ANNUAL SURVEY OF CANADIAN LAW
PART 2
ADMINISTRATIVE LAW

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I. INTRODUCTION

Until relatively recently little work had been done in administrative law as a discrete and identifiable subject of study.[1] This past year's outstanding contribution to administrative law in Canada must be the publication of a three-volume report by an Ontario Royal Commission on its Inquiry into Civil Rights, more popularly known as the McRuer Report. This survey cannot hope to test the premises, conclusions and recommendations of the Royal Commission, a task that the press and learned journals are already fulfilling,[2] but it can adumbrate for readers the sheer scope of the commission's work and some of the immediate benefits this report by its publication alone

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[1] Two older British works are W. ROBSON, JUSTICE AND ADMINISTRATIVE LAW (3d ed. 1951) and REPORT OF THE COMM. ON MINISTER'S POWERS, CMND. 4060 (1932), known as the DONOUGHMORE REPORT. These have been supplemented in recent years by H. WADE, ADMINISTRATIVE LAW (2d ed. 1967); S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (2d ed. 1968); J. GRIFFITH & H. STREET, PRINCIPLES OF ADMINISTRATIVE LAW (3d ed. 1963); J. GARNER, ADMINISTRATIVE LAW (2d ed. 1967); D. FOULKES, INTRODUCTION TO ADMINISTRATIVE LAW (2d ed. 1968); O. PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW (4th ed. 1967); D. BENJAFIELD & H. WHITMORE, PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW (3d ed. 1966); A. RUBINSTEIN, JURISDICTION AND ILLEGALITY, A STUDY IN PUBLIC LAW (1965); C. ALLEN, LAW AND ORDERS (3d ed. 1965); R. DUSSAULT, LE CONTRÔLE JUDICAIRE DE L'ADMINISTRATION AU QUEBÉC (1969) which contains, at 445-62, an excellent bibliography; K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965). There are now many leading Canadian articles which may be referred to: Millward, *Judicial Review of Administrative Authorities in Canada*, 39 CAN. B. REV. 351 (1961); Willis, *Administrative Law in Canada*, 39 CAN. B. REV. 251 (1961); Hendry, *Some Problems on Canadian Administrative Law*, 2 OTTAWA L. REV. 71 (1968); McAllister, *Administrative Law*, 6 CAN. B.J. 439 (1963); Woods, *Judicial Review of the Proceedings of Administrative Tribunals in Saskatchewan*, in CONTEMPORARY PROBLEMS OF PUBLIC LAW IN CANADA 90 (O. LANG ed. 1968); UPPER CAN. L. SOC'Y SPEC. LECTURES: RECENT DEVELOPMENTS IN THE LAW: *Administrative Law* (1967) and Dussault, *Judicial Review of Administrative Action in Quebec: Criteria and Scope*, 45 CAN. B. REV. 35 (1967). *The Canadian Abridgement* and the Western edition of *Canadian Encyclopedic Digest* as well as the *Digest of Ontario Law* now deal with administrative law as a separate subject heading. It should also be noted that, in contrast to the English Digests the *Australian Digest, Australian Current Law* and *Abridgement of New Zealand Case Law* analyze the subject under one comprehensive title.

[2] *E.g.*, Willis, *The McRuer Report: Lawyers' Values and Civil Servants' Values*, 18 U. TORONTO L.J. 351 (1968).

has conferred upon those interested in the administrative process. Apart from what may be found in the second volume of the report which investigates the courts and the administration of justice in Ontario, of more marked interest are the other two volumes that are dedicated to a scrutiny, generally, of the exercise of powers and duties within the administrative process and, more particularly, of expropriation and licensing procedures, the role of self-governing professions and occupations, the powers wielded under the Family Benefits Act [3] and the various enactments relating to the mentally ill and mental hospitals. The first occupies the whole of volume one and offers to Canadians a reasonably clear exposition of the governing principles of administrative law and the constitutional bases of these principles. The operative rules are treated at some length in order to dwell upon both their substantive and procedural framework, the roles and consequences of judicial review and subordinate legislation and investigatory powers. The commission advances beyond this purely expositive position to identify what it believes are present deficiencies, to draw upon the experiences of Britain and the United States and finally to synthesize and make recommendations. The specific illustrations of the exercise of "special powers" which the report then looks at confer inestimable benefits upon those interested in these areas; the analyses of statutes and regulations detailed at length in the report and its appendices cannot but ease the task of the lawyer faced with a lack of uniformity among the various pieces of legislation and their maze of conflicting procedures and norms.

The text that follows makes no pretence at formulating exhaustively the principles of administrative law. The survey intended, rather, is one of the applicable case law, statutes and writings on the subject during the past year. Space limitation does not permit of the critical and profound analysis which one would expect of a treatise.

II. ULTRA VIRES [4]

As the authority of every administrative tribunal is to be found in its constitutive instrument, the same fountainhead has the capacity to limit the powers which such a tribunal may exercise. The courts, therefore, identify the most salient means of control over these bodies with the doctrine of ultra vires which simply questions whether these bodies had the jurisdiction to do what they have purported to do.

A tribunal, on constitutional grounds, may lack the authority ever to have become seised of a matter: a provincial labour relations board [5] cannot act upon a set of facts that, under the British North America Act, [6] is deemed

[3] Ont. Stat. 1966 c. 54.

[4] A. RUBINSTEIN, JURISDICTION AND ILLEGALITY, A STUDY IN PUBLIC LAW (1965).

[5] Regina v. Nova Scotia Lab. Rel. Bd., 68 D.L.R.2d 613. (N.S. Sup. Ct. 1968); *cf.* Invictus Ltd. v. Manitoba Lab. Bd., 62 W.W.R. (n.s.) 150, 65 D.L.R.2d 517 (Man. Q.B. 1967); Coughlin v. Ontario Hwy. Transp. Bd., [1968] Sup. Ct. 569, 68 D.L.R.2d 384.

[6] 30 & 31 Vict., c. 3 (1867).

to fall within the exclusive purview of the legislative jurisdiction of the Dominion and its Industrial Relations and Dispute Investigations Act.[7]

Similar to the futile efforts of an administrative body to base itself and its powers on an unconstitutional statute is the attempt by a tribunal to rely on a statute no longer in existence. In *Re Jang Sue Yee*[8] the applicant, convicted of an offence under the Narcotic Control Act[9] and ordered to be deported as a person falling under section 19(1)(d) of the Immigration Act,[10] argued that the latter act referred only to the Opium and Narcotic Drug Act[11] and this statute had been repealed. The majority of the court were able to rely on the federal Interpretation Act[12] in order to sustain the power exercised by the special inquiry officer, but there can be no doubt that had the dissenting opinion prevailed the pertinent provision of the abrogated statute would have remained unpreserved and the basis for this person's exercise of authority left utterly destroyed. Again, if a tribunal purports to operate under or apply invalid statutory regulations, everything transacted by it in reliance upon that subordinate legislation can have no effect. Such a consequence has had its complement of examples in 1968;[13] this subject will be treated later in this survey.

The instrument upon which jurisdiction is founded may well be valid. This leads to the question of whether the tribunal's purported exercise of power is within the authority actually conferred upon it: Does the scope of that jurisdiction given that tribunal reach the matters which it purports to pass upon, or is that exercise wholly dependent upon the presence of other circumstances which themselves lie beyond the limits of what it exclusively may decide? To determine how an issue is to be characterized requires an investigation of the tribunal's instrument of authority, be it statute, regulation, collective agreement; but the boundary between what lies within and what falls outside jurisdiction is difficult to draw. During the past year, for example, some vital questions confronting labour boards to which applications for certification were made were: whether the proposed unit contained "employees" within the statute's definition,[14] whether the employees were already bound by a valid and subsisting collective agreement,[15] whether they were

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[7] CAN. REV. STAT. c. 152 (1952).

[8] 64 W.W.R. (n.s.) 23, 68 D.L.R.2d 137 (B.C. 1968).

[9] Can. Stat. 1960-61 c. 35.

[10] CAN. REV. STAT. c. 325 (1952).

