# ANNUAL SURVEY OF CANADIAN LAW

# ADMINISTRATIVE LAW

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## I. INTRODUCTION

If one were to trace the major themes of administrative law over the period 1978-1979,[1] it would be necessary to observe first that the subject is beginning to enter what may be called a "nominalistic" phase.[2] The Law Reform Commission of Canada has produced a remarkable series of specialized studies on various administrative tribunals;[3] commercial publishing houses have marketed several books and collections of essays

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[1] This is the fifth Annual Survey of Administrative Law, and the first prepared by the present contributors.

Previous surveys were prepared by Henry Molot. *See* 3 OTTAWA L. REV. 465 (1969); 4 OTTAWA L. REV. 458 (1971); 5 OTTAWA L. REV. 411 (1972); 7 OTTAWA L. REV. 514 (1975).

Although over five years have elapsed since the publication of the preceding survey an attempt will be made to maintain a certain degree of continuity with the 1975 review; nevertheless, primary attention will be given to developments occurring between 1 Jan. 1978 and 1 Jan. 1980. Moreover, in view of the enormous volume of litigation which has taken place in this field recently, this survey will be more selective than its predecessors; the reader will note no reference to developments in the United Kingdom, Australia, New Zealand and, regrettably, the United States. Greater emphasis will be placed on emerging themes as reflected in cases, statutes and learned writing; particular developments will often be overlooked. Finally, the reader will note a slight reformulation of the table of contents. It should also be added that this is a personal survey: in style, content and interpretation it reflects the authors' viewpoints, notwithstanding the organization traditionally associated with survey articles.

The following volumes of law reports are reviewed in detail: [1978] S.C.R.; [1979] S.C.R.; [1978] F.C.; [1979] F.C.; 79-99 D.L.R. (3d); [1978] W.W.R.; [1979] W.W.R.; 18-30 N.R.; 17-24 O.R. (2d); [1978] Que. C.S.; [1979] Que. C.S.; [1978] Que. C.A.; [1979] Que. C.A.; and selected provincial or specialist reports. It must be stressed that where a decision here noted has been appealed and the appeal reported in a volume not covered by this survey, the disposition on appeal will not normally be noted in the text. This survey will also cover periodical literature indexed in the 1978 and 1979 issues of the INDEX TO CANADIAN LEGAL PERIODICALS as well as texts and monographs bearing 1978 or 1979 publication dates. In view of the gap between this survey and its predecessor some reference to judicial and doctrinal developments in the period 1975-77 will also be included.

[2] It may be that a decade later Canadian lawyers are taking seriously John Willis' admonition "the principle of 'uniqueness' is the principle for me". *See The McRuer Report: Lawyers' Values and Civil Servants' Values*, 18 U. TORONTO L.J. 351, at 359 (1968). For a very interesting essay on the relationship of proliferating law reports and nominalism in legal writing, *see* Gilmore, *Legal Realism. Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

[3] LAW REFORM COMMISSION OF CANADA, THE IMMIGRATION APPEAL BOARD (1976); THE ATOMIC ENERGY CONTROL BOARD (1976); THE PAROLE PROCESS: A STUDY OF THE NATIONAL PAROLE BOARD (1976); UNEMPLOYMENT INSURANCE BENEFITS: A STUDY OF ADMINISTRATIVE PROCEDURE IN THE UNEMPLOYMENT INSURANCE COMMISSION (1977); THE NATIONAL ENERGY BOARD (1977); THE REGULATORY PROCESS OF THE CANADIAN TRANSPORT COMMISSION (1978); THE ANTI-DUMPING TRIBUNAL (1979); THE PENSION APPEALS BOARD (1979); CANADA LABOUR RELATIONS BOARD (1980); and THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (1980)

on narrow subjects;[4] nominate law reports devoted to individual administrative agencies have proliferated;[5] governments have promulgated several comprehensive legislative schemes governing entire fields of administrative regulation — schemes which often reflect quite particularized procedures, structures and review mechanisms.[6] While the previous contributor could focus his attention on "general principles of judicial review of administrative decision-making" as exemplified by the cases, no such luxury is possible in the current survey. Apart from the most abstract of propositions about the theory of jurisdiction little can be extrapolated from the myriad instances of individual judicial decision. Increasingly, judgments must be viewed primarily as illustrative of problems, not as determinative of legal principles.[7]

A second major theme emerging in administrative law has been the rediscovery of procedural control as a means of supervising agency activity. While the first half of the decade saw the development of,[8] and subsequent partial retreat from,[9] a wide theory of substantive jurisdictional review, it appears that judicial concern on the threshold of the

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[4] D. EMOND, ENVIRONMENTAL ASSESSMENT LAW IN CANADA (1978); THE REGULATORY PROCESS IN CANADA (G. Doern ed. 1978); THE PROFESSIONS AND PUBLIC POLICY (P. Slayton & M. Trebilcock eds. 1978); ONTARIO ECONOMIC COUNCIL, GOVERNMENT REGULATION: ISSUES AND ALTERNATIVES 1978 (1978); ECONOMIC COUNCIL OF CANADA, RESPONSIBLE REGULATION: AN INTERIM REPORT BY THE ECONOMIC COUNCIL OF CANADA (1979); N. BONSOR, TRANSPORTATION RATES AND ECONOMIC DEVELOPMENT IN NORTHERN ONTARIO (1978); D. DEWEES, C. EVERSON & W. SIMS, ECONOMIC ANALYSIS OF ENVIRONMENTAL POLICIES (1975); F. HAWKINS, CANADA AND IMMIGRATION: PUBLIC POLICY AND PUBLIC CONCERN (1972); M. TAYLOR, HEALTH INSURANCE AND CANADIAN PUBLIC POLICY: THE SEVEN DECISIONS THAT CREATED THE CANADIAN HEALTH INSURANCE SYSTEM (1978); L. GIROUX, ASPECTS JURIDIQUES DU RÈGLEMENT DE ZÔNAGE AU QUÉBEC (1979); G. DOERN, GOVERNMENT INTERVENTION IN THE CANADIAN NUCLEAR INDUSTRY (1980); G. RESCHENTHALER, OCCUPATIONAL HEALTH AND SAFETY IN CANADA (1979).

[5] *See, e.g.*, Municipal Planning Law Reports, Land Compensation Reports, Immigration Appeal Cases, Canadian Labour Law Reporter, Canadian Environmental Law, Tax Appeal Board Cases, Workers' Compensation Reports (B.C.), Décisions disciplinaires concernant les corporations professionnelles, Décisions de la commission des affaires sociales, Décisions de la commission des loyers, Canada Tax Cases, Canadian Transport Cases, Pension Review Board Reports.

[6] *E.g.*, the Health Disciplines Act, R.S.O. 1980, c. 196; Professional Code, R.S.Q. 1977, c. C-26; Transport Act, R.S.Q. 1977, c. T-12; Canadian Human Rights Act, S.C. 1976-77, c. 33.

[7] The author has previously addressed various aspects of this development in Macdonald, *A Bibliography of Legislation Relating to Administrative Law in Canadian Jurisdictions*, 27 CHITTY'S L.J. 83 (1979), arguing that even the general principles of administrative law differ substantially from province to province.

[8] Beginning with Metropolitan Life Ins. Co. v. Union of Operating Eng'rs, Local 796, [1970] S.C.R. 425, 11 D.L.R. (3d) 336, as to control of discretion, and Bell v. Ontario Human Rights Comm'n, [1971] S.C.R. 756, 18 D.L.R. (3d) 1, as to preliminary or collateral matters.

[9] *See*, as indicative of the trend, Service Employees' Int'l Union, Local 333 v. Nipawin Dist. Staff Nurses Ass'n, [1975] 1 S.C.R. 382, [1974] 1 W.W.R. 653, 41 D.L.R. (3d) 6 (1973).

1980's will be centered on matters of procedure.[10] Through expanding doctrines of natural justice and fairness many significant issues of policy are now being canvassed,[11] and one cannot help but think that courts see procedural review as a less offensive means of controlling what are perceived to be substantive jurisdictional errors.[12] Whether procedural activism will go the way of its predecessor is not yet clear. The focus of judicial attention in the next few years will be a question worthy of careful consideration.

Closely allied with both the nominalism of review principles and the renaissance of procedural control as a touchstone of judicial review is a declining conceptualism in administrative law theory.[13] The most obvious victim of this development has been the exercise of classifying functions as a preliminary to asserting several grounds for review,[14] or to remedial availability,[15] or to the application of a number of related doctrines.[16] While the Supreme Court of Canada has advanced the non-classification thesis only in respect of the applicability of the rules of natural justice,[17] other courts have extended this theme to issues such as the availability of *certiorari*,[18] *functus officio*[19] and error of law on the

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[10] Of course, Nicholson v. Haldiman-Norfolk Regional Bd. of Comm'rs of Police, [1979] 1 S.C.R. 311, 23 N.R. 410, 88 D.L.R. (3d) 671 (1978) is the major breakthrough in this field.

[11] *E.g.*, the jurisdiction of the Federal Court, Trial Division: Martineau v. Matsqui Inst. Disciplinary Bd., [1980] 1 S.C.R. 602, 30 N.R. 119, 106 D.L.R. (3d) 385 (1979); or the susceptibility of the Governor in Council to review: Inuit Tapirisat v. Governor-in-Council, [1979] 1 F.C. 710, 24 N.R. 361, 95 D.L.R. (3d) 665 (App. D.), *since rev'd sub nom.* Attorney General of Canada v. Inuit Tapirisat, [1980] 2 S.C.R. 735, 33 N.R. 304, 115 D.L.R. (3d) 1.

[12] *Cf.* the judgment in *Re* Abel & Penetanguishene Mental Health Centre, 24 O.R. (2d) 279, 46 C.C.C. (2d) 342, 97 D.L.R. (3d) 304 (Div'l Ct. 1979), *since aff'd by* 31 O.R. (2d) 520, 119 D.L.R. (3d) 101 (C.A. 1980), with *Bell*, *supra* note 8.

[13] This development may be contrasted with just the opposite tendency, which was predominant only a decade ago. Apart from the cases in note 8 *supra*, the conceptualist bias can be seen in consolidating statutes such as the Federal Court Act, R.S.C. 1970 (2d Supp.), c. 10; the Judicial Review Procedure Act, R.S.O. 1980, c. 224; the Statutory Powers Procedure Act, R.S.O. 1980, c. 484; and The Civil Rights Statute Law Amendment Act, 1971, S.O. 1971, c. 50.

[14] Among the grounds thought at one time to be contingent on classification in its various forms are: the rules of natural justice, sub-delegation, he who decides must hear, *functus officio* and error of law on the face of the record.

[15] *Certiorari* and prohibition lay only to quasi-judicial functions, while *mandamus* lay only to ministerial functions.

[16] Where a function is legislative, obligations of registration and publication are imposed and various interpretation acts will be relevant. Where a function is judicial, the decision-maker is generally immune from tort liability for having made a wrong decision.

[17] *Supra* note 10.

[18] McCarthy v. Board of Trustees of Calgary Roman Catholic Separate School Dist. No. 1 (No. 2), 26 A.R. 1, [1979] 4 W.W.R. 725, 101 D.L.R. (3d) 48 (S.C.).

[19] *Re* Lornex Mining Corp., [1976] 5 W.W.R. 554, 69 D.L.R. (3d) 705 (B.C.S.C.).

face of the record.[20] It remains to be seen whether the anti-conceptualism reflected in the abandonment of classification of function will be carried over into a general attack on the other pillars in the theoretical structure of administrative law. One might also speculate on how long it will take courts to invoke a new conceptualism within which problems of judicial review may be isolated and disputed.[21]

A particular manifestation of the movement away from the received conceptual framework of administrative law is illustrated by the simplification of procedures for invoking traditional remedies. One may cite the recent tendency of the Supreme Court of Canada to reject formalistic or technical arguments about the availability of review remedies.[22] Moreover, legislative initiative has not been lacking. British Columbia has copied Ontario's Judicial Review Procedure Act,[23] Nova Scotia has amended its Rules of Court,[24] the Ministry of Justice in Quebec has commissioned a report on methods of simplifying and unifying judicial review remedies,[25] and the Law Reform Commission of Canada has recommended a revamping of the Federal Court Act.[26] Finally, one finds a decline in the judicial predisposition to invoke discretionary bars such as "more suitable remedy", "ripeness" and "exhaustion" in order to defeat an application for judicial review.[27] How effectively this "modern concept of the administration of justice"[28] will resist the efforts of experts in civil procedure to ensure again that substance is secreted in the interstices of procedure will no doubt be a point of interest for lawyers in the early 1980's.

Recent developments also reveal a fifth trend, namely, the recognition that the real administrative law is to be found not in courts, but in agencies themselves.[29] While this is hardly a new theme, it is

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[20] Board of Trustees of Edmonton Catholic School Dist. No. 7 v. Edmonton, 3 A.R. 151, [1977] 3 W.W.R. 603, 75 D.L.R. (3d) 443 (S.C.).

[21] An instructive lesson in this regard is offered in G. GILMORE, THE AGES OF AMERICAN LAW *passim* (1977).

[22] Duquet v. Town of Sainte-Agathe-des-Monts, [1977] 2 S.C.R. 1132, 13 N.R. 160; Vachon v. Attorney General of Quebec, [1979] 1 S.C.R. 555, 25 N.R. 399; Landreville v. Town of Boucherville, [1978] 2 S.C.R. 801, 22 N.R. 407.

[23] R.S.O. 1980, c. 224; the B.C. act is the Judicial Review Procedure Act, S.B.C. 1976, c. 25.

[24] *See* the discussion of the 1972 Rules in Mullan, *Recent Developments in Nova Scotian Administrative Law*, 4 DALHOUSIE L.J. 467 (1978).

[25] C. EMERY, G. PÉPIN & H. Reid, RECOURS EN SURVEILLANCE JUDICIAIRE (1976).

[26] LAW REFORM COMMISSION OF CANADA, FEDERAL COURT: JUDICIAL REVIEW WORKING PAPER 18 (1977).

[27] *But see* Harelkin v. University of Regina, [1979] 2 S.C.R. 561, 26 N.R. 364, 96 D.L.R. (3d) 14.

[28] Montana v. Les Développements du Saguenay Ltée., [1977] 1 S.C.R. 32, at 38, 8 N.R. 168, at 173

[29] Again one might refer to the pioneering work of John Willis. *See* Willis, *Canadian Administrative Law in Retrospect*, 24 U. TORONTO L.J. 225 (1974), especially at 225-29. *See also* Weiler, *The Administrative Tribunal: A View from the Inside*, 26 U. TORONTO L.J. 193 (1976).

particularly evident in a series of judgments which at first glance appear to be simply examples of a conservative approach to judicial intervention,[30] but which upon examination reveal a judicial inclination to compel statutory decision-makers themselves to take greater responsibility for their acts. In addition, this preoccupation may be seen in legislative concerns such as freedom of information,[31] rule-making hearings,[32] sophisticated procedural and review mechanisms,[33] and ombudsman schemes.[34] Modern government priorities with respect to "deregulation", "privatization" and "sunset laws" also can be viewed as *indicia* that the replacement of administrative bureaucracies by judicial bureaucracies is no longer believed to be a panacea for improving the administrative process. One might almost conclude that the legal community may slowly be moving beyond the constraints of Dicey's conception of a "common law" applied by "ordinary courts" towards a more catholic perception of law and legality.[35]

A sixth development which has been accentuated in the late 1970's is the growth of written material on administrative law. Studies,[36]

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[30] Jacmain v. Attorney General of Canada, [1978] 2 S.C.R. 15, 18 N.R. 361, 81 D.L.R. (3d) 1 (1977); *Harelkin*, *supra* note 27; C.U.P.E. Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 26 N.R. 341, 97 D.L.R. (3d) 417.

[31] *See* LAW REFORM COMMISSION OF CANADA, ACCESS TO INFORMATION: INDEPENDENT ADMINISTRATIVE AGENCIES (1979); Freedom of Information Act, S.N.S. 1977, c. 10.

[32] ONTARIO COMMISSION ON FREEDOM OF INFORMATION AND INDIVIDUAL PRIVACY, RULE-MAKING HEARINGS: A GENERAL STATUTE FOR ONTARIO? (1979).

[33] Professional Code, R.S.Q. 1977, c. C-26; Judicial Review Procedure Act, S.B.C. 1976, c. 25; The Statutes and Subordinate Legislation Act, S.N. 1977, c. 108.

[34] Recent legislation includes the Ombudsman Act, S.B.C 1977, c 58; the Ombudsman Act, R.S.O. 1980, c. 325; and The Parliamentary Commissioner (Ombudsman) Act, R.S.N. 1970, c. 285.

[35] *See* Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business*, 17 OSGOODE HALL L.J. 1 (1979).

[36] From the Law Reform Commission of Canada: INDEPENDENT ADMINISTRATIVE AGENCIES, WORKING PAPER 25 (1980); PUBLIC PARTICIPATION IN THE ADMINISTRATIVE PROCESS (1979); POLITICAL CONTROL OF INDEPENDENT ADMINISTRATIVE AGENCIES (1979); COUNCIL ON ADMINISTRATION (1980); ACCESS TO INFORMATION, *supra* note 31, COMMISSIONS OF INQUIRY: A NEW ACT, WORKING PAPER 17 (1977); FEDERAL COURT, *supra* note 26. From Canada Treasury Board, Department of Consumer and Corporate Affairs, and Working Group on Social Regulation: GOVERNMENT INTERVENTION IN THE MARKETPLACE AND THE CASE FOR SOCIAL REGULATION (1977), GOVERNMENT EVALUATION OF REGULATIONS: THE UNITED STATES EXPERIMENT (1978); A CASE STUDY: OCCUPATIONAL HEALTH REGULATIONS LIMITING RADIATION IN URANIUM MINES (1980); A CASE STUDY: SAFETY GLASS REGULATIONS UNDER THE HAZARDOUS PRODUCTS ACT (1980). Related studies on government regulatory activity included: B. MONTADOR, A CASE STUDY: PROPOSED INSULATION REQUIREMENTS FOR CEILINGS AND OPAQUE WALLS (1979); M. PROULX, A CASE STUDY: PROPOSED SCHOOL BUS SAFETY STANDARDS UNDER THE CANADIAN MOTOR VEHICLE SAFETY ACT (1978), M. PROULX, A CASE STUDY: PETROLEUM REFINING EFFLUENT REGULATIONS AND GUIDELINES UNDER THE FISHERIES ACT (1979); and R. MIRSHHORN, A CASE STUDY OF THE

PROPOSALS FOR ENERGY CONSUMPTION LABELLING OF REFRIGERATORS, ECONOMIC COUNCIL OF CANADA WORKING PAPER No. 1 (1978). From the Ontario Commission on Freedom of Information and Individual Privacy: THE FREEDOM OF INFORMATION ISSUE: A POLITICAL ANALYSIS (1978); FREEDOM OF INFORMATION AND MINISTERIAL RESPONSIBILITY (1978); PUBLIC ACCESS TO GOVERNMENT DOCUMENTS: A COMPARATIVE PERSPECTIVE (1978); INFORMATION ACCESS AND THE WORKMEN'S COMPENSATION BOARD (1979); RESEARCH AND STATISTICAL USES OF ONTARIO GOVERNMENT PERSONAL DATA (1979); ACCESS TO INFORMATION: ONTARIO GOVERNMENT ADMINISTRATIVE OPERATIONS (1979); FREEDOM OF INFORMATION IN LOCAL GOVERNMENT IN ONTARIO (1979); SECURITIES REGULATION AND FREEDOM OF INFORMATION (1979); RULE-MAKING HEARINGS, *supra* note 32; FREEDOM OF INFORMATION AND THE ADMINISTRATIVE PROCESS (1979); GOVERNMENT SECRECY, INDIVIDUAL PRIVACY AND THE PUBLIC'S RIGHT TO KNOW: AN OVERVIEW OF THE ONTARIO LAW (1979); FREEDOM OF INFORMATION AND INDIVIDUAL PRIVACY: A SELECTIVE BIBLIOGRAPHY (1979); FREEDOM OF INFORMATION AND THE POLICY-MAKING PROCESS IN ONTARIO (1980); INFORMATION ACCESS AND CROWN CORPORATIONS (1980). These and other studies have since been followed by the Commission's report entitled PUBLIC GOVERNMENT FOR PRIVATE PEOPLE: THE REPORT OF THE COMMISSION ON FREEDOM OF INFORMATION AND INDIVIDUAL PRIVACY/1980 (1980).

collections of essays,[37] monographs,[38] texts[39] and periodical literature[40] have proliferated. Cases in this field are almost choking the law reports[41] and statutes and subordinate legislation are passed with alarming

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[37] L.S.U.C. SPECIAL LECTURES 1979: THE ABUSE OF POWER AND THE ROLE OF AN INDEPENDENT JUDICIAL SYSTEM IN ITS REGULATION AND CONTROL; P. KENNIFF, D. CARRIER, P. GARANT & D. LEMIEUX, LE CONTRÔLE POLITIQUE DES TRIBUNAUX ADMINISTRATIFS (1978); ASPECTS OF ANGLO-CANADIAN AND QUEBEC ADMINISTRATIVE LAW/DU DROIT ADMINISTRATIF ANGLO-CANADIEN ET QUEBECOIS (P. Garant ed. 1979); STUDIES ON REGULATION IN CANADA (W. Stanbury ed. 1978), GOVERNMENT REGULATION AND SCOPE, GROWTH, PROCESS (W. Stanbury ed. 1980).

[38] L. SARNA, THE LAW OF DECLARATORY JUDGMENTS (1978); LAW REFORM COMMISSION OF CANADA, THE FEDERAL COURT ACT: A STUDY OF THE COURT'S ADMINISTRATIVE LAW JURISDICTION (1977); C. MCNAIRN, GOVERNMENTAL AND INTERGOVERNMENTAL IMMUNITY IN AUSTRALIA AND CANADA (1977); D. HARTLE, PUBLIC POLICY DECISION MAKING AND REGULATION (1979); R. SCHULTZ, FEDERALISM AND THE REGULATORY PROCESS (1979); G. KANE, CONSUMERS AND THE REGULATORS: INTERVENTION IN THE FEDERAL REGULATORY PROCESS (1980).

[39] J. KAVANAGH, A GUIDE TO JUDICIAL REVIEW (1978); D MULLAN, ADMINISTRATIVE LAW (2d ed. 1979); G. PÉPIN & Y. OUELLETTE, PRINCIPES DE CONTENTIEUX ADMINISTRATIF (1979); R. REID & H. DAVID, ADMINISTRATIVE LAW AND PRACTICE (2d ed. 1978).

[40] Over 85 articles and case comments are listed for the period under review. Where these relate to particular sections of this survey, they will be noted there. Important articles of a general nature include: Janisch, *The Role of the Independent Regulatory Agency in Canada*, 27 U.N.B.L.J. 83 (1978); Mullan, *supra* note 24; Crane, *The Citizen and the State: Current Problems of Public Law*, in LAW SOCIETY OF UPPER CANADA SPECIAL LECTURES 1978, at 273; McMurtry, *Administrative Advocacy — The Lawyer and Government*, 12 GAZETTE 130 (1978); Forget, *L'administration publique sujet ou objet du pouvoir politique?*, 21 CAN. J. PUB. ADMIN. 234 (1978); Kernaghan, *Changing Concepts of Power and Responsibility in the Canadian Public Service*, 21 CAN. J. PUB. ADMIN. 389 (1978); Leclair, *D'un pouvoir responsable pour l'administrateur publique*, 21 CAN. J. PUB. ADMIN. 418 (1978); M. Taylor, *'The New Despotism': Fifty Years Later*, 37 ADVOCATE 417 (1979); Janisch, *Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada*, 17 OSGOODE HALL L.J. 46 (1979); McDonald, *Contradictory Government Action: Estoppel of Statutory Authorities*, 17 OSGOODE HALL L.J. 160 (1979), McRuer, *Control of Power*, in LAW SOCIETY OF UPPER CANADA SPECIAL LECTURES 1979, at 1, Cohen, *Freedom of Information and the Official Secrets Act*, 25 MCGILL L.J. 99 (1979); Mullan, *Developments in Administrative Law: The 1978-79 Term*, 1 SUP. CT. L. REV. 1 (1980); Macdonald, *Big Government and its Control: Legislative Initiatives of the Past Decade*, in LEGAL PERSPECTIVES ON CONTEMPORARY SOCIAL ISSUES: DECADE OF ADJUSTMENT 27 (J. Menezes ed. 1980); Brown-John, *Advisory Agencies in Canada An Introduction*, 22 CAN. J. PUB. ADMIN. 72 (1979); Dussault, *L'Equilibre entre des pouvoirs judiciaire, legislatif et executif: rupture ou evolution?*, 22 CAN. J. PUB. ADMIN. 196 (1979); Pépin, *Les régies vs Le Citoyen*, 38 R. DU B. 478 (1978); Atkey, *Freedom of Information: The Problem of Confidentiality in the Administrative Process*, 18 WESTERN ONT. L. REV. 153 (1980); Mullan, *Mr. Justice Rand Defining the Limits of Court Control of the Administrative and Executive Process*, 18 WESTERN ONT. L. REV. 65 (1980).

[41] For example, in the period of this survey over 400 judicial decisions were reported.

rapidity.[42] However, what is especially distressing about this explosion of both primary and secondary sources is the lack of theoretical perspectives which it reveals. Apart from the work of Harry Arthurs,[43] there has been little sign of an attempt by scholars and researchers to move beyond low level doctrinal analysis and simple case reporting. The picture painted in the law reports is no more illuminating. The reader need only attempt to unravel the tangled threads of the so-called "theory of jurisdiction" in order to appreciate the absence of a coherent analytical structure for judicial review. The issues of illegal sub-delegation, jurisdictional facts, classification of function, void or voidable, standing, asking wrong questions and planning or operational functions are only a few examples of fundamental concepts yet to receive the careful judicial treatment they compel. In fact much of this survey will be devoted to the preliminary sorting necessary to a clarification of many inchoate review doctrines.

While these trends may not yet be proof of Durkheim's prediction that ultimately all law will be public law,[44] they do illustrate the tremendous imperialism of administrative law as an object of study: if all law is not yet public law, at least most law is now heavily encrusted with administrative law concerns. Even the common law of property, contract, tort, successions, trusts and restitution is no longer adequately conveyed solely by reference to cases and judicially applied statutes.[45] It follows that in the 1980's the idea of a single Canadian administrative law may become a largely historical myth. Concomitantly, we may be compelled radically to revise our conception of what constitutes a discrete body of law. If the above-noted themes are evidence that administrative law ultimately will have the effect of extracting Canadian legal theory from the morass of received categories and sacrosanct symbols, perhaps one should not complain too loudly about the temporary discomfort the catalyst produces.[46]

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[42] Even aside from substantive administrative law (*i.e.*, statutes and subordinate legislation delegating statutory powers), the legislation is overwhelming. *See* Macdonald, *supra* note 7 for a review of statutes relating only to grounds for review and remedies.

[43] Recent contributions by Arthurs include the article cited in note 35 *supra* and *Jonah and the Whale: The Appearance, Disappearance, and Reappearance of Administrative Law*, 30 U. TORONTO L.J. 225 (1980).

[44] E. DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY (trans. 1964).

[45] A recent sociological elaboration of the reasons for this development may be found in P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978).

[46] The author has tried to suggest how this transformation may occur in Macdonald & Wydrzynski, *Book Review*, 28 U.N.B.L.J. 234, at 234-37, 251-52 (1979) and in Macdonald, *Book Review*, 25 McGILL L.J. 275 (1979).

## II. GROUNDS FOR JUDICIAL REVIEW

As noted, a slight departure from the organization adopted by the previous author of these surveys will be essayed: modifications have been made particularly with respect to grounds for review. Rather than being bifurcated into two main branches roughly corresponding to notions of substance and procedure (''*ultra vires* and error of law'' and ''natural justice''), the subject has been divided into five main categories, each illustrating a different focus of judicial inquiry.[47] In a trite sense the new organization corresponds to the questions ''who'', ''what'', ''why'', and ''how'' as these relate to the exercise of statutory powers, and reflects, if not the exact mechanisms, at least the general pattern of most legislative delegations.[48]

There is, however, a more important reason for adopting a modified organizational framework. In a survey of developments in administrative law it is more instructive to highlight the public administration problem which a ground of review reveals, rather than the legal category within which this ground usually has been slotted. The multiplicity of grounds that may be raised to challenge even the simplest of errors is evidence that the problem and not the precise vehicle for its solution should be the key structuring concept. In other words, when administrative law is seen primarily from the perspective of a reviewing court applying concepts of law, fact and jurisdiction to questions of substance and procedure, it is difficult to isolate why certain kinds of mistakes are made by decision-makers, and almost impossible to suggest useful improvements in the procedures of administrative agencies. Only when the bureaucratic problem revealed by a particular judicial review case is clarified do many seemingly incredible errors of law and fact become explicable.[49]

### A. *Irregularities Relating to the Holder of a Statutory Power*

The nominal focus of this sub-section is the question: what kinds of errors relating to the person purporting to exercise a statutory power are subject to correction upon judicial review? Attention will, however, be directed principally to a different issue: the manner in which the courts have responded to the ''systematic'' nature of public bureaucracies. Apart from difficulties arising out of personal prejudice on the part of

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[47] This restructuring is founded on the approach of many civilian writings, *see, e.g., G. Pépin & Y. Ouellette, supra* note 39. On occasion, however, we have both departed from and further subdivided the framework postulated by these writers.

[48] *See* the Abandoned Orchards Act, R.S.O. 1980, c. 1, s. 3(1), which provides:

> An inspector of the Provincial Entomologist may, between sunrise and sunset, for the purpose of making an inspection, enter any orchard or any premises in which he has reason to believe there is an orchard.

[49] Of course, one might even quibble with the title of this survey, for it really covers the field of judicial and non-judicial review of administrative action, rather than administrative law itself.

individual decision-makers, each of the grounds considered here raises the question as to where within an administrative hierarchy a statute fixes responsibility for decision-making. For example, judicial review doctrines founded on issues of illegal sub-delegation, acting under dictation, lack of a quorum, "he who decides must hear", section 96 of the B.N.A. Act, institutional and attitudinal bias and so forth, compel courts to determine at what point in an agency actual authority should be located, to evaluate how much authority is needed by individual decision-makers, and to consider the extent to which bureaucratic decisions can be as personal as judicial decisions. Of course, a comprehensive theory of bureaucratic accountability would be needed in order for these problems to be fully understood,[50] yet a flavour of this larger issue clearly emerges even from the small number of cases decided during the period of this survey.[51]

1. *Illegal Sub-delegation*

In accordance with the general theory of legal responsibility accepted in common law jurisdictions, statutes granting a power of decision usually identify the precise individual or body who is to be vested with that power. As a result, courts have been anxious to ensure that only those persons specifically vested with a legal power do in fact exercise that authority. It follows that authority to sub-delegate a statutory power must, in principle, be found in the statute by which the power is originally given; even when sub-delegation is statutorily authorized, courts have on occasion insisted on some documentary evidence of the sub-delegation.

Provisions permitting sub-delegation frequently give rise to difficult problems of interpretation and this is especially true where authority under more than one statute is in issue.[52] In addition, the complex interrelations and patterns of authority in public bureaucracies often mean that strict compliance with traditional doctrines of delegation is impossible. Partly in response to this situation, courts have recently been broadening the conditions of permissible sub-delegation.

If a power is granted to a named minister, sub-delegation to an appropriate departmental official will often be upheld in the absence of statutory authority to do so, even where no express instrument of

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[50] One of the virtues of the increasing interest by political scientists in administrative law is their use of theoretical models to explain agency activity. *See* notes 6, 39, 40 and 42 *supra*.

[51] Some authors prefer to characterize several of the grounds grouped together here in a different fashion. For alternative models, *see* D. MULLAN, *supra* note 39, which treats dictation as an aspect of abuse of discretion, bias and "he who decides must hear" as branches of natural justice and quorum issues as a problem of procedural *ultra vires*.

[52] *See Re* Canadian Pac. Transp. Co. & Loomis Courier Servs. Ltd., [1977] 1 W.W.R. 692, 72 D.L.R. (3d) 434 (B.C.S.C. 1976).

delegation can be found. Thus, in *Regina v. Harrison*[53] the Supreme Court of Canada permitted the director of the Criminal Law Division of a provincial Attorney General's department to authorize an appeal by the Crown notwithstanding section 605(1) of the Criminal Code, which vested this power exclusively in the Attorney General or his Deputy. Justification for this exception is usually offered either by reference to the doctrine of ministerial responsibility or, in certain limited cases, on the basis that various interpretation acts authorize deputy ministers and departmental officials to act in the minister's name.[54]

While courts generally recognize the hierarchical nature of departmental organization, sometimes they have held that the internal structure of an individual statute implies that a minister must personally exercise his authority. For example, in *Ramawad v. Minister of Manpower & Immigration*[55] the Supreme Court of Canada found that the discretion of the Minister of Immigration granted under paragraph 3G(*d*) of the Immigration Regulations could not be delegated to a Special Inquiry Officer. Factors such as express authorization to delegate certain functions to SIO's, a reservation of important matters to the Minister and a general power to delegate reserved only to the Minister or Deputy Director were cited as evidence that no implicit authority to sub-delegate the discretionary power in question was contemplated by the legislation. In a similar decision, the Trial Division of the Federal Court held that once an application to the Minister under section 8 of the Immigration Act[56] had been taken, the power of a Special Inquiry Officer under sections 11, 18 and 27 of the Act was excluded.[57] To have decided otherwise would, in the court's opinion, have amounted to authorizing a *de facto* delegation to the Special Inquiry Officer of a discretion exclusively reserved to the Minister. While both these decisions involve the complicated statutory framework of the Immigration Act and Regulations, they reveal that the crucial issue in sub-delegation cases is not simply whether a Minister's powers are involved.[58]

Finding that a statute impliedly authorizes sub-delegation constitutes a second manner by which hierarchy problems of public administration may be accommodated. In the past, the issue of implied authorization often has been resolved by an appeal to traditional classification

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[53] [1977] 1 S.C.R. 238, 8 N.R. 47, [1976] 3 W.W.R. 536, 66 D.L.R. (3d) 660 (1976). The statute in question is R.S.C. 1970, c. C-34, *as amended*.

[54] *See, e.g.*, the wide scope for sub-delegation permitted by the Interpretation Act, R.S.O. 1980, c. 219, s. 27(*m*), and the more limited provisions of the Interpretation Act, R.S.C. 1970, c. I-23, s. 23(2), *repealed and replaced by* R.S.C. 1970 (2d Supp.), c. 29, s. 1(2).

[55] [1978] 2 S.C.R. 375, 18 N.R. 69, 81 D.L.R. (3d) 687 (1977).

[56] R.S.C. 1970, c. I-2.

[57] Laneau v. Rivard, [1978] 2 F.C. 319, 87 D.L.R. (3d) 474 (Trial D. 1977).

[58] For other recent delegation cases involving ministers, *see Re* Clark, 17 O.R. (2d) 593, 81 D.L.R. (3d) 33 (H.C. 1977) and Dantex Woollen Co. v. Minister of Industry, Trade & Commerce, [1979] 2 F.C. 585, 100 D.L.R. (3d) 436 (Trial D.), and text accompanying notes 67-68 *infra*.

dogma: judicial powers may not be delegated; administrative powers may be freely delegated; legislative powers may in certain cases be delegated. Recently, however, courts have shown by their willingness to look at other criteria that classification may be useful only as a guide in this area. In a series of judgments delivered over the past decade, the Supreme Court of Canada has elaborated several tests to be employed in deciding whether sub-delegation is permissible. Each factor to be considered is directly related to the institutional setting of the power sought to be sub-delegated: the significance of the power in question, the position and abilities of the delegate, the special qualifications of the original holder, the existence of any controls stipulated in the delegating instrument, and whether substantive discretionary powers or merely technical and routine administrative powers are being delegated.

In *Canadian Institute of Public Real Estate Companies v. City of Toronto*[59] the Court dealt extensively with the question of whether a regulation-making power could be delegated if no controls were placed on its exercise.[60] The Court declared invalid a City of Toronto by-law which repeated almost verbatim section 35*a*(1) of the Planning Act,[61] finding that an unfettered and unstructured discretion was being sub-delegated. A slight variation of this theme arose where a municipality purported to delegate to the fire chief an ill-defined power to approve building plans under the local building code.[62] The Ontario Divisional Court noted that the authority conferred was not merely administrative, mechanical and designed to achieve a limited purpose, but was rather the grant of a wide discretion to set substantive conditions on building permits. As a consequence, the delegating by-law was declared invalid. In both these cases the sub-delegation of discretionary powers by legislative instrument to a decision-maker not under the hierarchical control of the authority delegating and having no special expertise in the field, was struck down. By contrast, in *Lamoureux v. City of Beaconsfield*[63] the Supreme Court of Canada permitted a city council to make certain by-laws contingent upon ratepayer approval, even though no control over the approval process was retained by the council. This case seems inconsistent with the general principles adopted in earlier decisions, but may be explained by the special provisions of the Cities and Towns Act.[64]

Two Ontario cases raised the question of whether purely discretionary powers, namely, the authority given to a municipal council to pay

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[59] [1979] 2 S.C.R. 2, 25 N.R. 108, 103 D.L.R. (3d) 226.

[60] *Cf.* Brant Dairy Co. v. Milk Comm'n of Ontario, [1973] S.C.R. 131, 30 D.L.R. (3d) 559 (1972).

[61] R.S.O. 1980, c. 379.

[62] *Re* Minto Constr. Ltd. & Township of Gloucester, 23 O.R. (2d) 634, 96 D.L.R. (3d) 491 (Div'l Ct. 1979).

[63] [1978] 1 S.C.R. 134, 10 N.R. 413 (1976). *See* Giroux, *La Cour Suprême, le zonage et la démocratie municipale*, 36 R. DU B. 704 (1976).

[64] R.S.Q. 1977, c. C-19.

the legal expenses of police officers in certain cases, could be delegated. In one case, the court found that a proposed clause in a collective agreement providing for automatic reimbursement of legal expenses of police officers could not override a statutory authority given to a municipal council to decide whether reimbursement should be granted.[65] The council could neither delegate its discretion to its labour negotiators, nor fetter its discretion by obliging itself in a labour contract always to reimburse its constables. In the other case, a municipal council exercising a similar power was permitted to seek the advice of a police commission as to whether it should reimburse, provided that it retained ultimate decision-making power in the matter and treated each case individually.[66] These cases reveal important aspects of the law of sub-delegation: first, the sub-delegation of a discretionary power usually will not be authorized where the delegation is to an individual outside a defined bureaucratic hierarchy or outside the control of the delegator; second, as long as final decision-making power is retained by the original grantee of a discretionary power, delegation of preliminary or recommendatory powers is permissible.

Particularly difficult questions arise when discretionary powers are sub-delegated to ministers of the Crown. While deputy ministers and other officials may sometimes exercise a minister's powers, there is no similar presumption that ministers may exercise powers given to specified officials under their control or to agencies for which they are responsible. Thus the Ontario High Court held that the Atomic Energy Control Board could not delegate to a minister its function of determining when certain information should be released to the public.[67] The court found that by granting a minister an absolute power to exempt individuals from the application of its disclosure regulations, the Board had effectively delegated the regulation-making power itself. A similar result was reached where the Governor in Council purported to sub-delegate an exempting power from customs and excise levies to the minister responsible for collecting these duties.[68] In both instances the court was unwilling to acknowledge any special expertise in the minister, or to accept that ultimate political control over the decision in question was vested in him. The paradox of these two cases is that they are unlikely to have any real impact on the authority of the minister; they are likely only to drive the true locus of a decision underground. Is it better that ministerial influence be visible or ought it to be exercised through options and pressures that might constitute, if discovered, examples of dictation?

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[65] *Re* Durham Regional Bd. of Comm'rs of Police & Durham Regional Police Ass'n, 21 O.R. (2d) 764 (Div'l Ct. 1978), *aff'd* 28 O.R. (2d) 1, 108 D.L.R. (3d) 629 (C.A. 1980).

[66] *Re* Grant, 21 O.R. (2d) 282 (Div'l Ct. 1978).

[67] *Re* Clark, *supra* note 58.

[68] *Dantex Woollen Co.*, *supra* note 58.

Of course, no issue of illegal sub-delegation can arise if the delegator has already exercised his power in such a way as to preclude the delegate from acting.[69] Correspondingly, when the delegate has already acted, the delegator is himself prevented either from revoking the delegation retroactively or attempting to re-exercise the power so delegated. As Willis noted long ago,[70] generalization in this area is quite difficult. What can be seen in recent cases, however, is a trend toward substance and not form, less reliance on *a priori* classification of functions, and an awareness of the administrative rationale of most delegations. Decisions in the period under review seem to reveal an attempt by courts to tailor the doctrine of delegation to the particular features of individual statutory schemes. Nevertheless, the *delegatus non potest delegare* doctrine remains ripe for detailed re-evaluation and reconceptualization on the basis that, in all cases, the true question to be considered is not whether the legislation expressly or impliedly authorizes sub-delegation, but rather what is the pattern of authority, discretion and responsibility within the bureaucratic hierarchy in question.

2. *Acting Under Dictation*

Although many writers consider this ground for review under the rubric "improper exercise of discretion", in this survey it will be viewed as the obverse of illegal sub-delegation; the real decision is taken by a third party and imposed upon the decision-maker contemplated by the statute under which the authority is granted. While cases of dictation most often involve the imposition of a superior's will on his subordinates, allegations of dictation may, on occasion, arise from pressures originating totally outside a bureaucratic structure.[71]

Most allegations of dictation arise in situations where a minister attempts to exert some influence on one of his departmental officials. In the context of modern public administration, however, the difficult question is to distinguish mere influence from dictation.[72] Presumably, as long as the official envisioned by the statute makes a decision himself and does not ignore any factor relevant to the issue to be decided, no dictation would occur simply where a minister made his position known.[73] Two Ontario cases illustrate that the key determinant usually

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[69] Ouimet v. The Queen, [1978] 1 F.C. 672, 77 C.L.L.C. 14,109 (Trial D.).

[70] Willis, *Delegatus Non Potest Delegare*, 21 CAN. B. REV. 257 (1943).

[71] *E.g.*, in Association des Gens de l'Air du Québec Inc. v. Lang, [1978] 2 F.C. 371, 22 N.R. 328, 89 D.L.R. (3d) 495 (App. D.) it was alleged, albeit unsuccessfully, that the Minister of Transport was acting under dictation by yielding to public pressure from the air traffic controllers' and pilots' associations.

[72] In section II. C. 3, the problem of whether ministerial influence itself may constitute a reviewable error as an irrelevant consideration will be examined.

[73] *See* Winnipeg Free Press v. Manitoba Lab. Rel. Bd., [1974] 3 W.W.R. 475, 44 D.L.R. (3d) 274 (Man. C.A.).

will be the way in which statutory decision-makers respond to the information or opinion generated by a minister. In *Re Township of Innisfil & City of Barrie*[74] the Divisional Court decided that the Ontario Municipal Board not only was entitled to take into account a letter from the Minister of Treasury, Economics and Intergovernmental Affairs, but also could itself determine the weight to be given to it. The Minister's letter was found to be a relevant consideration and since there was no evidence that the Board did not actually address the matter before it, the issue of dictation did not arise. In a related dispute, *Re Township of Innisfil & Township of Vespra*,[75] the Ontario Court of Appeal also came to the conclusion that the Municipal Board could accept a minister's statement as to government policy. However, the court held that the board must be open to arguments contesting both the accuracy and the significance of the minister's position. If it were not disposed to hear such evidence, the case for asserting dictation would be persuasive.

These two judgments reveal a reluctance on the part of courts to find dictation in the pure sense, especially where the issue to be decided has important policy elements. They do, however, show a judicial willingness to ensure that decision-makers do not *de facto* fall under the direction of an outside party through a failure to consider alternative positions to those officially stated. It appears, therefore, that an allegation of dictation will succeed only where a superior actually usurps the authority of a subordinate or so influences him as to prevent that subordinate from genuinely and personally exercising his statutory authority.[76] Rarely do the internal administrative channels of the provincial or federal public services degenerate to the point where crass usurpation results, and it is unlikely that political opportunism will again reveal itself in a manner capable of sustaining an allegation of dictation.[77]

### 3. *Illegal Constitution or Appointment; Statutory Disqualification*

In addition to grounds touching the relationship of the authorized power holder to other individuals in an administrative hierarchy, reviewable irregularities arising from the manner of appointment or subsequent disqualification of decision-makers may also occur. In the

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[74] 17 O.R. (2d) 277, 3 M.P.L.R. 47, 80 D.L.R. (3d) 85 (Div'l Ct. 1977).

[75] 23 O.R. (2d) 147, 7 M.P.L.R. 96, 95 D.L.R. (3d) 298 (C.A. 1978), *since rev'd in part sub nom.* Township of Innisfil v. Township of Vespra, 37 N.R. 43, 123 D.L.R. (3d) 530 (S.C.C. 1981).

[76] *See* Bligh v. Commission scolaire régionale du Grand-Portage, [1977] C.P. 106 (Que. Prov. Ct.) for a recent example where dictation was unsuccessfully pleaded in the context of a recommendation by the Ministry of Education to a local school board.

[77] In view of the wide concept of jurisdiction, under which taking into account irrelevant considerations may be asserted as reviewable error, repetitions of Roncarelli v. Duplessis, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 are unlikely, and this ground for review may well be spent. *But see* Henderson v. Zachariadis, 9 B.C.L.R. 363 (S.C. 1979) for an instance where the possibility of ministerial interference was mooted.

period under review no cases directly involving the usurpation of an office arose; nevertheless, courts were often required to determine questions of statutory disqualification of individual power holders and illegal constitution of multi-member bodies.

In *The Queen ex rel. Gillespie v. Wheeler*[78] the Supreme Court of Canada found that the Mayor of Moncton had lost the qualifications necessary to hold office because he had an interest in a contract made with the city, contrary to a statutory prohibition. However, where in another case[79] the illness of a decision-maker prevented him from continuing a hearing, there was no disqualification attaching to his replacement provided that the proceedings were commenced anew. The Federal Court found it inconceivable that the illness or death of a decision-maker could result in the permanent suspension of administrative proceedings.

Several cases relating to quorum requirements in multi-member bodies were reported during the period of this survey. Where a public service commission consisting of two members purported to hear an appeal notwithstanding a statutory requirement that the panel consist of three members, the court set aside the resulting award on the basis that the tribunal was illegally constituted; it also held that the requirement in question could not be waived by the appellants through their continued participation in the appeal hearing.[80] Again, it has been held that even where a statute expressly authorizes a multi-member body to sub-delegate its powers, the quorum requirements imposed upon the delegating authority must be respected by the delegate. Thus, powers to be exercised by a minimum of two persons may not be passed on to a single decision-maker.[81] However, in the absence of compulsory quorum and membership requirements the courts are reluctant to impose strict procedures on non-statutory bodies.[82]

The problem of illegal constitution of tribunals is often intertwined with allegations that certain decision-makers did not hear all the evidence presented. Exactly this issue was faced by the Supreme Court of Canada in *Bar of the Province of Quebec v. Ste-Marie*.[83] In this case the Court decided that as long as quorum requirements were met, a decision of a multi-member body could not be quashed on grounds of illegal constitution simply because two committee members did not receive a

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[78] [1979] 2 S.C.R. 650, 25 N.B.R. (2d) 209, 26 N.R. 323, 51 A.P.R. 209, 97 D.L.R. (3d) 605.

[79] *In re* Manhas & Immigration Act, [1977] 2 F.C. 120 (Trial D. 1976). *See also* Byer v. Barreau du Québec, [1976] Que. C.S. 1020, where a technical defect in appointment was overlooked.

