LE PROTECTEUR DU CITOYEN
Assemblée nationale
Québec

Equitable Intervention

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EQUITABLE INTERVENTION

Illegal or Unreasonable Acts?

Equal treatment? Equity?

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"And this is the nature of the equitable, a correction of law where it is defective owing to its universality”

Aristotle

Nichomacean Ethics (Book V, Chapter X)

Translated by W.D. Ross

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INTRODUCTION

This document was written to clarify notions such as legality, legitimacy (reasonableness), and equity, which, because they overlap, are often a source of confusion. Its purpose is to make sense of these concepts in relation to the role and specific powers conferred upon Le Protecteur du citoyen.

The document is also intended to guide Le Protecteur du citoyen employees—particularly investigators—in determining whether government decisions are reasonable or unreasonable and, ultimately, in deciding whether or not to intervene.

The document was prepared by the members of the Committee on Equity and Reasonableness appointed by the Public Protector. The committee is comprised of Jean-Claude Paquet, legal counsel to the institution (chair), and the Protector's delegates, Marie-José Péloquin, Fernande Rousseau, and Georges Wentser. It was submitted to the Protector and her management team, as well as to the staff of the Investigation Branch, which acts on her behalf.

1. THE MISSION OF LE PROTECTEUR DU CITOYEN

1.1. Mandate

The Public Protector Act entrusts the Protector with supervising the administration of government in Québec. Appointed by the National Assembly, the Protector acts to protect rights and strengthen the rule of law and the democratic values that underpin relations between the government and its citizens.

The office of Le Protecteur du citoyen handles complaints about government actions and intervenes where necessary with government departments and agencies to correct prejudicial situations and ensure they do not reoccur.

Le Protecteur du citoyen also acts to prevent harm by suggesting ways to eliminate the causes of potential problems. In addition, it may draw the attention of the government or of organization executives to legislative, regulatory, or administrative reforms it deems in keeping with the public interest.

Le Protecteur du citoyen performs its mission independently. It intervenes on its own initiative or at the request of individuals or groups of individuals.

1.2. Powers

Under section 26.1 of its constituting act[1], "*the Public Protector shall notify in writing the chief executive officer of a public body where he is of opinion that the public body or a person accountable to the chief executive officer:*

1. *Public Protector Act,*R.S.Q., c. P-32, hereafter PPA.

1) has not complied with the law;

2) has acted in an unreasonable, unjust, arbitrary or discriminatory manner;

3) has failed in its or his duty or has been guilty of misconduct or negligence;

4) has committed an error of law or of fact; or,

5) in the exercise of a discretionary power, has acted for an unjust purpose, has been actuated by irrelevant motives or has failed to give reasons for its or his discretionary act when it or he should have done so."

This provision is essentially modeled on the intervention criteria that govern how the courts exercise their power of review with respect to government decisions.[2] Article 846 of the *Code of Civil Procedure* lists several situations that open the door to judicial review. In substance, this section says that the court may intervene if the government has

- Violated the law
- Overstepped its jurisdiction
- Demonstrated procedural irregularities
- Abused its power

The incontestable link between these two statutes highlights the need to clarify the action of Le Protecteur du citoyen and distinguish it from the power of review exercised by the courts. From this perspective, two key questions arise with respect to section 26.1: What is the exact

2. In Québec, the Superior Court is the court of first instance in exercising the courts' superintending power over government authorities: *Code of Civil Procedure*, article 33.

meaning of the expression "*acted in an unreasonable (…) manner*?" What is the place of equity among the overlapping concepts enumerated in this clause?

These questions are at the heart of this paper. In the words of Professor Pierre Issalys of Université Laval,

> *More than any of the other terms used in section 26.1, the word 'unreasonable' appeals to the discretionary authority of Le Protecteur du citoyen. It therefore deserves special attention, given that it can clarify the scope of Le Protecteur du citoyen's equitable jurisdiction. The second reason it deserves attention is that it has long been part of the technical vocabulary of judicial review of the legality of administrative action. It has even taken on greater significance over the past 20 years in jurisprudence respecting the standards of review applied by the courts*.[3]

However, before addressing the crux of the matter—i.e., defining an unreasonable act and situating equity among the powers conferred upon Le Protecteur du citoyen—we must first define the scope of the institution's jurisdiction.

2. THE JURISDICTION OF LE PROTECTEUR DU CITOYEN

2.1. A shared jurisdiction

If the breaches listed in section 26.1 of the PPA largely echo the criteria for court intervention, it is because Le Protecteur du citoyen's surveillance role and the court's role have the same focus. In this respect, they share their jurisdiction: unreasonable, unjust, and arbitrary actions all fall within their purview.[4]

3. Pierre ISSALYS. Observations sur le document de travail "*L'intervention en équité,"* prepared for the Public Protector by the Committee on Equity and Reasonableness, May 2003, p. 10 (our translation).
4. As Professor Issalys affirms: "*All of these breaches share the characteristic of justifying, in their own right, intervention by review bodies other than Le Protecteur du citoyen, bodies whose specific*

The constitutionalists Brun and Tremblay have examined the convergent roles of Le Protecteur du citoyen and the courts as well as their limits and differences:

> *Under our system of law, the superior courts are responsible for verifying that the law is upheld by the agents of the executive or, in other words, verifying the legality of government action.*

As they explain, however, the scope of judicial review is very limited:

> *Of course, government procedures can be reviewed by the courts, be it in the name of the Charter of Rights (…) or some minimal level of procedural fairness recognized by administrative law for cases involving individual discretionary powers. But reviewing the content of administrative decisions that do not violate substantive Charter rights may prove problematic, given the scope of the enabling power.*

They conclude as follows with respect to the specific role of Le Protecteur du citoyen:

> *This is why the National Assembly of Québec created a mechanism for reviewing the exercise of executive authority that is distinct from conventional parliamentary channels and more likely to resolve the grievances of isolated individuals: Le Protecteur du citoyen*.[5]

mission is to ensure the application or enforcement of the law (courts of common law) or a particular piece of legislation (specialized courts of law, administrative tribunals, review and hierarchical control mechanisms within government, the auditor general to some extent). In situations involving such breaches, Le Protecteur du citoyen therefore exercises a jurisdiction in principle shared with the various other bodies." Ibid, p. 5 (our translation).

5. Henri BRUN and Guy TREMBLAY, *Droit constitutionnel*, 4th ed., Yvon Blais, 2001, pp. 693 and 697–698 (our translation).

2.2. A specific jurisdiction

What is the specific role of Le Protecteur du citoyen given that it investigates the same type of breaches as those dealt with under judicial review?

Professor Issalys cites the terms “unreasonable,” “unjust,” and “arbitrary” enumerated in section 26.1 of the PPA to put the unique nature of the Le Protecteur du citoyen’s jurisdiction in clear perspective:

> *Used in the PPA to describe any act by a public body, they enjoy widespread acceptance (…)*
>
> *“Le Protecteur du citoyen’s authority to identify this kind of breach is the specific component of its overall jurisdiction. Only Le Protecteur du citoyen can legitimately intervene in cases where public bodies act in ways that are “simply” unreasonable, unjust, or arbitrary. This jurisdiction, which implies a reliance on common sense notions of “reason,” “justice,” and “measure,” is at the core of the institution of ombudsman, as the Supreme Court made clear in the B.C. Development Corporation ruling:*
>
> > *[…] That the Ombudsman's powers of investigation and reporting were meant to extend beyond those cases in which the complaining party asserts a cause of action is evident from s. 22 of the Ombudsman Act, which speaks of determinations by the Ombudsman that something the government did was “unjust,” “oppressive,” […] brought about through “arbitrary, unreasonable or unfair procedures,” or “otherwise wrong.”*
> >
> > *[…] it was, at least in part, the lack of any remedy at law for many administrative injustices that gave rise to the creation of the office of Ombudsman.*
>
> *In my view, Le Protecteur du citoyen’s authority to intervene, express an opinion, make recommendations, or report on situations prejudicial to citizens and resulting from acts by a public body that are “simply” unreasonable, unjust, or arbitrary corresponds to its equitable jurisdiction, which—along with its means of*

> *action—distinguishes it from all other bodies that play a role in reviewing government actions.*[6]

Another reason—and a major one—has to do with the scope of this right of oversight. Professor Mockle has made the following observation:

> *" In the past, certain legal specialists have been overly confident in the ability of the right for judicial review to remedy systemic problems with the enforcement of certain laws. In administrative law, however, there is a review mechanism designed to draw society's attention to injustices and aberrations in the enforcement of social or so-called public interest legislation. One authority can denounce these problems through its power of recommendation: the parliamentary ombudsman. This authority can act to protect the public, as indicated by the title of certain ombudsmen such as the Public Protector of Québec or the Defensor del Pueblo in Spain.*
>
> *(…)*
>
> *Ombudsmen are even better placed than the courts to correct aberrations that cause inequities*.[7] ".