[11] CAN. REV. STAT. c. 201 (1952).

[12] CAN. REV. STAT. c. 158, § 20(*b*) (1952).

[13] *E.g.*, North Coast Air Services Ltd. v. Canadian Transp. Comm'n, [1968] Sup. Ct. 940, 69 D.L.R.2d 425; Pharmaceutical Soc'y of Great Britain v. Dickson, [1968] 3 W.L.R. 286, [1968] 2 All E.R. 686 (H.L.).

[14] Midland Superior Express Ltd. v. Truckers, Local 362, 63 W.W.R. (n.s.) 53, 66 D.L.R.2d 639 (Alta. 1968).

[15] Regina v. Ontario Lab. Rel. Bd., [1968] 1 Ont. 313, 66 D.L.R.2d 323 (High Ct.), *aff'd on this point*, [1968] 2 Ont. 269, 68 D.L.R.2d 706. Notice of discontinuance in Supreme Court of Canada filed October 18, 1968. *Re* Lodum Holdings Ltd., 67 W.W.R. (n.s.) 38, 3 D.L.R.3d 41 (B.C. Sup. Ct. 1968).

really members of the trade union,[16] whether a still outstanding certificate covered the employees for whom the applicant sought certification[17] and whether an applicant had provided the documentation stipulated by the legislation.[18] In other areas, the courts have had to determine who was to decide whether an "offence" within the rules of the Canadian Trotting Association had been committed so as to permit the judges to redistribute winnings,[19] and whether on an application for a liquor licence the population of the municipality in question did or did not exceed 1,200.[20] These cases were held to involve matters which fell within the jurisdiction of the tribunal to decide, regardless of their having been ones of fact[21] or of law[22] on which it may have come to debatably incorrect conclusions. Vitally important to this characterization will be any general statutory language which, in seeking to expand upon specific powers given a tribunal, causes that exclusive jurisdiction to expand and attain larger bounds.[23]

The same issue attends the board of arbitration constituted under a collective agreement, for although legislation may grant wide powers of decision to this body,[24] a court must ultimately decide whether the board's act which is being called into question falls to it exclusively for decision, or is one collateral or preliminary to that jurisdiction and hence open to judicial challenge. So, where the board's decision rested on the construction of a collective agreement and was one which its language could readily bear, the courts would not attribute to the arbitrators any absence of jurisdiction.[25] On the other hand, the arbitration board's conclusions might have been conditioned on a response it had first to give to a preliminary issue but in which by flying directly in the face of the agreement's language it was clearly in

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[16] Board of Indus. Rel. of Alberta v. Stedelbauer Chevrolet Oldsmobile Ltd., [1969] Sup. Ct. 137, 65 W.W.R. (n.s.) 344, 1 D.L.R.3d 81 (1968); Regina v. Ontario Lab. Rel. Bd., [1968] 2 Ont. 37, 68 D.L.R.2d 109 (High Ct.), *appeal dismissed*, [1968] 1 Ont. 412, 2 D.L.R.3d 652, leave to appeal to Supreme Court of Canada granted from Court of Appeal January 13, 1969.

[17] Commission des rel. de travail du Que. v. Canadian Ingersoll-Rand Co., [1968] Sup. Ct. 695, 1 D.L.R.3d 417.

[18] Komo Constr. Inc. v. Commission des rel. de travail du Que., [1968] Sup. Ct. 172, 1 D.L.R.3d 125 (1967).

[19] Regina v. Jerry, [1969] 1 Ont. 85, 1 D.L.R.3d 436 (High Ct. 1968).

[20] Regina v. Liquor Licensing Comm. (Sask.), 1 D.L.R.3d 448 (Sask. Q.B. 1968), *appeal dismissed*, 70 W.W.R. (n.s.) 316 (Sask. 1969).

[21] *E.g.*, Regina v. Ontario Lab. Rel. Bd., [1968] 1 Ont. 313, 66 D.L.R.2d 324 (High Ct.) and Regina v. Liquor Licensing Comm'n (Sask.), 1 D.L.R.3d 448 (Sask. Q.B. 1968).

[22] *E.g.*, Regina v. Ontario Lab. Rel. Bd., [1968] 2 Ont. 37, 68 D.L.R.2d 109 (High Ct.), *appeal dismissed*, 68 Can. Lab. L. Cas. 11,744, ¶ 14,150 (Ont. 1968) leave to appeal to Supreme Court of Canada by Court of Appeal granted January 13, 1969; Midland Superior Express Ltd. v. Truckers, Local 362, 63 W.W.R. (n.s.) 53, 66 D.L.R.2d 639 (Alta. 1968).

[23] *E.g.*, Regina v. Ontario Lab. Rel. Bd., *supra* note 22 and Regina v. Liquor Licensing Comm'n (Sask.), 1 D.L.R.3d 448 (Sask. Q.B. 1968).

[24] *E.g.*, Labour Relations Act, ONT. REV. STAT. c. 202, § 34 (1960).

[25] International Ass'n of Machinists v. Hudson Bay Mining & Smelting Co., [1968] Sup. Ct. 113, 62 W.W.R. (n.s.) 559 (1967); Regina v. Fuller, [1968] 2 Ont. 564, 70 D.L.R.2d 108.

error. With power only to interpret this constitutive instrument a board attempting to amend its contents has exceeded its authority;[26] moreover, the courts speak of excess of jurisdiction even where the tribunal has merely had resort to extrinsic evidence as an aid to the interpretation of the agreement.[27]

The issue on which a tribunal's jurisdiction has faltered might be very substantive and yet subsequent to the assumption of this jurisdiction, a collateral issue,[28] such as whether under a collective agreement a particular employee holding a specific position was legally capable of performing the work given him by his employer, may be raised.[29] A more anterior question is whether there has been any failure to establish the presence of certain preliminary conditions to the tribunal's jurisdiction to act. Could the levy by a workmen's compensation board against an employer who had failed to comply with "directions of the Board or . . . regulations made under this Act" stand in the absence of such "directions" or "regulations"?[30] Could a certificate issued by the Alberta Board of Industrial Relations exist at all in the face of a vote amongst employees not authorized by statute?[31] Was a rezoning by-law valid if a legislatively required public hearing had not first been held?[32] On an application for certification, had the Ontario Labour Relations Board properly and in accordance with statutory demands first determined the specific date on which trade union membership was to be ascertained?[33] Had the tribunal, in accordance with a regulation under the Immigration Act, properly informed the subject of the inquiry of his right to counsel,[34] and did a person's crime involve "moral turpitude" so as to bring him within one of the prohibited classes of section 5 of the Immigration Act?[35] Equally valid preliminary issues have permitted a court to question the decision of a tribunal improperly constituted under its statutory charter:[36]

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[26] International Chemical Workers, Local 161 v. Krever, 68 Can. Lab. L. Cas. 11, 478, ¶ 14,086 (Ont. High Ct. 1968). *See also* Regina v. Fine, [1968] 2 Ont. 490, at 492-93, 69 D.L.R.2d 625, at 627-28 (High Ct.).

[27] Regina v. Barber, [1968] 2 Ont. 245, 68 D.L.R.2d 682; Regina v. Reville, [1968] 2 Ont. 92, 68 D.L.R.2d 213 (High Ct.). See *infra* at p. 467.

[28] *Re* Lodum Holdings Ltd., 67 W.W.R. (n.s.) 38, 3 D.L.R.3d 41 (B.C. Sup. Ct. 1968).

It was argued that this was not really a viable issue, but such a view is firmly rebutted in Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 W.L.R. 163, at 170, 191-92, 206, [1969] 1 All E.R. 208, at 213-14, 233, 246 (H.L.).

[29] International Chemical Workers, Local 161 v. Krever, 68 Can. Lab. L. Cas. 11, 478, ¶ 14,086 (Ont. High Ct. 1968). *See also* Anisminic Ltd. v. Foreign Compensation Comm'n, *supra* note 28.

[30] Foster Wheeler Ltd. v. Workmen's Compensation Bd., 66 W.W.R. (n.s.) 79, 70 D.L.R.2d 313 (Alta. 1968).

