Article

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Judicial Restraints on Administrative Action : Effective or Illusory ?

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I - Introduction

The title of this morning's session reminds me of one of those examination questions that I never answered, unless forced to, when a student and now seldom set as a teacher. My philosophy was that, if you really do not understand a question, avoid it like the plague and, anyway, someone almost certainly has already said it all that much better than you possibly could. It is therefore with interest that I note that Peter Hogg's paper, presented to you this morning by Bill Angus, does not really answer the question posed. Now, I know that Peter was instructed explicitly by Don Carter to deal with the issue of whether judicial review of administrative action was protected constitutionally in Canada under the *B.N.A. Act*, but that does not help me too much. My first difficulty remains one of really understanding and defining the limits of the question fully.

I am also plagued by the second difficulty, however — many people have already said it that much better than I can and, indeed, quite recently. My exceptional colleague, Professor John Willis, has distilled his amassed knowledge on the role of judicial review of administrative action in his 1973 Cecil A. Wright Memorial Lecture at the University of Toronto.[1] Even more recently, Paul Weiler has unleashed on the Canadian public his work on the Supreme Court of Canada, *In the Last Resort*,[2] and followed this up with a further sceptical view on the need for and effectiveness of judicial review of administrative action in his paper, *The Administrative Tribunal: A View from the Inside*, delivered at the University of Toronto Conference on Law and Contemporary Affairs, held in February, 1976.[3]

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1. Published in (1974) 24 *U.T.L.J.* 225.
2. Toronto, Carswell-Methuen, 1974.
3. Now published in revised form in (1976) 26 U.T.L.J. 193.

Of more immediate concern, however, is the fact that the person whose paper I am following has not only told us this morning that judicial review of administrative action is not constitutionally guaranteed but has also, in a paper published in three places,[4] argued that we need very little judicial review of administrative action. Beyond that, his mouthpiece at this session, Bill Angus, has also, in a paper published in the same three places,[5] stated in as many words that the individual confronted by unlawful administrative action has little hope of gaining an ultimate victory against the administrative process if he resorts to law. All of this makes it very difficult for me, particularly when Don Carter, in inviting me to deliver this paper some eight months ago, said that my mandate was to develop his own preconception that Bill Angus was not quite correct when he argued that judicial review of administrative action was an expensive and largely ineffective commodity.

II - Recent Judicial Review of Administrative Action in Nova Scotia

Let me start off my very tentative search for the question and the answer by looking at the results of some recent Nova Scotia decisions in the area of judicial review of administrative action. Thanks to the efforts of a newspaper man named McNeil, the citizenry of the province have in the last month had a lawful opportunity of viewing a badly scratched print of that old movie, "Last Tango in Paris", in a local theatre (though, perhaps, the Supreme Court of Canada may still say ultimately that it was an unlawful opportunity after all).[6] The Supreme Court of Canada has recently affirmed the Nova Scotia courts' decision that Dalhousie University is entitled to a building permit from the City of Halifax authorizing it to build a new sports complex.[7] Decent squash courts at last! The Lord Nelson Hotel Ltd.

4. "Judicial Review: How Much Do We Need?" delivered as part of the Osgoode Hall Law School Annual Lecture Series for 1972-73 entitled *The Individual and Bureaucracy* and published in (1974) 26 *Admin. L. Rev.* 337, (1974) 20 *McGill L.J.* 157 and in *The Individual and Bureaucracy*, ed. D. J. Baum, Toronto, Carswell, 1974, at 81.

5. "Judicial Review: Do We Need It?", 26 *Admin. L. Rev.* 301; 20 *McGill L.J.* 177 and *The Individual and Bureaucracy*, at 101.

6. See *McNeil* v. *The Queen* (1976), 14 N.S.R. (2d) 225 (N.S.S.C., A.D.). This judgment follows a trip to the Supreme Court of Canada on the issue of *Locus standi*. See (1975), 12 N.S.R. (2d) 85; 5 N.R. 43 (S.C.C.), *aff'g* (1974), 9 N.S.R. (2d) 483; 53 D.L.R. (3d) 259 (S.C., A.D.), *aff'g* (1974), 9 N.S.R. (2d) 506; 46 D.L.R. (3d) 259.

