1964

*June 2, 3
Oct. 6

PHILIPPE GUAY .....APPELLANT;

AND

RENE LAFLEUR .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Taxation—Income tax—Investigation—Inquiry by person authorized by Minister into the affairs of taxpayer—Whether taxpayer entitled to be present and represented by counsel at hearings—Injunction—Income Tax Act, R.S.C. 1952, c. 148, s. 126(4), (8)—Inquiries Act, R.S.C. 1952, c. 154, ss. 4, 5—Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2 (e) —Public Inquiries Act, R.S.O. 1960, c. 323, s. 5—Security Frauds Prevention Act, 1930 (B.C.), c. 64, ss. 10, 29.

The appellant, an officer of the Department of National Revenue, was authorized by the Deputy Minister, under s. 126(4) of the *Income Tax Act,* R.S.C. 1952, c. 148, to make an inquiry into the affairs of the respondent and thirteen other individuals, corporations and estates. A number of persons were summoned for the purpose of being questioned under oath regarding the affairs of the persons subject to the inquiry. But the respondent was not summoned to appear nor did he receive any official notice that this inquiry was being held. At the opening of the inquiry, attorneys appeared on behalf of the respondent and asked that the latter be allowed to be present and to be represented by counsel during the examination of all persons summoned by the investigator. This request was refused. Whereupon, the respondent applied to the Superior Court for an injunction asking that the sittings be suspended until the respondent had obtained from the investigator the authorization to be present and to be represented. The injunction was granted by the trial judge; and his judgment was affirmed by a majority judgment in the Court of Appeal. The investigator was granted leave to appeal to this Court.

Held (Hall J. *dissenting*): The appeal should be allowed and the injunction dismissed.

Per Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.: Section 2 (e) of the *Canadian Bill of Rights* had no application since no rights and obligations of the respondent were to be determined by the person conducting the investigation. The investigation was a purely administrative matter which could neither decide nor adjudicate upon anything. It was neither a judicial nor a quasi-judicial inquiry but a private investigation at which the respondent was not entitled to be present or represented by counsel. The power given to the Minister under s. 126 (4) is to enable him to obtain the facts which he considers necessary to enable him to discharge the duty imposed on him of assessing and collecting the taxes payable under the Act. The taxpayer's right is not affected until an assessment is made. Then all the appeal provisions mentioned in the Act are open to him. As a purely administrative matter where the person holding the inquiry neither decides nor adjudicates

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie, Hall and Spence JJ.

upon anything, it was not for the Courts to specify how that inquiry was to be conducted except to the extent, if any, that the subject's rights are denied him. The fact that the investigator was given certain limited powers of compelling witnesses to attend before him and testify under oath did not change the nature of the inquiry.

Per Cartwright J.: Generally speaking, apart from some statutory provisions making it applicable, the maxim *"Audi alteram partem"* did not apply to an administrative officer whose function was simply to collect information and make a report, and who had no power either to impose a liability or to give a decision affecting the rights of the parties, as in the present case.

Per Spence J.: The investigation was a purely administrative matter which could neither decide nor adjudicate upon anything. To give effect to the respondent's demand even without the right to cross-examine the witnesses would be for the judiciary to attempt to impose its own methods on an administrative officer and the judiciary should not make such an attempt. *Saint John v. Fraser,* [1935] S.C.R. 441, referred to. The fact that the investigator was bound to act judicially in the sense of being fair and impartial did not require him to permit the respondent and his counsel to be present whether or not such counsel were to attempt to cross-examine witnesses.

Hall J. *dissenting*: The respondent's right to a fair and impartial investigation implied that he had the right to attend and to be represented by counsel. Although he was not acting in a judicial capacity or performing a judicial function, the investigator was clothed with all the outward attributes of a judicial body. The terms of his appointment authorized under s. 126 of the Act did not exclude the making of recommendations arising out of the inquiry. On the contrary it was implicit to the inquiry that some judgment on the facts and information obtained would be made by the investigator in his report to the Deputy Minister.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming the granting of an injunction by the trial judge. Appeal allowed, Hall J. dissenting.