Le Protecteur du citoyen thus plays a vital role that complements that of the courts. It does not take the place of political and administrative decision makers, it has no control over judicial power, and it is not a substitute for the courts. Its mission is to protect citizens against abuse, errors, rights violations, negligence, and inaction in their dealings with the public service. Its power to recommend rather than order, its simple modes of intervention, the flexibility of its alternate solutions to unreasonable government decisions, and its ease of access for citizens who feel they have been wronged make it a unique form of redress.

6. Supra, note 3, p. 6–7 (our translation, except for Supreme Court citation).
7. Daniel MOCKLE, "Justice administrative et équité," *Canadian Bar Review* , 1999 (our translation).

Now that we have a better understanding of the scope of Le Protecteur du citoyen's right of review, let's take a look at the notion of "illegal act" and how its meaning has changed in reaction to changes to the law since the Public Protector Act was adopted nearly 35 years ago. A number of decisions only recently considered unreasonable are now termed illegal.

3. ILLEGAL ACTS

3.1. The principle of legality: An overview

A legacy of our British constitutional heritage, the principle of legality or of primacy of law—the rule of law—is fundamental to the running of the state.[8]

It signifies first and foremost that government actions must comply with the law. Non-compliance with the law would automatically be considered an illegal act. It should be noted that regulations are just as binding as the law, since they derive from the law in the first place.[9]

A second rule flowing from the principle of legality holds that the government has no other powers other than those conferred upon it by law. It therefore follows that should the

8. See the preamble to the Canadian Charter of Rights and Freedoms. Also see H. BRUN and G. TREMBLAY, *op. cit*., note 3, pp. 679–692. The authors summarize this principle, first formulated by Dicey in the 19th century, in three statements: *The public service has no powers other than those attributed to it by law; the powers of the public service are circumscribed; the public service is subject to the law.*
9. What about directives? A generic term that includes instructions, guidelines, memorandums, policies, and interpretation manuals, directives raise problems. In some cases, they have a regulatory aspect, in others, they are more akin to internal management rules. As a result, and given the ambivalence of the applicable legal framework, directives are not necessarily classified as binding texts. That said, they can serve as tools for analysis and supplementary argument during the course of an intervention. The same can be said for the commitments set forth in the declarations of service drafted by government departments as well as the declaration of public service values tabled by the president of Conseil du trésor in the National Assembly. (http:www.tresor.gouv.qc.ca/ministre/declaration2002.htm)

government usurp a power it does not possess or use a power in violation of the terms that govern how it is exercised, it is acting illegally.

A third rule holds that the government, in exercising the discretionary powers conferred upon it, must act legally. In other words, it cannot transform its discretionary powers into arbitrary powers. Administrative tribunals and the courts have intervened on numerous occasions to clarify this obligation to act legally, and their decisions are binding. Non-compliance with such a ruling automatically qualifies as an illegal act.

In short, under the principle of legality, an action, decision, or omission qualifies as illegal if :

- It violates a statue
- It exceeds the powers conferred by law
- It fails to comply with a court or tribunal ruling or order

Now that this brief overview of the rules deriving from the principle of legality is complete, let us examine how legislative rules have changed since the passage of the PPA and made it necessary to update the definition of an illegal act.

3.2. The rules of natural justice

In administrative law, the rules of natural justice are unrelated to the substance of a decision. Instead they deal with a certain number of rules that must be followed when making the decision.

The rules of natural justice can be summarized in two categories: the right to an impartial decision (*nemo judex in causa sua*) and the right to be heard, i.e., to present one's point of view (*audi alteram partem*).

First developed by the courts, these core principles have now been enshrined by lawmakers. Section 2 of the Canadian Bill of Rights (1960), for example, stipulates that "*Every law of Canada shall […] be so construed and applied as not to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice […]*" In Québec, the Charter of Human Rights and Freedoms also stipulates, in chapter III on judicial rights, that every person has a right to a fair hearing by an independent tribunal (section 23). Furthermore, a number of specific statutes contain provisions inspired by the rules of natural justice. But it is only recently that the formalities inherent to the decision making process have become binding where government activities are involved. With the entry into force of sections 1 to 13 of the *Act respecting administrative justice* in April 1998,[10] the principles of natural justice, referred to as procedural fairness, have been incorporated as specific and imperative rules.

3.3. Procedural fairness

As mentioned above, the *Act respecting administrative justice* deals with procedural fairness. More specifically, it lists the measures the government must implement to comply with its duty to act fairly. Section 4 reads as follows:

> *"* **4.** *The Administration shall take appropriate measures to ensure*
>
> *1) that procedures are conducted in accordance with legislative and administrative norms or standards and with other applicable rules of law, according to simple and flexible rules devoid of formalism, with respect, prudence and promptness, in accordance with the norms and standards of ethics and discipline governing its agents and with the requirements of good faith;*
>
> *2) that the citizen is given the opportunity to provide any information useful for the making of the decision and, where necessary, to complete his file;*

10. R.S.Q., c. J-3.

> *3) that decisions are made with diligence, are communicated to the person concerned in clear and concise terms and contain the information required to enable the person to communicate with the Administration;*
>
> *4) that the directives governing agents charged with making a decision are in keeping with the principles and obligations under this chapter and are available for consultation by the citizen.*".

This section therefore sets minimum standards for administrative decision making, with paragraphs 1 and 2 essentially reaffirming the principles of natural justice elaborated by the courts. Moreover, sections 5 to 8 of this basic law impose minimum standards on the government when it makes decisions of certain types or on certain subjects, adapting them to each situation. All statutes that allow the government to make such decisions have subsequently been revised to comply with the principles and rules set forth in articles 4 to 8.[11]

The Supreme Court gave full effect to the *Act respecting administrative justice* and the associated procedural rules in the Imperial Oil Ltd. decision.[12]

3.4. Summary: an up-to-date definition of an illegal act

This analysis reveals that the definition of an illegal act has broadened in scope since the passage of the *Public Protector Act* in 1968. With the inclusion of rules of natural justice in the

11. Under the *Act respecting the implementation of the Act respecting administrative justice*, S.Q., 1997, c. 43.
12. 2003, SCC 58; in reference to special rules applicable to the issue of an order by the minister of the environment, Justice Louis LeBel wrote, "***26**. Those procedural rules provide more guidance about certain aspects of the general duty of procedural fairness that s. 2 of the* Act respecting Administrative Justice *imposes on administrative decision-makers, by codifying a consistent line of decisions in Canadian administrative law" (P. Issalys and D. Lemieux,* L'action gouvernementale: Précis de droit des institutions administratives *(2nd ed. 2002), at p. 847)."*

Québec Charter and the passage of the *Act respecting administrative justice*, all breaches of procedural fairness are now considered as illegal acts.

4. UNREASONABLE ACTS

4.1. Definitions from the dictionary, jurisprudence, and doctrine

What is an unreasonable act? The dictionaries consulted unanimously concur that it is "*an act that is not reasonable*," and follow up with a list of attributes such as absurd, stupid, excessive, senseless, irrational, or reckless. This being of little help, let us see what the courts say. Although more loquacious, justices cast insufficient light to illuminate the role of Le Protecteur du citoyen. Indeed, over the past 20 years, the courts have gradually restricted the scope of their powers of review over the government, justifying this judicial restraint by invoking the specialization of tasks, including the expertise administrative tribunals have developed in interpreting administrative law.

That said, by no means do the courts grant government carte blanche. They effectively retain the power to review the legality and validity of administrative decisions, which they do by examining their reasonableness.