[31] Driver Salesmen, Local 987 v. Board of Indus. Rel., 61 W.W.R. (n.s.) 484 (Alta. Sup. Ct. Chambers 1967).

[32] McMartin v. Vancouver, 65 W.W.R. (n.s.) 385, 70 D.L.R.2d 38 (B.C. 1968).

[33] Regina v. Ontario Lab. Rel. Bd., [1967] 2 Ont. 469, 64 D.L.R.2d 117.

[34] *Re* Kokorinis, 62 D.L.R.2d 438, [1968] 1 Can. Crim. Cas. Ann. (n.s.) 151 (B.C. 1967).

[35] Turpin v. Minister of Manpower & Immigration, 3 Can. Crim. (n.s.) 330, at 343-52 (Imm. App. Bd. 1968).

[36] Regina v. Weiler, [1968] 1 Ont. 705, 67 D.L.R.2d 484, *aff'd*, 4 D.L.R.3d 449 (Sup. Ct. 1969).

to ask whether the applicant was one over whom the agency had any jurisdiction at all, [37] and to overturn administrative acts that proceeded upon defective procedures not of a purely directory nature, such as the requirement that a copy of the complaint giving rise to the hearing as well as notice of the hearing itself be served on the applicant, [38] or that a grievance be filed within the time stipulated by the collective agreement. [39]

The provisions of the Canadian Immigration Act would appear to have led the Ontario and British Columbia Courts of Appeal to reach conflicting results with respect to how exclusive is the authority of a tribunal to decide whether the status of a person applying for admission to Canada is to be characterized under section 19 or 7(3). In the British Columbia case, [40] the appellant was temporarily in Canada as a non-immigrant; instead of returning to China as originally intimated and while still in Canada, he applied for admission as an immigrant. Shortly thereafter, he was arrested under the act and subjected to an inquiry by a special inquiry officer under section 19 which authorizes such a tribunal to deport a person falling within any of the paragraphs of that provision. On the other hand, section 7(3) deems a person falling within its ambit as one "seeking admission to Canada," a status that entitles him to be processed under provisions other than section 19. Who then has the authority to ascertain the fundamental question of whether a person falls within section 7(3) or 19? The court found that it lay with the special inquiry officer who, despite a person's application for admission to the country, retained his jurisdiction to determine whether that person fell within section 19 and hence is subject to deportation. Three months later, the Ontario court [41] had to consider a similar case, concerning one who had entered Canada as a visitor only and while here applied for permanent admission. Again it was argued that a special inquiry officer had jurisdiction to hold a hearing under section 19, and, upon finding that the subject of this hearing fell within its provisions and despite the presence of section 7(3), he could then deport that person. The argument failed and, therefore, whether section 19 might or might not be prima facie applicable, a special inquiry officer could not ignore a person's changed status under the act and claim exclusive jurisdiction over the questions of what status that person held and consequently under which provision of the act he fell. Neither case was referred to in the later case. [42]

In contrast to these cases of the preliminary or collateral issue funda-

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[37] Regina v. Institute of Chartered Accountants, [1968] 2 Ont. 691, 70 D.L.R.2d 366.

[38] Maskall v. Chiropractors' Ass'n (B.C.), 62 W.W.R. (n.s.) 129 (B.C. Sup. Ct. 1967).

[39] Union Carbide Canada Ltd. v. Weiler, [1968] Sup. Ct. 966, 70 D.L.R.2d 333.

[40] *Re* Ho Kit Cheung, 62 W.W.R. (n.s.) 667, 67 D.L.R.2d 181 (B.C. 1968). *See also Re* Koressis, 63 W.W.R. (n.s.) 566 (B.C. Sup. Ct. 1968).

[41] Regina v. Pringle, [1968] 2 Ont. 129, 68 D.L.R.2d 290.

[42] Turpin v. Minister of Manpower & Immigration, 3 Can. Crim. (n.s.) 330, at 333-35 (Imm. App. Bd. 1968).

mental to a tribunal's jurisdiction is a problem that arose last year [43] involving an essential element that existed at the date of the tribunal's decision but subsequently vanished, leaving that decision without the necessary foundation. In 1964, the applicant, whose conviction on one count was upheld by the provincial Court of Appeal, was disbarred by the Law Society of British Columbia under a provision of the Legal Professions Act [44] which permitted such a procedure "upon proof that a member of the Society has been convicted of an indictable offence." After the applicant was released from prison in 1965, the Supreme Court of Canada quashed this conviction and thereby vitiated entirely the very foundation of the Law Society's act. Although this basis did exist in 1964, and hence its action then did not fail for want of jurisdiction, still something akin to a defeasible interest did qualify that decision so long as the applicant's right to appeal continued and consequently when that conviction disappeared and the act of defeasance occurred to destroy the condition of the Law Society's disbarment, the applicant was "entitled *ex debito justitiae* to be restored to the rolls." [45]

III. NATURAL JUSTICE

As comprehensive analyses are to be found in the treatises, articles and McRuer Report, no extensive discussion of this subject is necessary. But the cases referred to below will bring out many of the salient features of natural justice and, moreover, will identify certain tendencies toward an expansion of their application.

It is at this point that the distinctions among the legislative, ministerial, administrative, discretionary and judicial functions of a tribunal have taken on some importance. [46] The rules of natural justice are said to apply only to a judicial or quasi-judicial power and thus one must necessarily first identify that power correctly before attempting to bring them to bear, a process that more often than not has led to the circular reasoning of a determination of whether the rules of natural justice have, or should be, applied in these circumstances [47] as the basis for discovering a quasi-judicial function in a case. This same question of function has acted to rein in the applicability of certiorari and prohibition, remedies not to be given where the tribunal is exercising powers not quasi-judicial in nature. The most important decision of recent years on this problem has been *Ridge v. Baldwin* [48] in which Lord

[43] Law Soc'y of British Columbia v. MacKrow, 64 W.W.R. (n.s.) 550, 68 D.L.R.2d 179 (B.C. 1968).

[44] B.C. REV. STAT. c. 214 (1960).

[45] *Supra* note 43, at 557, 68 D.L.R.2d at 185.

[46] See Hendry, *Some Problems on Canadian Administrative Law*, 2 OTTAWA L. REV. 71, at 75-77, 83-84 (1968); Dussault, *Relationship Between the Nature of the Acts of the Administration and Judicial Review: Quebec and Canada*, 10 CAN. PUB. ADM. 298 (1967); S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION ch. 2 (2d ed. 1968).

[47] 1 ROYAL COMM'N INQUIRY INTO CIVIL RIGHTS, REPORT No. 1, at 139 (Ontario 1968). [Hereinafter cited as the McRUER REPORT].

[48] [1964] A.C. 40 (1963).

Reid analyzed earlier authority to find that "quasi-judicial," though difficult to define, had a far wider meaning than evidenced by such cases as *Nakkuda Ali v. Jayaratne*[49] and that the capacity for intervention by the courts was less confined than these cases would have led us to believe.[50] Of particular note is the express agreement given lately to Lord Reid's speech by Chief Justice Barwick of the Australian High Court.[51]

Something was made of these functional distinctions last year shortly before an English Divisional Court underscored the wide latitude to be given to the concept of the quasi-judicial function.[52] An Industrial Inquiry Commission established under the federal Industrial Relations and Disputes Investigation Act[53] to inquire into labour disputes at three Quebec ports held investigations and then simply reported its findings to the minister. In helping to formulate and create law, it was acting more in a legislative, than a quasi-judicial, capacity.[54] Similarly, an attempt by a solicitor, who was served with a notice to produce his books of account for inspection by the Law Society, to argue that the tribunal of inspection was executing a quasi-judicial function was overruled on the ground that this tribunal decided nothing but only carried out an inquiry to determine whether there was prima facie evidence upon which the Law Society could then proceed to act.[55] This case relied on *Wiseman v. Borneman*[56] where again the tribunal's only task was to ascertain whether or not there was "a prima facie case for proceeding in the matter" and not to make any final determination of the rights of the parties involved. A municipal council considering a landowner's application for a development permit is acting quasi-judicially,[57] whereas the council proceeding to amend a zoning by-law is acting in a legislative capacity.[58] Lastly,

[49] [1951] A.C. 66 (P.C. 1950).

