ADMINISTRATIVE DISCRETION AND CURRENT JUDICIAL ACTIVISM

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A long-time observer of the administrative law scene may be forgiven for marvelling at the degree to which courts are now prepared to question the exercise of administrative discretion. Some of the factors which have occasioned this development are the perhaps excessive expansion of government, the growth of public interest groups and legal aid, and the increasing willingness of the population to question governmental action. The fact that society at this time does not perceive itself to be threatened by war or economic calamity has made it less tolerant of administrative excesses. Another factor is the apparent indifference of the legislative and executive arms of the government to the issue. All of these considerations have combined to encourage the development of a reactive judiciary and a resurgence of individualism.

It follows that shibboleths of the past are now far more open to question. It is true that the principle of collateral jurisdictional questions has suffered some eclipse of late, particularly in the area of labour law.[1] Nevertheless, one now finds greater judicial scepticism and activism in many other spheres in which courts traditionally have been loath to interfere. That the Crown and its instrumentalities are no less subject to the law than the ordinary subject is a legal principle that in its application appears to have come of age. The discretionary authority exercised by Her Majesty's Executive and the activities of Her commissions of inquiry have become far more susceptible to successful attack. And the forms of relief are not necessarily confined to traditional judicial review. Indirect avenues of attack by way of actions in tort and compensatory damages are increasingly being tested, albeit not as yet with any large measure of success. Finally, the mechanisms devised by government to assist in the exercise of discretion, particularly the internal guideline or policy directive, have come in for greater judicial scrutiny.

I. THE CROWN

Of late, the Crown has found itself increasingly subject to attack in the courts for its decisions and the manner in which those decisions have

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* Department of Justice. Revised from a paper presented to the Canadian Bar Association, Administrative Law Subsection, Aug. 1978. The views expressed herein are the author's own and do not necessarily represent those of the Department of Justice or the Government of Canada.

[1] C.U.P.E., Local 963 v. New Brunswick Liquor Corp., 25 N.B.R. (2d) 237, 26 N.R. 341 (S.C.C. 1979).

been made. What has marked off the Canadian situation as somewhat peculiar when compared with that of Britain, Australia and New Zealand, is that both the Dominion and the provinces have continued the tradition of bestowing in their statutes a great deal of regulation-making and adjudicative (quasi-judicial and administrative) powers on the Governor in Council and Lieutenant-Governor in Council respectively.

Unlike these other Commonwealth countries where the tendency is to place such high-level authority in the hands of responsible ministers of the Crown, in Canada we seem to prefer having our ministers act collectively when very important matters must be translated into legal norms or decisions. Therefore, executive provisions of the British North America Act which provide for the Governor General and Lieutenant-Governors acting by and with the advice of their respective councils are far from being out-dated anomalies that can be dismissed as now moribund. They may function differently, but it is not a matter of mere idle curiosity or academic hocus-pocus for Professors Mallory[2] and Ward[3] to devote lengthy individual chapters to the formal aspects of executive government in Canada. How has this impinged upon administrative law principles in the last few years?

The case of *Inuit Tapirisat of Canada v. Léger,*[4] decided by the Federal Court of Appeal, points to some of the issues which arise when acts of the Crown are brought before the courts by way of judicial review. In that case, the Governor in Council had refused to vary a decision of the C.R.T.C. after being petitioned under section 64(1) of the National Transportation Act.[5] The plaintiffs claimed that this refusal had occurred before they had had an opportunity to file a reply to the submissions of Bell Canada. When they sought *certiorari* and, in the alternative, a declaration, the Crown moved to strike out.

A. *Remedies*

Ordinarily, at common law *certiorari* has not been available against the Crown. In Commonwealth countries such as Canada this includes the Governor General as the Crown's representative.[6] In applying the

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[2] J. MALLORY, THE STRUCTURE OF CANADIAN GOVERNMENT (1971).

[3] R. MACGREGOR DAWSON, THE GOVERNMENT OF CANADA (5th ed. N. Ward 1970).

[4] 24 N.R. 361 (F.C. App. D. 1978). Leave to appeal was granted by the Supreme Court of Canada on February 5, 1979.

[5] R.S.C. 1970, c. N-17, *as amended by* R.S.C. 1970 (1st Supp.), c. 44, s. 10; R.S.C. (2nd Supp.), c. 10, s. 65; S.C. *174-75, c. 49, s. 18.*

[6] Inuit Tapirisat of Canada v. Léger, *supra* note 4; *Re* Rothmans of Pall Mall Canada Ltd. v. M.N.R., [1976] 2 F.C. 500, 67 D.L.R. (3d) 505 (App. D.); Border Cities Press Club v. Attorney-General of Ontario, [1955] O.R. 14, [1955] 1 D.L.R. 404 (C.A.); The Queen v. C.I.R., 12 Q.B.D. 461 (C.A. 1884); Duncan v. Theodore, [1919] A.C. 696, 121 L.T. 408, 26 C.L.R. 276 (J.C.P.C.); Reynolds v. Attorney-General, 29 N.Z.L.R. 24, 12 Gaz. L.R. 309 (C.A. 1909); Banks v. Transport Regulation Bd., 119 C.L.R. 222 (H.C. 1968); The King v. Governor of the State of South Australia, 4 C.L.R. 1497 (H.C. 1907); Australian Communist Party v. The Commonwealth, 24 A.L.J. 485, [1951] A.L.R. 129, 83 C.L.R. 1 (H.C.).

principle in one case,[7] the High Court of Australia laid some stress on the fact that the Governor of a State was acting in the exercise of "a constitutional duty . . . imposed on him as such Head of the State".[8] However, it is difficult to imagine this personage, identified in legislation by his title, being authorized as such to act in any other capacity. This conclusion has recently been confirmed by a judgment of the Federal Court of Appeal.[9] The same result has been reached with respect to the remedies of prohibition[10] and *mandamus*.[11]

The legal theory upon which this is based is that Her Majesty's judges cannot claim the authority to command Her. For example, *certiorari* is not simply a remedy for quashing a decision but is also a means whereby a superior court may command an inferior tribunal to send up the record in order to assess the legality of the tribunal's actions. Consequently, *certiorari*, like *mandamus* and prohibition, contemplates that a court may command or issue an order to the inferior tribunal and not merely deal with its acts or decisions divorced from their source and author. On the other hand, in *Re Gooliah and Minister of Citizenship and Immigration*,[12] the Manitoba Court of Appeal held that the Sovereign could be made subject to a *certiorari* order. The authority cited by Freedman and Monnin JJ.A. in favour of the issues of orders of *habeas corpus* against the Crown would, unless explicable on some other statutory or common law basis, seem to explode the rationale for courts claiming that they cannot command the Crown.

Paragraph 18(a) of the Federal Court Act[13] provides for various enumerated forms of relief "against any federal board, commission or other tribunal", a phrase defined so broadly as to comprehend prima facie the Governor General and Governor in Council exercising statutory authority. And yet, the Trial Division of the Federal Court has expressed doubts that this indeed was the result.[14] In view of the court's own recognition that section 28(6) expressly excluded the Governor in Council from being subject to the remedy of judicial review, but that this did not affect the remedies available under section 18, one might have expected the court to draw the necessary inference that Parliament must have intended the Governor in Council, except to the extent of the exclusion

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[7] The King v. Governor of the State of South Australia, *supra* note 6.

[8] *Id.* at 1513.

[9] Inuit Tapirisat of Canada v. Léger, *supra* note 4.

[10] Chabot v. Lord Morpeth, 17 L.J.Q.B. 336, 117 E.R. 528 (1848).

[11] R. v. Minister of Mineral Resources of Saskatchewan, [1973] 2 W.W.R. 672, 38 D.L.R. (3d) 317 (S.C.C.).

[12] 59 W.W.R. 705, 63 D.L.R. (2d) 224 (Man. C.A. 1967). The court was unanimous on this point.

[13] R.S.C. 1970 (2nd Supp.), c. 10.

[14] Desjardins v. Bouchard, [1976] 2 F.C. 539, 71 D.L.R. (3d) 491 (Trial D.); *cf.* Landreville v. The Queen, [1973] F.C. 1223, 41 D.L.R. (3d) 574, in which Pratte J. in the Trial Division carefully avoided coming to any conclusion on this and the more general issue.

under section 28(6), to be a "federal board, commission or other tribunal".[15]

It is certainly open to debate whether, save in peculiar circumstances, the foregoing is anything but academic. After all, in a direct action against the Crown the declaratory judgment is usually available[16] and, in fact, Barwick C.J. clearly stated in the *Banks* case that while *certiorari* may not be appropriate, "that does not deny that the proceedings of the Governor in Council in performance of a statutory function may be void and in an appropriate case be so declared".[17]

B. *Substantive Rights*

Is the Governor in Council or Lieutenant-Governor in Council, when exercising statutory authority, subject to less control than other tribunals? Recent English cases have made clear that a minister of the Crown must exercise a statutory discretion in accordance with the same general principles that govern inferior officials.[18] This merely confirms the Canadian position enunciated twenty years ago in the famous *Roncarelli v. Duplessis*.[19] Recently, when an order in council purportedly made pursuant to the Ontario Public Hospitals Act[20] attempted to shut down a number of hospitals on the ground of fiscal constraints, the Divisional Court determined that the statute

> is regulatory in nature. Section 4(5) was not designed or intended to be used as a means of closing hospitals for financial or budgetary considerations. . . . Since the Lieutenant-Governor in Council in its decision took into account financial considerations, it considered extraneous matters that were beyond the objects and policy of the *Public Hospitals Act*.[21]

The Ontario Court of Appeal confirmed this approach[22] in analyzing whether an order in council rescinding an O.M.B. decision was or was not

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[15] Recently, the Supreme Court of Canada significantly reduced the likelihood that judges exercising statutory authority as such would in future be considered to be a "federal board, commission or other tribunal". This was accomplished by severely limiting what had become in Canada an over-inflated view of the *persona designata*. Herman v. Attorney-General of Canada, 23 N.R. 235, 91 D.L.R. (3d) 3 (S.C.C. 1978); Coopers and Lybrand v. M.N.R., 24 N.R. 163 (S.C.C. 1978).

[16] *E.g.*, Landreville v. The Queen, *supra* note 14; Desjardins v. Bouchard, *supra* note 14.

[17] Banks v. Transport Regulation Bd., *supra* note 6, at 241. *See also* the forceful judgments in Hochoy v. N.U.G.E., 7 W.I.R. 174 (T.C.A. 1964), in which the Governor General of Trinidad and Tobago was held subject to declaratory orders in respect of his appointment of a commission of inquiry.

[18] Laker Airways Ltd. v. Department of Trade, [1977] Q.B. 684, [1977] 2 All E.R. 182 (C.A. 1976); Secretary of State for Educ. and Science v. Tameside, [1976] 3 All E.R. 665, [1976] 3 W.L.R. 641 (H.L.); Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 1016, [1968] 1 All. E.R. 694 (H.L.).

[19] [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

[20] The Public Hospitals Act, R.S.O. 1970, c. 378.

[21] *Re* Doctors Hosp. and Minister of Health, 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div'l Ct. 1976).