7. *City of Halifax* v. *Dalhousie University* (1976), 14 N.S.R. (2d) 718; 8 N.R. 144, *affirming* without reasons *Dalhousie University* v. *City of Halifax* (1974), 9 N.S.R. (2d) 643; 53 D.L.R. (3d) 610 (S.C., A.D.).

was able to prevent the erection of another hotel opposite the Halifax Public Gardens.[8] Another high rise monstrosity avoided! A Trial Division judge has told a provincial magistrate that he cannot compel lawyers to wear gowns in his court.[9] An outdated tradition out the window! A Mrs. Busche had a disciplinary decision made against her by the Nova Scotia Teachers' Union quashed for an absence of jurisdiction, an absence of evidence and an absence of natural justice.[10] Schwartz, the spices people, had a certification by the Nova Scotia Labour Relations Board quashed because the decision to certify without a vote came after the wrong question had been asked and irrelevant factors had been taken into account.[11] There have been other triumphs in the courts as well. Indeed, for some of those applicants for review who lost, there have been tactical victories as well. Brodie, the rate-payer, has seen the Quinpool Road project, which he challenged unsuccessfully in the courts, change in concept and still not finalised.[12] Dombrowski, the discontented Dalhousie Classics professor, lost at two levels, but at least at the considerable satisfaction of his day in court and seeing his former employers obliged to testify.[13]

Most, if not all of these decisions, have been reported extensively in the local press. Nova Scotians have also seen in recent months in their newspapers how citizens' groups have been able to force the removal of Mr. Crowe, the Chairman of the National Energy Board, from a particular pipeline hearing.[14] There has also been considerable

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8. See *Lord Nelson Hotel Ltd.* v. *City of Halifax* (1973), 12 N.S.R. (2d) 66; 39 D.L.R. (3d) 539 (S.C., T.D.), after a trip to the Appeal Division on the question of standing. See (1972), 4 N.S.R. (2d) 775; 31 D.L.R. (3d) 755 (S.C., T.D.), *rev'd* (1973), 4 N.S.R. (2d) 753; 33 D.L.R. (3d) 98 (S.C., A.D.).

9. See *Re Samson and the Queen* (1974), 50 D.L.R. (3d) 365 (N.S.S.C., T.D.).

10. See *Re Busche* (1975), 62 D.L.R. (3d) 330 (N.S.S.C., T.D.).

11. See *W. H. Schwartz and Sons Ltd.* v. *Bread, Cake etc. and Miscellaneous Workers Union, Local 446 and Labour Relations Board* (1975), 12 N.S.R. (2d) 606; 65 D.L.R. (3d) 506 (S.C., A.D.).

12. See *Brodie* v. *City of Halifax* (1974), 9 N.S.R. (2d) 415; 46 D.L.R. (3d) 529 (S.C., T.D.), *rev'd* (1974), 9 N.S.R. (2d) 380; 47 D.L.R. (3d) 454 (S.C., A.D.), *leave to appeal refused* (1974), 10 N.S.R. (2d) 560; 3 N.R. 214 (S.C.C.); *Brodie* v. *City of Halifax (No. 2)* (1974), 9 N.S.R. (2d) 415 (S.C., A.D.).

13. See *Dombrowski* v. *Board of Governors of Dalhousie University and College* (1974), 15 N.S.R. (2d) 314; 55 D.L.R. (3d) 268 (N.S.S.C., T.D.), *aff'd* (1976), 15 N.S.R. (2d) 299 (S.C., A.D.).