[80] British Columbia Gov't Employees Union v. Public Serv. Comm'n, 10 B.C.L.R. 87, 96 D.L.R. (3d) 86 (S.C. 1979).

[81] *Re Canadian Pac. Transp. Co.*, *supra* note 52.

[82] Civil Serv. Ass'n of Alberta v. Solicitor General of Alberta, 2 A.R. 500, 74 D.L.R. (3d) 48 (S.C. 1977), *since aff'd by* 15 A.R. 503, [1979] 3 W.W.R. 385, 98 D.L.R. (3d) 282 (C.A.).

[83] [1977] 2 S.C.R. 414, 11 N.R. 59 (1976).

notice of a meeting. The Court was confirmed in its position by the fact that the evidence indicated that the meeting in question was merely a continuation of a prior meeting at which those two members were not present.

The most important and difficult issue in cases where illegal constitution or statutory disqualification is alleged does not involve an interpretation of the statutory requirement which has been infringed. Rather, it centres on judicial attitudes to technical defects, waiver, acquiescence, whether requirements are mandatory or directory and the possibility of correcting errors upon appeal. While these will be taken up in a later section of this survey, it is worth noting here a recent trend by courts to tailor decisions to factors such as the existence of substantial prejudice, and to refuse relief unless a gross irregularity has occurred. This again seems to indicate a recognition that much administrative decision-making is neither as discrete nor as formal as judicial decision-making.

### 4. *He Who Decides Must Hear*

A judicial review principle which is often raised in conjunction with a claim of illegal constitution is derived from the common law maxim "he who decides must hear". Usually this maxim is invoked when the composition of multi-member panels has changed during the course of a hearing. Yet it may also find application in situations involving institutional decisions.[84] While no cases of the latter type arose during the past two years, rotating memberships in multi-person tribunals continue to pose difficulties for reviewing courts. For example, in *Ste-Marie*[85] the Court observed that if certain members of a discipline committee who had not been present at a first meeting were to join a proceeding at a later time, the maxim "he who decides must hear" could be invoked to quash any decision in which they participated. However, where two separate resolutions were required by the applicable statute in order to remove a pharmacist from a pharmacists' association, it was held not to be necessary that the people who considered the first resolution should also consider the second.[86] Moreover, in a case where an application for promotion was in issue, the fact that one member of the selection committee who decided did not hear all the evidence personally but relied on a review of the findings and on his own impressions did not infringe the principle. The court found that there was no fixed quorum, or any legal requirement that all members be present at all times.[87]

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[84] For a brief discussion, *see* J. EVANS, H. JANISCH, D. MULLAN, & R. RISK, ADMINISTRATIVE LAW 294-303 (1980).

[85] *Supra* note 83.

[86] *Re* Davis, 16 Nfld. & P.E.I.R. 293, 42 A.P.R. 293, 86 D.L.R. (3d) 375 (Nfld. S.C. 1977).

[87] *Civil Serv. Ass'n of Alberta*, *supra* note 82.

The underlying policy problem is determining whether this ground of review applies equally to all types of administrative activity. While it makes sense to insist on a congruence between those who hear and those who decide when a decision-maker must proceed to an adjudication upon a record after an oral hearing, the case for applying the maxim to regulation-making bodies, investigating panels and advisory committees is considerably weaker.[88] Once again courts are required to evaluate, in individual cases, how similar judicial and administrative decision-making should be.

### 5. *The B.N.A. Act, Section 96*

One of the most intractable problems in Canadian administrative law arises from the fact that section 96 of the B.N.A. Act provides that only the federal executive may appoint superior and county court judges. Hence, should a statute purport to vest in an individual who is, or in a tribunal whose members are, appointed under provincial authority, any powers traditionally exercised by a superior court, the courts will deny these powers to the tribunal so established, even should the subject matter of the tribunal's jurisdiction fall entirely within provincial constitutional jurisdiction. We have treated section 96 problems as a defect relating to the holder of a statutory power rather than as an example of constitutional *ultra vires*. This has been done for two reasons. First, there is usually no attack on the power of a province to legislate in respect of the subject matters conferred upon the tribunal, or on the substantive jurisdiction of the tribunal to act as it has under the terms of its generic legislation. Second, the problem of public administration presented by section 96 is that of integration — can an agency function properly if several of its important adjudicative powers must be exercised by individuals outside the administrative hierarchy?

Four times during the period of this survey and six times since the last survey, the Supreme Court of Canada has been confronted with a judicial review application based on section 96. In *Farrah v. Attorney General of Quebec*[89] the Court was asked to decide whether a body styled the "Transport Tribunal" could, to the exclusion of the courts, be given the power to sit in appeal on questions of law from decisions of the Transport Commission. In a decision upholding the decisions of the court of first instance and the appeal court, the Supreme Court found this power *ultra vires* a provincial appointee either because it was an appellate jurisdiction on pure questions of law (the view of the minority of the Court) or because it was a superintending jurisdiction analogous to

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[88] *See* P.P.G. Industries Canada Ltd. v. Attorney General of Canada, [1976] 2 S.C.R. 739, 7 N.R. 209, 65 D.L.R. (3d) 354 (1975).

[89] [1978] 2 S.C.R. 638, 86 D.L.R. (3d) 161, discussed in Duplé, *Le contrôle de la légalité: une compétence exclusive des cours supérieures*, 19 C. DE D. 1069 (1978); and Pépin, *Case Comment*, 38 R. DU B. 818 (1978).

that exercisable on *certiorari* (the view of the majority). The offending power was clearly associated with the usual jurisdiction of superior courts and could not be said to be part of an integrated remedial authority granted to the tribunal, which was predominantly administrative in orientation.

By contrast, in *City of Mississauga v. Regional Municipality of Peel*[90] the Supreme Court of Canada held that a power of the Ontario Municipal Board to determine "whether any particular asset or liability is vested in the Regional Corporation" did not offend section 96. Following principles established in earlier decisions such as *Tomko v. Nova Scotia Labour Relations Board*,[91] attention was directed not to the detached jurisdiction or power of the tribunal, but rather to its setting in the institutional arrangements in which it appeared and under which it was exercisable. In addition, there was some suggestion that the power in question had more in common with that traditionally exercised by non-section 96 courts, and consequently the exclusive appointment jurisdiction of the federal executive was not infringed.

The two other Supreme Court of Canada cases in which a section 96 issue arose involved commissions of inquiry. In *C.B.C. v. Quebec Police Commission*[92] the Court held that the power to punish for contempt not committed in the presence of a tribunal was exercisable only by a superior court. This power was separate from and wider than the primary powers of the Commission and it could not be granted to individuals not appointed in conformity with section 96 of the B.N.A. Act. Again, in *Attorney General of Quebec v. Attorney General of Canada*,[93] the power to go behind an affidavit submitted under section 41 of the Federal Court Act was declared to be exclusive to a superior court and could not be exercised by a provincial inquiry. In both instances the offending jurisdiction was found to be neither necessary to the activity of the inquiry nor inextricably intertwined with its ordinary administrative and investigatory powers.

By its very nature this ground is not capable of definitive *a priori* elaboration of principles applicable to all legislative schemes. How, for example, are issues of institutional setting and conditions of exercise to be determined other than by careful analysis of particular statutory grants of power? As a result, section 96 problems continue to arise in a variety of contexts. In a lengthy judgment relying heavily on the *Tomko* decision, a Manitoba court concluded that the power of the provincial Clean Environment Commission to affix responsibility for contamination

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[90] [1979] 2 S.C.R. 244, 97 D.L.R. (3d) 439.

[91] [1977] 1 S.C.R. 112, 7 N.R. 317, 69 D.L.R. (3d) 250 (1975); Jones v. Edmonton Catholic School Dist. No. 7, [1977] 2 S.C.R. 872, 11 N.R. 280, [1976] 6 W.W.R. 336, 70 D.L.R. (3d) 1 (1976).

[92] [1979] 2 S.C.R. 618, 28 N.R. 541, 48 C.C.C. (2d) 289, 101 D.L.R. (3d) 24.

[93] [1979] 1 S.C.R. 218, 24 N.R. 1, 43 C.C.C. (2d) 49, 90 D.L.R. (3d) 161 (1978), *var'g* [1978] Que. C.A. 44, 41 C.C.C. (2d) 452, 87 D.L.R. (3d) 667 (hereafter referred to as *Keable*).

and to determine costs of a clean-up offended section 96.[94] The case rested on the principle that attribution of fault between subject and subject was separate and distinct from the Commission's other powers and was clearly a superior court function. Conversely, in several cases *Tomko* has been invoked to sustain provincial jurisdiction. For example, the power of the Ontario Labour Relations Board to issue cease-and-desist orders,[95] the jurisdiction of an adjudicator to determine claims as between competing mining companies, even where subtle questions of contract interpretation were involved,[96] and the authority of an agricultural implements board to assess and award compensation for purchasers' losses and to administer a no-fault compensation fund for that purpose[97] were held not to infringe section 96. In each case the court was primarily concerned with the questions whether the decision-maker adjudicated upon rights and whether the judicial functions exercised were truly ancillary to a jurisdiction not reserved to section 96 courts.

The most frequently litigated section 96 issue in recent years has concerned the jurisdiction of various residential tenancies commissions and rent review tribunals. Cases on this point have arisen in British Columbia, Alberta and Ontario and reached the Court of Appeal in all three jurisdictions. In two British Columbia decisions, courts found that the power of a rent review commission to make determinations as to allowable rent increases, and the power of a decision-maker styled a rentalsman to terminate a tenancy, did not infringe section 96.[98] However, in reference cases to appeal courts, analogous legislation in both Alberta and Ontario was found to vest provincial appointees with section 96 functions.[99] What is of particular significance in the latter decision is the reluctance of the Court of Appeal to apply the institutional setting analysis proferred in *Tomko*. The court found the tribunal to be a court, not an administrative agency, for three reasons. First, it distinguished the British Columbia legislation on the basis that no power to act *proprio motu* was given to the Ontario tribunal; second, the

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[94] Texaco Canada Ltd. v. Clean Environment Comm'n, [1977] 6 W.W.R. 70, 79 D.L.R. (3d) 18 (Man. Q.B.).

[95] C.U.P.E. v. Guelph Gen. Hosp., 22 O.R. (2d) 348, 93 D.L.R. (3d) 359 (H.C. 1978).

[96] *Re* Miramichi Lumber Co., 20 N.B.R. (2d) 35, 34 A.P.R. 35, 83 D.L.R. (3d) 545 (C.A. 1977).

[97] Massey-Ferguson Indus. Ltd. v. Government of Saskatchewan, [1979] 1 W.W.R. 97, 92 D.L.R. (3d) 161 (Sask. Q.B. 1978), *since aff'd by* 4 Sask. R. 318, [1980] 6 W.W.R. 604, 115 D.L.R. (3d) 47 (C.A.). *Appeal to S.C.C. dismissed* 6 Oct. 1981.

[98] Cohen v. Dhillon, [1979] 5 W.W.R. 609, 102 D.L.R. (3d) 589 (B.C. Cty. Ct.); Pepita v. Doukas, 16 B.C.L.R. 120, 101 D.L.R. (3d) 577 (C.A. 1979).

[99] Reference *re* Constitutional Questions Act (Alberta), [1978] 6 W.W.R. 152, 89 D.L.R. (3d) 460 (Alta. C.A.); Reference *re* Residential Tenancies Act, 26 O.R. (2d) 609, 105 D.L.R. (3d) 193 (C.A. 1980), *aff'd* 37 N.R. 158, 123 D.L.R. (3d) 554 (S.C.C. 1981). It should be noted that the Alberta case was in respect only of draft legislation while the Ontario case dealt with an existing statute.

mediatory powers granted to the Board were held to be severable from its adjudicative powers; third, the Court of Appeal denied that any particular legislative policy was to be pursued which would oblige the Board to act other than as a court. Having rejected the argument that the Commission was exercising only administrative powers, the Court of Appeal then found that the judicial powers granted were not of a summary nature, but were of a type traditionally associated with a superior court.

While the Ontario judgment would seem conclusive of how broadly the *Tomko* decision may be interpreted, given the reasons why most section 96 litigation arises, it is unlikely that similar challenges to integrated administrative schemes will abate. Moreover, as public pressure increases for legislative intervention in traditional common law areas such as contract, property and tort, through consumer protection agencies, rent review tribunals and accident compensation boards, newer omnibus administrative bodies are certain to be established. Until a means of integrating section 96 and administrative functions is achieved, perhaps along the line of the unified family court, the conflict of federal and provincial appointment powers will persist.

### 6. *Bias or Interest*

Although bias or interest as a ground of judicial review usually is viewed as a procedural principle associated with the concept of natural justice, there are a number of reasons for considering it at this point in the survey. The irregularity alleged in bias cases is essentially one that goes to the decision-maker, rather than the scope of decision or the procedures for decision. Much of the reason for linking *audi alteram partem* and *nemo judex in causa sua* was tied to the classification of function exercise — an exercise which seems now to be of less significance, at least in so far as grounds for review are concerned. Most bias allegations arising today are founded not on a complaint of personal prejudice, but rather on attitudes towards the issue the decision-maker is likely to have formed through past association either with a party to a dispute or with the dispute itself. Both of these compel courts to evaluate the patterns of authority and responsibility in given administrative structures.

Notwithstanding several important Supreme Court of Canada decisions in this field, bias cases have been less frequent than one might expect. This relative lack of litigation is perhaps explained by the creativity of counsel in invoking other grounds for review relating to abuse of discretion,[100] or their unwillingness to invoke a ground for review which challenges the integrity of the decision-maker (especially where the relationship between agency and potential litigant is necessar-

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[100] *E.g.*, Campeau Corp. v. Calgary, 12 A.R. 31, 8 M.P.L.R. 88, 7 Alta. L.R. (2d) 294 (C.A. 1978). For a discussion of bias, *see also* Campeau Corp v. Calgary (No. 2), 22 A.R. 572, 12 Alta. L.R. (3d) 379, 112 D.L.R. (3d) 737 (C.A. 1980).

ily ongoing), or the fact that of all grounds for review this defect is most easily corrected by in-house mechanisms such as appeals or reconsiderations.

Some decisions during this period suggest that allegations of bias may only be raised in respect of decision-makers performing judicial or quasi-judicial functions. Thus, the Federal Court refused to entertain such an allegation with respect to a Royal Commission inquiry, which it characterized as performing non-judicial functions.[101] The same court also concluded that an inspector acting under the Canada Corporations Act performed purely investigatory functions and was therefore not subject to review on grounds of bias.[102] By contrast, other decisions reflect the liberalizing trend of the fairness doctrine. In a Manitoba judgment it was suggested that allegations of bias could properly be raised against bodies performing investigatory functions, although a less strict standard would be used in evaluating impartiality.[103] Moreover, the Ontario Court of Appeal has observed that in view of the fairness doctrine, allegations of bias could be made against bodies not required to act judicially.[104] Courts also have finessed the classification problem by finding that a nominally investigatory process such as a coroner's inquest really amounted to a judicial proceeding in respect of which an allegation of bias could be brought.[105] The trend of judgments would seem to be away from classification of function and towards adoption of a modified fairness principle applicable to claims of bias.

Occasions of bias in fact are relatively infrequent even though any direct pecuniary interest in proceedings will invariably disqualify a decision-maker. However, if the relationship giving rise to the alleged pecuniary interest is implausible or remote, the decision challenged will not be set aside on this basis. For example, the mere fact that one member of a provincial board appointed by the cabinet owed money to the government would not be sufficient to raise a likelihood of bias in favour of the government position.[106] In cases where actual bias cannot be proved, courts will nevertheless set aside a decision if the circumstances alleged give rise to a reasonable apprehension of bias in the decision-maker. After some hesitation as to whether the test to be applied should

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[101] Copeland v. McDonald, [1978] 2 F.C. 815, 42 C.C.C. (2d) 334, 88 D.L.R. (3d) 724 (Trial D.).

[102] Canadian Javelin Ltd. v. Sparling, [1979] 1 F.C. 334, 4 Bus. L.R. 284, 89 D.L.R. (3d) 226 (Trial D. 1978), *since aff'd by* 22 N.R. 465, 91 D.L.R. (3d) 64 (F.C. App. D. 1978); *leave to appeal to S.C.C. denied* 17 Mar. 1980. The statute in question is R.S.C. 1970, c. C-32.

[103] Camino Management Ltd. v. Manitoba Sec. Comm'n, [1979] 2 W.W.R. 594 (Man. Q.B.).

[104] *Re* Webb, 22 O.R. (2d) 257, 93 D.L.R. (3d) 187 (C.A. 1978).

[105] *Re* Evans, 24 O.R. (2d) 181, 97 D.L.R. (3d) 687 (C.A. 1979); *leave to appeal to S.C.C. denied* 24 Apr. 1979.

[106] Greyhound Lines of Canada Ltd. v. Motor Transp. Bd., 4 Alta. L.R. (2d) 280, 80 D.L.R. (3d) 143 (C.A. 1977).

be "reasonable suspicion", "real likelihood" or "real apprehension", the Supreme Court of Canada appears to have adopted the formula "reasonable apprehension of a biased appraisal and judgment of the issues to be determined" as the standard for evaluating claims of bias.[107]

During the period of this survey, courts have quashed decisions on the ground of bias in a variety of situations. For example, the fact that the prosecuting counsel prepared a draft judgment for the tribunal was held to give rise to an apprehension of bias, even though upon a look at all the circumstances no actual bias could be shown.[108] Again, a labour arbitration decision was set aside for bias because the award contained language suggesting that immigrants might not be aware of the importance of telling the truth.[109] By contrast, in several cases allegations of bias were held to be unfounded. Thus, the mere fact that a hospital board had imposed an interim suspension on an applicant was held not to be sufficient to give rise to an apprehension of bias at a later hearing.[110] In one case, the Director of Information of the Ministry of Manpower and Immigration indicated that the applicant was a member of the Mafia. The court held that this revelation did not give rise to an apprehension that the officer conducting his deportation hearing would be biased in favour of the Minister's position, and that even if it did, the application could not succeed since everyone in the Ministry would be disqualified.[111]

Allegations of bias founded on the prior association of the decision-maker with one of the parties to a dispute has proved a particularly common ground for seeking disqualification. In *P.P.G. Industries Ltd. v. Attorney General of Canada*,[112] for example, the Supreme Court of Canada held that where a member of a tribunal disclosed his interest and did not formally participate in a decision, his earlier employment as an adviser to one party did not taint the proceedings. Where the decision-maker does not disqualify himself, courts have looked to factors such as the nature of the prior relationship

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[107] *See* Committee for Justice & Liberty v. National Energy Bd., [1978] 1 S.C.R 369, 9 N.R. 115, 68 D.L.R. (3d) 716 (1976), commented on in Jones, *The National Energy Board Case and the Concept of Attitudinal Bias*, 23 McGILL L.J. 462 (1977); and in Garant, *Les exigences de l'impartialite quasi-judiciaire*, 18 C. DE D. 585 (1977). *See also* Ringrose v. College of Physicians & Surgeons of Alberta, [1977] 1 S.C.R. 814, 1 A.R. 1, 9 N.R. 383, 67 D.L.R. (3d) 559 (1976), commented on in Jones, *Institutional Bias: The Applicability of the Nemo Judex Rule to Two-Tier Decisions*, 23 McGILL L.J. 605 (1977).

[108] *Re* Sawyer, 24 O.R. (2d) 673, 99 D.L.R. (3d) 561 (C.A. 1979).

[109] *Re* Service Employees Union Local 246, 18 O.R. (2d) 55, 82 D.L.R. (3d) 157 (Div'l Ct. 1977).

[110] Stewart v. Board of Governors of Wadena Union Hosp., [1979] 1 W.W.R. 671 (Sask. C.A. 1978); *leave to appeal to S.C.C. denied* 23 Jan. 1979.

[111] Caccamo v. Minister of Manpower & Immigration, [1978] 1 F.C. 366, 16 N.R. 405, 75 D.L.R. (3d) 720 (App. D. 1977).

[112] *Supra* note 88. *See generally* Jones, *Administrative Law — Natural Justice — Nemo Judex Rule — The Appearance of Justice*, 55 CAN. B. REV. 718 (1977).

and the length of time since it had been terminated. Thus, the fact that a vice-chairman of a panel of the Ontario Labour Relations Board was once a member of a law firm which was associated with the applicant union was held not to give rise to an apprehension of bias since he had been dissociated from his firm for more than one year and had never had any dealings with the union or its predecessor.[113] Again, where an arbitrator had at one time sat on a conciliation board with the solicitor of one party, the court held the prior relationship to be too tenuous to found a claim of bias.[114]

Perhaps the most difficult bias problems arise when the claim for disqualification is based not upon a decision-maker's attitudes towards a party, but rather his attitude towards the matter to be decided. Partiality in this sense usually arises from commitment to government policy, to the policy goals of the empowering statute, or from a close relationship between two levels of an agency. In *Committee for Justice & Liberty v. National Energy Board*[115] the Supreme Court of Canada was faced squarely with this problem. In finding a member of the Board to be disqualified because of a prior connection with the project upon which judgment was to be passed, the Court was particularly concerned with the intensity of that person's commitment to the project and the degree of identity between the matter to be decided and the prior association. In another case, a decision of a Human Rights Commission was overturned because of what was termed overzealous pursuit of legislative policy without due regard to the facts of the particular case.[116] Where attitudinal bias is alleged because of a close relationship within an agency hierarchy, it is often characterized as institutional bias. In *Ringrose v. College of Physicians & Surgeons of Alberta*[117] the Supreme Court of Canada was asked to find that an overlapping membership between a recommendatory and a decision-making body gave rise to an apprehension of bias, even though no member actually participated at both levels. In refusing to quash the decision, the Court noted that there was no evidence upon which a reasonable person would find the decision-making body unable to treat the issue in an unbiased manner. Given the internal structure of the agency, any impact the prior decision of the recommendatory body might have on the final decision-maker would be insignificant.

Occasionally the framework of a statute will be such that factors usually giving rise to an apprehension of bias are expressly contemplated in the normal procedures of a tribunal. In such cases courts will not find

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[113] *Re* Marques, 18 O.R. (2d) 58, 81 D.L.R. (3d) 554 (Div'l Ct. 1977).

[114] *Re* Association of Indus. Workers & Flyer Indus. Ltd., 85 D.L.R. (3d) 441 (Man. C.A. 1978). *Cf. Re* Degerness, 91 D.L.R. (3d) 438 (Sask. Q.B. 1978).

[115] *Supra* note 107.

[116] Iwasyk v. Human Rights Comm'n of Saskatchewan, [1977] 6 W.W.R. 699, 80 D.L.R. (3d) 1 (Sask. Q.B.), *rev'd on other grounds* [1978] 5 W.W.R. 499, 87 D.L.R. (3d) 289 (C.A.).

[117] *Supra* note 107. *See generally* Jones, *supra* note 107.

an apprehension of bias on these grounds alone but will look for stronger proof of bias before intervening. A common form of built-in bias occurs when seemingly inconsistent functions are assigned to the same person; for example, a registrar's decision will be upheld where a statute contemplates that he may act as investigator, administrator and judicial officer.[118] Built-in bias can also arise where an individual is authorized to sit on an appeal from his own decision: a university president would not be disqualified from sitting on an appeal to the Board of Governors from his decision to suspend a professor when the statute authorizes him to do so.[119] The Supreme Court judgment in *Ringrose*[120] can also be viewed as an instance of built-in bias. In that case the Court found that the Discipline Committee judging a complaint did not sit on an appeal from the recommendation of the Executive Committee and that consequently, even absent statutory authorization of overlapping memberships, an allegation of bias could not be sustained. A third situation in which legislation contemplates the participation of decision-makers who might otherwise be excluded for reasons of bias often arises in labour arbitrations. In tripartite tribunals, the mere fact that the nominee of one party is known to support the position of that party will not, in the absence of objective evidence that the nominee is incapable of approaching his duties with an open mind, be sufficient to lead to his disqualification.[121] A similar conclusion is also frequently reached in situations that do not involve labour relations. However, where legislation establishes a regulation-making body composed of representatives of various interests, the statutory authority will not be interpreted so as to permit direct, pecuniary conflicts of interest.[122] In other words, while courts will defer to legislative will in cases of built-in bias, they will interpret any authorizations strictly and will not extend them to conflicts not expressly contemplated by the statute.

Closely related to situations where legislative provisions have been held to oust the rule against bias are those cases where, of necessity, decisions taken by a person who may otherwise be disqualified will be permitted to stand. When there was an apprehension of bias based on circumstances that applied to all members of a government department,

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[118] *Re* Centurion Investigation Ltd., 23 O.R. (2d) 371, 98 D.L.R. (3d) 745 (Div'l Ct. 1978). The legislation in question even provided for a replacement if the Registrar was unable to act, but the court permitted him to perform all his statutory functions in any event.

[119] Kane v. Board of Governors of Univ. of British Columbia, 82 D.L.R. (3d) 494, (B.C.S.C. 1977), *aff'd* 11 B.C.L.R. 318, 98 D.L.R. (3d) 726 (C.A. 1979), *rev'd* [1980] 1 S.C.R. 1105, 31 N.R. 214, 110 D.L.R. (3d) 311.

[120] *Supra* note 107.

[121] Gypsumville Dist. Teachers' Ass'n 1612 v. Consolidated School Dist. of Gypsumville 2461, [1979] 5 W.W.R. 600 (Man. Q.B.), *aff'd* [1979] 6 W.W.R. 616, 103 D.L.R. (3d) 672 (C.A.).

[122] Alaska Trainship Corp. v. Pacific Pilotage Auth., [1978] 1 F.C. 411, 104 D.L.R. (3d) 364 (Trial D. 1977).

no prohibition issued to prevent a decision from being made.[123] This principle has also been applied where the special expertise of a decision-maker outweighs evidence which normally might give rise to a claim of bias.[124]

One of the troubling issues about allegations of bias is whether proof of the bias renders a decision void or voidable. While no coherent view has yet emerged, courts nevertheless are continuing to hold that waiver may be asserted as a defence to a claim of bias.[125] Moreover, reluctance to grant prohibition to restrain proceedings for apprehended bias reveals an inclination not to treat this ground of judicial review on the same basis as those arising from statutory misinterpretation. Here again the courts are attempting to fit the requirements of impartiality into the framework of public administration: regardless of the basis for an allegation of bias, it is preferable to see how the impugned proceedings actually turn out before issuing a remedy.

#### 7. *Conclusion*

Perhaps more than other grounds for review, irregularities relating to the holder of a statutory power show important differences between judicial and administrative decision-making. To the extent that judges seem to be groping towards a theory of bureaucratic accountability tailored to individual legislative arrangements, these differences are being recognized.

### B. *Irregularities Relating to the Scope of the Statutory Power Exercised*

Many of the perennial problems in law can be traced to the fact that linguistic symbols must be used to convey complex patterns of ideas.[126] Of course, when the language of a judicial decision is being analysed the task of interpretation is simplified because the rule to be interpreted is set out in a factual and historical context and the reasons for the rule may be found together with the statement of the rule itself. No such luxury of information is available to assist those who are required to construe legislatively announced rules. In fact, official canons of interpretation exclude many useful explanatory materials from decision-makers.

Since the primary concern in the study of administrative law is legislatively defined jurisdiction, it is not surprising that many judicial review cases should involve no more than a conflict of interpretation between courts and agencies over the meaning of a statute. While courts

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[123] *Caccamo*, *supra* note 111.

[124] *Civil Serv. Ass'n of Alberta*, *supra* note 82.

[125] *Henderson*, *supra* note 77. *See* section II. D. 2.k *infra*.

[126] For an elaboration of this thesis, *see* L. FULLER, ANATOMY OF THE LAW (1968), especially 89ff.

are inclined to read legislative grants of power restrictively — both to enhance or preserve their own jurisdiction and in deference to the liberal-democratic tradition of the minimal state — agencies are prone to read their enabling legislation broadly so as to achieve their policy mandate more efficiently. Although substantive jurisdictional control is often dressed up in the language of the rule of law, the cases tend to reveal more the rule of tacit assumptions, both judicial and administrative. Since professionally trained bureaucrats and professionally trained judges receive widely different training, the approach each takes to the same statutory provision is bound to differ. In addition to these interpretative differences, one should also consider that administrators are usually less sensitive to highly technical irregularities affecting the scope of their power.

In this section, attention will be focussed on the consequences arising where conflicts in interpretation result in findings of invalidity of agency decisions on constitutional grounds, or because of a total absence of jurisdiction, an excess of jurisdiction or a determination that a decision-maker wrongfully declined to act. Of course, the overlap between these grounds for review is often substantial and an attitude of judicial pragmatism in invoking them has produced confused law in this area. Nevertheless, we shall attempt to invoke a taxonomy of irregularities which may be useful in isolating both real and presumed jurisdictional defects.

### 1. *Constitutional Limitations*

In any federal state an important limitation on the exercise of administrative power arises from the divided legislative jurisdiction. An attempt by a province to delegate B.N.A. Act section 91 powers to a provincial board, or any attempt by the Federal Government to delegate B.N.A. Act section 92 powers to a federal board, will be held *ultra vires*. It is a measure of the growth of administrative law that so many of these cases continue to arise. While it is properly the province of a survey of constitutional law to examine these cases in detail, a few general points can usefully be made here.

First, because of shared jurisdiction in labour relations matters, a number of cases have involved attempts by provincial labour boards to assert power over arguably federal bargaining units. Recently the trend of cases has been in favour of upholding provincial jurisdiction. For example, in *Montcalm Construction Inc. v. Minimum Wage Commission*[127] the Supreme Court of Canada held the provisions of various Quebec statutes to be applicable to a Quebec construction company

[127] [1979] 1 S.C.R. 754, 25 N.R. 1, 79 C.L.L.C. 14,190.

engaged in work on a federal airport by virtue of the general authority of the province over labour relations.[128]

Second, the extensive scope of regulation given to self-governing professional organizations in many provinces has led to claims of constitutional invalidity. A provision in an association's by-laws subjecting a member to discipline for acts committed outside the province was held not to be invalid as having interprovincial effect, only because such actions might be relevant in determining the continued fitness of an individual to practise in the province.[129] However, the court decided that were the provision to make unbecoming conduct committed outside the province not merely evidence admissible to show unfitness in general, but rather an independent head of prosecution, it would have been invalid. The courts have also held that a requirement in a provincial Legal Profession Act[130] requiring a member to be "a Canadian citizen or a British subject" was not a provision dealing with "naturalization and aliens"[131] and was therefore not *ultra vires*.[132] Sometimes cases centre on an alleged conflict between an existing federal statute and aspects of the provincial regulatory legislation. In one case, the court found various provisions in the Health Disciplines Act[133] regarding the sale of prescription medication not to be in conflict with the Food and Drugs Act[134] and refused to quash charges brought under the former statute on the ground that the latter statute occupied the field.[135] Conversely, it has been held that the provisions of the federal Combines Investigation Act[136] would override sections of a provincial Legal Professions Act[137] prohibiting advertising and establishing minimum fees.[138]

Complex agricultural marketing schemes involving interdelegation are a third area where constitutional difficulties have frequently arisen. For example, in *Reference re Agricultural Products Marketing Act*[139] the

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[128] Similarly, in *Re* Four B Mfg. & United Garment Workers of Am., 80 C.L.L.C. 14,006, 79 D.L.R. (3d) 576 (Ont. Div'l Ct. 1977), the court held that the Ontario Labour Relations Board had jurisdiction to certify a trade union respecting a plant operating on an Indian reservation and relating to Indians. *But see* Pro-Star Mills v. Canadian Food & Allied Workers Local P342, [1978] 3 W.W.R. 667 (Sask. Q.B.).

[129] Underwood McLellan & Assocs. Ltd. v. Association of Professional Eng'rs of Saskatchewan, [1978] 4 W.W.R. 525, 86 D.L.R. (3d) 501 (Sask. Q.B.), *rev'd* 1 Sask. R. 25, [1980] 1 W.W.R. 43, 103 D.L.R. (3d) 268 (C.A. 1979).

[130] R.S.A. 1970, c. 203, s. 39(2)(*a*).

[131] B.N.A. Act, s. 91(25).

[132] Dickenson v. Law Soc'y of Alberta, 10 A.R. 120, 5 Alta. L.R. (2d) 136, 84 D.L.R. (3d) 189 (S.C. 1978).

[133] *Now* R.S.O. 1980, c. 196.

[134] R.S.C. 1970, c. F-27.

[135] *Re* Levkoe, 18 O.R. (2d) 265, 37 C.C.C. (2d) 356 (Div'l Ct. 1977).

[136] R.S.C. 1970, c. C-23.

[137] R.S.B.C. 1979, c. 26.

[138] Jabour v. Law Soc'y of British Columbia, 34 C.P.R. (2d) 145, 87 D.L.R. (3d) 305 (B.C.S.C. 1978), *aff'd* 97 D.L.R. (3d) 295 (B.C.C.A. 1978).

[139] [1978] 2 S.C.R. 1198, 19 N.R. 361, 84 D.L.R. (3d) 257.

Supreme Court of Canada held a section of the Act[140] *ultra vires* as regulating intra-provincial trade. While regulation within the province was permissible, it could only be achieved through provincial enactment. In other cases, courts have found provincial regulatory schemes to trespass upon federal jurisdiction. Thus, a regulation designed to allow a provincial marketing board to control the sale of chickens imported into the province was held invalid as being a restriction on interprovincial trade.[141] In both cases it is important to observe that the court confined its holding to the question of whether the legislation actually passed was within the competence of the enacting legislature. An appropriately worded interdelegation formula apparently would achieve the desired result.

In addition to the matters reviewed in detail, there was a plethora of cases in which agency regulation was struck down or upheld upon a constitutional challenge. These decisions contain little of interest to the administrative lawyer, for their common thread is simply that the enacting jurisdiction overstepped the limitations of the B.N.A. Act. The fact that the offending legislation happened to create an agency or delegate powers to a statutory decision-maker is invariably irrelevant to the constitutional challenge, for it is only when a power struck down on constitutional grounds could also be challenged on another basis relevant to our survey that administrative law issues become significant.

### 2. *Absence of Jurisdiction*

While it is true that an agency acting by virtue of a legislative provision declared unconstitutional has no jurisdiction so to act, usually a tribunal will be found to be acting in absence of jurisdiction when it attempts to exercise powers which have not been delegated to it. There are four main ways in which this may occur. First, the statutory authority upon which a decision-maker bases his actions may have been repealed or may never have been properly passed. Second, an agency may fail to satisfy certain formal prerequisites to its power to act. Third, a tribunal may misinterpret its enabling legislation so as to inquire into a matter over which it has been given no authority, or may make certain erroneous factual determinations and thereby assume a power to act when not

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[140] Agricultural Products Marketing Act, R.S.C. 1970, c. A-7, s. 2(2)(*a*).

[141] Kelly Douglas Co. v. B.C. Broiler Marketing Bd, [1978] 2 W.W.R. 1, 84 D.L.R. (3d) 132 (B.C.S.C. 1977). *See also* under this general rubric Nova Scotia Bd. of Censors v. McNeil, [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1; Millbrook Indian Band v Northern Counties Residential Tenancies Bd., 28 N.S.R. (2d) 268, 43 A.P.R. 268, 81 D.L.R. (3d) 174 (C.A. 1978); Attorney General of Quebec v. Kellogg's Co. of Can., [1978] 2 S.C.R. 211, 83 D.L.R. (3d) 314; Attorney General of Can. v. Dupond, [1978] 2 S.C.R. 770, 84 D.L.R. (3d) 420; Central Can. Potash v. Saskatchewan, [1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609; Hamilton Harbour Comm'rs v. City of Hamilton, 21 O.R. (2d) 459, 91 D.L.R. (3d) 353 (C.A. 1978); *Re* Essex County Roman Catholic Separate School Bd. & Porter, 21 O.R. (2d) 255, 89 D.L.R. (3d) 445 (C.A. 1978).

authorized to do so. Finally, a tribunal may attempt to reopen or reconsider a matter which it has already disposed of. Each of these irregularities can be characterized as an example of a tribunal acting in the absence of jurisdiction. The challenge relates neither to the person who made a decision, nor to the way in which the decision was made, nor to the question of whether a part of a tribunal's order was unauthorized. Rather, the issue is simply whether the decision-maker had the power to undertake the proceedings complained of.[142] This determination can be made at the outset of a tribunal's proceedings.

### (a) *Non-existence of Statutory Authority*

There are many ways in which irregularities of this type may arise, although frequently the issue in dispute requires the court to interpret a statute which repeals and replaces existing legislation under which powers were originally granted. Where regulations establishing a tariff schedule have been abolished, an agency has no authority to impose levies collecting these.[143] Again, upon the repeal of legislation providing for a statutory appeal, no administrative agency may exercise the repealed jurisdiction — tribunals have no inherent appellate jurisdiction.[144] Since the regulatory structure in immigration matters is in constant evolution, cases involving the allegation of absence of jurisdiction tend to arise. Usually, however, the complaint is not that a non-existent jurisdiction was exercised but rather that a repealed jurisdiction should have been exercised.[145]

On rare occasions an absence of jurisdiction may arise simply because appropriate enabling legislation was never passed. This may occur when power is exercised under claim of royal prerogative which the court finds not to exist[146] or, as in *Re Manitoba Government Employees Association & Government of Manitoba*,[147] when an order in council is found insufficient to confer the powers purportedly delegated. Cases of blatant usurpation of powers no longer seem to be frequent; rather, one finds that technical defects in legal formality occasionally result in a complete absence of power.

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[142] Of course, many of the grounds for review considered in section A *infra*, could also be considered here as forms of acting in the absence of jurisdiction. As noted, however, our attention will be devoted to the substance of a power and not to an examination of power-holders.

[143] Shell Canada Ltd. v. Laurentian Pilotage Auth., [1978] 1 F.C. 119, 18 N.R. 439 (App. D. 1977).

[144] Martinoff v. Gossen, [1979] 1 F.C. 327, 46 C.C.C. (2d) 368 (Trial D. 1978), *appeal dismissed* 46 C.C.C. (2d) 368n (App. D. 1979).

[145] *See In re* Kleifges, [1978] 1 F.C. 734, 84 D.L.R. (3d) 183 (Trial D.); McDoom v. Minister of Manpower & Immigration, [1978] 1 F.C. 232, 77 D.L.R. (3d) 559 (Trial D. 1977).

[146] Regina v. Catagas, [1978] 1 W.W.R. 282, 33 C.C.C. (2d) 296, 81 D.L.R. (3d) 396 (Man. C.A. 1977).

[147] [1978] 1 S.C.R. 1123, 17 N.R. 506, 79 D.L.R. (3d) 1 (1977).

(b) *Formal Prerequisites*

A decision-maker may also lack the power to act because certain formal prerequisites to his jurisdiction have not been fulfilled. Often these involve procedural matters such as time limit clauses or the necessity for preliminary reports and summary investigations; as such they can also be viewed as examples of procedural *ultra vires*. In our usage, the latter concept will be employed where a statutory precondition relating to the opportunity to be heard has been infringed and the notion of formal prerequisites will be restricted to cases involving substantive requirements. It is a measure of the improvement in administrative decision-making that fewer cases of this nature arise, and blatant errors relating to matters such as territorial jurisdiction rarely occur.

As with other grounds for review canvassed in this section, a failure to fulfill a prerequisite usually arises because of a conflict in statutory interpretation between agency and court. For example, in one case the power of a minister to determine a zoning matter was dependent on the prior filing of a report conforming to a statutory requirement. Since the court disagreed with the minister's view of the necessary content of the report, the decision taken was quashed.[148] The power of a human rights commission to investigate a matter was stated to be contingent on the filing of a complaint within six months; since the commission had no power to extend this period, once it elapsed the commission did not have jurisdiction to undertake an inquiry.[149] Finally, in an immigration case the court held that the filing of a report against a person was a condition precedent to the power to deport him. Prior to receipt of such a report, the person making the deportation order would be acting in absence of jurisdiction.[150]

In some cases, however, courts refuse to find that formal statutory requirements are a precondition to a tribunal's jurisdiction. Where an act required that notice of a complaint be given to a teacher prior to termination of his contract, this notice was deemed unnecessary when dismissal resulted not from a specific complaint but from lack of student enrolment.[151] As with allegations of procedural *ultra vires*, the preliminary question facing courts when it is alleged that a formal prerequisite has not been satisfied is whether the requirement is mandatory or merely directory.[152]

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[148] *Re* Braeside Farms Ltd., 20 O.R. (2d) 541, 5 M.P.L.R. 181, 88 D.L.R. (3d) 267 (Div'l Ct. 1978).

[149] Burns v. United Ass'n of Journeymen, [1978] 2 W.W.R. 22, 82 D.L.R. (3d) 488 (B.C.S.C. 1977).

[150] Saini v. Minister of Manpower & Immigration, 22 N.R. 22, 86 D.L.R. (3d) 492 (F.C. App. D. 1978).

[151] McDougall v. Board of School Comm'rs of Town of Mahone Bay, 33 N.S.R. (2d) 444, 57 A.P.R. 444, 92 D.L.R. (3d) 408 (S.C. 1978), *rev'd* 33 N.S.R. (2d) 435, 57 A.P.R. 435, 101 D.L.R. (3d) 87 (C.A. 1979).

[152] *See* Section II. D.1 *infra*.

### (c) *Jurisdictional Errors of Law and Fact: Preliminary or Collateral Matters*

Undoubtedly the most significant ground for judicial review of the substance of a statutory power arises from a claim of absence of jurisdiction resulting from the misinterpretation of enabling legislation. There are two main difficulties which have made review on this ground a trap for the unwary: first, the problem of distinguishing errors of law from mistakes about facts, and second, the problem of distinguishing between matters within jurisdiction and matters going to jurisdiction. Drawing a distinction between law and fact is theoretically important because mistakes relating to factual determinations are in principle immune from correction on judicial review; drawing the line between jurisdictional and non-jurisdictional errors is crucial because, subject to errors of law appearing on the face of the record, only the former will sustain a successful judicial review challenge. However, many judgments in this area have a strong flavour of *ex post facto* rationalization, and the touchstone of whether an agency decision will be quashed appears to be judicial attitudes towards the capacity of public servants to determine responsibly the limits of their own authority.

The most important development in the period under review has been the retreat by the Supreme Court of Canada from its posture in earlier cases in which a sceptical view of agency competence seems to have led to a narrow conception of a tribunal's formal jurisdiction.[153] Twice in the early years of this survey period the Court rendered judgments consistent with the approach developed at the beginning of the decade. Invoking the jurisdictional fact doctrine,[154] the Court quashed decisions by finding in *Jacmain v. Attorney General of Canada*[155] that despite wide statutory language, an arbitrator's characterization of grievance was not conclusive, and in *British Columbia Provincial Council United Fishermen & Allied Workers Union v. British Columbia Packers*[156] that the question of who is an employee was a preliminary to the jurisdiction of the Canada Labour Relations Board to decide certification issues. However, in a later decision, *C.U.P.E. Local 963 v. New Brunswick Liquor Corp.*,[157] the Court seems to have staked out a new approach to defining agency jurisdiction. First, it warned against

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[153] Notably Jarvis v. Associated Medical Servs., [1964] S.C.R. 497, 44 D.L.R. (2d) 407; Galloway Lumber Co. v. British Columbia Lab. Rel. Bd., [1965] S.C.R. 222, 48 D.L.R. (2d) 587; *Bell*, *supra* note 8.

[154] *See* case comments by Garant, *Les performances inégales de la Cour Suprême en droit administratif: du contrôle des faits créateurs de juridiction à la protection quasi-judiciaire du fonctionnaire en période de stage*, 19 C. DE D. 545 (1978) and Fera, *Comment*, 5 DALHOUSIE L.J. 364 (1979).

[155] *Supra* note 30.

[156] [1978] 2 S.C.R. 97, 19 N.R. 320, [1978] 1 W.W.R. 621, 82 D.L.R. (3d) 182 (1977).

[157] *Supra* note 30.

classifying matters as preliminary or collateral simply to make them reviewable; second, it held that a reviewing court ought not merely to substitute its opinion for an agency opinion when the latter is based on a reasonable interpretation of the terms of enabling legislation. If the theory elaborated in this case is followed consistently by lower courts one can anticipate fewer successful applications for judicial review based on this ground over the next few years.

As the above three cases attest, it seems that the doctrine of preliminary or collateral matters is likely to be invoked in labour relations matters in particular. A variety of labour law questions have recently been held to be of a preliminary nature and thus open to review. These included such questions as: is a person an employee or an independent contractor?[158] Is a proceeding before an arbitration board one involving interest arbitration or one involving grievance arbitration?[159] Is an employee an occasional worker or is he a full time worker?[160] Is a letter warning that a certain act may be a criminal offence a disciplinary sanction?[161] In each case, an incorrect answer to the question posed would result in either a wrongful assumption, or a wrongful refusal, of jurisdiction.

However, because this ground for review requires only a minor exercise in statutory reinterpretation and recharacterization, it tends to be pleaded in several other areas as well. Thus, the existence of the contract upon which a consensual arbitrator's jurisdiction rests is a preliminary matter.[162] The same is true of the question whether a prison work program constitutes hard labour so as to support a magistrate's jurisdiction.[163] Similarly, whether a barge transfer operation constitutes a branch line was held to be an issue preliminary to the Canadian Transport Commission's power to prevent its abandonment.[164] Moreover, a prospectus was held not to be an advertisement with the consequence that a cease-and-desist order flowing from a power to regulate advertisements was quashed;[165] soil contamination resulting from a train accident was found not to be the result of spillage and therefore an order of the Ministry of the Environment was set aside;[166] and regulations requiring a licence to market sweet corn have been held not to apply to a co-operative acting as a vertically integrated producer.[167] In the above cases a decision

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[158] *Re* Manitoba Gov't Employees Ass'n, 85 D.L.R. (3d) 375 (Man. C.A. 1978).

[159] Nova Scotia Gov't Employees Ass'n v. Nova Scotia Civil Serv. Comm'n, 24 N.S.R. (2d) 364, 35 A.P.R. 364, 84 D.L.R. (3d) 29 (C.A. 1977).

[160] Foyer St. Antoine v. Lalancette, [1978] Que. C.A. 349.

[161] Attorney General of Canada v. Lachapelle, [1979] 1 F.C. 377, 91 D.L.R. (3d) 674 (Trial D. 1978).

[162] *Re* Devald, 21 O.R. (2d) 45, 89 D.L.R. (3d) 153 (Div'l Ct. 1978).

[163] *Re* Shum, [1978] 2 F.C. 829 (App. D.).

[164] *Re* C.P. Ltd., [1978] 2 F.C. 785, 19 N.R. 347 (App. D.)

[165] *Re* 237345 Products Ltd., 21 O.R. (2d) 861 (H.C. 1978).

[166] *Re* C.P. Ltd. & Director of the Ministry of the Environment, 19 O.R. (2d) 498 (Dist. C. 1978).

[167] *Re* Farm Products Marketing Bd., 17 O.R. (2d) 52 (H.C. 1977)

of an agency was set aside because the court disagreed with the tribunal's interpretation of a legislative provision upon which jurisdiction was founded.

While there are numerous instances where a wrongful assumption of jurisdiction flowing from a mistake of law or fact has led to the quashing of a decision, there is little by way of useful generalization which can be extracted from reported judgments. In respect of no other ground for review does the question of deference to agency expertise play so important a role. The only conclusion to be drawn is that as long as judicial review of the substance of administrative action is tied to the theory of jurisdiction, the finality of agency will always be subject to prevailing trends in judicial philosophy.