Rodrigue Bédard, Q.C., and *Roger Tassé,* for the appellant.

Roch Pinard, Q.C., for the respondent.

The judgment of Taschereau C.J. and Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

ABBOTT J.:—The material facts in this case are not in dispute. The sole issue is whether the respondent is entitled to be present and represented by counsel at an enquiry conducted by appellant under the *Income Tax Act.*

[1] [1963] Que. Q.B. 623, [1963] C.T.C. 201, 63 D.T.C. 1098.

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The appellant is an officer of the Department of National Revenue. On December 28, 1960, he was authorized in writing by the Deputy Minister of National Revenue, acting for his Minister under the provisions of the Act, "to investigate the affairs" of the respondent and thirteen other individuals, corporations and estates.

The appellant commenced the investigation on January 10, 1961, after summoning a number of persons (of whom respondent was not one) to appear on that date at the office of the Department of National Revenue in Montreal, to be questioned under oath regarding the affairs of the persons subject to the enquiry. The persons summoned for examination were permitted to be represented by counsel if they so desired.

At the opening of the enquiry, attorneys appeared before appellant on behalf of respondent and asked that respondent be allowed to be present and to be represented by counsel during the examination of all persons summoned by the appellant. That request was refused.

The same day respondent applied to the Superior Court for an injunction asking for an order—

> que lesdites séances de ladite commission soient suspendues jusqu'à ce que le demandeur ait obtenu du défendeur l'autorisation d'être présent et d'être représenté à toutes et chacune desdites séances par ses procureurs.

On January 12, 1961, the date fixed for the hearing on the application for an interlocutory injunction, the appellant agreed to suspend his investigation until judgment was rendered on the application, and therefore no interlocutory order was necessary.

On February 17, 1961, Mr. Justice Brossard in a considered judgment granted the injunction asked for in the following terms:

> ACCUEILLE la requête en injonction du demandeur; ORDONNE que les séances du défendeur agissant en sa qualité d'enquêteur nommé par le sous-ministre du Revenu national en date du 28 décembre 1960 et en vertu des dispositions de l'article 126(4) de la Loi de l'impôt sur le revenu soient suspendues jusqu'à ce que le demandeur ait obtenu du défendeur l'autorisation d'y être présent et d'y être représenté par ses procureurs; le tout sans frais mais avec recommandation que les frais du demandeur soient payés par le mis-en-cause.

That judgment was affirmed by the Court of Queen's Bench[1], Hyde and Montgomery JJ. dissenting.

[1] [1963] Que. Q.B. 623, [1963] C.T.C. 201, 63 D.T.C. 1098.

As I have indicated, under the terms of his appointment, the appellant was authorized—

> to make an inquiry, as authorized by Section 126, subsections 4 and 8 of the said Income Tax Act which sections give the person authorized to make the inquiry all the powers and authorities conferred on a commissioner by sections 4 and 5 of the Inquiries Act or which may be conferred on a commissioner under section 11 thereof, into the affairs of RENE LAFLEUR, MARIE-MARTHE LAFLEUR, FRANCOIS FOURNELLE, DAME HENRIETTE LAFLEUR-FOURNELLE, JEAN FAUVIER, JEAN CHAPOLARD, RAOUL DASSERRE, P. SUTTER, HENRI CLOUARD, LUC LEMAIRE-LAFLEUR LTEE, LES PLACEMENTS MONTCALM LIMITEE, EDIFICE LAFLEUR LTEE, SUCCESSION LEONARD LAFLEUR, and the ESTATE OF HERMAS FOURNELLE.