[22] *Re* Davisville Inv. Co. and Toronto, 15 O.R. (2d) 553, 76 D.L.R. (3d) 218 (C.A. 1977). *See also* Vanterpool v. Crown Attorney, 3 W.I.R. 351 (1961).

authorized by the Ontario Municipal Board Act.[23] Finally, in *obiter dicta* the Federal Court of Appeal went out of its way to make the same point in relation to the discretion given to the Governor in Council by section 64(1) of the National Transportation Act.[24]

> Obviously the discretion is a broad one permitting the Executive Government to take into consideration questions of general policy, but the considerations on which it may exercise the discretion must presumably be reasonably related to the purposes or object for which the regulatory jurisdiction with respect to telephone rates is established.[25]

In the end, the question being asked is not a profound one: was the action of the Executive *ultra vires* the statute from which it derived its sole authority to act, or did it err in law?[26] So, courts have looked at the minute or order of Council to determine whether, in law, it was that of the Governor as required by statute[27] and have discussed the formal prerequisites set down by statute that are conditions precedent to action by the Governor.[28]

C. *Procedural Rights*

In the *Tapirisat* case, the plaintiffs claimed that the procedures before the Governor in Council did not fulfil the requirements of natural justice. In reply to this, in the context of the statutory scheme in which the Executive was called upon to act, Marceau J. in the Trial Division[29] found that the statute could not be interpreted as requiring the observance of natural justice. Insofar as the common law principle of *audi alteram partem* was concerned, he first quoted from the judgment of Urie J. in *CSP Foods Ltd. v. C.T.C.*,[30] and then proceeded:

> In my view, in making decisions under 64(1), the Governor General in Council makes them on the basis of political accountability and not on a judicial or quasi-judicial basis. The scheme of the statutes pertaining to telecommunications is that decisions involving broad economic questions are entrusted to the CRTC which is under a strict duty to hold a hearing and to afford the parties a full opportunity to be heard. The Commission may itself at any time review, rescind, change, alter or vary any of its orders or decisions (section 63 of the *National Transportation Act*), and these orders or decisions, moreover are subject to appeal to, and review by, the Courts (section 64(2) to (7) of the Act).

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[23] The Ontario Municipal Board Act, R.S.O. 1970, c. 323.

[24] R.S.C. 1970, c. N-17, *as amended by* R.S.C. 1970 (1st Supp.), c. 44, s. 10, R.S.C. 1970 (2nd Supp.), c. 10, s. 65, S.C. 1974-75, c. 49, s. 18.

[25] Inuit Tapirisat of Canada v. Léger, *supra* note 4, at 370.

[26] *See, Re* Davisville Inv. Co. and Toronto, *supra* note 22, at 556, 76 D.L.R. (3d) at 222. *See also* Consumers Assoc. of Canada v. Attorney-General of Canada, 87 D.L.R. (3d) 33 (F.C. Trial D. 1978).

[27] Wrathall v. Fleming, [1945] Tas. S.R. 61 (S.C.).

[28] Brettingham-Moore v. St. Leonards Corp., 43 A.L.J.R. 343, 121 C.L.R. 509 (H.C. 1969); Emerson v. Skinner, 12 B.C.R. 154 (S.C. 1906).

[29] Inuit Tapirisat of Canada v. Léger, [1979] 1 F.C. 213, 87 D.L.R. (3d) 26 (Trial D. 1978).

[30] 84 D.L.R. (3d) 541 (F.C. App. D. 1978).

> The power to "vary or rescind" entrusted by section 64(1) to the Governor General in Council is, as I understand it, a power of a different nature altogether: it is a political power for the exercise of which the Cabinet is to be guided by its views as to the policy which in the circumstances should be followed in the public interest. Its exercise has nothing to do with the judicial or quasi-judicial process. The party who proceeds to adopt the means of questioning an order or a decision of the CRTC provided by section 64(1) is choosing to resort to a political, not a judicial process.[31]

But the Governor in Council or his provincial counterpart may very well be acting pursuant to statutory authority that is not so clearly political in nature. For example, section 93(3) of the B.N.A. Act gives a right of "appeal" to the Governor General in Council. Under a different scheme *Re Squier*[32] held that among the means available for the amotion of an Ontario County Court judge was included the procedure established by the Colonial Leave of Absence Act, 1782, 22 Geo. 3, c. 75, whereby a person holding office other than at pleasure "in his Majesty's Colonies and Plantations in America, and the West Indies" may be amoved by the Governor in Council of the Colony and that person may appeal and have "such Amotion . . . finally judged of and determined by his Majesty in Council". Wilson C.J. held that proceedings under this statute could be taken by and before the Governor in Council and he referred to authority where in similar circumstances the Governor in Council had acted in a judicial capacity.

In any event, the Federal Court of Appeal in the *Tapirisat* case enjoyed the benefit of having before it the very recent Supreme Court of Canada decision in *Nicholson,*[33] which had applied the fairness doctrine to an administrative non-judicial function. While the Court of Appeal did not disagree with the views of Marceau J. if the principles of natural justice alone were to be relied upon, the fairness doctrine now provided an additional consideration. "I cannot see why the duty to act fairly which was affirmed in the *Nicholson* case should not *in principle* be applicable to the Governor in Council when dealing with an interested party who exercises the right of petition or appeal."[34] The court was willing to recognize the procedure here as akin to an "appeal" and not simply the stark exercise of political power. The court in fact proceeded to state that the Governor in Council's "authority is not the general political power of the Cabinet but a specific statutory authority".[35] It concluded that whether the appellants "were denied a fair opportunity to reply to the submissions" of the opposing party was a question of fact for the trial judge depending on the circumstances of the case.[36]

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[31] *Supra* note 29, at 221, 87 D.L.R. (3d) at 32.

[32] 46 U.C.Q.B. 474, 1 Cart. B.N.A. 789 (1882).

[33] Nicholson v. Haldimand-Norfolk Regional Bd. of Comm'rs of Police, [1979] 1 S.C.R. 311, 23 N.R. 410 (1978). *See* Campeau Corp. v. City of Calgary, 12 A.R. 31, at 42-44 (C.A. 1978).

[34] *Supra* note 4, at 372. Emphasis by LeDain J.

[35] *Id.*

[36] *Id.* at 373.

One court looking at the statutory power of review of a Governor in Council concluded that the enactment there contemplated

> an effective review by the Governor in Council of the Board's decision The statute therefore placed upon the Governor in Council an obligation to consider the matter for himself and to reach a conclusion, upon all the material available to the Board, whether or no [*sic*] the Board's decision should be approved, or disapproved, or whether the circumstances called for some other action on the part of the Council within s. 32(2)(c). The statute did not create, in my opinion, a situation where the Governor in Council could act merely on the recommendation of a Minister.[37]

Along the same lines are Canadian decisions recognizing that where the statute contemplated that before the issue of a Crown grant the Lieutenant-Governor in Council shall decide the question whether or not there is reasonable proof of improvement or occupation and of intention to reside,

> . . . the function of the Lieutenant-Governor in Council in deciding upon such questions is judicial in the sense that he must, to adapt the language of Lord Moulton in *Arlidge's Case*, "preserve a judicial temper" and perform his duties "conscientiously with a proper feeling of responsibility" in view of the fact that a decision in favour of the applicant must result in the transfer to the applicant of property to which, but for the statute and but for the production of the necessary proof, the respondent company (or its successors in title) would have possessed an unassailable right. . . .[38]

Therefore, failure of the Lieutenant-Governor in Council in such circumstances to give proper notice or hearing to an interested party is fatal and any consequent decision, order, grant or other act purported to be based upon authority given him by statute is a nullity.[39]

If it is wondered how the Governor in Council or his provincial counterparts may practically fulfil this legal responsibility in the unusual circumstances where the principles of natural justice are found to be applicable, the matter was recently discussed in *Desjardins v. Bouchard*,[40] which recognized the need for perhaps delegating the task of investigation and report to another. The issue then may arise as to whether this latter tribunal must observe natural justice or the principles of fairness. It may be of interest to note that in the *Inuit Tapirisat* decision LeDain J. was able to

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[37] Banks v. Transport Regulation Bd., *supra* note 6, at 240-41 (*per* Barwick C.J.). *See also* Taylor and Owen JJ. at 246-47 and 254-55 respectively.

[38] Wilson v. Esquimalt and Nanaimo Ry., [1922] 1 A.C. 202, at 211-12, [1921] 3 W.W.R 817, at 825 (P.C. 1921). *See also* Coyle v. Minister of Educ. of B.C., [1978] 6 W.W.R. 279 (B.C.S.C.).

[39] Esquimalt and Nanaimo Ry. v. Fiddick, 11 W.L.R. 509, 14 B.C.R. 412 (C.A. 1909); Border Cities Press Club v. Attorney-General for Ontario, *supra* note 6; Greek Catholic Church of St. Mary's v. McKinnon, 10 W.W.R. 1222, 28 D.L.R. 509 (Alta. S.C 1916); *In re* Cooks and Waiters Club, [1938] 3 W.W.R. 305, [1938] 4 D.L.R 790 (Alta S.C.). With respect to the relationships among lack of natural justice, the "nullity" or "voidness" of the decision in issue, and the right to appeal such a "decision", *see* Harelkin v. University of Regina, 26 N.R. 364 (S.C.C. 1979) and Calvin v. Carr, 22 A.L.R. 417 (P.C. 1979).

[40] *Supra* note 14.

demonstrate that less than fifty years ago an actual committee of the Privy Council sat and heard "appeals" from the Board of Railway Commissioners.[41] Similarly, in *Re Squier*,[42] Wilson C.J. discussed the validity of the mechanism whereby the delegate there in issue, a commission of inquiry, was established.

D. *The Prerogative*

It is sometimes forgotten that the Crown and its officers can act lawfully pursuant to the Royal prerogative as well as pursuant to legislative authority. While, as recently noted,[43] the prerogative may be confined and fettered by an act of Parliament that covers much the same ground, Lord Denning M.R. was willing to consider the exercise of discretion under the prerogative in much the same way as under statutory authority. He therefore stated, "Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive. . . ."[44] He proceeded to refer to the *Padfield*[45] and *Tameside*[46] decisions to emphasize the point that, whatever their basis in law, discretionary powers exercised by the ministers or officers of the Crown are subject to legal limitations. This approach hearkens back to the Divisional Court judgment in *Regina v. Criminal Injuries Compensation Board ex parte Lain*,[47] where *certiorari* was granted against a tribunal established and operating under the prerogative. While it was an executive body performing executive functions, this body nevertheless was one "having legal authority to determine questions affecting the rights of subjects".[48] This seems to be a more appropriate dividing line than the one which baldly states that the "Courts have always been careful to distinguish between acts done pursuant to the exercise of a statutory power — subject to Court review — and decisions made under the Royal prerogative — which are not per se reviewable by the Courts".[49]

In the area of government contracts, too, the distinction between prerogative and statutory authority is sometimes raised. Thus, one finds Thurlow J. stating that a minister has no authority to enter a contract on behalf of the Crown unless authorized to do so by statute or order in

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[41] *Supra* note 4, at 371-72.

[42] *Supra* note 32.

[43] Laker Airways Ltd. v. Department of Trade, *supra* note 18 (Roskill and Lawton L.JJ.).

[44] *Id.* at 705, [1977] 2 All E.R. at 193.

[45] *Supra* note 18.

[46] *Id.*

[47] [1967] 2 Q.B. 864, [1967] 2 All E.R. 770.

[48] *Id.* at 880, [1967] 2 All E.R. at 777, quoting from Rex v. Electricity Comm'rs, [1924] 1 K.B. 171, at 205 (*per* Atkin L.J.).

[49] *Re* Multi-Malls Inc. and Minister of Transp., 14 O.R. (2d) 49, at 58, 73 D.L.R. (3d) 18, at 27 (C.A. 1976); *see also Re* Doctors Hosp. and Minister of Health, *supra* note 21, at 170-74, 68 D.L.R. (3d) at 226-30.

council.[50] However, the Supreme Court of Canada recently refused to follow this narrow view of legal authority, which in effect ignores the concept of agency. It concluded rather that the Quebec Minister of Social Welfare had ostensible authority by virtue of his functions and responsibilities under the Department of Social Welfare Act to contract on behalf of the Crown for the construction of a home for the aged.[51]

The *Anti-Inflation Act Reference*[52] provided an excellent example of the constitutional and political overtones that may at times characterize Canadian attempts at co-operative federalism. There, federal-provincial agreements were expressly authorized by the Act. However, Ontario entered the agreement only on the basis of an order in council, and the effect of the agreement, when read in conjunction with the Act, was to make the anti-inflation guidelines "apply in accordance with the terms of the agreement not in accordance with the terms of the Act".[53] In the absence of provincial legislative authority, one is left with the laws of Ontario being altered not by virtue of a provincial or federal statute but by an executive act that is crystallized in this federal-provincial agreement. While the Crown may contract in the way it did in this case and may in fact have general legislative authority to enter into contracts in this way,[54] that contract may not legislate so as to bind members of the public in the absence of any act of the legislature. "Nor can a federal-provincial agreement be a basis for enlarging either the legislative authority of Parliament or of a provincial Legislature. If the power asserted is not found in the Constitution, it cannot be given by agreement."[55]

II. Commissions of Inquiry

Another area of administrative law that has shown itself strangely active of late is that relating to commissions of inquiry. Not only has there been a good deal of recent case law pertaining to the subject but, as well, the courts appear to be willing to consider exercising greater control than heretofore over the activities of such commissions. The Law Reform Commission of Canada, following the lead of the Ontario McRuer Commission Report,[56] is studying the existing legislation on the subject.[57]

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[50] Walsh Advertising Co. v. The Queen, [1962] Ex. C.R. 115, at 123-24 (1961).

