and supported by authority.[58] In performing this function there can be no absolute standard of "natural justice" for the courts to apply; much depends on the circumstances. The demands of natural justice

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[54] *Ibid.*

[55] See F. E. LaBrie, The Principles of Canadian Income Taxation (1965); G. S. A. Wheatcroft, The Law of Income Tax, Surtax and Profits Tax (1962). The literature and case law on this subject is voluminous.

[56] This proposition is by no means free from judicial conflict. See Thorson P.'s remarks in *M.N.R. v. Simpsons Ltd.*, [1953] Ex. C.R. 93.

[57] *Supra*, footnote 5, at p. 225 (C.T.C.).

[58] *Cf.* the policing power exercised by the courts in reviewing municipal by-laws, e.g. *Wiswell v. Winnipeg*, [1965] S.C.R. 512, 51 D.L.R. (2d) 754.

would increase the more closely the procedure approximated a court action and in each case the court would have to balance expediency with concern for the individual. This is, in essence, what the courts already do when reviewing the conduct of administrative bodies or the by-law making power of municipalities.[59] The distinction between quasi-judicial and administrative functions is at best an obscure and crude controlling device which prevents a reasonable compromise between competing but valid interests and forces a choice in favour of one to the the entire exclusion of the other. Abandonment of this sophistic distinction in favour of a sliding scale of natural justice applicable to cases on both sides of this obscure border would more closely answer the exigencies of these competing interests in a society which becomes daily more closely bound by the tentacles of administrative control. The standard which the court applies is always natural justice but what constitutes natural justice varies with the circumstances. In the words of Lord Parmoor in *Local Government Board v. Arlidge*:[60]

> In determining whether the principles of substantial justice have been complied with in matters of procedure, regard must necessarily be had to the nature of the issue to be determined and the constitution of the tribunal.

The legal mind rebels against any suggestion of an approach which is not amenable to the application of established principles with mechanical precision, but where reality cannot be kneaded and moulded to suit the law, the law must accommodate itself to reality.

The problem which is the core of *Guay v. Lafleur*[61] is not susceptible to solution by general principle because it involves a clash of two social philosophies. In a recent article, D. S. M. Huberman stated:

> *Guay v. Lafleur* manifests the re-emergence of a vital and pressing current problem, the theme of which is to strike a balance between law and discretion, between the need for broad grants of power sufficient to ensure effective government regulation and the need to limit that power and protect the citizen from real or supposed unfairness and oppression.[62]

The real conflict is below the surface: it is the conflict between the value attributed to the individual and the demands of the community as a whole. The constant re-defining of this relationship runs through

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[59] *Home Oil Distributors Ltd. v. A.-G. of British Columbia* (1938), 53 B.C.R. 355 (B.C. C.A.); *United Amusement Corporation Ltd. v. Kent Theatres Ltd.*, [1944] Que. K.B. 736; *Shannon Realties Ltd. v. Ville de St. Michel*, [1923] A.C. 185 (P.C.). In these cases the Court refused to interfere with the administrative tribunal since review would have resulted in administrative chaos. But *cf. Street v. Ottawa Valley Power Co.*, [1940] S.C.R. 40; *Stephens v. Richmond Hill*, [1955] 4 D.L.R. 572 (Ont. H.C.). Where legal aspects predominate, the Court more readily intervenes in administrative adjudication. See also *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.); *Scarborough Township v. Bondi* (1959), 18 D.L.R. (2d) 161 (S.C.C.).

Lord Reid's remarks in the important decision of *Ridge v. Baldwin*, [1964] A.C. 40, at p. 65 (H.L.) lend support to such an approach.

[60] *Supra*, footnote 20, at p. 140.

[61] *Supra*, footnote 7.

[62] D. S. M. Huberman, Inquiry or Investigation (1965), 13 Can. Tax J. 343, at p. 347.

the history of Western civilization. On the one hand, there is the position represented by the majority in the Court of Queen's Bench and Prof. Huberman who passes the following judgment on the decision of the majority of the Supreme Court of Canada:

> It seems to me, with all due respect to the learned judges, that somewhere along the line we have lost all sense of perspective when we are prepared to see the *inherent* rights of the individual subjugated to the conveniences of revenue collection and to the more efficient administration of the Income Tax Act;[63]

and, on the other hand, the position taken by the majority in the Supreme Court which favoured the efficient administration of the community over the value of the individual. The quality of the decision of the Supreme Court of Canada depends in the final analysis upon which of these competing values one espouses.[64]

It is the state of the law which determined the form this issue would take when it arose before the court. The case might have been decided either way because there was no strong overriding rule of law which demanded either solution.[65] However, the distinction between administrative and quasi-judicial functions and the attendant consequences with respect to curial review, precluded any compromise between the two competing interests and made imperative absolute victory for one of them. It was then merely a question of which philosophical position each individual judge espoused. Where the law is silent, the judge legislates.

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[63] *Ibid.*, at p. 346. Italics mine. See also Rinfret J., *supra*, footnote 5, at p. 210 (C.T.C.). "[P]our établir cette fraude, l'on ne doit pas procéder avec une partialité et un arbitraire qui sied mal aux personnes chargées de la bonne administration de nos lois . . . .