The relevant statutory provisions referred to in that authorization are:

Income Tax Act

> 126 (4) The Minister may, for any purpose related to the administration or enforcement of this Act, authorize any person, whether or not he is an officer of the Department of National Revenue, to make such inquiry as he may deem necessary with reference to anything relating to the administration or enforcement of this Act.
>
> (8) For the purpose of an inquiry authorized under subsection (4), the person authorized to make the inquiry has all the powers and authorities conferred on a commissioner by sections 4 and 5 of the Inquiries Act or which may be conferred on a commissioner under section 11 thereof.

Inquiries Act

> 4. The Commissioners have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.
>
> 5. The Commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

Section 11 of the *Inquiries Act* referred to in the authorization does not appear to be material to the present proceedings.

The rights claimed by the respondent are not to be found in the *Income Tax Act* or the *Inquiries Act,* and this was recognized by the learned trial judge. He appears to have based his judgment primarily upon the ground that, in refusing to permit the respondent to be present and represented by counsel, appellant had infringed the provisions of

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the *Canadian Bill of Rights* specifically s. 2(*e*) which seeks to ensure the right of all persons—

> to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

With respect to this section it is sufficient to say that it can have no application since no rights and obligations are determined by the person appointed to conduct the investigation.

There are no common reasons of the majority in the Court of Queen's Bench. Mr. Justice Bissonnette and Mr. Justice Rinfret held that the investigation was a quasi-judicial one and that consequently respondent had a right to be heard. Mr. Justice Rinfret also held that the enquiry infringed the *Canadian Bill of Rights*.

Mr. Justice Owen was of opinion that the enquiry is an administrative matter and that the *Canadian Bill of Rights* was not infringed. He held however that respondent was entitled to be present and represented by counsel for the following reasons:

> Lafleur's right to a fair and impartial investigation implies that he has the right to attend and to be represented by counsel at the sittings of the Inquiry.
>
> The proposed investigation into the affairs of Lafleur with Lafleur and his counsel excluded would, in my opinion, be a one-sided and prejudiced Inquiry.
>
> The presence of Lafleur and his counsel at the Inquiry would tend to discourage exaggerated or biased evidence by the witnesses called and to remind Guay and counsel for the Minister of their duty to act with fairness and impartiality.
>
> According to the fundamental principle of law which requires that the present investigation be fair and impartial Lafleur is entitled to attend the sittings of the Inquiry and to be represented by legal counsel at such sittings.

Hyde and Montgomery JJ. dissenting, held that the investigation conducted by appellant on behalf of the Minister, is a purely administrative matter which can neither decide nor adjudicate upon anything, that it is not a judicial or quasi-judicial enquiry but a private investigation at which the respondent is not entitled to be present or represented by counsel.

I am in respectful agreement with Hyde and Montgomery JJ. and there is very little I desire to add to what they have said in their reasons.

The power given to the Minister under s. 126(4) to authorize an enquiry to be made on his behalf, is only one

of a number of similar powers of enquiry granted to the Minister under the Act. These powers are granted to enable the Minister to obtain the facts which he considers necessary to enable him to discharge the duty imposed on him of assessing and collecting the taxes payable under the Act. The taxpayer's right is not affected until an assessment is made. Then all the appeal provisions mentioned in the Act are open to him.

The fact that a person authorized to make an investigation on behalf of the Minister is given certain limited powers of compelling witnesses to attend before him and testify under oath, does not, in my opinion, change the nature of the enquiry. That view was admirably expressed by Mr. Justice Hyde whose words I adopt:

> As a purely administrative matter where the person holding the inquiry neither decides nor adjudicates upon anything, it is not for the Courts to specify how that inquiry is to be conducted except to the extent, if any, that the subject's rights are denied him. The taking of sworn statements is a common everyday occurrence. The deponent is frequently examined in subsequent Court proceedings where the interests of another may be affected by the statements of that witness. I know of no requirement in law that any person likely to be affected in such a way is entitled to be present with counsel when such a sworn statement is originally made, and I see little distinction from the proceeding in issue.

I would allow the appeal and dismiss the application for the injunction, with costs throughout.