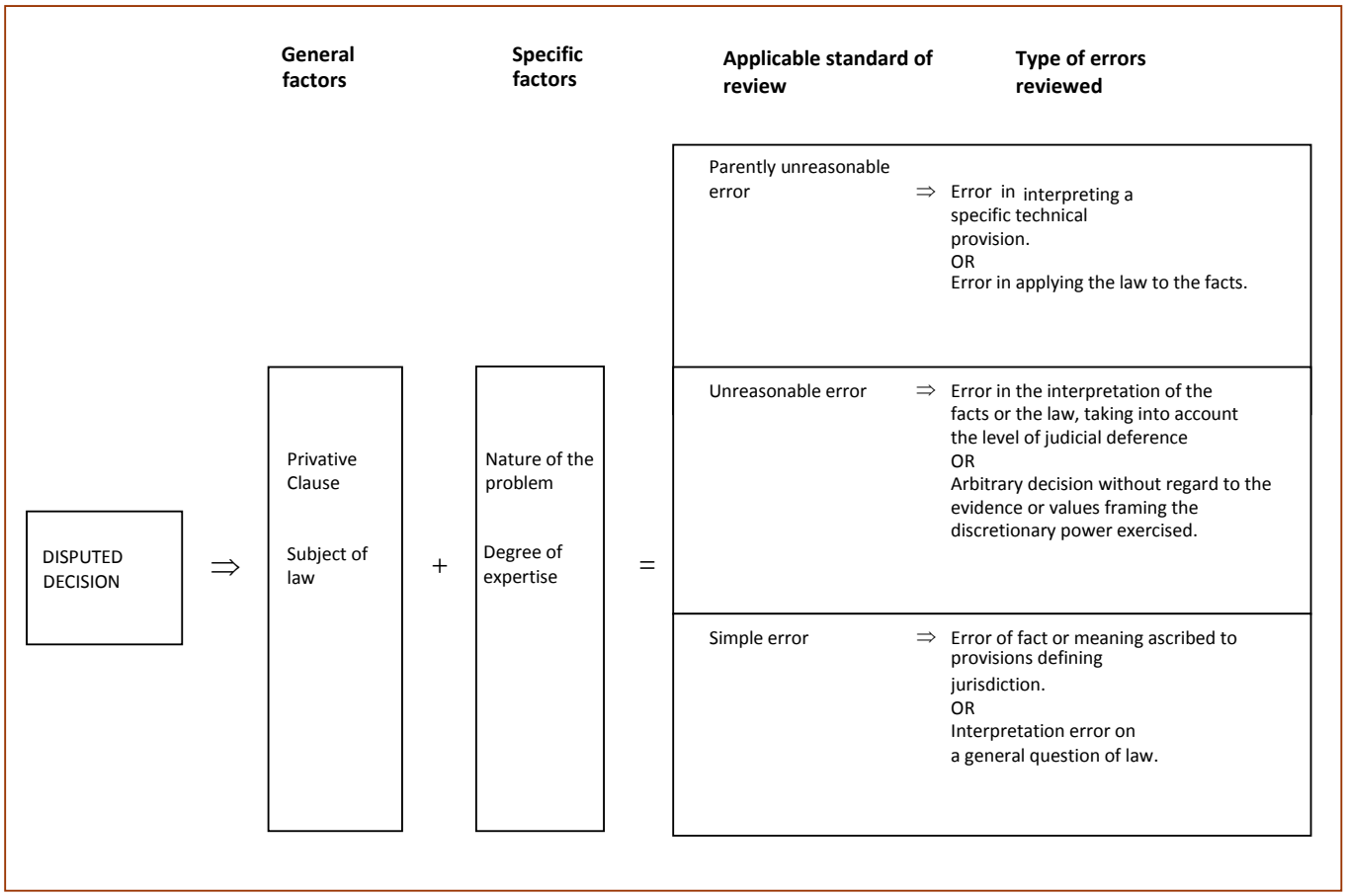
Judges have proven very creative in this respect, designing tests and establishing review standards. However, as author Gabrielle Perrault has pointed out, the content of these standards is subtle to say the least, and complicated to apply:

> *" To date, the court has defined three standards of decision: the correct, situated at the least deferential end of the spectrum; the reasonable* simpliciter*, in the middle of the spectrum; and the not patently unreasonable, at the most deferential end of the spectrum*.

> *[…] One problem that arises is how to identify, define, and distinguish between these new standards. Should a decision be identified as less correct, less unreasonable, more unreasonable, or not patently unreasonable?*
>
> *[…] What seems certain is that the court, before defining new standards of review, must give serious thought to the risk of further complicating a field already perceived as extremely complex, to the point where it would no longer b possible to know which standard applied in which circumstance.*[13] *".*

To structure and clarify these standards of review—i.e. decisions that are less correct, less unreasonable, more unreasonable, or not patently unreasonable—Professor Denis Lemieux[14] has summarized the issue in a table, which we have reproduced below.

13. Gabrielle PERRAULT, *Le contrôle judiciaire des décisions de l'Administration: De l'erreur juridictionnelle à la norme de contrôle*, Éditions Wilson & Lafleur Ltée, 2002, p. 85 (our translation).
14. Denis LEMIEUX, "La nature et la portée du contrôle judiciaire," *Droit public et administratif*, Éditions Wilson et Lafleur Ltée, 2002.



Despite this attempt at clarification, the distinction between these notions remains tenuous, and it appears the main concern of the judges is to justify their intervention rather than provide a concrete definition of the nature of an unreasonable act.

In *Canada v. Southam Inc.*,[15] Justice Iacobucci of the Supreme Court nonetheless made the effort to distinguish between an unreasonable and patently unreasonable decision: "*The difference […] lies in the immediacy or obviousness of the defect.*" He went on to note that "*if*

15. (1997) 1. S.C.C. 748. p. 777.

the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable."

Although this definition comes from the Supreme Court, it leaves us unsatisfied. This analysis leaves us no choice but to conclude that the courts are of little use in finding a definition applicable to the powers of Le Protecteur du citoyen.

What about the administrative tribunals? Have they defined the notion of unreasonable act in a manner useful to the institution?

In an article entitled *Justice administrative et équité*,[16] Professor Daniel Mockle answers the question as follows:

> *" Notwithstanding the diverse array of administrative tribunals, we must realize that although certain bodies have a greater margin of appreciation to assess complex factual situations, their freedom is predetermined by numerous elements. Even though they may take issues of "reasonableness" into account by issuing "just orders," their discretion is tempered by various objective factors linked to their expertise as organizations […]*
>
> *Since legislators sought to create bodies composed of experts, the solutions these bodies put forward inevitably draw on the specialized knowledge of the tribunal rather than some sense of judicial dissatisfaction in order to arrive at decisions that are fair and appropriate. An administrative tribunal cannot exceed the limits of its specialized jurisdiction to give decisive weight to criteria of reasonability or pure appropriateness in determining the outcome of a case. ".*

16. D. Mockle, *loc cit*., note 4, pp. 140 and 146 (our translation).

Therefore, the very role of administrative tribunals limits the possibility of assessing the reasonableness of a decision and, consequently, providing a definition thereof.

As for doctrine, administrative law treatises define the word unreasonable on the basis of existing jurisprudence.[17] In short, a decision is unreasonable if it is patently unfair, malicious, or discriminatory and arbitrarily, gratuitously, or oppressively limits the rights of individuals or leads to situations so unusual or implausible that is unthinkable for lawmakers to have desired such an outcome. Under this definition, only an abusive or aberrant decision qualifies as unreasonable.

4.2. A meaning more appropriate for the role of Le Protecteur du citoyen

Clearly, dictionaries, jurisprudence, and doctrine do not define the notion of unreasonable act in a manner appropriate for Le Protecteur du citoyen

Professor Issalys writes that "[…] *only Le Protecteur du citoyen can legitimately intervene in cases where public bodies act in ways that are "simply" unreasonable, unjust, or arbitrary. This jurisdiction, which implies a reliance on common sense notions of "reason," "justice," and "measure," is at the core of the institution of ombudsman*."[18] Later, he affirms that, "*more than any of the other terms used in section 26.1, the word 'unreasonable' appeals to the discretionary authority of Le Protecteur du citoyen. It therefore deserves special attention, given that it can clarify the scope of the institution's equitable jurisdiction*."[19]

17. See, for example, Denis LEMIEUX, *Le contrôle judiciaire de l'action gouvernementale*, Les Publications CCH Ltée, No. 70–100, p. 3921.
18. *Supra*, note 3, p. 6 (our translation).
19. *Ibid*, p. 10 (our translation).