### (d) *Functus Officio*

Each of the three irregularities so far examined in this subsection is an example of an absence of jurisdiction flowing from the fact that, in the circumstances of the case, the tribunal was never vested with the power to make the determination it did make. A fourth kind of irregularity that may be seen involving an absence of jurisdiction occasionally arises when a decision-maker attempts to reconsider a matter which has previously been decided.[168] As a general rule, it has been held that in the absence of express or implied statutory authorization, once a body has decided a matter it is *functus officio* and it will have no power to reopen or reconsider its decision. The Immigration Appeal Board, for example, was held to have no jurisdiction to proceed anew with an application it had already disposed of.[169] However, courts have found an implicit jurisdiction to reconsider in many cases where a non-judicial function was in issue,[170] or where a tribunal was held to be exercising a continuing jurisdiction.[171]

A corollary of the above principle is that where a statute permits rehearings, the court may find that a tribunal has declined jurisdiction if it refuses to reconsider its decision. Nevertheless, as long as there has been no other reviewable error in the exercise of this discretion to reopen a matter the courts will intervene to compel a reconsideration.[172] The exact terms of a power to reconsider must be carefully examined. In reopening a matter, an agency must not only fulfill the formal requirements for doing so, but must also have regard for all statutory

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[168] For a general discussion of this area, *see* Macdonald, *Reopenings, Rehearings and Reconsiderations in Administrative Law*, 17 OSGOODE HALL L.J. 207 (1979).

[169] Woldu v. Minister of Manpower & Immigration, [1978] 2 F.C. 216, 18 N.R. 46 (App. D. 1977)

[170] Consumers' Ass'n of Canada v. Attorney General of Canada, [1979] 1 F.C. 433, 87 D.L.R. (3d) 33 (Trial D.).

[171] *Re* Lornex Mining Corp., *supra* note 19.

[172] *Re* Jordan, 19 O.R. (2d) 226, 84 D.L.R. (3d) 557 (Div'l Ct. 1977).

provisions mandatory at the original hearing.[173] Most express powers to reconsider are extensive, with the result that reconsideration even on the initiative of an agency and in the absence of a formal application will sometimes be permitted.[174] It should also be noted that where a rehearing and redetermination are permitted, no principle of reliance may operate so as to prevent an agency from modifying its decision prospectively.[175]

Of course, where a prior decision is tainted by jurisdictional error, no question of *functus officio* can arise since no valid determination has ever been made. Where a matter is taken up again by an agency following a judicial quashing of a previous decision,[176] or following a tribunal's own recognition of a jurisdictional error,[177] and where the defect involves an abuse of discretion or a defect in natural justice, reconsideration will be permitted.[178] A final circumstance in which reconsideration will be permitted arises when, even though no jurisdictional error has been committed, a technical error or a minor mistake in transcription has occurred.[179]

In each of the above cases one sees the court attempting to strike a balance between agency autonomy and the principle that reliance by affected parties should prevent amendment of decisions already made.[180] Nevertheless, as in all cases where an absence of jurisdiction is alleged, the question brought before the court usually involves delicate issues of statutory interpretation.

### 3. *Excess of Jurisdiction*

It is often difficult to distinguish applications for judicial review founded on a claim of excess of jurisdiction from those in which an absence of jurisdiction is alleged. While the distinction has been characterized as Byzantine and without great significance,[181] there are at least three respects in which the two grounds for review may produce

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[173] C.U.P.E. Local 41 v. Alberta Bd. of Indus. Relations, 8 A.R. 174, 79 C.L.L.C. 14,206, 5 Alta. L.R. (2d) 219, 84 D.L.R. (3d) 710 (C.A. 1978).

[174] *Re* Parent Cartage, 20 O.R. (2d) 219, 87 D.L.R. (3d) 144 (Div'l Ct. 1978), *rev'd* 26 O.R. (2d) 83, 102 D.L.R. (3d) 117 (C.A. 1979).

[175] *In re* Shell Canada, [1979] 2 F.C. 367 (App. D.).

[176] Little Narrows Gypsum Co. v. Nova Scotia Lab. Rel. Bd., 24 N.S.R. (2d) 406, 35 A.P.R. 406, 82 D.L.R. (3d) 693 (C.A. 1977).

[177] Lange v. Maple Ridge School Dist. No. 42 Trustees' Bd., 9 B.C.L.R. 232 (S.C. 1978).

[178] *McCarthy*, *supra* note 18.

[179] *Re* City of Kingston, 18 O.R. (2d) 166 (Div'l Ct. 1977).

[180] *Re* Carde, 34 C.C.C. (2d) 559 (Ont. H.C. 1977).

[181] *See* G. PÉPIN & Y. OUELLETTE, *supra* note 39, at 205. In this section we shall not follow the formulation of the Supreme Court of Canada in *Metropolitan Life Ins. Co.*, *supra* note 8, but shall restrict the concept of excess of jurisdiction to substantive errors affecting the scope of statutory powers. Misappreciation of evidence, wrong questions, bad faith and improper purposes will be treated as irregularities affecting justification in exercising statutory powers.

different results. First, if a determination is set aside on grounds of an absence of jurisdiction, there can be no question of a tribunal's redeciding the matter; the court has denied an agency authority to undertake the impugned activity. However, if a mere excess of jurisdiction is committed, it may be assumed that the agency has been given the power to undertake the matter in question; only the order or decision actually rendered exceeds the delegated authority. Consequently, after a first decision is quashed, the decision-maker would presumably retain authority to make a proper determination.[182] Second, as Mr. Justice Beetz noted in *Harelkin v. University of Regina*,[183] the power of an agency to cure mistakes upon appeal would depend on a finding of excess, and not absence, of jurisdiction. Finally, while prohibition usually lies to restrain activity where an absence of jurisdiction is alleged, rarely will courts attempt to enjoin or prohibit an apprehended excess of jurisdiction.[184]

As with errors relating to absence of jurisdiction resulting from a mistake of law and fact, errors leading to an excess of jurisdiction invariably flow from divergences between courts and tribunals on issues of statutory interpretation. It follows that the general approach of the Supreme Court of Canada in *New Brunswick Liquor Corp.*[185] should also be applied to restrain an overzealous pursuit of errors constituting an excess of jurisdiction. Often allegations of excess of jurisdiction arise from promulgation of orders in council, regulations and by-laws,[186] but instances of an excess of jurisdiction occur most frequently when an aspect of an order of a tribunal goes beyond statutory authority.

During the period of this survey the following were held to be made in excess of jurisdiction: an overly severe sanction imposed by a discipline committee;[187] an inquiry appointed by a Lieutenant Governor to consider matters beyond the scope of the petition on the basis of which it was appointed;[188] those paragraphs in the notice of hearing of a disciplinary committee that included charges other than those based on the medical errors alleged in the letter initiating the complaint on which jurisdiction was founded;[189] part of an order of a police commission in which the punishment meted out exceeded statutory limitations;[190] an

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[182] David Everett Holdings Ltd. v. Council of City of Red Deer, [1975] 3 W.W.R. 333 (Alta. C.A.).

[183] *Supra* note 27.

[184] *Underwood McLellan & Assocs., supra* note 129.

[185] *Supra* note 30.

[186] Sommers v. City of Edmonton, 10 A.R. 48, [1978] 5 W.W.R. 204, 88 D.L.R. (3d) 204 (C.A.).

[187] *Re* Milstein, 20 O.R. (2d) 283, 87 D.L.R. (3d) 392 (C.A. 1978).

[188] *Re* City of St. John's, 22 Nfld. & P.E.I.R. 46, 58 A.P.R. 46, 90 D.L.R. (3d) 249 (Nfld. S.C. 1978).

[189] *Re* Creery, 19 O.R. (2d) 631, 86 D.L.R. (3d) 153 (Div'l Ct. 1978).

[190] Mitchell v. Kowal, 10 B.C.L.R. 96, 96 D.L.R. (3d) 464 (S.C. 1979).

order of the C.R.T.C. dealing with an aspect of a company's operation which was not in issue in the proceedings before the Commission.[191]

Because it is only an order of a tribunal which is under attack, however, this ground for review is more difficult to establish than an absence of jurisdiction, and several allegations of excess of jurisdiction were summarily dismissed. Most often these dismissals occurred when the challenge involved no more than a disguised attempt to have a reviewing court exercise appellate jurisdiction. For example, a labour board was found not to have exceeded its jurisdiction in declaring that a one-day strike in protest against the Anti-Inflation Act was unlawful;[192] a province was allowed to exercise its power to expropriate as long as there was a reasonably direct relationship between the objective to be achieved and the land expropriated;[193] and finally, a regulation restricting the practice of retired judges was found to be validly enacted under a general power to control admission to the practice of law.[194]

Of course the question of whether a defect complained of constitutes an excess, as opposed to an absence, of jurisdiction also depends on the perspective of the person seeking review. Thus, an order of an official made in excess of jurisdiction may lead to the appointment of a body whose actions would then be taken in absence of jurisdiction; presumably, this would occur whenever a constitutive regulation or order is found to be invalid.[195]

### 4. *Declining Jurisdiction*

The concomitant of a theory of absence and excess of jurisdiction is a ground for review on the basis that jurisdiction was unlawfully refused. Usually an improper failure to assume jurisdiction results from the purported misinterpretation of a statutory provision establishing either the preconditions for the exercise of a power or the scope of that power. For example, a mistaken decision as to who was a party to a proceeding was held to constitute a failure to exercise jurisdiction;[196] a refusal to grant a business license flowing from the erroneous interpretation of an empowering by-law resulted in jurisdiction being declined.[197] By

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[191] Bell Canada v. Challenge Communications Ltd., [1979] 1 F.C. 857, 22 N.R. 1, 86 D.L.R. (3d) 351 (App. D. 1978).

[192] *Re* United Glass and Ceramic Workers, 19 O.R. (2d) 353, 85 D.L.R (3d) 118 (Div'l Ct. 1978). The statute is S.C. 1974-75-76, c. 75.

[193] Thompson v. The Queen in Right of the Province of Manitoba, [1978] 5 W.W.R. 635, 89 D.L.R. (3d) 217 (Man. Q.B.).

[194] Pichette v. Barristers' Society of New Brunswick, [1978] 5 W.W.R. 635, 89 D.L.R. (3d) 217 (Man. Q.B.).

[195] Régie des services publiques du Québec v. Dionne, [1978] 2 S.C.R. 191, 18 N.R. 271, 83 D.L.R. (3d) 178.

[196] Bedford Serv. Comm'n v. Provincial Planning Appeal Bd., 28 N.S.R. (2d) 605, 43 A.P.R. 605 (S.C. 1978).

[197] *Re* Tomaro, 20 O.R. (2d) 657, 89 D.L.R. (3d) 265 (C.A. 1979)

contrast, a refusal to grant a time extension for launching an appeal did not amount to an improper declining of jurisdiction where the statute in question did not grant a tribunal inherent powers.[198] In addition to irregularities resulting from mistaken statutory interpretation, this ground may also be invoked to control erroneous factual determinations; thus, an arbitrator's award was quashed because he failed to make the necessary findings of fact in rendering a decision as to the outcome of a grievance proceeding.[199]

Occasionally jurisdiction may be declined through a wrongful refusal to exercise discretion, a failure to appreciate the extent of discretion, or a failure to take relevant considerations into account. Nevertheless, once jurisdiction has been properly assumed a tribunal may also err by not fully dealing with all aspects of the matter remitted to it. For example, where a board mistakenly interpreted the mode of calculating workmen's compensation benefits, thereby underpaying an applicant, its award was set aside.[200] Again, once a board determined that an applicant met the general criteria for a license, it wrongfully declined jurisdiction when it did not exercise its further discretion to decide whether to issue a license in the individual case.[201] Finally, where an applicant had been misled into claiming too little because compensation ceilings had been set in the absence of statutory authority, a tribunal was held to have declined jurisdiction by refusing to award the appropriate benefits.[202]

As with allegations of absence or excess of jurisdiction, applicants often attempt to use this ground for review as a disguised appeal. In such cases relief is invariably refused. Thus, in *Newfoundland Association of Public Employees v. Attorney General of Newfoundland*[203] the Supreme Court of Canada held that the refusal by an arbitration board to alter an employer's penalty did not constitute a reviewable declining of jurisdiction. The same applied to the failure of a tribunal expressly to raise the particularities of an applicant's case, since the onus of bringing relevant information forward lay on each party.[204] Yet where the court finds jurisdiction to have been refused wrongfully, it will rarely make a determination on the merits. Rather, the matter will be referred back to the administrative decision-maker for disposal according to the terms of the legislation in question.[205]

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[198] Ali v. Minister of Manpower & Immigration, [1978] 2 F.C. 277, 20 N.R. 337, 82 D.L.R. (3d) 401 (App. D. 1977).

[199] *Re* C.U.P.E., Local 1, 19 O.R. (2d) 245, 84 D.L.R. (3d) 601 (Div'l Ct. 1978).

[200] *Re* Gianoukakis, 21 O.R. (2d) 246, 89 D.L.R. (3d) 722 (Div'l Ct. 1979).

[201] M & M Bulk Milk Serv. Ltd. v. Highway Transp. Bd., [1979] 6 W.W.R. 330, 102 D.L.R. (3d) 566 (Man. Q.B.).

[202] Jacobs v. Agricultural Stabilization Bd., [1979] 2 F.C. 840 (Trial D.).

[203] [1978] 1 S.C.R. 524, 16 N.R. 16, 75 D.L.R. (3d) 616.

[204] *Re* Pugliese & Borough of North York, 24 O.R. (2d) 532 (Div'l Ct. 1979).

[205] *Tomaro*, *supra* note 197.

5. *Conclusion*

Grounds for review which sanction irregularities relating to the scope of statutory powers are theoretically the key elements of any system of law which contemplates decision-makers vested with only a limited jurisdiction. Yet just as control over the holder of a statutory power reflects the more important issue of authority and accountability in bureaucracies, review of the scope of the power delegated also highlights problems of public administration. Two of these were especially evident during the period of this survey: the different approach to legislative language adopted by courts and agencies, and the tendency of the latter to define jurisdiction primarily in terms of policy mandate, rather than statutory rule. To the extent that lower courts will follow the approach of the Supreme Court of Canada articulated in *New Brunswick Liquor Corp.*,[206] there may be a reconciliation of judicial review and administrative responsibility. Greater emphasis may also be placed by lawyers and teachers on the substance of administrative decisions within agencies themselves and less focus on the myriad of supposed irregularities by which the decision-making power of such agencies is circumscribed.

C. *Irregularities Relating to Justification in Exercising Statutory Powers*

It is a measure of the growth of administrative law in the 1970's that an aspect of the theory of jurisdiction that was coherently articulated only at the outset of the decade[207] has developed into one of the most frequently litigated areas of administrative law. In this section several grounds for review that are often grouped together as examples of abuse of a statutory power will be considered,[208] although they will not be discussed as such but rather as irregularities relating to justification in exercising statutory powers. In other words, the principle focus of judicial review in this context is whether the activity undertaken by a tribunal is consistent with the aims, objectives and policy of the enabling legislation. Courts are prepared to acknowledge that the act or determination under attack is within the formal power of an agency; their concern is whether the reasons for, and processes of, the decision are appropriate.

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[206] *Supra* note 30.

[207] *See* text accompanying note 8 *supra*.

[208] Recent general literature on this topic includes Gagnon, *L'abus de pouvoirs en droit administratif canadien et quebecois*, 19 C. DE D. 135 (1978); Smith, *Abuse of Power by Those Vested with a Statutory Power of Decision*, in L.S.U.C LECTURES 1979, at 133; Molot, *Administrative Discretion and Current Judicial Activism*, 11 OTTAWA L. REV. 336 (1979); Grey, *Discretion in Administrative Law*, 17 OSGOODE HALL L.J. 107 (1979).

In the next few paragraphs, analysis will be directed to understanding how courts and agencies differ in their interpretation of administrative decision-making processes: issues of policy, evidence, law, and motive, including a failure to give reasons, will be examined as they affect the manner in which agency decisions are justified. Of course this is not the place to attempt a thorough critique of the rationale for considering these grounds for review as aspects of the theory of jurisdiction. Nevertheless, it should be noted that the excessive judicial activism in invoking errors relating to justification which characterized the early 1970's seems to have abated during the period of this survey.[209]

### 1. *Fettering Discretion by Self-created Rules of Policy*

One of the most problematic aspects of judicial review of administrative discretion arises from the competing and partly irreconcilable claims which the rule of law theory imposes on agencies and tribunals. On the one hand, it is thought to be desirable that decision-makers formulate guidelines, policies, interpretation notes and the like so as to provide the public with more information as to how broad policy mandates are being exercised. On the other hand, courts insist that agencies do not purchase openness and consistency at the expense of individual evaluation of cases. Achieving the appropriate balance between these goals remains one of the most difficult tasks in public administration.

Two distinct aspects of the problem of promulgating policy rules may be noted. First, the adoption of such rules may lead to a wrongful declining of jurisdiction; in other words, where the policy relates to standing or other threshold issues, the application of a rigid policy may result in a refusal to assume jurisdiction, or where, for example, the policy results in a reformulation of a statutory mandate in terms not contemplated by the legislation, it may evidence a failure to address the true issue to be decided.[210] Second, the adoption of policy rules may serve to deflect a decision-maker's attention away from relevant material or may induce him to attach undue importance to certain criteria. It is the second problem which will be examined in this subsection. Here, our general concern will be with the influence of pre-existing policy rules upon the *manner* in which decisions are taken, and the limits which

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[209] The debate as to whether there are unreviewable statutory discretions does, however, seem to have been settled in the negative. *See* Bahdawia v. Minister of Manpower & Immigration, [1978] 1 F.C. 229, at 231-32 (Trial D.), *but cf.* École commerciale Bluteau, Inc. v. Morin, [1978] Que. C.A. 186.

[210] The former problem has already been discussed under the rubric "Declining Jurisdiction": *see* Section II. B.4 *supra*; while the latter will be analyzed under the heading "Asking the Wrong Question": *see* Section II. C.2 *infra*.

courts will place on a decision-maker's recourse to such rules in justifying his decision.[211]

Occasionally, discretion may be fettered not by formally promulgated policy rules, but rather by the attitude taken to the matter in dispute. This ground is therefore closely related to review for taking into account irrelevant considerations, or for bias. Hence, even though no explicit policy was announced, the attitude of a municipal council towards certain kinds of land use was held by the court to preclude the issue of any permit and the council's refusal was set aside.[212] Similarly, a loosely understood policy of non-prosecution was not permitted to be asserted as a defence to a criminal charge, the court holding that prosecutorial discretion could not be circumscribed in advance.[213] In both cases, nothing as formal as a rule was promulgated, although the decision-maker clearly undertook his task from a set perspective which influenced the way in which discretion was exercised.

The most difficult instances of fettering discretion arise in cases where agencies establish their own guidelines to sort cases and determine issues, for here the question concerns the degree to which consistency and openness should be a consideration in administrative decision-making. Where an announced policy amounts to pre-judgment of an application, a decision denying a permit will be set aside.[214] By contrast, as long as individual cases are decided on their own merits, policy guidelines to structure discretion are acceptable. Thus, in *Capital Cities Communications Inc. v. C.R.T.C.*[215] the Supreme Court of Canada refused to quash a decision of the C.R.T.C. which referred to a pre-existing policy and its underlying rationale. Because the C.R.T.C. was delegated such all-embracing objects, the Court found it proper that guidelines be laid down periodically so that prospective applicants would be able to understand the priorities of the Commission. Even in cases where enabling legislation does not contemplate that a broad policy perspective be taken, courts have held that application of pre-existing guidelines or policies is not in itself fatal, as long as such guidelines do not amount to pre-judgment of the issue to be decided.[216]

A somewhat more relaxed approach is taken to the internal procedural rules of a tribunal. For example, a broad policy respecting late oppositions was allowed to stand because no substantive rights were affected and an injustice did not result;[217] a decision based on guidelines

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[211] Helpful discussions of this problem may be found in Atkinson, *La discretion administrative et la mise en oeuvre d'une politique*, 19 C. DE D. 187 (1978); Filion, *Le pouvoir discrétionnaire de l'administration exerce sous forme de normes administratives: les directives*, 20 C. DE D. 855 (1979).

[212] *Re* Malette, 17 O.R. (2d) 576, 4 M.P.L.R. 287 (Div'l Ct. 1977).

[213] *Catagas*, *supra* note 146.

[214] *Re* Phillips, 86 D.L.R. (3d) 518 (B.C.C.A. 1978).

[215] [1978] 2 S.C.R. 141, 18 N.R. 181, 81 D.L.R. (3d) 609 (1977)

[216] *Martinoff*, *supra* note 144.

[217] *Re* Al's Towing Serv., 94 D.L.R. (3d) 697 (Man. C.A. 1978)

respecting the awarding of costs was upheld because these were consistent with the object of the statute in question;[218] and a labour board was entitled to base its decision solely upon the policy rule governing the reopening of its proceedings.[219]

However, where a policy relates neither to the object of a statute nor to criteria properly to be considered by a tribunal, any decision in which it has had a preclusive effect will be set aside. Thus the court ordered the grant of a business permit where a minister declined to grant one simply on the basis of a policy of not granting permits whenever he determined that a sufficient number had already been issued.[220] Clearly, while consistency with determinations of other decision-makers in an agency should be pursued, consistency cannot be invoked as a reason for not considering the merits of individual cases. Consequently, an unemployment insurance umpire could not rely on the policy set by other umpires in determining eligibility for benefits, if this amounted to a refusal of jurisdiction.[221]

### 2. *Asking the Wrong Question*

While fettering discretion as a ground for review envisions irregularities in the application of agency policy, asking the wrong question is a doctrine relating to errors of law. Of all the grounds for review thrown up by the theory of jurisdiction, this has been criticized as most offensive to the structure of administrative decision-making. Of course, review on the basis that a decision-maker asked himself the wrong question may often be simply a convenient way of describing an absence or an excess of jurisdiction. By asking itself the wrong question, an agency may address itself to a problem not contemplated by its enabling statute; for example, a labour board may erroneously treat independent contractors as employees by examining an economic relationship rather than a juridical relationship. Moreover, by asking the wrong question, a tribunal may make an order which goes beyond the power it is authorized to exercise; for example, a securities commission may order a company to cease trading in franchises because it applies a functional rather than conceptual test of a security. In both these cases, however, what is questioned is the scope of an agency's power, not the manner in which it invokes the law it is charged with applying.

As an error relating to justification in exercising statutory powers, asking the wrong question invests courts with the authority to ensure that a decision-maker properly conceives of the issue he is to decide. In other

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[218] Green, Michaels & Assocs. v. Public Utilities Bd., 13 A.R. 574, [1979] 2 W.W.R. 481, 94 D.L.R. (3d) 641 (C.A.).

[219] *Re* Jordan, *supra* note 172.

[220] Bentley Nursing Home Inc. v. Attorney General of Quebec, [1978] Que. C.S. 30.

[221] *Re* Dick, [1978] 2 F.C. 336, 18 N.R. 42 (App. D. 1977).

words, the court inquires whether a tribunal's approach to the issue reveals a misunderstanding of the legal rule to be applied. Thus, what would otherwise be an error of law within jurisdiction can be transformed into reviewable jurisdictional error. The unique mix of law, fact and policy inherent in administrative decision-making will be evaluated against the adjudicative standard of courts.[222]

Examples of review on this ground are invariably novel and often could probably be decided under some other jurisdictional rubric. However, the reported cases tend to show how courts will recharacterize perceived irregularities in order to assert a review jurisdiction. In one case arising from a grievance concerning the applicability of a collective agreement to certain employees, an arbitration board was found to have erred in asking itself whether the grieving employees were employees for the purposes of the Labour Relations Act[223] rather than for the purposes of the agreement.[224] In another case, the Immigration Appeal Board was held to have addressed itself to the wrong question in finding the applicant not to be a German refugee when he had applied for special status as a Polish refugee.[225] In yet another case, the decision of an employment review board was quashed because the complaint upon which the applicant's demotion had been based was not directly covered by a list of grounds for demotion set out by statute.[226] Finally, an immigration officer asking whether a sponsor was a legitimate relative was asking the wrong question, for in the court's view the question of legitimacy was not relevant to the statutory definition of a sponsor.[227] Each of the above cases illustrates how this ground for review can be invoked to assert what is almost an appellate jurisdiction over agency decision-making. They accordingly also illustrate why this ground is severely criticized. Review is, of course, available only when a tribunal asks itself the wrong question, not when it errs in its answer to an appropriate question. Thus, the decision of a labour board which properly inquired whether a union had the ability to bargain for a given unit was not quashed even though the court disagreed with the answer given.[228]

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[222] Hence the importance of the Supreme Court of Canada decision in *New Brunswick Liquor Corp.*, *supra* note 30, cautioning restraint in finding errors of law.

[223] *Now* R.S.O. 1980, c. 228.

[224] *Re* General Concrete of Canada Ltd., 22 O.R. (2d) 65, 95 D.L.R. (3d) 119 (Div'l Ct. 1978).

[225] Hurt v. Minister of Manpower & Immigration, [1978] 2 F.C. 340, 21 N.R. 525 (App. D.).

[226] Bennie v. Grievance Review Board, 18 Nfld. & P.E.I.R. 11, 47 A.P.R. 11, 84 D.L.R. (3d) 686 (P.E.I.S.C. 1977).

[227] Gill v. Minister of Employment & Immigration, [1979] 2 F.C. 782, 30 N.R. 596, 102 D.L.R. (3d) 341 (App. D.).

[228] *Re* Construction & General Labour Union, Local 1157, 82 D.L.R. (3d) 11 (Man. C.A. 1977).

### 3. *Relevant and Irrelevant Considerations*

A continuing legacy of the expanded concept of jurisdictional review which developed early in the past decade is judicial control founded on the supposed relevance or irrelevance of the matters considered by a decision-maker, that is, an evaluation of the evidentiary basis of agency determinations. With respect to the justification of decisions, a refusal to examine what a court considers to be relevant material is analogous to declining jurisdiction, whereas taking into account irrelevant material approximates an excess of jurisdiction. Rather than scrutinizing the formal order of a tribunal here, however, the court is reviewing the manner in which an exercise of the delegated power was justified. As with all grounds treated in this section, there can be a substantial overlap with other grounds for review; this is particularly true in so far as irrelevant considerations and improper purposes are concerned.

Twice during the period of this survey the Supreme Court of Canada was confronted with an application that could be said to have raised this ground for review. In *City of Prince George v. Payne*[229] the Court quashed a decision because irrelevant factors were considered. It held that the withholding of a business license because the nature of the business (a sex shop) offended a city council's moral sensibilities amounted to a consideration of irrelevancies. Conversely, in *City of Hamilton v. Canadian Transport Commission*[230] the Court was asked to quash a decision because relevant factors were not considered. In dismissing the application, the Court held that the Transport Commission was not bound to consider evidence of disruption of peace and quiet by trucking activities on Sundays in determining whether to exempt certain companies from the prohibitions of the Lord's Day Act.[231]

In general there are two approaches which can be taken to the question of the relevancy of considerations entertained. Sometimes the court adopts a very narrow view of a tribunal's power; sometimes it takes a more global perspective, attempting to construe the scheme of the enabling act as a whole in order to determine whether certain evidence is relevant to an agency's task. For example, in deciding whether to raise fees, a university board was found properly to have considered possible budget penalties that may have been imposed by the university council, a superior body in the statutory scheme.[232] As a general rule, the more global a court's perspective, the fewer considerations will be found to be irrelevant; the less adjudicative a decision, the greater the latitude for

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[229] [1978] 1 S.C.R. 458, 15 N.R. 386, [1977] 4 W.W.R. 275, 75 D.L.R. (3d) 1 (1977). *See* the comment on this case by Rust-D'eye, *Morality and Municipal Licensing: The Untouched Constitutional Issues in City of Prince George v. Payne*, 16 OSGOODE HALL L.J. 761 (1978).

[230] [1978] 1 S.C.R. 640, 17 N.R. 573, 80 D.L.R. (3d) 263 (1977).

[231] R.S.C. 1970, c. L-13.

[232] *Re* Webb, 83 D.L.R. (3d) 244 (B.C.S.C. 1978).

exploring evidentiary matters that is left to agencies. Thus, the Ontario Court of Appeal quashed a penalty imposed by a professional disciplinary committee, although it affirmed a conviction, because the committee had heard evidence about the defendant's activities during a period of time not covered by the formal charge and had taken into account his attitude during the trial.[233]

As noted, failure to address all relevant considerations may also constitute a reviewable error. Here too, courts will be more willing to intervene in proceedings which closely resemble adjudications. In a town planning case, the municipal board was found to have erred in holding itself bound by a letter sent to it by the minister without accepting evidence as to whether the letter properly reflected the prevailing government policy.[234] Furthermore, where a statute required a decision to be made on the basis of a driving record and other information about an applicant's ability to drive, a failure to take into account this other information resulted in an invalid decision.[235]

### 4. *Improper Purposes*

A further irregularity relating to the justification for exercising power, closely parallel to that just treated, occurs when a decision-maker exercises his power to achieve an improper purpose. Here the reviewing court is not concerned with the objective purpose of the enabling statute *per se*; rather it is concerned that the decision-maker should act only to achieve the policy of the statute and for reasons consistent with that policy.

The Supreme Court of Canada decisions noted in the preceding subsection can also be viewed as instances of review for improper purposes. In *City of Prince George v. Payne*[236] it was held that a city council decision to withhold a business license in order to prohibit an entire trade and to enforce land use restrictions to promote a certain moral viewpoint was motivated by improper purposes and should be set aside. In order to determine what purposes the council could properly promote, the Court examined the statute as a whole and concluded that if the legislature had wished the council to further the above purposes it would have expressly granted powers to do so. Similarly, in *City of Hamilton v. Canadian Transport Commission*[237] the Court found that if a decision of the Commission respecting exemptions from the Lord's Day Act[238] were made in order to preserve neighbourhood quiet on Sundays,

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[233] *Re* Milstein, *supra* note 187.

[234] *Vespra*, *supra* note 75. *See also* the companion case *Barrie*, *supra* note 74.

[235] Clauson v. Superintendent of Motor Vehicles, 5 B.C.L.R. 251, 82 D L.R (3d) 656 (Cty. Ct. 1978).

[236] *Supra* note 229.

[237] *Supra* note 230.

[238] R.S.C. 1970, c. L-13.

the Commission would be acting for an improper purpose. In both cases the Court was unwilling to admit that the broad policy mandate of an administrative decision-maker would be sufficient justification for decisions apparently grounded in motives not expressly set out by statute.

In principle, not all instances where improper purposes may be alleged will lead to an invalid decision. For example, as long as a decision is justifiable in terms of the policy of the enabling statute, it is not inappropriate for a decision-maker to act so as also to relieve other pressures such as public opinion and union demands.[239] By contrast, where a municipal council passed a zoning by-law after waiving its normal procedures in response to public pressure in the form of petitions and where no *bona fide* planning purpose could be invoked in justification of the decision, the by-law was quashed.[240] Similarly, a resolution of a city council intended to ensure the preservation of historic structures was set aside as not falling within the statutory power to regulate land use and control development.[241] As these cases illustrate, in order for a decision to be struck down on this basis, the improper purpose must be the determinative consideration, but where this is the case, even when actions can be justified as falling within one of the purposes of a statute, a decision will be invalid if the primary purpose pursued is improper.[242]

In a time of budgetary constraint, decisions motivated by financial considerations are likely to become more common. Occasionally these may be found to be improper,[243] although the language of individual statutes sometimes will be read as authorizing decisions taken for economic reasons.[244] Even over the period of this survey it is possible to detect a liberalization of the courts' attitude towards the propriety of invoking budgetary justifications.

### 5. *Unreasonable, Capricious, or Arbitrary Decisions*

If an administrative decision is attacked because it is unreasonable, arbitrary or capricious, a claim is made of irregularity in how the decision is justified. In contrast to other grounds considered in this section, however, where the court attempts to phrase its intervention in jurisdictional terms, judges acknowledge that they are in effect actually deciding the merits of a case. Most cases where this ground is

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[239] *Association des Gens de l'Air*, *supra* note 71.

[240] *Re* H.G. Winton Ltd., 20 O.R. (2d) 737, 6 M.P.L.R. 1, 88 D.L.R. (3d) 733 (Div'l Ct. 1978).

[241] Tegon Devs. Ltd. v. City of Edmonton, 5 Alta. L.R. (2d) 63, 81 D.L.R. (3d) 543 (C.A. 1977), *aff'd* [1979] 1 S.C.R. 98, 24 N.R. 269.

[242] Heppner v. Minister of Environment of Alberta, 4 Alta. L.R. 139, 80 D.L.R. (3d) 112 (C.A. 1977).

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

[244] *Re* Town of Durham, 23 O.R. (2d) 179, 95 D.L.R. (3d) 327 (H.C. 1978).

successfully invoked involve the power to make regulations,[245] including municipal by-laws,[246] although the principle has also been raised in respect of powers of decision-making.[247] In justifying this review power, courts claim that they are ensuring that the decision reached bears some rational connection with the rules of law, findings of fact and policy goals applicable to the case at hand — an appellate jurisdiction.

Reasonableness has traditionally been given a restrictive interpretation. Courts have often declined the power to assert a review unless a decision is "so unreasonable that no reasonable authority could come to that conclusion".[248] While this may be the test for reviewing the conditions upon which a disciplinary committee would convict a member, at least one court has held that it does *not* apply in reviews of the imposition of penalties where a more liberal test should be invoked.[249] In situations involving the executive, courts often require that a decision be so unreasonable as to constitute a gross abuse of decision-making power. Thus, a minister may insist that a corporation participate in group purchases to reduce costs if it wishes to receive provincial subsidies.[250]

In assessing the reasonableness of a decision, courts will, of course, have regard to a tribunal's expertise; in specialized areas review will not be successful unless there has been a complete absence of evidence or a total lack of rational connection between the law and policy as set out by statute and the decision reached.[251] Thus, where a university adopted a fee schedule which differentiated between foreign and native students, this alone did not make the decision unreasonable or capricious unless the differential was so great as to be prohibitive or contrary to the purposes of the university itself.[252]

### 6. *Bad Faith and Malice*

Bad faith and discrimination are sometimes grouped together as a single ground of review. However, we have treated the latter earlier

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[245] *See* Section V *infra*; Germain v. Malouin, [1978] 2 F.C. 14, 80 D.L.R. (3d) 659 (Trial D.); *but cf. Pichette*, *supra* note 194.

[246] Bell v. The Queen, [1979] 2 S.C.R. 212, 26 N.R. 457, 98 D.L.R. (3d) 255; Blaiklock Bros. Ltd. v. Cité de Lachine, [1978] Que. C.S. 117; *Re* H.G. Winton Ltd., *supra* note 240.

[247] Nova Scotia Forest Indus. v. N.S. Pulpwood Marketing Bd., 12 N.S.R. (2d) 91, 61 D.L.R. (3d) 97 (C.A. 1975).

[248] *Re* Milstein (No. 2), 13 O.R. (2d) 700, 72 D.L.R. (3d) 202 (Div'l Ct. 1977), *aff'd supra* note 187.

[249] *Hurt*, *supra* note 225.

[250] Le Centre d'Accueil Notre Dame du Perpétuel Secours v. Le Procureur Général de la Province du Québec, [1978] Que. C.S. 985.

[251] Sarco Canada Ltd. v. Anti Dumping Tribunal, [1979] 1 F.C. 247, 22 N.R. 225 (App. D.).

[252] Redline v. Governors of Univ. of Alberta, 8 Alta. L.R. (2d) 313, 98 D.L.R. (3d) 643 (Dist. C. 1979), *aff'd* 23 A.R. 31, 110 D.L.R. (3d) 146 (C.A. 1980)

under the headings *Improper Purposes* and *Unreasonable, Capricious or Arbitrary Decisions*;[253] only the former will be discussed here. In reviewing on the grounds of bad faith, the courts are attempting to preserve, on the basis of judicial standards, an untainted perception of individual cases by administrative decision-makers. Most applications for review in this area arise in the context of delegated legislation.[254] Thus, where a municipal council passed by-laws quickly, without assembling information in the customary manner, without giving notice, and by directing the by-laws specifically at individual pieces of property, a court found evidence of bad faith.[255]

Nevertheless, individual decisions of agencies are also subject to attack on this basis and have occasionally been set aside where the requisite standard of proof was met.[256] In *Landreville v. Town of Boucherville* the Supreme Court of Canada noted that the onus in such cases was heavy, since the contesting party had to establish "an abuse of power equivalent to fraud and resulting in a flagrant injustice".[257] Such onus will, however, be met where a municipality attempts to expropriate a quarry for the sum of $1.00 in order to create a park, after already having coerced the owner into delivering 10,000 tons of stone free of charge. Moreover, where a municipality refused an application for rezoning because the land was to be acquired for a park, the court found bad faith when the developer demonstrated that the land was rated by city planners lowest in priority for a park and that no steps to acquire the land had ever been taken by the municipality.[258]

### 7. *Conclusion*

Each of the grounds for review considered in this section can be viewed as an aspect of the courts' attempts to import assumptions about the justification of decisions normally associated with adjudication into administrative decision-making. Adjudication presupposes a discrete decision rendered by a dispassionate referee, argued in terms of pre-existing claims of right capable of demonstration through restrictively structured proofs and arguments.[259] In such a framework doctrines of fettering discretion, extraneous considerations, improper purposes and others are the guarantees that decision-making is truly adjudicative.

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[253] Section II, C. 4 and 5 *supra*.

[254] *See also* Section V *infra*.

[255] *Re* Hall, 23 O.R. (2d) 86, 94 D.L.R. (3d) 750 (C.A. 1979).

[256] Usually courts prefer to set aside decisions for one of the grounds already reviewed since this does not involve a personal condemnation of the agency. *But see* Gershman v. Manitoba Vegetable Producers Marketing Bd., [1976] 4 W.W.R. 416, 69 D.L.R. (3d) 114 (Man. C.A.).

[257] *Supra* note 22, at 809, 22 N.R. at 416.

[258] *Campeau (No. 1)* and *Campeau (No. 2)*, *supra* note 100.

[259] *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 352 (1978).

However, administrative tribunals rarely adjudicate and the structure of justification appropriate to agency decisions is more systematic, more overtly political, more relational and, above all, more oriented to the future.[260] To the extent that it is possible to detect fewer inclinations among courts to second-guess agency activity through invocation of irregularities in justification of the exercise of statutory powers, greater scope may be found for inducing responsible administrative decision-making.

### D. *Irregularities Affecting the Manner of Exercising Statutory Powers*

In few legal domains is concern for procedural regularity as pronounced as in the field of administrative law. Partly as a result of the restrictions on supervision of the merits of decisions inherent in the theory of jurisdiction and partly as a result of the legacy of the common law writs, procedural review has always been an important weapon in the arsenal of advocates seeking to challenge administrative action.[261] In the past, judicial control over procedures manifested itself in two main ways: first, where statutes provided relatively specific and exhaustive procedural requirements, a failure to abide by these requirements would lead to decisions being quashed on grounds of procedural *ultra vires*; second, where enabling statutes did not, or did not comprehensively, spell out the procedural prerequisites for the exercise of statutory powers, courts asserted a jurisdiction to fill in the omission of the legislature by compelling decision-makers to adhere to implied procedural requirements analogous to those of courts.

Over the past decade, however, other themes have emerged in the law of procedural control. On the one hand, some jurisdictions had enacted general legislative consolidations of administrative procedures by the early 1970's. These consolidations usually stipulated either formal prerequisites to the validity or enforceability of administrative action (*e.g.* the requirement that regulations be published), or purely procedural requirements as to the manner of exercising statutory powers (*e.g.* the nature of the hearing that must be afforded to parties affected by a decision). On the other hand, in the past few years courts have begun to take a more sophisticated view of their power to remedy the omission of the legislature by implying procedural requirements into statutory decision-making. With the more general realization that they need not always insist that administrative decision-makers adopt a procedure analogous to those of courts came an awareness that decision-making functions not at all resembling adjudication might properly be subject to due judicial control on implied procedural grounds.

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[260] *See* J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW (1978).

[261] For a brief historical review, *see* Macdonald, *Judicial Review and Procedural Fairness in Administrative Law*, 25 MCGILL L.J. 520 (1979).

Out of deference to the way in which each of these four themes emerged, a distinction will continue to be drawn in this survey not only between (i) procedural *ultra vires* in the enabling statute and (ii) failure to follow mandatory requirements in statutory consolidations, but also between (iii) natural justice as restricted to decision-making powers analogous to the judicial, and (iv) fairness as applicable to all other instances of implied procedural control. Throughout the discussion, conflicts in conceptual structure and the terminology of judicial decisions will be highlighted, for it is here that the most significant tensions between conceptualism and nominalism can be seen; here also it is possible to find evidence of "the revolution in administrative law theory".[262]

### 1. *Procedural Ultra Vires*

One of the most interesting developments during the period of this survey has been the increasing promulgation of detailed statutory schemes establishing exhaustive procedural requirements and sophisticated patterns of review and control.[263] While particularized procedural codes serve to make agency decision-making more regular and thus open the door to closer judicial supervision of stipulated requirements, courts have sometimes seen in the enactment of such provisions an implicit suppression of their power to assert common law procedural control. It has even been suggested that a carefully wrought procedural code such as is found in the Immigration Act[264] might serve impliedly to exclude the application of both natural justice and fairness.[265] By contrast, in at least one case[266] a court has asserted the applicability of the doctrine of fairness, nothwithstanding both a detailed procedural scheme and express exclusion of the Ontario Statutory Powers Procedure Act.[267]

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[262] During the period of this survey procedural review has attracted substantial scholarly discussion. The following are general reviews in the periodical literature: Loughlin, *Procedural Fairness: A Study of the Crisis in Administrative Law*, 28 U. TORONTO L.J. 215 (1978); Flick, *The Opportunity to Controvert Adverse Testimony in Administrative Proceedings*, 28 U. TORONTO L.J. 1 (1978); Ouellette, *La procédure et la preuve devant les juridictions administratives*, 39 R. DU B. 704 (1979); Mullan, *Human Rights and Administrative Fairness*, in THE PRACTICE OF FREEDOM III (R. St. J. MacDonald & J. Humphrey eds. 1979); Macdonald, *supra* note 261; Macdonald, *Judicial Review and Procedural Fairness in Administrative Law*, 26 McGILL L.J. 1 (1980).

[263] For an analysis of some of these, *see* Johnston, *Procedures before the C.R.T.C.*, 1 ADVOCATES QUARTERLY 25 (1977); Riddell, *Procedures before the Ontario Workman's Compensation Board*, 1 ADVOCATES QUARTERLY 46 (1977); MacDowell, *Law and Practices before the O.L.R.B.*, 1 ADVOCATES QUARTERLY 198 (1978).

[264] S.C. 1976-77, c. 52.

[265] McCarthy v. Attorney General of Canada, [1980] 1 F.C. 22, 102 D.L.R. (3d) 496 (Trial D.).

[266] *Re* Downing, 21 O.R. (2d) 292, 92 D.L.R. (3d) 355 (C.A. 1978).

[267] R.S.O. 1980, c. 484.

How the relationship between implied requirements and detailed codes is worked out will be of major importance over the next few years as legislatures increasingly attempt to tailor administrative procedures to individual agencies.

An important preliminary issue in cases of alleged procedural *ultra vires* is whether the breach asserted will entail the nullity of a decision. In other words, courts are required first to determine whether the procedure specified is mandatory or merely directory. While it is difficult to generalize, especially since the word "shall" will on occasion be considered directory, it would appear that where a statute establishes a prerequisite to the assumption of jurisdiction, failure to follow that procedure will result in an invalid decision. This is particularly true with respect to requirements relating to notice, preparation of a case, the nature of a hearing and quorum. Thus, a stipulation that public notice of place, days and hours of accessibility to the text of a proposed by-law be given, was held to be mandatory and an advertisement giving an address and a date of commencement of accessibility was held to be insufficient compliance.[268] Moreover, even where an enabling statute mandates a hearing, but expressly states that no decision will be invalid merely because of lack of notice or insufficient notice, courts will sometimes intervene. For example, in circumstances where a notice misrepresented the function of a proposed hearing the court construed the statutory exemption as not applying where the notice was defective or misleading.[269]

Courts have also been anxious to ensure that procedural requirements about the nature of a hearing to be held are met. Hence, where a statute prescribed that a recommendation be accompanied by a summary of evidence, failure to include such a summary vitiated any decisions made on the basis of the recommendation.[270] Similarly, where a committee filing a preliminary report was required by statute to provide reasons for its recommendations, a failure to do so resulted in the report being set aside.[271] An irregularity relating to the right to be represented will also be treated as nullifying a decision; for example, an exclusion order under the Immigration Act[272] was quashed because a minor was represented by counsel rather than by a parent or guardian, as envisioned by statute.[273] Lack of prejudice to the applicant was found to be irrelevant; the statutory requirement was read strictly and was held to be not merely directory. It should be noted that a separate right to counsel

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[268] *Re* Pullen, 5 M.P.L.R. 63, 81 D.L.R. (3d) 751 (B.C.S.C. 1977)

[269] Penticton v. British Columbia Energy Comm'n, 10 B.C.L.R. 73, 96 D.L.R. (3d) 345 (C.A. 1979).

[270] *Braeside Farms*, *supra* note 148.

[271] Manitoba Pool Elevators v. Assiniboine Park-Fort Garry Community, [1978] 2 W.W.R. 486, 5 C.P.C. 7 (Man. Q.B.).

[272] S.C. 1976-77, c. 52.

[273] Kissoon v. Minister of Employment & Immigration, [1979] 1 F.C. 301, 23 N.R. 267, 90 D.L.R. (3d) 766 (App. D. 1978).

set out in another section was important in influencing the court's decision. By contrast, where no substantial harm has resulted, hearing requirements have occasionally been considered non-essential. In such cases it often happens that by recharacterizing a procedure, courts can avoid a finding of procedural *ultra vires*. Thus, where a hearing prior to dismissal for cause was mandated, no hearing was required since the dismissal was held to result from declining enrolments.[274]

Generally, provisions relating to time are waived if prejudice would result. In one case,[275] a prohibition sought against an arbitrator on the grounds that the proceeding was commenced outside the statutory time limit was denied despite the use of the word "shall" in the provision establishing the limitation. The court stated that the purpose of arbitrations was to expedite procedures, not to give a reluctant party incentive to delay, and held the requirement to be directory. However, a provision requiring notification to owners within sixty days of proclamation respecting a ministerial designation of lands for planning purposes was held to be mandatory.[276]

The statutory obligation to give reasons has also given rise to litigation. In some cases a failure to give reasons will not affect the validity of a decision; for example, if a statute requires a board to supply parties with reasons on request, a breach would not nullify a decision because the duty arises upon request of a party only after the decision is made.[277] A failure to meet this obligation has also been excused where the applicant already knows the reasons for decision and no prejudice results.[278]

Often, in determining the rigour with which a statutory requirement to give reasons must be obeyed, the courts will take into account the policy underlying such a procedure. Where irrelevant considerations are alleged, a statutory obligation to give reasons has been considered mandatory, since without reasons the court would effectively be denied its jurisdiction to review the decision on the grounds raised.[279] A similar approach was taken, with different results, in a case where an adjudicator was obliged to state the grievance, representations, decision and reasons.[280] An award in which many grievances were consolidated was not quashed because not all the details of each case were given, since the adjudicator provided an overview of the cases, stated the general

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[274] *McDougall*, *supra* note 151.

[275] Metro Toronto Police Ass'n v. Board of Comm'rs of Police, 20 O.R. (2d) 774 (H.C. 1978).

[276] Prevost Invs. & Dev. Ltd. v. Prince Edward Island, 15 Nfld. & P.E.I.R. 135, 38 A.P.R. 135, 89 D.L.R. (3d) 308 (P.E.I.C.A. 1978).

[277] Alvarez v. Minister of Manpower & Immigration, [1979] 1 F.C. 149, 22 N.R. 85, 89 D.L.R. (3d) 77 (App. D. 1978).

[278] Emms v. The Queen, [1978] 2 F.C. 174, 17 N.R. 14 (App. D. 1977).