14. See *Committee for Justice and Liberty* v. *National Energy Board* (1976), 9 N.R. 115. In fact this case started as a case stated to the Federal Court of Appeal by the N.E.B. itself but the decision of the Federal Court of Appeal in favour of Mr. Crowe (See (1975), 9 N.R. 150; 65 D.L.R. (3d) 660 (*sub nom. Re Canadian Arctic Gas Pipeline Ltd.*)) was appealed to the Supreme Court of Canada by the public interest groups.

publicity in the media these past few weeks of an attempt to obtain judicial review of a decision designating an area as the site of the new Halifax rubbish dump.[14a] We have also heard a lot about the decision of the Ontario Divisional Court blocking the closure of Doctors' Hospital in Toronto.[14b]

Does this factual catalogue tell very much about the effectiveness of judicial review of administrative action? First, it tells us that some people have been successful in court and, by one yardstick, that is a measure of effectiveness. However, the question is by what other standards is effectiveness to be measured? Does success in court really amount to very much even for the individual successful plaintiff? These are the questions explored so well by Bill Angus in his paper, *Judicial Review — Do We Need It?* and I will return to these considerations in a very few moments. Secondly, the catalogue that I have just recited may tell us that judicial review of administrative action is becoming a much more visible process. Undoubtedly, the publicity has always been there, but it is my view that the frequency of the publicity is becoming greater. Later in my paper, I will return to this factor as a criterion of effectiveness and as a justification for judicial review of administrative action.

III - Success as a Criterion of Effectiveness

At the practical and important level of a solicitor advising a client whether it is worthwhile seeking judicial review of administrative action, the prospects of success in court are obviously in many cases the most important criterion from the client's point of view. I say "many" rather than "all" cases for two reasons.

First, and most importantly, as Bill Angus has demonstrated more than amply, success in court does not necessarily mean ultimate success and, if the chances of ultimate success are slim, the utility of going to court, even if the prospects there are good, is marginal.[15] The reviewable abuse of discretion can the next time round be so easily

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14a. This matter has now been litigated on an interlocutory application up to the Appeal Division of the Nova Scotia Supreme Court and leave may be sought to appeal the judgment of that court to the Supreme Court of Canada. In essence, on an interlocutory application as to the appropriateness of one of the parties suing, the Appeal Division decided that the issues raised by the action for declarations of invalidity were not justiciable. See *Attorney-General (Nova Scotia)* v. *Bedford Service Commission*, S.H. 10163, judgment delivered: October 27, 1976, as yet unreported (N.S.S.C., A.D.).

14b. *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.).

15. See *The Individual and the Bureaucracy, supra*, note 4 at 106–110.

turned into exactly the same result, expressed in impeccable, unreviewable language. The decision taken in breach of the rules of natural justice can also easily become the same decision, following the use of the most judicial-like procedures. In extreme cases, success in court may lead to retroactive legislative change. Along the same lines is the consideration, in the case of those who appear before the same tribunal frequently, of whether a successful application for judicial review may prejudice subsequent dealings with that tribunal in different matters.

At the other end of the spectrum, the chances of success in court may be of little relevance in some contexts because the only interest of the applicant for judicial review may be to delay the administrative process. As Professor Weiler points out in his paper, *The Administrative Tribunal: A View from the Inside*, this is not infrequent in the labour field.[16] A variation on this same theme is the example given by John Willis, of the lawyer who deals frequently with a particular tribunal and, rather than being afraid of the consequences for future dealings of seeking judicial review, slaps a writ of certiorari on the tribunal every so often to keep it honest.[17] There too, success in court may be a relatively minor consideration, at least for the lawyer, if not for the client.

Just as an aside, it could be that the recent challenge to the bias of Mr. Crowe, Chairman of the National Energy Board, demonstrated a growing awareness on the part of consumer and public interest groups of the place of the "tactical" application for judicial review. I merely pose the question without knowing the answer. Were the Committee for Justice and Liberty, the Consumers' Association of Canada and the Canadian Arctic Resources Committee as concerned with the bias of Mr. Crowe and the need to replace him as they were with the consideration that an appeal to the Supreme Court of Canada, whether successful or not, would show the National Energy Board that the groups were not to be trifled with at the pipeline hearings and, perhaps in the last analysis, this emphasis of their presence might just have some impact on the final decision of the Board?

This type of attitude, when present, leads to a situation where those seeking judicial review see it not as anywhere near an end in itself, but rather as a part of a much broader political scenario — one of the tools by which ultimate ends are helped peripherally but

16. *Supra*, note 3 at 208.