[51] J.E. Verreault et Fils v. Attorney General of Quebec, [1977] 1 S.C.R. 41, 57 D.L.R. (3d) 403 (1975).

[52] [1976] 2 S.C.R. 373, at 428-35, 68 D.L.R. (3d) 452, at 500-06.

[53] *Id.* at 432, 68 D.L.R. (3d) at 503.

[54] Manitoba Gov't Employees Assoc. v. Manitoba, [1978] 1 S.C.R. 1123, 17 N.R. 506 (1977).

[55] *Re* Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, at 1232, 19 N.R. 361, at 399, 84 D.L.R. (3d) 257, at 282.

[56] Ontario Royal Commission Inquiry into Civil Rights, Report No. 1 (Vol. 1, Part I, Section 4, 1968).

[57] The Law Reform Commission of Canada, Commissions of Inquiry, Working Paper 17 (1977). *See also* Crete, *L'enquête publique et les critères de contrôle judiciaire*

A. *Constitutional Issues*

The importance of the sudden onslaught of cases on commissions of inquiry is exemplified by the willingness to test the constitutionality of proceedings. When persons were found guilty of contempt for refusing to testify before the Quebec Police Commission, which had been ordered to inquire into organized crime pursuant to an order in council made under the enabling provision of the Police Act,[58] they argued that both the enabling provision and the order in council were unconstitutional as trespassing upon Parliament's exclusive jurisdiction in relation to the criminal law. The Supreme Court of Canada upheld the principal and subordinate legislation in question.[59] At the same time, the Court upheld the validity of procedural provisions of the Police Act[60] and the more general enactment, *viz.*, the Public Inquiry Commission Act.[61] On the other hand, that same Court has recently held that a provincial commission empowered to inquire into the administration and management of the Royal Canadian Mounted Police had been given terms of reference beyond provincial jurisdiction. Inquiry into the alleged commission of individual criminal acts by members of that police force was one thing, but it was quite another to investigate the way in which that federally constituted body actually operated.[62] It follows of course that the Prince Edward Island Public Inquiries Act[63] may authorize the establishment of a commission of inquiry into the procedures and operation of the Charlottetown Police Department.[64]

Two important procedural questions of constitutional significance were addressed in the *Keable* decision.[65] The first was whether a minister of the federal Crown acting for and on behalf of the Crown was a compellable witness before a provincial commission of inquiry. Simply because the Commission was given the powers of a superior court did not in law transform it into a court and its proceedings into a trial. The Court characterized the investigative process put into play by the commission, wholly dependent as it was on provincial legislation, as akin to the discovery process. The immunity of the federal Crown from discovery can only be altered by federal legislation. The second question related to the statutory "Crown privilege" afforded federal documents under section 41

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des fonctions exercées par les enquêteurs, 19 CAHIERS DE DROIT 643 (1978); Henderson, *Abuse of Powers by Royal Commissions*, [1979] SPECIAL LECTURES L.S.U.C. (forthcoming).

[58] S.Q. 1968, c. 17.

[59] Di Iorio v. Warden of the Common Jail of Montreal, [1978] 1 S.C.R. 152, 73 D.L.R. (3d) 491 (1976).

[60] *Supra* note 58.

[61] R.S.Q. 1964, c. 11.

[62] Keable v. Attorney-General of Canada, [1979] 1 S.C.R. 218, 24 N.R. 1 (1978).

[63] R.S.P.E.I. 1974, c. P-30.

[64] Reference *re* a Comm'n of Inquiry into the Police Dep't of Charlottetown, 74 D.L.R. (3d) 422 (P.E.I.S.C. 1977).

[65] *Supra* note 62.

of the Federal Court Act.[66] Unfortunately, no satisfactory treatment was given to the applicability of that provision to a tribunal of this sort, and therefore the earlier judgments of Deschênes C.J. and the Quebec Court of Appeal remain the only real authority on the issue.[67] What the Supreme Court did say, however, was that as an inferior body the commission had no authority to superintend questions relating to its jurisdiction; those remain for the inherent jurisdiction of a superior court.

Finally, there was the very interesting decision[68] of Collier J. in the Trial Division of the Federal Court, which briefly traced the history of the manner in which superior court judges appointed during good behaviour could be removed. The court all too briefly grappled with the very thorny question of whether the procedure for removal set forth in section 99 of the B.N.A. Act was an exclusive one or whether other methods still remained available,[69] including the appointment of a commission of inquiry by the executive arm of government in order to enable it to decide what action, if any, it should take. Though not related to the division of legislative powers under the Act, nonetheless the decision was concerned with the validity of appointing the commission of inquiry in question by virtue of other provisions of the B.N.A. Act. Not far removed from this is recently commenced litigation that would question the validity of amendments to the annuity provisions of the Judges Act.[70]

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[66] R.S.C. 1970 (2nd Supp.), c. 10.

[67] Le Procureur Général du Canada v. La Commission des Droits de la Personne, [1977] C.S. 47, *aff'd* [1978] C.A. 67. *See also Re* Royal Comm'n of Inquiry into the Activities of Royal American Shows Inc. (No. 2), 39 C.C.C. (2d) 28 (Alta. 1977). *See* the recent Australian decision of Sankey v. Whitlam, 21 A.L.R. 505 (H.C. 1978), which held that Cabinet documents are not *as a class* privileged but that each such document may be examined by the court for content to determine whether in the circumstances the public interest favouring non-disclosure of the Cabinet document was or was not outweighed by the public interest favouring its disclosure in order to assist in the administration of justice. While it may be suggested that s. 41(2) of the Federal Court Act renders this judgment inapplicable to the federal government, it cannot be gainsaid that the conclusions of the High Court on the inadequacies of the affidavits there could equally apply here. Moreover, it could be argued that the "confidences" of Council protected by s. 41(2) should be limited to those that the law would regard as truly a "confidence" as interpreted by the courts on the basis of *Sankey*, rather than as interpreted by executive fiat on the basis of ministerial affidavit.

[68] Landreville v. The Queen (No. 2), [1977] 2 F.C. 726, 75 D.L.R. (3d) 380 (Trial D.).

[69] This issue was discussed and analyzed in some depth by PROFESSOR R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973) and has come to the fore once again in the United States. *See* 61 JUD. 439-84 (1978), which contains a number of articles on this theme in response to S. 1423, 95th Cong., 1st Sess. (1977), which proposes an alternative mechanism for the investigation and disciplining of judges. In view of the quality of Canadian legal digests, it is perhaps not surprising that Collier J. may not have had *Re* Squier, *supra* note 32, brought to his attention.

[70] R.S.C. 1970, c. J-1, *as amended*. *See* The National, Vol. 5, No. 6, June-July 1978, at 1, col. 3. For a comprehensive discussion of this area, see Lederman, *The Independence of the Judiciary*, 34 CAN. B. REV. 769, 1139 (1956).

B. *Remedies*

While Collier J.[71] had no difficulty granting declaratory relief against a commission of inquiry in respect of which a mandatory procedural requirement in the Inquiries Act[72] was applicable, an Australian decision has recently been more categorical than Pratte J.[73] in refusing to grant *certiorari* to quash the report of a Royal commission of inquiry whose terms of reference were confined to inquiry and report.[74] Similar reasoning was applied by Addy J. in refusing to grant prohibition against a commission of inquiry whose sole duty was to investigate and report.[75] On the other hand, his general proposition that "[a]part from special statutory provisions, a board, commission or tribunal, which is not performing a judicial or *quasi*-judicial function, is not itself liable to direct control by the Courts *in any way*"[76] (emphasis added) is at odds not only with the views of his own judicial colleagues[77] but also with at least two court of appeal decisions[78] which appear to have left an earlier Ontario Court of Appeal[79] decision somewhat removed from the present mainstream of authority.

Then too, Addy J.'s conclusion that prohibition cannot lie because the commission of inquiry was confined to inquiry and report is one that has since become debatable. In two recent cases[80] heard by the Trial Division of the Alberta Supreme Court as a result of applications for prohibition against a commissioner of inquiry, Miller J. began his analysis by noting that "generally, the Supreme Court of Alberta does not have supervisory jurisdiction over the proceedings of a public inquiry in this Province through the use of prerogative writs on the grounds that such an inquiry is merely to investigate and report . . .".[81] He then proceeded to refer to

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[71] Landreville v. The Queen (No. 2), *supra* note 68.

[72] R.S.C. 1952, c. 154; R.S.C. 1970, c. I-13.

[73] Landreville v. The Queen, *supra* note 14.

[74] Regina v. Collins, 50 A.L.J.R. 471, 8 A.L.R. 691 (H.C. 1976).

[75] "B" v. Commission of Inquiry, [1975] F.C. 602, 60 D.L.R. (3d) 339 (Trial D.). *See also Re* Nanticoke Ratepayers Ass'n and Environmental Assessment Bd., 19 O.R. (2d) 7, 83 D.L.R. (3d) 722 (H.C. 1978).

[76] "B" v. Commission of Inquiry, *supra* note 75, at 613, 60 D.L.R. (3d) at 349.

[77] Collier J. in Landreville v. The Queen (No. 2), *supra* note 68; Pratte J. in Landreville v. The Queen, *supra* note 14.

[78] Samuels and Charter Airways Ltd. v. Attorney General of Canada, 17 W.W.R. 129, [1956] 1 D.L.R. (2d) 110 (Alta. C.A. 1955); Pyx Granite Co. v. Ministry of Housing and Local Gov't, [1958] 1 Q.B. 554, at 571, [1958] 1 All E.R. 625, at 632 (C.A.), *rev'd on other grounds* [1960] A.C. 260, [1959] 3 All E.R. 1 (H.L. 1959).

[79] Hollinger Bus Lines Ltd. v. O.L.R.B., [1952] O.R. 366, [1952] 3 D.L.R. 162 (C.A.). Ontario courts now seem to be following the general trend in this area: Campbell Soup Co. v. Farm Products Marketing Bd., 10 O.R. (2d) 405, 63 D.L.R. (3d) 401 (H.C. 1975), *aff'd* 16 O.R. (2d) 256 n., 77 D.L.R. (3d) 725 n. (C.A.).

[80] Royal American Shows Inc. v. Laycraft, [1978] 2 W.W.R. 169, 82 D.L.R. (3d) 161 (Alta. S.C.); *Re* Anderson and Royal Comm'n into Activities of Royal American Shows Inc., 5 Alta. L.R. (2d) 155, 82 D.L.R. (3d) 706 (S.C. 1978). *See also* Le Procureur Général du Canada v. La Commission des Droits de la Personne, *supra* note 67.

[81] *Re* Anderson and Royal Comm'n into Activities of Royal America Shows Inc., *supra* note 80, at 156, 82 D.L.R. (3d) at 708.

four exceptions to this general proposition. The first is where the report of the commission is capable of affecting a person's rights in the sense that, though subject to approval and action by higher authority, the report by statute forms "the basis of the decision to be made by the higher authority".[82] Examples of this are found in *Rex v. Electricity Commissioners*[83] and *Bell v. Ontario Human Rights Commission.*[84] A recent illustration of this is *Saulnier v. Quebec Police Commission,*[85] where the rules of civil procedure were to be applied to the summoning of the appellant before the Commission, since the recommendations of the Commission enabled it under other statutory provisions to reduce the appellant in rank. This decision may be contrasted with one concerning the report of an electoral boundaries commission which had to cross many other hurdles before the boundaries could be legally altered.[86]

The second exception arises where in exercising its ancillary or procedural powers the commission wrongfully impairs the liberty or property of a person. This is exemplified in cases where the summons or subpoena of a witness has been successfully attacked by *certiorari.*[87] Recently, evocation was granted by the Supreme Court of Canada against a commission of inquiry that had wrongfully sought to compel federal government documents to be produced before it,[88] as well as against the Quebec Police Commission conducting an inquiry into organized crime under the Police Act[89] and the Public Inquiry Commission Act[90] of Quebec.[91]

These two exceptions could be said to fall within Lord Justice Atkin's formulation in *Electricity Commissioners* that the tribunal must have "legal authority to determine questions affecting the rights of subjects".[92] The other two exceptions, namely, when the area of investigation given to a commission of inquiry is not within the legislative jurisdiction of the

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[82] Royal American Shows Inc. v. Laycraft, *supra* note 80, at 181, 82 D.L.R. (3d) at 711.