[279] O'Hanlon v. Municipal Dist. of Foothills No. 31, 17 A.R. 477, [1979] 6 W.W.R. 709, 105 D.L.R. (3d) 499 (C.A.).

[280] Proulx v. Public Serv. Staff Relations Bd., [1978] 2 F.C. 133, 20 N.R. 605 (App. D.).

principles he was employing, and then dealt with each case very briefly. Since the court could determine the findings and principles relied on, it was still in a position to exercise its supervisory power. Generally, technical defects or a failure to employ proper forms will not render a decision invalid. In the Supreme Court of Canada decision in *Houde v. Quebec Catholic School Commission*,[281] voting on an issue took place in secret although public voting seemed to be contemplated under the enabling statute. The Court found no evidence of impropriety, nor any suggestion that public voting was mandatory and dismissed the challenge.

While the conclusion that a certain procedural requirement is mandatory normally will lead to the invalidity of all decisions taken following its breach, acquiescence, waiver, lack of prejudice and public convenience may be asserted to cure defective proceedings. For example, a mandatory injunction to disconnect water works was refused, despite the lack of required approval.[282] The Water Commission had tacitly acquiesced to the works, because it had an administrative policy that dispensed with need for approval in circumstances similar to the one at hand; the complainant had not suffered any special damage, and the balance of convenience was in the respondent's favour.

### 2. *Audi Alteram Partem*

The phrase *audi alteram partem* has come to be understood as the collective term for a number of requirements developed by the common law courts to supplement the procedures actually delineated in enabling legislation. While issues of procedural *ultra vires* arise directly from the terms of a statute, here the courts are left free to develop a model of decision-making and procedural rules appropriate to the exercise of the statutory power in question. In developing the doctrine of *audi alteram partem* the courts traditionally have used the decision model with which they are most familiar, adjudication, as a starting point for implying procedural requirements.[283] This of course has led to great confusion about the appropriateness of the adjudicative model. As a result, whenever courts were required in the past to elaborate procedural standards by implication, a preliminary question arose: under what circumstances should the courts assume jurisdiction? To this question we now turn.

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[281] [1978] 1 S.C.R. 937, 17 N.R. 451, 80 D.L.R. (3d) 542 (1977).

[282] Brown v. Gananoque, 17 O.R. (2d) 228, 4 M.P.L.R. 127 (H.C. 1977).

[283] A useful elaboration may be found in Loughlin, *supra* note 262, and Macdonald, *supra* note 261.

(a) *Classification of Function*

Since *audi alteram partem* was developed with a view to the model of adjudication, it has been held to apply only where the statutory function performed by the agency under review can be classified as judicial or quasi-judicial rather than administrative. During the early part of this survey the traditional two-pronged test for identifying a judicial or quasi-judicial function (*i.e.*, are rights affected and is there a super-added duty to act judicially?) was still being regularly employed.[284] In classifying functions the entire statutory scheme must be considered. Factors such as the existence of a statutory appeal, the requirement to hold a hearing and take evidence and the duty to keep records are crucial.[285]

The requirement that rights be affected continues to pose difficulties, especially where the court finds that policy questions are in issue.[286] In such cases, a determination that the claim being asserted is a privilege rather than a right will exclude the application of the *audi alteram partem* principle. Thus, because it is a privilege to visit inmates at women's penitentiaries, an order of the corrections director prohibiting such visits need not be made in accordance with the requirements of natural justice.[287] The finality of decisions is also seen as a crucial factor. For example, a recommendation to an environment committee was held to be a determination affecting rights and not merely advice; it was therefore analogous to a judicial process and classifiable as quasi-judicial.[288] By contrast, passage of a by-law amending an official plan was not required to be preceded by a hearing since it did not come into effect until approved by a minister, who could change the plan.[289] Similarly, a minister's decision to prohibit the importing of magazines on the basis that they were immoral or indecent was held to be interlocutory since the statute provided for a right of appeal to the courts.[290] Finally, a Royal Commission inquiry, which merely investigates and recommends, does not perform a function which gives rise to a duty to act judicially.[291]

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[284] Tottrup v. The Queen in Right of the Province of Alberta, 10 Alta. L.R. (2d) 117, 102 D.L.R. (3d) 42 (C.A. 1979), *aff'g in part* 4 Alta. L.R. (2d) 302, 79 D.L.R. (3d) 533 (S.C. 1979); Alberta Union of Provincial Employees v. Alberta Classification Appeal Bd., 9 A.R. 462, [1978] 1 W.W.R. 193, 81 D.L.R. (3d) 184 (S.C. 1977).

[285] Hobby Ranches Ltd. v. The Queen in Right of the Province of B.C., 8 B.C.L.R. 247, 94 D.L.R. (3d) 529 (S.C. 1978).

[286] *Braeside Farms*, *supra* note 148.

[287] Culhane v. Attorney General of British Columbia, 44 C.C.C. (2d) 245, 93 D.L.R. (3d) 616 (B.C.S.C. 1978), *aff'd* 18 B.C.L.R. 239, 108 D.L.R. (3d) 648 (C.A. 1980).

[288] *Manitoba Pool Elevators*, *supra* note 271.

[289] Maple Leaf Mills Ltd. v. Village of Point Edward, 24 O.R. (2d) 685, 10 M.P.L.R. 196, 99 D.L.R. (3d) 345 (H.C. 1979).

[290] Gordon & Gotch (Can.) Ltd. v. Deputy Minister of Nat'l Revenue for Customs & Excise, [1978] 2 F.C. 603, 20 N.R. 467 (App. D.).

[291] *Copeland*, *supra* note 101. *See also* Texaco Canada Ltd. v. Bastien, [1978] Que. C.S. 380 on a labour report to the minister. *But cf. Keable*, *supra* note 93.

Courts have recently departed from the two-pronged test and adopted a more functional approach. The key impetus for this new trend is the Supreme Court of Canada decision in *Minister of National Revenue v. Coopers & Lybrand*,[292] where Mr. Justice Dickson elaborated a four-fold test of a judicial function:

> 1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated?
> 2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
> 3) Is the adversary process involved?
> 4) Is there an obligation to apply substantive rules for many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?[293]

This approach seems to have been followed in a number of recent cases. For instance, the Alberta Court of Appeal held, after canvassing the nature and scope of rights and interests of affected parties in light of legislative concepts derived from the enabling act, that approval of a subdivision plan was subject to the principles of natural justice.[294] As a result of this new approach some general themes are emerging. Interference with personal liberty,[295] property,[296] employment status,[297] and even certain welfare rights[298] have been held to give rise to a duty to act judicially. On the other hand, in many cases involving prisoners[299] and immigrants,[300] no such duty has been found.

Of course the key to whether the *audi alteram partem* principle will apply is to be found in a classification of the specific function performed by an agency and not in a characterization of the agency itself. Thus, a human rights commission was seen as carrying out a judicial function when it determined its own jurisdiction[301] and when exercising constrain-

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[292] [1979] 1 S.C.R. 495, 24 N.R. 163, 92 D.L.R. (3d) 1 (1978).

[293] *Id.* at 504, 24 N.R. at 172, 92 D.L.R. (3d) at 7.

[294] Harvie v. Calgary Regional Planning Comm'n, 12 A.R. 505, 8 Alta. L.R. (2d) 166, 94 D.L.R. (3d) 49 (C.A. 1978).

[295] *Abel*, *supra* note 12; Cotroni v. Quebec Police Comm'n, [1978] 1 S.C.R. 1048, 18 N.R. 541, 38 C.C.C. (2d) 56, 80 D.L.R. (3d) 490 (1977).

[296] *See* the cases cited in note 284 *supra*.

[297] McWhirter v. Governors of Univ. of Alta., 18 A.R. 145, 103 D.L.R. (3d) 255 (C.A. 1979); *Alberta Union of Provincial Employees*, *supra* note 284.

[298] *Webb*, *supra* note 104.

[299] Martineau v. Matsqui Inst. Inmate Disciplinary Bd., [1978] 1 S.C.R. 118, 14 N.R. 285, 33 C.C.C. (2d) 366, 74 D.L.R. (3d) 1 (1977); Bruce v. Reynett, [1979] 2 F.C. 697, [1979] 4 W.W.R. 108, 12 B.C.L.R. 342, 104 D.L.R. (3d) 11 (Trial D.).

[300] Minister of Manpower & Immigration v. Hardayal, [1978] 1 S.C.R. 470, 15 N.R. 396, 75 D.L.R. (3d) 465 (1977).

[301] Les Ateliers d'Ingénierie Dominion Ltée. v. La Commission des Droits de la Personne du Québec, [1978] Que. C.S. 370.

ing or contempt powers,[302] but not when it embarked on a purely recommendatory inquiry.

### (b) *The Nature of the Hearing: Adversarial or Consultative, Oral or Documentary, Open or Closed*

Once it has been determined that a particular agency decision must be made according to the requirements of *audi alteram partem*, it is necessary to specify exactly what this principle means. While it is trite to say that affected parties must be given an opportunity to be heard, tracing out the particular content of the expression in individual cases remains a difficult task. Must the decision-maker hear the matter personally? What happens in multi-stage hearing processes? Must the hearing be conducted according to the rules for an adversarial adjudicative process or may it be inquisitorial and consultative? Should the hearing be oral? Must it take place in public? All of these are recurring questions and arose in litigation during the period of this survey.

It is a feature of modern administrative regulation that multi-stage hearing and decisional processes in which a minister makes the final determination are routine. In one case[303] it was held that a minister need not grant a hearing to affected parties when approving, with minor modifications, amendments to an official plan. Not only did the affected landowners make extensive representations to the town council which submitted the plan, but the statute authorized the minister to approve and modify such plans after consultation with the council. Conversely, where a minister is not implicated, second stage decision-makers may be required to hold separate hearings and not rely on reports arising from public hearings. This is particularly the case where legislation envisions a two-step decision process, for this implies two stages of hearings.[304]

Courts must also determine whether a hearing should be adversarial, inquisitorial or consultative. This requires an evaluation of whether the assumptions of adversarial adjudication should be imposed upon decision-makers. For example, it has been held that where a defendant before a disciplinary committee did not ask for separate trials, and where the nature and circumstances of the charges were such that they could be heard together, the committee need not have undertaken separate hearings for each of three charges.[305] In effect, the court was not prepared to turn the proceedings into a criminal trial. Informal discussions between the Ontario Health Insurance Plan and a pharmaceutical supplier concerning alleged overpayments have been held to

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[302] La Commission des Droits de la Personne v. Le Procureur Général du Canada, [1978] Que. C.A. 67.

[303] Thickett Builders Inc. v. Minister of Housing of Ont., 18 O.R. (2d) 104, 3 M.P.L.R. 297 (H.C. 1977).

[304] Karn v. Ontario Hydro, 16 O.R. (2d) 737, 79 D.L.R. (3d) 256 (C.A. 1977).

[305] *Ringrose*, *supra* note 107.

constitute a sufficient hearing, but where the supplier was given no opportunity whatsoever to respond to a separate allegation of overpayment, the decision to withhold future payments on this ground was quashed.[306] Rule-making hearings present particular difficulties. In one case, where members of council visited the development site with a developer prior to passing a by-law, this *ex parte* contact was not an infringement of the *audi alteram partem* principle since the hearing envisioned by law was only a public consultative hearing.[307] However, where new evidence arises from an informal contact, it must be passed on to the other side for rebuttal and contrary argument.[308]

This issue leads to a consideration of whether or not hearings must be oral rather than documentary. In one case, the court held that an applicant seeking indemnity from the Law Society's special fund on the ground that he had been defrauded by a lawyer was entitled to a hearing before the Benchers, with the right to present full argument, although without the right to call witnesses.[309] When asked the terms of this order, particularly whether the applicant was entitled to an oral hearing or merely to present written submissions, the court held that there was no absolute right to an oral hearing, and that each case had to be decided on its own facts.[310] In this case an oral hearing was indicated because the applicant's claim had been filed four years previously, and credibility of witnesses was in issue. Conversely, in a case involving the discharge of an R.C.M.P. officer, an oral hearing was found unnecessary; the court concluded that the procedural rights of discharged officers were exhausted by the commissioner's rules and standing orders and that these did not contemplate such a hearing.[311]

As to whether the hearing should be open or closed, once again no absolute rule can be invoked; courts must weigh competing claims of openness and confidentiality. Thus, proceedings may be held *in camera* in order to protect industrial secrets,[312] whereas a by-law may be quashed because a committee reporting to the town council heard private representations of a proponent of the by-law without hearing from opponents.[313]

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[306] S. & M. Laboratories Ltd. v. The Queen in Right of the Province of Ontario, 24 O.R. (2d) 732, 99 D.L.R. (3d) 160 (C.A. 1979).

[307] Lewis v. District of Surrey, 99 D.L.R. (3d) 505 (B.C.S.C. 1979).

[308] Bourque v. Township of Richmond, 6 B.C.L.R. 130, 87 D.L.R (3d) 349 (C.A. 1978).

[309] Patchett v. Law Soc'y of B.C., [1979] 1 W.W.R. 585, 92 D.L.R. (3d) 12 (B.C.S.C. 1978).

[310] Patchett v. Law Soc'y of B.C. (No. 2), [1979] 4 W.W.R. 534, 12 B.C.L.R. 82 (S.C.).

[311] Danch v. Nadon, [1978] 2 F.C. 484, 18 N.R. 568 (App. D. 1977).

[312] *Sarco Canada Ltd.*, *supra* note 251.

[313] *Bourque*, *supra* note 308.

(c) *Notice*

Closely linked with the issues relating to the nature of the hearing which must be afforded is the problem of deciding what constitutes adequate notice of proceedings. The right to a hearing is illusory unless the party knows when, where and to what he must speak. In the past few years many difficulties have arisen with this third element: how much information must be disclosed in the notice?

Often, adequacy of notice is litigated in employment-related situations. For example, it has been held that the notice required prior to disciplinary action must contain the grounds of complaint, the charges and the time and place of the hearing. The time between notice and hearing must also be reasonable.[314] A decision of a grievance review board was quashed because the notice of hearing lacked details of the complaint alleged and the facts in issue.[315]

In some situations, notice need not be formally given; as long as the affected party actually knew the case to be met, informal notice would be adequate. Thus, once a defendant is given accurate details of a complaint and is shown a copy of the complaint at the outset of the hearing, it is not necessary to provide copies of these complaints.[316] Again, where the function of a committee is primarily investigatory, full particulars need not be given since it would be impossible to know these until the investigation has been completed.[317] In one case, it was held that a defective notice constituted grounds for quashing a decision even though the statute did not set out a hearing requirement.[318] The notice given mentioned complaints arising during a four-year period, whereas the decision-maker looked at incidents that occurred later. Although the Federal Court of Appeal classified this irregularity as defective notice, it would appear to be better characterized as evidence of irrelevant considerations. Where a hearing does not relate to employment matters, courts tend to be less strict about the contents of a notice. Nevertheless, in situations involving economic regulation, decisions have been set aside for a failure to disclose the true nature of an order being considered.[319]

(d) *Access to Evidence, Right to Cross-examine, Right to Present Argument*

In this section, cases relating to access to evidence, the right to cross-examine witnesses and the right to present proofs and arguments

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[314] *Davis*, *supra* note 86.

[315] *Bennie*, *supra* note 226.

[316] *Creery*, *supra* note 189.

[317] Jow v. Board of Governors of Regina Gen. Hosp., 86 D.L.R. (3d) 93 (Sask. Q.B. 1978).

[318] *Danch*, *supra* note 311.

[319] *Penticton*, *supra* note 269.

will be reviewed. Each of these is an aspect of the kind of participation in a decision which the *audi alteram partem* principle implies. Unlike the case of adversarial adjudication, an administrative tribunal may be acting properly in accepting evidence not adduced by the parties, and in not allowing the parties access to each other's witnesses. Expediency, confidentiality, and active participation by the board itself may counterbalance the principles underlying the judicial model of adjudication.

Preliminary questions concern the relevance of evidence: can institutionally generated evidence be accepted? Can a decision-maker refuse to hear certain evidence? Where, under a statute, one subcommittee investigated complaints, and, if it found it advisable, lodged a formal complaint with a second subcommittee, it was held that the second subcommittee need not go behind the formal complaint and look at the original complaint, since this would subvert the statutory scheme.[320] Where a statute required an inquiry officer to determine whether an expropriation was "fair, sound and reasonably necessary", it was improper for him to refuse evidence and cross-examination on an issue which had already been considered by a commission.[321]

While cross-examination is usually encompassed by the hearing concept, this may be refused where a minister is being asked to justify government policy.[322] Two-step processes present particular difficulties. Thus, where a preliminary inquiry was held with a view to settlement, and a formal inquiry undertaken only subsequently, one trial court decided that it would be a breach of natural justice for the second decision-maker to accept in evidence correspondence written during the inquiry process. However, the Court of Appeal reversed this decision, holding that the second body was statutorily empowered to take account of such evidence, and furthermore, because this two-stage process was contemplated, this body was obliged to have before it a complete record of the preliminary stage.[323]

In addition to determining what evidence decision-makers may properly consider, courts are often asked to decide how much access each party may have to such evidence. In disciplinary matters it has been held that where a party knows the case he has to meet (*i.e.*, sufficient notice has been given) and where all the statutory requirements have been met, it is not necessary that he sees in advance the evidence which will be produced against him.[324] Similarly, candidates in a departmental competition for promotions have no right of access to the evidence of others, nor any right to cross-examine one another, because a statutory

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[320] Hatfield v. Nova Scotia Barristers' Soc'y, 30 N.S.R. (2d) 386, 49 A.P.R. 386, 95 D.L.R. (3d) 585 (C.A. 1978).

[321] *Les Ateliers*, *supra* note 301.

[322] *Vespra*, *supra* note 75.

[323] *Iwasyk*, *supra* note 116.

[324] Keller v. College of Physicians & Surgeons, 17 O.R. (2d) 516 (Div'l Ct. 1977).

right to an interview does not imply a full-scale hearing.[325] However, parties must have an opportunity to examine all evidence ultimately relied on by a decision-maker. It is not sufficient to provide access to highly technical evidence without also giving sufficient opportunity to test it. It is also improper to take into account evidence received from third parties where requirements of confidentiality make disclosure of such information to the affected parties impossible.[326] Finally, it was held that a union may not suspend one of its members after considering evidence of which she was not aware, since this would seriously impair her right to have a hearing and to cross-examine witnesses.[327]

(e) *Counsel*

During the period of this survey only two cases arose which dealt directly with the right to the assistance of counsel. Both, decided by the Federal Court of Appeal, involved challenges to deportation orders and problems of adjournment. The legislation in issue expressly gave the applicants a right to counsel, but the court chose to treat the problem as one of *audi alteram partem* rather than as one of procedural *ultra vires*.[328] In one case, after many adjournments had already been granted and after a full opportunity to participate had been afforded, the applicant sought a further adjournment on the ground that his lawyer was not ready to proceed on the set date. The court refused to intervene, holding that a right to counsel does not mean the right to the busiest lawyer, but a right to choose among those ready and able to take the case.[329] In the other case, the applicant's lawyer had only been given a few hours to prepare before the outset of the hearing. When the decision-maker sought to adjourn the proceedings until the following day, the counsel asked for a three-day adjournment in order to meet a previous commitment. The denial of this request was seen as an irregularity, since the applicant did not have a real opportunity, in the time allotted, to find and instruct another lawyer.[330]

(f) *Adjournment*

The right to seek an adjournment is often seen as an adjunct to some other right (*e.g.*, that of counsel, or of adducing or examining evidence). Since it is an ancillary right, denial of adjournment alone is often

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[325] *Civil Serv. Ass'n of Alberta*, *supra* note 82.

[326] *Sarco Canada Ltd.*, *supra* note 251.

[327] Pollock v. Alberta Union of Provincial Employees, 12 A.R. 398, 90 D.L.R. (3d) 506 (S.C. 1978).

[328] *Cf. Kissoon*, *supra* note 273.

[329] Pierre v. Minister of Manpower & Immigration, [1978] 2 F.C. 849, 21 N.R. 91 (App. D.).

[330] McCarthy v. Minister of Employment & Immigration, [1979] 1 F.C. 121, 22 N.R. 306 (App. D. 1978).

insufficient to constitute a breach of natural justice. The two cases discussed in the previous section are illustrative.

Where the court upheld a decision-maker's refusal to adjourn in order to allow the applicant to retain counsel, it was held that for this to lead to an invalid decision it must be shown that substantial prejudice resulted.[331] Similarly, a labour board was permitted to refuse an adjournment sought because the company was changing lawyers; the board was seen as master of its own procedures.[332] Because adequate notice of the hearing had already been given, the board did not act unfairly in deciding that the inconvenience to the lawyers involved was an insufficient reason to adjourn. It has also been held that a tribunal acted properly in refusing an adjournment sought on the ground that a party's lawyer was busy elsewhere; in the case in issue, there had already been one year of adjournments.[333]

Courts were asked on two occasions to assess the propriety of adjournments sought in order to review technical evidence to be presented. In one case,[334] the Consumers' Association of Canada, a participant in a public hearing, requested and was refused an adjournment in order to receive and prepare documents from various airlines whose rules were under review. An application for prohibition was dismissed, the court finding that is was too early to know whether this refusal would result in a denial of natural justice. By contrast, in another case a tribunal's refusal to grant an adjournment was set aside, the court holding that a party must have sufficient time to test evidence released to it only shortly before the hearing.[335]

### (g) *Official Notice, Rules of Evidence, Burden of Proof*

A recurring difficulty arising from the specialized nature of administrative agencies is the extent to which the concept of official notice may be relied upon to justify decisions. Official notice is an expanded version of the concept of judicial notice, and is a particularly important doctrine where material generated within a bureaucracy is being considered. Thus, recognizing that boards are composed of experts, courts permit decision-makers to act on opinions and assumptions not adduced in evidence as long as these are not inconsistent with the evidence presented.[336]

A second problem involves the common law rules of evidence, as these affect admissibility, onus and burden of proof. In burden of proof

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[331] Krebs v. M.N.R., [1978] 1 F.C. 205, 17 N.R. 70 (App. D. 1977).

[332] *Re* Flamboro Downs Holdings Ltd., 24 O.R. (2d) 400, 99 D.L.R. (3d) 165 (Div'l Ct. 1979).

[333] *Iwasyk*, *supra* note 116.

[334] Consumers' Ass'n of Can. v. Canadian Transp. Comm'n, [1979] 2 F.C. 415 (Trial D.).

[335] *Sarco Canada Ltd.*, *supra* note 251.

[336] *Ringrose*, *supra* note 107.

cases, the issue before the court is whether a decision-maker allotted the proper weight to the input of the parties when the decision was reached. For example, in a criminal injuries compensation case the court held that the claimant need only show that her husband was a victim of a crime on a balance of probabilities in order to be indemnified. The board was found to have erred in giving conclusive weight to an acquittal at a criminal trial, and was compelled to reconsider.[337] However, it has also been held that although the burden of proof in disciplinary actions is upon a balance of probabilities, a tribunal must demand more cogent evidence when the allegation of misconduct is grave.[338] Similarly, an arbitrator must consider the seriousness of a charge when determining the burden of proof and may not simply adopt a "balance of probabilities" test in all cases.[339]

As far as the onus of proof is concerned, it is always necessary to examine the legislation closely in order to determine whether a reverse onus is contemplated. In one case, for example, the court held that a decision that the onus of proof in showing entitlement to tenure rested with the employee was not unreasonable, and therefore could stand. The board had sufficient reason to distinguish cases of refusal of tenure from those of dismissal, where the onus would lie upon the employer.[340]

### (h) *Reasons for Decision*

The last six topics reviewed — hearing, notice, evidence, counsel, adjournment and official notice — have dealt with the input which an affected party may have into a decision-making process. The next two topics — reasons and transcripts — focus primarily on the output of decision-makers.

Although there is no duty at common law to provide reasons for a decision, in several cases courts have imposed this duty upon decision-makers. Usually, reasons will be required where other procedural requirements presuppose their existence. Thus, a right to reasons was implied from a statutory right of appeal.[341] In the Supreme Court of Canada decision in *Monsanto Co. v. Commissioner of Patents*,[342] the Patent Appeal Board was compelled to give reasons. The Court held that a lack of reasons would render the statutory right of appeal illusory and furthermore, that the enabling statute contemplated that these would be substantive. Of course, where an authority is obliged by statute to give

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[337] *Re* Castel, 89 D.L.R. (3d) 67 (Man. C.A. 1978).

[338] *Ringrose*, *supra* note 107.

[339] *C.U.P.E., Local 1*, *supra* note 199.

[340] *Re* Association of Professors of the Univ. of Ottawa, 19 O.R. (2d) 271, 78 C.L.L.C. 14,149, 84 D.L.R. (3d) 576 (Div'l Ct. 1978).

[341] *Re* Stoangi, 22 O.R. (2d) 274, 93 D.L.R. (3d) 204 (H.C. 1978).

[342] [1979] 2 S.C.R. 1108, 28 N.R. 181, 100 D.L.R. (3d) 385.

reasons, failure to do so will invalidate a decision.[343] Normally a failure to give reasons will lead only to an order that they be provided,[344] but where these are an integral part of the decision-making process, failure to provide reasons will result in the decision being set aside.[345]

(i) *Transcripts and the Record*

In judicial review proceedings, two issues are often found linked together. First, what constitutes the record of an administrative decision and second, must the record be transcribed? The former will be examined as a separate ground for review,[346] while the latter will be considered here as an aspect of procedural regularity. At common law, tribunals were neither obliged to make a transcript of their proceedings nor to give access to a transcript already made. Thus, a court refused to quash a decision on the ground that a transcript of the proceedings was not made available to an affected party.[347] Moreover, even where the common law position has been statutorily modified, courts are reluctant to quash a decision on this basis. For example, even though the Alberta Rules of Court made tape recordings of proceedings part of the record of a tribunal, no duty to make a transcript from these tapes lay upon decision-makers, since written transcripts were not required by statute and expediency overrode any reason for supplying transcripts.[348] Again, under Federal Court Rule 1402,[349] a section 28 judicial review application must be accompanied by transcripts of the verbal testimony that gave rise to the decision under attack, yet it has been held that submission of a transcript was mandatory only where such was available.[350] A tribunal cannot be compelled to transcribe the tape recording, although an applicant may do so at his own expense.

(j) *Public and Private Bodies; Voluntary Procedures*

The above requirements of the *audi alteram partem* principle have been held to apply only to bodies performing public functions. Consequently, it is of primary importance to determine whether a decision-maker is a public official, or whether his decision is one of

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[343] Northwestern Utils. Ltd. v. Edmonton, [1979] 1 S.C.R. 684, 23 N.R. 565, 89 D.L.R. (3d) 161 (1978).

[344] *Proulx*, *supra* note 280.

[345] *Re* Cardona, 89 D.L.R. (3d) 77 (F.C. App. D. 1978).

[346] *See* Section II. E *infra*.

[347] *Re* Mroszkowski, 20 O.R. (2d) 688 (Div'l Ct. 1978).

[348] Alberta Union of Provincial Employees v. The Queen, [1978] 3 W.W.R. 63, 85 D.L.R. (3d) 387 (Alta. S.C.).

[349] C.R.C. 1978, c. 663.

[350] Grain Handlers Union No. 1 v. Grain Workers Union, Local 1333, [1978] 1 F.C. 762, 16 N.R. 539 (C.A. 1977).

internal management with no public aspect. In addition, problems may arise because certain decision-makers voluntarily adopt procedures analogous to those mandated by natural justice. In both cases it is necessary to determine the extent to which the complete requirements of *audi alteram partem* should be applicable.

Sometimes courts obliterate the distinction between public and private bodies in order to assert jurisdiction to review procedural irregularities. Thus a civil service selection panel, neither created by legislation nor by regulation, was held not to be a statutory body, but because it acted on behalf of a statutory entity (the department head), it was considered to be a public body amenable to review on procedural grounds.[351] By contrast, a labour arbitration board established by collective agreement under section 155 of the Canada Labour Code,[352] which allows for settlement of grievances "by arbitration or *otherwise*", was found to be non-statutory and therefore not a public body.[353] Moreover, in *Houde v. Quebec Catholic School Commission*[354] an admittedly public body chose to hold a vote by secret ballot. The Supreme Court of Canada held that the mode of voting was purely a matter of internal procedure, and as a result the Commission's procedural decisions were not reviewable.

Insofar as voluntary hearings are concerned, where a decision-maker has a discretion whether or not to hold a hearing and chooses to do so, he will be required to conform to a least the basic elements of *audi alteram partem* here reviewed.[355] However, internal procedural rules will not of themselves give rise to an enforceable claim unless the rules of natural justice have also been infringed;[356] voluntarily adopted procedures providing for greater procedural protection are merely directory.[357]

### (k) *Effect of Breach, Curing Defects and Waiver*

There are two situations in which a court may refuse relief despite a breach of *audi alteram partem* by a public body in the exercise of a judicial or quasi-judicial function. These occur when a subsequent proceeding has effectively cured the procedural breach and when the injured party has waived the requirements of natural justice. The principle that defects may be cured is justifiable on the grounds that if no prejudice results, administrative tribunals ought to be encouraged to recognize and correct their own errors; the doctrine of waiver can be justified on the principle of consent. However, both ideas can be

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[351] *Civil Serv. Ass'n of Alberta*, *supra* note 82.
[352] R.S.C. 1970, c. L-1, *as amended*.
[353] *See* text accompanying notes 910-12 *infra*.
[354] *supra* note 281.
[355] *Clauson*, *supra* note 235.
[356] Regina v. Johnson, [1979] 2 W.W.R. 571 (Sask. C.A. 1977).
[357] *Martineau*, *supra* note 299.

understood only after the effect of a breach of natural justice is examined.

The leading case in this regard is *Harelkin v. University of Regina*,[358] although other recent Supreme Court of Canada cases have also addressed the issue. As a result of *Harelkin*, it now appears that a breach of natural justice results in a jurisdictional error which makes a decision absolutely void for some purposes, but merely voidable for others. Thus, decisions are void in the sense that an ordinary privative clause will not preclude procedural review and decisions will be open to collateral as well as direct attack. Yet they are only voidable in the sense that a tribunal will not be granted standing except to defend its jurisdiction,[359] that a decision will remain valid until set aside upon review,[360] that the grant of judicial remedies will be subject to various discretionary bars,[361] that procedurally irregular decisions may be appealed[362] and that breaches of natural justice may be waived by affected parties.[363] These last two points merit further elaboration.

While courts will normally permit procedural defects to be cured in appeal proceedings, this will not be permitted where the appeal rights are limited or discretionary. As a result, the doctrine was not applied to a case where a disciplinary committee's decision, allegedly tainted by breaches of natural justice, was appealed to a tribunal's provincial executive. Since the jurisdiction of the executive was solely appellate in that it did not have power to reopen the proceedings *de novo* and was obliged to accept the evidentiary findings of the discipline committee, the court found that it had no authority to cure the initial lack of notice before the discipline committee.[364]

Instances of waiver are more frequent. For example, it has been held that by taking advantage of the grievance procedure under the Public Service Act,[365] an employee waived his right to complain of a lack of notice and hearing in a disciplinary action resulting from a Royal Commission report.[366] Similarly, the right to complain of breaches of natural justice was deemed to have been waived when the affected party had not taken advantage of a statutory right to seek a stay of an interim suspension order pending a hearing on the merits.[367] Moreover, where a party's own procrastination was the only reason for an alleged procedural

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[358] *Supra* note 27.

[359] Canada Lab. Rel. Bd. v. Transair Ltd., [1977] 1 S.C.R. 722, 76 C.L.L.C. 14,024, 9 N.R. 181 (1976).

[360] Central Broadcasting Co. v. Canada Lab. Rel. Bd., [1977] 2 S.C.R. 112, 67 D.L.R. (3d) 538 (1976).

[361] *Harelkin*, *supra* note 27.

[362] Melvin v. Christiansen, 4 R.P.R. 98 (B.C. Cty. Ct. 1978).

[363] *Iwasyk*, *supra* note 116.

[364] *Pollock*, *supra* note 327.

[365] R.S.O. 1980, c. 418.

[366] *Re* Lochhead, 22 O.R. (2d) 673, 94 D.L.R. (3d) 274 (Div'l Ct. 1978).

[367] *Jow*, *supra* note 317.

breach the court held that he had waived his rights.[368] However, where a procedural defect arises from the breach of a mandatory statutory requirement, waiver is not possible. Thus, a union was held not to have waived its right to a proper hearing by making representations to an illegally-constituted board.[369]

### 3. *Statutory Procedural Consolidations*

An important element in any discussion of irregularities affecting the manner of making decisions is the consideration of statutory procedural consolidations. Of course the various requirements for making valid subordinate legislation constitute a type of procedural code;[370] however, these will be considered later in the survey.[371] Our concern at the present time is with consolidating statutes which impose hearing requirements on decision-makers performing activities analogous to adjudications. To date, only two Canadian jurisdictions have enacted procedural codes. In Ontario, the Statutory Powers Procedure Act[372] sets out detailed rules of procedure which closely parallel the traditional conception of natural justice; in Alberta, The Administrative Procedures Act[373] establishes a laconic framework in which many rights are not precisely enumerated.

Both these statutes are products of the great system-building period in administrative law, where legislatures seemed to believe that all administrative decision-making could be structured and routinized on the basis of a uniform procedural model borrowed from the courts. In retrospect, both attempts appear rather naive and the actual impact these codes have had on agency procedures has been considerably less than expected. Paradoxically, their enactment may have retarded development of the fairness doctrine since the anti-conceptualism of the latter flies directly in the face of the assumptions underlying these two statutes.

#### (a) *The Statutory Powers Procedure Act, 1971*[374]

In view of the potential significance of this statute and the enthusiasm which greeted its enactment, the paucity of litigation it has spawned is remarkable. In contrast to the *audi alteram partem* principle, which covers much the same ground, it has rarely been pleaded. Moreover, during the period of this survey reported cases invariably have

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[368] *Krebs*, *supra* note 331.

[369] *British Columbia Gov't Employees Union*, *supra* note 80.

[370] *See*, *e.g.*, the Regulations Act, R.S.O. 1980, c. 446; Statutory Instruments Act, S.C. 1970-71-72, c. 38.

[371] *See* Section V *infra*.

[372] R.S.O. 1980, c. 484.

[373] R.S.A. 1970, c. 2.

[374] *Now* R.S.O. 1980, c. 484.

been concerned with the scope and range of application of the statute rather than its substance.

Subsection 3(1) establishes two criteria upon which the applicability of the S.P.P.A. depends: first, a decision-maker must be exercising a "statutory power of decision" under paragraph 1(1)(*d*), and second, he must be required by law to afford to affected parties a hearing. This latter requirement may be met either by virtue of an express legislative direction, or by implication of the common law. Thus, whenever no requirement for a hearing is set out in the statute under which the decision is taken, the applicability of the S.P.P.A. remains contingent upon the common law exercise of classifying functions. On two occasions in recent years this point has arisen. Where the Ontario Housing Corporation terminated a tenancy without a hearing, the Divisional Court held that the S.P.P.A. did not apply, on the basis that the Corporation was not exercising a statutory power of decision.[375] However, the Court of Appeal concluded that the Corporation was exercising a statutory power of decision, but that the S.P.P.A. did not apply since there was no obligation to afford a hearing under the statute; in addition, no obligation to do so arose at common law since the function performed was purely administrative.[376] Similarly, the courts have held that the discretionary power of a city council to reimburse policemen for legal expenses is a statutory power of decision, yet the S.P.P.A. was found not to apply since the enabling statute did not require a hearing and because the exercise of a discretionary power, being a purely administrative function, did not give rise to a duty to afford a hearing at common law.[377]

Subsection 3(2) lists a variety of explicit exceptions to the general scope of the application of the S.P.P.A. For example, paragraph 3(2)(*g*) excepts certain recommendatory processes leading to reports which do not "legally bind or limit" the decision-maker to whom they are presented; however, the exception does not apply where a hospital selection committee does more than merely make a recommendation and actually determines a matter.[378] Paragraph 3(2)(*d*) excepts arbitrators acting under the Arbitrations Act[379] and the Labour Relations Act;[380] consequently, where a union proceeds under section 13 of the S.P.P.A on a matter arising out of a grievance filed with the Ontario Labour Relations Board, the applicability of the statute is in issue. In such a case, the court found that the Ontario Labour Relations Board was acting not as a labour board but as an arbitrator under section 112*a* of the Labour

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[375] *Re* Webb, 18 O.R. (2d) 427 (Div'l Ct. 1977).
[376] *Supra* note 104.
[377] *Grant*, *supra* note 66.
[378] *Re* Peterson, 23 O.R. (2d) 266, 95 D.L.R. (3d) 349 (Div'l Ct. 1978).
[379] R.S.O. 1980, c. 25.
[380] R.S.O. 1980, c. 228.

Relations Act; paragraph 3(2)(*d*) thus excepted the board from the requirements of the S.P.P.A.[381]

During the period of this survey only once was the actual effect of procedures imposed under the S.P.P.A. litigated. The obligation to permit cross-examination of witnesses under section 10 was found not to extend to cross-examination of government officials about policy statements admitted in evidence.[382] In other words, adversarial confrontation with respect to documentary proof is not contemplated by the S.P.P.A.

Two questions about the applicability of the Act remain to be considered. First, what is the relationship between the S.P.P.A. and the common law rules of natural justice? Does an express exclusion of the former implicitly exclude the latter, and does the non-applicability of the former under subsection 3(1) carry with it a suppression of the latter? The Ontario Court of Appeal has dealt with this issue twice, finding, on the one hand, that an express statutory exclusion of the S.P.P.A. would not operate to suppress the rules of natural justice or the doctrine of fairness,[383] and, on the other hand, that where the S.P.P.A. does not apply under subsection 3(1), the common law rules of natural justice may nevertheless do so.[384] The second question is whether parties may waive their rights under the S.P.P.A. As with cases involving a breach of statutory procedural requirements, courts have held that a failure to adhere to the provisions of the S.P.P.A. will not always lead to the quashing of a decision. Thus, non-compliance with the notice provision of section 6 was excused because the defect was merely technical and no prejudice resulted.[385]

### (b) *The Administrative Procedures Act*[386]

While decisions involving the Statutory Powers Procedure Act, 1971[387] have not been frequent over the past decade, litigation respecting The Administrative Procedures Act of Alberta has been almost non-existent. Firstly, the statute applies only where the Lieutenant Governor in Council has so ordered. Secondly, the A.P.A. does not establish a comprehensive procedural code but simply highlights certain general requirements applicable to decision-makers. Since 1978 the statute has come directly before the courts in only five reported cases, each of which centred on section 8. This section provides that where the exercise of a

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[381] *Re* International Ass'n of Heat & Frost Insulators, 25 O.R. (2d) 8, 99 D.L.R. (3d) 757 (Div'l Ct. 1979).

[382] *Vespra*, *supra* note 75.

[383] *Downing*, *supra* note 266.

[384] *Webb*, *supra* note 104.

[385] *Re* Polgrain, 13 O.R. (2d) 463, 71 D.L.R. (3d) 348 (Div'l Ct. 1976).

[386] R.S.A. 1970, c. 2.

[387] R.S.O. 1980, c. 484.

statutory power adversely affects the rights of a party, the decision-maker must provide written reasons for his decision.

The scope of section 8 was considered by the Supreme Court of Canada in *Northwestern Utilities Ltd. v. City of Edmonton*.[388] It was held that the section places an obligation on the tribunal to render substantive written decisions with meaningful reasons and facts in support. The policy underlying this requirement was seen as an attempt to reduce capriciousness, to reinforce public confidence, to afford the parties an opportunity to assess possible appeal action and to ensure that the reviewing or appellate body had an adequate basis upon which to ground a decision. Consequently, a mere affirmation that the parties' representations had been considered would not meet the requirements of the Act.[389] Section 8 has also been applied by analogy in the interpretation of the provisions of specific enabling legislation. For example, the courts have held that reasons given by a tribunal which merely mimic a statutory ground for decision are insufficient.[390] By contrast, it is not offensive to section 8 for an agency to incorporate the findings of fact and reasons for decision of a recommendatory body and to adopt these without change or addition as its own reasons.[391]

Even when the Lieutenant Governor in Council has directed that the A.P.A. apply, its specific provisions can only be invoked when a tribunal exercises a statutory power. In another case dealing with section 8 it was argued that a discretionary decision did not fall within the definition of "statutory power".[392] The court rejected this argument and held that the reasons given must be proper, adequate and intelligible.

### 4. *Fairness*

The decade's second main development in judicial control over the manner of exercising power was the discovery of the doctrine of fairness.[393] While the jurisdiction of courts to imply procedural requirements in respect of non-judicial functions was first asserted in the United Kingdom in the late 1960's, it was only during the period of this survey that the Supreme Court of Canada accepted a similar proposition. In the landmark decision of *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*,[394] Chief Justice Laskin observed:

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[388] *Supra* note 343.

[389] R.S.A. 1970, c. 2. A similar result was reached in *O'Hanlon*, *supra* note 279.

[390] Hannley v. City of Edmonton, 12 A.R. 473, 91 D.L.R. (3d) 758 (C.A. 1978).

[391] Caribe Holdings Ltd. v. Alberta Energy Resources Conservation Bd., 13 A.R. 132 (C.A. 1978).

[392] *Green, Michaels & Assocs.*, *supra* note 218.

[393] The literature has been overwhelming: *see* note 262 *supra*.

[394] *Supra* note 10. *See generally* Carter, *Fair Play Comes to Canada*, 44 SASK. L. REV. 349 (1979); Grey, *The Duty to Act Fairly After Nicholson*, 25 MCGILL L.J. 598 (1980); Pépin, *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, 39 R. DU B. 121 (1979).

> The emergence of a notion of fairness involving something less than the procedural protection of traditional natural justice has been commented on in de Smith, *Judicial Review of Administrative Action*. . . .
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> What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question. . . .[395]

In other words, fairness was developed to deal with precisely those cases where the procedural requirements of *audi alteram partem* would be inappropriate, because, unlike the rules of natural justice, which are modelled on the elements of adjudication, fairness does not presuppose a set list of minimum procedural requirements. No single model of decision-making can be appealed to, and the courts must evaluate each case independently, according to the quality and degree of participation appropriate to the type of decision being challenged.[396]

Of course, there were a number of cases antedating *Nicholson* in which the fairness concept was mooted. The most important of these was *Minister of Manpower & Immigration v. Hardayal*,[397] where the Supreme Court of Canada first seemed to countenance the possibility of fairness. Earlier, the fairness principle had actually been adopted in two provinces. In Alberta, a declaration was issued to the effect that a minister's failure to give adequate notice of non-renewal of a licence and his failure to set out renewal conditions were unfair.[398] In Nova Scotia, upon a claim of inadequate notice of evidence to be produced, the court expressed a reluctance to "enter the morass" of distinctions between administrative and quasi-judicial functions, preferring to look at the subject matter of the case.[399] From an overview of the enabling Act, the court ruled that decision-makers must treat each party equally in respect of cross-examination and opportunity to hear the other's witnesses and consequently ordered a reconsideration.

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[395] *Id.* at 324-25, 23 N.R. at 423-24, 88 D.L.R. (3d) at 680-81.

[396] This point is made in the analysis of English and French concepts of procedural due process in Lefas, *A Comparison of the Concept of Natural Justice in English Administrative Law with the Corresponding General Principles of Law and Rules of Procedures in French Administrative Law*, 4 QUEEN'S L.J. 197 (1978).

[397] *Supra* note 300. *See* Hucker, *Comment*, 16 OSGOODE HALL L.J. 773 (1978).

[398] Regina v. Industrial Coal & Minerals, [1977] 4 W.W.R. 35 (Alta. S.C.), *rev'd* [1979] 5 W.W.R. 102 (Alta. C.A. 1977). *See also Alberta Union of Provincial Employees*, *supra* note 284, where the court quashed a decision on the basis of a breach of natural justice. However, the court stated that the doctrine of fairness would yield the same result even if the Board's function were administrative.

[399] Scott v. Rent Review Comm'n, 23 N.S.R. (2d) 504, 81 D.L.R. (3d) 530 (C.A. 1977).

In *Nicholson*,[400] a probationary police constable was fired without being informed that such action was being considered, without being told the reasons for dismissal, and without being given an opportunity to make representations to the Police Commission. The Supreme Court of Canada quashed this dismissal and held that although Nicholson may not have been entitled to all the procedural trappings associated with natural justice, he was still entitled to fair treatment. The Court also decided that the rules of natural justice would apply to quasi-judicial decisions, and the doctrine of fairness to administrative decisions.

As a result of this case, two different views of fairness emerged. According to one view, a preliminary classification of function would still be necessary and the doctrine of fairness would apply only after a court concluded that the decision under review was administrative in nature. Thus, the decision of a school board to fire a superintendent was found to be an administrative function; the duty to act fairly rather than to observe the rules of natural justice was applied to ground an application for judicial review.[401] Courts have also held that in passing a by-law concerning a subdivision plan, a municipality would not be acting in a quasi-judicial capacity as there was no *lis* being determined. But once the function was classified as purely legislative, the court recognized the possibility of asserting a duty to act fairly.[402] The drawbacks of this approach are illustrated in a case where it was held that the general manager of the Ontario Health Insurance Plan was performing administrative functions and would therefore be under a duty to act fairly. However, because the allegations of procedural impropriety had been framed as breaches of natural justice rather than as breaches of fairness, the court refused to grant relief.[403] Often courts will acknowledge that the distinction between quasi-judicial and administrative functions is illusory and then attempt to distinguish administrative functions (where the legislative intent is that the decision-maker rely on unfettered discretion and policy) from judicial functions (where decision-makers must rely on pre-existing legal principles).[404]

The second interpretation of *Nicholson* is that reviewing courts are entitled to dispense with the difficult task of classifying functions. For example, in a case where inmates of a mental health centre under a Lieutenant Governor's warrant were refused access to medical records that would be relied on by a board when making recommendations concerning their release, the court expressed its dislike for the distinction between quasi-judicial and administrative functions, and insisted that the rules of natural justice must apply. The court then cited, in support of its

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[400] *Supra* note 10.

[401] *McCarthy*, *supra* note 18.

[402] *Re* Village of Wyoming, 23 O.R. (2d) 398, 95 D.L.R. (3d) 728 (C.A. 1979), *aff'd* 116 D.L.R. (3d) 1 (S.C.C. 1980).

[403] *S. & M. Laboratories Ltd.*, *supra* note 306.

[404] Citizens' Health Action Comm. Inc. v. Milk Control Bd. of Manitoba, [1979] 4 W.W.R. 431, 100 D.L.R. (3d) 741 (Man. Q.B.).

decision, the fact that the recently decided *Nicholson* case established a duty to act fairly beyond the limits of quasi-judicial functions.[405] In another case involving the discharge of a policeman, the court upheld the applicant's right to a fair hearing, without first classifying the function of the decision-maker.[406] At first instance an employment standards investigation was found to be a non-adjudicative function, and therefore not subject to the rules of natural justice.[407] On appeal, however, the investigator's function was held to comprise both judicial and administrative elements; since the *Nicholson* case was seen as having blurred the distinction between quasi-judicial and administrative functions without detracting from the requirements of natural justice where such were appropriate, the decision was set aside.[408]

In an important decision the Federal Court of Appeal held that where the requirements of fairness differ from those of natural justice, classification of function becomes irrelevant. Procedural fairness, like natural justice, was seen as a common law requirement to be applied as a matter of statutory interpretation, determining what would be appropriate by taking into account the nature of the authority, the power exercised and the consequences of the decision. On this test, it was found that the Governor in Council acting under a statutory power (rather than in a Privy Council capacity) would be under a duty to act fairly.[409] This principle was later applied in a case involving a Crown agency. The court looked at the power being exercised, the consequences of the decision, and the relationship between the affected party and the power-holder in order to determine whether procedural control would be appropriate.[410]

The major Supreme Court of Canada excursus on the meaning of the *Nicholson* case was offered in *Martineau v. Matsqui Institution Disciplinary Board*.[411] Although the majority of the Court found it unnecessary to address the issue, Mr. Justice Dickson suggested in a concurring opinion that, in principle, classification of functions is no longer necessary (except for certain remedial purposes under the Federal Court Act).[412] In his Lordship's view, fairness and natural justice ought not to be seen as two separate standards. Rather, the duty to be fair ranges across all decision-making activities; the rules of natural justice merely outline the content of this duty in adjudicative situations. As a

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[405] *Abel*, *supra* note 12.