[50] See discussions of H. WADE, ADMINISTRATIVE LAW 120-25, 168-87 (2d ed. 1967); 1 MCRUER REPORT 138-44; S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 137-67 (1968).

[51] Banks v. Transp. Regulation Bd., [1968] Austl. Argus L.R. 445, at 451 (High Ct.). *Cf.* Durayappah v. Fernando, [1967] 2 A.C. 337, at 348-49 and Schmidt v. Secretary of State for Home Affairs, [1969] 2 W.L.R. 337, at 350 (C.A. 1968) where Lord Denning, M.R. relied on Ridge v. Baldwin, [1964] A.C. 40 (1963) to conclude that the distinction between "an administrative power and . . . a judicial act" is "no longer valid" but that whether a person is entitled to have the precepts of natural justice observed "depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

[52] Regina v. Criminal Inquiries Compensation Tribunal, [1967] 2 Q.B. 864. *But see* Regina v. Royal Institution for the Advancement of Learning, 2 D.L.R.3d 129 (Qué. 1968) where apparently the provisions of arts. 33 and 846 of the Code of Civil Procedure of Quebec led the court to conclude that there was nothing quasi-judicial about a university discipline committee established under charter and statute.

[53] CAN. REV. STAT. c. 152, § 56 (1952).

[54] Regina v. Picard, 65 D.L.R.2d 658 (Que. 1967).

[55] Parry-Jones v. Law Society, [1968] Ch. 195, [1968] 2 W.L.R. 397, [1968] 1 All E.R. 177 (C.A. 1967).

[56] [1968] Ch. 429, [1968] 2 W.L.R. 320, [1967] 3 All E.R. 1045 (C.A. 1967), *aff'd* on other grounds, [1969] 3 All E.R. 274 (H.L. 1969).

[57] Michie v. M.D. of Rocky View, 64 W.W.R. (n.s.) 178 (Alta. Sup. Ct. 1968).

[58] McMartin v. Vancouver, 65 W.W.R. (n.s.) 385, 70 D.L.R.2d 38 (B.C. 1968) (per McFarlane and Robertson, J.J.A.).

the receiving of an information by a magistrate under section 439 of the Criminal Code is a ministerial, not judicial act.[59] One might also note here that the illogical distinction between "right" and "privilege" occasionally drawn to deny a quasi-judicial role to one who is deciding whether to suspend or revoke a licence granted under some legislative scheme[60] has been dealt a grievous blow by the *Banks* decision[61] and the Canadian case of *Hlookoff v. Vancouver*,[62] which recognized the vested interest and proprietary quality a licence once granted then assumed.

1. *Bias*

This, the first branch of natural justice, is indisputably implicit in the very nature of the judicial function: to be an impartial and disinterested arbiter of the issues involved. This has led the courts to impugn the authority of not only one who is adjudicating upon matters in which he has a direct interest, but also one who has any real likelihood of bias. As might have been anticipated, it is the latter which more often offers support to an aggrieved individual, a result confirmed by a survey of last year's cases. Moreover, the strictures to which the administrative official exercising his quasi-judicial function is subjected have been stated to be analogous to those binding the purely judicial officer and, therefore, in three cases the conduct of Exchequer Court judges and provincial magistrates was tested in accordance with the same standards devolving upon tribunals, and administrative law cases were cited as authority. However, where Exchequer Court judges were empowered by the Canada Shipping Act[63] to hear an appeal from the decision of a commissioner investigating the collision of two ships and then private actions arising out of this same accident were commenced in the same court, any judge sitting upon the earlier appeal was held not to be disqualified from trying the private actions.[64] To find bias in such a case would be tantamount, it was believed, to a wholesale impugnment of the judicial process itself and of the duty undertaken by a judge to express his conclusions only upon the evidence adduced in the case at bar. President Jackett, therefore, found it unreasonable that without any evidence upon which to make such an inference there should be any apprehension of " 'a real likelihood' that a judge will be so derelict in his duty as to decide one case in whole or in part on the evidence heard in an earlier case."[65] Again, a magistrate was not disqualified from trying an accused whom he had prosecuted for the Crown

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[59] Regina v. Read, 1 D.L.R.3d 118 (Alta. 1968).

[60] *E.g.*, Regina v. Metropolitan Police Comm'r, [1953] 1 W.L.R. 1150 (Q.B.).

[61] [1968] Austl. Argus L.R. 445. See Note, *Administrative Law—Revocation of Licence*, 42 AUSTL. L.J. 261 (1968) and Trew, *The Circular Fiction of Natural Justice*, 1 N.Z.L.J. 18 (1969).

[62] 63 W.W.R. (n.s.) 129, 67 D.L.R.2d 119 (B.C. Sup. Ct. 1968).

[63] CAN. REV. STAT. c. 29 (1952).

[64] Nord-Deutsche Versicherungs Gesellschaft v. The Queen, [1968] 1 Can. Exch. 443.

[65] *Id.* at 457.

twelve years earlier,[66] or of whom in the course of proceedings it was reported that he was under investigation for a different crime in another province.[67]

However applicable to judicial officers the principles derived from the cases of administrative tribunals may be, of greater significance for this survey are the fact situations in which these latter bodies have been found to be biased. When may a real likelihood of bias be said to have been present and how within the confines of administrative law are we to interpret this phrase? In *Regina v. Board of Arbitration*,[68] the decision of a non-statutory board of arbitration was challenged because its chairman had acted earlier as chairman of the Board of Referees under the Unemployment Insurance Act[69] which, for the purposes of the benefits available thereunder, had decided exactly the same issues that were now the subject of the grievance procedures. In both hearings, the one matter in issue was whether employees of the applicant had been dismissed for just cause. On the basis of the *Nord-Deutsche Versicherungs Gesellschaft v. The Queen*[70] one might have concluded that the motion to quash the board's decision should have failed, but it must be recalled that that decision contemplated only the position of a court of law, a distinction underscored in the reference made by the court to a statement in De Smith's treatise that it was "remarkable that the superior courts should have expressly declined to adopt . . . for themselves" the rule applied to tribunals that "a man is likely to be biased in favour of his own previous decision. . . ."[71] Consequently and in contrast to the magnanimous opinion courts have of themselves, it was found that the chairman of this arbitration board before which the charges and evidence were "in essence" and "in substance" the same as those before the earlier Board of Referees could "hardly be expected to exclude from his mind and give fair consideration to whatever evidence or argument was presented to the board of arbitration,"[72] and so he must be considered to have been tainted by legal bias. On the other hand, in *Regina v. Walker*,[73] where it was argued that the magistrate because of his past association with one of the parties to the proceedings had some interest in their subject-matter, may be compared with *Regina v. Picard*,[74] where the special commissioner had been retained as a consulting economist by a company which controlled one of the parties before the commission more than one year previous to his appointment as commissioner. Both held that no real likelihood of bias was to be found. In *Picard*, Mr. Justice Hyde discussed

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[66] Regina v. Walker, 63 W.W.R. (n.s.) 381 (Alta. 1968).

[67] Horbas v. Reginam, 63 W.W.R. (n.s.) 157 (Man. Q.B. 1968) *aff'd*, *id.* at 384 (Man. 1968).

[68] 67 D.L.R.2d 135 (N.S. 1968).

[69] Can. Stat. 1955 c. 50.

[70] [1968] 1 Can. Exch. 443.

[71] S. De Smith, Judicial Review of Administrative Action 147 (1959) and *id.* at 242 (2d ed. 1968).

[72] *Id.* at 149 (1959).

[73] 63 W.W.R. (n.s.) 381 (Alta. 1968).