CARTWRIGHT J.:—The relevant facts and the questions raised on this appeal are set out in the reasons of my brother Abbott. I agree with the conclusion at which he has arrived and wish to add only a few observations.

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

There are, of course, many administrative bodies which are bound by the maxim *"audi alteram partem"* but the condition of their being so bound is that they have power to give a decision which affects the rights of, or imposes liabilities upon, others.

It was of a body having such power that Lord Loreburn L.C. said in *Board of Education v. Rice*[1]:

> I need not add that . . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything.

[1] [1911] A.C. 179 at 182, 80 L.J.K.B. 769.

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The appellant in the case at bar has no power to decide anything.

In *Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montreal*[1], Lord Macnaghten, delivering the judgment of the Judicial Committee, cited with approval the following passage from the judgment of Kelly C.B. in *Wood v. Wood*[2], which was adopted by Rinfret C.J. in *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board*[3]:

> They are bound in the exercise of their functions by the rule expressed in the maxim *'Audi alteram partem'* that no man should be condemned to consequence resulting from alleged misconduct unheard, and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

The appellant in the case at bar is not invested with authority to adjudicate upon any matter.

Generally speaking, apart from some statutory provision making it applicable, the maxim *"audi alteram partem"* does not apply to an administrative officer whose function is simply to collect information and make a report and who has no power either to impose a liability or to give a decision affecting the rights of parties.

In the case of *Re The Ontario Crime Commission, Ex Parte Feeley and McDermott*[4], the Court of Appeal for Ontario held that while the question, whether persons against whom grave allegations of criminal conduct were made should be permitted to be represented before the Commissioner conducting an inquiry to ascertain facts and without power to make any decision binding on anyone, was one committed to the discretion of the Commissioner, the Court of Appeal had authority to review his decision and substitute its discretion for his. Schroeder J.A. who gave the reasons of the majority made it clear that this result flowed from the terms of s. 5 of the *Public Inquiries Act* of Ontario, R.S.O. 1960, c. 323, a statutory provision which the learned Justice of Appeal aptly described as unique. Laidlaw J.A., dissenting, reached the opposite conclusion. I refrain from attempting to choose between these con-

[1] [1906] A.C. 535 at 540, 75 L.J.P.C. 73.
[2] (1874), L.R. 9 Ex. 192 at 196, 43 L.J. Ex. 153.
[3] [1953] 2 S.C.R. 140 at 152, 107 C.C.C. 183, 4 D.L.R. 161.
[4] [1962] O.R. 872, 133 C.C.C. 116, 34 D.L.R. (2d) 451.

flicting views; it is unnecessary to do so for the purpose of deciding the case before us as there is no similar statutory provision relating to the inquiry which the appellant is conducting.

The only statutory provision relied on by the respondent is clause (*e*) of s. 2 of the *Canadian Bill of Rights,* 1960 (Can.), c. 44, which reads as follows:

> 2. . . . no law of Canada shall be construed or applied so as to . . .
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

This does not assist the respondent, for the appellant has no power to determine any of the former's rights or obligations.

In conclusion I wish to express my general agreement with the reasons of my brother Abbott and with those of Hyde and Montgomery JJ. I would dispose of the appeal as proposed by my brother Abbott.

HALL J. (*dissenting*):—The relevant facts and the questions raised on this appeal are set out in the reasons of my brother Abbott. With deference, however, I cannot agree with the conclusion reached by him and by the other members of the Court. I see no alternative to the position taken by Owen J. in the Court of Queen's Bench[1] that "Lafleur's right to a fair and impartial investigation implies that he has the right to attend and to be represented by counsel at the sittings of the inquiry."

Although he was not acting in a judicial capacity or performing a judicial function, Guay was clothed with all the outward attributes of a judicial body, including the right to subpoena witnesses, to have them questioned under oath by counsel for the Crown and to compel them to give evidence as might any court of record in civil cases. Anyone entering the room in which the inquiry was begun would have thought himself in a judicial hearing or proceeding akin thereto. From this scene only one person is missing—the man whose affairs are under investigation. The door is barred to him. That, in my view, is a denial of a fair and impartial hearing to this man.