[406] *Re* Proctor, 24 O.R. 715, 99 D.L.R. (3d) 356 (C.A. 1979), *rev'd* [1980] 2 S.C.R. 727, 116 D.L.R. (3d) 577.

[407] *Re* Downing, 17 O.R. (2d) 26, 79 D.L.R. (3d) 310 (Div'l Ct. 1977).

[408] *Downing*, *supra* note 266.

[409] However, the Supreme Court of Canada allowed the appeal from this decision. *See Inuit Tapirisat*, *supra* note 11.

[410] *Webb*, *supra* note 104.

[411] *Supra* note 11. *See* on the first *Martineau* decision, Mullan, *Comment*, 24 McGILL L.J. 92 (1978).

[412] R.S.C. 1970 (2d supp.), c. 10. On this last point, *see Coopers & Lybrand*, *supra* note 292.

result, it may well be that in the future a distinction between fairness and natural justice need no longer be made for any procedural purpose.

Once the threshold question of whether a duty of fairness lies has been answered in the affirmative, the court's next task is to determine the content of this duty, for unlike the requirements of natural justice, the content of fairness cannot be determined through analogies with the judicial process. Because the relevant circumstances change with each case, even general statements about the content of fairness are misplaced. As MacKinnon A.C.J.O. once stated: "[I]t may be that what constitutes fairness is, like beauty, to be found in the eye of the beholder."[413] Many cases have centred on the right of parties to obtain access to information; in procedures closely resembling adjudications it has been held that although the doctrine of fairness does not *per se* require that a full-scale oral hearing be undertaken, it may be necessary to disclose adverse evidence, and it may be necessary for the decision-maker to consider the merits of holding a full hearing.[414] The principle of fairness does not, however, always involve a right to counsel. For example, the decision of an immigration officer to hold an inquiry need not be preceded by a hearing at which counsel is present; the court concluded that since the subject of inquiry need only withdraw his application to avoid being investigated, he was not entitled to counsel.[415] The nature of the right to make representations is often contingent upon an applicant's status, so that while claims of fairness may always be raised, they will not uniformly be successful;[416] whereas probationary police officers have a right to a hearing prior to dismissal,[417] prisoners have more limited rights to challenge transfer decisions.[418]

Dealings with land constitute an important area where fairness may well have a significant impact. For example, courts in Alberta have quashed a rezoning decision of a planning commission for its failure to afford owners of adjacent property an opportunity to make representations.[419] In British Columbia, courts have held that, even in the absence of a statutory duty to hold a public hearing, a minister who proposes to replace a tree-farm licence should hold such a hearing if he is to act fairly.[420] Finally, it should be noted that in Ontario even municipal councils performing legislative functions have been found to be subject to a duty to act fairly prior to passing by-laws.[421]

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[413] *Webb*, *supra* note 104, at 266, 93 D.L.R. (3d) at 196.

[414] *See* notes 7 & 10 *supra*.

[415] Monfort v. Minister of Immigration, [1980] 1 F.C. 478, 30 N.R. 174, 105 D.L.R. (3d) 463 (App. D. 1979).

[416] *Evans*, *supra* note 105.

[417] *Supra* note 9.

[418] Magrath v. The Queen, [1978] 2 F.C. 232, 38 C.C.C. (2d) 67 (Trial D. 1977); *Bruce*, *supra* note 299.

[419] *Harvie*, *supra* note 294.

[420] Islands Protection Soc'y v. The Queen, [1979] 4 W.W.R. 1, 11 B.C.L.R. 372, 98 D.L.R. (3d) 504 (S.C.).

[421] *Village of Wyoming*, *supra* note 402.

One important consequence of the fairness doctrine is that previously unnoticed remedial problems will be raised in the courts. On the one hand, some courts accept the fairness principle yet hold that the ground can only be raised in declaratory proceedings, since *certiorari* lies only with respect to judicial functions;[422] on the other hand, a line of authority to the effect that *certiorari* will lie with respect to administrative functions and therefore may be used in fairness cases is also developing.[423] A similar confusion occurs with respect to recent remedial legislation. Particular difficulty may arise because of the wording of section 28 of the Federal Court Act,[424] although the Supreme Court of Canada seems to have held that *certiorari* under section 18 may be employed to assert fairness claims.[425] Since *Nicholson* was argued under the new Ontario statute it might have been thought that such problems would not afflict The Judicial Review Procedure Act, 1971.[426] However, the British Columbia courts have recently suggested that their inherent discretion to refuse relief might override any claims of fairness.[427]

### 5. *Conclusion*

In no other area of administrative law does one see the major themes outlined in the introduction illustrated so clearly. The promulgation of specific procedural schemes for agencies, the declining relevance of general procedural consolidations, the volume of litigation on basic principles of *audi alteram partem*, and the emergence of the doctrine of fairness all offer excellent examples of the law during the period of this survey. Over the next few years the evolution of the fairness theory will no doubt be the most interesting theme of judicial review, for whether legislatures react to procedural activism by abandoning the attempt to promulgate detailed procedural provisions for individual agencies, by delegating even wider statutory discretions or by enacting more comprehensive general procedural consolidations, the choice is likely to shape the basic structure of administrative law for at least the next decade.

## E. *Error of Law on the Face of the Record and Non-jurisdictional Mistakes About Facts*

The final ground for review to be canvassed in this survey represents a departure from the theory of jurisdiction around which all other grounds revolve. While a tribunal may make a reviewable error of law or fact

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[422] *E.G., Alberta Union of Provincial Employees, supra* note 284.
[423] *McCarthy, supra* note 18.
[424] R.S.C. 1970 (2d Supp.), c. 10.
[425] *Martineau, supra* note 11.
[426] R.S.O. 1980, c. 224.
[427] *Culhane, supra* note 287.

leading to a wrongful assumption, refusal or exercise of jurisdiction, similar errors committed within the decision-maker's jurisdiction are in principle immune from review.[428] Only two exceptions to this principle have been admitted: (i) if, when performing a judicial or quasi-judicial function, a decision-maker errs in law and the error is manifest on the record of the proceedings, and (ii) if there is absolutely no evidence upon which a decision-maker could have founded a decision, the determination will be set aside.[429]

Errors of law within jurisdiction will include misconstruction of statutes or general common law principles, and presumably wrong decisions relating to the admissibility of evidence. Nevertheless, there is often great confusion as to when an error of law is jurisdictional. For example, the Quebec Court of Appeal has held that application of a repealed text by a decision-maker constituted a jurisdictional error of law.[430] While this may conceivably amount to taking into account an irrelevant matter, the court curiously characterized the error as an excess of jurisdiction. A Manitoba court also appears to have confused review on jurisdictional grounds and review for error of law.[431] It began by finding that a police commission had jurisdiction to determine whether an officer had been legitimately dismissed. However, it decided that the commission had erred in law by treating as valid an individual agreement made between an officer and a police department. The error of law was found to be jurisdictional, because questions as to contractual validity were stated to be within the sole purview of the courts. These two decisions show how the expanded concept of jurisdiction, elaborated during the past decade, has undermined the theory of jurisdiction itself and led to confusion in the law of judicial review.[432]

During the period of this survey there were no major developments in the common law definition of the record upon which the error must appear. Nevertheless, broadened statutory definitions now usually permit dissenting opinions and transcripts of evidence to be filed as part of a tribunal's record.[433]

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[428] Of course, errors of law within jurisdiction may be converted into jurisdictional errors through grounds for review such as "preliminary matter", and "asking wrong questions", while mistakes about facts may similarly be converted through grounds such as "preliminary matter", "irrelevant considerations" and "unreasonableness".

[429] In one case, namely, *Board of Trustees of Edmonton Catholic School Dist No 7*, *supra* note 20, the possibility of using a declaration to challenge all errors of law, whether on the record or not, has been mooted. This decision is aberrant. *See also* s. 28(1)(*b*) of the Federal Court Act, R.S.C. 1970 (2d Supp.), c. 10.

[430] Tremblay v. Themens, [1979] Que. C.A. 26.

[431] Winnipeg Police Ass'n v. Winnipeg, [1979] 5 W.W.R. 193 (Man. Q.B.). *Cf* Paquin v. Commission des Affaires Sociales, [1978] Que. C.S. 832.

[432] *See also* Commission de contrôle des permis d'alcool du Québec v. Distribution Kinéma Ltée., [1977] Que. C.A. 308.

[433] *Alberta Union of Provincial Employees*, *supra* note 348.

The manner in which a reviewing court reacts to the decision of an inferior tribunal is an important issue that arises when error of law on the face of the record is alleged. On the one hand, courts seem inclined to repeat the task of the decision-maker and attempt to determine afresh the matter in issue. This often occurs in cases involving statutory arbitrations; for example, an arbitrator found that the closing of a mine after a legal strike constituted a permanent discontinuance of its business, therefore entitling the employees to termination notice. Holding that the interpretation of "permanent discontinuance" was a question of law, the court quashed the decision on the basis that the referee erred by not assessing the situation at the time the employees received notice, at which time there was no intention to shut down the operation permanently.[434] A determination by an adjudicator that a provision of the Immigration Act, 1976[435] applies at the time it first becomes relevant and not at the time of deportation, was held to constitute an error of law.[436] Similarly, a reviewing court reversed an extradition judge[437] by finding that a fugitive who had entered a guilty plea but left the jurisdiction before being sentenced was "convicted" for the purposes of the Extradition Act.[438] Finally, where school trustees were empowered to dismiss a teacher who had been convicted of a criminal offence, the court reversed a reference board decision upholding dismissal on the basis that a conditional discharge is not a conviction under the Criminal Code.[439] Each of these decisions shows little deference to the findings of administrative decision-makers, contrary to the principle of *New Brunswick Liquor Corp*.[440]

On the other hand, an alternative more in line with recent approaches to jurisdictional errors is sometimes taken: a tribunal's decision will only be overturned where its interpretation of the applicable law was not reasonable. Thus, although the reviewing court disagreed with a law society's view of what constituted a lawyer's professional capacity, because the position taken was not outrageous it did not find an error of law on the face of the record.[441] As a general principle, courts have held that where more than one conclusion could be drawn from undisputed facts, there ought to be no review simply because the court disagrees with an agency.[442] The same principle applies to the

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[434] *Re* Falconbridge Nickel Mines Ltd., 19 O.R. (2d) 448, 85 D.L.R. (3d) 297 (Div'l Ct. 1978).

[435] S.C. 1976-77, c. 52.

[436] Robertson v. Minister of Employment & Immigration, [1979] 1 F.C. 197, 91 D.L.R. (3d) 93 (App. D. 1978).

[437] *In re* McMahon, [1978] 2 F.C. 624, 40 C.C.C. (2d) 250 (App. D.).

[438] R.S.C. 1970, c. E-21.

[439] R.S.C. 1970, c. C-34. *Re* Board of School Trustees of School Dist. No. 37 (Delta), 82 D.L.R. (3d) 509 (B.C.S.C. 1979).

[440] *Supra* note 30.

[441] *Patchett*, *supra* note 310.

[442] *See*, *e.g.*, *Re* S.E.I.U., Local 308, 90 D.L.R. (3d) 255 (Man. Q.B. 1978).

interpretation of contracts. A court will not review an arbitration board's construction of a collective agreement for error of law on the face of the record where the construction given was reasonable.[443] However, where an arbitration board interprets "laid-off" to include only those instances where the employee is given formal notice of a lay-off and to exclude *de facto* lay-offs, the court will find the interpretation to be unreasonable.[444]

Twice during the period of this survey the Supreme Court of Canada has dealt with an allegation of error of law on the face of the record arising from a collective agreement. In *U.A.W., Local 720 v. Volvo Canada Ltd.*[445] a majority of the Court held that where a question of law is not specifically referred to an arbitrator, his award should be upheld if reasonable. A minority also held that where a question of law is specifically referred the decision is not reviewable in any case. In *Bradburn v. Wentworth Arms Hotel Ltd.*[446] the Court reasserted jurisdiction to review an arbitration award where an arbitration board's jurisdiction was in issue or where a statute was being interpreted. While neither of these decisions breaks new ground, each is helpful in establishing the attitude of deference to administrative decision advocated by the Court in other areas.

Although error of law on the face of the record should not in theory be invoked as a ground for review to control mistakes about facts, it is clear that courts look at the evidence presented to a decision-maker and the weight attached to it. Thus, where a decision includes a conclusion which is wholly unsupported by the evidence in the record, review will lie for error of law.[447] Similarly, where a tribunal rejects the finding of facts by an assessment panel, the court will find an error of law on the basis of an unreasonable finding of fact.[448] In a very brief judgment, *University of Saskatchewan v. C.U.P.E., Local 1975*,[449] the Supreme Court of Canada reiterated the view that a complete absence of evidence in support of a decision would constitute an error of law, but also concluded that such errors were jurisdictional. This latter proposition is doubtful.

The scope for review of errors of law and mistakes about facts has been slightly modified by paragraphs 28(1)(*b*) and (*c*) of the Federal Court Act.[450] The former paragraph permits review of all errors of law, whether they appear on the face of the record or not, while the latter

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[443] Attorney-General for Newfoundland v. Newfoundland Ass'n of Public Employees, 84 D.L.R. (3d) 44 (Nfld. S.C. 1978).

[444] *Cf. Re* Metropolitan Toronto Police Ass'n, 17 O.R. (2d) 265, 80 D.L.R. (3d) 131 (Div'l Ct. 1977).

[445] [1980] 1 S.C.R. 178, 33 N.S.R. (2d) 22, 79 C.L.L.C. 14,210, 27 N.R. 502, 57 A.P.R. 22, 99 D.L.R. (3d) 193 (1979).

[446] [1979] 1 S.C.R. 846, 24 N.R. 417, 94 D.L.R. (3d) 161 (1978).

[447] *Re* Falconbridge Nickel Mines Ltd., *supra* note 434.

[448] Benoit v. Workmen's Compensation Bd., 18 N.B.R. (2d) 601, 80 D.L.R. (3d) 343 (C.A. 1977).

[449] [1978] 2 S.C.R. 834, 22 N.R. 314.

[450] R.S.C. 1970 (2d Supp.), c. 10. *See* Section III. C. 3 *infra*

allows review for mistaken findings of fact if these are made in a capricious or perverse manner. Nevertheless, the Federal Court seems reluctant to review factual determinations, especially where these relate to matters within a tribunal's specialized knowledge.[451] Moreover, on two occasions paragraph 28(1)(*c*) has been held only to cover instances where no evidence could be found to support a decision, and in this respect it simply repeats one of the grounds for review set out in paragraph 28(1)(*b*).[452]

A final type of error of law on the face of the record arises when a tribunal offers obscure, insufficient or confusing reasons for its decision. Clearly, determinations may be reviewed on this basis where there is a statutory obligation to give reasons;[453] it is less certain that failure to do so will constitute an error of law at common law. Nevertheless, in *Canadian Pacific Ltd. v. City of Montreal*[454] the Supreme Court of Canada set aside upon appeal a valuation of a tax revision board on the basis that its reasons were insufficient to explain its decision.

A finding that a tribunal committed an error of law on the face of the record will lead the court to set aside a decision if the error is determinative; however, where no change is likely to result from correction of the error, relief will be refused.[455] Moreover, this ground for review cannot be alleged in the face of a privative clause. Thus, an incorrect ruling on a matter of evidence would not be subject to challenge as an error of law where a tribunal's decisions are protected by a privative clause.[456]

In conclusion, of all the grounds for review examined, error of law on the face of the record is that which is most closely tied to the remedial structure of administrative law. It is also the only irregularity committed within jurisdiction which gives rise to judicial control. However, in view of the expanded concept of jurisdiction now asserted by courts and the attitude of deference which seems to have developed recently, occasions on which this principle will be invoked are likely to become infrequent over the next few years, except in those areas such as labour law, where the ground has acquired a certain status.

## III. Remedies

A second major branch of administrative law is the study of the legal recourses by which control of administrative decision-making is ef-

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[451] *Re* Rhom & Haas Ltd., 22 N.R. 175, 91 D.L.R. (3d) 212 (F.C. App. D. 1978).

[452] *See id.*, and *Sarco Canada Ltd.*, *supra* note 251.

[453] As in *Northwestern Utils. Ltd.*, *supra* note 343; and *Hannley*, *supra* note 390. *See also Johnson*, *supra* note 356, where the obligation to give reasons arose from a tribunal's own rules of procedure.

[454] [1978] 2 S.C.R. 719, 21 N.R. 541.

[455] *Central Broadcasting Co.*, *supra* note 360.

[456] *Marques*, *supra* note 113.

fected. Once again the reader will note a slight departure in this survey from the organization adopted by the previous author. Traditionally, it has been said that there are four distinct means of superintending or controlling administrative activity: direct review of decisions through the courts either at common law or by statute; indirect review of decisions by means of tort, contract and restitutionary claims; statutory modes of challenge such as appeals, where the merits of decisions may be canvassed; and self-policing by agencies either through in-house appeals or by way of reconsideration.

While in the trivial sense each of these is oriented toward accomplishing the same goal — the correction of errors of law, fact and policy — the differences between them are more important than their similarities. Each highlights a distinctive facet of governmental activity and may be seen as an attempt to channel grievances towards the appropriate agency for review. Judicial review and private law claims both involve the courts in an assessment of the legality of agency activity; questions of law are thus of prime concern. Statutory remedies, such as appeals, presume that courts are able to assess the factual context of tribunal decisions. Thus, it may be noted that decisions which are appealable to courts tend to be most like those undertaken by adjudicative agencies. In-house remedies such as appeals and reconsiderations are oriented to maintaining coherence in administrative policy.

Just as the various grounds for review can be understood best when the kind of bureaucratic problem they reflect is highlighted, so too the various remedies against administrative action can be understood best when the kinds of errors they are most suited to correcting are emphasized. In other words, distinguishing the strengths and weaknesses of each of these recourses enables one to appreciate the proper role of judicial review in administrative law and to see why the traditional remedies based on the concept of jurisdiction are ill-suited for many of the modern purposes to which they are put.[457]

### A. *Judicial Review Remedies*

In this section, various aspects of judicial review remedies will be examined. Both at common law and as a result of statutory enactment these have undergone remarkable evolution in the past decade.[458] Moreover, much of the theory of judicial review is being reconsidered as

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[457] For the best treatment of this entire problem, *see* Abel, *Appeals Against Administrative Decisions: In Search of a Basic Policy*, [1978] SPECIAL ANNIVERSARY ISSUE, CAN. J. PUB. ADMIN. 28.

[458] For a summary of developments in the U.K., *see* Lambert, *Administrative Law: Reform of the Public Law Remedies in England*, 56 CAN. B. REV. 668 (1978). *See also* the following cases for explicit statements by the S.C.C. of its desire to rationalize the law of judicial review: *Montana*, *supra* note 28; *Duquet*, *supra* note 22; *Landreville*, *supra* note 22; *Vachon*, *supra* note 22; *Coopers*, *supra* note 292; *Harelkin*, *supra* note 27; *Wheeler*, *supra* note 78.

a result of the continuing constitutional debate.[459] Consequently, the continuing evolution of these remedies at common law, the impact of various legislative initiatives to reform them, the emergence of judicially developed doctrines such as the discretionary nature of judicial review and the modern treatment of privative clauses will be assessed in detail.

### 1. *Common Law Writs and Orders*

At common law, propriety in administrative action was usually ensured through a great variety of prerogative writs and orders. The more important of these, *certiorari*, *mandamus*, prohibition and *quo warranto*, have survived the development of modern administrative law. To these traditional remedies have been added several other distinct judicial recourses including *habeas corpus*, now finding increasing use in administrative law, and declarations and injunctions which are appearing as transformed private law recourses.[460] Although some jurisdictions have slightly modified certain procedural aspects of these remedies through amendments to judicature acts and rules of practice, the unique characteristics of each are still identified and discussed by reviewing courts. These characteristics remain a trap for the unwary and continue to colour much litigation. For example, because the remedies available by way of judicial review aim at *decisions* of administrative agencies, courts have no power to quash any of the *reasons* given by a tribunal when the decision itself is not impugned;[461] that is, unlike the case upon appeal, judicial review does not contemplate the court's making a decision about either the merits or the justification given for an administrative act.

#### (a) *Certiorari*

Of the traditional common law writs *certiorari*, being the remedy by which the record of the agency under review was brought before the reviewing court and by which the decision rendered was quashed, remains the most important. Not surprisingly it has also undergone the greatest changes during the period of this survey. In the past, *certiorari* was thought to lie only in respect of decisions required to be made on a judicial or quasi-judicial basis. This still appears to be the accepted position in many jurisdictions,[462] although in several cases the remedy

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[459] *See* Jones, *A Constitutionally Guaranteed Role for the Courts*, 57 CAN. B. REV. 669 (1979).

[460] For a general survey of the use of such remedies, *see* Ouellette, *Le pouvoir de surveillance et le contrôle de la sévérité des sanctions disciplinaires ou administratives*, 38 R. DU B. 362 (1978).

[461] *See Re* Libby, 21 O.R. (2d) 362, 91 D.L.R. (3d) 281 (C.A. 1978).

[462] *See, e.g., Re* Pfeiffer, 75 D.L.R. (3d) 407 (N.W.T.S.C. 1977); *Copeland*, *supra* note 101; Youngberg v. Alberta Teachers' Ass'n, 8 A.R. 36, 82 D.L.R. (3d) 376 (C.A. 1977).

has been granted with respect to administrative functions, either through a more liberal interpretation of the test for a judicial function,[463] or through a rejection of the concept of classification itself.[464] While *certiorari* was at one time thought to be restricted to low level decisions based on statutes, there is now some suggestion that ministers' decisions are also reviewable by way of *certiorari*[465] despite the fact that purely prerogative powers themselves are not.[466]

Since *certiorari* lies to quash a decision, it is necessary to examine the effect of a successful application. In principle, the quashing of a decision will not annul all the proceedings within which the improper decision was taken. For example, the setting aside of a labour board's certification decision for a statutory procedural irregularity will not void a union's application, so that the board would retain jurisdiction to hold another vote on the matter.[467] As the *certiorari* merely renders the decision a nullity, the board is left with an outstanding request with which it has to deal. By contrast, where later proceedings are dependent upon a determination which is found to be void, the *certiorari* judgment quashing that decision will annul the entire process. Thus a recommendation to the minister, quashed for failure to hold a hearing, *did* have the effect of rendering the minister's later approval inoperative.[468] While these two cases suggest the question is primarily one of timing, in the second case at least the issue is also whether the void decision can be cured at a later stage.[469]

### (b) *Prohibition*

In many aspects prohibition is a remedy similar to *certiorari*, except that it operates to prevent an agency from making an unlawful decision, rather than to quash a void determination after it has been made.[470] A first limitation on the availability of prohibition arises from the traditional distinction between administrative and judicial or quasi-judicial func-

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[463] *See Alberta Union of Provincial Employees*, *supra* note 284; *Abel*, *supra* note 12.

[464] *See McCarthy*, *supra* note 18; Board of Police Comm'rs v. Tickell, [1979] 2 W.W.R. 361, 95 D.L.R. (3d) 473 (Sask. Q.B.); *Controni*, *supra* note 295; *Keable*, *supra* note 93; *Re* Royal American Shows Inc., 10 A.R. 577, 39 C.C.C. (2d) 35, [1978] 2 W.W.R. 169, 82 D.L.R. (3d) 161 (S.C.); Anderson v. Laycraft, 12 A.R. 74, 39 C.C.C. (2d) 217, 5 Alta. L.R. (2d) 155, 82 D.L.R. (3d) 706 (S.C. 1978). The last four cases will be discussed in Section VI of this survey *infra*.

[465] *See Re* Davisville Inv. Co., 15 O.R. (2d) 553, 72 D.L.R. (3d) 218 (C.A. 1977).

[466] *See Inuit Tapirisat*, *supra* note 11; Coyle v. Minister of Education, [1978] 6 W.W.R. 279, 90 D.L.R. (3d) 388 (B.C.S.C.).

[467] *Little Narrows Gypsum Co.*, *supra* note 176.

[468] *Coyle*, *supra* note 466.

[469] *See* Section IV *infra*.

[470] *See* discussion in *Laneau*, *supra* note 57.

tions. Like *certiorari*, prohibition is often denied on the basis that the agencies are merely investigating and reporting, and not rendering final decisions.[471] Nevertheless, the comments respecting the evolution of *certiorari* in this area are also in large measure applicable to prohibition.

A second limitation on prohibition is that the irregularity pleaded must go to a decision-maker's jurisdiction.[472] Here the courts seem to use the term "jurisdiction" in its strictest sense and are reluctant to substitute their decisions on questions relating to justification in the exercise of power for those of the administrative agency. The test most commonly used is whether a decision by the agency upon the matter before it would include a resolution of a factual dispute; if so, the agency will rarely be prohibited from rendering a decision even if *certiorari* might lie at a later stage.[473] The success of an application for a prohibition therefore seems to depend on how broadly the applicant has framed the issue,[474] especially where the allegation is of an apprehended excess rather than an absence of jurisdiction.[475] This remedy rarely lies for breach of natural justice, although some allegations or apprehended procedural irregularity may lead to proceedings being restrained.[476] This could occur, for example, where the agency contests the applicability of a certain statutory procedure to its decision.

A third factor limiting the availability of prohibition is the fact that expediency is not a sufficient ground for issuing the writ. Thus, prohibition did not lie to suspend C.R.T.C. approval of a transfer of shares simply because a previous approval of the transfer to the transferors was under review at the appellate level. Because the appeal court might have upheld the first decision, and because the C.R.T.C. itself had power to suspend its orders to the parties, the court refused to intervene.[477] Here the refusal of prohibition was linked to the court's view that other remedies were more appropriate at this stage of the proceedings.[478]

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[471] *See Re* Nanticoke Ratepayers' Ass'n, 19 O.R. (2d) 7, 83 D.L.R. (3d) 722 (H.C. 1978); Stevens v. Restrictive Trade Practices Comm'n, [1979] 2 F.C. 159, 98 D.L.R. (3d) 662 (Trial D.); *Jow*, *supra* note 317.

[472] By contrast with *certiorari*, which can be invoked with respect to intra-jurisdictional errors of law appearing on the face of the record.

[473] *See Re* CIP Paper Products Ltd., 87 D.L.R. (3d) 609 (Sask. C.A. 1978); *Lachapelle*, *supra* note 161.

[474] *See* Transportaide Inc. v. Canada Lab. Rel. Bd., [1978] 2 F.C. 660, 86 D.L.R. (3d) 24 (Trial D.).

[475] *Underwood McLellan & Assocs.*, *supra* note 129.

[476] *See Jabour*, *supra* note 138, at 152-53, 87 D.L.R. (3d) at 312.

[477] Radio Inter-Cité Inc. v. C.R.T.C., [1978] 2 F.C. 124 (Trial D.).

[478] *See* Section IV *infra*.

(c) *Mandamus*

The writ of *mandamus* is used to compel a decision-maker other than the Crown or a servant of the Crown[479] to perform a duty imposed on him by law. Hence, if a party thinks that an agency has wrongly declined jurisdiction, *mandamus* will be appropriate; normally, however, courts defer to other means of assessing problems of allegedly declined jurisdiction. For example, an agency will be permitted to stay its proceedings until a question of law put to the courts by agreement is decided at the appellate level.[480]

*Mandamus* may also be sought for breaches of procedural requirements such as a failure to give a hearing.[481] While the remedy has not been available in the past to compel a hearing when an administrative function is performed[482] it now appears to lie to enforce the procedural requirements of both natural justice and fairness.[483]

In many *mandamus* cases the simple issue is whether the decision-maker in fact has the power to make the decision sought, independently of any question of volition,[484] for this remedy obviously cannot be issued to compel the *ultra vires* exercise of power. Of course, in some cases the difficulty facing counsel is how to frame a *mandamus* order. For example, the writ will not issue when the court is unable to find a useful formulation of the legal duty imposed upon a decision-maker that can be enforced in subsequent proceedings.[485]

The determination of whether an office-holder has a duty or merely a discretion to exercise the power is a recurring problem in *mandamus* cases. Generally the remedy will not lie where the power is purely discretionary, although occasionally courts will divide a statutory power into two elements: an enforceable duty, followed by a discretion as to implementation. Thus, where a court finds a duty to enforce safety standards, but a discretion as to the manner of exercising this function, a *mandamus* will issue insisting that the board do something about the problem without further delay, but without outlining what steps ought to be taken.[486] Judicial reluctance to enforce discretion can be seen in

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[479] *Martinoff*, *supra* note 144.

[480] Cominco Ltd. v. Mineral Land Tax Rev. Bd., 12 B.C.L.R 132, [1979] 4 W.W.R. 648 (S.C.).

[481] *Re* Hudnick, [1979] 2 F.C. 82 (Trial D.), *rev'd sub nom* Minister of Employment & Immigration v. Hudnick, [1980] 1 F.C. 180, 103 D.L.R. (3d) 308 (App. D. 1979).

[482] *See* Lam v. Minister of Manpower & Immigration, [1978] 2 F C 3 (Trial D. 1977).

[483] *See Campeau Corp.*, *supra* note 100.

[484] *See* Greater Winnipeg Cablevision Ltd. v. Public Utils. Bd., [1979] 2 W.W.R. 82, 93 D.L.R. (3d) 741 (Man. C.A. 1978); Lemyre v. Trudel, [1978] 2 F.C 453, 41 C.C.C. (2d) 373 (Trial D.); *Martinoff*, *supra* note 144.

[485] Germain v. Malouin, [1978] 2 F.C. 14, 80 D.L.R. (3d) 659 (Trial D. 1977).

[486] *Re* North Vancouver, 7 M.P.L.R. 151, 89 D.L.R. (3d) 704 (F.C. Trial D 1978).

several cases reported during the period of this survey; for example, a *mandamus* to compel a university to consider an applicant's further employment or opportunity for tenure was refused.[487] A similar reluctance can be seen where courts give agencies time to rectify erroneous discretionary decisions.[488] Nevertheless, in the face of imperative language, *mandamus* will issue. A decision-maker was accordingly ordered to perform a duty imposed by federal law despite attempted restrictions enacted by provincial authorities.[489] Finally, even though a power may be discretionary, if the court finds no valid considerations upon which the decision actually taken could be based, the exercise of discretion in a particular way may be ordered by *mandamus*.[490]

(d) *Quo Warranto*

*Quo warranto* is an order used to question the qualifications and propriety of an officer-holder's position. If granted, it will compel the removal of that individual from his office, and quash acts done by him in pursuance of his purported power. Consequently, it will not lie where the jurisdiction of an officer to make a particular decision is questioned, but his right to hold office is not.[491]

A useful illustration of the use of *quo warranto* is found in *The Queen ex rel. Gillespie v. Wheeler*.[492] By statute, no person was qualified to serve as mayor if he had an interest in contracts made with the city. Although Wheeler had disclosed and refrained from voting on issues touching his interests, he was ordered to relinquish his office. The Supreme Court of Canada stated that because the writ is aimed at protecting the very integrity and functioning of statutory delegations, no exception could be made for good faith or full disclosure. In addition, the Court held that the remedy was appropriate even if special statutory procedures for contesting office-holders were no longer available.

(e) *Habeas Corpus*

The writ of *habeas corpus* orders the release of a person from wrongful detention. In the context of administrative law, therefore, it operates as a collateral attack on the validity of the decision by virtue of which a person is held in custody. During the period of this survey, in all reported cases where this remedy was sought, it was refused on the basis

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[487] Dombrowski v. Dalhousie Univ., 15 N.S.R. (2d) 299, 79 D.L.R. (3d) 355 (C.A. 1976).

[488] *Re* Buhler, 5 M.P.L.R. 142, 84 D.L.R. (3d) 692 (Man. C.A. 1978).

[489] *Martinoff*, *supra* note 144.

[490] *Tomaro*, *supra* note 197.

[491] *Bruce*, *supra* note 299.

[492] *Supra* note 78.

that the detention complained of was lawful. For example, where an illegal immigrant to Canada was detained pending deportation, and no country could be found that would accept him, *habeas corpus* was held not to lie. Although the court agreed that continued detention where there was no hope of deportation might constitute unlawful detention, it found the applicant at fault and noted that the detention could be ended at any time if the applicant voluntarily left Canada.[493]

In *Martin v. The Queen*[494] the detainees argued that the court should hear a plea for *habeas corpus* with *certiorari* in aid, notwithstanding that an earlier application for a writ of *certiorari*, based on alleged insufficiency of evidence to support committal until trial, had been denied. The Supreme Court of Canada rejected the application because granting the relief sought would widen the grounds for review of committals for trial beyond those expressly contemplated by the Criminal Code.[495]

In *Jackson v. The Queen*[496] the same Court held that the National Parole Board had the jurisdiction to revoke the parole of a day parolee. The resulting loss of earned and statutory remission led to the applicant's detention during the period of previously remitted time. Since the relevant statute expressly provided for loss of remission, the detention was found not to be unlawful.

Since *habeas corpus* is sought most often in criminal matters, few developments occur in purely administrative law cases, and as the above examples illustrate, rarely is the remedy successfully invoked.

### (f) *Declaration*

Over the past two decades, declaratory relief has become an increasingly popular administrative law remedy. One advantage of the declaration is that it may be obtained despite the existence of procedural barriers to other possible remedies. Thus, despite the lapse of the time limit for making a statutory application to quash a by-law, courts will issue a declaration that the by-law is invalid.[497] Similarly, judges have occasionally asserted the right to issue declarations despite statutory language which expressly provides for enforcement by summary conviction or injunction,[498] and where certain prerogative remedies may

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[493] *Re* Rojas, 20 O.R. (2d) 590, 88 D.L.R. (3d) 154 (C.A. 1978).

[494] [1978] 2 S.C.R. 511, 20 N.R. 373, 41 C.C.C. (2d) 342, 87 D.L.R. (3d) 704.

[495] R.S.C. 1970, c. C-34, *as amended*.

[496] [1979] 1 S.C.R. 712, 24 N.R. 541, 44 C.C.C. (2d) 65, 93 D.L.R. (3d) 321 (1978).

[497] G. Gordon Foster Devs. Ltd. v. Langley, 5 B.C.L.R. 42, 5 M.P.L.R. 28, 81 D.L.R. (3d) 216 (S.C. 1977), *rev'd on other grounds* 14 B.C.L.R. 29, 11 M.P.L.R. 1, 102 D.L.R. (3d) 730 (C.A. 1979).

[498] Architectural Inst. of B.C. v. Lee's Design & Engineering Ltd., 96 D.L.R. (3d) 385 (B.C.S.C. 1979).

not lie because no judicial function is performed,[499] or because relief is sought against the Crown,[500] declarations continue to be available. Nevertheless, where the agency against which relief is sought is not a suable entity, there is still some question as to whether a declaration can issue.[501]

Because declaratory proceedings are not directed to the merits of administrative acts, courts are reluctant to change the *status quo* through a declaration unless the party seeking relief has a clear right to a particular decision. Thus, in one case, the court refused to declare that an official direction regarding sewage works amounted to statutory authority to execute that direction, since opponents of the application had raised doubts on the issue.[502] By contrast, a declaration that a provincial auditor could not audit a legal aid lawyer's books was granted; the court held that such an audit would conflict with the general lawyer-client privilege, and the statutory provision did not expressly mention legal aid lawyers.[503]

Although there is some authority that declarations will be issued for intra-jurisdictional errors,[504] courts are generally reluctant to entertain applications for declarations respecting an agency's factual determinations.[505] Thus, the jurisdictional character of the remedy continues to be preserved and its evolution towards a multi-purpose recourse suffers at least one exception.

### (g) *Injunction*

The injunction, like prohibition, is primarily used to prevent action from being taken by an agency,[506] yet as an equitable remedy it is available only under certain conditions. For example, even though it is not limited to restraining judicial functions, courts continue to preserve its private law character. Thus, there is a reluctance to permit private

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[499] *Re* Clark, 17 O.R. (2d) 593, 34 C.P.R. (2d) 91, 81 D.L.R. (3d) 33 (H.C. 1977).

[500] Clayton Devs. Ltd. v. N.S. Housing Comm'n, 26 N.S.R. (2d) 161, 40 A.P.R. 161, 86 D.L.R. (3d) 603 (C.A. 1978).

[501] Manchuk v. Byle, [1979] 2 W.W.R. 61, 9 C.P.C. 39, 93 D.L.R. (3d) 426 (Man. Q.B. 1978).

[502] *Re* Hidden Valley Resorts Ltd., 18 O.R. (2d) 379, 82 D.L.R. (3d) 577 (H.C. 1978).

[503] Wardell v. Lutz, [1978] 2 W.W.R. 362, 82 D.L.R. (3d) 478 (Sask. Q.B.).

[504] *Board of Trustees of Edmonton Catholic School Dist.*, *supra* note 20.

[505] Carota v. Jamieson, [1979] 1 F.C. 735 (Trial D. 1978), *aff'd* [1980] 1 F.C. 790 (App. D. 1979); Labatt Breweries v. Attorney General of Can., 36 C.P.R. (2d) 163, 84 D.L.R. (3d) 61 (F.C. Trial D. 1978), *rev'd* [1980] 1 F.C. 241, 26 N.R. 617, 104 D.L.R. (3d) 646 (App. D. 1979), *rev'd on other grounds* [1980] 1 S.C.R. 914, 30 N.R. 496, 110 D.L.R. (3d) 594 (1979).

[506] *See* Sexton, *The Regulation and Control of Abuse of Power Through Equity and Equitable Remedies*, L.S.U.C. SPECIAL LECTURES 1979, at 109.

individuals to enforce public rights through injunctions.[507] Occasionally, however, private litigants may be given such a right expressly by statute,[508] but, as a result of provisions in some judicature acts, courts generally still regard the injunction as not being available against the Crown or Crown servants.[509] Nevertheless, in *Berardinelli v. Ontario Housing Corporation*[510] the Supreme Court of Canada suggested that a Crown agency performing business functions might no longer be entitled to claim some traditional Crown immunities. It remains to be seen whether the traditional immunity from injunctive proceedings is one of these.

Injunctions may be interim, interlocutory or permanent. As the first two are issued pending disposition of the case on the merits, the requirements for obtaining them are not as stringent as those for permanent injunctions. Hitherto, courts have demanded that the applicant make out a strong *prima facie* case for the issuance of an interlocutory injunction.[511] However, during the period of this survey this test seems to have been slightly reformulated; now, it appears, the applicant need only establish that there is a serious question to be tried,[512] and that he would suffer loss for which damages would be inadequate compensation.[513] In addition to these requirements, it is sometimes held that the remedy is only available once there has been actual interference with legal rights or a likely deprivation of legal rights.[514] Hence, for example, an injunction was issued preventing a minister from executing a deportation order until after a motion for *mandamus* to order reconsideration had been heard.[515]

### 2. *Provincial Legislation*

Simplification of common law writs and orders is a first method by which the procedural technicalities of judicial review may be overcome. However, the casuistic nature of such development often means that,

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[507] *Cf.* Maguire v. Calgary, 13 A.R. 325, [1978] 4 W.W.R. 380, 87 D.L.R. (3d) 549 (Alta. S.C.), *rev'd without written reasons* [1979] 1 W.W.R. 480 (C.A. 1978).

[508] *Re* B.C. Tree Fruit Marketing Bd., [1978] 4 W.W.R. 477, 86 D.L.R. (3d) 549 (B.C.S.C.), *with supplemental reasons given in* [1979] 3 W.W.R. 72, 10 B C.L.R 116, 96 D.L.R. (3d) 645 (S.C.).

[509] Lodge v. Minister of Employment & Immigration, [1979] 1 F.C. 775, 25 N.R 437, 94 D.L.R. (3d) 326 (App. D.).

[510] [1979] 1 S.C.R. 275, 23 N.R. 298, 8 C.P.C. 100, 90 D.L.R. (3d) 481 (1978)

[511] MacDonald v. Municipal School Bd., 30 N.S.R. (2d) 443, 49 A.P.R. 443 (S.C. 1979); *Jabour*, *supra* note 138.

[512] Baker Lake v. Minister of Indian Affairs & N. Dev., [1979] 1 F.C. 487, 7 C.E.L.R. 75, 87 D.L.R. (3d) 342 (Trial D. 1978); Sankey v. Minister of Transp., [1979] 1 F.C. 134 (Trial D. 1978).

[513] Attorney General for Ontario v. Harry, 22 O.R. (2d) 321, 93 D.L R. (3d) 332 (H.C. 1979).

[514] *Jabour*, *supra* note 138.

[515] Pratap v. Minister of Employment & Immigration, [1979] 1 F C. 797, 95 D.L.R. (3d) 383 (Trial D. 1978).

until the process is complete, relief will be denied to meritorious claims for no better reason than the fact that the wrong remedy was sought. A second response, pursued by both Ontario and British Columbia, is to enact special legislation covering all applications for judicial review. Such legislation is based on the assumptions that standardization of procedures and wider opportunity for judicial review are desirable goals. A third approach involves tinkering with the remedies themselves, usually in the context of a general reform of civil procedure. Thus, when a complete overhaul of Quebec's Code of Civil Procedure was undertaken in 1964, several changes were effected in the law of judicial review. In this section the latter two themes will be reviewed; all that has been said about the common law remedies remains applicable except to the extent of express amendment by this newer legislation.

### (a) *Ontario: Judicial Review Procedure Act*[516]

Although the J.R.P.A. was enacted in 1971, several important issues respecting its scope and effect continue to arise.[517] Under this Act, reviewable administrative action is classified primarily as resulting either from the exercise of "statutory powers" or "statutory powers of decision", rather than on the basis of the traditional administrative/judicial dichotomy.[518] However, courts sometimes appear reluctant to abandon former concepts and applications for review have been dismissed because no judicial function was being exercised.[519] From a reading of the broad definition of "statutory power" in the J.R.P.A., such a finding is irrelevant to the question of the court's jurisdiction to review, although it may affect certain grounds for review. A liberal tendency, more in keeping with the purpose of the Act, is illustrated by cases holding consensual arbitrations to be reviewable. The court found jurisdiction to review these arbitrations under section 2(1)(*i*) on the basis that an order "in the nature of *certiorari*" could be issued even to decision-makers not exercising "statutory powers".[520]

Sometimes courts rely on the narrow definition of a "statutory power of decision" in order to refuse jurisdiction. For example, a mere referral was held not to fall within the list in paragraph 1(*f*)(i) of legal rights, powers, privileges, immunities, duties or liabilities, and therefore could not be quashed by application under the J.R.P.A.[521] Where the

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[516] R.S.O. 1980, c. 224.

[517] Recent comments include Evans, *Comment*, 55 CAN. B. REV. 148 (1977); Thompson, *Relief by Way of Judicial Review and Orders in the Character of Prohibition, Mandamus and Certiorari*, L.S.U.C. SPECIAL LECTURES 1979, at 151.

[518] *E.g.*, ss. 1(*f*) and (*g*), 2, 3 and 8.

[519] *Maple Leaf Mills Ltd.*, *supra* note 289; *S. & M. Laboratories Ltd.*, *supra* note 306.

[520] *Re* Major Holdings & Devs. Ltd., 22 O.R. (2d) 593, 94 D.L.R. (3d) 474 (Div'l Ct. 1979).

[521] *Re* Dodd, 23 O.R. (2d) 423, 95 D.L.R. (3d) 560 (Div'l Ct. 1978).

problem between the parties is contractual and no specific statutory duty is imposed on an agency, the dispute is outside the spirit of the Act even if a decision nominally falls within the paragraph 1(*f*)(ii) definition.[522] Finally, decisions of court officials, even though potentially subject to review under the J.R.P.A., have been found to be subject to review only within the judicial hierarchy.[523] There continues to be much scope for disputes about jurisdiction under the Act and it is likely that only legislative amendments will clarify the situation.

Several judgments on the scope of subsection 6(2) were given during the period of this survey. Subsection 6(2) permits a judge of the High Court to hear an application in that court, rather than in the Divisional Court, on the grounds of urgency and likely failure of justice. In principle, neither the fact that the Divisional Court has a backlog nor the possibility of financial harm will be sufficient,[524] although in one case leave was granted where a professor's discharge from a university was to become effective almost immediately.[525] Courts have established that under subsection 6(2) the conditions of urgency and likely failure of justice are cumulative. Thus, in a case involving a by-law affecting a parking lot, relief was denied because even though the former requirement was met, the latter was not.[526] Finally, one subsection 6(2) application was denied because the dispute in question arose nine months before the application was made. The court did not seem to consider important the fact that the precise order under attack had been rendered only two months before the application was made.[527] Nevertheless, the High Court granted a stay of the order under section 4 of the J.R.P.A. because a *prima facie* case for relief had been demonstrated. The power to issue orders staying proceedings represents a modification of the common law of judicial review.[528]

Section 3 of the Act allows a reviewing court to refuse relief where a decision is tainted by a technical defect and no substantive harm results. For example, a failure to spell out a complaint in detail will not lead to successful review if the accused actually knew the substance of the case against him.[529] Section 3 has also been applied, by analogy, to a case where a decision-maker listed in his reasons a violation which had not been itemized in the complaint. As there had been a finding of guilt on four complaints which were itemized, the decision was not set aside.[530]

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[522] *Re* Midnorthern Appliances Indus. Corp., 17 O.R. (2d) 290 (Div'l Ct. 1977).

[523] *Re* Olympic Towers Ltd., 20 O.R. (2d) 670, 7 C.P.C. 171 (H.C. 1978).

[524] Bay Charles Centers v. Toronto, 3 C.P.C. 343 (Ont. H.C. 1977).

[525] *Re* Brendon, 17 O.R. (2d) 721, 81 D.L.R. (3d) 260 (H.C. 1977).

[526] *Re* Bennett, 24 O.R. (2d) 121 (H.C. 1979).

[527] *Re* Dylex Ltd., 17 O.R. (2d) 448, 77 C.L.L.C. 14,105 (H.C. 1977).

[528] *Re* International Woodworkers of America, 14 O.R. (2d) 118, 2 C.P.C. 98 (H.C. 1976).

[529] *Brendon*, *supra* note 525.

[530] *Re* Monk, 21 O.R. (2d) 445, 2 L.M.Q. 236 (Div'l Ct. 1978).

There has been some confusion as to the relationship between subsection 2(1), which permits review "notwithstanding any right of appeal", and subsection 2(5), which preserves judicial discretion to refuse relief. However, the majority position now appears to be that subsection 2(5) prevails and consequently courts may refuse relief on the ground that an appeal should have been taken.[531]

### (b) *British Columbia: The Judicial Review Procedure Act*[532]

Since the last annual survey, British Columbia has also enacted a J.R.P.A. Although modelled substantially on the Ontario legislation, it has several differences from the Ontario Act. The most important of these are: (i) by section 20 the Act is made subject to the Crown Proceedings Act; (ii) by section 19 *quo warranto* is abolished and declaratory relief under the Act is instituted; (iii) by section 17 the record need only be filed when the court orders; (iv) by subsection 1(2) inquiries are deemed to fall within the definition of a statutory power; (v) by section 5 the reviewing court can order a reconsideration; and (vi) no new court analogous to the Divisional Court is created.[533]

Already some distinctive interpretations have arisen from the British Columbia Act. For example, under section 11 there is no limitation period for bringing an application unless the court considers that substantial prejudice will result. Thus, an amendment to a land use plan was impugned four years after it had been made official.[534] Although the court hesitated because many interests would be affected, it held that it could sever the plan and strike out only that portion which affected the applicant's land, thereby not prejudicing anyone else.[535] Moreover, on one occasion it was held that purely administrative decisions are not open to review under the Act.[536] Finally, the J.R.P.A. has been interpreted so as to require affidavits in support of an application to be based solely on facts and not on facts and belief, as may be the case in Ontario.[537] This, of course, restricts the evidence that can be brought before the reviewing court and limits the scope of judicial inquiry.