[74] 65 D.L.R.2d 658 (Que. 1967).

the issue of the assumption of the commissioner's quasi-judicial function and then took the very pragmatic tack of recognizing that governments must draw on the very same group of persons upon whom the private sector depends for advice and consultation, a response which might not so easily have been made if this retainer had been less remote in time. [75]

The legislative scheme may establish its own standards in this area. In *Picard*, a provision that prohibited the appointment of a conciliator who, within the preceding six months, had acted for any of the parties, offered some guideline of what Parliament would have expected of a commissioner appointed under different sections of the act. Similarly, a bencher of the Law Society of Alberta, who was chairman of its Discipline Committee which investigated and reported to the benchers upon the complaint against the applicant and then sat with them in convocation at the hearing and final disposition of the case, could not be accused of bias when statutory rules of the society authorized this very procedure. [76]

The most important case on bias last year was an English one [77] in which a rent assessment committee under the Rent Act 1965 [78] heard an appeal in respect of the rents for Oakwood Court and reached a figure considered startlingly low by the landlords. It appeared that the committee's chairman, a solicitor, lived with his parents in a flat in Regency Lodge situated in a different registration area but owned by a company belonging to the same group with which the landlords of Oakwood Court were associated. After his appointment to the committee in May 1966 but before the hearing in question, he had acted for the tenants of Regency Lodge, including his father, in the matter of fair rents for their flats under the act. This earlier dispute, directed against the very group of companies of which the landlords appealing to his committee were members, had lasted from August, 1966, until a few days before the hearing in question. When that committee fixed a very low rent, the landlords alleged bias and moved to quash its decision. The Court of Appeal found that the chairman had no direct pecuniary interest in the subject-matter of the case and no actual bias. On the issue of whether a real likelihood of bias existed, the court had to bridge a chasm that over the years had apparently opened between the classical statement of Lord Hewart that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" [79] and the more recent tendency to require the presence of a "real likelihood" of bias, not merely a reasonable suspicion, based on the

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[75] *See* Metropolitan Properties Co. v. Lannon, [1969] 1 Q.B. 577, [1968] 3 W.L.R. 694, [1968] 3 All E.R. 304 (C.A. 1968) and S. v. P., [1968] Que. B.R. 896 where ten years had transpired between the two different hearings at both of which the applicant was disbarred and the same Bar Council member was present.

[76] Regina v. Law Soc'y of Alberta, 64 D.L.R.2d 140 (Alta. 1967).

[77] Metropolitan Properties Co. v. Lannon, *supra* note 75. See Notes, *Bias—A Question of Appearance or Reality*, 85 L.Q.R. 23 (1969) and *Natural Justice—Likelihood of Bias*, 43 AUSTL. L.J. 71 (1969).

[78] Rent Act 1965, c. 75.

[79] The King v. Sussex Justices, [1924] 1 K.B. 256, at 259.

objective opinion of the reviewing court upon the evidence before it. The court opted for the former and refused to countenance a decision where "there is a *reasonable* suspicion of bias on the part of one or more members of the adjudicating body." [80] The question, therefore, is not whether there was a real likelihood that such a person would, or did, favour one side at the other's expense or whether he was fair. Rather, the court must look "at the impression which would be given to other people. Even if he was as impartial as he could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit." [81]

This de-emphasis of the impression produced on the court learning of the circumstances in favour of the reasonable suspicion produced in right-minded, reasonable members of the public recognizes the appearance of injustice to which Lord Hewart referred. The revitalization of this higher standard also seems to lie behind the decision in *Magee v. Cookson.* [82] Here, the court issued an order of prohibition against the chief of Regina's police who, as disciplinarian of members of his force, attempted to subject to such proceedings a member who had advised persons of the public of their rights against a superintendent of the force who had subjected them to criminal attacks. No disciplinary or criminal action had been commenced against the latter, but rather the chief of police proceeded only against the applicant whom he had also advised beforehand to resign. The court too made reference to the principles of likelihood of bias and the appearance of justice as the basis for its finding that the partiality of the respondent concluded the issue of bias in the applicant's favour.

2. *Audi Alteram Partem*

The second branch of natural justice gives a court the opportunity to examine the procedural framework in which the tribunal exercised its powers. The duty to give a fair hearing, inherent in the judicial process and described as one "lying upon every one who decides anything," [83] has also been imported into the administrative process. That transposition, however, remains incomplete and consequently open to the inquiry of which of its aspects can claim reliance on this right to a fair hearing. If, as it is necessary to do, this administrative process must try to adapt the incidents of this right to its own particular setting, the procedures a party can successfully demand of a court may not always qualify as ones available before a tribunal. *When* is the right of *audi alteram partem* applicable to administrative hearings, and *how*

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[80] Metropolitan Properties Co. v. Lannon, [1969] 1 Q.B. 577, at 606, [1968] 3 W.L.R. 694, at 713, [1968] 3 All E.R. 304, at 314 (C.A.) (per Davies, L.J.) (his emphasis in W.L.R. only).

[81] *Id.* at 599, [1968] 3 W.L.R. at 707, [1968] 3 All E.R. at 310 (per Lord Denning, M.R.).

[82] 65 W.W.R. (n.s.) 321 (Sask. Q.B. 1968).

[83] Board of Education v. Rice, [1911] A.C. 179, at 182.

is it to be defined are difficult questions, more fully discussed elsewhere.[84] Because the first has already been made the subject of some comment, the remainder of this sub-section will deal with the cases that have grappled with the manner in which the rule is to be given substance when once found applicable.

The most common elements of *audi alteram partem* define a party's right to appear before, and be heard by, the tribunal and its concomitant, the right to be notified of that agency's proceedings. Thus, failure to give a party any notice at all has been held to be a breach of the rules of natural justice.[85] And yet, some notice indeed may have been given. Where the line should be drawn between notice which contains sufficient particulars and notice which fails to give enough information is a difficult one to discern. In *Posluns v. Toronto Stock Exchange*,[86] although the appellant was fully informed of the transactions which the exchange disapproved and which were to be the subject of a hearing before it, the notice indicated that the case of another, and not his own, was to be heard on the stated date. This defective notice to the appellant was only cured by a second, full re-hearing of the matter, but the result might certainly have been otherwise had he been given inadequate notice of the subsequent review proceedings at which his penalty then was increased.[87] Then again, it must be realized that the rules of natural justice may be statutorily modified: legislation could lighten the procedural burden placed upon a tribunal, for example, by setting forth the precise method by which notice was to be served on a party whether he actually received it or not;[88] or it might prescribe requirements perhaps more onerous than those of the common law. This happened in one recent case where a notice informing the applicant of the charges against him was by itself held insufficient to satisfy the statutory definition of the rule that a copy of the complaint upon which the tribunal's investigations were to be based "shall" be sent "to the person against whom it is made."[89]

A person's right to be heard could be confined to the obligation of the tribunal to permit him to state his side of the case but no more. The failure even to allow him this "opportunity to present his version and explanation of any such allegations"[90] is, without more, a breach of this principle of natural

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[84] *E.g.*, 1 McRUER REPORT 137-44; H. WADE, ADMINISTRATIVE LAW 168-98 (2d ed. 1967); S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION chs. 2, 4, 5 (2d ed. 1968).

[85] Hoogendoorn v. Greening Metal Prods. & Screening Equip. Co., [1968] Sup. Ct. 30, 65 D.L.R.2d 119 (1967); Hlookoff v. Vancouver, 63 W.W.R. (n.s.) 129, 67 D.L.R.2d 119 (B.C. Sup. Ct. 1968); Michie v. M.D. of Rocky View, 64 W.W.R. (n.s.) 178 (Alta. Sup. Ct. 1968).

[86] [1968] Sup. Ct. 330, 67 D.L.R.2d 165.

[87] Nicholson v. New Zealand Kennel Club Inc., [1968] N.Z.L.R. 529 (Wellington Sup. Ct.).

[88] Brodsky Constr. Ltd. v. International Union of Operating Engineers, 61 W.W.R. (n.s.) 53, 63 D.L.R.2d 621 (Sask. 1967).

[89] Maskall v. Chiropractors' Ass'n, 62 W.W.R. (n.s.) 129 (B.C. Sup. Ct. 1967).