[83] *Supra* note 48. *See also* Brettingham-Moore v. St. Leonards Corp., *supra* note 28.

[84] [1971] S.C.R. 756, 18 D.L.R. (3d) 1.

[85] [1976] 1 S.C.R. 572, 57 D.L.R. (3d) 545 (1975).

[86] Penner v. Electoral Boundaries Comm'n for Ontario, [1977] 2 F.C. 58 (App. D. 1976). *Cf. Re* Nanticoke Ratepayers Ass'n and Environmental Assessment Bd., *supra* note 75, at 14-15, 83 D.L.R. (3d) at 730-31.

[87] Rogers v. Home Secretary, [1973] A.C. 388, [1972] 2 All E.R. 1057 (H.L.). This also illustrates the gaping hole left open to the exercise of *certiorari* jurisdiction by the Federal Court, Trial Division under s. 18 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, by virtue of the Federal Court of Appeal's very restrictive interpretation placed under "decision or order" in s. 28 of the Act (*see e.g., In re* Danmor Shoe Co., [1974] F.C. 22).

[88] Keable v. Attorney-General of Canada, *supra* note 62.

[89] S.Q. 1968, c. 17.

[90] R.S.Q. 1964, c. 11.

[91] Cotroni v. Quebec Police Comm'n, [1978] 1 S.C.R. 1048, 80 D.L.R. (3d) 490 (1977).

[92] *Supra* note 48.

granting authority or when the commission has not remained within its terms of reference, do not indicate, without more, that anyone's rights are being affected. Nevertheless, one surely wants to be able to bring such issues before the courts and to be certain that there is some appropriate remedy available. The *Landreville* case[93] is a recent example of how the courts have been able to resolve such questions where, unlike in the Ontario Public Inquiries Act,[94] no special statutory procedure by way of appeal or stated case is provided. The discussion of these two last exceptions by Miller J. in his reasons for judgment contains a perhaps unfortunate intermingling of substantive rights and procedural remedies.

In any event, what may be happening here is that with respect to both procedural remedies and substantive rights the courts are becoming more willing to break down the former distinction between the decision-making tribunal and the one which allegedly just investigates and reports. In his *Royal American Shows* decision Miller J. discussed "the essential nature and thrust of a public inquiry"[95] and, like Morrow J.A.,[96] drew a good deal of comfort from the fact that a judge might be sitting as commissioner. In the end he concluded that the Laycraft inquiry was one of "investigation and report only".[97] While this may answer questions pertaining to the remedy and substantive rights in issue insofar as the final report itself is concerned, it hardly satisfies one's curiosity about other aspects of an inquiry, including those very matters that Miller J. himself was so willing to discuss in his judgments. As well, the very fact that courts faced with the conduct of commissions of inquiry show no diffidence about citing cases that have considered the investigations and reports of other kinds of bodies indicates that the special position of Royal and similar commissions of inquiry is being assimilated to what is happening more generally. In other words, form matters not; the courts will prefer to look at function. In light of such cases as *Electricity Commissioners*,[98] *Bell*[99] and *Saulnier*,[100] might the actions of a tribunal of investigation or inquiry and report affect individual rights? Is there some other procedure or forum whereby the contents of its report may be questioned? Does the statutory scheme under which the tribunal operates envisage that while legal action can only be taken by higher or other authority, the basis of that action will be the report? There are doubtless other factors at work here, but it would certainly seem that the labels of "inquiry", "investigation" and "report" are no longer in themselves sufficient to dissuade courts from intervening. It may be argued that the important majority decision in *Guay v. Lafleur*[101]

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[93] *Supra* note 68.

[94] S.O. 1971, vol. 2, c. 49.

[95] *Supra* note 80, at 183, 82 D.L.R. (3d) at 173.

[96] Orysiuk v. The Queen, [1977] 6 W.W.R. 410, at 415-16, 37 C.C.C. (2d) 445, at 455 (Alta. C.A.).

[97] *Supra* note 80, at 183, 82 D.L.R. (3d) at 173.

[98] *Supra* note 48.

[99] *Supra* note 84.

[100] *Supra* note 85.

[101] [1965] S.C.R. 12, 47 D.L.R. (2d) 226 (1964).

has to some extent been eroded, but as Pigeon J. noted in the *Keable* case, no judicial power was being exercised against the taxpayer in that case.

> Such is not the case here. Assuming the Commissioner's report will not amount to any judicial or quasi-judicial determination, what is presently in issue is the validity of strictly judicial acts: the compulsion of witnesses to testify and to produce documents.[102]

C. *Substantive Rights*

As we have already seen, the proceedings and even the ultimate report of a commission of inquiry may be attacked because the authorizing statute or the proceedings themselves go beyond what is constitutionally permitted by the B.N.A. Act. It is also true that a commission of inquiry cannot be established with terms of reference beyond those authorized by the enabling legislation,[103] nor can the commission's inquiry stray beyond the terms of reference themselves.[104]

Procedural requirements commanded by statute must of course be complied with by a commission of inquiry. Recently, the Federal Court found that Mr. Justice Rand, in the capacity of commissioner, failed to abide by the requirement of section 13 of the Inquiries Act[105] that notice and hearing procedures must be observed before a report concerning a charge of misconduct is made against any person.[106] The same approach was taken in the *Bortolotti* case[107] with respect to the statutory right of a person with an interest to give evidence and to call and cross-examine witnesses. The Ontario Court of Appeal then drew the obvious inference that the exclusion of evidence that was "reasonably relevant to the subject-matter of the inquiry"[108] would be "a denial of a statutory right

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[102] *Supra* note 62, at 225, 24 N.R. at 10.

[103] *See, e.g.*, Reference *re* a Comm'n of Inquiry into the Police Dep't of Charlottetown, *supra* note 64; Hochoy v. N.U.G.E., *supra* note 17.

[104] *See, e.g.*, Landreville v. The Queen (No. 2), *supra* note 68; *Re* Bortolotti and Ministry of Hous., 15 O.R. (2d) 617, at 623, 76 D.L.R. (3d) 408, at 415 (C.A. 1977); *Re* Royal Comm'n into Metropolitan Toronto Police Practices and Ashton, 10 O.R. (2d) 113, at 121, 64 D.L.R. (3d) 477, at 485 (Div'l Ct. 1975).

[105] R.S.C. 1952, c. 154.

[106] Landreville v. The Queen (No. 2), *supra* note 68. This in itself provides an interesting comment on the emphasis laid by Miller J. and Morrow J.A. on how the presence of judges on commissions of inquiry safeguards the rights of the subject (*see* text accompanying notes 95-97, *supra*). *Cf. Re* Royal Comm'n on Conduct of Waste Management Inc., 17 O.R. (2d) 207 (Div'l Ct. 1977).

[107] *Re Bortolotti*, *supra* note 104, at 625-26, 76 D.L.R. (3d) at 417. *See generally Re* Inquiry into the Confidentiality of Health Records in Ontario, 21 O.R. (2d) 402, 90 D.L.R. (3d) 576 (Div'l Ct. 1978), where the court ruled on the application of evidentiary rules of privilege to the disclosure of medical information to the police by members and employees of hospital boards and by doctors not subject to the control of such boards; *rev'd in part* by the Court of Appeal, May 10, 1979; leave to appeal granted by the Supreme Court of Canada (*sub. nom.* Solicitor General of Canada v. Royal Comm'n of Inquiry into the Confidentiality of Health Records in Ontario), June 18, 1979.

[108] *Re Bortolotti*, *supra* note 104, at 625, 76 D.L.R. (3d) at 417

amounting to an error of jurisdiction".[109] The obverse to this would be letting in irrelevant evidence which, in effect, would allow the Commission to "define its own terms of reference under the guise of evidential rulings on admissibility".[110] Otherwise, the general rule applies that, apart from statute, commissions of inquiry are not bound by the ordinary rules of evidence. Also examined of late has been the power of the majority of commissioners to make binding rulings[111] and the question of who has standing before a commission of inquiry to call for the exercise of rights on his behalf by the commission.[112]

A more difficult question is whether a person is entitled to claim from a commission of inquiry non-statutory procedural rights founded on the common law. Usually, of course, such rights are based on the principles of natural justice which traditionally apply only in respect of quasi-judicial functions. Miller J. stated that when the report of a commission is capable of affecting the rights of a person, the courts may supervise. By implication, the specific function would be classified by him as quasi-judicial if the report would form the legal basis for a decision or legal action by some higher authority.[113] While reminiscent of the debate in *Law Soc'y of Upper Canada v. French*,[114] this view may be said to accord with authority that recognizes that the various functions of a tribunal must be broken down in order to assess how the one in issue should be characterized.[115] A second situation described by him as possessing a quasi-judicial quality is where during the course of its proceedings a commission wrongfully impairs personal or property rights. Decisions of this sort should presumably attract the principles of natural justice.[116] Finally, there is the interesting question of whether one day the fairness doctrine might not make this sort of analysis unnecessary.[117] As was recently stated by Lord Denning with respect to a body that in the end was required to form an opinion and hence was not strictly analogous to the typical commission of inquiry:

> The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.[118]

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[109] *Id.* at 626, 76 D.L.R. (3d) at 417.

[110] *Re* Royal Comm'n into Metropolitan Toronto Police Practices and Ashton, *supra* note 104.

[111] *Re Bortolotti*, *supra* note 104.

[112] *Re* Royal Comm'n on Conduct of Waste Management Inc., *supra* note 106.

[113] Royal American Shows Inc. v. Laycraft, *supra* note 80.

[114] [1975] 2 S.C.R. 767, 49 D.L.R. (3d) 1 (1974).

[115] *See* text accompanying notes 83-88, *supra*.

[116] *See* Saulnier v. Quebec Police Comm'n, *supra* note 85; Keable v. Attorney General of Canada, *supra* note 62; Cotroni v. Quebec Police Comm'n, *supra* note 91, at 1057-58, 80 D.L.R. (3d) at 497-98.

[117] *See* text accompanying notes 33 & 34, *supra*.

[118] Selvarajan v. Race Relations Bd., [1976] 1 All E.R. 12, at 19, [1975] 1 W.L.R. 1686, at 1694 (C.A. 1975).

III. Torts and Administrative Decisions

Earlier suggestions[119] that traditional judicial review remedies were no substitute for damages where unlawful administrative actions caused economic loss seem to have borne fruit, at least amongst litigants. Certainly, the number of reported cases in Canada has risen dramatically. Moreover, in the course of litigating a wide array of fact situations, lawyers have had to stretch the boundaries of present legal doctrines to envelop new principles and revive other ones. However, this is not to say that judges and lawyers always know what they are doing in this area.

The distinction may be missed between an invalid administrative decision-making act which itself directly causes loss and one which causes officialdom to commit a nominate tort with regard to which, if valid, the administrative act would have been lawful authority. It was certainly lost sight of by the plaintiff and the Alberta Supreme Court in a case[120] concerning the seizure of the plaintiff's vehicles by officers of the transport board for an alleged violation of a condition of his operating licence. The court found that the condition limiting the plaintiff's extraprovincial operations was void. But instead of then dismissing the defence of lawful authority and proceeding on the basis that officers of the board had committed the tort of conversion, the court became entangled in a completely irrelevant discussion of the difference between ministerial and judicial acts. As was so well demonstrated more than one hundred years ago,[121] if in answer to a nominate tort, the defendant claims that he acted on the basis of lawful authority, characterizing that act as judicial or ministerial is immaterial except for purposes of establishing its validity or legality.