Given the wording of section 26.1 of the PPA and the scope of Le Protecteur du citoyen's right of review, which entitles it to investigate not only actions that are patently unreasonable, but also "simply unreasonable," it is therefore incumbent upon us to draw on our experience of the past 35 years to propose our own definition of an unreasonable act, which could read as follows:

> *An act is unreasonable if, although consistent with standards, it is counter to common sense and provokes an instinctive reaction given the patently disproportionate consequences it entails for a person or group of persons.*

This conception of an unreasonable act introduces the idea of proportion, of balance between the purpose of a law drafted in the public interest and the consequences of an act on the person affected. In this way, it touches on both aspects of Le Protecteur du citoyen's mission: legality and equity. We have examined the first aspect. Let us now turn to the second.

5. EQUITY

5.1. Equality and equity

Equality and equity are sometimes confused, but in fact are distinct notions. Civil servants who say, "*in the interest of equity, I have to apply the rules the same way for everyone*," are not wrong. They are simply referring to the principle, whereas most of the time, we invoke exceptions to the rule.

5.1.1. Equality before the law

Under the rule of law, the main purpose of which is to combat arbitrariness, rule number one is clearly equality before the law. The law applies to everybody the same way so as not to unduly favor one category of people over another. However, there are numerous situations where the

law recognizes exceptions and provides special protection to certain groups. This is notably the case for minors, the incompetent, and the most vulnerable.

The principle of equality before the law is therefore not absolute, and is subject to exceptions meant to encourage greater equality between citizens.

5.1.2. Equality of treatment

Since equality before the law is not absolute, what about equality of treatment for all in the practical application of a given law?

It is clear that the law must be applied the same way for everyone. Yet, here again, nothing is absolute. Certain specific laws contain provisions granting the minister the power to set aside a standard in exceptional circumstances. How can such special treatment be justified? In the name of equity.

5.1.3. Equality and equity: the principle and the exception

Equality before the law and its corollary, equality of treatment, are the cornerstones of the rule of law. Moreover, in a democratic society, the principle of equality is not synonymous with uniformity. It is inevitably tempered to take into account the needs of all citizens, including those who, due to their condition or a situation, fall outside of established rules.

Equity is not opposed to equality. On the contrary, these two concepts, although distinct, are complementary. In fact, the word equality comes from the Latin *æquitas*, which means equity. The principle that all humans are equal by their very nature is therefore considered by some to be a higher form of equity.

5.2. Equity and natural law

Defining equity is no easy task, and here again, the waters are muddied. Equity involves a sentiment whose intensity varies from one person to the next. Professor Philippe Jestaz, associate lecturer at Université François Rabelais in Tours, sums up the vagueness of this notion:

> *" Although the concept of equity has sparked considerable controversy, equitable decisions are generally not discussed. How can thousands of minds disagree about a general concept whose specific consequences they all recognize? It is because no general notion exists, at least not in the abstract sense of the word. Equity is first and foremost a sentiment, a cast of mind we stubbornly seek to define without realizing that the multitude of definitions is little more than a catalog of shortcomings. Philosophically, it has been successively envisaged as a natural virtue (Cicero), a Christian virtue (St. Thomas of Aquinas), a principle of natural law (Domat), and a moral element that creates law (Savigny). But what of equity from a legal standpoint?*[20] *".*

The rule of law is the guarantee of justice. Yet in individual cases, enforcing the rule of law may upset human conscience. In such situations, each of us has a tendency to invoke a natural law intimately related to our condition as humans and incarnating the individual sentiment of true justice: equity. Equity does not take its inspiration from the rules of law in effect. It may even run counter to them. Indeed, if we use the word *law* to refer to the full letter of the law, equity may even seem opposed to law. "*Justice metes out punishment and reward on the basis of existing laws; equity is determined in keeping with the circumstances of a given action. Drawing on natural law, equity is the rule and the foundation of man's duties toward one another*."[21]

20. Philipp Jestaz, *L'équité*, Dalloz compendium, 1972 (our translation).
21. Dictionary of Trévoux. See also Pierre-Gabriel JOBIN*, Mélanges Claude Masse: En quête de justice et d'équité*, Éditions Yvon Blais, 2003. On page 476, the author makes the link between equity and existing law: *"General law being presumed fair, equity is essentially a search for justice in spite of general law. Since application of general law may, in specific circumstances, engender situations that*

A universal notion, equity refers to the imperatives of conscience proper to our individual value systems. A subjective notion, it cannot be comprehensively defined. We shall thus attempt to get a grasp on it by examining its function.

5.3. The function of equity

The previous statement to the effect that equity is opposed to law deserves qualifying. When equity is envisaged as a sentiment, a cast of mind, or a principle of natural law, it obviously stands in opposition to the letter of the law. In functional terms, however, equity is complementary to the law. Rather than weaken the rules, it reinforces them by adapting them to situations where substantive law does not provide a satisfactory solution. Drawing on the spirit of the law, it seeks to improve how legal standards are applied. Exceptions are its domain, and the purpose of the law its guideposts.

In practice, then, equity fulfills a triple role by helping correct excessively rigid rules, flesh out rules that are incomplete, and interpret rules that are insufficiently clear.[22]

5.3.1 Equity helps correct the law

In its role of corrector of the law, equity offers but one solution—change the rules. It is Parliament's prerogative to make its intentions known and the law, when it is clear and explicit, must be applied despite any considerations of natural law, natural justice, and equity. Though

are untenable and violate the spirit of justice, equity demands derogation from the law in such cases. In short, it is an exception to the law in the name of justice." (our translation).

22. In his analysis, Pierre-Gabriel Jobin*, op. cit.,* Note 14, reiterates equity's triple role: "*Equity takes various forms. In some cases, the general rule is adapted to certain situations; in others, it is supplemented by special rules; and in certain cases, it is implicitly or explicitly set aside to be replaced by another rule in a specific context."* (our translation).

the courts have no choice but to apply the law if it is unambiguous, Le Protecteur du citoyen, in contrast, has the power to recommend rule changes in cases where the law has unfair consequences.

The following example illustrates the role equity plays in correcting the law.

Shared accommodation

In 1989, the government introduced a measure reducing social aid payments for people who shared accommodation. The rationale for the decision was that social aid recipients who lived with someone else enjoyed savings and thus needed less monetary assistance. The deduction was $85 per month in 1989, and rose to $100 per month in 1993.

In 1990, Le Protecteur du citoyen criticized the measure for penalizing a certain category of already disadvantaged citizens and recommended the law be amended to abolish the provision.

After repeated refusals, the legislature gradually amended the rule. In 1998, the reduction was abolished for single parent families; in June 2000, it was decreased by 50% for other recipients before being abolished altogether in February 2003.

5.3.2. Equity helps refine the law

In its second capacity, equity can provide assistance when the law is too general. This complementary function is rooted in the government's discretionary powers. In essence, it is equity by legislative invitation. Once limited, such invitations have become increasingly

numerous. One example is section 115 of the *Act respecting income support, employment assistance and social solidarity*:[23]

> " **115.** *In exceptional circumstances, the Minister may, subject to the conditions determined by the Minister, suspend in whole or in part the recovery of an amount owed or grant a full or partial discharge to a debtor, even after the filing of the certificate (of exigibility) […]at the office of the court. ".*

Another example is section 351 of the *Act respecting industrial accidents and occupational diseases* (AIAOD):[24]

> " **351.** *The Commission shall render its decisions according to equity and upon the real merits and justice of the case. ".*

It should be noted, however, that inclusion of the term equity in the wording of a legislative provision is not automatically seen by authorities as an authorization to relax, let alone deviate from the requirements of the law. Some see it merely as a procedural aspect. With respect to section 351 of the AIAOD, for example, employment injuries have, until now, been analyzed using a specific, medical approach based on a very detailed statute. As a result, expertise has taken precedence, relegating questions of equity to the margins. However, a new line of jurisprudence is starting to emerge at Commission des lésions professionnelles, the administrative tribunal of final recourse in this domain, based on the fact that AIAOD's objective is to repair the consequences of employment injuries, and that all decisions by Commission de la santé et de la sécurité du travail must, as stipulated in section 351, be rendered according to equity and the justice of the case.[25]

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23. R.S.Q., c. S-32.001; see also section 94.0.1 of the *Act respecting the Ministère du Revenu* (R.S.Q., c M-31), which has the same effect concerning debt remittance under the *Act respecting income support, employment assistance and social solidarity*. The National Assembly recently adopted a similar provision on student loans by amending the *Act respecting financial assistance for education expenses* (R.S.Q., c. A-13.3) to include the following section: "*Where warranted by exceptional circumstances, the Minister may grant a release from all or part of an amount owed*."
24. R.S.Q., c. A-3.001.
25. See CLP 166812-31-0108, February 20, 2002. CLP Commissioner René Ouellet wrote: "In the case under review, the calculation is easy to make and the inequity is flagrant. The tribunal believes that a

What can be done when the government does not use its discretionary power or when legislators do not explicitly grant it?