[90] Posluns v. Toronto Stock Exchange, [1968] Sup. Ct. 330, at 337, 67 D.L.R.2d 165, at 170-71.

justice.[91] But how such a formula is to be interpreted in any particular case and whether it is universally applicable may again depend on procedures provided by statute.[92] Then too, as we have already seen, an improper hearing, however defined, may well have been validated by a subsequent reconsideration of the whole matter at which the otherwise injured party has been given this proper opportunity to present his case.[93] Nevertheless, this still leaves unresolved the question of composition of the "opportunity" and what constitutes a full and fair hearing.

Must a party always have the opportunity to present his case orally, or will a written submission suffice?[94] In *Quebec Labour Relations Board v. Canadian Ingersoll-Rand Co.*,[95] the respondent had purchased another company where the employees were already represented by a certified trade union. When a second union sought to become the bargaining agent for the employees whom it claimed remained unrepresented; the respondent balked. The respondent sent the appellant its written objections and the union replied in kind. Having before it only these written arguments and the results of its own inquiries, the board granted certification. To the contention that the board had failed to hold a proper hearing, the Supreme Court replied that *audi alteram partem* does not imply that there must always be an oral hearing but only an opportunity to present a party's case. Such an opportunity, in the form of written argument, had been accorded to the parties; there was nothing to indicate that the company's objections to certification of the union had not been as capably presented in writing as they would have been in a full hearing. The Court cited as authority one of its own prior decisions,[96] in which an application for a certificate had been met by the company's petition for its dismissal on the lone ground that certain documentation was missing. The Board, again without a hearing, granted the certificate. When the absence of a hearing was raised before the Court, the Court responded that a hearing is not always necessary so long as the parties are able to present argument. Since only a question of law was in dispute and it would not be desirable "to impose a code of procedure upon an entity which the law has sought to make master of its own procedure," the board had neither abused its discretion nor breached the rules of natural justice.

Three matters should be noted here. First, the latter case, and by implication the *Ingersoll-Rand* case also, followed *Forest Industrial Relations Ltd. v. International Union of Operating Engineers Local 882*[97] where, unlike

[91] *Re* Premier Trust Co., [1968] 2 Ont. 774, at 777, 70 D.L.R.2d 572, at 575 (High Ct.) *rev'd* on another point, [1969] 1 Ont. 625, 3 D.L.R.3d 417, leave to appeal to Supreme Court of Canada granted March 31, 1969.

[92] *Re* Cohen, 64 D.L.R.2d 238 (Alta. 1967).

[93] Posluns v. Toronto Stock Exchange, [1968] Sup. Ct. 330, 67 D.L.R.2d 165.

[94] Pett v. Greyhound Racing Ass'n, [1969] 1 Q.B. 125, at 131, [1968] 2 W.L.R. 1471, at 1476, [1968] 2 All E.R. 545, at 550 (C.A.) (per Lord Denning, M.R.) and S. De Smith, Judicial Review of Administrative Action 188-89 (2d ed. 1968).

[95] [1968] Sup. Ct. 695, 1 D.L.R.3d 417.

[96] Komo Constr. Inc. v. Commission des rels. de travail du Québec, [1968] Sup. Ct. 172, 1 D.L.R.3d 125 (1967).

[97] [1962] Sup. Ct. 80 (1961).

the two which purported to rely on it, an oral hearing and a view had both been held and subsequent written submissions were only supplementary. Nevertheless, this case did anticipate the significance of having such a board master of its own procedures, including the kind of hearing it might give by the specific reference it made to provisions of the British Columbia Labour Relations Act [98] which expressly conferred this power upon it. If statute or regulation had been relied upon as authorizing this absolute control of internal procedures of the Quebec board, one might have found less cause to quarrel with the conclusion of Mr. Justice Pigeon that it is for the board, not the courts, to decide when a matter "has been presented in a manner deemed adequate." [99] Lastly, as pointed out in *Komo Construction Inc. v. Québec Labour Relations Board*, [100] the *Forest Industrial Relations Ltd.* case spoke of a hearing being unnecessary "with respect to *all* the arguments raised," [101] but in these two recent decisions the Court appears to have stepped beyond this to hold that *none* of the arguments need be subject to a full hearing.

What of the right to be represented by counsel? In Canada, it appears so tenuous a one within the context of the administrative process that even where statute required the tribunal to instruct a person of his right to counsel and the courts then assumed that "counsel" could refer only to a qualified lawyer, then, notwithstanding the tribunal's misleading remarks that counsel also meant "a friend, businessman, priest, or any person of your choice," a person could not afterwards complain that the tribunal had so failed in its duty to him that it lacked the jurisdiction to proceed. [102] Neither the apparent right to proper advice given by the regulations nor the right recognized by the Canadian Bill of Rights [103] came to the deportee's assistance. For a perhaps competing point of view, *Pett v. Greyhound Racing Assoc'n* [104] presents an excellent and most fortuitous example. There, stewards who had ordered an inquiry into a trainer's conduct at the track refused to allow him to have his solicitor present at the hearing, and, in his application for an interim injunction, the Court of Appeal had to decide whether denial of counsel constituted a failure to afford natural justice. In refusing to follow an earlier dictum to the contrary, [105] the court pointed out that the association's constitution in nowise denied "what appears to be the common law right of the plaintiff to do by agent or representative, including counsel, that which under the procedure he is entitled to do, namely, question witnesses and address the stewards." [106]

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[98] B.C. Stat. 1954 c. 17, § 62(8).

[99] *Supra* note 96, at 175, 1 D.L.R.3d at 127.

[100] *Supra* note 96.

[101] *Id.* at 176, 1 D.L.R.3d at 127 (emphasis added).

[102] *Re* Kokorinis, 62 D.L.R.2d 438, [1968] 1 Can. Crim. Cas. Ann. (n.s.) 151 (B.C.). *See also* Re Vinarao, 63 W.W.R. (n.s.) 93, 66 D.L.R.2d 736 (B.C. 1968).

[103] Can. Stat. 1960 c. 44, § 2 (*c*)(ii).

[104] [1969] 1 Q.B. 125, [1968] 2 W.L.R. 1471, [1968] 2 All E.R. 545 (C.A.). *See also* Willheim, *Legal Representation Before Administrative Tribunals*, 43 AUSTL. L.J. 64 (1969).

[105] Maclean v. Workers Union, [1929] 1 Ch. 602.

[106] *Supra* note 104, at 129, [1968] 2 W.L.R. 1478, [1968] 2 All E.R. at 551 (per Russell, L.J.).

As Lord Denning stated:

> If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who had trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor.[107]

This would also seem to apply where a man's liberty is at stake. However, at the trial of this action, the court felt that *University of Ceylon v. Fernando*[108] was to be preferred to this decision of the court and, therefore, although this Privy Council case was never concerned with the problem of legal representation before a domestic tribunal, it was concluded that natural justice did not include such representation.[109]

Other alleged procedural requirements of a full and fair administrative hearing were presented to the courts last year. What if a tribunal refuses to summon a witness whom a party wishes to testify on his behalf? *Re Koressis*[110] held that, notwithstanding the power given a special inquiry officer under the Immigration Act to subpeona witnesses, his failure to do so at the request of the party whose conduct was being investigated would not deprive the latter of a fair hearing where the witness' testimony would not have been relevant to the issues before the tribunal.[111] The proposed witness was to have testified only to the applicant's qualifications as a welder, an issue not before the officer in these deportation proceedings. In *Regina v. Fine*[112] it was found improper for one of the arbitrators to hold a personal view of the premises in question independently of his brethren and counsel and while there to seek the unsworn testimony of witnesses of one of the parties to the proceedings. On the other hand, there was nothing objectionable in the procedure of a tribunal which admitted the hearsay contents of a letter without the benefit of oath or the cross-examination of its writer.[113] The courts felt there was nothing wrong when a tribunal swore a witness but not his language interpreter,[114] or a tribunal refused to provide copies of relevant written statements held by it to the party under investigation who had in lieu received an accurate resumé of their contents,[115] or which continued proceedings after one of the parties in response to an unfavourable decision by the tribunal had

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[107] *Id.* at 1475, [1968] 2 All E.R. at 549 (per Lord Denning, M.R.).