17. *Supra*, note 1 at 234; citing (1971) L.S.U.C. Special Lectures at 315.

nevertheless a tool which would not willingly be surrendered. In such instances, the answer to the question "Is judicial review effective?" is no more than "We think it helps" and the embittered response of the tribunal being challenged (and, in most cases, parties on the other side) is "What business has this group got perverting the judicial process and ruining our efficiency and effectiveness?" As a final note on this point, it must, of course, be said that the costs involved in a journey to the Supreme Court of Canada still must place a premium on the use of such tactical judicial review by public interest groups and this is a point that I will take up again in another context later.

To return now to the question of success before the courts as a criterion: where judicial review of administrative action is concerned, according to Bill Angus' statistics, the chances of successful review would seem, at least in Ontario, to be less than fifty per cent.[18] Add to this the costs of litigation, successful and unsuccessful, and the further peril that the tribunal may never give you what you want, even after successful litigation, and the case for the frequent use of judicial review is not at all strong. In a great many instances, the prudent advice must be that the risks are great and the ultimate gains few. Of course, this applies more particularly to cases based on procedural unfairness and abuse of discretion than it does to jurisdictional challenges and such matters as applications to quash regulations and by-laws and proceedings to compel the issue of building permits. These latter cases are instances where success in the courts generally leads to ultimate success but, even here, the question is one of whether success in the courts is likely.

In summary, therefore, to point to a number of recent instances where the Nova Scotia courts have reviewed administrative action invites the retort from Bill Angus: "But what about the cases which failed? What are the statistics on the success rate of judicial review applications in Nova Scotia generally? Did success in the courts ensure the successful applicants an ultimate triumph over the administrative process?"

IV - Other Criteria of Effectiveness

Of course, even if it were possible to point to a 75% success rate in judicial review applications (which would be most unusual), the other half of the Angus/Hogg Osgoode team would then come at you with

18. *Supra*, note 15 at 105-106.

guns blazing.[19] The arguments would almost certainly be: (a) Unless Nova Scotia has a particularly poor set of administrative tribunals and other administrative decision-makers, such a high percentage of successful judicial review applications must mean that the courts are intervening far too readily in the administrative process and (b) Even if such a high level of review can be justified in terms of the technical law, what is it doing to the efficiency and effectiveness of the administrative process in your province?

Here, of course, the focus has changed and effectiveness has been measured not in terms of the position of the individual applicant for judicial review, but rather in terms of the administrative process itself and its own concern for a "proper" relationship between it and the courts. The argument also, and more importantly, purportedly speaks to the question of where objectively the balance is to be struck in that relationship between the administrative process and the courts.

The familiar arguments are, of course, that the courts have a very limited role to play in relation to the administrative process. Historically, the remedies for unlawful administrative action were known as the extraordinary writs, connoting what they should arguably remain today: a reserve power to be used in the event of serious and patent error. In matters relating to its statute, the administrative tribunal not only is intended to be but actually is more expert than the generalist superior court. Its day-to-day involvement with that statute makes it far more likely that it will have a much greater familiarity with the intricacies and nuances of the legislation, as well as its underlying social purpose, than the ordinary courts of the land. The attitude of the courts should be therefore to exercise remarkable restraint when asked to review and only intervene when it is abundantly clear that the tribunal has ignored its statutory mandate and gone off on a frolic of its own or where, in Professor Hogg's terms, "its action is out of harmony with the legal order as a whole"[20] or review is needed "to protect fundamental civil libertarian" values.[21]

Beyond this, the argument becomes cost-effectiveness oriented. Every judicial review application involves not only cost to the applicant for relief but great costs to the administrative process and the other parties involved in that process. And the costs here are not

19. See *supra*, note 4. Also "The Supreme Court of Canada and Administrative Law, 1949-1971", (1973) 11 *Osgoode Hall L.J.* 187.

20. *Id.*, at 99.

21. *Id.*

only the actual costs of the litigation, but the costs of delay and disruption of the orderly functioning of the administrative process, factors which, in many instances, have effects well beyond the boundaries of the particular case. For instance, the point at issue before the courts may well affect many matters coming before the same administrative tribunal. To proceed to these other matters before the litigated issue is settled judicially invites trouble, yet to wait may involve administrative chaos.