A. *Negligence*

Negligence remains the most common cause of action. However, to establish this tort a plaintiff must first satisfy a court that the defendant owed him a duty of care. While it may not be difficult to prove that a statute or regulation did impose some duty of responsibility on a public tribunal or official, the courts have been careful to note that where the duty is a public one for which public law remedies are available, it is incumbent upon the plaintiff to go one step further and translate that public duty into a private duty of care owed to him.[122]

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[119] Molot, *Tort Remedies Against Administrative Tribunals for Economic Loss*, in [1973] Special Lectures L.S.U.C. 413; Molot, *Annual Survey of Administrative Law*, 7 Ottawa L. Rev. 514, at 584-86. The growing interest in this area is underscored by the space devoted to it in Wade, Administrative Law 617-50 (4th ed. 1977)

[120] National Freight Consultants Inc. v. Motor Transp. Bd., [1978] 2 W.W.R. 330, 84 D.L.R. (3d) 504 (Alta. S.C.); *rev'd* 14 A.R. 252 (C.A. 1979) (on the ground that the Board's decision was intra vires).

[121] Cooper v. Wandsworth Bd. of Works, 14 C.B., N.S. 180, 143 E.R. 414 (1863).

[122] Home Office v. Dorset Yacht Co., [1970] A.C. 1004, [1970] 2 All E.R. 294 (H.L.); Welbridge Holdings Ltd. v. Winnipeg, [1971] S.C.R. 957, 22 D.L.R. (3d) 470.

This reasoning exercise was enlarged upon recently by the House of Lords in *Anns v. Merton London Borough Council*.[123] In that case, defective housing foundations allegedly not in conformity with municipal by-laws authorized by the Public Health Act, 1936[124] had caused damage to a two-storey block of maisonettes. The plaintiffs claimed as against the city council that municipal employees had either failed to inspect the foundations before the superstructure was erected, or had done so negligently. Lord Wilberforce, on behalf of the more cautious majority, made reference to the difference between the policy or discretionary responsibilities of a public authority and that authority's responsibilities for "the practical execution of policy decisions".[125] The latter he described as "operational powers" and stated: "It can safely be said that the more 'operational' a power or duty may be, the easier it is to superimpose a common law duty of care."[126] It is interesting to note that this same distinction was discussed six years earlier in the Supreme Court of Canada by Laskin J. (as he then was).[127] There the line was drawn between legislative and quasi-judicial functions and functions which are "administrative or ministerial, or perhaps better categorized as business powers".[128] The distinction made by Laskin J. was expressed in more absolute terms than that of Lord Wilberforce: "[T]here may be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasi-judicial duty."[129]

Insofar as the claim based on failure to inspect was concerned, the defendant in the *Anns* case[130] understandably relied heavily on *East Suffolk Rivers Catchment Board v. Kent*[131] as indicating that the exercise of the power to inspect was purely discretionary. To this Lord Wilberforce replied that "there may be room, once one is outside the area of legitimate discretion or policy, for a duty of care at common law".[132] He thus made

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See also Kwong's Estate v. Alberta, 14 A.R. 120, at 140 (C.A. 1978), where the majority of the court stated:

> [T]he alleged negligence is in the Department failing to take steps to protect, or at least to warn, the public of the potential for death or injury by operating a certain type of furnace with the fan-compartment door removed. In my view, while there is a public duty [under the Gas Protection Act, R.S.A. 1970, c. 156] and assuming a breach of it, it is not a breach which is actionable at the instance of any member of the public.

See also Takaro Properties Ltd. v. Rowling, [1978] 2 N.Z.L.R. 314 (C.A.).

[123] [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.). *See also* Comment, 24 McGill L.J. 277 (1978).

[124] 26 Geo. 5 & 1 Edw. 8, c. 49.

[125] *Supra* note 123, at 754, [1977] 2 All E.R. at 500.

[126] *Id.*

[127] Welbridge Holdings Ltd. v. Winnipeg, *supra* note 122.

[128] *Id.* at 968, 22 D.L.R. (2d) at 477.

[129] *Id.*

[130] *Supra* note 123.

[131] [1941] A.C. 74, [1940] 4 All E.R. 527 (H.L.).

[132] *Supra* note 123, at 758, [1977] 2 All E.R. at 503.

the absence of authority or jurisdiction a condition precedent to the finding of a duty of care in such cases. With respect to a duty of care as regards the manner of an inspection actually carried out, he stated that "[o]n principle there must surely be a duty to exercise reasonable care".[133] However, although this is a task heavy with operational responsibility, that duty still arises under statute and therefore may possess some discretionary element. To that extent, a plaintiff claiming negligence must prove "that action taken was not within the limits of a discretion bona fide exercised".[134]

This way of linking the public law concept of jurisdiction or authority to the private law concept of duty of care is more helpful than the unclear way in which the two were discussed in *Welbridge*.[135] Nonetheless, it still leaves open to debate just what is meant by jurisdiction or authority. Is it the broad definition which found favour with most of the Law Lords in *Anisminic Ltd. v. Foreign Compensation Commission*,[136] or is it the narrower one preferred by Lord Reid in that case? Some assistance is to be found in a recent Court of Appeal decision[137] which opted for the latter position when a judge was sued for damages. Equally if not more difficult to predict is the line to be drawn between discretionary and operational powers. Unless inspection is required by law, surely the decision to inspect lies within the discretion of municipal officials. Even where there is a duty to inspect, the manner of inspection is also discretionary in the absence of detailed legal requirements as to how this obligation must be fulfilled. In the end, the distinctions drawn by Lord Wilberforce are far from satisfying and one can only hope that subsequent decisions will prove more helpful.

Lord Salmon in a minority opinion in *Anns*[138] would have taken the high road and found a duty of care with respect to the inspection of the foundations in question. The basis for this conclusion was his agreement with the dissenting judgment of Lord Atkin in the *East Suffolk Rivers* case[139] where the latter said:

> [E]very person whether discharging a public duty or not is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care. This duty exists whether a person is performing a public duty, *or merely exercising a power which he possesses* either *under statutory authority* or in pursuance of his ordinary rights as a citizen.[140]

What kind of a "power" does this refer to, particularly in view of Lord Atkin's preface of "merely" exercising a power? One may surmise that it

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[133] *Id.* at 755, [1977] 2 All E.R. at 501.

[134] *Id.*

[135] *Supra* note 122.

[136] [1969] 2 A.C. 147, [1969] 1 All E.R. 208 (H.L. 1968).

[137] Sirros v. Moore, [1974] 3 All E.R. 776, [1974] 3 W.L.R. 459 (C.A.). *See also* Nakhla v. McCarthy, [1978] 1 N.Z.L.R. 291 (C.A. 1977).

[138] *Supra* note 123.

[139] *Supra* note 131.

[140] *Id.* at 88, [1940] 4 All E.R. at 533. This passage was quoted in *Anns*, *supra* note 123 at 766-67, [1977] 2 All E.R. at 511. Emphasis is that of Lord Salmon.

probably is not intended to include legislative or judicial acts and therefore, when combined with public duty may well include those "business powers" of Laskin J. and "operational powers" of Lord Wilberforce. However, it is interesting that Lord Salmon seems unconcerned with whether officialdom was acting within or outside its authority in causing the damage. Of course, it may be answered that only when discretionary functions of the higher order[141] are in issue, does *vires* or jurisdiction become relevant.

On the difficult issue adverted to above of where to draw the line between business/operational activities and those of a more discretionary variety, it was held in *Bowen v. Edmonton (No. 2)*[142] that the latter encompass the approval by a city council of a plan of subdivision. A subsequent case, *Harvie v. Calgary Regional Planning Commission*,[143] characterized a similar activity as administrative. While the *Bowen* case described the same activity as not being administrative, it must be kept in mind that *Bowen* was a tort situation which used "administrative" as a synonym for business/operational powers, whereas *Harvie* was a *certiorari* situation in which the traditional quasi-judicial/administrative distinction had to be addressed. A British Columbia case[144] confirms this approach in a situation where the warden of a penitentiary exercised the discretion given to him by section 26 of the Penitentiary Act[145] in deciding to give the defendant prisoner a temporary pass. In reaching the conclusion that the warden acted within his authority and in good faith, Hutcheon J. found that he owed no tort duty of care, and reached back to an earlier House of Lords decision[146] that had also found no liability where the official exercising a discretion pursuant to statutory authority had remained within his jurisdiction. One should note that because *Anns*[147] confirmed the result in *Dutton v. Bognor Regis U.D.C.*,[148] the trial decision of the British Columbia Supreme Court in *McCrea v. White Rock*,[149] a building inspection case, is to be preferred to that of the Court of Appeal,[150] which had gone out of its way to view the *Dutton* decision with disfavour.

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[141] *I.e.*, those functions encompassed by what remains after business or operational powers are subtracted from the whole.

[142] [1977] 6 W.W.R. 344, 80 D.L.R. (3d) 501 (Alta. S.C.).

[143] 11 A.R. 315, 5 Alta. L.R. (2d) 301 (S.C. 1978). This decision was reversed by the Appellate Division, 12 A.R. 505, 8 Alta. L.R. (2d) 166 (1978), which found the function in issue to be quasi-judicial.

[144] Toews v. MacKenzie, [1977] 6 W.W.R. 725 (B.C.S.C.).

[145] R.S.C. 1970, c. P-5.

[146] Everett v. Griffiths, [1921] 1 A.C. 631, 125 L.T. 230 (H.L.).

[147] *Supra* note 123.

[148] [1972] 1 Q.B. 373, [1972] 1 All E.R. 462, [1972] 2 W.L.R. 299 (C.A. 1971).

[149] [1973] 1 W.W.R. 542, 34 D.L.R. (3d) 227 (B.C.S.C.).

[150] [1975] 2 W.W.R. 593, 56 D.L.R. (3d) 525 (B.C.C.A.). In Kwong's Estate v. Alberta, *supra* note 122, at 141-42, McGillivray C.J.A. acknowledged that, in view of the *Anns* decision and the Supreme Court of Canada decision in O'Rourke v. Schacht, [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96 (1974), "*Bognor Regis* is today accepted in Canada, limited, however, to there being active negligence on the part of an inspector who has done negligently what he was entrusted to do properly."

In *French v. Law Soc'y of Upper Canada*,[151] negligence was alleged against the Benchers in the exercise of their investigative functions under the Act.[152] The Ontario Court of Appeal had no difficulty in finding these to be part of the performance of a quasi-judicial function, and that the Society was engaged in discretionary and quasi-judicial acts. Therefore, the *Harris*[153] and *Partridge*[154] cases were applied, and negligence was not a viable cause of action in the circumstances. Even though *Welbridge*[155] was not cited in the judgment, it is easy to accommodate the facts and results of *French* within the framework established by Laskin J. in *Welbridge*, and by Lord Wilberforce in the subsequent *Anns* case.[156]

With the important expansion of negligence law as a result of *Hedley Byrne*,[157] a variation of this theme has been the increasing attempt to fix officials with liability because their allegedly erroneous advice or representations have led the private citizen to suffer financial loss. Many of the cases referred to above placed reliance on this development, but the more classical analysis of the principles developed by *Hedley Byrne* in the context of the private sector was applied recently to government by the Supreme Court of Canada in *The Pas v. Porky Packers Ltd.*[158] There, the majority noted that the plaintiff's representative was experienced in the meat trade, was a town councillor, and was a member of the planning commission. How then could such an experienced person, in asking for information from the municipality with respect to the availability of lands that were industrially zoned, be said to be relying on the skill and judgment of municipal officials? Other allegations by the plaintiff were turned aside as not amounting to representations by the municipality at all. Similar results were reached in *Couture Estate v. The Queen*,[159] where the Trial Division of the Federal Court found that there was no negligence in failing to inform a licensee that his licence had become invalid as a result of the

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[151] 9 O.R. (2d) 473, 61 D.L.R. (3d) 28 (C.A. 1975). *See also* Voratovic v. Law Soc'y of Upper Canada, 20 O.R. (2d) 214 (H.C. 1978). It is interesting to note the limitation placed upon plaintiffs because they must plead tort and to contrast this situation with non-statutory self-governing organizations, where the legal relationship is based on contract and, consequently, where disciplinary action based on an unlawful act by the organization leads to suits founded on breach of contract. Philpzyk v. Edmonton Real Estate Bd., [1975] 4 W.W.R. 449, 55 D.L.R. (3d) 424 (Alta. C.A.); Tippet v. International Typographical Union Local 226, [1976] 1 W.W.R. 673, 71 D.L.R. (3d) 146 (B.C.S.C.); Abouna v. Foothills Provincial Gen. Hosp. Bd., [1978] 2 W.W.R. 130, 8 A.R. (2d) 94 (C.A.).