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[531] Mississauga v. Director, Environmental Protection Act, 7 C.E.L.R. 139, 8 C.P.C. 292, 6 M.P.L.R. 115 (Ont. H.C. 1978).

[532] S.B.C. 1976, c. 25.

[533] *See* Branson, *Some Aspects of the Judical Review Procedure Act, S.B.C. 1976, Chapter 25*, 37 ADVOCATE 401 (1979).

[534] *Hobby Ranches Ltd.*, *supra* note 285.

[535] *But see* Jericho Area Citizens' Ass'n v. City of Vancouver, 12 B.C.L.R. 313 (S.C. 1979), where a two month delay was held fatal to an application for review because severance was impossible.

[536] *Culhane*, *supra* note 287.

[537] *Islands Protection Soc'y*, *supra* note 420.

(c) *Remedies in the Law of Quebec*

As a result in part of the extensive codification of remedies undertaken in Quebec's Code of Civil Procedure, the law of judicial review has developed distinctive characteristics in many areas. The most striking differences may be found in three remedies: the direct action in nullity; the writ of evocation, which approximates a combination of the writs of *certiorari* and prohibition; and the declaratory judgment upon motion.[538]

(i) *The direct action in nullity*

After much hesitation, the existence of a particular Quebec remedy, the direct action in nullity based on article 33 of the C.C.P., was recognized by the Supreme Court of Canada.[539] In *Vachon v. Attorney General of Quebec*[540] the Court held that despite provision for other remedies such as evocation elsewhere in the Code, jurisdiction to entertain a direct action in nullity remained. To the parties, the difference between evocation and the direct action in nullity is that the latter is an *ad rem* proceeding like *certiorari*, but is available, like declaratory relief, regardless of the function performed.[541] Further, in *Francon Ltée. v. Montreal Catholic School Commission*[542] it was held that the direct action in nullity was not ousted by the availability of similar remedies, such as an application to quash by-laws, lying outside the Code of Civil Procedure. As a result it would seem that a privative clause excluding evocation will not oust a court's jurisdiction to entertain a direct action in nullity.[543]

An important advantage of this remedy is that it lies with respect to domestic tribunals, consensual arbitrators, and police commissions and to administrative,[544] legislative,[545] and judicial decisions. It can be used to raise all grounds for review including error of law on the face of the

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[538] *See* Lemieux, *Supervisory Judicial Control of Federal and Provincial Authorities in Quebec*, 17 OSGOODE HALL L.J. 133 (1979) for a general treatment. *See also* Ferland, *Comment*, 39 R. DU B. 1067 (1979) and Prujiner, *Comment*, 19 C. DE B. 1061 (1978).

[539] Ferland, *L'action directe en nullite et la requête pour emission du bref d'évocation, recours alternatifs ou exclusifs?* 39 R. DU B. 325 (1979).

[540] *Supra* note 22.

[541] Article 33 applies to "courts", "bodies politic" and "corporations", all of which have been given a broad interpretation. *See* Reid, *Que signifient les mots "public", "corps public", "bureau public" et "corps politique" utilises aux articles 33, 828, 838 et 844 du Code de Procédure Civile du Quebec?*, 18 C. DE D. 455 (1977).

[542] [1979] 1 S.C.R. 891, 26 N.R. 271.

[543] In this sense Corporation Municipale de St-Zéphirin de Courval v. Gamache, [1978] Que. C.A. 76, has probably been overruled.

[544] Robinson v. Commission de Police du Quebec, [1977] Que. C.S. 335

[545] *Vachon*, *supra* note 22.

record.[546] Finally, it can also be joined to an action for an injunction[547] or for damages[548] and is thus a flexible judicial recourse.

There are, however, certain inconveniences that attach to the remedy. For example, unlike evocation, it does not operate to stay proceedings, its limitation period is uncertain and it must be brought as an action rather than by motion. Nevertheless, since the *Vachon* case it has become a widespread supplementary remedy.

### (ii) *Evocation*

In the 1964 codification the remedies of *certiorari* and prohibition were abolished and replaced by the writ of evocation. The new recourse, however, continues much of the procedural law of *certiorari* and prohibition and retains the two-step procedure known to the old common law. In *Blouin v. Longtin*[549] the Supreme Court of Canada pointed out that this means that the complainant must first obtain an authorization for the writ of summons by convincing the judge that if the facts alleged were true they would justify the conclusion sought. The second stage consists of the judgment upon the merits of the application. However, if there is no dispute on the facts, and if the authorizing judge renders an extensive opinion, the first stage may be conclusive. Thus, a decision at the first stage that arbitrators in a labour dispute could not, by interpretation of a collective agreement, override a city by-law amounted to "chose jugée" and could not be reversed at the second stage.[550]

Like the writs of *certiorari* and prohibition, evocation has been restricted to statutory tribunals performing judicial functions. Thus, consensual arbitrators have been held not to be subject to evocation.[551] Nevertheless, recent cases have included within the rubric "courts" various investigatory tribunals having the power to subpoena witnesses.[552] The Supreme Court of Canada decision in *Keable*[553] clearly establishes this principle. Finally, while courts have held the writ to be available only when a judicial function is performed,[554] there has been a recent tendency in Quebec as well as in the common law provinces to

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[546] Majestic Neckwear Ltd. v. City of Montreal, [1979] 1 S.C.R. 823, 26 N.R. 181, 97 D.L.R. (3d) 653.

[547] *Houde*, *supra* note 281.

[548] Canadian Air Line Flight Attendants' Ass'n v. Air Canada, [1977] Que. C.S. 728.

[549] [1979] 1 S.C.R. 577, 29 N.R. 317.

[550] Lachine v. Lachapelle, [1979] Que. C.S. 24; *see also* Malo v. Commission de la fonction publique, [1978] Que. C.S. 712.

[551] P.C.A. Constr. v. Dufresne, [1978] Que. C.S. 1042.

[552] *See Re* Human Rights Comm'n, [1978] Que. C.A. 67, 93 D.L.R. (3d) 562.

[553] *Supra* note 93.

[554] Distribution Eclairs Ltée. v. Comité administratif du Barreau du Québec, [1978] Que. C.S. 25.

liberalize the test for a judicial function: thus, in certain cases a police commission has been found to be performing such functions.[555]

Evocation retains the dual nature of *certiorari* and prohibition. For example, an application for the writ based on the presentation before a tribunal of allegedly extraneous evidence was held to be premature, since evidentiary matters were for the agency to decide. However, the writ would lie to quash any decision taken on the basis of irrelevant considerations.[556] Similarly, an application to prevent a municipal court from hearing evidence relating to a defence of acquired rights was held to be premature.[557] Notwithstanding recent developments relating to the direct action in nullity and the declaratory judgment upon motion, this writ remains the principle judicial review remedy in Quebec.

### (iii) *The declaratory judgment upon motion*

A third remedy that has a distinctive character in Quebec is the declaratory judgment upon motion.[558] While the courts of Quebec now seem to have become accustomed to the idea of an action for declaration similar to that of the common law provinces,[559] until recently the declaratory judgment was not a widespread administrative law remedy. In fact, probably the major development in remedies in Quebec during the period of this survey was the discovery of article 453 of the Code of Civil Procedure, which creates the declaration upon motion. Previously courts had seen the declaration upon motion as a preventive rather than a curative recourse. However, in *Duquet v. Town of Ste-Agathe des Monts*[560] the Supreme Court of Canada reversed this line of authority and held that the remedy was available to challenge the validity of municipal by-laws.

While the Court of Appeal has expressed a reluctance to grant the new remedy in administrative law matters,[561] declaratory motions seem to have taken hold and have been granted against ministerial orders[562] and arbitration decisions.[563] Nevertheless, whenever the possibility of

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[555] Snyder v. Montreal Gazette Ltd., [1978] Que. C.S. 32, 87 D.L.R. (3d) 5.

[556] Guay v. City of Shawinigan, [1979] Que. C.A. 315.

[557] Roy v. Ville D'Anjou, [1978] Que. C.S. 28.

[558] *See* Grey, *Duquet v. Ste-Agathe des Monts*, 24 McGILL L.J. 477 (1978) for a discussion of features of this remedy.

[559] *See* Blaikie v. Attorney General of Quebec, [1978] Que. C.S. 37, 85 D.L.R. (3d) 252, *aff'd* [1978] Que. C.A. 351, 95 D.L.R. (3d) 42, *aff'd* [1979] 2 S.C.R. 1016, 30 N.R. 225, 101 D.L.R. (3d) 394. It was only with the enactment of the new Code of Civil Procedure in 1964 that the declaration was recognized in Quebec.

[560] *Supra* note 22.

[561] Commission de Transport de la Communauté Urbaine de Montréal v. Syndicat du Transport, [1977] Que. C.A. 476, 77 C.L.L.C. 14,098; Voghel v. Attorney General of Quebec, [1977] Que. C.A. 197.

[562] *Centre d'Accueil*, *supra* note 250.

[563] Union des employés de service, Local 298 v. Hôpital St-Luc, [1978] Que. C.S. 586.

conflicting interpretation may result, courts have exercised their discretion not to issue the remedy and to permit the tribunal to decide the issue first.[564] It remains to be seen whether the declaratory judgment upon motion will supplant the direct action in nullity and evocation as the major judicial review remedy in Quebec.

### 3. *The Federal Court Act*

Even an optimistic observer of the field of judicial review remedies would be distressed that after nearly a decade, problems with the Federal Court Act seem to be multiplying rather than diminishing.[565] A statute which was originally promulgated for the dual purpose of centralizing federal judicial review jurisdiction and of simplifying many of the arcane elements of the law has, more than a decade later, achieved neither of these objectives. Some questionable judicial decisions have contributed to this lamentable situation, yet much of the blame must be shouldered by the legislative draftsmen. The following analysis is divided into three subsections, each reflecting a discrete problem in the Act.

#### (a) *The Definition of "Federal Board, Commission or Other Tribunal"*

In several cases, courts have been asked to decide whether the agency, board or commission under review has been constituted by or under an act of the Parliament of Canada, as required by section 2 of the Act, to support federal jurisdiction.[566] A first series of cases on this point concerns the authority of the agency. On occasion the issue has centred on the source of a decision-maker's power. For example, it has been

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[564] *See, e.g.*, Campisi v. Attorney General of Quebec, [1978] Que. C.A. 520.

[565] Literature in this area during the period of this survey includes Lamek, *Jurisdiction of the Federal Courts and Superior Courts*, L.S.U.C. SPECIAL LECTURES 1978, at 87; Fera, *Review Under s. 28(1)(c) of the Federal Court Act: Error of Law Not an Appeal on the Merits*, 4 QUEEN'S L.J. 148 (1978); Macdonald, *How to do Things with Statutes: Re Clark v. Attorney-General of Canada*, 10 OTTAWA L. REV. 456 (1978); Tod, *McNamara Constr. v. The Queen*, 12 U.B.C.L. REV. 342 (1978); Fera, *While Certiorari May Live in the Trial Division of the Federal Court, the Fairness Concept has Suffered a Serious Blow: The Recent Martineau Decisions*, 11 OTTAWA L. REV. 78 (1979); Macdonald, *Federal Judicial Review Jurisdiction Under Section 2(g) of the Federal Court Act: The Position of Section 96 Judges*, 11 OTTAWA L. REV. 689 (1979); Macdonald, *Re Pereira and Minister of Manpower and Immigration*, 29 U.N.B.L.J. 228 (1980).

[566] The relevant definition in s. 2 reads as follows:

> "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of The British North America Act, 1867.

held[567] that *quo warranto* would not lie in the Federal Court to challenge a Yukon magistrate's authority, since the court was constituted under a law of a province, as determined in the federal Interpretation Act.[568] By contrast, the courts have held that an Indian band council is a "federal board",[569] notwithstanding the doubts expressed by Laskin C.J.C. in an earlier Supreme Court of Canada minority opinion.[570] In another case it was held that a decision-maker appointed under an act of Parliament (the Unemployment and Immigration Commission) was reviewable in the Federal Court, even though it was a Crown agent.[571] Similarly, the British Columbia Supreme Court found the Commissioner of the R.C.M.P., acting under sections 82, 97, 98 and 99 of the Criminal Code,[572] to be a federal board,[573] and the Federal Court of Appeal decided that decisions of an officer of the Restrictive Trade Practices Commission[574] could be reviewed federally. Nevertheless, neither a physician in a federal penitentiary[575] nor an arbitrator named under a collective agreement[576] was found to be subject to federal court review.

A second issue in determining federal jurisdiction is the extent to which tribunals exercising both federal and provincial powers are subject to review in the Federal Court. The Alberta courts have held, without discussing the point in detail, that even when acting under the powers granted by the Motor Vehicle Transport Act,[577] the Alberta Motor Transport Board was not a federal board; however, this was reversed on appeal.[578] Similarly, the Advisory Review Board appointed under the Mental Health Act[579] of Ontario has been held[580] not to be a federal board when exercising powers under the Criminal Code,[581] and in *Vardy v.*

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[567] Smith v. The Queen, [1978] 1 F.C. 631 (Trial D.).

[568] R.S.C. 1970, c. I-23, *as amended*.

[569] Gabriel v. Canatonquin, [1978] 1 F.C. 124 (Trial D. 1977), *aff'd* [1980] 2 F.C. 792 (App. D.), *foll'd in* Rider v. Ear, [1979] 6 W.W.R. 226, 103 D.L.R. (3d) 168 (Alta. S.C.).

[570] Attorney General of Canada v. Lavell, [1974] S.C.R. 1349, at 1379, 38 D.L.R. (3d) 481, at 504 (1973). Ritchie J., speaking for the majority, specifically declined to deal with this jurisdictional issue: *id.* at 1373, 38 D.L.R. (3d) at 500.

[571] Macdonald Tobacco Inc. v. Canadian Employment & Immigration Comm'n, [1979] 2 F.C. 100, 28 N.R. 284, 98 D.L.R. (3d) 653 (App. D.).

[572] R.S.C. 1970, c. C-34, *as amended*.

[573] Martinoff v. Simmonds, [1978] 2 W.W.R. 97, 82 D.L.R. (3d) 209 (B.C.S.C. 1977).

[574] *Canadian Javelin Ltd.*, *supra* note 102.

[575] McNamara v. Caros, [1978] 1 F.C. 451 (Trial D. 1977).

[576] Rogers v. National Harbours Bd., [1979] 1 F.C. 90 (App. D. 1978).

[577] R.S.C. 1970, c. M-14.

[578] National Freight Consultants Inc. v. Motor Transport Bd., 10 A.R. 408, [1978] 2 W.W.R. 230, 84 D.L.R. (3d) 504 (S.C.), *rev'd* 14 A.R. 252, [1979] 2 W.W.R. 534, 96 D.L.R. (3d) 278 (C.A.).

[579] R.S.O. 1980, c. 262.

[580] *Abel*, *supra* note 12.

[581] R.S.C. 1970, c. C-34, *as amended*.

*Scott*[582] the Supreme Court of Canada held that a provincial magistrate taking depositions under the Extradition Act for use in extradition proceedings was not a federal decision-maker. In all of these cases the jurisdiction of the Federal Court was characterized as statutory, limited and exceptional.

An equally serious difficulty involving the section 2 definition arises with respect to section 96 judges who may or may not be acting as *persona designata*. Two cases, *Herman v. Deputy Attorney General of Canada*[583] and *Coopers & Lybrand*,[584] have recently reached the Supreme Court of Canada on this issue. The cases involved judges acting under the Income Tax Act[585] and in both instances the Court found the judge not to be *persona designata* and therefore not to be reviewable in the Federal Court. The Court advanced the view that normally a judge acts *qua* judge (*i.e.*, not as a federal board) and any departure from this presumption must be clearly indicated in the federal statute under review.

### (b) *Jurisdiction Arising Under a "Law of Canada"*

The decision in *Quebec North Shore Paper Co. v. C.P. Ltd.*[586] has produced a flood of litigation on the meaning of the term "law of Canada". Much of this is not relevant to a study of administrative law but several cases concern judicial review jurisdiction. For example, in situations involving joint tortfeasors one of whom is the Crown, the court's jurisdiction is limited. Thus a claim against a co-defendant municipality was dismissed because no "existing and applicable" federal law was involved.[587] In many cases, the Federal Court has struck from the proceedings all defendants other than the Queen.[588] The reverse problem may also arise; for example, a general contractor sued by a sub-contractor was not permitted to implead the Crown as a third party in the Ontario High Court.[589] By contrast, in an interesting case involving admiralty jurisdiction, the Federal Court held that a claim against a

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[582] [1977] 1 S.C.R. 293, 8 N.R. 91, 66 D.L.R. (3d) 431 (1976). The statute in question is R.S.C. 1970, c. E-21.

[583] [1978] 1 F.C. 857, 20 N.R. 70, 81 D.L.R. (3d) 120 (App. D. 1977), *aff'd* [1979] 1 S.C.R. 729, 23 N.R. 235, 91 D.L.R. (3d) 3 (1978).

[584] *Supra* note 292.

[585] S.C. 1970-71-72, c. 63.

[586] [1977] 2 S.C.R. 1054, 71 D.L.R. (3d) 111 (1976).

[587] Alda Enterprises Ltd. v. The Queen, [1978] 2 F.C. 106, 80 D.L.R. (3d) 551 (Trial D. 1977).

[588] Haida Helicopters Ltd. v. Field Aviation Co., [1979] 1 F.C. 143, 88 D.L.R. (3d) 539 (Trial D. 1978); Pacific Western Airlines Ltd. v. The Queen, [1979] 2 F.C. 476 (Trial D.), *aff'd* [1980] 1 F.C. 86, 105 D.L.R. (3d) 44 (App. D. 1979); Atridge v. The Queen, 86 D.L.R. (3d) 543 (F.C. Trial D. 1978); Western Caissons (Quebec) Ltd. v. McNamara Corp. of Nfld. Co., [1979] 1 F.C. 509, 23 N.R. 91, 91 D.L.R. (3d) 250 (App. D. 1978); Tomossy v. Hammond, [1979] 2 F.C. 232 (Trial D.).

[589] Lewis Insulations Ltd. v. Goodram Bros., 21 O.R. (2d) 236, 90 D.L.R. (3d) 311 (H.C. 1978).

sub-contractor was sufficiently ancillary to the main action to sustain federal jurisdiction.[590]

In *Regina v. Thomas Fuller Construction Co.*,[591] the Supreme Court of Canada attempted finally to resolve this issue. The Crown, the defendant in a tort action under the Crown Liability Act,[592] sought to implead a third party. The Court disallowed the third party notice, regardless of the close connection of the bases for actions, because no federal statute existed to support it. Instead, an indemnity action, following an initial finding of liability in the Federal Court, would have to be instituted in the superior court of the province.

Occasionally the issue is whether a statute establishes a federal cause of action, or merely sets out rights to be determined under provincial law. Five cases, two of which involved the Wheat Board, raised this point. The Canada Grain Act[593] has been held capable of sustaining federal jurisdiction under section 17(4)(*a*),[594] as has the Prairie Grain Advance Payments Act,[595] with respect to a promise to repay an advance.[596] The third case established that the Crown's right to be subrogated to a bank under a student loan fell within the ambit of banking and therefore would be subject to Federal Court jurisdiction as a matter of federal law.[597] The two remaining cases arose under the Canada Labour Code[598] and in both the court held that an action brought against a union was within the scope of section 23 of the Federal Court Act.[599]

A final jurisdictional issue concerns the problem of whether the provincial courts are ousted by section 17(1) of the Federal Court Act where a constitutional question is in issue. Following earlier decisions, the British Columbia Supreme Court found that it had concurrent

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[590] Davie Shipbuilding Ltd. v. The Queen, [1979] 2 F.C. 235, 90 D.L.R. (3d) 661 (Trial D. 1978).

[591] [1980] 1 S.C.R. 695, 30 N.R. 249 (1979).

[592] R.S.C. 1970, c. C-38, *as amended*.

[593] S.C. 1970-71-72, c. 7.

[594] Regina v. Saskatchewan Wheat Pool, [1978] 2 F.C. 470, [1978] 3 W.W.R. 358, 81 D.L.R. (3d) 459 (Trial D. 1977).

[595] R.S.C. 1970, c. P-18, *as amended*.

[596] Regina v. Rhine, [1979] 2 F.C. 651, 98 D.L.R. (3d) 496 (App. D.).

[597] Regina v. Prytula, [1979] 2 F.C. 516, 99 D.L.R. (3d) 91 (App. D.).

[598] R.S.C. 1970, c. L-1, *as amended*.

[599] Canadian Pacific Ltd. v. United Transp. Union, [1979] 1 F.C. 609, 21 N.R. 33, 85 D.L.R. (3d) 665 (App. D. 1978); McKinlay Transp. Ltd. v. Goodman, [1979] 1 F.C. 760, 90 D.L.R. (3d) 689 (Trial D. 1978). On the facts in these two cases, however, the courts decided they lacked their normal jurisdiction. In the former case, provisions for final arbitration had the effect of ousting the jurisdiction of the Federal Court by virtue of s. 155 of the Canada Labour Code and the closing words of s. 23 of the Federal Court Act. In the latter case, the court ruled that since the Canada Labour Code gave the Canada Labour Relations Board jurisdiction, *inter alia*, to enjoin employees from participating in a strike contrary to the provisions of the Canada Labour Code, it did not have jurisdiction to grant an injunction for this purpose on behalf of the employer.

jurisdiction with the Federal Court[600] in constitutional matters, specifically in declaratory actions, to determine the constitutionality of federal legislation.

### (c) *The Jurisdictions of Trial and Appeal Divisions*

A recurring problem under the Federal Court Act relates to the first-instance jurisdictions of the trial and appeal divisions. This problem arises because the exclusive jurisdiction of the Court of Appeal is accompanied by several limiting phrases in section 28 of the Act. One of these limitations is that review in the Court of Appeal requires a finding that a judicial or quasi-judicial function is being performed. Thus, the Court of Appeal has declined jurisdiction by holding that a minister's decision imbued with policy considerations was not required to be made on a judicial or quasi-judicial basis.[601] Similarly, in *Minister of Manpower & Immigration v. Hardayal*[602] the Supreme Court of Canada held that a decision to grant or refuse a ministerial permit under the Immigration Act[603] was not required to be made on a quasi-judicial basis. Although a broader test for a judicial function seems to have been adopted by the Supreme Court in *Coopers & Lybrand*,[604] a decision to authorize a search during a tax investigation was still held not to be reviewable by the Court of Appeal. Discussing another limiting phrase in section 28, which requires that the judicial function be mandated by law, the Supreme Court held in *Martineau*[605] that directives are not "law" and that therefore jurisdiction to review a decision taken in violation of such directives vests only in the Trial Division.

Investigatory functions have also been excluded from review under section 28. This has resulted, for example, in the Trial Division's assuming jurisdiction and joining the Attorney General as defendant in a suit against the Restrictive Trade Practices Commission.[606] The courts have again held preliminary decisions on jurisdiction not to be "decisions" for the purposes of section 28.[607] Similarly, a decision of the Public Service Commission forming an opinion was also held not to

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[600] Law Soc'y of B.C. v. Attorney-General of Canada, [1978] 6 W.W.R. 289, 92 D.L.R. (3d) 53 (B.C.S.C.), *aff'd* 18 B.C.L.R. 181, [1980] 4 W.W.R. 6, 108 D.L.R. (3d) 753 (C.A.).

[601] AGIP S.P.A. v. Atomic Energy Control Bd., [1979] 1 F.C. 223, 22 N.R. 46, 87 D.L.R. (3d) 530 (App. D. 1978).

[602] *Supra* note 300.

[603] R.S.C. 1970, c. I-2.

[604] *Supra* note 292.

[605] *Supra* note 299. This approach was confirmed in *Rogers*, *supra* note 576.

[606] Bell Canada v. Attorney-General of Canada, [1978] 2 F.C. 801, 86 D.L.R. (3d) 45 (Trial D.).

[607] Paul L'Anglais Inc. v. Canadian Lab. Rel. Bd., [1979] 2 F.C. 444, 99 D.L.R. (3d) 690 (App. D.).

be a section 28 decision,[608] and a decision not to hold a hearing was held to fall outside section 28.[609]

In addition to exclusions resulting from the restrictive language of subsection 28(1), there are also certain statutory exclusions set out in subsection 28(6) of the Act. Thus, a decision of the Pension Appeals Board was held not to be reviewable in the Court of Appeal on the basis of subsection 28(6).[610]

In a decision early in the survey period, the Trial Division refused to issue an interim order to stay execution of a writ of possession on the ground that it had no inherent jurisdiction.[611] The court has held that in the absence of statutory language permitting it to do so, it could not entertain *in forma pauperis* proceedings.[612] However, in *Martineau*[613] the Supreme Court of Canada settled a long-standing problem by finding jurisdiction in the Trial Division to issue a writ of *certiorari* under section 18. Notwithstanding the substantial congruence between the availability of section 28 review and the conditions under which *certiorari* could be invoked, the court concluded that in some cases the latter were greater than the former.

It is unfortunate that so often questions involving judicial review cannot be dealt with expeditiously by the Federal Court because of preliminary problems of jurisdiction. However, unless certain key sections of the Act are redrafted with an eye to alleviating the ambiguities brought to light in recent years, such problems will probably continue. It is possible to envisage an increase in applications to provincial courts where concurrent jurisdiction can be found in order to avoid the problems arising within the Federal Court Act.

### 4. *The Discretionary Nature of Judicial Review*

As witness the size of this survey, the number of judicial review cases has increased dramatically in recent years. Three interrelated dangers can result from this flood of litigation. First, as the courts become overloaded they are unable to give proper attention to each case; this is especially perturbing if review proceedings are merely used as a dilatory tactic. Second, constant and close judicial supervision undermines development of and respect for administrative processes. This is especially true if all the administrative channels provided by statute have not been canvassed by the complainant. Third, courts are likely to become embroiled in situations foreign to their traditional role. As

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[608] Nenn v. The Queen, [1979] 2 F.C. 778, 102 D.L.R. (3d) 724 (App. D.).

[609] Croy v. Atomic Energy Control Bd., [1981] 1 F.C. 515, 29 N.R. 14, 105 D.L.R. (3d) 625 (App. D. 1979).

[610] Martins v. Minister of Nat'l Health & Welfare, [1979] 1 F.C. 347, 92 D.L.R. (3d) 767 (App. D. 1978).

[611] Fisher v. The Queen, [1978] 1 F.C. 300 (Trial D. 1977).

[612] Magrath v. National Parole Bd. of Can., [1979] 2 F.C. 757 (Trial D.)

[613] *Supra* note 11.

experienced adjudicators, judges are comfortable with disputes involving well-defined parties making claims of pre-existing right, yet problems leading to judicial review often do not arise in this form. In response to these concerns, various doctrines have been developed by which invocation of the judicial process may be controlled. Although many of these are usually considered as particular aspects of a given judicial review remedy, they may all be conveniently grouped under the rubric "discretionary nature of judicial review". Together they reflect the judicial response to overuse of review remedies as a means of supervising administrative activity.

(a) *Standing*

The doctrine of standing involves the court in a determination of whether the party seeking a remedy should be permitted to challenge the allegedly unauthorized activity.[614] Many cases involving standing relate to the status of applicants before the administrative decision-maker and simply raise questions of statutory interpretation. For example, it has been held that the term "any person" in a human rights code would encompass even those persons not directly affected by the discrimination complained of.[615]

A second issue involving standing that has achieved some prominence in recent years relates to the questionable status of a tribunal itself to appear in review applications. The reluctance to grant such status may be based on the courts' traditional view of decision-makers as impartial third parties. This view may not, however, be appropriate where the function is such that the tribunal plays a more active role than a judge would. For example, in two similar cases it was held that conferral upon a board of "all power necessary or useful in the exercise of the powers hereinbefore and hereinafter enumerated" was sufficient to permit the board to apply for an injunction to restrain breach of its regulations.[616] However, in a case involving a compensation board the court held that the Attorney-General, rather than the board itself, was the proper respondent party in an appeal against the latter's decision.[617]

The leading case on this issue is *Northwestern Utilities Ltd. v. City of Edmonton*,[618] in which the Supreme Court of Canada decided that an agency may have standing before the courts for limited purposes only.

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[614] *See* Bogart, *Public Interest — Locus Standi — Right of Private Citizen to Litigate Questions Involving Public Interest*, 56 CAN. B. REV. 331 (1978); Rownthwaite, *Re Pim and Minister of the Environment*, 44 SASK. L. REV. 338 (1979).

[615] *Iwasyk*, *supra* note 116.

[616] *B.C. Tree Fruit Marketing Bd.*, *supra* note 508, where an injunction issued, and Ontario Wheat Producers' Marketing Bd. v. Royal Bank of Can., 24 O.R. (2d) 490, 98 D.L.R. (3d) 551 (H.C. 1979), where an equitable action was successfully brought against the defendant bank.

[617] *Re* Castel, 89 D.L.R. (3d) 67 (Man. C.A. 1978).

[618] *Supra* note 343.

Thus, even when a statute grants a tribunal standing, this should be read as meaning standing to argue jurisdiction but not to argue the merits of a decision or the issue of natural justice. A similar result has been reached with respect to a tribunal's power to appeal from its own decision; absent statutory authority, a board cannot argue the merits of its decision on an appeal, although it can defend its jurisdiction on a judicial review application.[619] Sometimes the question of an agency's standing has been held to be dependent on characterization of its function. For example, in one case a commission was accorded status to seek *certiorari* against the decision of an appeal tribunal, because the commission was held to be acting in an administrative and not a quasi-judicial capacity in its initial procedures.[620]

The most important issues involving standing, however, are those involving the determination of who is an affected party. The courts are concerned with whether the claim asserted is recognized as sufficiently important or well defined to constitute a pre-existing right attaching to that complainant. Of particular interest are "ideological plaintiffs", such as private associations and interest groups, as well as municipalities and other public bodies.

As for unincorporated private associations, courts have taken an ambivalent attitude. For example, subsection 5(1) of the Ontario Public Inquiries Act[621] has been held to encompass even unincorporated associations of concerned citizens who appeared in earlier proceedings before statutory boards.[622] By contrast, the liberalized rules of standing in constitutional cases have been distinguished in purely administrative law matters. Thus, while its individual members were given standing, an environmental protection society was not.[623] A similar result was reached in another environmental dispute, although at least one judge was prepared to address the merits of the case first.[624] Standing has also been denied to an unincorporated association of lawyers which was unable to demonstrate a special interest in administrative proceedings,[625] and to a students' union which was found not to be directly affected by a decision and which had other means available for contesting the matter in question.[626] However, when rights to property are in issue[627] or when

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[619] *Re* Beattie, 93 D.L.R. (3d) 477 (Man. C.A. 1978).

[620] Health Servs. Comm'n of P.E.I. v. Appeal Bd., 25 Nfld. & P.E.I R. 181, 68 A.P.R. 181, 95 D.L.R. (3d) 684 (P.E.I.S.C. 1979).

[621] *Now* R.S.O. 1980, c. 411.

[622] *Re* Royal Comm'n on Conduct of Waste Management Inc., 17 O.R (2d) 207, 80 D.L.R. (3d) 76 (Div'l Ct. 1977).

[623] *Islands Protection Soc'y*, *supra* note 420.

[624] *Re* Pim, 23 O.R. (2d) 45, 94 D.L.R. (3d) 254 (Div'l Ct. 1978). *See also* authorities cited in note 614 *supra*.

[625] *Copeland*, *supra* note 101.

[626] University of Man. Students' Union Inc. v. Attorney General of Man., [1979] 4 W.W.R. 762, 101 D.L.R. (3d) 390 (Man. Q.B.).

[627] Sunshine Hills Property Owners Ass'n v. Delta, [1977] 6 W.W.R. 749, 80 D.L.R. (3d) 692 (B.C.S.C.).

*mandamus* to compel performance of a legal duty is being sought,[628] courts appear to be less stringent in their approach to standing.

A number of cases have concerned the status of municipalities. Standing has been granted in cases where a town was held to be a person whose interests could be prejudicially affected although it was not a necessary party,[629] where a town had a greater interest than the general public and the decision would have financial impact upon it[630] (however, a decision to close a registry office for financial reasons is a policy decision and thus no hearing is required) and where the provisions of a municipal act[631] were ambiguous as to the status of a regional municipality.[632] In each of these cases the court purported merely to be applying ordinary principles of standing.

During this survey three miscellaneous issues relating to standing arose that merit notice. In one, the court interpreted legislation in such a manner as to give certain parties a right to be joined to an action as defendants, and not merely as intervenors.[633] In another, the court refused a private individual status to challenge actions of a law society since such a power was within the exclusive jurisdiction of the Attorney General.[634] In the third, a rival trade union was given status before a labour board because although its juridical rights would not be affected by a decision to which it was not a party, it would in fact otherwise suffer severe prejudice.[635] In each instance, the court adopted the view that, rather than dispose of the case on the basis of the issue of standing, it ought to examine the merits of the claim raised.

### (b) *Timeliness or Ripeness*

While there are many facets to this concept, the primary notion is that review will be denied until a matter has crystallized sufficiently to enable a court to adjudicate on it. For example, in one case a court refused to vacate an injunction because it could not determine whether a proposed course of conduct would be illegal.[636] In another case, the court declined to issue a declaration because the question was merely hypothetical.[637] Similarly, where the court was asked to issue a declaration in respect of some future event of uncertain likelihood,

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[628] *North Vancouver*, *supra* note 486.

[629] *Kingston*, *supra* note 179.

[630] *Durham*, *supra* note 244.

[631] *Now* R.S.O. 1980, c. 302.

[632] Campeau Corp. v. Township of Gloucester, 21 O.R. (2d) 4, 89 D.L.R. (3d) 135 (H.C. 1978), *aff'd* 22 O.R. (2d) 652, 96 D.L.R. (3d) 320 (C.A. 1979).

[633] Chitty v. C.R.T.C., [1978] 1 F.C. 83, 81 D.L.R. (3d) 136 (Trial D. 1977).

[634] Voratovic v. Law Soc'y of Upper Can., 20 O.R. (2d) 214, 87 D.L.R. (3d) 140 (H.C. 1978).

[635] Syndicat des Employés du Centre Hospitalier Robert-Giffard v. Syndicat Professionnel des Infirmières et Infirmiers, [1979] Que. C.A. 323.

[636] *Hidden Valley Resorts Ltd.*, *supra* note 502.

[637] *University of Man. Students' Union Inc.*, *supra* note 626.

because the applicant had only a remote and indirect interest in the matter, relief was refused.[638]

Often questions of ripeness arise in respect of proceedings for prohibition. The remedy is rarely granted when the feared illegality has not yet occurred but is merely anticipated. Thus, prohibition will not issue to prevent procedures when a motion for particulars would suffice,[639] when an excess rather than an absence of jurisdiction is threatened,[640] or when an arbitration board has not yet had an opportunity to determine matters of jurisdictional fact.[641] By contrast, a court has held that prohibition will lie where a potential absence of jurisdiction is clear from the outset.[642]

### (c) *Exhaustion*

A further ground for refusing to exercise judicial review jurisdiction is that the plaintiff has not exhausted all available administrative remedies. For example, it has been held that a declaration will not lie against an allegedly *ultra vires* act unless a prior objection has been made to the relevant decision-maker.[643] Likewise, it has been held that a plaintiff must first ask a municipal council to repudiate an illegal act before a declaration that a by-law is *ultra vires* would issue.[644] In both cases the court expressed concern that it ought not to usurp the functions of administrative review tribunals or to encourage litigation until all adequate internal remedies had been pursued.

### (d) *Alternative Remedies*

Closely allied to exhaustion is the idea that some recourse other than judicial review is more appropriate to challenge illegal activity. Apart from being reluctant to multiply proceedings, courts are wary of reviewing administrative procedures where a statutory right of appeal on the merits or other recourse would constitute a more appropriate means of vindicating the applicant's claim. Thus, courts have granted a building permit on *mandamus*, but refused a demolition permit because an appeal would lie to a body which had jurisdiction to hear the merits of the case.[645] However, in one case a writ of *mandamus* was issued despite the

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[638] C.U.P.W. v. Attorney General of Can., 93 D.L.R. (3d) 148 (F.C. Trial D. 1978).

[639] *Youngberg*, *supra* note 462.

[640] *CIP Paper Products Ltd.*, *supra* note 473.

[641] *Re* Transair Ltd., 86 D.L.R. (3d) 85 (Man. Q.B. 1978).

[642] *Transportaide Inc.*, *supra* note 474.

[643] Cliff's Towing Service v. City of Edmonton, 9 A.R. 520, [1978] 1 W.W.R. 639 (S.C. 1977), *aff'd* 10 A.R. 326, [1978] 5 W.W.R. 31, 88 D.L.R. (3d) 488 (C.A.).

[644] *Maguire*, *supra* note 507.

[645] *Re* A.W. Banfield Constr. Ltd., 21 O.R. (2d) 157 (H.C. 1978).

possibility of an appeal to the county court, because this latter alternative was found to be inadequate.[646]

Several other examples of a court refusing to take jurisdiction on this basis arose during the period of this survey. For example, prohibition to prevent a hearing was refused when the court held that the appropriate recourse was to seek particulars;[647] on one occasion *certiorari* was not granted even though leave to seek a statutory appeal had already been refused;[648] and one court declined to issue a declaration where an appeal was available.[649] Similar in principle was a refusal to grant declaratory relief where the court was already seized of the matter upon a stated case and no further material could be adduced through declaratory proceedings.[650]

In *Landreville v. Town of Boucherville*[651] the Supreme Court of Canada reviewed one aspect of the relationship between judicial review remedies and special statutory recourses. It held that the existence of a procedure to quash by-laws would not preclude an application for evocation, since the jurisdiction of the court in either event was analogous. By contrast, in another case a civil cause of action was refused on the basis that the statutory remedies were exhaustive.[652] Of course, this doctrine can only be invoked when the statutory remedy does in fact lie, so that where a court finds that the jurisdiction of a university visitor does not extend to the matter in dispute, it may grant a judicial review remedy.[653]

### (e) *Miscellaneous Doctrines*

In addition to the four principles outlined above, courts have asserted a variety of other reasons for declining to grant the judicial review remedy sought. Where the point upon which the court's opinion is sought has become moot or, in cases of failure to afford a hearing, where the result would have been the same after a new hearing,[654] relief will be refused. No declaration was granted in a case where the legislation sought to be impugned had expired and no useful purpose would have been served by granting relief.[655] Finally, where subsequent legislation

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[646] *Re* Cann, 5 B.C.L.R. 206, 82 D.L.R. (3d) 316 (S.C. 1977).

[647] *Youngberg*, *supra* note 462.

[648] *Re* Rozander, 13 A.R. 479, 8 Alta. L.R. (2d) 203, 93 D.L.R. (3d) 271 (C.A. 1978).

[649] Sebastian v. Government of Saskatchewan, 93 D.L.R. (3d) 155 (Sask. C.A. 1978).

[650] *Re* Johnson, 91 D.L.R. (3d) 535 (Man. C.A. 1978).

[651] *Supra* note 22.

[652] MacDonald v. 283076 Ontario Inc., 23 O.R. (2d) 185, 95 D.L.R. (3d) 723 (H.C. 1979).

[653] *Webb*, *supra* note 232.

[654] *Monk*, *supra* note 530.

[655] *C.U.P.W.*, *supra* note 638.

had determined an issue, the court summarily dismissed an application alleging a breach of natural justice.[656]

Occasionally, courts will refuse relief on the basis that an application raises no justiciable issue. This ground expressly addresses what many others tacitly reflect: the court does not believe that the problem as raised is tailored to settlement by adjudication. Thus, in one case, a judge would have refused relief because the applicant could not establish a legally enforceable right: the statute in question did not oblige the government to pass regulations enforcing the statutory prohibitions which the applicant sought to have observed.[657]

Although there may be no limitation period attaching to judicial review remedies, a failure to seek redress expeditiously has also led to refusal of relief. For example, a five-year delay in seeking *mandamus* was held to preclude the applicant from obtaining the remedy.[658] By contrast, where no prejudice resulted, a four-year delay was found not to be fatal to declaratory proceedings.[659] Laches will also be raised to prevent extension of statutory time limits. Hence, the Manitoba Court of Queen's Bench refused to extend deadlines for seeking review, even after a Federal Court application was refused on jurisdictional grounds.[660]

Relief has been refused in rare cases when sought for an improper purpose,[661] or, if the allegation is a failure of natural justice, when the applicant has acquiesced in the procedure followed.[662] Both of these discretionary bars reflect the courts' attempts to prevent an abuse of their processes by disingenuous litigants.

Undoubtedly the most important decision respecting the discretionary nature of judicial review was the Supreme Court of Canada judgment in *Harelkin v. University of Regina*.[663] In this case, even though the Court unanimously found that a breach of natural justice had been committed, the majority refused to grant *certiorari* because a statutory right of appeal, which the court deemed adequate, had not been taken. More significantly, the Court rejected the argument that judicial review remedies are available *ex debito justitiae* whenever jurisdictional defects have been established. A lengthy dissent on both these points, however, suggests that neither the scope of the doctrine of exhaustion nor the extent of a court's discretion to refuse relief has been conclusively settled.

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[656] Yukon Conservation Soc'y v. N.E.B., [1979] 2 F.C. 14, 95 D.L.R. (3d) 655 (App. D. 1978).

[657] *Pim*, *supra* note 624.

[658] Picard v. Ville de Charny, [1979] Que. C.S. 707.

[659] *Hobby Ranches Ltd.*, *supra* note 285.

[660] Attorney General of Canada v. DeLaurier, [1979] 1 W.W.R. 277, 93 D.L.R. (3d) 434 (Man. Q.B. 1978).

[661] Wight v. Canadian Egg Marketing Agency, [1978] 2 F.C. 260, 19 N.R. 529 (App. D. 1977).

[662] *Re* Pearlman, 2 M.P.L.R. 174, 74 D.L.R. (3d) 367 (Man. C.A. 1977).

[663] *Supra* note 27. *See* Pépin, *Comment*, 39 R. du B. 1070 (1979).

In cases in which courts decline to grant otherwise well-grounded applications for judicial review it is possible to find a concern with the integrity of the courts' supervisory role. By expressing an opinion on the breach alleged yet refusing relief, courts are able to oversee administrative decision-making without having to perform a function for which they are ill-suited. This may have the effect of increasing the efficiency and responsibility of administrative decision-makers, while reducing to a realistic level the expectations placed on courts by litigants. In all events the concept of a court's discretion to refuse relief remains a key element in the theory of judicial review remedies.

### 5. *Privative Clauses*

During the period of this survey the law of privative clauses did not develop significantly.[664] For example, it is still the case that finality clauses will be read as excluding only rights of appeal, but not judicial review remedies.[665] However, the courts' practice of interpreting these provisions as narrowly as possible and the legislatures' practice of drafting them as broadly as possible continues.[666] Finally, the general principle that a privative clause will immunize agency decisions from review when the error alleged was one within jurisdiction rather than one of jurisdiction itself has not been seriously contested over the past decade. As a result, characterization of errors in terms of jurisdiction remains the fundamental issue; in recent years the minor changes in judicial approaches to jurisdiction have produced some evolution in the law of privative clauses.

It is not surprising that labour relations matters continue to produce most of the litigation concerning privative clauses, since questions of jurisdiction in this field are always pregnant with difficult policy issues. In one case, a labour board was required to decide the expiry date of a collective agreement where a privative clause declared the board's decisions to be final and conclusive and not open to review; upon review, after agreeing with the board's conclusion, the court stated that even had the board been wrong, it would not have quashed the order since such a decision was within the board's jurisdiction, was based on adduced evidence and was reasonable.[667] Similarly, privative clauses have been held to be effective in protecting decisions whenever the substantive issues involved an interpretation of the collective agreement; even exhaustion of grievance procedures would not overcome the effect of the

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[664] For the only article directly treating the problem of privative provisions, *see* Schwartz, *Woodward's Estate*, 4 QUEEN'S L.J. 124 (1978).

[665] *Sommers*, *supra* note 186.

[666] *See Re* Robertson, [1974] 2 W.W.R. 165, 42 D.L.R. (3d) 135 (B.C.C.A. 1973), *aff'd without reasons* [1975] 1 S.C.R. vi; Beacon Hill Lodges v. Winnipeg, [1978] 5 W.W.R. 375, 89 D.L.R. (3d) 239 (Man. C.A.).

[667] *S.E.I.U.*, *supra* note 442.

privative clause.[668] Sometimes courts will distinguish between review for declining or exceeding jurisdiction and review for procedural irregularities or error of law on the face of the record. For example, allegations of lack of counsel, absence of a transcript and insufficient evidence have been classified as raising issues of procedural irregularity which were protected by the privative clause.[669] Usually, however, breaches of natural justice can be raised even in the face of a privative clause.

The privative provisions of the Canada Labour Code[670] are often litigated and have produced a distinctive jurisprudence. In one case,[671] the Federal Court analyzed section 122 of the Code in light of its legislative and judicial history in order to determine its effect. Prior to April 1978, the clause declared that the board's decisions were final and immunized the board from review by any order or writ that would restrain, question or prohibit its proceedings. The clause was then amended to permit only section 28(1)(*a*) review under the Federal Court Act,[672] thereby prohibiting applications for various common law writs in cases where the board was alleged to have exceeded its jurisdiction. The court held that the statutory amendment was aimed at eradicating the judicial distinction between jurisdictional and non-jurisdictional errors, and therefore refused to grant prohibition. However, the Federal Court has also held that even though section 122 of the Code restricts review to applications under section 28, prohibition under section 18 would lie notwithstanding the privative clause, since at that stage of proceedings section 28 review could not be sought.[673] Moreover, on occasion the Federal Court, Appeal Division has held that section 122 only protects errors of law, not errors of jurisdiction.[674] Thus, in one case the court implicitly accepted the jurisdictional/non-jurisdictional dichotomy by holding that an error of law would not be reviewable if it were not also an error of jurisdiction.[675]

Not only has section 122 led to conflicting decisions, but section 155 of the Code has also generated divergent interpretations. During the period of this survey, however, the meaning of the section seems to have been settled. It now appears that the court sees this section as excluding

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[668] Bergeron v. Kingsway Transp. Ltd., 23 O.R. (2d) 332, 95 D.L.R. (3d) 749 (Div'l Ct. 1979).

[669] *Malo*, *supra* note 550.

[670] R.S.C. 1970, c. L-1.

[671] C.J.M.S. Radio Montreal Ltée., [1979] 1 F.C. 501, 91 D.L.R. (3d) 388 (Trial D. 1978).

[672] R.S.C. 1970, (2d Supp.), c. 10.

[673] *Transportaide Inc.*, *supra* note 474.

[674] Uranerz Exploration & Mining Ltd. v. Canada Lab. Rel. Bd., [1980] 1 F.C. 312, 28 N.R. 431, 102 D.L.R. (3d) 518 (App. D. 1979).