In such situations, we must look to the purpose of the law to try to discover the original intent of the framers. In other words, we must interpret the law.

5.3.3. Equity helps interpret the law

Let us now examine the "humanizing" role of equity. But first, let us recount a case that combined all the elements and arguments needed for an intervention founded on an equitable interpretation of the law.

The ID number

In 1998, a citizen contacted Le Protecteur du citoyen because he was contesting Ministère du Revenu's refusal to grant him a shelter allowance. His application had been rejected on the grounds that he did not have a social insurance number, a *sine qua non* for eligibility under the law.

Le Protecteur du citoyen's first reaction was to encourage the man to obtain a social insurance number, a relatively simple formality. But he refused due to his "*profound convictions*."

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strictly literal application of section 21 (AIAOD) does not meet the equity criterion and, in this sense, no longer seems appropriate for the economic and societal conditions prevailing in 2001. […]in a flagrant case of inequity, the tribunal must apply the combined provisions of sections 351 and 75 of the law, which constitute nothing less than a 'safety net' to ensure the actual loss suffered by the worker is compensated." (our translation). Commissioner Ouellet based his argument on four similar decisions.

The investigation revealed that the man met all financial requirements for the allowance. He had never worked and was receiving social assistance benefits and an allowance for his severely limited capacity for employment. He also suffered from a neurotic disorder and had been interned several times in psychiatric institutions. In other words, he was an exceptional case and deserved special treatment.

The investigation also revealed that the Department had already recognized the exceptional nature of the case since, subsequent to an earlier decision by the deputy minister, it awarded the man a subsidy despite the lack of an SIN. On this occasion, the man was assigned an internal identification number, or NOID. Legislators had no doubt felt it important to require a social insurance number from subsidy applicants in order to verify their identities and avoid potential confusion between individuals. But in this case, the Department had already identified the man, thereby precluding the possibility of mistaken identity and ensuring respect for the spirit of the law.

The Department finally agreed with Le Protecteur du citoyen's position.

This example illustrates the third function of equity: helping adapt rules to special cases. In such instances, it is not a matter of correcting or refining the law, but rather of interpreting it in light of its intent so as not to negate a right on technical or formal grounds.

It seems appropriate here to open a parenthesis in order to examine the scope of section 41 of the *Interpretation Act*,[26] which reads as follows:

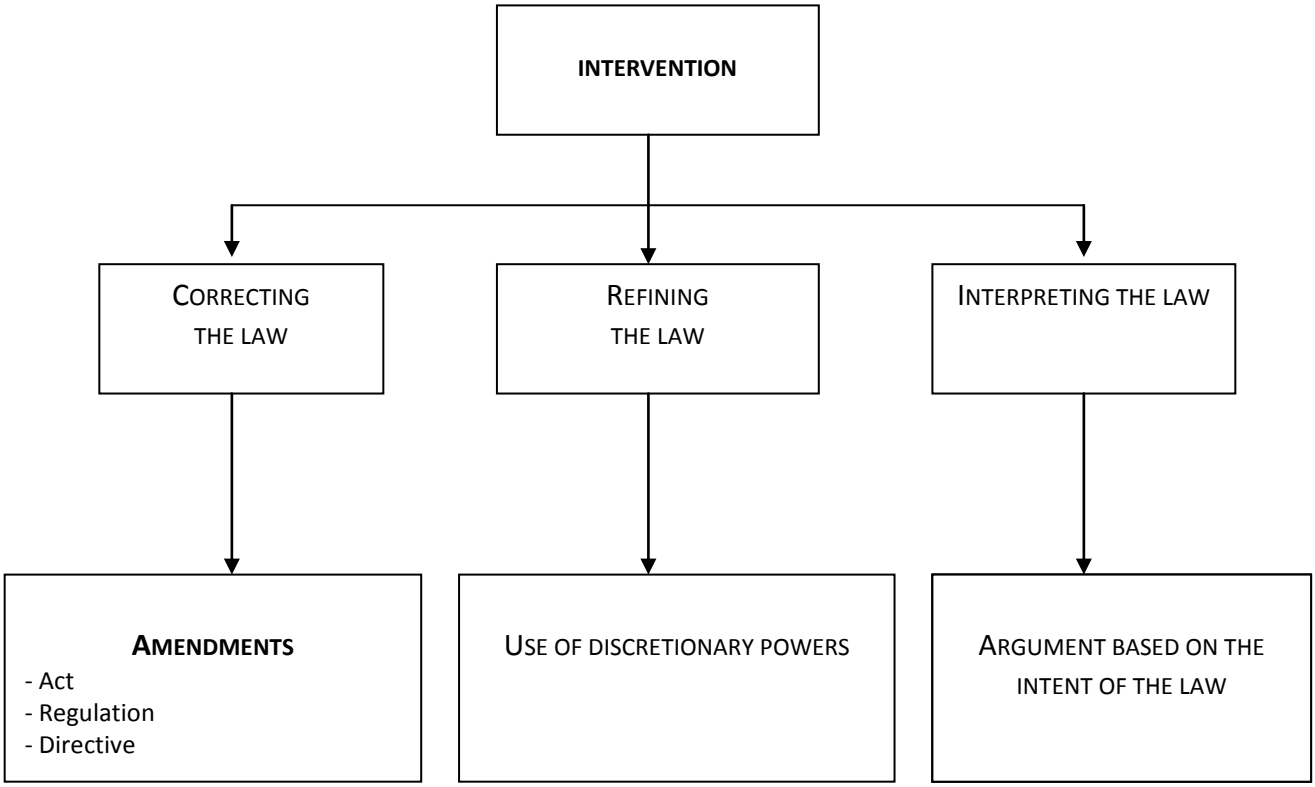
26. R.S.Q., c. I-16.

> " **41.** *Every provision of an Act is deemed to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights, or for the remedying of some injustice or the securing of some benefit.*
>
> *Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit.* ".

In the above example, the provision in question stipulated that all applicants required a social insurance number. It was therefore difficult to invoke section 41 to interpret a provision of such clarity. The only option was to use equity, stressing the exceptional nature of the case and reminding authorities of the primary objective of the shelter allowance program. Therefore, even though the *Interpretation Act* may prove useful in certain circumstances, it does not automatically rule out the need for equitable intervention.

In short, if a lawfully sanctioned government act nonetheless clashes with common sense and sparks an instinctive reaction to the problem it raises, an equitable intervention should be envisaged. The table on the next page sums up the different functions of equity and the types of intervention associated with each.

THE FUNCTIONS OF EQUITY



6. CRITERIA FOR EQUITABLE INTERVENTION

Equity issues may be exceptions, but certain precautions must nonetheless be taken to avoid arbitrariness and ensure that an intervention is appropriate. It is a matter of safeguarding Le Protecteur du citoyen's credibility and authority. Even though Le Protecteur du citoyen analyzes each situation before taking action, equitable interventions must meet certain criteria, because the disputed decisions are legal. These criteria are threefold: respecting the legislator's intent, evaluating the seriousness of harm, and determining the appropriateness of the recommendation. These criteria serve as the basis for assessing a situation and guide Le Protecteur du citoyen in exercising its discretion to intervene in the name of equity.

6.1. The legislator's intent

Most laws are designed to grant rights to citizens. Some, however, are meant to restrain rights. First and foremost, then, it is useful to verify whether the consequences of applying a standard were intended by legislators.

This is the notably the case with limitation periods. Legislators knowingly impose limitation periods despite the hardships people can suffer when they exceed them, because clear rules are absolutely necessary to the orderly management of rights when large numbers of people are involved. In these situations, the role of Le Protecteur du citoyen is to ensure that incorrect information or attenuating circumstances were not the reason people missed the deadline. This is also the case when legislators grant a right to a single category of citizens. Here is an example:

The Program for Older Worker Adjustment

Now abolished, this program was set up to provide monthly compensation to victims of mass layoffs. To qualify, workers had to be between 55 and 64 when laid off. Payments began once their employment insurance benefits ran out. At the time, Le Protecteur du citoyen received a

number of complaints from unemployed individuals who were 54 when laid off, but had mostly turned 55 by the time their employment insurance ran out. Under the law, they were ineligible for the program.