[152] The Law Society Act, 1970, R.S.O. 1970, c. 238.

[153] Harris v. Law Soc'y of Alta., [1936] S.C.R. 88, [1936] 1 D.L.R. 401.

[154] Partridge v. General Council of Medical Educ., 25 Q.B.D. 90, 62 L.T. 787 (C.A. 1890).

[155] *Supra* note 122.

[156] *Supra* note 123.

[157] Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

[158] [1977] 1 S.C.R. 51, 65 D.L.R. (3d) 1 (1976). *Cf.* Jung v. Burnaby, [1978] 6 W.W.R. 670, 91 D.L.R. (3d) 592 (B.C.S.C.). *See also* Patrick L. Roberts Ltd. v. Sollinger Indus. Ltd., 19 O.R. (2d) 44, 84 D.L.R. (3d) 113 (C.A. 1978).

[159] [1976] 1 F.C. 515, 28 C.P.R. (2d) 182 (Trial D. 1975).

coming into force of the new Broadcasting Act.[160] The invalidity of the licence was a result of a legal act quite divorced from any acts, negligent or otherwise, of the officials. They were under no legal duty to inform the licensee of the new statute and its consequences for his licence. This is an odd finding in view of the fact that the licence was issued in the very month that the new Act was passed and that it was for a one-year term. In any event, even though the officials wrote letters to the licensee in which they represented that the licence was still in effect, it was found that negligence was not in fact the cause of his loss because it would have occurred even if the letters had not been sent. Finally, in *Wilfrid Nadeau Inc. v. The Queen*,[161] it was found that officials reporting to the Treasury Board on the financial capacity of the plaintiff to fulfil a contract had not been negligent in the bases or result of these financial reports.

B. *Statutory Tort Duty*

There is also the more traditional exercise of trying to convert a statutory duty directly into a common law duty of care. This tends to be a difficult exercise in Canada, whether claimed against a private or a public defendant. For example, the breach of a regulation obligating a municipality to supply proper uniforms to its police constables did not give rise to a cause of action.[162] The duty of the Minister of Transport under the Aeronautics Act[163] to keep all government airports properly maintained was a public duty only, not giving rise to enforceable private rights.[164] The responsibility of the Postmaster-General for management of the Post Office could not be translated into a tort (or contract) duty owed to its users[165] who suffer financial loss during a strike of postal employees. Nor did the general responsibility and regulation-making powers of the Commissioner of the Northwest Territories with respect to education and employees give rise to a cause of action against him or his servants for injuries suffered by a student at school.[166]

This question assumes completely different proportions when the duty is based on an obligation in the B.N.A. Act and the parties to the action are a province and the Dominion. That was the situation before the Federal Court of Appeal in *The Queen (Canada) v. The Queen (P.E.I.)*.[167] The Government of Prince Edward Island claimed that by reason of the Dominion's failure to live up to its statutory obligation to provide it with an "efficient steam service for the conveyance of mails and passengers",

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[160] R.S.C. 1970, c. B-11.

[161] [1977] 1 F.C. 541 (Trial D.). *But cf.* Patrick L. Roberts Ltd. v. Sollinger Indus. Ltd., *supra* note 158.

[162] Persall v. Township of Oakland, 17 O.R. (2d) 239 (C.A. 1977).

[163] R.S.C. 1970, c. A-3.

[164] Canadian Pacific Air Lines, Ltd. v. The Queen, [1977] 1 F.C. 715, 71 D.L.R. (3d) 421 (Trial D. 1976), *aff'd* [1979] 1 F.C. 39, 87 D.L.R. (3d) 511 (App. D. 1978).

[165] Canadian Fed'n of Independent Business v. The Queen, [1974] 2 F.C. 443, 49 D.L.R. (3d) 718 (Trial D.).

[166] Kezar v. The Queen, [1977] 2 F.C. 41, [1977] 2 W.W.R. 83 (Trial D.).

[167] [1978] 1 F.C. 533, 83 D.L.R. (3d) 492 (App. D. 1977).

Canada had caused the province to suffer financial loss, and that this loss was recoverable in an action in tort based on breach of this legislative duty. A majority of the court held that the province did have a legally enforceable right to be compensated for a breach of the duty owed to it. Therefore, that right was not merely a public one incapable of being converted into a private cause of action; nor was there merely a political obligation contemplated by the agreement, the enforcement of which would not fall within the purview of the courts.[168] What the Federal Court may be saying is not that a statutory duty is being converted into a common law duty of care, but rather that the tort obligation flows directly from the statute. This, of course, is reminiscent of the reasoning of Lord Chief Justice Holt in *Ashby v. White,*[169] who found that the defendant's breach of a statutory duty which had resulted in injury to the plaintiff gave rise to an action on the case.

C. *Other Torts*

As for other tort claims, the Manitoba Court of Appeal[170] took a very strong line against a marketing board that had used tactics of harassment against the plaintiff. The court had no difficulty in finding that the action of the board, which had been given a monopoly in the area by the Legislature, in denying credit to any customer of the board who dealt with the plaintiff, was an attempt to induce others to forego their contractual relationships with the plaintiff. This amounted to the tort of unlawful interference with contractual relationships, and damages were awarded not on the basis of breach of contract, but with regard to the economic position lost by the plaintiff in the general fruit and vegetable business. The court went on to find the board liable for intimidation and for the tort of using unlawful means to cause damage to another. The vindictiveness of the board was a flagrant abuse of power outside the ambit of the objects of the statute, and was explicitly recognized as such by the court's award of punitive or exemplary damages.

In a recent case in the Australian High Court,[171] officials had unlawfully issued a certificate of clearance under the Australian Customs Act,[172] thereby allowing the boat in question to be sailed away by others; the boat's owner (the plaintiff) sought to rely on an action on the case as interpreted by an earlier[173] High Court decision. The Full High Court in

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[168] *Cf.* South Australia v. Australia, 35 A.L.J.R. 460, at 461, 464-65, 466-67, 468, 108 C.L.R. 130, at 140-41, 148-49, 154, 157 (H.C. 1962).

[169] 1 Bro. P.C. 62, 1 E.R. 417 (H.L. 1703).

[170] Gershman v. Manitoba Vegetable Producers' Marketing Bd., [1976] 4 W.W.R. 406, 69 D.L.R. (3d) 114 (Man. C.A.). For another brief reference to the tort of unlawful interference with contractual relations, *see* McKenzie v. Peel County Bd. of Educ., 5 O.R. (2d) 549, 51 D.L.R. (3d) 33 (C.A. 1974).

[171] Kitano v. Australia, 47 A.L.J.R. 757, 129 C.L.R. 151 (H.C. 1973).

[172] Customs Act, 1906-1968 (Cth).

[173] Beaudesert Shire Council v. Smith, 18 L.G.R.A. 65, 120 C.L.R. 145 (H.C. 1966). This case was doubted by the New Zealand Court of Appeal in Takaro Properties Ltd. v. Rowling, *supra* note 122.

Kitano[174] affirmed the trial judgment of Mason J. that intention was not an element of the tort. In any event, it was not the unlawful act in question that deprived the plaintiff of possession of his boat, as this deprivation had occurred before the certificate had been issued. The Court was not willing in this situation to find a tort on the basis of "a mere breach of the statute and consequential damage".[175]

Manitoba Fisheries Ltd. v. The Queen[176] concerned the Freshwater Fish Marketing Corporation, which by statute[177] had been given exclusive control over the marketing of freshwater fish. The Corporation was placed in the legal position of depriving a company that had an established clientele in the purchase, processing and sale of such fish from being able to continue to carry on its business. The Supreme Court of Canada[178] held that the statute had the effect of confiscating or expropriating the plaintiff's goodwill as a going concern, consequently rendering its physical assets virtually worthless. In the absence of any statutory provision denying compensation, the plaintiff was entitled to rely on the *De Keyser* case,[179] which held that a statute is not to be interpreted as taking away property without compensation. *Manitoba Fisheries* may be compared with the House of Lords decision in *Westminster Bank,*[180] which distinguished between government taking property by compulsory purchase or expropriation (this giving rise to compensation) and government refusing to give planning permission to develop lands, which was what had actually happened in *Westminster Bank.*

IV. DISCRETION

In his famous book on discretionary justice, Professor Davis responds to William Pitt's words "where law ends tyranny begins" with this counsel: "I think that in our system of government, where law ends tyranny need not begin. Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness."[181] The extent to which our political institutions are willing to recognize the potential dangers inherent in administrative discretion provides some measure of the health of those institutions and the laws they administer.

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[174] 48 A.L.J.R. 343 n., 129 C.L.R. 151, at 176 (Full Ct. 1974).

[175] *Supra* note 171, at 765, 129 C.L.R. at 175.

[176] [1979] S.C.R. 101, [1978] 6 W.W.R. 496, 88 D.L.R. (3d) 462.

[177] Freshwater Fish Marketing Act, R.S.C. 1970, c. F-13.

[178] *Supra* note 176.

[179] Attorney-General v. De Keyser's Royal Hotel, Ltd., [1920] A.C. 508, 89 L.J. Ch. 417 (H.L.).

[180] Westminster Bank Ltd. v. Minister of Hous. and Local Gov't, [1971] A.C. 508, [1970] 1 All E.R. 734 (H.L. 1970).

[181] DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 3 (1969).

A. *Discretion and Ultra Vires*

Some indication was given earlier of the increased activity of courts in questioning the legal authority of tribunals to exercise wide discretionary powers. This tendency would appear to be the consequence of the perhaps not unfortuitous coincidence of the *Padfield* case,[182] which found the House of Lords only too willing to strike down a minister's improper exercise of discretion, and the *Anisminic* decision,[183] where the same court evolved very flexible and potentially far-reaching principles for calling into question the exercise of discretion by any tribunal.

The two cases have been linked to strike down the discretionary act of the Ontario Minister of Transportation who, in refusing access and land-use permits for a proposed shopping centre, based his decision entirely on planning considerations that were not contemplated by, and hence were irrelevant to, the statutory scheme[184] under which he was authorized to act.[185] The thesis was borne out at an even higher level in *Re Doctors Hospital and Minister of Health*.[186] The Lieutenant-Governor in Council was empowered by the Public Hospitals Act[187] to exercise discretion in deciding whether or not to close down a public hospital. However, the order to close a hospital was set aside because it had been prompted by financial or budgetary reasons which were held to be irrelevant considerations under the Act.[188]

The English courts too have continued to apply these principles with increasing sophistication. If Parliament has stated that one of the objectives to be used in regulating air transport licences is that at least one major British airline other than British Airways be given the opportunity of providing charter air service, the Minister cannot ignore this very material consideration by formulating a policy guideline to the effect that no more than one British airline servicing the same route shall be licensed unless British Airways gives its consent.[189] And finally, the failure of a Minister to address himself to relevant considerations in deciding whether a local education authority acted or proposed to act unreasonably led the House of Lords to find that he did not direct his mind to the right question.[190]

This issue of relevant consideration by the tribunal, or the asking of the proper question, has also become an important means of controlling discretion exercised by less exalted officialdom. In *Re Funk and Manitoba*

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[182] *Supra* note 18.

[183] *Supra* note 136.

[184] The Public Transportation and Highway Improvement Act, R.S.O. 1970, c. 201, s. 35 (previously entitled The Highway Improvement Act and renamed by S.O. 1971, vol. 2, c. 61, s. 1).

[185] *Re* Multi-Malls Inc. and Minister of Transp., *supra* note 49.