[675] Banque Provinciale v. Syndicat Nat'l des Employés de Commerce, [1979] 2 F.C. 439, 30 N.R. 564, 102 D.L.R. (3d) 720 (App. D.).

federal jurisdiction under section 23 of the Federal Court Act and as investing provincial courts with review jurisdiction.[676]

Apart from issues relating to the Canada Labour Code, the most important development in the law of privative clauses flowed from the Supreme Court of Canada decision in *New Brunswick Liquor Corp.*[677] After a decade of expanding the concept of jurisdiction, partly in order to overcome privative provisions, the Supreme Court of Canada cautioned against excessive creativity in finding jurisdictional errors and suggested that "exclusive jurisdiction" clauses should be interpreted as giving administrative authorities a broader range in making determinations relating to their area of expertise. Nevertheless, some courts still read privative clauses very restrictively. Thus, where a board was found to have misconstrued the applicable statute by giving contradictory interpretations to two sections in the act, the court concluded that this was a jurisdictional error of law not protected by the privative clause.[678] Other courts have followed the Supreme Court closely and have declined to intervene in the face of a privative clause when the disputed question was one of mixed law and fact. For example, the question of whether student research assistants were "employees" was held to be wholly within a board's jurisdiction and, given the privative clause, any decision, even if wrong in law or fact, would be conclusive.[679] Of course, as the Supreme Court of Canada pointed out in *Majestic Neckwear Ltd. v. City of Montreal*,[680] where a statute does not contain a privative clause nothing prevents the court from reviewing all errors of law appearing on the face of the record.

In *Bell Telephone Co. of Canada v. Harding Communications Ltd.*[681] the effect of an indirect privative clause was considered by the Supreme Court of Canada. Under Bell's constituent statute, the C.T.C. was given authority to decide any question of fact concerning Bell's decisions about access to its facilities and to disallow any stipulations it found to be unreasonable. When an injunction was sought in the Superior Court of Quebec, Bell contested the application on the basis that the C.T.C.'s jurisdiction was exclusive. The Supreme Court found that the statute neither expressly nor impliedly granted exclusive jurisdiction to the C.T.C.[682] A grant of statutory authority does not itself imply that such authority is exclusive.

A final aspect of the judicial treatment of privative clauses may be noted in *Attorney General of Quebec v. Farrah*,[683] where the Supreme

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[676] *Canadian Pacific Ltd.*, *supra* note 599; *McKinlay Transp. Ltd*, *supra* note 599.

[677] *Supra* note 30.

[678] *Gianoukakis*, *supra* note 200.

[679] University of Regina v. C.U.P.E. Local 1975, [1979] 5 W.W.R. 744, 101 D.L.R. (3d) 633 (Sask. C.A.).

[680] *Supra* note 546.

[681] [1979] 1 S.C.R. 395, 92 D.L.R. (3d) 213 (1978).

[682] *See also* Crestbrook Pulp Ltd. v. Columbian Natural Gas Ltd., [1978] 5 W.W.R. 1, 87 D.L.R. (3d) 248 (B.C.C.A.).

[683] *Supra* note 89.

Court viewed such a clause as evidence that a section 96 function was being conferred on a provincially appointed tribunal. That is, in certain cases the grant of exclusive and final jurisdiction on questions of law to an appellate tribunal may transform an otherwise lawful provincial delegation into one which offends section 96.

### B. *Statutory Modes of Challenging Administrative Action*

While the theory of jurisdiction and the common law remedies together make up what are often viewed as the distinctive elements of administrative law, statutory remedies which permit review of the merits of decisions are far more important from the persepective of the litigant seeking redress against administrative activity. Little can be said by way of useful generalization, however, since these statutory remedies are often set in the context of specific tribunals and do not usually give rise to litigation over general principles. The most important statutory remedy is, of course, the judicial appeal, although other remedies such as special procedures to quash, university visitorial jurisdiction, cabinet appeals and judicial homologation may frequently be relied upon.

#### 1. *Appeals*

A statute establishing an administrative agency will often provide for an appeal, either after or in lieu of an administrative appeal, to the superior court of the relevant jurisdiction.[684] The appeal will sometimes be given as of right upon any question of law or jurisdiction. However, since it is a creature of statute, both the right of appeal itself and its scope will always be set out in a legislative enactment.[685] A taxonomy of the differing appeal clauses usually found in administrative law would include: appeals restricted to questions of jurisdiction,[686] to questions of law and jurisdiction,[687] to questions of law (usually arising from problems of statutory interpretation),[688] to questions of law or fact or

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[684] Again, the *locus classicus* remains the recently reprinted study by Abel, *supra* note 457.

[685] *See Re* Conroy, 99 D.L.R. (3d) 642 (F.C. Trial D. 1979), where the court held it could not extend a time limit for appeal. *See also Re* Kolbrich, 20 O.R. (2d) 85, 15 L.C.R. 14 (Div'l Ct. 1978), where the court expressed reluctance to permit appeals from an interlocutory order despite wide statutory language.

[686] Canadian Pac. Ltd. v. Canadian Transp. Comm'n, [1979] 2 F.C. 809, 79 D.L.R. (3d) 698 (App. D. 1977); *Re* Western Decalta Petroleum, 6 Alta. L.R. (2d) 1, 86 D.L.R. (3d) 600 (C.A. 1978).

[687] *Re* Laidlaw Transp. Ltd., 23 O.R. (2d) 737, 97 D.L.R. (3d) 373 (Div'l Ct 1979).

[688] *Re* Cummings, 21 O.R. (2d) 389, 90 D.L.R. (3d) 568 (Div'l Ct. 1978); Gay Alliance Towards Equality v. Vancouver Sun, [1979] 2 S.C.R. 435, 27 N.R. 117, 97 D.L.R. (3d) 577; *Re* Brown, 18 O.R. (2d) 405, 83 D.L.R. (3d) 95 (Div'l Ct. 1978); *Re* Transports Drouin Ltée., 16 Nfld. & P.E.I.R. 345, 42 A.P.R. 345, 91 D L.R. (3d) 400 (P.E.I.S.C. 1978).

both,[689] or to questions which, upon an application for leave to appeal, the court considers worthy of consideration.[690]

The key question in matters of appeal, especially from specialized agencies, is the degree of deference courts will show to the particular expertise of the original decision-makers. Even when the clause establishing a right of appeal is drafted widely, courts continue to express reluctance to review the discretion of major regulatory tribunals,[691] or tribunals constituted by self-regulating professions.[692] Nevertheless, where an irregularity or error is clearly made out, courts will not hesitate to give a liberal interpretation to the clause setting out the right of appeal. Thus, an appeal on questions of law and jurisdiction has been held to embrace errors of jurisdictional fact.[693]

Aside from a reluctance to interfere based on deference to an administrative tribunal's expertise, courts will treat appeals from administrative tribunals and appeals from ordinary trial courts differently, especially where the admissibility of fresh evidence is in issue. A less restrictive approach to admitting new evidence is often taken in administrative appeals; courts adopt such an approach since the weight of evidence is not heavily linked to the question of credibility and since the parties in an administrative case are not the sole generators of evidence.[694]

Once a court has decided to interfere with a tribunal's decision on appeal, a question can arise as to the court's jurisdiction to vary rather than merely affirm or overturn the original jurisdiction. Usually courts will not substitute their standards for those of the initial decision-maker. For example, under a standard appeal clause a court may affirm a decision suspending a driver's licence or may quash the decision, but may not order a conditional suspension.[695] In other words, the range of possible dispositions upon appeal cannot be greater than that available to the original decision-maker.

Recently, an important issue has been the relationship of appeals to other remedies, especially where the decision complained of raises a question of jurisdiction. In some circles it is felt that where a decision is a nullity, no appeal, even on a question of jurisdiction, is possible. Yet the position in Canada, as confirmed by the Supreme Court of Canada

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[689] *Re* Radeff, 18 O.R. (2d) 272, 2 L.M.Q. 135 (Div'l Ct. 1978); *Re* Ontario Human Rights Comm'n, 17 O.R. (2d) 712, 81 D.L.R. (3d) 273 (Div'l Ct. 1977), *leave to appeal refused* 92 D.L.R. (3d) 544 (Ont. C.A. 1977).

[690] *Re* Nocita, 10 C.P.C. 50, 95 D.L.R. (3d) 677 (Man. C.A. 1979).

[691] C.S.P. Foods v. Canadian Transp. Comm'n, [1979] 1 F.C. 3, 21 N.R. 361, 84 D.L.R. (3d) 541 (App. D. 1978).

[692] *Re* Ghilzon, 22 O.R. (2d) 756, 94 D.L.R. (3d) 617 (Div'l Ct. 1979); *Re* Ringrose (No. 3), 8 A.R. 113, 91 D.L.R. (3d) 653 (C.A. 1978); *Re* Tse, 23 O.R. (2d) 649, 96 D.L.R. (3d) 475 (Div'l Ct. 1979); Mason v. Registered Nurses Ass'n of B.C., [1979] 5 W.W.R. 509, 102 D.L.R. (3d) 225 (B.C.S.C.).

[693] *Clauson*, *supra* note 235.

[694] *Re* Houston, 17 O.R. (2d) 254, 79 D.L.R. (3d) 766 (Div'l Ct. 1977).

[695] *Clauson*, *supra* note 235.

decision in *Harelkin*,[696] would appear to be that nullities may be raised and corrected upon appeal.[697] However, courts will usually refuse an application for judicial review if an appeal right is not exercised[698] or is unsuccessful[699] unless a matter of substantive jurisdiction is raised.[700] Courts generally will not allow parties not involved in initial proceedings to bring an appeal,[701] although this has been permitted on occasion. Where, however, the appellant is not the original applicant before the administrative agency, it will not be possible to remedy nullities on appeal, and the *Harelkin* principle will not be applicable.[702]

### 2. *Special Remedies*

In addition to traditional means of challenging administrative decisions before courts either by way of review or appeal, certain statutory schemes provide for special recourses: homologation, reargument, appeals to cabinet, applications to quash and so forth. These extraordinary remedial alternatives usually generate little litigation, except as to their relation to judicial remedies and as to the control of the reviewing bodies themselves by courts.

In the context of the university the most common extraordinary remedy is the "visitorial" power.[703] Courts are frequently asked to intervene in university affairs and must consequently determine the visitor's jurisdiction. In one case during the period of this survey the issue was the validity of a tuition fee increase proposed by a board of governors. The court concluded that fees were a public matter not within the visitor's exclusive jurisdiction; consequently, it assumed jurisdiction to review the matter.[704] In another case the court observed that visitorial jurisdiction did not extend to deciding whether the university was in breach of contract; as a result, it held that the courts could not be deprived of their common law jurisdiction to hear contract litigation.[705] In many provinces the visitorial power has been abolished, and in view of the recent tendency of courts neither to decline jurisdiction nor to defer to the visitor, it is likely that this extraordinary recourse will soon disappear.

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[696] *Supra* note 27.

[697] Melvin v. Christiansen, 4 R.P.R. 98 (B.C. Cty. Ct. 1978).

[698] *Rozander*, *supra* note 648; *Brendon*, *supra* note 525.

[699] *But see Sommers*, *supra* note 186.

[700] *Beacon Hill Lodges*, *supra* note 666.

[701] *Re* Ledohowski Hotels of Can. Ltd., 6 M.P.L.R. 229, 89 D.L.R. (3d) 333 (Man. C.A. 1978).

[702] *Re* Revie, [1978] 3 W.W.R. 177, 85 D.L.R. (3d) 381 (Man. Q.B.).

[703] *See* Ricquier, *The University Visitor*, 4 DALHOUSIE L.J. 647 (1977-78).

[704] *Webb*, *supra* note 232.

[705] Riddle v. University of Victoria, [1979] 3 W.W.R. 289, 84 D.L.R. (3d) 164 (B.C.S.C. 1978).

A second exceptional form of redress is the Cabinet or "political" appeal. During the period of this survey the main issue which arose in respect of Cabinet appeals was not their scope, but rather the procedures for such appeals. Courts have held the Cabinet to be bound not only by mandatory procedural requirements[706] but also by implied procedural requirements flowing either from the doctrine of fairness or the rules of natural justice.[707] Although the Cabinet usually is concerned with matters of policy and does not deal with strictly legal issues on such appeals,[708] occasionally it is given strictly legal powers to "confirm, vary or rescind" orders. Even in such cases, its exercise of appellate power will rarely attract judicial scrutiny, either upon judicial review or appeal.[709]

A third statutory recourse is the application to quash by-laws. Most provinces have enacted such procedures, but little administrative law litigation has resulted. An expanded concept of "person interested" frequently permits even incorporated associations consisting of residents of a municipality to move to quash,[710] and occasionally courts seem more inclined to sever by-laws upon applications to quash.[711] In a series of cases from Quebec, the Supreme Court of Canada held the application to quash to be merely an alternative form of proceeding and also permitted by-laws to be challenged by declaration,[712] direct action in nullity[713] and collateral attack.[714] All these cases provide evidence that courts view traditional judicial review remedies as the principal administrative law recourse.

A final extraordinary remedy frequently employed in Quebec is judicial homologation. By this procedure, arbitration awards and other administrative acts are made executory. As a remedy, homologation is a creature of statute,[715] permitting the homologating court to review the decision submitted to it. In *Adricon Ltée. v. East Angus*[716] the Supreme Court of Canada determined that this review jurisdiction is the same as that exercisable upon an ordinary judicial review application. Consequently, where homologation is mandated, it not only ensures the enforcement of administrative decisions, but also serves as an automatic right to jurisdictional review.

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[706] *Consumers' Ass'n of Can.*, *supra* note 170; *C.S.P. Foods*, *supra* note 691.

[707] Inuit Tapirisat v. Attorney General of Canada, [1979] 1 F.C. 213, 24 N.R. 361 (App. D. 1978). This point has been overruled in the Supreme Court judgment, *supra* note 11.

[708] *Davisville Inv. Co.*, *supra* note 465.

[709] *Re* Rush, 21 O.R. (2d) 592, 92 D.L.R. (3d) 143 (H.C. 1978).

[710] *Sunshine Hills Property Owners Ass'n*, *supra* note 627.

[711] *See Lamoureux*, *supra* note 63.

[712] *Duquet*, *supra* note 22.

[713] *Francon*, *supra* note 542.

[714] *Landreville*, *supra* note 22.

[715] Sénécal v. Canada Metal Co., [1977] Que. C.S. 278.

[716] [1978] 1 S.C.R. 1107, 19 N.R. 781 (1977).

C. *Administrative Reconsiderations*

An important development during the period of this survey has been the recognition by courts that an array of administrative remedies is needed to supplement traditional judicial ones. Connected with this recognition has been a judicial inclination to encourage agencies to avail themselves of these remedies. In this section we shall look at the most important of these administrative recourses: agency reconsiderations.[717]

In asking an administrative agency to reconsider, rehear or reopen a decision, a party is seeking to benefit from the expertise of the agency and its familiarity with the file as well as attempting to save time and expense. The question whether reconsideration is an appropriate remedy compels the courts to consider first, whether the agency has jurisdiction and second, whether the reasons for seeking reconsideration justify the reopening of a matter already decided. In this respect the law of reconsideration merges with the issue of absence of jurisdiction arising because an agency is *functus officio*.

Theoretically, an agency ought not to be considered *functus officio* unless its first decision is both valid and final. Since both validity and finality are usually assumed, courts tend to look first for an implied or express statutory authority, allowing them to reconsider the decision in question.[718] Nevertheless, there is judicial opinion to suggest that where a tribunal recognizes that it has failed to observe the rules of natural justice, it may treat its decision as a nullity and rehear the case.[719] Sometimes courts conclude that a tribunal has no power to reconsider its own decision on the basis of *a contrario* reasoning. For example, where a statute expressly authorized the Ontario Municipal Board to review "any decision, approval or order", it was held that the Board was precluded from reviewing its own report because the latter was not a "decision, approval or order" within the meaning of the statute.[720] Similarly, where a statute expressly authorized a board to vary its decision, other officials within the administrative hierarchy were deemed not to have such a jurisdiction if the statute was silent in their regard.[721]

In some cases, however, courts do not seem to recognize the presumption against agency reconsiderations. Thus, in one case a board was permitted to reopen a matter on its own initiative, despite the lack of express statutory authority and despite the fact that the act in question provided for revision on the instigation of the minister but not on that of

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[717] Macdonald, *supra* note 168.

[718] Garcia v. Minister of Employment & Immigration, [1979] 2 F.C. 772, 29 N.R. 34, 101 D.L.R. (3d) 281 (App. D.); Ramkissoon v. Minister of Manpower & Immigration, [1978] 2 F.C. 290, 20 N.R. 361, 82 D.L.R. (3d) 406 (App. D. 1977). These two cases are examples of instances where reconsideration was permitted on the basis of an implied continuing equitable jurisdiction in the Immigration Appeal Board.

[719] *Woldu*, *supra* note 169.

[720] *Re* Schutz, 20 O.R. (2d) 104 (Div'l Ct. 1978).

[721] Doyon v. Public Serv. Staff Rel. Bd., [1979] 2 F.C. 190 (App. D.).

the board.[722] Of course, decision-makers may always reopen a matter to correct technical errors[723] or to complete an order when they have reserved the right to do so. For example, by rendering a decision which did not dispose of all the matters put before it, an arbitration board was found to have implicitly reserved a right to reconvene and to accept additional evidence.[724] Again, an arbitration board was permitted to reopen hearings on its award because it had expressly retained jurisdiction to clarify any doubts about the interpretation or application of the award.[725]

The effect of finality clauses on the jurisdiction of administrative tribunals to rehear their decisions is difficult to determine. Rather than reading these as privative clauses directed to judicial review, courts often hold that the finality spoken of is directed to the agency and precludes reassessment. In one instance, in justifying this interpretation, the Alberta Supreme Court stated that a power to reopen old cases would be unusual, would tend towards injustice, and would be out of step with the "basic principle" that decisions affecting rights should be final.[726] A similar result was also reached with respect to a decision involving the issue of unemployment insurance premiums.[727] In both instances the court considered that the decision made was essentially judicial and could not be revised or altered once it had been rendered.

At the other end of the spectrum are decisions which are considered "legislative", and to which, therefore, the above assumptions are clearly inapplicable. For example, a municipal by-law was passed but the procedure followed from the second and third readings on was invalid.[728] Hamilton J. held that such an error could be corrected by the municipal council if it started its reconsiderations at the point where it had erred in its procedure. Hence, the proposal and first reading were not void and the council could proceed to enact the impugned instrument.

Once it has been established that an administrative agency is competent to reconsider its decisions, the question may still arise whether such a remedy is appropriate to the particular situation before the court. Several cases have explored the circumstances under which a rehearing should be undertaken. For example, where a decision-maker has a discretion to reopen an inquiry he cannot be forced to reconsider his previous decision.[729] However, even when the reopening of an inquiry is

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[722] *Parent Cartage*, *supra* note 174.

[723] *Kingston*, *supra* note 179.

[724] C.N.R. v. McIntyre Mines, 13 A.R. 56, 86 D.L.R. (3d) 533 (S.C. 1978).

[725] *Re* B.C. Tel. & Telecommunications Workers Union, 93 D.L.R. (3d) 603 (B.C.S.C. 1978).

[726] Lambert v. Alberta Teachers' Ass'n, [1978] 6 W.W.R. 184, at 191, 90 D.L.R. (3d) 498, at 504 (Alta. S.C.).

[727] *Macdonald Tobacco Inc.*, *supra* note 571.

[728] Watko v. St. Clements, [1979] 3 W.W.R. 279, 98 D.L.R. (3d) 96 (Man. Q.B.).

[729] *Pratap*, *supra* note 515.

discretionary, a decision-maker cannot refuse to consider a request to reopen proceedings.[730] In another case,[731] a Newfoundland court approved four reasons for which a statutory arbitrator could reconsider his decision: first, in the situation where the award is bad on its face; second, if there is a mishandling of the procedures by the arbitrator; third, if he admits an error and requests a reconsideration; and fourth, if there is additional evidence arising after the termination of the initial hearing.[732] This limited enumeration contrasts with the position of an Alberta court that permitted a labour board to reconsider a certification granted to a nursing aid association three years earlier.[733] Even though a redefinition of a bargaining unit resulted and a group of employees was prevented from forming its own union, the court held that the board was entitled to reconsider since the decision would have been within its jurisdiction initially.

Although an agency may have jurisdiction to rehear and although there may be sufficient grounds for granting this remedy, there are circumstances in which it appears that the right to seek reconsideration is lost. For example, in one case, despite the continuing equitable jurisdiction of the Immigration Appeal Board and despite the discovery of new evidence relevant to a reconsideration, an applicant was held to have voluntarily executed the original order, and consequently to have waived his right to demand a reconsideration.[734] In other words, like traditional judicial review remedies, agency reconsiderations are often seen as being discretionary.

### D. *Tort, Contract and Restitutionary Claims*

Up to this point, we have studied instances where aggrieved parties have sought to challenge decisions of public officials by way of judicial review, statutory appeal or administrative reconsideration. There are circumstances, however, where traditional public law remedies are inadequate; this occurs most often when an unlawful administrative act has caused damage to an applicant. In such cases, parties will attempt to invoke ordinary private law remedies by way of tort, contract or

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[730] Garba v Lajeunesse, [1979] 1 F.C. 723, 29 N.R. 48, 96 D.L.R. (3d) 606 (App. D. 1978).

[731] *Attorney General for Newfoundland*, *supra* note 443.

[732] The four reasons were outlined in Montgomery, Jones & Co. v Liebenthal & Co., [1898] 1 Q.B. 487, 78 L.T. 211 (C.A.).

[733] *C.U.P.E. Local 41*, *supra* note 173.

[734] *Ramkissoon*, *supra* note 718.

restitutionary claims.[735] Two distinct issues arise whenever private law remedies are sought against public officials: first, how can such remedies be integrated into the broad framework of public decision-making, and second, how have these remedies been affected by special legislation?

1. *Private Law Remedies and Public Decision-Makers*

When a plaintiff attempts to invoke a claim in tort, contract or restitution, the general issue before the court is: to what degree is it appropriate to import private law considerations into an area where the relations between parties are governed by traditions of administrative law? In the common law tradition there exists no separate structure of administrative courts, and consequently, the theory of administrative liability has had a long gestation.

A preliminary question which must always be asked is whether the administrative agency under attack has the requisite personality to be a party to a civil action. This is really a two-edged problem since often the issue is not whether an agency may be sued but rather whether it has the status to bring judicial proceedings.[736] For example, a marketing board was permitted to sue a bank for breach of trust on the basis that the board's statutory responsibilities could only be met if it had the power to conclude contracts and to sue for their enforcement.[737] Generally, however, courts are required to determine whether an agency may be made the defendant in a civil action, and in such cases the powers of the agency in question are often determinative of the issue. For example, an action against a municipal board was dismissed on the ground that the defendant was not a suable entity: the board was not incorporated, did not carry on a business, and had no assets out of which a judgment could be satisfied.[738]

Contracts concluded with public bodies are normally subject to the usual principles of law, because once the parties have entered into a contractual relationship, the character of one party as a public body becomes less relevant.[739] However, in three Supreme Court of Canada

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[735] The special position of the Crown is discussed in Section IV *infra*. Note the following articles published during the period of this survey: Garant, *La formation des contrats administratifs: Théorie du mandat apparent ou Théorie de la délégation de pouvoir*, 38 R. DU B. 178 (1978), an article on the subject of government contracts; on the subject of restitution, *see* Rousseau-Houle, *La notion d'enrichissement sans cause en droit administratif québécois*, 19 CAHIERS 1039 (1978); and on the subject of damages, *see* Craig, *The Innocent Victims of a Police Action*, 26 U.N.B.L.J. 34 (1977); Bridge, *Governmental Liability, the Tort of Negligence and the House of Lords Decision in Anns v. Merton London Borough Council*, 24 MCGILL L.J. 277 (1978); Parker, *Suing the Municipal Police Officer*, [1977-78] 1 ADVOCATE 329.

[736] Attorney General of Canada v. Canadian Human Rights Comm'n, [1980] 1 F.C. 142, 30 N.R. 569, 102 D.L.R. (3d) 727 ( App. D. 1979).

[737] *Ontario Wheat Producers' Marketing Bd.*, *supra* note 616.

[738] *Manchuk*, *supra* note 501.

[739] This point was implicitly made in *Adricon Ltée.*, *supra* note 716.

cases arising in Quebec, *Gravel v. City of St.-Léonard*,[740] *Lalonde v. City of Montreal North*[741] and *Adricon Ltée.*,[742] it was held that where formal approval for formation of a contract is statutorily required, such approval is a condition precedent to the conclusion of a valid contract.

Where plaintiffs are seeking damages in tort in addition to, or instead of, a public law remedy, difficult issues of liability often arise. In principle, a tort or delict committed as a result of an *ultra vires* act is actionable. Thus in *Chartier v. Attorney-General of Quebec*,[743] police officers who arrested the plaintiff pursuant to a coroner's warrant which they knew to be invalid were held by the Supreme Court of Canada to have committed a fault giving rise to damages. A similar approach was taken in a case where damages were awarded to a plaintiff doctor whose hospital privileges were revoked without a hearing.[744]

Recently, courts have frequently acknowledged that the tort of negligence presents special problems in the adaptation of private law remedies to public officials. In one case,[745] the court found that although a municipality was negligent in drafting its subdivision scheme, no action in damages could succeed because the negligent omission was ancillary to the exercise of a quasi-judicial function. The court distinguished quasi-judicial or legislative functions on the one hand, and administrative functions on the other, and held that liability would attach only to the latter. This reasoning may be compared with that in another case which involved injury sustained by a bicyclist because of bad road conditions. The court refused to draw a distinction between administrative and quasi-judicial functions, but rather distinguished between powers and duties. Tort liability would attach only to statutory duties, or to *ultra vires* exercises of power. Thus, where there was a discretion to be exercised, no liability in tort could arise.[746]

In cases involving certain discretionary acts the issue of whether the decision-maker is acting in good faith becomes significant. In *Central Canada Potash Co. v. Saskatchewan*,[747] for example, the Supreme Court of Canada found that government officials did not commit a tort by enforcing legislation which was later declared invalid. Similarly, in two other cases decision-makers were found not liable, even though their errors had caused damage to the plaintiff, because their error was one of

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[740] [1978] 1 S.C.R. 660, 17 N.R. 486 (1977).

[741] [1978] 1 S.C.R. 672, 17 N.R. 402 (1977).

[742] *Supra* note 716.

[743] [1979] 2 S.C.R. 474, 27 N.R. 1, 9 C.R. (3d) 97, 104 D.L.R. (3d) 321

[744] Abouna v. Foothills Provincial Gen. Hosp. Bd. (No. 2), 8 A.R. 94, [1978] 2 W.W.R. 130, 83 D.L.R. (3d) 333 (C.A.).

[745] Bowen v. City of Edmonton (No. 2), 8 A.R. 336, [1977] 6 W.W.R. 344, 80 D.L.R. (3d) 501 (S.C.).

[746] Barratt v. District of North Vancouver, 6 B.C.L.R. 319, 89 D.L.R (3d) 473 (C.A. 1978).

[747] [1979] 1 S.C.R. 42, 23 N.R. 481, [1978] 6 W.W.R. 400, 88 D.L.R. (3d) 609 (1978).

judgment made in good faith.[748] In addition, the court was unsure whether an enforceable legal duty was owed to the plaintiff. In other words, responsibility in tort will rarely be found unless the plaintiff can establish that an administrative power actually contemplates a recognizable legal duty owed to him.

### 2. *Public Authorities Protection Acts*

Many jurisdictions have enacted public authority protection acts establishing short limitation periods for actions taken in respect of an act or default in the execution of statutory or public duties. Consequently, cases which might otherwise have been argued on traditional private law principles often turn on the narrower point of whether the action is proscribed. In two lower court decisions in Ontario, it was held that once it was established that a statutory duty was in issue, the Ontario Public Authorities Protection Act[749] applied. In both cases the court expressed its regrets at dismissing the action since the plaintiff appeared to have a claim which would have been successful on the merits.[750]

In contrast to this approach, which does not account for policy considerations in distinguishing cases under these acts from other actions and does not involve a discussion of the facts, other decisions have focused on whether or not the duty allegedly breached was a public duty. Thus, in one case, although the act was found to apply, the court noted that a merely managerial or incidental duty not essential to the statutory function of an agency would fall outside the ambit of the act's provisions.[751] The rationale for a distinction based on the issue of whether the duty breached is a public one was discussed by the Supreme Court of Canada in the important case of *Berardinelli v. Ontario Housing Corporation*.[752] The plaintiff, a tenant of the defendant, was injured when he slipped on ice on the latter's property. The Court refused the invitation of the defendant's counsel to apply the Public Authorities Protection Act. The Act was held to apply only to those powers and duties that have public impact or connotation and not to those of a subordinate, internal or operational nature. Thus the nature of the power

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[748] *See Voratovic*, *supra* note 634; Toews v. MacKenzie, [1977] 6 W.W.R. 725, 81 D.L.R. (3d) 302 (B.C.S.C.).

[749] R.S.O. 1980, c. 406, s. 11.

[750] *See* Wright v. Board of Education for the City of Hamilton, 16 O.R. (2d) 828, 79 D.L.R. (3d) 316 (H.C. 1977) (*obiter*); Aubut v. The Queen, 18 O.R. (2d) 261, 82 D.L.R. (3d) 253 (Cty. Ct. 1977).

[751] *Riddle*, *supra* note 705.

[752] *Supra* note 510.

or duty in issue, and not that of the body itself, was found to be determinative.[753]

In other provinces particular statutes may provide government bodies with protection similar to that found in the public authorities protection acts. However, as these protections are already limited in scope because of their narrow context, other issues such as questions of statutory interpretation[754] or jurisdiction[755] are more likely to be raised. It is important to note that in *Bowen v. City of Montreal*[756] the Supreme Court of Canada refused to allow a plaintiff to overcome a short limitation period by framing an action in quasi-contract rather than delict. It seems, therefore, that once a statutory function of a public nature is made out, the public authorities protection acts will be applied to all claims against public authorities.

## E. *Conclusion*

In a very real sense the subject of administrative law may be seen as comprising the theory of jurisdiction and the judicial review remedies which sustain it. Yet the above taxonomy of recourses against agency activity illustrates a wide variety of review mechanisms, review agencies and orientations to governmental decision-making. It is a commendable feature of recent developments in the law of remedies that courts are seeking to channel litigation not only to mechanisms other than traditional judicial review, but also through processes such as reconsiderations and special statutory recourses.

In this light, decisions such as *Martineau*,[757] which emphasizes remedial flexibility, *Vachon v. Attorney-General of Quebec*,[758] in which substance is seen to control form, *Harelkin*,[759] which preserves a court's right to direct litigants to other review agencies, *New Brunswick Liquor Corp.*,[760] which evidences sympathy for exclusive administrative jurisdiction and *Berardinelli*,[761] which suggests a restrictive approach to exceptional regimes of public authority liability, can be viewed as evidence that the law of remedies is evolving with the concept of fair

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[753] This case effectively overrules part of the decision in Attorney-General for Ontario v. Palmer (No. 2), 18 O.R. (2d) 362, 82 D.L.R. (3d) 761 (H.C. 1978). However, in the latter case the court also held that the Public Authorities Protection Act did not apply to bar a counterclaim brought after the six month period in an action launched by the Crown within the relevant limitation period.

[754] Comté de Huntingdon v. Garceau, [1978] Que. C.A. 425.

[755] *See Beacon Hill Lodges*, *supra* note 666, where a time limit to contest an assessment was treated as a privative clause.

[756] [1979] 1 S.C.R. 511, 29 N.R. 408 (1978).

[757] *Supra* note 11.

[758] *Supra* note 22.

[759] *Supra* note 27.

[760] *Supra* note 30.

[761] *Supra* note 510.

procedures. It remains to be seen whether this approach will survive over the next few years.

## IV. THE CROWN

While in principle the general regime of administrative law applies to the Crown in the same way as it applies to statutory tribunals, it is not surprising that a plethora of special problems arises when an action is taken against the Crown and its agents.[762] For example, there are a number of prerogatives which the Crown may assert in defence of an action or during the course of a proceeding. Again, special rules of liability and procedure establish a distinctive structure of both private law and public law remedies. Finally, courts have usually found that different policy considerations must be taken into account when the defendant is the Crown. Each of these features makes it most appropriate to treat the Crown as a separate topic, rather than to highlight its distinctive position during the general discussion of grounds for review and of remedies in administrative law.

### A. *Crown Prerogative*

Although the Crown is possessed of a number of prerogatives which might bear on its administrative law position, only three of these prerogatives were asserted during the period of this survey. Historically, one important Crown prerogative has been the right to dismiss Crown servants at will. This prerogative has been held to override generally applicable obligations under a collective agreement, where the relevant statute preserved the Crown's prerogative rights.[763] In addition, where a statutory provision provided that an employee could be dismissed for failing to meet the requirements of his position, it was held that this did not restrict the Crown's prerogative to dismiss at will.[764] In both cases the courts concluded that legislation had not abolished or limited a pre-existing prerogative.

A second Crown prerogative is the privilege to refuse disclosure of documents.[765] While this topic is more appropriately studied in a survey of the law of evidence, it is worth noting that the courts have consistently held the privilege not to be absolute. For example, in one instance it was

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[762] Recent literature on this subject-matter includes Schachter, *Controlling the Ministers*, 16 ALTA. L. REV. 388 (1978); Lyman, *Estoppel and the Crown*, 9 MAN. L.J. 15 (1978); McNairn, *Crown Immunity from Statute — Provincial Governments and Federal Legislation*, 56 CAN. B. REV. 145 (1978); Garant & Leclerc, *La qualité d'argent de la Couronne ou de mandataire du gouvernement*, 20 CAHIERS 485 (1979).

[763] Wilson v. Civil Serv. Comm'n, 33 N.S.R. (2d) 247, 57 A.P.R. 247, 96 D.L.R. (3d) 355 (S.C. 1979).

[764] Mitchell v. The Queen, 23 O.R. (2d) 65, 96 D.L.R. (3d) 292 (H.C. 1979).

[765] Julien v. St.-Pierre, [1978] Que. C.S. 599.

held that conversations,[766] comments and correspondence between provincial government employees and a municipality, which were neither secret nor confidential, did not fall within the ambit of the Crown's privilege, which was held to attach only to communications among senior officers of the government and Cabinet committees.

A third Crown prerogative, immunity from estoppel, was asserted in two cases. In one of these,[767] visitors to Canada were required to give security deposits to guarantee their departure from Canada on a specific date. The aliens remained in Canada after the designated date in order to be present at a special inquiry, established to consider their request for landed immigrant status. After their application failed, the aliens' deposits were forfeited. It was argued that the immigration officials made representations to the aliens that the deposits would not be forefeited and that such representations bound the Crown. The court held that this argument "amount[ed] to an invocation of the doctrine of estoppel" and that estoppel did not lie against the Crown. In the other case, the Crown successfully repelled a defence of estoppel in its action to recover a grant paid by mistake, even though the mistake was induced by flaws in the application form itself.[768] However, the extent to which this immunity is limited to cases where the estoppel is raised to uphold an otherwise invalid action has not yet been considered.[769]

Of course, whether or not a Crown prerogative can be claimed depends on the preliminary question of status. For example, where an attempt to assert immunity from *certiorari* was raised with respect to the decision of a council composed of provincial Cabinet members, the court held that the order was not an order in council and that the members were acting as *personae designatae*. As a result, the order under attack was that of a statutory tribunal and therefore could be quashed by *certiorari*.[770] Similarly, whenever this immunity is claimed, the court must determine whether the act being impugned is within the scope of the authority of the person asserting such immunity. Where there is an absence, excess or declining of jurisdiction, it is often held that the individual may personally be subject to a prerogative writ even if the Crown is not.[771] Thus, status to claim a Crown prerogative requires a preliminary judicial determination that the claimant is acting as a Crown servant or agent.

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[766] Regina v. Vanguard Hutterian Brethren Inc., [1979] 4 W.W.R. 173, 46 C.C.C. (2d) 389, 97 D.L.R. (3d) 86 (Sask. C.A.).

[767] Gill v. The Queen, 88 D.L.R. (3d) 341 (F.C. Trial D. 1978).

[768] Regina v. Baig, 23 O.R. (2d) 730 (Dist. C. 1979).

[769] *See* McDonald, *supra* note 40, for a thorough treatment of this issue.

[770] *Coyle*, *supra* note 466.

[771] Charles Bentley Nursing Home Inc. v. Minister of Health, [1978] Que C.S. 30.

B. *Statutory Modifications to Crown Liability*

The scope of Crown prerogative is often modified by special statutory provisions. Immunity from liability in tort or delict, for example, has been legislatively abolished and a special regime of liability established. Once again, however, the question of status is crucial. For example, in one particular instance,[772] although a failure to give the required notice under subsection 10(1) of the Crown Liability Act[773] was fatal to an action against the Canadian Broadcasting Corporation, other co-defendants who were independent contractors were not allowed to claim the benefit of the above provision.

Special notice procedures are envisioned by section 17 of Nova Scotia's Proceedings Against the Crown Act,[774] under which the Crown must have two months notice of any action taken against it. The word "action" in this section has been given a wide meaning to include injunctive and similar proceedings even where no damages are claimed.[775] Nevertheless, courts generally interpret provisions altering the common law regime of liability restrictively. Thus in *Canadian Industrial Gas & Oil Ltd. v. Saskatchewan*,[776] a generally worded provision in Saskatchewan's Proceedings Against the Crown Act[777] was held to be sufficient to displace the Crown's traditional exemption from interest payments.

Not only do statutes modify the position of the Crown in respect of tort liability, but they also impose special rules respecting government contracts or government's susceptibility to judicial review. During the period of this survey, however, there has been no litigation on the former point; the latter point only requires mention of the privative provisions of subsection 28(6) of the Federal Court Act.[778]

C. *The Common Law Regime of Crown Liability*

In addition to difficulties arising from claims of Crown prerogatives or from the assertion of special statutory immunities, courts are also required to determine the extent to which ordinary civil liability ought to attach to the Crown. This issue requires the courts to balance two important interests: responsibility of the Crown and the justification of the Crown's act as part of a larger political or administrative program. In these cases, the responsibilities of the Crown are so wide and diverse that

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[772] Burnett v. The Queen, 23 O.R. (2d) 109, 94 D.L.R. (3d) 281 (H.C. 1979).

[773] R.S.C. 1970, c. C-38.

[774] R.S.N.S. 1967, c. 239.

[775] *Clayton Devs. Ltd.*, *supra* note 500.

[776] [1979] 1 S.C.R. 37, 23 N.R. 257, [1978] 6 W.W.R. 477, 91 D.L.R. (3d) 555 (1978).

[777] R.S.S. 1978, c. P-27, s. 17(1).

[778] R.S.C. 1970 (2nd Supp.), c. 10, s. 28(6).

the dispute does not fit easily into the framework of two-party adjudication.

1. *Contractual and Restitutionary Claims*

Since the Crown has never been allowed to assert its immunity from actions based on contractual rights, this regime of Crown liability, *i.e.*, contractual and restitutionary claims, is not unduly strange. In fact, apart from special requirements relating to formation, in most cases no major transformation of the dispute is necessary to make it amenable to adjudication. Thus, in several cases the relevant issues of contract law were discussed and decided without reference to the defendant's status. Examples include such diverse matters as: the interpretation of a covenant in a deed granting land,[779] the question of whether a bribe would vitiate consent,[780] whether a contract could be rescinded for duress,[781] or whether a government was liable for promises made by an agent within the scope of his apparent authority.[782]

In such cases as *J.E. Verrault & Fils Ltée. v. Attorney-General of the Province of Quebec*[783] the Supreme Court of Canada has shown a tendency to bring the contractual liability of the Crown as closely as possible into line with ordinary contractual liability. In *Bank of Montreal v. Attorney-General of Quebec*,[784] the Supreme Court held that the Crown was bound by its contract with the bank, the terms of which implicitly included a provision of the Bills of Exchange Act,[785] which required notice of forgery to be given within one year. The provision was seen as essential to the cause of action, being part of the contractual relation of banker and customer under the Civil Code, and therefore the maxim "time does not run against the Crown" could not be asserted.

During the period of this survey there were no cases in which a quasi-contractual or a restitutionary claim was made against the Crown. Nevertheless, since the last survey the Supreme Court of Canada appears to have decided, in *Lalonde*,[786] that a restitutionary claim cannot be raised where a contract is found to be void as a result of a failure to comply with required formalities. The question of whether a *quantum meruit* claim may lie in other circumstances remains undecided.

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[779] Seymour Management Ltd. v. Kendrick, [1978] 3 W.W.R. 202, 4 R.P.R. 1 (B.C.S.C.).

[780] 251798 Ontario Inc. v. The Queen, [1978] 1 F.C. 90, 2 Bus. L.R. 83 (Trial D.).

[781] Value Dev. Corp. v. The Queen, [1978] 1 F.C. 823 (App. D. 1977). *See also* Anchorner v. The Queen, [1979] 1 F.C. 572, 92 D.L.R. (3d) 303 (Trial D. 1978).

[782] Clark v. The Queen, 15 B.C.L.R. 311, 99 D.L.R. (3d) 454 (S.C. 1979).

[783] [1977] 1 S.C.R. 41, 5 N.R. 271, 57 D.L.R. (3d) 403 (1975).

[784] [1979] 1 S.C.R. 565, 25 N.R. 330, 96 D.L.R. (3d) 586 (1978).

[785] R.S.C. 1970, c. B-5, s. 49(3).

[786] *Supra* note 741.

2. *Tort Actions*

The issue of status becomes important whenever an action is founded on an alleged act or omission of the Crown, because in such a case courts must balance liability against public policy objectives pursued by the Crown. Nevertheless, it would appear that proprietary rights are treated by the courts in a fashion similar to contractual ones and private law principles tend to be applied with little, if any, modification. Thus, where a ship collided with a railway bridge owned by the Crown, damages were assessed as in any other case.[787] In another case, the court, precluded from issuing an executory writ of possession against the Crown, treated an unlawful trespass by the latter as an expropriation and ordered compensation.[788] A similar view was taken by the Supreme Court of Canada in *Manitoba Fisheries Ltd. v. The Queen*,[789] where it held that a marketing scheme which effectively put the plaintiff out of business was an expropriation. Even though no tangible property was taken by the Crown, good will was considered property and therefore, in the absence of a statutory provision to the contrary, a right to compensation was presumed.[790]

Actions for tort or breach of statutory duty are not dealt with so expeditiously by the courts. As in private law, actions of this nature usually begin with an examination of the question of duty. If the plaintiff can establish a breach of a statutory duty, recovery is easier, especially if the statute also provides that damages are available upon default.[791] However, even where there is no provision for damages and other remedies are expressly contemplated, an action in tort may not be excluded. In one case the duty imposed was found not to benefit the public at large but rather to benefit a particular class of individuals. Therefore, it was enforceable by the injured parties.[792] By contrast, a claim for damages based on customs officials' failure to enforce certain regulations was dismissed since the court found that there was no intention in the legislation to bestow a right upon an injured party to seek damages; the duty owed was a public duty and the statutory remedies were held to be exclusive and sufficient.[793]

Plaintiffs have less success when they complain of a breach of a general duty of care rather than of a breach of a statutory duty. In determining whether the breach is actionable, courts distinguish between

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[787] Gypsum Carrier Inc. v. The Queen, [1978] 1 F.C. 147, 78 D.L.R. (3d) 175 (Trial D. 1977).

[788] Malone v. The Queen, 1 R.P.R. 322, 79 D.L.R. (3d) 677 (F.C. Trial D. 1977).

[789] [1979] 1 S.C.R. 101, 23 N.R. 159, 88 D.L.R. (3d) 462 (1978).

[790] *See* Jones, *No Expropriation Without Compensation: A Comment on Manitoba Fisheries Limited v. The Queen*, 24 McGILL L.J. 627 (1978).

[791] Regina v. Graham, [1978] 6 W.W.R. 48 (Sask. Q.B.).

[792] *Saskatchewan Wheat Pool*, *supra* note 594.

[793] Edmonton Mint Ltd. v. The Queen, 94 D.L.R. (3d) 312 (F.C. Trial D. 1978).

the discretionary and operational powers of the Crown. It appears that courts are unwilling to impose a duty on the Crown, forcing it to undertake a particular course of action, but may insist that any action undertaken by the Crown be performed in accordance with a duty of reasonable care. Thus it has been held that there could be no civil responsibility for a failure to pass safety regulations.[794] However, this test brought different results in a case where the court found a duty to restudy, redesign and improve a highway installation. Although the Crown could not be held liable for nonfeasance, the failure to replace the installation with a safer one was seen as misfeasance, falling within the operational sphere of Crown duties.[795] Here the court seems to be juggling both the planning/operational and the feasance/misfeasance dichotomies.

These distinctions were reviewed in three Federal Court cases where it was recognized that the question of Crown liability may involve considerations beyond those accounted for by private law notions such as "misfeasance" and "nonfeasance". In one case, a riparian owner sued the Crown for erosion damage caused to his land by increased spring navigation in the St. Lawrence River.[796] The court dismissed the claim, stating that the Crown could not be held responsible for shipbuilding trends and could certainly not be expected to prevent the resulting increase in early spring navigation. However, the plaintiff did recover on a second claim. In attempting to prevent further erosion, the Ministry of Public Works had voluntarily embarked on a course of action which resulted in further damage and was therefore held liable for this additional loss.

In a second case[797] the province of Prince Edward Island sued the federal Crown for breach of a statutory duty pursuant to an 1873 order in council. As a result of a strike, the Government of Canada had failed to operate a ferry service to the province for ten days. While the court found that the dispute was primarily political, and therefore not immediately amenable to resolution by adjudication, it held that the federal government was in breach of its statutory obligation. However, on the issue as to whether an intention should be ascribed to the order in council that the province is entitled to be compensated for damages, the court held that there had been evidence of agreement by the parties to settle the dispute judicially. Consequently, the cross-appeal of the province was allowed.

Finally, in a suit by Canadian Pacific Airlines for losses caused by the closing of federally owned and operated aerodromes because of a

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[794] Kwong v. The Queen, 14 A.R. 120, [1979] 2 W.W.R. 1, 96 D.L.R. (3d) 214 (C.A. 1978), *aff'd* [1979] 2 S.C.R. 1010, 29 N.R. 295, 105 D.L.R. (3d) 576.

[795] Malat v. Bjornson (No. 2), [1978] 5 W.W.R. 429, 6 C.C.L.T. 142 (B.C.S.C.).

[796] Rivard v. The Queen, [1979] 2 F.C. 345 (Trial D.).

[797] Regina v. The Queen in Right of the Province of P.E.I., [1978] 1 F.C. 533, 20 N.R. 91, 83 D.L.R. (3d) 492 (App. D. 1977).

legal strike of maintenance workers, the majority of the court held that the statutory duty imposed on the Minister of Transport to maintain government airports conferred no individual rights enforceable by an action. The duty owed was a general, public one and therefore the Minister was responsible only to Parliament.[798] However, in a separate opinion, Mr. Justice Heald found that the Minister was not in breach of a duty altogether. He refused to analyze the situation in the narrow context of a duty to maintain airport runways, but situated the Minister's responsibilities in the wider context of various government duties, including considerations of labour relations policy, the reasonableness of the strikers' claims on the public treasury and public safety.

### D. *Conclusion*

Various trends in the treatment by adjudication of claims involving the Crown have already been examined. Where the dispute involves Crown prerogatives or special statutory provisions, problems are most often raised with regard to the determination of status. Where the dispute can easily be assimilated to traditional categories of contract and property rights, such concepts are invoked without major modifications. However, where cases involve a general duty of care, the courts continue to be reluctant to make a decision regarding the proper priorities of the many competing responsibilities of government. Since two-party adjudication often does not allow for a full canvassing of all the issues at stake, claims in tort are viewed with suspicion and even today liability is not frequently imposed.