Que l'on recherche la vérité, d'accord, mais que l'on procède avec impartialité, que l'on accorde à l'enquêté un 'fair hearing', une audition impartiale, tel que pourvu à l'art. 2(e) de la Déclaration des Droits de l'Homme."

[64] The Joint Committee representing the Canadian Bar Association and The Canadian Institute of Chartered Accountants in December 1964 submitted recommendations that "subsection 126(4) be amended to provide that at any Inquiry being conducted thereunder the subject about whose affairs the Inquiry is being conducted should be entitled:

(a) to notice

(b) to be present and represented by counsel; and

(c) to cross-examine any person giving evidence under oath thereat." See (1965), 8 Can. Bar J. 78, at p. 86.

[65] *Cf. Battary v. A.-G. Saskatchewan*, [1965] S.C.R. 465, where the basic issue was the same as in *Guay v. Lafleur*, but the Court decided in favour of the individual. The ancient principle that the accused is not to be forced to incriminate himself overrode the considerations which formed the basis of the decision in *Guay v. Lafleur*.

Guay v. Lafleur is distinguishable from both *Re Ontario Crime Commission, ex parte Feeley and McDermott, supra*, footnote 51, and *St. John v. Frazer, supra*, footnote 50. Unlike the *Crime Commission* case, the hearings were held *in camera* and therefore would not create public embarrassment for Lafleur without giving him an opportunity to vindicate himself before the public at large. The *St. John* inquiry was not directed at any particular person but at certain transactions in securities. The fact that the appellant's conduct was examined was purely adventitious; the inquiry in *Lafleur* was directed at a specific person. It must be noted, however, that this distinction has more clarity in principle than reality in practice. It can be circumvented in drafting the terms of the inquiry.

The decision in *Guay v. Lafleur*[66] raises many problems, beyond the construction of The Income Tax Act, s. 126(4)[67], which remain unanswered. Those who dislike the ever increasing extension of ministerial discretion in the Income Tax Act might ask themselves why Parliament should consider that necessary. It would be curious to speculate how *Guay v. Lafleur*[68] might have been decided had Canadian courts never followed *Partington v. Attorney-General*[69] and *Duke of Westminster v. C.I.R.*[70] and given to taxing statutes the strict literal construction otherwise applied to penal laws, but instead construed the Income Tax Act as any other statute.[71] What attitude might the Court have adopted to the taxpayer under circumstances where taxation could not as easily have been avoided by a manipulation of the law with the assistance of astute tax counsel?

Guay v. Lafleur[72] is a touchstone where all the problems of administrative law converge. The issues of when there should be curial review of administrative action, and to what extent, and what standards are to be imposed on administrative action here demand an answer. Scandanavian countries have reacted to this problem of administrative review with the ombudsman, the civil law countries with special administrative courts,[73] but the common law just bumbles along.

The great question raised by *Guay v. Lafleur*[74] is whether this case represents a trend in which the value placed on unrestricted individual liberty is in decline and the demands of a complex interrelated society for conformity and subjection of individual "rights"

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66 *Supra*, footnote 7.
67 *Supra*, footnote 2.
68 *Ibid.*
69 (1869) L.R. 4 H.L. 100, at p. 122, *per* Lord Cairns.
70 19 T.C. 490 (H.L.).
71 For an interesting discussion of the construction of the Income Tax Act, see G. T. Tamaki, Form and Substance Revisited (1962), 10 Can. Tax J. 179; J. T. Thorson, Form and Substance (1966), 14 Can. Tax J. 59.
72 *Supra*, footnote 7.
73 For a penetrating criticism of the common law approach to administrative problems, see W. Friedmann, Law in a Changing Society (2d ed. abridged, 1964), Part IV, "The Growth of Administration and the Evolution of Public Law". At p. 317 Friedmann writes ". . . there are, in fact, two systems of law in existence, and the dichotomy, 'evil' or otherwise, has been with us for some time. The only difference between civil-law and the common-law jurisdictions is that the former openly recognize administrative law as a discipline of its own, with its characteristic problems and solutions, whereas the latter continue to live with the fiction that there is only one system of law, the common law, with administrative sideshoots sprouting from the stem here and there. The result is . . . that there is a widespread lack of proper appreciation of characteristic public-law problems and institutions. . . . The recognition of the duality of the legal system as an inevitable corollary to the development of modern government—is a basic problem which the common-law world can continue to ignore or belittle only at the cost of failing to develop a healthy balance between the needs of administration in the modern welfare state and the essential rights of the citizen."
This writer maintains that the Supreme Court of Canada in *Guay v. Lafleur* refused to recognize even that this was a *legal* problem.
For a favourable view of the common law approach as compared with the civil law by an administrator in a civil law jurisdiction, see R. Grégoire, Le Conseil d'Etat (1965), 8 Can. Public Admin. 495.
74 *Supra*, footnote 7.

for the "common good" is in the ascendency. The pendulum had swung a long way from the organic mediaeval society through the Renaissance to *laissez-faire* of the nineteenth century and now is returning. The subtle encroachments of administrative regulation upon the lives of the citizens have been growing at an accelerated rate. It would be well to remember that a legal system shapes its society no less than the nature of a society determines its legal system.

J. W. MIK*