It is urged that the requirement of acting judicially is absent here because Guay as Commissioner was not required

[1] [1963] Que. Q.B. 623, [1963] C.T.C. 201, 63 D.T.C. 1098.

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to make a decision, that he was merely to conduct an inquiry and to make a report to the Deputy Minister who had authorized and named him to make the inquiry. I do not read the terms of Guay's appointment authorized by s. 126 of the *Income Tax Act* as excluding the making of recommendations arising out of the inquiry. I think it is implicit to the inquiry that some judgment on the facts and information obtained would be made by Guay in his report to the Deputy Minister. If the Deputy Minister (who is said to be the person who would make the decision) had himself conducted the inquiry, he would have been required to act judicially in the sense that he must act fairly and impartially. See *St. John v. Fraser*[1]. Surely when the powers are given to a subordinate, the requirement of acting judicially is even stronger. One cannot ignore the reality of the situation that in such cases the decision is made by the subordinate but put out in the name of the Deputy Minister.

I would, accordingly, dismiss the appeal with costs.

SPENCE J.:—I have had the opportunity of reading the reasons of my brother Abbott and I agree in the result.

It would appear, however, that it would be proper to examine the decision of this Court in *St. John v. Fraser*[1]. There, Fraser was appointed by the Attorney General of British Columbia under the provisions of s. 10 of the *Securities Fraud Prevention Act* of that province to carry on an investigation in reference to the affairs of Wayside Consolidated Gold Mines Limited. It appearing during the examination that the Vancouver Stock and Bond Company Limited had underwritten a large part of a new issue of stock to the former company, St. John, the Vancouver company's business manager, was examined by the investigator on four occasions. The solicitor for Mr. St. John and the Vancouver company was present on all of those occasions and their counsel on the last two. Both the solicitor and the counsel took part in the examinations of Mr. St. John and the counsel was afforded the fullest opportunity for argument on his clients' behalf. The investigator had in the meantime examined some other witnesses on matters connected with St. John and the Vancouver company's conduct without notice to them and with no opportunity for their counsel to cross-examine such witnesses.

[1] [1935] S.C.R. 441, 3 D.L.R. 465, 64 C.C.C. 90.

Their counsel requested a copy of the evidence given by two particular witnesses and the investigator informed such counsel that in view of the fact that St. John was about to be recalled to give further evidence he would furnish the counsel with the copies of the transcript of the evidence so requested after Mr. St. John had been further examined, and suggested that then counsel could recall St. John to give any further evidence or explanation that might be desired. It was admitted on behalf of the Attorney General that he had taken the position after counsel for Mr. St. John and the Vancouver company had intervened in the case, that such counsel was not entitled to cross-examine any witnesses who had been examined by the investigator in the course of the investigations and that he, the Attorney General, had so instructed the investigator. The solicitor for Mr. St. John and the Vancouver company then applied for an injunction restraining the investigator from proceeding with the investigation in so far as it related to the conduct or actions of either St. John or the Vancouver company and from making any finding or report to the Attorney General in connection therewith on the ground that he had not given notice to St. John or the Vancouver company of the examination of witnesses concerning their relations with the Wayside Consolidated Gold Mines Limited and that he had not afforded them an opportunity of cross-examining such witnesses. The court was unanimous in coming to the opinion that the investigation was an administrative procedure only. Davis J. said, at p. 452:

> Fundamentally, the investigator in this case was an administrative officer, and the machinery set up by the statute was administrative for the purpose of enquiring as to whether or not fraudulent practices had been or were being carried on in connection with the sale of the securities of the Wayside Company.

In the present case, I am in agreement with my brother Abbott in holding as did Hyde and Montgomery JJ. that this investigation is a purely administrative matter which can neither decide nor adjudicate upon anything.