[108] [1960] 1 W.L.R. 223, [1969] 1 All E.R. 631 (P.C.).

[109] Pett v. Greyhound Racing Ass'n (No. 2), [1969] 2 W.L.R. 1228, [1969] 2 All E.R. 211, 113 Sol. J. 166 (Q.B. 1969). See note, *Natural Justice*, [1969] CAMB. L.J. 13; and Willheim, *Legal Representation Before Administrative Tribunals*, 43 AUSTL. L.J. 64 (1969).

[110] 63 W.W.R. (n.s.) 566 (B.C. Sup. Ct. 1968).

[111] *But see* Turpin v. Minister of Manpower & Immigration, 3 Can. Crim. (n.s.) 330, at 342 (Imm. App. Bd. 1968).

[112] [1968] 2 Ont. 490, 69 D.L.R.2d 625 (High Ct.).

[113] T. A. Miller Ltd. v. Minister of Housing & Local Gov't, [1968] 1 W.L.R. 992, [1968] 2 All E.R. 633 (C.A.).

[114] *Re* Jang Sue Yee, 64 W.W.R. (n.s.) 23, 68 D.L.R.2d 137 (B.C. 1968).

[115] Regina v. Law Soc'y of Alberta, 64 D.L.R.2d 140 (Alta. 1967).

walked out of the hearing. [116]

Also material to whether the conditions of natural justice have been satisfied may be the manner in which the tribunal arrives at and then renders its decision. They will not be satisfied where there was never any hearing, meeting or conference at which all members of the tribunal were present, [117] or where one of its members participated in the decision but was not present during part of the time when evidence was taken. [118] Closely allied to this is the prohibition against any delegation by a tribunal of the powers vested in it, a limitation which remains subject to specific legislative authority to the contrary. An example of this occurred in *Regina v. Jerry*, [119] where the rules of the Ontario Racing Commission indeed had required the tribunal in question to refer the matter to the commission. Again, if common law or statute permits the introduction of hearsay and other evidence inadmissible in the court of law into an administrative hearing, does it follow that the tribunal should be able to give it some consideration? *Regina v. Barber* [120] allows that there was nothing to prevent an arbitral tribunal from admitting as evidence an insurance policy and oral evidence of past practices in its interpretation of a collective agreement, but it proceeded then to deny the tribunal any authority to consider them in its deliberation. The court held that this error effectively destroyed the board's jurisdiction. [121] Its function was to construe this instrument, but "principle" required the intentions of the parties to be gleaned from their own written words without the benefit of extrinsic evidence. Apparently, the waiver of some of the rules of evidence did not necessarily produce the consequence that, perhaps unlike the situation where the true intent of an expropriation by-law was in issue, [122] all, including the parol evidence rule, were similarly inapplicable. One is left with the impression that the court failed to appreciate the evidentiary chain with its links of admissibility, relevancy and the various exclusionary rules [123] and its reasons may be usefully contrasted with the brief exposition of Lord Denning. [124]

Having satisfied all the requisites of natural justice before rendering its decision, will a tribunal then stumble if it gives no accompanying reasons for its conclusions? One may think it clear that without them a party can have little or no recourse to the appeal procedures contemplated by the administrative scheme or to the more extraordinary methods available for ques-

[116] United Steelworkers of America Local 1105 v. Tunnel & Rock Workers Local 168, 63 W.W.R. (n.s.) 596 (B.C. Sup. Ct. Chambers 1968).

[117] *Re* Premier Trust Co., *supra* note 91.

[118] Foster Wheeler Ltd. v. Workmen's Compensation Bd., 66 W.W.R. (n.s.) 79, at 94, 70 D.L.R.2d 313, at 325 (Alta. 1968); *cf.* McMartin v. Vancouver, 65 W.W.R. (n.s.) 385, 70 D.L.R.2d 38 (B.C. 1968).

[119] [1969] 1 Ont. 85, 1 D.L.R.3d 436 (High Ct. 1968).

[120] [1968] 2 Ont. 245, 68 D.L.R.2d 682.

[121] Regina v. Reville, [1968] 2 Ont. 92, 68 D.L.R.2d 213 (High Ct.).

[122] *Re* Circuit House Ltd., [1968] 1 Ont. 737, 67 D.L.R.2d 555 (High Ct.).

[123] [1968] 2 Ont. at 252-53, 68 D.L.R.2d at 689-90.

[124] T. A. Miller Ltd. v. Minister of Housing & Local Gov't, [1968] 1 W.L.R. 992, at 995, [1968] 2 All E.R. 633, at 634 (C.A.).

tioning the validity of what the tribunal has done. It was with this in mind that British legislation has provided for such a general, though not universal, requirement, [125] and the McRuer Report recommended its adoption by Ontario. [126] However, as was recently reiterated, unless a particular law demands this of a tribunal, the mere failure to give reasons affords no basis for claiming a breach of the rules of natural justice. [127]

It must not be forgotten that the provisions of the tribunal's constitutive instrument may perhaps be permitted to confirm, [128] supplement, [129] or exclude [130] any of the incidents of natural justice.

IV. Error of Law

As noted earlier, within the jurisdiction conferred upon it, a tribunal may arrive at erroneous conclusions of fact or law with impunity. This is subject, however, to one important exception: the tribunal may not indulge in errors of law that appear on the face of its record of proceedings, a limitation that respects the importance of a reasoned decision by the tribunal to the aggrieved individual. Moreover, it assumes that members of the tribunal have acted within their jurisdiction, that they "had power to enter on the inquiry and make a determination; not whether their determination was right or wrong in fact or in law." [131] Recently, Canadian courts have reconsidered and confirmed this as a valid, discrete ground for issuing certiorari. [132] Courts have examined the order made by a tribunal, its statutory terms of reference and the accompanying transcript and record of its proceedings to find as a matter of law that: in disciplinary proceedings a pharmacist could not be held vicariously responsible for the misconduct of others; [133] a veterinarian could not be erased from the register of his association for "malpractice and unpro-

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[125] Tribunals and Inquiries Act, 6 & 7 Eliz. 2, c. 66, § 12 (1958).

[126] 1 McRuer Report 218.

[127] Fountaine v. Chesterton, 112 Sol. J. 690 (Vacation Ct. 1968).

[128] Regina v. Fine, [1968] 2 Ont. 490, 69 D.L.R.2d 625 (High Ct.).

[129] *Re* Jang Sue Yee, 64 W.W.R. (n.s.) 23, 68 D.L.R.2d 137 (B.C. 1968).

[130] Fountaine v. Chesterton, *supra* note 127; Regina v. Law Soc'y of Alberta, 64 D.L.R.2d 140 (Alta. 1967); Turpin v. Minister of Manpower & Immigration, 3 Can. Crim. (n.s.) 330, at 335-38.

[131] Anisminic Ltd. v. Foreign Compensation Comm'n, [1967] 3 W.L.R. 382, at 389, [1967] 2 All E.R. 986, at 990 (C.A.) (per Sellers, L.J.), see in particular, the extensive judgment of Lord Justice Diplock. The decision of the Court of Appeal was reversed by the House of Lords, *supra* note 28, but portions of the judgment may be usefully compared with this aspect of the *Barber* case, [1968] 2 Ont. 245, at 251, 254, 68 D.L.R.2d 682, at 688, 691.

[132] Board of Indus. Rel. of Alberta v. Stedelbauer Chevrolet Oldsmobile Ltd., [1969] Sup. Ct. 137, 65 W.W.R. (n.s.) 334, 1 D.L.R.3d 81 (1968); Regina v. Dick, [1968] 2 Ont. 351 (High Ct.); Regina v. Ontario Lab. Rel. Bd., [1968] 2 Ont. 37, 68 D.L.R.2d 109 (High Ct.) *appeal dismissed*, [1969] 1 Ont. 412, 2 D.L.R.3d 652 (1968). Leave to appeal to Supreme Court of Canada by Court of Appeal granted January 13, 1969, and Regina v. Kennedy, 68 Can. Lab. L. Cas. 11,552, ¶ 14,102 (Ont. High Ct. 1968).