Was it necessary to intervene?

In light of studies concluding that employment opportunities existed for those under 55, Le Protecteur du citoyen decided not to intervene. Legislators had set up a program to assist a specific category of citizens—those 55 and over. Not abiding by that decision would be like taking the place of legislators to introduce new eligibility criteria.

In other cases, the inequitable consequences that arise from applying a law may not have been foreseen by legislators. Here is an example.

The Act respecting prescription drug insurance

In 1996, the government set up a public prescription drug insurance plan to provide coverage to over 1.4 million citizens without group insurance who had previously assumed the cost of their prescription drugs alone. Despite the generosity of the act[27] for thousands of citizens, the obligation to reimburse plan deductibles as well as coinsurance payments with a lump sum payment every three months put social assistance recipients and certain seniors in a difficult situation. There was a risk that those taking regular medication would end up cutting back on their drugs, putting off other essential spending, or depriving themselves of medication entirely for lack of sufficient funds to make the minimum payments.

27. R.S.Q., c. A-29.

Was it necessary to intervene?

Le Protecteur du citoyen did not hesitate. It was a matter of eliminating the unwanted effects of the reform, which were interfering with the achievement of the legislature's primary goal: ensuring that all Quebecers would enjoy fair and reasonable access to prescription drugs.

In 1997, the government adopted the monthly ceiling rule, reducing the contribution amount by making it payable to pharmacists on a monthly rather than quarterly basis.

Later, in 1999, the minister of health and social services restored free access to drugs for welfare recipients on the severely limited capacity for employment program.

6.2. The seriousness of harm

When the goal of an intervention is to redress a wrong, the harm caused must be both real and serious. Harm is considered real and serious if it significantly affects such fundamental citizens' rights as the right to dignity, health, and security or results in substantial financial loss, in accordance with a person's financial circumstances.

In voicing approval for one of the factors Le Protecteur du citoyen takes into consideration when deciding whether to intervene—the disproportionateness of the consequences of an act by a public body for a private citizen—Professor Issalys states, "*It is thus from the citizen's perspective that we must pose the question of equitable distribution of benefits and constraints*

arising from the act of a public body, given the public interest objective to which the act is referable."[28]

Here are two examples where the seriousness of harm justified an intervention.

Dignity

In 1998, a citizen was disfigured in an accident when her car caught fire. Since then, she has been obliged to wear a capillary prosthesis. Specialists felt she should have a made-to-measure prosthesis because of the irregular shape of her skull since the accident. However, the cost of the prosthesis exceeded the maximum $700 reimbursement available under the *Regulation respecting the reimbursement of certain costs*. When Société de l'assurance automobile du Québec (SAAQ) refused to reimburse the additional amount, the young 24-year-old contacted Le Protecteur du citoyen.

After unsuccessfully contacting SAAQ, Le Protecteur du citoyen went straight to the minister of transport and explained that it was crucial for the young accident victim to have an appearance as much like her peers as possible. After having had her nose and ears reconstructed, she now wanted to cover her misshapen skull with something other than a turban. More than a matter of mere looks, this was another way to help her return to a normal life and restore her dignity. Part of the SAAQ mission is to help people ultimately lead as normal a life as possible after an accident. In this case, the spirit of the law should have taken precedence over the letter of the law.

28. Supra, note 3, p.11.

After this intervention, the minister informed Le Protecteur du citoyen that SAAQ would reimburse the entire cost.

Complete destitution

Ministère de l'Emploi et de la Solidarité sociale cancelled a citizen's benefits because she refused to fill out a Régie des rentes du Québec pension application in a proper and accurate manner.

The 62-year-old woman had apparently qualified for a monthly pension of $365 two years previously. MESS was supposed to pay the difference between her pension and the amount she was entitled to under the Employment-Assistance Program (social assistance). However, in her application the women claimed that had never stopped working, although she had been retired for nearly ten years. She even claimed that she was making over $10,000 a year in employment income. As a result, the Régie automatically rejected her application. Aware of the situation, but not knowing what else to do, MESS cancelled the benefits to force the woman to act.

The woman made numerous requests for assistance and sent letters to different departments at MESS. After two months without income support, she asked Le Protecteur du citoyen to intervene.

Legally, MESS was entitled to demand that the woman apply to Régie des rentes, as she had already contributed to the Québec pension plan for a number of years. The cancellation of her benefits was in keeping with the law. But it left her completely destitute and without any source of income, even though she was eligible for social assistance in addition to her pension.

Le Protecteur du citoyen therefore asked MESS to temporarily reactivate her benefits while a more in-depth investigation was launched into why the woman was determined to cling to a position that was harmful to her. The request was accepted. MESS reactivated the woman's benefits and she was not required to go through Régie des rentes.

It should be noted that when assessing the seriousness of harm, the consequences of the law will not be denounced if the harm suffered as a result is minimal or does not exceed that which everyone else subject to the law can be expected to endure.

6.3. The appropriateness of the recommendation

There are two aspects involved in examining the appropriateness of a recommendation. On the one hand, the proposed solution must be practically achievable and, on the other, it must be financially supportable by the community. In certain cases, it is better to take a gradual, step-by-step approach.

In a recent Supreme Court decision,[29] Justice Bastarache addressed the matter of the appropriateness of a remedy.

In this case, the appellant, a welfare recipient, had launched a class action suit contesting the 1984 social assistance scheme on behalf of all recipients under the age of 30. The program, which was abolished in 1989, set basic benefits for those under 30 at one-third of the rate for those aged 30 and over. Invoking the Canadian and Québec charters, the appellant pleaded discrimination on the basis of age as well as infringement of the right to security and to measures of financial assistance. She asked the court to invalidate the regulatory provisions creating the age-based distinction and order the Québec government to pay all social assistance

29. *Gosselin v. Québec*, [2002], 4 SCR 429.

recipients a sum equal to the difference between the benefits they received and those they would have received had they been over 30, which represented a total of $389 million plus interest. The Québec Superior Court dismissed the suit, a decision upheld by the Court of Appeal. In a five-to-four ruling, the Supreme Court also rejected the appeal and declared the scheme constitutional for two reasons.

First, Justice Bastarache, although he was in dissent and felt the regulation was discriminatory, concluded that the requested remedy was not practically achievable:

> " **295.** *First, […] it would be impossible for this Court to determine the precise amount that was owed to each individual in the class. Who participated in the programs, and who did not, the number of months during which they did not participate, the amount of the shortfall in benefits at different times, are all impossible to determine.* ".

Furthermore, referring the Justice Lamer's opinion in the Schachter decision,[30], Justice Bastarache concluded that the remedy was not financially supportable:

> " **296**. *Second, the significant cost that would be incurred by the government were it required to pay damages must be considered. […W]hile a consideration of expenses might not be relevant to the substantive Charter analysis, it is relevant to the determination of the remedy. Requiring the government to pay out nearly half a billion dollars, the amount requested, would have a significant impact on the government's fiscal situation, and potentially on the general economy of the province of Quebec. ".*

As we can see, the Supreme Court position is "Caution!" Even if a law, regulation, or decision is unconstitutional or unreasonable, the remedy itself may not be feasible.

30. Schachter v. Canada, [1992], 2 SCR 679.

Here is an example of a recommendation involving a remedy that, although complicated, proved possible:

Immigrant sponsorship

Under Canadian and Québec family reunification provisions, Québec residents willing to act as guarantors can sponsor family members living abroad to come to Québec. Sponsorship involves a commitment of three years in the case of a spouse or fiancé, and ten years in the case of a dependent child, father, mother, etc. The sponsorship contract specifically indicates that the sponsor must reimburse any social assistance payments made to the sponsored relative, as the case may be.

In 1996, Ministère de l'Emploi et de la Solidarité sociale launched a campaign to reclaim benefits paid to sponsored immigrants. As a result, a number of sponsors learned that relatives they had assisted had applied for and received government assistance. Finding themselves with a debt virtually impossible to pay, they turned to Le Protecteur du citoyen.

In 1998, Le Protecteur du citoyen issued a special report with several recommendations on the sponsorship program. Of interest to us here is the recommendation concerning special situations involving sponsors receiving social assistance themselves.