Everything that I have just said is almost certainly quite trite. However, I say it again simply to make the point that there are a number of perspectives from which to view the question asked: "Judicial Restraints or Administrative Action: Effective or Illusory?" For the administrative tribunal or administrative decision-maker, effectiveness connotes little or no judicial review. More objectively than that, the arguments of relative expertise might also be seen to dictate that effective judicial review is both infrequent and limited.

To change tack once again, it should also be pointed out that a great amount of judicial review litigation, as there indeed seems to be nowadays, does not necessarily mean that all who should be are litigating. Bill Angus in a section of his paper entitled *Who Uses Judicial Review*? confirms that the bulk of judicial review applications come in labour relations matters, professional discipline cases, zoning problems, licensing and tax assessment.[22] The cost of litigation dictates the effectiveness of access in this as in all other fields and, despite legal aid, there has not as yet been any great groundswell of litigation against low level administrators, who affect the poor by their decisions and where we tend to assume from time to time that real abuses of discretion are occurring — a not unpredictable situation if the qualifications for the position are lesser. However, there must be a recognition that here the answer may really be internal, cheap and efficient statutory appeal structures rather than an ill-advised attempt to increase the incidence of judicial review of low level administrators. Such procedures, of course, exist already in many areas of statutory decision-making, and to a greater or lesser extent, in most provinces, are supplemented by an Ombudsman. If these methods are working well, the effectiveness of judicial review is not necessarily brought into question by the limited class of persons who use it.

22. *Supra*, note 15 at 112–113.

V - Back to Nova Scotia

The search for criteria by which to evaluate the effectiveness of judicial review of administrative action leads one down many paths, paths which often head in completely opposite directions and, just to re-emphasize this point, I would like to return to the Nova Scotia cases that I mentioned in passing some minutes ago.

Judged by the criterion of success in court, all except two meet the test of effectiveness. But even here the *caveat* must be entered that they are just random samples and do not tell us anything of those who failed. We also do not know what happened ultimately. For example, there is still talk that the city will somehow or other block the new Dalhousie University sports complex. The question must also be raised as to whether success in court was bought at too high a cost. *McNeil* is probably by no means as an important decision as *Roncarelli* v. *Duplessis*,[23] but Mr. McNeil's continued public solicitation of funds to meet his large legal expenses makes me fear at times that he will be reduced by his litigation to the same state of impoverishment that Roncarelli was.

Viewed from other perspectives, questions can also be raised about the other cases where the applicant was successful. Were the public interest and, more particularly, the interest of the neighbouring landowners really sacrificed by the decision in the *Dalhousie* case, just because the university barely filed its application for a building permit before the City gave clear notice of an intention to rezone the land in question? Should the Lord Nelson Hotel Ltd., relying on its status as a neighbouring landowner and concerned citizen, really have been able to halt the erection of a new hotel when its real concern was not the amenities of the neighbourhood but the avoidance of competition? Should valuable court time be wasted on deciding whether a provincial magistrate has authority to require lawyers in his court to gown? Would not this matter have been best settled by consultation between the Barristers' Society, the Attorney General and the magistrate concerned or left to be? Have the Nova Scotia Teachers' Union's disciplinary powers now been hamstrung by the imposition of inappropriate judicial-like procedures as a result of the decision in the *Busche* case? Did the Appeal Division of the Nova Scotia Supreme Court misinterpret the relevant legislation and fail to pay sufficient respect to the expertise of the Nova Scotia Labour Relations Board in the *Schwartz* case?

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23. [1959] S.C.R. 121.

Questions can also be raised about the effectiveness of judicial review of administrative aetion by the two losing cases to which I referred. Was the use of judicial review by Brodie, a representative citizen, as part of the overall tactics to halt the proposed Quinpool Road development, a justifiable step? Has the public interest now been served by the fact that the land is still vacant and the City pays out large sums monthly in interest on the property? Do we think it is a good thing that people like Dombrowski should enjoy their day in court, even if the chances of success are slim?

Let it not be thought that in each of these questions I believe that the answer should be against the decision to review or against the availability of the judicial review process. Far from it! Rather, the only point that I am making is that the criteria against which the effectiveness of judicial review is to be measured are many and varied and none of the questions posed is easy to answer.