[186] *Supra* note 21.

[187] R.S.O. 1970, c. 378, s. 4(5) *as amended by* S.O. 1972, c. 90, s. 4(5).

[188] *See also* statements of LeDain J. in Inuit Tapirisat of Canada v. Léger, *supra* note 4.

[189] Laker Airways Ltd. v. Department of Trade, *supra* note 18.

[190] *See* Secretary of State for Educ. and Science v. Tameside, *supra* note 18.

Labour Board,[191] it was held that discretion to absolve an employee of the obligation of paying union dues on the basis of "his religious beliefs" must be exercised in relation to *his* beliefs; to examine the religious beliefs of the church to which he belongs is to ask oneself the wrong question and thereby exceed jurisdiction. Although labour relations legislation is based on similar principles across Canada, one Nova Scotia case[192] demonstrates the danger of transposing the law of one jurisdiction to another for the purpose of interpreting the act of an employer. Nova Scotia regulations expressly provided that, in determining whether a pre-certification vote would serve any useful purpose, the Labour Relations Board should have regard only to the wishes of the employees expressed by petition; and therefore, apart from the issue of voluntariness, for the Board to consider the Ontario test of undue employer interference in the absence of petitions is to take into account an irrelevant consideration.[193] In another case, the tribunal in question had made orders pursuant to statutory authority, but because it had failed to require compliance with the criteria in its orders, the court held that it had failed to take into account material considerations.[194] Where an application to reclassify lands was defeated by a municipal council on the basis that the lands should be used for park purposes, the Appellate Division of the Alberta Supreme Court held that the decision was based on an irrelevant consideration.[195]

This substantive issue is not unrelated to the question of what evidence may be determined by a court to be relevant. Ordinarily, even a tribunal which is not bound by the general principles of evidence is discouraged by the courts from receiving irrelevant evidence, and may be found to have erred in law for doing so.[196] What may be relevant evidence is immediately dependent upon the material factual issues confronting the tribunal.

In *Dallinga v. City of Calgary*,[197] the Appellate Division of the Alberta Supreme Court held that in the granting of a development permit the tribunals in question were bound by The Planning Act[198] to look to planning considerations that relate solely to the use and development of

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[191] [1976] 3 W.W.R. 209, 66 D.L.R. (3d) 35 (Man. C.A.).

[192] *Re* Schwartz (W.H.) & Sons, 12 N.S.R. (2d) 606, 65 D.L.R. (3d) 506 (C.A. 1975).

[193] *Id.*

[194] N.S. Forest Indus. v. N.S. Pulpwood Marketing Bd., 12 N.S.R. (2d) 91, at 113-14, 61 D.L.R. (3d) 97, at 123-24 (C.A. 1975). The case is concerned with the administration of pulpwood marketing by the Nova Scotia Pulpwood Marketing Board.

[195] Campeau Corp. v. City of Calgary, *supra* note 33. *Cf.* Vancouver v. Simpson, [1977] 1 S.C.R. 71, 65 D.L.R. (3d) 669 (1976).

[196] *See, e.g., Re* McKendry, [1973] F.C. 126, 35 D.L.R. (3d) 305 (App.D.); T.A. Miller, Ltd. v. Minister of Hous. and Local Gov't, [1968] 2 All E.R. 633, [1968] 1 W.L.R. 992 (C.A.).

[197] [1976] 1 W.W.R. 319, 62 D.L.R. (3d) 433 (Alta. C.A. 1975). *See also Re* Marques and Dylex Ltd., 18 O.R. (2d) 58, at 64-67, 81 D.L.R. (3d) 554, at 560-63 (Div'l Ct. 1977).

[198] R.S.A. 1970, c. 276.

land. Therefore, evidence that the applicant had commenced to operate his business on the lands in question before he had received any permit to do so, and character evidence showing deception by the applicant in his business practices, were irrelevant. While this could well have been considered an error of law which under the Act was a ground for appeal, the court was not willing to place on the tribunal such strictures as to burden the manner in which it would then have to conduct its hearings. Moving on to the jurisdictional issue, the court appeared to proceed on the following basis: irrelevant evidence was admitted; the evidence was irrelevant because it related to considerations that were of no concern to the tribunals in exercising their discretion under the Act; consequently, the considerations to which the evidence in question related were immaterial and so, from a strictly evidentiary perspective, the court was concerned with materiality rather than relevance. The matter became a particularly difficult one for the court because the Development Appeal Board gave no reasons for refusing the requested permit, and yet "both relevant and irrelevant evidence was before it".[199] The *Padfield* decision[200] was relied on to support the principle that the absence of reasons cannot deprive the applicant of his rights and the court of its jurisdiction. While evidence relating to material or relevant considerations may have been relied on by the Board, the court examined the circumstances surrounding the Board's receipt of evidence on immaterial questions, and concluded that the only reasonable inference was that the Board must have taken this evidence, and consequently these questions, into account in the course of exercising its discretion. Therefore, the Board's order was vacated and a new hearing of the permit application was ordered.

B. *Discretion and Informal Guidelines*

While administrative discretion must be exercised in accordance with, and subject to, the law, what place does the policy guideline or interpretation bulletin have in the scheme of things if it has not been translated into a formal legal norm?

An information bulletin issued by the Deputy Minister of National Revenue for the purpose of indicating how the Department intends to administer particular provisions of income tax legislation is not binding on anyone. A taxpayer may challenge the interpretation in the bulletin. "The Act has to be interpreted by the Court and not by rulings of departmental officers so defendant is not estopped in the present proceedings from

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[199] *Dallinga*, *supra* note 197, at 331, 62 D.L.R. (3d) at 444. *See also* Green, Michaels & Assocs. v. Public Utils. Bd., 13 A.R. 574, at 592-93 (C.A. 1979). The matter is simplified for the courts when the only evidence in support of an exercise of discretion relates to an immaterial consideration and hence is required by law to be ignored by the tribunal. Then the applicant can point to there having been no evidence at all in support of the decision: *see* Actus Management Ltd. v. City of Calgary, [1975] 6 W.W.R. 739, at 749, 62 D.L.R. (3d) 421, at 430-31 (Alta. C.A.); Fiordland Venison Ltd. v. Minister of Agriculture and Fisheries, [1978] 2 N.Z.L.R. 341 (C.A.).

[200] *Supra* note 18.

refusing to apply these Interpretation Bulletins''.[201] Similarly, a manual prepared for administering competitions for civil service positions is not carved in stone. It is one of the many virtues of informal policies that they do "not impose rules to be followed strictly, but merely guidelines to be employed in most cases, but [*sic*] to be adapted and modified to meet the varying circumstances which are found in the public service''.[202] The Professional Conduct Handbook issued to members by the Law Society of British Columbia, while "not a statute or a rule made pursuant to a statute'', may be used as a guide both by the Society and by its members in disciplinary matters.[203] However, any breach of a ruling in the Handbook does not per se constitute professional misconduct; the Law Society must expressly so find.[204] By contrast, where an administrator promulgates a policy in mandatory language imposing conditions precedent and precluding consideration of each case on its merits, that policy may be found to be both "a regulation or order made . . . without jurisdiction'' and a "void condition'' that has been "promulgated in an unlawful edict''.[205]

These and other attributes of informal administrative policies have been discussed recently in the Supreme Court of Canada. *Capital Cities Communications Inc. v. C.R.T.C.*[206] involved a consideration of an order of the C.R.T.C. amending the licence of a cablevision company so as to permit the random deletion of advertisements from the television signal of a Buffalo station. This order was expressly stated by the Commission to be in accordance with an earlier promulgated policy statement which had been formulated after public hearings and the submission of written briefs. Chief Justice Laskin, speaking for the majority, made a number of points:

> (i) Any regulations in force relating to the licensing function of the Commission would have to be followed even if in conflict with that body's policy statements. "The regulations would prevail against any policy statements.''[207]
>
> (ii) Adjudicative decisions in the area of licensing and with respect to an individual licensee do not have to be based on applicable regulations. The C.R.T.C. may proceed to regulate either by the making of

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[201] C.P.R. v. The Queen, [1976] 2 F.C. 563, at 590, 76 D.T.C. 6120, at 6132 (Trial D.), *aff'd* [1978] 2 F.C. 439 (App. D.).

[202] *Re* Civil Service Assoc. of Alta. and Farran (No. 2), 74 D.L.R. (3d) 48, at 53 (Alta. S.C. 1977).

[203] *Re* Fan and Law Soc'y of B.C., 4 B.C.L.R. 16, at 22, 77 D.L.R. (3d) 97, at 102 (C.A. 1977).

[204] *Id.* at 22, 77 D.L.R. (3d) at 102-03.

[205] *Re* Phillips and Registrar, Mortgage Brokers Act, 86 D.L.R. (3d) 518, at 521, (B.C.C.A. 1978).

[206] [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609 (1977). The Supreme Court has also decided that administrative practices or policies may be looked to for the purpose of interpreting ambiguous legislation: Harel v. Deputy Minister of Revenue (Quebec), [1978] 1 S.C.R. 851, at 858, 80 D.L.R. (3d) 556, at 560-61 (1977).

[207] *Capital Cities*, *supra* note 206, at 170, 81 D.L.R. (3d) at 629.

regulations, by adjudicative decision-making, or by both techniques in tandem.[208]

(iii) If the Commission decides to proceed on the basis of its adjudicative powers, it may establish guidelines which announce in advance the overall policy of the C.R.T.C. "Although one [a policy] could mature as a result of a succession of applications, there is merit in having it known in advance."[209]

(iv) Any such policy, if it is to be lawfully applied in a particular case, must fall within the legislated objects and policies of the empowering statute, in this case sections 3 and 15 of the Broadcasting Act.[210]

(v) While these guidelines never purported to be regulations, the Court laid some stress on the fact that they were only "arrived at after extensive hearings at which interested parties were present and made submissions".[211]

(vi) A full adjudicative hearing at which the licensee and the appellants were represented permitted all parties to be "heard as to the policy of the Commission and as to the merits of the application".[212]

(vii) Finally, the classical formulation of Bankes L.J. in the *Kynoch* case[213] was referred to, presumably for the principle that, so long as a properly adopted policy is not applied dogmatically so as to raise a reasonable inference that the discretionary authority in issue has been entirely abdicated,[214] a court will not quarrel with the application of the policy in the individual case before it.

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[208] *Id.* at 170-71, 81 D.L.R. (3d) at 629. For a discussion of these issues, *see generally* Molot, *The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion*, 18 McGILL L.J. 310 (1972); Janisch, Book Review, 4 DALHOUSIE L.J. 824, at 834-38 (1978).

[209] *Capital Cities*, *supra* note 206, at 171, 81 D.L.R. (3d) at 629.

[210] R.S.C. 1970, c. B-11. *See also Capital Cities*, *supra* note 206, at 171, 81 D.L.R. (3d) at 629.

[211] *Capital Cities*, *supra* note 206, at 171, 81 D.L.R. (3d) at 629. This is reasoning that, in view of the earlier acknowledgment by the Court that a full adjudicative hearing had been held, could only have reference to a *rule-making* hearing and, more particularly, to the specific requirements of subsection 16(2) of the Act, which is confined to procedures prior to the making of regulations. *See also* Green, Michaels & Assocs. v. Public Utils. Bd., *supra* note 199, at 590-92, where the Appellate Division discussed the value of informal guidelines in the context of awarding costs to intervenors in a rate hearing.

[212] *Capital Cities*, *supra* note 206, at 170-71, 81 D.L.R. (3d) at 629.

[213] R. v. Port of London Auth., *ex parte* Kynoch, [1919] 1 K.B. 176, at 184, 88 L.J.K.B. 553, at 559 (C.A. 1918). Laskin C.J. also cited British Oxygen Co. v. Minister of Technology, [1971] A.C. 610, at 624, [1970] 3 All E.R. 165, at 170 (H.L.) — *see Capital Cities*, *supra* note 206, at 170-71, 81 D.L.R. (3d) at 629.