To illustrate the problem, let us take the case of a guarantor who sponsored his wife. He had work and everything was going well until he lost his job. The family was forced to go on social assistance, and he was obliged to repay the benefits his wife received. However, social assistance was not paid separately to individual members of the family, but rather in the form of a single cheque to cover all their needs. As a result, MESS reclaimed the total benefits paid to

the family. Le Protecteur du citoyen recommended that MESS only reclaim the additional amount paid to the family due to the presence of the sponsored spouse.

After analyzing and discussing the situation, MESS changed its calculation method to implement the recommendation.

Applying the new calculation method posed no problem for future cases, but did require additional effort for past cases. However, since the computer system could be used to trace all "guarantor/sponsored immigrant" claims, MESS made the effort. To date, $16 million in credit notes have been issued to guarantors, an amount representing 6.75% of the $237 million in social assistance benefits paid to sponsored immigrants

The recommendation was therefore practically achievable and financially supportable.

This example raises the issue of the retroactivity of a measure. When, as is often the case, an intervention seeks changes to a piece of legislation, a policy, or a decision, should the new measure be applied retroactively?

It is rare that such changes affect the past. However, retroactive applications may be possible, and should not be ruled out automatically. At this point, it is worth repeating the test of appropriateness by applying it to the past.

As mentioned at the start of this chapter, the remedy, if on its face too costly, may be implemented in stages, as illustrated in the following example.

Determining support payment income

When calculating social assistance benefits, Ministère de l'Emploi et de la Solidarité sociale takes into account support payment income, even if the payments are solely intended for the children. Basic benefits are reduced by the amount of the support payment.

In 1993, Le Protecteur du citoyen recommended exempting support income from the calculation, at least in part. Under changes to the family policy in 1997, the number of children in a family was no longer taken into consideration when determining social assistance benefits. Le Protecteur du citoyen thus reiterated its recommendation and, in 1998, support payment income was exempted up to a maximum of $100 for families with children age five or under. In June 2002, with the announcement of the anti-poverty act, Le Protecteur du citoyen raised the issue again. In his 2003 budget, the finance minister of the day announced government plans to extend this measure to all social assistance recipients receiving support payments for their children. The matter is still pending.

Faced with this issue, a step-by-step approach is probably the only solution. Although the remedy is achievable, it represents a burden for society as whole, since the cost of a blanket exemption would be in the order of $36 million.

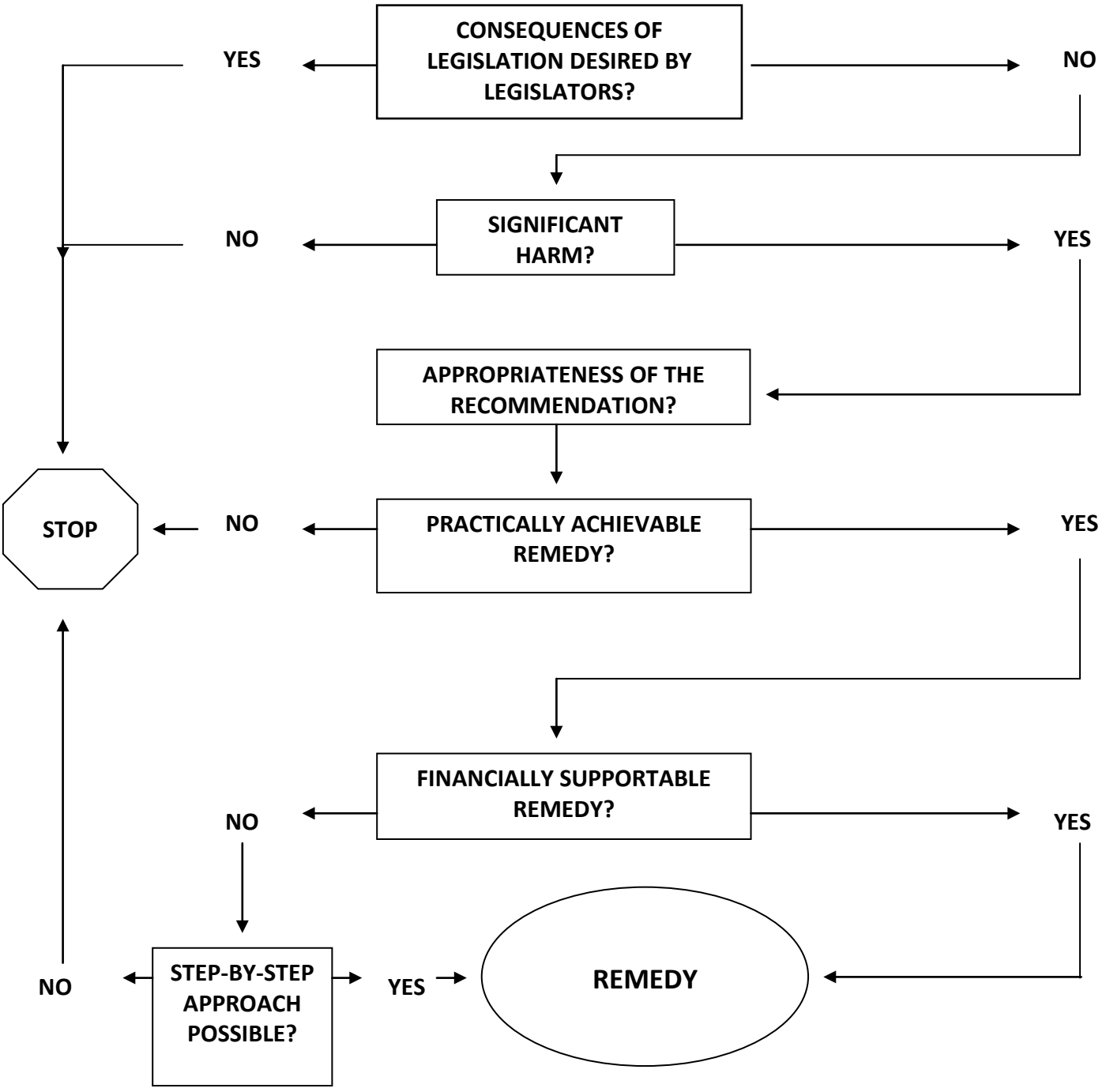
6.4. Summary of equitable intervention criteria

Although equitable intervention falls within the specific jurisdiction of Le Protecteur du citoyen, it is not automatic and, as we have just seen, must obey certain criteria before action can be taken with respect to a decision that is clearly legal, but is inequitable for the citizen. These criteria may seem limiting on the face of things, but it must be remembered that equity issues usually arise in exceptional situations. The point is therefore not to launch a legislative

revolution, but to evaluate whether the anticipated benefit to the citizen can justify changes to a rule established in the public interest.

The table on the next page illustrates the equitable intervention process.

EQUITABLE INTERVENTION PROCESS



7. THE LEGAL BASIS FOR EQUITABLE RECOMMENDATIONS

Now that we have determined the scope of Le Protecteur du citoyen's right of review and examined the functions of equity and the criteria for invoking it, two final questions remain. Is the government legally bound to examine equitable recommendations since, unlike the law establishing the Mediator of the Republic,[31] the law establishing Le Protecteur du citoyen contains no specific provisions to this effect? And is the government empowered to act upon such recommendations?

7.1. The power of Le Protecteur du citoyen to formulate equitable recommendations

Under the rules for interpreting legislation, the *Public Protector Act*, like any legislation, must be interpreted in a broad and liberal manner to ensure that its objectives are attained.

This requirement of respect for the legislator's intent through broad interpretation of the provisions of the ombudsman act was enshrined by the Supreme Court in the Friedmann decision.[32]

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31. *Loi instituant un Médiateur de la République*, Loi No. 73-6, January 1973, and subsequent legislation. Section 9 of the act specifically grants the authority to resolve a claimant's situation in an equitable manner. "9. If it appears to the Mediator of the Republic that the application of legislative or regulatory provisions has led to unfairness in the claim before him, he may make a recommendation to the body concerned for an equitable solution to the claim, suggest measures to the competent authority that he feels will remedy the situation, or suggest any legislative or regulatory amendments he deems appropriate." (our translation).
32. B.C. Development Corp. v. Friedmann (Ombudsman), [1984] 2 SCR 447. On page 463, the Court reaches the following conclusion regarding the role and powers of the B.C. Ombudsman, whose founding legislation is similar to the *Public Protector* Act: "*Read as a whole, the Ombudsman Act of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfill*."