VI - The Profession of Faith

I come now to the last part of my paper, the part which Professor Willis would describe as the "theological" [24] section. Having come this far, and I hope this is not too disappointing for Don Carter, I find myself still unable to disagree with Bill Angus' argument that judicial review of administrative action is an expensive and chancy business to be warned against strongly in most instances when the possibility is raised. I also find myself convinced for the most part by Peter Hogg's arguments that only very limited judicial review can be justified, though perhaps I do not accept some of the details of his conclusions.

Given an acceptance of these two arguments, the next question that is raised is whether I should go one step further and accept that judicial review is not really necessary or, perhaps just a half step, and accept that it is not really necessary for some tribunals or statutory decision-makers — in other words *should* not be constitutionally guaranteed?

First, let me say that, on this question, I do not think that it is really relevant that the number of judicial review cases represents but the tip of an enormous iceberg of uncontested administrative decisions. My students should know this fact and I should also keep myself constantly aware of it, but, in the last analysis, is the situation any different, for example, from the proportion of litigated contracts and

24. *Supra*, note 1 at 225 and *seriatim*.

marriages to unlitigated contracts and marriages? Certainly it may be argued that a comparative lack of judicial review applications and little successful judicial review can lead to both a lack of understanding of the administrative process by the courts and a lack of attention to the role of the courts by the administrative process. However, it seems to me that the first of these problems may go more to judicial selection and the possibility of a specialised administrative court than to the need for review. As far as the effect of the role of the courts on the administrative process, tip of the iceberg or not, I believe that most important tribunals are aware very acutely of the role that the courts play in the supervision of the administrative process. Desirable or not, this fact is probably brought home to them in many instances by the tactical *certiorari* or appeal to keep them honest.

Second, before coming to the substance of my argument that a guaranteed core of judicial review is important (*ergo* effective?) despite all the drawbacks, let me also say that that argument is not meant to commit me to all aspects of judicial review as it is practised presently by the courts. As mentioned previously, I share some of Peter Hogg's beliefs as to the limited, exceptional or reserve nature of judicial review. I also believe with John Willis that judicial review should in many instances be tailored to the particular statutory context and "review" by way of a clearly-defined statutory appeal provision could accomplish this.[25]

In making the argument for judicial review as an important component of administrative law, the difficulty that I have is in drawing the line between a healthy respect for traditional institutions, such as the courts and the lesson that I draw from history, both ancient and modern, that there is some need for controls on administrative power, on the one hand, and the image, so vigorously debunked by Professor Willis, of the Royal Courts springing to the defence of every poor individual being badgered unmercifully by an amorphous and capricious State,[26] on the other. This latter notion ranks as one of the most laughable yet widely accepted legal fictions of all time, yet somewhere at its roots is the genesis of what judicial review is all about and why it is needed.

The argument for a guaranteed core of judicial review also becomes harder to make in the face of Professor Weiler's very strong arguments for the complete exclusion of the courts from the British

25. See particularly his "The McRuer Report: Lawyers' Values and Civil Servants Values", (1968) 18 *U.T.L.J.* 351 at 359, cited *id.* at 244.

26. *Supra*, note 1 at 228, 234 and 244 particularly.

Columbia Labour Relations Board's activities that he makes in his paper, "The Administrative Tribunal: A View from the Inside".[27] Basically, the point that he makes is that there are so many other checks and balances present not only in the internal mechanisms of the Board but also in the external pressures on the Board, that the courts are, in view of their past record in labour relations, not only undesirable but also unnecessary. The Board simply cannot go off on a frolic of its own without being checked very swiftly and, if that is all we want to achieve by judicial review, it is no longer necessary in this particular context. To be more specific he sees these effective restraints in:

1. Internal administrative review of the Board decisions.
2. An eighteen-member Board representing "a wide spectrum of trade-union and employer groups".
3. The high visibility that labour relations has in British Columbia with the Minister of Labour and other legislators, a visibility that would lead not only to early amendment, if the Board went on a frolic of its own, but also which has insured dialogue between...