[214] *See Re* Township of Westminster and City of London, 5 O.R. (2d) 401, at 413, 50 D.L.R. (3d) 481, at 493 (Div'l Ct. 1974); *Re* Retmar Niagara Peninsula Devs. Ltd. and Farm Products Marketing Bd. of Ont., 8 O.R. (2d) 549, at 562, 58 D.L.R. (3d) 517, at 530 (Div'l Ct. 1975); Smith v. Inner London Educ. Auth., [1978] 1 All E.R. 411 (C.A. 1977); *Re* Jordan and York Univ. Faculty Assoc., 19 O.R. (2d) 226, 84 D.L.R. (3d) 557 (Div'l Ct. 1977); Green, Michaels & Assocs. v. Public Utils Bd., *supra* note 199, at 592. The fettering of discretion by the terms of a prior agreement or contract was discussed recently in Cudger Rutile (No. 2) (Pty.) Ltd. v. Chalk, [1975] A.C. 520, at 533-34, [1975] 2 W.L.R. 1, at 7-8 (P.C. 1974); and in Ansett Transp. Indus. (Operations) (Pty.) Ltd. v. Australia, 17 A.L.R. 513 (H.C. 1977).

Some emphasis has been laid on the difference between an informal policy that by itself has no legally compelling effect, and a legally binding rule or regulation. The care required in this area is emphasized in those situations where one can point to specific statutory authority for the so-called guidelines or directives in question. In *Laker Airways Ltd. v. Department of Trade,*[215] the statute authorized both "guidance" and "directions" in the context of "objectives" expressly set forth in the legislation. The Court of Appeal therefore had to contend with the interrelationships of these two legal beasts, including the ranking of each in the statutory hierarchy, and the degree to which each had legally compelling effect on the Minister and the Civil Aviation Authority. Lord Denning had this to say:

> The word "direction" in section 4 is in stark contrast with the word "guidance" in section 3. It is used again in section 24(2) and (6)(b) and section 28(2). It denotes an order or command which must be obeyed, even though it may be contrary to the general objectives and provisions of the statute. But the word "guidance" in section 3 does not denote an order or command. It cannot be used so as to reverse or contradict the general objectives or provisions of the statute. It can only be used so as to explain, amplify or supplement them. So long as the "guidance" given by the Secretary of State keeps within the due bounds of guidance, the Authority is under a duty to follow his guidance. Even so, the Authority is allowed some degree of flexibility. It is to perform its function "in such a manner as it considers is in accordance with the guidance". So, while it is obliged to follow the guidance, the manner of doing so is for the Authority itself. But if the Secretary of State goes beyond the bounds of "guidance", he exceeds his powers: and the Authority is under no obligation to obey him.[216]

There can be little doubt that he had no difficulty in characterizing both "guidance" and "direction" as legal norms which at law bound the appropriate level of the hierarchy contemplated by the Act.[217]

This approach may be contrasted with the plurality decision of the Supreme Court of Canada in *Martineau v. Matsqui Institution Inmate Disciplinary Board.*[218] There, the appellants had been disciplined in alleged conformity with detailed procedures set forth in directives of the Commissioner of Penitentiaries that had been made expressly pursuant to subsection 29(3) of the Penitentiary Act.[219] The Court was confronted with the preliminary issue of whether the decision of the disciplinary board acting pursuant to the directive in question was one of an administrative nature not required by law to be made on a judicial or quasi-judicial basis for purposes of subsection 28(1) of the Federal Court Act.[220] Pigeon J. had this to say about whether decisions made by such boards acting pursuant to

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[215] *Supra* note 18.

[216] *Id.* at 699-700, [1977] 2 All E.R. at 188.

[217] Civil Aviation Act 1971, U.K. 1971, c. 75.

[218] Martineau v. Matsqui Inst. Inmate Disciplinary Bd., [1978] 1 S.C.R. 118, 74 D.L.R. (3d) 1 (1977).

[219] R.S.C. 1970, c. P-6.

[220] S.C. 1970-71-72, c. 1.

directives authorized by statute were required "by law" to be made on such a basis (judicial or quasi-judicial):

> I do not think the same can be said of the directives. It is significant that there is no provision for penalty and, while they are authorized by statute, they are clearly of an administrative, not a legislative, nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity. I have no doubt that he would have the power of doing it by virtue of this authority without express legislative enactment. It appears to me that s. 29(3) is to be considered in the same way as many other provisions of an administrative nature dealing with departments of the administration which merely spell out administrative authority that would exist even if not explicitly provided for by statute.[221]

The consequence of this approach is this: despite their being based on statutory authority, directives of this sort have no legally binding force and may be treated in the same informal and cavalier manner as guidelines that have no such statutory basis for their existence.[222]

C. *Guidelines Issued by Others: Dictation*

In *H. Lavender and Son Ltd. v. Minister of Housing and Local Government,*[223] Willis J. had to consider the decision of the Minister who had refused the applicant planning permission to extract minerals from agricultural lands on the ground that he had a "present policy that land in the reservations should not be released for mineral working unless the Minister of Agriculture, Fisheries and Food is not opposed to working. In the present case the agricultural objection has not been waived . . .".[224] Two objections to the legality of the Housing Minister's actions were submitted. The first was that he had fettered his discretion by following a self-created policy.[225] The second was that not he, but the Minister of Agriculture, had made the decision in question. The court agreed that by adopting and applying his stated policy the Minister of Housing had "in effect inhibited himself from exercising a proper discretion (which would of course be guided by policy considerations) in any case where the Minister of Agriculture ha[d] made and maintained an objection . . .".[226] What the Minister had done was to delegate his discretion to another; he had allowed himself to be dictated to regarding the essential matter which Parliament had expressly left in his hands alone. Moreover, it should be noted that he could not elevate his claim by characterizing his position as that of an advisor to the Queen or Her representative. He was not purporting to act in such a capacity, but was performing statutory functions

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[221] *Supra* note 218, at 129, 74 D.L.R. (3d) at 9-10.

[222] The most devastating critique of the judgment of Pigeon J. in *Martineau* is contained in Janisch, Comment, 55 CAN. B. REV. 576 (1977).

[223] [1970] 3 All E.R. 871, [1970] 1 W.L.R. 1231 (Q.B. 1969).

[224] *Id.* at 876, [1970] 1 W.L.R. at 1236.

[225] This ground of attack is discussed *supra*.

[226] *Supra* note 223, at 880, [1970] 1 W.L.R. at 1240-41.

that were confined by the limitations of the enactment itself.[227] What is unusual about this is, in the first place, the presence of an informal policy or guideline and secondly, that the policy requires the person or tribunal legally possessed of the discretionary power to have recourse to the views of others who may or may not be part of the bureaucratic hierarchy of the decision-maker.

In annexation proceedings before the Ontario Municipal Board, the Minister responsible for municipal affairs filed a letter with the Board expressing the policy of the government and his own views with respect to contentious matters before the Board. When the Board ruled that it was bound to follow the government's policy statement, judicial review was sought on the ground that the Board had so fettered its discretion as to have committed jurisdicitional error. The Court of Appeal dismissed this objection.[228] Invested with the power to re-draw municipal boundaries and severable from its statutory responsibility to hold a public hearing before making any annexation order, the Board was exercising "an administrative — almost a legislative" function.[229] This meant that the Board was to be guided by broad policy considerations. While the Board could not consider itself bound in law to follow the policy statement and therefore had to retain "a discretion whether to adopt and how best to implement government policy in the area of population",[230] the content of such policy was a purely political matter that could not be argued and debated in a court of law. "[P]rovided such policy is not inconsistent with statutory objectives in the broad area of planning, an administrative board may conclude that it must be accepted having regard to all relevant facts and after listening to the objections raised."[231] It should be noted that the court put heavy emphasis on the administrative and non-judicial practice of the Board's statutory discretion to make the ultimate decision or order; that legislative facts and policy considerations predominated over the adjudicative aspects of the proceedings; that the Minister conveying the views of the government was the one responsible for municipal affairs and these views were confined to municipal matters; that the content of the government policy was a political matter which could not be questioned before the courts; that the legislation required a public hearing before any order was made by the Board; and that even a policy emanating from such a high governmental source did not bind the Board, which retained its discretion throughout to implement that policy or not. Therefore, while an independent governmental body like the Ontario Municipal Board could not, without more, be legally dictated to by the government and a minister

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[227] *See Re* Multi-Malls Inc. and Minister of Transp., *supra* note 49, at 58, 73 D.L.R. (3d) at 27.

[228] *Re* Township of Innisfil and Barrie, (Ont. C.A., December 20, 1978). Leave to appeal granted by Supreme Court of Canada, March 30, 1979.

[229] *Id.* at 20 of the manuscript judgment.

[230] *Id.* at 15-16.

[231] *Id.* at 21.

in that government, express legislation presumably could accomplish this task.[232]

The foregoing has given some indication of the constraints placed upon decision-makers charged with statutory responsibility who seek to resort to policy guidelines and considerations originating outside their own bureaucratic structure. What, however, is the legal situation where that policy flow is within the structure and thus is vertical, rather than lateral, in nature? We are not here concerned with delegation and with whether someone may act in the place of the person identified in legislation as having the authority in question. The issue is whether and to what extent the properly identified tribunal may receive non-legislative instructions or directives from another. A recent High Court of Australia decision[233] is instructive on this question. Resort was had to the basic constitutional principle of responsible parliamentary government in order to arrive at the conclusion:

> It would be inconsistent with that concept [principle of responsible government] for the Secretary or any officer of a department to exercise such a power or discretion contrary to the Minister's directions or policy (provided of course these are lawful). It is not for the officer to distinguish between "government policy" and the Minister's policy. The duty of those in a department is to carry out the lawful directions and policy of their Minister. It is the Minister who is responsible to the Government and the Parliament for the directions and policy.[234]

A perhaps less expansive view of the extent to which such outside intrusions may be permitted was expressed in *Ansett*[235] by Aickin J., who appeared to draw the same distinction as did the Ontario Court of Appeal in the *Innisfil* case[236] between legislative and policy-oriented acts of a tribunal, and those that are more adjudicative in nature. After examining the judgments in the *Ipec case*,[237] he stated:

> There is, therefore, a majority for the view that it was proper for the Director-General to take into account governmental policy, *though no doubt on matters of safety he could properly confine himself to his own or his Department's expert knowledge*. Indeed *apart from such technical matters*, it is hard to see what relevant matters there would be save government policy on imports of aircraft and imports generally.
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> It is clear from these citations that, although the discretion is that of the Secretary of the Department of Transport, it is not one to be exercised entirely according to his personal views. Government policy, and particularly that applicable to matters within the scope of his Department must in every case be a matter for his serious consideration. Moreover the Minister or the Cabinet may properly indicate to him what government policy is in relation to imports of aircraft generally or to the importation of particular aircraft. There is

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[232] *See, e.g.*, the Federal Telecommunications Bill, Bill C-16, 30th Parl. 4th sess., 1978, cl. 9 (1st reading, Nov. 9, 1978).

[233] Ansett Transp. Indus. (Operations) (Pty.) Ltd. v. Australia, *supra* note 214.

[234] *Id.* at 540 (*per* Murphy J.).

[235] *Supra* note 214.

[236] *Supra* note 228.

[237] The Queen v. Anderson, 39 A.L.J.R. 66, 113 C.L.R. 177 (H.C. 1965).

> nothing improper in the Minister requesting him to act in a particular manner or seeking to influence or persuade him to act in a particular manner, nor is there any failure of duty by the head of a department of government in acting in accordance with such a request. In many matters of policy it might indeed be the duty of the Secretary to act in accordance with the policy of the government of the day.[238]

V. CONCLUSION

One can only be thankful that Canadian lawyers and academics have finally taken such an interest in administrative law that books and articles on the subject are appearing with increasing frequency. One may expect that so much activity in the real world of tribunals, bureaucracies and government, all of which must be made to function according to law, will, with the able assistance of Canadian courts and lawyers, lead to greater sophistication and new approaches. As history has so often demonstrated, neither the public official nor the private citizen can take too much for granted in this area.

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[238] *Ansett Transport*, *supra* note 214, at 564 (emphasis added). With respect to the vertical flow of authority within a department from the minister to his officials, *see Re* Cruikshank, 64 D.L.R. (3d) 420, at 424 (B.C.S.C. 1975).