Rules of interpretation aside, sections 13 and 27.3 of the PPA state that the mission of Le Protecteur du citoyen is to intervene when a person has been or is at risk of being harmed. With such a broad mandate, it appears difficult to exclude equitable recommendations, as confirmed by professors Issalys and Lemieux in distinguishing the two main categories of grounds for intervention:

> *" […] the breaches providing a basis for intervention are of two kinds. One kind concerns the legality of the behavior of the administrative authority (violation of the law, error of law or fact, discrimination, misuse of discretionary power). The other concerns the more flexible notion of equity in government actions and more specifically expresses Le Protecteur du citoyen's mission (unreasonable, unjust, or arbitrary nature of administration's behavior).*[33] *".*

It would therefore seem that the *Interpretation Act*, jurisprudence, and doctrine are unanimous and that, despite the absence of the term "equity" in the PPA, the jurisdiction conferred upon Le Protecteur du citoyen is equitable in nature and distinct from that of all other bodies with a power of review over the government.

This said, can the government act upon an equity-based recommendation without having express statutory authority to do so?

7.2. The power of the government to act upon an equitable recommendation

When Le Protecteur du citoyen proposes an equitable solution in response to an action that, although legal, it finds unreasonable, the government may prove reluctant to take action, especially if the remedy involves financial compensation. Arguments raised in such cases draw

33. Pierre ISSALYS and Denis LEMIEUX, *L'Action gouvernementale: Précis de droit des institutions administratives*, 2nd edition, Éditions Yvon Blais, 2002, p. 321 (our translation).

on the lack of a statutory basis for granting the remedy on the one hand, and the fact that the decision would be contrary to the law on the other.

Although understandable, these objections do not hold up in the face of the general remedial goal inherent to the ombudsman's role. In this regard, the Supreme Court points out that, "*any analysis of the proper investigatory role the Ombudsman is to fulfill must be animated by an awareness of this broad remedial purpose for which the office has traditionally been created*."[34] Moreover, Professor Pierre-André Côté, in his treatise on interpreting laws,[35] states that the *Public Protector Act* is what can be termed a favorable law of a remedial nature in keeping with the Québec *Charter of Human Rights and Freedoms.*

Furthermore, section 26.2 of the PPA gives Le Protecteur du citoyen the right not only to issue any useful recommendations, but also to "*ask to be informed of the measures actually taken to remedy the prejudicial situation*." This provision is an invitation to the government to act upon Le Protecteur du citoyen's recommendation.

Again, as we see here, legislators, judges and authors agree. That said, if the government acts upon a recommendation, what should be its basis for determining the remedy?

Aside from the available legal measures—reviewing disputed actions, awarding additional funds, introducing regulatory or legislative amendments, etc.—the government has additional means to act if it is convinced as to the merits of a recommendation.

34. B.C. Development Corp. v. Friedmann (Ombudsman), *op. cit*., note 22, 450.
35. Pierre-André Côté, *Interprétation des lois,* 3rd edition, Thémis, 1999. pp. 624–623. Also see Brun and Tremblay, *op. cit.,* note 3, 699.

The adoption by the Québec government of the decree on the program for reconciliation with the Duplessis orphans[36]is an eloquent example of an equitable solution implemented subsequent to a recommendation by Le Protecteur du citoyen.[37]

The objective of the program, as set out in section 1 of the decree, confirmed the possibility of making payments on purely equitable grounds where circumstances warrant:

> ***" 1.*** *Objective of the program*
>
> *The objective of the Quebec program for reconciliation with the Duplessis orphans is to set conditions for the awarding of individual financial assistance, irrespective of fault or liability, to the persons commonly known as 'the Duplessis orphans.' Financial assistance shall be granted in consideration of the fact that these person were admitted to psychiatric hospital, whereas their internment was apparently unjustified. ".*

In this case, the government based its decision to provide compensation on two provisions of the *Act respecting the Ministère des Relations avec les citoyens et de l'Immigration*.[38] In substance, these provisions state that the minister is responsible for fostering intergenerational solidarity and respect for fundamental rights, as well as for encouraging equality between citizens and participation in social and community life. It goes without saying that these dispositions provide ample basis for redress, without requiring the passage or amendment of any other legislation.

Furthermore, regarding the forgiveness of a citizen's debt to the state, the government, in the absence of a specific provision in a particular piece of legislation, can draw on the *Règlement sur la perception et l'administration des revenus et recettes du gouvernement* (untranslated

36. Decree 1153-2001, September 26, 2001, Gazette officielle Part 2, October 24, 2001, p. 7 359.
37. Le Protecteur du citoyen, *Les enfants de Duplessis: à l'heure de la solidarité*, Québec, January 1997.
38. R.S.Q., c. M-25.01, sections 10 and 11.

regulation).[39] Among other things, this regulation stipulates that debt remission may be decreed under the government's general powers.

The express government power to remit or reduce certain debts, fees, or penalties is further recognized in section 94 of the *Act respecting the Ministère du Revenu*.[40]

> " **94.** *The Government, whenever it considers it in the public interest, and to save the public from serious inconvenience or individuals from hardship or injustice, may remit any amount payable or refund any amount paid to the State relating to any matter within the powers of the Parliament as well as any forfeiture or pecuniary penalty imposed […]*
>
> *Such a remission may be made by general regulation or by special order in each particular case; it may be total or partial, conditional or unconditional […]*
>
> *The Minister shall table a detailed statement of such remissions in the National Assembly within four months of the end of the fiscal year […]. ".*

In short, the arguments sometimes invoked by the government to refuse to act upon equitable recommendations have less to do with legal obstacles than with a reluctance to acknowledge certain injustices and, most likely, a lack of familiarity with available avenues of redress. Where there is a will to act, these obstacles appear surmountable, both from a legal and administrative standpoint. After all, does the government not regularly reach out-of-court settlements—whether or not there has been legal action—without government managers and legal specialists objecting because there is no specific budget available? And do not government departments and agencies have discretionary budgets they can use to cover certain non-budgeted expenditures?

39. Regulation 20.01, adopted under the *Financial Administration Act*, R.S.Q., A-6 and renewed under chapter A-6.001 (new *Financial Administration Act*).
40. Chapter M-31.

We can thus conclude that the Québec government has a variety of completely legal means at its disposal when it decides to act in response to an equitable recommendation.

CONCLUSION

The concepts of legality, legitimacy (reasonableness), and equity have sparked considerable debate, and this paper makes no claim to lay the issue to rest. Nonetheless, our discussion has provided an opportunity to clarify these notions and—most of all—to define them in relation to the powers and jurisdiction of Le Protecteur du citoyen. Drawing on the wording of section 26.1 of the PPA, we have redefined the categories of breach that invite intervention, updated the notion of illegal act, and delineated what constitutes an unreasonable act.

This has clarified the link between legality and equity. By stressing the spirit and intent of the law, these two notions, which on the face of things seem contradictory, converge to help engender true equality, the kind that simultaneously recognizes both principle and exception.

From the perspective of balancing state power with citizens' rights and interests, equitable intervention is as much the public service's responsibility as Le Protecteur du citoyen's. In this respect, equity is a vital tool for proper management of the government apparatus.

Furthermore, equitable intervention is often the only option available to a certain category of citizens struggling with problems beyond their control or experiencing special situations. In this light, equity provides a unique and indispensable recourse that is part of our obligation of mutual solidarity toward each other.

APPENDIX

Table of cited legislation

1. QUÉBEC LEGISLATION

1.1 ACTS

- *Canadian Charter of Rights and Freedoms*, R.S. (1985) Appendix II
- *Code of Civil Procedure*, R.S.Q., c. C-25
- *Interpretation Act*, R.S.Q., c. I-16
- *Health Insurance Act*, R.S.Q., c. A-29
- *Act respecting administrative justice*, R.S.Q., c. J-3
- *Act respecting the Ministère des Relations avec les citoyens et de l'Immigration*, R.S.Q., c. M-25.01
- *Act respecting the Ministère du Revenu*, R.S.Q., c. M-31
- *Public Protector Act*, R.S.Q., c. P-32
- *Act respecting income support, employment assistance and social solidarity*, R.S.Q., c. S-32.001
- *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001

1.2 REGULATIONS

- Règlement sur la perception et l'administration des revenus et des *recettes du gouvernement*, c. A-6, r.20.01, (1990) 122 G.O. II, 4099)

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