> ... the Board and the legislature [Executive?] in the refinement of labour law policy, a dialogue which it would be difficult if not impossible to duplicate with the judiciary.[28]

Undoubtedly, these checks described by Weiler will ensure that judicial review is seldom, if ever, necessary with respect to the British Columbia Labour Relations process. Indeed, they can be seen from one point of view as ensuring everything that judicial review ever achieved and less — in the sense that they avoid largely the costs and disruptions of judicial review, which at times, if one is to believe the Labour Law commentators, has been so misguided.

Judicial review of administrative action has in this country received a bad name largely because of its spotty record in the labour relations area. Not that it might not have come to have a bad name anyway, but the quantity of litigation and the level of feeling generated in the labour law area has ensured that much of the commentary on judicial review has had its starting point and focus in the courts' performance in labour relations cases. From this standpoint, it is relatively easy to fall into arguing that the courts should be excluded from judicial review of the labour relations process completely and then, perhaps, to move further and say that judicial review generally is a bad thing and should be excluded completely.

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27. *Supra*, note 3 at 207-210.
28. *Id.*, 209-210.

Jaffe, whose views on the need for judicial review of administrative action Professor Weiler notes with respect,[29] argues (and here we become really theological):[30]

> The complete representative administration is a professional mirage, whether we look to actual administrations (even the very good ones) or resort to more abstract inquiry. Representation means organized purpose, and at one time no more than a fraction of the potential infinity of organized purposes are in being. Policy means choice, decisions, directions: and if policy is to have any stability or weight, any creative drive, it will almost inevitably be a choice of one interest over others. Administration, then, as the active principle of choosing, or preferring (be it for the most part wisely, fairly, kindly) has in it the inherent power to hurt, to awaken resentment, to stir the sense of injustice. By its very nature, because it is challenged to hammer out policy against opposition, it is driven almost inevitably to seek allies and to provide cement for its alliances.

From this theological statement, which I share, he proceeds to argue for the necessity for independent review of administrative action, review which he sees as best reposed in the ordinary courts to which the country looks "for its ultimate protection against executive abuse".[31]

All this is written against the background of a system where the role of the judiciary is constitutionally much more sacrosanct than it is in Canada, particularly if we believe the thesis of Peter Hogg's paper. However, even accepting the patent falsity in fact of the courts' knight in shining armour image, theoretically the model of review by superior courts appeals as a necessary check against the tendencies identified by Jaffe. Furthermore, the high visibility (if not high reputation) that the courts have had in the past and the higher visibility that they may be achieving today in Canada continues to make them, in a practical sense, the organs of our political system in which the greatest number of people would say a counterweight to excessive administration rests.

In conclusion, to reduce it all to the labour law area again, it seems to me that it is vitally important to have the courts, admittedly in a very reserve role, when the unlikely day comes when the internal and external checks, with which the British Columbia Labour Rela-

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29. See *id.*, at 207, n. 12.

30. L. JAFFE, *Judicial Control of Administrative Action*, Boston, Little, Brown, Abridged Student Edition, 1965, at 323.

31. *Id.* at 324. Note at 327, Jaffe accepts that in some particular instances there may be a case for the removal of judicial review and he may possibly view Canadian Labour Relarions as one such instance.

tions has surrounded itself, fail. This is, of course, not to criticize those checks. Indeed, one looks for their repetition in all good administration. It is simply to argue, as Jaffe has done, that they may not be enough given the natural tendencies of even good administrations. It is also simply to argue, as Peter Hogg has done, that we need something to guard against the day when all the internal and political checks conspire together to pose a threat to "fundamental civil libertarian values" [32] and "the legal order as a whole".[33] When judged as a system which produces satisfactory end results for the people who use it, judicial review of administrative action ranks low in effectiveness. In terms of its effect on the administrative process, it has at times been a quite disruptive, even destructive influence. Viewed qualitatively, the level of intervention has not at times been high. It by no means goes towards ensuring equality of access. Yet, in the last analysis, I would maintain that the power of judicial review, albeit improved and albeit of an extraordinary nature in many situations, is a necessary part of an effective political system in our traditions.

32. *Supra*, note 20.
33. *Supra*, note 21.