## V. SUBORDINATE LEGISLATION

As with proceedings involving the Crown, the general regime of administrative law is applicable to rule-making powers. However, because the validity and effect of subordinate legislation (*e.g.*, by-laws, regulations, orders in council) may depend on a variety of factors not already discussed in this survey, we shall treat this topic as a separate

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[798] Canadian Pac. Airlines Ltd. v. The Queen, [1979] 1 F.C. 39, 21 N.R. 340, 87 D.L.R. (3d) 511 (App. D. 1978).

aspect of administrative law.[799] Apart from constitutional constraints, courts are required to consider issues of procedure, scope, conflict with other statutes and justification in determining the validity of delegated legislation. Not surprisingly, therefore, the cases tend to revolve around issues of statutory construction.

A preliminary difficulty lies in determining exactly what constitutes subordinate legislation. In particular, it is necessary to distinguish subordinate legislation from mere administrative activity in the form of orders or directives; while the former must be published and is judicially enforceable, the latter need not be published and cannot confer enforceable legal rights. Thus in *Martineau*,[800] the Supreme Court of Canada held prison directives granting procedural rights not to be "law" within the meaning of section 28 of the Federal Court Act.[801] A similar result was reached where prison directives established substantive rights,[802] although in one case the Federal Court was prepared to consider standing orders of the R.C.M.P. as subordinate legislation.[803] It would appear that if directives are founded upon a specific statutory grant of power, they will be held to constitute subordinate legislation.[804] This will also be the case where authority to make a directive is itself to be found in a regulation.[805] Given the significant differences in legal consequences attaching to each category,[806] continued disputes about classification are likely.

### A. *Procedural Requirements*

Because subordinate legislation may establish legally enforceable duties, it is frequently the case that various procedural prerequisites, usually relating to the requirements of notice and hearing, are set out by

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[799] The following literature on this topic has appeared during the past two years: Garant & Grenier, *Réflexions sur l'acte reglementaire et quasi-reglementaire*, 17 CAHIERS 515 (1976); Janisch, *What is "Law"? — Directives of the Commissioner of Penitentiaries and Section 28 of the Federal Court Act — The Tip of the Iceberg of "Administrative Quasi-Legislation"*, 55 CAN. B. REV. 576 (1977); Brunner, *Judicial Review of Municipal By-Laws: Is there a Limitation Problem?*, 1 ADVOCATES QUARTERLY 71 (1977-78); Blache, *Du pouvoir de changer la loi par acte reglementaire statutaire*, 12 R. JUR. THÉMIS 371 (1977); Pépin, *Le pouvoir reglementaire et la charte de la langue française*, 13 R. JUR. THÉMIS 107 (1978); Borgeat, *La faute disciplinaire sous le code des professions*, 38 R. DU B. 3 (1978); Barbe, *La connaissance judiciaire des actes reglementaires*, 21 CAHIERS 427 (1980). *See also* G. PÉPIN & Y. OUELLETTE, *supra* note 39, at 56-100; D. MULLAN, RULE-MAKING HEARINGS: A GENERAL STATUTE FOR ONTARIO (1979).

[800] *Supra* note 299.

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

[802] *Magrath*, *supra* note 418.

[803] *Danch*, *supra* note 311.

[804] Rogers v. National Harbours Bd., [1979] 1 F.C. 90 (App. D.).

[805] *Association des Gens de l'Air*, *supra* note 71.

[806] *See Capital Cities Communications Inc.*, *supra* note 215.

the delegating statute. Failure to adhere to these formal prerequisites will render the resulting instruments invalid. For example, failure by a minister to serve notice of a land designation regulation upon owners within sixty days, as required by the enabling statute, resulted in the finding that the regulation was invalid.[807]

Nevertheless, there is generally no common law requirement to hold a hearing before making subordinate legislation. Two Ontario decisions have reaffirmed this principle, although both involved activity by ministers. In one case the Divisional Court held that a ministerial designation that certain land fell within a development control area need not be preceded by a hearing;[808] in the other, the High Court of Ontario reached a similar conclusion with respect to a regulation amalgamating land registry offices.[809] This principle, however, seems to be subject to the exception that where the regulation effects a specific determination and suggests that in reality a judicial determination is being made, a hearing will be required. Thus, a by-law was quashed where a municipal council, subsequent to the completion of public hearings, acted after listening to futher representations from a developer but not from opponents.[810] Much of the difference between the above cases lies in the particularity of the act in question and the resulting classification of the function performed. Presumably, however, since the adoption of the fairness principle, some manner of hearing may be generally required. A *mandamus* ordering a hearing prior to enactment of a general by-law had already been issued, although the case was also complicated by an allegation of bad faith.[811]

While in most provinces and at the federal level requirements of registration and publication are legislatively mandated, during the period of this survey no cases on these points were reported.

### B. *Substance of Subordinate Legislation*

As in the case of all administrative law matters, courts will review subordinate legislation on the basis that the instrument made is not authorized by the empowering act and is therefore invalid. Invalidity may arise because the wrong individual made the regulation, because it transgressed the terms of the statute or conflicted with other statutes, because it was passed for an improper purpose or because it infringed some principle of construction applicable to delegated legislation. Extensive litigation on each of these points has recently come before the courts.

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[807] *Prevost Invs. & Dev. Ltd.*, *supra* note 276.
[808] *Braeside Farms Ltd.*, *supra* note 148.
[809] *Durham*, *supra* note 244.
[810] *Re* Bourque, 6 B.C.L.R. 130, 87 D.L.R. (3d) 349 (C.A. 1978).
[811] *Campeau Corp.*, *supra* note 100.

1. *The Individual Authorized to Make Subordinate Legislation*

As a general principle it can be asserted that authority to make subordinate legislation cannot be implied. Nevertheless, as the Supreme Court of Ontario noted in *Capital Cities Communications Inc. v. C.R.T.C.*,[812] the absence of power to make subordinate legislation does not preclude an agency from issuing directives and policy rules. By contrast, where legislation requires a decision-maker to proceed by regulation he can neither issue directives,[813] nor attempt to act by other means such as requiring a contractual undertaking as a supplement to the regulation.[814] Subordinate legislation must, of course, be made by the person who is granted authority to do so.

In the context of delegated legislation, problems relating to the individual exercising power invariably arise as a result of an illegal subdelegation. Thus, in *Canadian Institute of Public Real Estate Companies v. City of Toronto*[815] it was held that the Council of the City of Toronto could not enact a by-law which passed on powers to an official in the same terms as the original statutory grant of power. Furthermore, it has been held that a portion of a regulation purporting to give a minister full discretion in a matter reserved to the regulation-making power of the Atomic Energy Control Board was an illegal delegation and therefore *ultra vires*.[816] Similarly, a regulation passed by the deputy head which established and provided for the possible extention of probationary periods of certain public servants was held to be partially *ultra vires* the enabling section in question.[817] Nevertheless, where a power to regulate can be traced directly, for example from Parliament to the Governor in Council under the Financial Administration Act[818] to the Postmaster General by Order in Council, subordinate legislation will be upheld.[819] In a curious case, *Lamoureux v. City of Beaconsfield*,[820] the Supreme Court of Canada also decided that a partial delegation by a municipality to its ratepayers of the power to approve by-laws would be invalid.

Other irregularities relating to the maker of subordinate legislation are less frequent. No cases involving illegal constitution, the maxim that he who decides must hear or bias have arisen, although in two connected

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[812] *Supra* note 215.

[813] Autobus Bob Boileau Inc. v. Autobus Drummondville Ltée., [1977] Que C.A. 329.

[814] Harrietsfield-Grandlake Community Ass'n v. Halifax, 26 N.S.R. (2d) 198, 40 A.P.R. 198, 6 M.P.L.R. 186, 87 D.L.R. (3d) 208 (C.A. 1978).

[815] *Supra* note 59.

[816] *Clark*, *supra* note 58.

[817] The Queen v. Quimet, [1979] 1 F.C. 55, 21 N.R. 247 (App. D 1978)

[818] R.S.C. 1970, c. F-10.

[819] Bartholomew Green 1751 Ass'n v. Attorney General of Canada, [1978] 2 F.C 391 (Trial D.).

[820] *Supra* note 63.

disputes an allegation of dictation was pleaded unsuccessfully.[821] Usually these other issues are considered by courts as aspects of the scope of a regulation-making power.

2. *Scope*

Regulations can be attacked by a claim that they are substantively *ultra vires*. In determining the validity of such a claim, the courts will look to whether the subordinate legislation is inconsistent with or repugnant to the enabling statute. Thus, a rule of practice requiring a party to request reasons in writing within thirty days of the disposition of an appeal, enacted pursuant to a statutory provision enabling a tribunal to pass such rules of procedure, was held to be invalid because it was inconsistent with another provision in the statute which imposed a duty on the tribunal to give reasons upon a party's request.[822] In contrast, in *CKOY Ltd. v. The Queen*[823] a statutory provision giving the C.R.T.C. power to pass regulations to implement a policy of high programming standards was held to be wide enough to support a regulation prohibiting the broadcast of an interview without the interviewee's consent. The wording of the enabling provision, especially in view of a general "basket clause", was held to grant a broad regulatory discretion to the Commission.

During the period of this survey there have been several unsuccessful challenges to subordinate legislation. For example, in one case, where a lieutenant governor in council was authorized by statute to define "person in need" and to set eligibility standards for assistance, subordinate legislation restricting eligibility to "single persons" as defined by the regulations was held to be valid since the court found no duty to define "person in need" by purely mathematical criteria.[824] Similarly, regulations which exempted certain classes of processors from the licensing requirements of an act were held to be valid, not only because they were expressly authorized by the statute, but also because they accorded with the general purposes of the act, read as a whole.[825] In another case, an environmental regulation which added to the offences set out in the principal act was held not to be *ultra vires* since there was no repugnancy between the regulation and the statute, and also since it appeared that the act was only establishing minimum standards.[826] A regulation assessing tax on the basis of the previous year's production

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[821] *Barrie*, *supra* note 74; *Vespra*, *supra* note 75.

[822] *Alvarez*, *supra* note 277.

[823] [1979] 1 S.C.R. 2, 24 N.R. 254, 90 D.L.R. (3d) 1 (1978).

[824] *Re* Warwick, 21 O.R. (2d) 528, 91 D.L.R. (3d) 131 (C.A. 1978).

[825] Canbra Foods Ltd. v. Overwater, 7 A.R. 506, [1978] 1 W.W.R. 231, 84 D.L.R. (3d) 350 (C.A. 1977).

[826] Steetley Indus. Ltd. v. The Queen, 21 O.R. (2d) 44, 35 C.C.C. (2d) 553 (Div'l Ct. 1977).

revenue from minerals was held to be *intra vires* a land taxing statute and was not seen as a commodity tax.[827] Finally, a regulation which established areas within which policemen were required to reside was held to be valid; it was not inconsistent with the statutory provision authorizing regulation for the government of the force.[828]

Sometimes, however, regulations are struck down as being *ultra vires* the enabling statute. For example, where legislation empowered the governor in council to pass regulations prescribing time periods within which a board had to hear and decide, and another section of the act required the board to decide "forthwith", a regulation compelling the board to wait fifteen days before disposing of certain cases was held to be invalid as contrary to the enabling act.[829] Attacks on the scope of subordinate legislation seem to have been particularly successful in Quebec, although no general principles emerge from the decisions.[830]

A variation on the theme of *ultra vires* subordinate legislation arises when a regulation is impugned on the ground that it is in conflict with a statute other than its enabling act. However, courts are reluctant to find inconsistency when a regulation reasonably falls within the scope of the empowering statute; hence this ground is not frequently invoked successfully.[831] Usually the subordinate legislation will be "read down" or otherwise interpreted so as to avoid conflict.[832] Similarly, subordinate legislation is interpreted so as to avoid conflict with other subordinate legislation. For example, permission to run horseraces, pursuant to a land commission's regulations, was held not to exempt an applicant from relevant municipal by-laws.[833] The court found that the two sets of subordinate legislation could be read cumulatively, thereby avoiding any inconsistency. However, when a constitutional question is in issue, the courts are more circumspect. In one case the policy of the Benchers of British Columbia on advertising came into conflict with federal combines legislation.[834] Since the provincial legislation did not give the Benchers a specific power to restrain advertising, it was held that their activities in this area could not be "carved out" of federal jurisdiction; hence their regulation was declared invalid.

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[827] Granduc Mines Ltd. v. The Queen in Right of the Province of British Columbia, [1979] 1 W.W.R. 682, 94 D.L.R. (3d) 175 (B.C.S.C. 1978).

[828] *Re* Coates, 23 O.R. (2d) 568, 96 D.L.R. (3d) 560 (Div'l Ct. 1979).

[829] Stevens v. National Parole Bd., [1979] 2 F.C. 279 (Trial D.).

[830] *Cf.* Dorion v. Commission des Affaires Sociales, [1978] Que. C.S. 1069; Courielles v. Dionne, [1978] Que. C.S. 172.

[831] *E.g., Association des Gens de L'Air*, *supra* note 71. *See also Alvarez*, *supra* note 277; *Phillips*, *supra* note 214.

[832] *E.g., Bell Canada*, *supra* note 191.

[833] *Re* Meadow Creek Farms Ltd., 89 D.L.R. (3d) 47 (B.C.C.A. 1978).

[834] *Jabour*, *supra* note 138.

### 3. *Unreasonableness, Discrimination, Uncertainty, Bad Faith, Improper Purpose*

Just as ordinary administrative activity may be set aside for reasons relating to the justification for a decision or for excess of jurisdiction, so too may delegated legislation be open to review on these bases. As a general principle, courts are reluctant to set aside regulations on the basis of bad faith or improper purpose. Nevertheless, an improper purpose was found in one case when a court set aside a regulation which attempted to create a transportation and utility corridor.[835] This regulation had been passed pursuant to an act the stated purposes of which involved environmental concerns. The court held that once the major purpose of the subordinate regulation was found not to meet the terms of the enabling act, the instrument could not be saved because it had a peripheral purpose which could be accommodated by the act. Bad faith, on the other hand, is more difficult to establish as a ground for review. Although unusual haste can be seen as evidence of bad faith,[836] in all cases where motivation is in issue the courts continue to treat subordinate legislation as presumptively valid.[837]

In construing the powers given by statute to determine the validity of subordinate legislation, the court presumes that the legislature's intent was reasonable. Thus, except in certain cases respecting municipal by-laws, unreasonableness is not a ground for review. Sometimes, however, as in *Bell v. The Queen*,[838] a by-law will be set aside for unreasonableness. In that case the use of certain buildings was restricted to single families, with the result that adults not related by blood or marriage were prohibited from sharing accommodations. While the by-law was set aside on grounds of unreasonableness, the court could well have determined that it was enacted for an improper purpose. Occasionally, rather than finding a reasonable construction for a by-law, courts will determine that the wording is too vague or uncertain. Such wording may lead to unreasonable orders and consequently the by-law concerned will be set aside. In these cases the by-law is effectively being held not to constitute legislation, but rather to attribute discretion invalidly.[839]

Another significant ground of review, especially in municipal matters, arises where a by-law is totally prohibitive. Courts have consistently held that the power to regulate does not encompass the power to prohibit.[840] However, when an alleged prohibition is *de facto*

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[835] *Heppner*, *supra* note 242.

[836] *E.g.*, *H.G. Winton Ltd.*, *supra* note 240.

[837] *E.g.*, *Re* City of Vancouver Licence By-Law 4957, 5 B.C.L.R. 193, 83 D.L.R. (3d) 236 (C.A. 1978).

[838] *Supra* note 246.

[839] *E.g.*, Campeau Corp. v. City of Ottawa, 22 O.R. (2d) 40, 92 D.L.R. (3d) 413 (Div'l Ct. 1978); *see also Blaiklock Bros.*, *supra* note 246.

[840] *Re* Try-San Int'l, 83 D.L.R. (3d) 236 (B.C.C.A. 1978).

prohibitive though not juridical, the by-law will not be quashed if it is otherwise reasonable. Thus, a by-law respecting pollution is not prohibitive even though certain types of diesel motors cannot conform to it. [841] Similarly, an argument that a business would fail if it had to meet by-law requirements was not held to be evidence that a prohibitive by-law was being enacted. For example, a city which prescribed dress regulations for massage parlour employees and charged high licensing fees was found to be lawfully regulating and not prohibiting a business.[842]

Subordinate legislation is also open to attack on the basis that it is discriminatory or applies unequally to various classes of persons; however, this ground is not often successfully pleaded. A law society regulation prohibiting former judges from practising in certain courts for five years was not found to be discriminatory in this regard.[843] Courts have consistently held, especially with respect to zoning by-laws, that mere differential treatment does not lead to invalidity since there is always an element of discrimination in regulation.[844]

Finally, instruments may be construed so as not to offend acquired rights.[845] Of continuing interest is the presumption that subordinate legislation will not have retroactive effect.[846] In one case, a court ordered a reconsideration of a penalty imposed by a disciplinary committee on the ground that all but one of the alleged offences had occurred before the relevant regulation had come into effect.[847] However, an express statutory authorization to enact retroactive subordinate legislation coupled with a clear statement that a regulation does have retroactive effect will override this presumption.[848]

### C. *Effect of Invalidity, Reviewing Subordinate Legislation*

The normal effect of finding subordinate legislation to be inconsistent with the enabling statute is invalidation. However, subordinate legislation that is not inconsistent with the enabling act but that restricts the discretion granted by the act is not invalid; it is only inoperative to the

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[841] Compagnie Miron Ltd. v. Communauté Urbaine de Montréal, [1978] Que. C.S. 1004.

[842] Cal Invs. Ltd. v. City of Winnipeg, 6 M.P.L.R. 31, 84 D.L.R. (3d) 699 (Man C.A. 1978); *accord* Moffat v. City of Edmonton, 12 A.R. 418, 5 Alta. L.R. (2d) 174, 84 D.L.R. (3d) 705 (Dist. C. 1978), *aff'd* 15 A.R. 530, 9 Alta. L.R. (2d) 79, 99 D.L.R. (3d) 101 (C.A. 1979).

[843] *Pichette*, *supra* note 194.

[844] *E.g.*, Horseshoe Valley Ltd. v. Township of Medonte, 16 O.R (2d) 709, 79 D.L.R. (3d) 156 (H.C. 1977).

[845] Regina v. Engler, 12 A.R. 194, [1978] 6 W.W.R. 230, 93 D.L.R. (3d) 526 (C.A.).

[846] Brasserie Ratafin Inc. v. Ville de Montréal, [1978] Que. C.S. 777

[847] *Re* Yat Tung Tse, 18 O.R. (2d) 546, 83 D.L.R. (3d) 249 (Div'l Ct. 1978)

[848] *Re* George Sebok Real Estate Ltd., 21 O.R. (2d) 761 (C.A. 1978).

extent that it is *ultra vires*.[849] In an important decision, *Emms v. The Queen*,[850] the Supreme Court of Canada held that once a court declares a regulation to be invalid, such a ruling is *res judicata* and binds future courts. This seems to convert the declaration into a proceeding *in rem*, although it does parallel the effect of an application to quash municipal by-laws.[851]

Another common effect of a finding that a regulation is invalid is a response from the legislature. Thus, in one case where the court held regulations to be *ultra vires*,[852] the legislature subsequently amended the enabling act ratifying the impugned regulations and expressly expanding the board's powers. Usually such drastic measures are unnecessary since legislatures achieve the goal of minimizing review by making a regulatory power dependent only on the opinion of its maker as to its necessity.

### D. *Conclusion*

The justification for treating subordinate legislation separately from other aspects of this survey is found in the special nature of legislative instruments. Although the grounds for reviewing subordinate legislation are similar to those available for attacking other agency decisions, courts often treat the cases differently; dispute-settlement and rule-making are fundamentally distinctive processes. Moreover, in view of the continued relevance of the classification of function to the availability of certain remedies, and the existence of special procedures for challenging by-laws and regulations, the remedial aspects of the subject also merit separate treatment.

## VI. COMMISSIONS OF INQUIRY

One of the most significant recent developments in administrative law has been the increasing recourse by governments to commissions of inquiry, which may be labelled Royal Commissions, Public Inquiries or

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[849] Ciglen v. Law Soc'y of Upper Canada, 19 O.R. (2d) 335, 5 C.P.C. 286 (Div'l Ct. 1977), *aff'd* 5 C.P.C. 292 (C.A. 1978).

[850] [1979] 2 S.C.R. 1148, 29 N.R. 156, 102 D.L.R. (3d) 193.

[851] *See Lamoureux*, *supra* note 63.

[852] Apex Gen. Supplies Ltd. v. Board of Comm'rs of Public Utils., 26 N.S.R. (2d) 97, 40 A.P.R. 97, 86 D.L.R. (3d) 661 (C.A. 1978).

Investigatory and Recommendatory Commissions.[853] Not surprisingly, the proliferation of such inquiries has spawned greater interest in this form of administration[854] and has led to an increase in litigation respecting the various powers and procedures of inquiries. Several Royal Commissions seem to have attracted particular attention. The Commission of Inquiry into Certain Activities of the R.C.M.P.,[855] the Inquiry into the Confidentiality of Health Records in Ontario,[856] the Keable Inquiry,[857] the Quebec Police Commission Inquiry into Organized Crime, [858] the Royal Commission Inquiry into the Activities of Royal American Shows Inc.[859] and the Royal Commission on the Conduct of Waste Management Inc.[860] have each generated at least one reported judgment. During the period of this survey the focus of judicial review applications concerning inquiries has been fourfold, involving constitutional, substantive, procedural and remedial issues. While there is a

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[853] It is noteworthy that in previous surveys no separate treatment was given to commissions of inquiry. However, the frequency of inquiries now makes it possible to devote a distinct section to this theme. In addition to the judgments discussed in the text, *see also* the following cases reported during the interval between this survey and its predecessor: Landreville v. The Queen, [1977] 2 F.C. 726, 75 D.L.R. (3d) 380 (Trial D.); B. v. Department of Manpower & Immigration, [1975] F.C. 602, 60 D.L.R. (3d) 339 (Trial D.); *Re* Bortolotti & Ministry of Housing, 15 O.R. (2d) 617, 76 D.L.R. (3d) 408 (C.A. 1977); Reference *re* A Comm'n of Inquiry into the Police Dep't of the City of Charlottetown, 74 D.L.R. (3d) 422 (P.E.I.S.C. *in Banco* 1977); *Re* Royal Comm'n into Metropolitan Toronto Police Practices, 10 O.R. (2d) 113, 27 C.C.C. (2d) 31, 64 D.L.R. (3d) 477 (Div'l Ct. 1975); *Re* Royal Comm'n of Inquiry into the Activities of Royal Am. Shows Inc. (No. 2), 39 C.C.C. (2d) 28 (Alta. S.C. 1977).

[854] *See generally* LAW REFORM COMMISSION OF CANADA: COMMISSIONS OF INQUIRY, *supra* note 36 and REPORT 13: ADVISORY AND INVESTIGATORY COMMISSIONS (1979). Recent periodical literature includes: Berger, *The Mackenzie Valley Pipeline Inquiry*, 16 OSGOODE HALL L.J. 639 (1978); Crete, *L'enquête publique et les critères de contrôle judiciaire des fonctions exercées par les enquêteurs*, 19 C. DE D. 643 (1978); Crete, *L'enquête publique et le pouvoir de condamnation pour outrage au tribunal*, 19 C. DE D. 859 (1978); Henderson, *Abuse of Power by Royal Commissions*, L.S.U.C. SPECIAL LECTURES 1979, at 493; Molot, *supra* note 208, at 345-52; Proulx, *La protection du témoin contre l'auto-incrimination devant une commission d'enquête*, 39 R. DU B. 580 (1979). A comprehensive treatment of recent cases and articles as well as a critique of *Working Paper 17* may be found in Macdonald, *The Commission of Inquiry in the Perspective of Administrative Law*, 18 ALTA. L. REV. 366 (1980).

[855] *Copeland*, *supra* note 101; *Re* Comm'n of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, 44 C.C.C. (2d) 200, 94 D.L.R. (3d) 365 (Can. Comm'n Inquiry 1978).

[856] *Re* Inquiry into the Confidentiality of Health Records in Ontario, 24 O.R. (2d) 545, 98 D.L.R. (3d) 704 (C.A. 1979), *rev'g* 21 O.R. (2d) 402, 90 D.L.R. (3d) 576 (Div'l Ct. 1978). This decision was reversed by the Supreme Court of Canada in an unreported judgment rendered on 20 Oct. 1981.

[857] *Keable*, *supra* note 93, *modifying Re* Attorney General of Canada & Keable, 41 C.C.C. (2d) 452, 87 D.L.R. (3d) 667 (Que. C.A. 1978).

[858] Di Iorio v. Warden of the Montreal Jail, [1978] 1 S.C.R. 152, 8 N.R. 361, 35 C.R.N.S. 57, 73 D.L.R. (3d) 491 (1976); *Cotroni*, *supra* note 295; *Royal American Shows*, *supra* note 464; *C.B.C.*, *supra* note 92.

[859] *Royal American Shows*, *supra* note 464.

[860] *Royal Comm'n on Conduct of Waste Management Inc.*, *supra* note 622

certain overlap with topics already surveyed, the distinctive features of commissions of inquiry permit a separate, more detailed, treatment here. As Reid and David note: "Decisions on public inquiries must always be considered rather special in administrative law and may be of little general value."[861]

A. *Constitutional Questions*

Interestingly, the decisions raising problems of constitutionality have arisen exclusively from the activities of two Quebec inquiries: The Quebec Police Commission Inquiry into Organized Crime and the Keable Inquiry into the R.C.M.P. In *Di Iorio v. Warden of the Montreal Jail*[862] the Supreme Court of Canada upheld the power of the Quebec Police Commission to punish for contempt a witness who refused to testify when subpoenaed. This power was held not to trespass on federal jurisdiction over criminal law, although in *C.B.C. v. Quebec Police Commission*[863] the same Court refused the Commission the power to punish for contempt not committed in its presence. The latter power was found to be exclusively that of a superior court and hence, a provincial legislature could not confer such a power upon individuals not appointed in conformity with section 96 of the B.N.A. Act.[864]

In *Keable*[865] the same Court found constitutionally invalid several powers conferred on the Keable Commission. First, it held that while the Commission might lawfully investigate specific criminal conduct and allegations of wrongdoing by individual members of the R.C.M.P., it could not inquire into the management of the force generally. The former inquiries would fall within the "administration of justice in the Province" power set out in section 92(14) of the B.N.A. Act, but the latter investigation would involve an infringement of the powers of the federal Solicitor General and would therefore not fall within the powers delegable by the provincial legislature. Second, the Court held that the Solicitor General of Canada could not be compelled to testify before the Commission since this would in effect abridge the Crown prerogative against being compelled to submit to discovery; the rules of inter-governmental immunity mean that provincial legislation could not operate so as to take away this right of the federal Crown. Third, the Court held that the affidavit of the Solicitor General given pursuant to

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[861] *Supra* note 39, at 93.

[862] *Supra* note 858 (Pigeon, Dickson and Beetz JJ. wrote separate judgments supporting this position, while Laskin C.J.C. dissented).

[863] *Supra* note 92, at 627-47, 28 N.R. at 551-97, 48 C.C.C. (2d) at 298-313, 101 D.L.R. (3d) at 33-48 (Dickson J. would not go this far on the s. 96 issue).

[864] An interesting consequence of these two decisions seems to be that if a witness refuses to appear when subpoenaed he may not be cited for contempt, while if he appears but refuses to testify, the commission has authority to enforce its order through contempt proceedings.

[865] *Supra* note 93.

subsection 41(2) of the Federal Court Act would preclude the Commission from examining any documents mentioned therein. The term "any court" in this section was found to encompass Commissions or other bodies which have the power to compel the production of documents. In *obiter*, the Court also noted that even if there were a power to go behind a section 41 affidavit, this power could only be vested in a superior court. Since the Commission was a tribunal of limited jurisdiction and since the Commissioner was not appointed under section 96 of the B.N.A. Act, it was bound to accept the affidavit as submitted.

B. *Substantive Issues*

Most judicial review applications on substantive grounds during the period of this survey concerned evidentiary matters. For example, when asked to determine whether the principals of a corporation under investigation were compellable witnesses in any inquiry into its affairs, the court found that although the applicant could claim the protection of section 5 of the Canada Evidence Act,[866] this section did not encompass a privilege against self-incrimination.[867] In further litigation respecting the same inquiry the court held that the fact of a criminal acquittal on charges relating to the inquiry did not operate as *res judicata* and did not preclude the Commission from investigating these same matters.[868] The inquiry was found to be neither quasi-criminal nor quasi-judicial and consequently judicial jurisdiction to review the activities of the Commission was deemed to be strictly limited.

Two questions of evidentiary privilege also arose upon a stated case in the Health Records Inquiry.[869] First, the Ontario Court of Appeal held that the identities of police informers were not privileged unless certain conditions were met, and that therefore the police could be compelled to reveal such names to the Commission. Second, the court held that physicians and hospital employees who had earlier divulged confidential information about patients could not assert an evidentiary privilege to withhold this information from the Commission.

A continuing debate in the criminal law field centres on the question of the admissibility of illegally obtained evidence. In *Cotroni v. Quebec Police Commission*[870] the Supreme Court of Canada upheld the power of the Commission to take notice of and act upon such evidence, and declined to find that the Commission exceeded its jurisdiction in doing so. The Court noted that the Commission should not be characterized as performing a function analogous to a criminal trial.

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[866] R.S.C. 1970, c. E-10.
[867] *Royal American Shows*, *supra* note 464.
[868] *Anderson*, *supra* note 464.
[869] *Supra* note 856.
[870] *Supra* note 292.

Perhaps the most complete analysis of evidentiary questions is found in a statement by the McDonald Inquiry.[871] After noting the breadth of its powers, the Commission announced that it alone would decide whether to proceed *in camera* and whether the Solicitor General's representations on the issue of confidentiality would be heeded. The Commission also observed that the prohibitions set out in subsection 4(1) of the Official Secrets Act[872] were probably inapplicable to its processes. This conclusion may be contrasted with the finding by the Supreme Court of Canada in *Keable* that the Commission was bound by the provisions of that act.[873]

Two other substantive questions were raised in review applications brought against commissions of inquiry. First, in both *C.B.C. v. Quebec Police Commission*[874] and in *Keable*[875] the Supreme Court of Canada noted that a public inquiry, even when vested with "all the powers of a judge of the Superior Court in term", was not itself constituted as a superior court and hence could have no inherent or residual jurisdiction; rather, it might exercise only that power specifically given to it by its patent or by statute. In the former case this resulted in a denial of the power to punish for contempt not committed in the presence of the Commission, and in the latter case, a denial of a commission's power to decide the extent of its own jurisdiction. A final substantive issue was raised in *Cotroni*,[876] where the Supreme Court of Canada held that an inquiry could not cite the plaintiff for contempt merely because he gave "evasive replies". The Court held this charge to be too vague and consequently quashed the contempt citation. In other words, notwithstanding the extraordinary legal status of inquiries, the normal rules relating to the exercise of its criminal or quasi-criminal powers would be applicable.

### C. *Procedures of Commissions*

Many applications for review of inquiries raise important procedural questions relating to the rules of natural justice. On two occasions, the issue of standing to present evidence and participate in proceedings before a commission was considered. For example, the Ontario Divisional Court was asked, on a stated case, whether an unincorporated association of concerned citizens had status under subsection 5(1) of the Public Inquiries Act[877] to call and cross-examine witnesses. The court noted that this group had demonstrated an interest in the inquiry through

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[871] *R.C.M.P. Inquiry*, *supra* note 855.

[872] R.S.C. 1970, c. O-3.

[873] *Supra* note 93, at 250-51, 24 N.R. at 37-38, 43 C.C.C. (2d) at 74-75, 90 D.L.R. (3d) at 186-87.

[874] *Supra* note 92.

[875] *Supra* note 93.

[876] *Supra* note 292.

[877] *Now* R.S.O. 1980, c. 411.

its participation in earlier proceedings and therefore fell under the terms of subsection 5(1), even though it could not claim the benefits of subsection 5(2) of the statute (which sets out who is entitled to receive advance notice of a pending unfavourable inquiry report).[878]

Standing both before the commission and before the courts was also in issue in the *Health Records* case. Upon a motion by the Solicitor General of Canada to quash the appeal of The Canadian Civil Liberties Association on the basis that it had no standing to challenge the inquiry, the Court of Appeal declined to deny the Association status. It noted that the Association had been a full participant before the Commission under subsection 5(1) and had also appeared before the Divisional Court on this same application.[879]

A third case involved only standing to seek judicial review and did not concern the question of status before an inquiry. In a challenge to the R.C.M.P. Inquiry the court refused to permit a class action to be brought on behalf of the Law Union of Ontario, holding it to be merely a collection of individuals with no special interest in the proceedings of the Commission.[880]

This case did, however, raise an interesting procedural issue which required the court to characterize the legal nature of an inquiry and determine the applicability of the rules of natural justice thereto. After a lengthy analysis of prior decisions and the Commission's terms of reference, Cattanach J. came to the conclusion that the inquiry was not performing a quasi-judicial function and therefore the applicant's allegations of bias were irrelevant. Moreover, the court referred to several English cases on the theory of procedural fairness but decided that no claim on this basis could be sustained. A similar approach to characterization can be found in *Cotroni*,[881] and in the *Royal American Shows Inquiry* case[882] where other courts held that the internal procedures, and the modes of examination of witnesses undertaken by commissions need not follow the rules of natural justice. These three decisions may be of less authority today, however, in view of the adoption of the procedural fairness principle by the Supreme Court of Canada.

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[878] *Supra* note 622.
[879] *Supra* note 856.
[880] *Copeland*, *supra* note 101.
[881] *Supra* note 292.
[882] *Anderson*, *supra* note 464.

D. *Remedies*

A final series of issues worthy of note in the various cases on inquiries relates to judicial review remedies.[883] In *Keable*,[884] *Di Iorio*[885] and *Cotroni*[886] the availability of evocation against the proceedings of an inquiry was expressly accepted, and in the *C.B.C.* case[887] it was assumed. This Quebec equivalent of *certiorari* was held to be appropriate to question the power to cite for contempt or to compel a witness to testify, both held to be quasi-judicial acts, even though in the latter three cases a privative clause restricted review to jurisdictional errors. Similar reasoning as to the availability of *certiorari* was advanced in the two cases involving the Royal American Shows Inquiry,[888] where the court decided that it had jurisdiction to review where an inquiry report is susceptible of affecting rights, where it wrongly impairs liberty or goods, where there is constitutional *ultra vires* or where there is statutory *ultra vires*.

Interestingly, however, while courts generally do not seem troubled by the classification of function exercise in so far as the availability of prohibition and *certiorari* are concerned, in the challenge to the R.C.M.P. inquiry the applicability of the rules of natural justice was denied precisely on this basis.[889] Ultimately, the best solution to these remedial problems may be the enactment of a procedure similar to that set out in section 6 of the Ontario Act, which permits a case to be stated to the court on any question of law.[890]

E. *Conclusion*

The present theory of commissions of inquiry sees them as a supplement to the three traditional branches of government, performing investigatory and/or recommendatory functions. While traditional principles of judicial review may always be invoked to control substantive and procedural aspects of inquiries, these remedies are manifestly insufficient if a sophisticated supervision of commissions is to be asserted. The *Law Reform Commission Report 17*,[891] which proposes a new federal Inquiries Act, should serve to open debate on the role of this ubiquitous institution.

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[883] In all decisions reviewed, except *Health Records* and *Waste Management* (which involved stated cases), traditional judicial review remedies were sought.

[884] *Supra* note 93.

[885] *Supra* note 858.

[886] *Supra* note 292.

[887] *Supra* note 92.

[888] *Supra* note 464.

[889] *Supra* note 855.

[890] *See* the Public Inquiries Act, R.S.O. 1980, c. 411.

[891] COMMISSIONS OF INQUIRY, *supra* note 36.

## VII. OMBUDSMAN STATUTES

As of 1 January 1980 every Canadian province but Prince Edward Island had enacted an ombudsman statute.[892] While the most interesting developments in this aspect of administrative law are, of course, those which occur in the office of the ombudsman,[893] during the period of this survey the courts were twice required to determine the precise scope of a particular ombudsman's jurisdiction,[894] an issue which had previously been raised in the courts on three occasions.[895]

In one case, an order of prohibition was sought to prevent the Saskatchewan ombudsman from inquiring into the manner in which a police commission conducted an investigation of a complaint.[896] The court concluded that while the ombudsman did perform a judicial function (section 22 of the statute permitted him to compel the production of documents and to subpoena witnesses) and was thus amenable to prohibition, in this case he was acting within his jurisdiction as set out in section 12 of the Ombudsman Act. [897] Nevertheless, the jurisdiction of the ombudsman was limited to an investigation of the specific complaint and did not include the power to inquire into the activities of the board generally. Concomitantly, persons subpoenaed before the ombudsman could only be required to give evidence respecting their participation in the matter complained of and not as to their powers and duties in the ordinary course of their functions. In so defining the ombudsman's

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[892] Ombudsman statutes include: R.S.A. 1970, c. 268; S.B.C. 1977, c. 58; R.S.M. 1970, c. O-45; R.S.N.B. 1973, c. 0-5; S.N. 1970, c. 3; R.S.O. 1980, c. 325; S.Q. 1977, c. P-32; R.S.S. 1978, c. 0-4. For recent examinations and justifications of ombudsman schemes, *see* Nyman, *British Columbia's Proposed Labour Ombudsman*, 4 QUEEN'S L.J. 3 (1978); Tremblay, *Une contribution positive a la protection des droits individuels: L'institution de l'Ombudsman au Canada*, 20 C. DE D. 525 (1979); Garant, *Le protecteur du citoyen et le droit administratif*, in ASPECTS OF ANGLO-CANADIAN AND QUEBEC ADMINISTRATIVE LAW, *supra* note 37, at 26; Friedmann, *The Ombudsman in Nova Scotia and Newfoundland*, 5 DALHOUSIE L.J. 471 (1979); Maloney, *The Ombudsman Idea*, 13 U.B.C.L. REV. 380 (1979). The articles by Tremblay and Friedmann contain extensive bibliographies.

[893] For statistical analyses of the work of ombudsmen, *see* in particular Friedmann, *id.*

[894] *Board of Police Comm'rs*, *supra* note 464; *Re* Ombudsman for Ontario, 23 O.R. (2d) 485, 95 D.L.R. (3d) 716 (H.C. 1978), *aff'd* 26 O.R. (2d) 105, 104 D.L.R. (3d) 597 (C.A. 1979). It should be noted that the precise scope of this jurisdiction varies from province to province.

[895] *See Re* Alberta Ombudsman Act, 72 W.W.R. 176, 10 D.L.R. (3d) 47 (Alta. S.C. 1970); *Re* Ombudsman for Saskatchewan, [1974] 5 W.W.R. 176, 46 D.L.R. (3d) 452 (Sask. Q.B.); Ombudsman for Nova Scotia v. Sydney Steel Corp., 17 N.S.R. (2d) 361 (C.A. 1976).

[896] *Board of Police Comm'rs*, *supra* note 464.

[897] S.S. 1972, c. 87, *as amended*.

jurisdiction, the court followed the lead of the Supreme Court of Canada in delimiting the jurisdiction of a commission of inquiry.[898]

In the other case both the Divisional Court and the Court of Appeal of Ontario sustained the power of the ombudsman to inquire into a decision of the Health Disciplines Board of Ontario.[899] In a lengthy judgment the Court of Appeal first established that the Board was a governmental organization. Although counsel attempted to argue that the Board, as a semi-independent body, was not subject to the ombudsman's jurisdiction, the court rejected this argument by noting that the Board was established by a provincial statute, that its members were appointed by the Lieutenant-Governor in Council, and that it discharged a provincially assumed regulatory responsibility, in the course of which it was required to apply provincial law. The court then rejected counsel's submission that legislative, judicial and quasi-judicial functions were not contemplated by the expression "in the course of the administration of a government organization", by which the ombudsman's jurisdiction was defined. It concluded: "I think that the most reasonable approach to 'administrative' . . . is to regard it as a compendious description of the wide range of governmental activity carried on by bodies other than the Legislature or the regular Courts."[900] Finally, the court analyzed the meaning of the exhaustive clause set out in paragraph 15(4)(*a*) of the Ombudsman Act. This section suspends the ombudsman's jurisdiction where there is a right of appeal or objection on the merits of the case until that right of appeal or objection has been exercised or has expired. The court correctly pointed out that an application for judicial review under the Judicial Review Procedure Act[901] does not constitute a review on the merits and therefore the ombudsman would have jurisdiction to investigate, even though an application for judicial review might also lie.

Both these decisions are significant for the future of ombudsman schemes in that they preserve the extensive investigatory jurisdiction granted to ombudsmen: the former confirms jurisdiction over delegated decision-makers, the latter upholds jurisdiction with respect to semi-independent regulatory agencies. Moreover, the Ontario judgment illustrates, through its proper reading of the exhaustion provisions of subsection 15(4), an appreciation of the juridical structure of the office of ombudsman.

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[898] *See Keable*, *supra* note 93, at 239-44, 24 N.R. at 27-31, 43 C.C.C. (2d) at 66-69, 90 D.L.R. (3d) at 178-81.

[899] *Ombudsman for Ontario*, *supra* note 894.

[900] *Id.* at 123, 104 D.L.R. (3d) at 615.

[901] *Now* R.S.O. 1980, c. 224.

## VIII. Domestic Tribunals and Consensual Arbitrations

On the periphery of what has been traditionally characterized as administrative law lies a large body of doctrine and cases relating to domestic tribunals.[902] In modern society there will be numerous occasions when individuals may wish to challenge the activity of tribunals not deriving their legal existence from statute, regulation or prerogative. While any extensive discussion of judicial review of private decision-makers is beyond the scope of this survey,[903] at several points the connection between public and domestic tribunals becomes so close that only a pedant would seek to exclude the latter from the subject of administrative law. This distinction is particularly tenuous in two cases: university decisions and consensual arbitrations. In most Canadian jurisdictions the statutory character of universities has exposed them to traditional doctrines of administrative law, and consequently these cases have been treated as forming an integral part of the survey.[904] However, consensual arbitrations, whether they are purely contractual or quasi-contractual as in certain labour relations contexts, still lie on the frontiers of administrative law. Hence, the more important of these cases will be treated here as an independent aspect of administrative law.

Applications for judicial review of arbitral awards have posed difficult threshold questions for courts. Upon an appeal under the Arbitrations Act[905] the Alberta Court of Appeal was asked to set aside an award because members of the Arbitration Board failed to answer the issue put to them, answered a question not put to them and also failed to sign the award properly.[906] The court expressed a reluctance to intervene because the parties had chosen the forum and submitted to the jurisdiction of the arbitrators. Moreover, on the substance of the application the court found no merit in the first two allegations, and also held that the failure of one of the three arbitrators to sign the award was not fatal, there being other proof of his assent and the agreement in question providing that a majority decision was sufficient.

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[902] In the previous survey this body of law was footnoted but not discussed in detail. *See* Molot, *supra* note 1, 7 Ottawa L. Rev. at 516 (1975).

[903] For an excellent review of this topic, *see* Forbes, *Judicial Review of the Private Decision-Maker: The Domestic Tribunal*, 14 Western Ont. L. Rev. 123 (1977). *See also* Wex, *Natural Justice and Self-Regulating Voluntary Associations*, 18 McGill L.J. 262 (1972).

[904] Recent periodical literature includes: Mullan, *Comment on King v. University of Saskatchewan*, 49 Can. B. Rev. 624 (1971); Fridman, *Judicial Intervention into University Affairs*, 21 Chitty's L.J. 181 (1973); McConnell, *The Errant Professoriate. An Inquiry into Academic Due Process*, 37 Sask. L. Rev. 250 (1972-73); Mullan, *The Modern Law of Tenure*, in The University and the Law 102 (H. Janisch ed. 1975); Ricquier, *supra* note 703.

[905] R.S.A. 1970, c. 21.

[906] Zwirner v. University of Calgary Bd. of Governors, 6 A.R. 271, 4 Alta. L.R. (2d) 31, 79 D.L.R. (3d) 81 (C.A. 1977).

In certain labour relations contexts, conflicts in jurisdiction are frequent. For example, in one case a union impugned a grievance arbitration taken by another union against the common employer on the ground that the employee was a member of the former union's bargaining unit.[907] The court held that even if the arbitrator had no jurisdiction, and even if this rendered the award void, *certiorari* would not lie against consensual arbitration. The court did not distinguish this case on the ground that the complaining party, not being a party to the arbitration, could not be said to have submitted to the jurisdiction. The general proposition that *certiorari* does not lie against a consensual arbitration is often reiterated although in many cases an "order in the nature of *certiorari*" is issued by the courts.[908]

The more difficult problem facing the courts is to determine whether or not the impugned arbitration was consensual. For example, in one instance it was held that although the relevant labour relations statute made arbitration of disputes mandatory, the arbitration was consensual because the parties had voluntarily submitted a specific question of law to an arbitrator for determination.[909] The Supreme Court of Canada dealt at length with this problem in *Volvo Canada Ltd.*[910] A majority found that because the arbitration arose out of a regular grievance procedure, the parties could not be said to have chosen the forum so that the arbitration was not consensual. However, there was a split in this majority as to whether a referral of a specific question of law to such a board would make the arbitration consensual. A minority of judges held that once the parties agreed on the arbitrator and the question, the arbitration was consensual and therefore only reviewable on the non-jurisdictional ground of error of law on the face of the record.

Courts are also continuing to find that an arbitration tribunal will not be a statutory tribunal if the labour legislation in question provides for settlement of disputes "by arbitration or otherwise".[911] A review of this area of law is found in the dissenting judgment in the Supreme Court of Canada case of *Douglas 109 Aircraft Co. of Canada Ltd. v. McDonnell*[912] (the majority did not disapprove the dissent but focussed on other issues). Estey J. characterized labour arbitration boards on the basis of the relevant statutes rather than that of the collective agreements. If the legislation makes arbitration mandatory, the arbitration is statutory, as in Ontario. If there is no such legislative direction, the arbitration is consensual, as in British Columbia. If an arbitration is consensual, it is vitiated only by fraud, error of law on the face of the record, or by going beyond the area of the constitutive agreement. If it is

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[907] *Re* Pitre, 20 N.B.R. (2d) 196, 34 A.P.R. 196, 84 D.L.R. (3d) 55 (C.A. 1977).

[908] *Major Holdings & Devs. Ltd.*, *supra* note 520.

[909] *Re* Hunter Rose Co., 24 O.R. (2d) 608, 79 C.L.L.C. 14,219, 99 D.L.R. (3d) 566 (C.A. 1979).

[910] *Supra* note 446.

[911] Motorways (Quebec) Ltd. v. Brunet, [1978] Que. C.S. 716.

[912] [1980] 1 S.C.R. 245, 29 N.R. 109, 94 D.L.R. (3d) 385 (1979).

consensual and a specific question of law is referred, then there is no review for error of law on the face of the record. However, if the arbitration is statutory, the parties have never agreed to oust the jurisdiction of the courts, and the decision is reviewable on normal considerations.

There are two reasons for concluding this survey with consensual arbitrations. First, this topic illustrates the fact that the frontiers of administrative law are contiguous with the more traditional areas of private law. Second, it serves as a reminder that judicial adjudication is only one method of settling disputes; the desire to erect separate specialized jurisdictions, which is characteristic of administrative law, also has a nongovernmental analogue. Both reflect the growing perception that the usual distinction between public and private law may indeed reflect a false dichotomy.

## IX. Conclusion

Little can be added by way of conclusion that has not already been canvassed explicitly or by implication earlier in the survey. Yet one main theme bears repeating: just as judicial review judgments themselves are framed in terms which do not do justice to the complex factual underlay of administrative decision-making, surveys also tend to eviscerate this branch of the law. The questionable assumption of uniformity in doctrine and judicial decision is what makes it possible to talk of a subject called administrative law. It is also what permits us to ignore what actually happens in administrative tribunals. The paradox of all facile generalizations is that they can be simultaneously true and not true. The paradox of this survey of administrative law is that it reveals that there is no one subject of that name.