On the basis of that finding in the *St. John v. Fraser* case, Crocket J., with whom Lamont J. agreed, held that s. 29 of the *Securities Fraud Prevention Act,* a prohibitory section, barred the action for an injunction. Davis J., however, although agreeing with that conclusion, proceeded at p. 451:

> Assuming then in favour of the appellants that the prohibitory section does not apply in this case, the real issue on the merits is whether or not

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the plaintiffs were entitled as of right to be afforded freedom of cross-examination of each and every witness called by the investigator.

And at p. 452:

The investigator was not a court of law nor was he a court in law, but to say that he was an administrative body, as distinct from a judicial tribunal, does not mean that persons appearing before him were not entitled to any rights. An administrative tribunal must act to a certain extent in a judicial manner, but that does not mean that it must act in every detail in its procedure the same as a court of law adjudicating upon a *lis inter partes*. It means that the tribunal, while exercising administrative functions, must act "judicially" in the sense that it must act fairly and impartially. In *O'Connor v. Waldron*, [1935] A.C. 76 at 82, Lord Atkin refers to cases where tribunals, such as a military court of enquiry or an investigation by an ecclesiastical commission, had attributes similar to those of a court of justice.

"On the other hand (he continues) the fact that a tribunal may be exercising merely administrative functions though in so doing it must act judicially, is well established, and appears clearly from the *Royal Aquarium* case."

In the *Royal Aquarium case* [1892] 1 Q.B. 431, "judicial" in relation to administrative bodies is used in the sense that they are bound to act fairly and impartially.

And at p. 453:

The only objection taken by the appellants, and it was very strenuously and earnestly pressed upon us in a very able argument by their counsel Mr. Farris, was that it was against natural justice that the plaintiffs should have been denied the right they claim of cross-examining every witness who was heard by the investigator. The right was asserted as a right to which every witness against whom a finding might possibly be made was entitled. I do not think that any such right exists at common law. The investigation was primarily an administrative function under the statute, and while the investigator was bound to act judicially in the sense of being fair and impartial, that, it seems to me, is something quite different from the right asserted by the appellants of freedom of cross-examination of all the witnesses. It is natural, as Lord Shaw said in the *Arlidge* case, [1915] A.C. 120 at 138, that lawyers should favour lawyer-like methods but it is not for the judiciary to impose its own methods on administrative or executive officers,

Although in the *St. John v. Fraser* case the complaint urged by counsel for the plaintiffs was the refusal to permit him to cross-examine all witnesses called, it is significant that the investigator took exactly the same course as the investigator had done in the present case, i.e., he proceeded in the absence of counsel for the plaintiffs and without notice to either the plaintiffs or their counsel to examine other witnesses. During the course of the argument, I attempted to ascertain from counsel for the respondent

whether, in fact, his present demand that he should be allowed to be present during the examination of all witnesses and therefore necessarily to have notice of such examinations, was not merely preliminary to a demand that counsel have leave to cross-examine such witnesses, and, in my opinion, the prejudice to the respondent suggested in the reasons for judgment of Owen J. could not be avoided without such right of cross-examination being exercised. However, even if the respondent were to confine his demand to a simple right to be present in person and with counsel during such examination, in my view, to give effect to that demand would be for the judiciary to attempt to impose its own methods on an administrative officer and, with respect, I am of the opinion that Davis J. rightly held that the judiciary should not make such an attempt. The fact that the investigator is bound to act judicially in the sense of being fair and impartial does not require the investigator to permit the respondent and his counsel to be present during every examination carried on by virtue of the authorization of the Deputy Minister whether or not such counsel were to attempt to cross-examine such witnesses.

For these reasons, I agree that the appeal should be allowed and the application for the injunction dismissed with costs throughout.

Appeal allowed with costs, HALL J. *dissenting.*

Attorney for the appellant: E. A. Driedger, Ottawa.

Attorneys for the respondent: Pinard, Pigeon, Paré & Cantin, Montreal.