[133] *Re* Windt, 65 W.W.R. (n.s.) 100, 68 D.L.R.2d 400 (B.C. 1968).

fessional conduct" where, in the absence of valid regulations to the contrary, his acts amounted only to professional negligence; [134] an employer, having the authority to dismiss for proper cause under a collective agreement, could not be denied the exercise of this authority when the facts established the presence of proper cause; [135] no fundamental duty rested upon an employee to disclose relevant information in his possession to his employer; [136] a trade union could not be certified as bargaining agent for employees who were ineligible under its constitution to become members; [137] in interpreting a collective agreement, extrinsic evidence could not be considered; [138] and an arbitration board must examine the facts within the context of the provisions of the collective agreement to determine whether the discharge in question had occasioned any injustice to the employee. [139]

The presence and state of the record before the court assumes, therefore, a vast amount of significance. Where, in alleged contravention of the Immigration Act, a special inquiry officer failed to administer an oath to an interpreter, any assumed error of law that did not appear on the face of the record could not be introduced to support an application for certiorari. [140] However, if upon the return of the notice of motion the tribunal, in compliance with the Rules of Court, filed its reasons for granting a certificate, its order became "not an unspeaking or unintelligible order, but a speaking one . . . which told its own story, and for error could accordingly be quashed." [141] Moreover, the revelation by the record of some error of law has been confirmed by the remarks of counsel during the course of the hearing before the tribunal but which formed no part of its record. [142] Then too, the court may have recourse to the whole record in order to overcome a patent error appearing on the face of the order: the certificate issued by the Manitoba Labour Board defined the unit to include "all truck drivers, warehousemen, helpers and mechanics in the Province of Manitoba," but this

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[134] Roenisch v. Alberta Veterinary Medical Ass'n, 62 W.W.R. (n.s.) 688 (Alta. Sup. Ct. 1968). This case, *id.* at 692-95, also contains a helpful discussion of the power of a profession to discipline its members and may be usefully read with Banks v. Transp. Regulation Bd., [1968] Austl. Argus L.R. 445, which in an analogous context examines the dichotomy between "right' 'and "privilege."

[135] Port Arthur Shipbuilding Co. v. Arthurs, [1969] Sup. Ct. 85, 70 D.L.R.2d 693 (1968).

[136] *Re* International Woodworkers of America Local 1-118, 1 D.L.R.3d 622 (B.C. 1968).

[137] Board of Indus. Rel. of Alberta v. Stedelbauer Chevrolet Oldsmobile Ltd., *supra* note 132 and Regina v. Ontario Lab. Rel. Bd., *supra* note 132.

[138] Regina v. Reville, [1968] 2 Ont. 92, 68 D.L.R.2d 213 (High Ct.); Regina v. Barber, [1968] 2 Ont. 245, 68 D.L.R.2d 682.

[139] Regina v. Kennedy, 68 Can. Lab. L. Cas. 11,552, ¶ 14,102 (Ont. High Ct. 1968).

[140] *Re* Jan Sue Yee, 64 W.W.R. (n.s.) 23, 68 D.L.R.2d 137 (B.C. 1968).

[141] Board of Indus. Rel. of Alberta v. Stedelbauer Chevrolet Oldsmobile Ltd., [1969] Sup. Ct. 137, 65 W.W.R. (n.s.) 344, at 353, 1 D.L.R.3d 81, at 88-89 (Sup. Ct. 1968) *quoting* Lord Sumner in Rex v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128, at 155 (P.C.).

[142] *Re* Windt, 65 W.W.R. (n.s.) 100, at 105, 68 D.L.R.2d 400, at 404 (B.C. 1968).

was identified as a "formal or accidental" error that the rest of the record was able to correct. [143]

One last, but interesting, question falling within the ambit of either error of law [144] or failure of jurisdiction [145] has inspired no little controversy. If upon a close perusal of the record a court finds that a conclusion of fact of the tribunal is supported by no evidence at all, has there then been an error of law or an absence of jurisdiction? The greatest hurdle to an affirmative reponse lies in the language of the Privy Council in *Rex v. Nat Bell Liquors, Ltd.* [146] That obstacle, however, seems not to have daunted Justice Gould who, upon an application for certiorari attacking the certification of a trade union, asked himself "whether there was any evidence at all upon which the board could have founded a decision" and, finding some present, concluded that he could not reconsider and re-weigh that evidence without usurping the board's functions. [147] Further illumination of this point has appeared recently in cases that questioned the decisions of private arbitrators on the grounds of lack of jurisdiction and error on the face of the record. These common-law bases for setting aside an award [148] were referred to in a recent decision that concluded that "there was no evidence before the arbitrators to justify their finding" and this "complete absence of evidence to support a finding of fact on such an essential matter goes to jurisdiction." [149]

V. Privative Clauses and Discretionary Powers

Some reference has already been made to the manner in which legislation is able to revise the common-law principles otherwise exclusively operative in this field. It defines the jurisdiction of the administrative tribunal and is able to set forth special procedures that modify or abrogate the customary rules of natural justice. Furthermore, the supremacy of the legislature permits it to confer upon the functions of tribunals other forms of immunity from judicial scrutiny.

The first, the privative clause,[150] in one form or another [151] represents a

[143] Invictus Ltd. v. Manitoba Lab. Bd., 62 W.W.R. (n.s.) 150, 65 D.L.R.2d 517 (Man. Q.B. 1967).

[144] See H. Wade, Administrative Law 90-93 (2d ed. 1967); S. De Smith, Judicial Review of Administrative Action 117-22 (2d ed. 1968).

[145] 1 McRuer Report 261-62; *but see* S. De Smith, *supra* note 144, at 96-97.

[146] *Supra* note 141.

[147] United Steelworkers of America Local 1105 v. Tunnel & Rock Workers, Local 168, 63 W.W.R. (n.s.) 596, at 604 (B.C. Sup. Ct. Chambers 1968). *See also* Regina v. County Court Judge of Down, [1967] N. Ir. L.R. 171 (Q.B. 1966), and Note, *The Scope of Certiorari*, 19 N. Ir. L.Q. 449 (1968) for a discussion of this problem and for a tendency to prefer the American "substantial evidence" rule.

[148] Port Arthur Shipbuilding Co. v. Arthurs, *supra* note 135.

[149] *Re* International Woodworkers of America, Local 1-118, 1 D.L.R.3d 622, at 625 (B.C. 1968).

[150] See Carter, *The Apparent Virility of Privative Clauses*, [1967] U.B.C.L. Rev. 219; Pink, *Judicial "Jurisdiction" in the Presence of Privative Clauses*, 23 U. Toronto Fac. L. Rev. 5 (1965).

[151] Their permutations and combinations may be examined in 1 McRuer Report 267-74.

statutory attempt to insulate completely from review the proceedings and decisions of a particular tribunal. However, the courts, though appreciative of the limitations such a clause places upon their own powers, have nonetheless refused to shield a tribunal from the consequences of acting beyond its jurisdiction.[152] In *Foster Wheeler Ltd. v. Workmen's Compensation Board*[153] the Alberta Workmen's Compensation Board made a levy against an employer in excess of its jurisdiction, which led to its order being quashed in spite of the presence of a privative clause in the statute: once a tribunal has no authority to act in the way it did, a privative clause cannot confer that power upon it.[154] A very recent decision of the House of Lords has reiterated this position.[155] On the other hand, where a complainant does not rely on a jurisdictional defect in the tribunal's proceedings, the privative clause has played a far more active role: although it was an error in law, fatal to a tribunal's decision if apparent on the face of the record, to certify a trade union whose constitution excluded from membership the employees in the unit,[156] nevertheless, the presence[157] or absence[158] of such a clause in the statutory scheme dictated completely whether or not the court could grant certiorari in the circumstances.

Secondly, the legislature may have clothed the power bestowed upon a tribunal in such subjective and discretionary language that it becomes very difficult for a court to employ its usual standards. Thus, on the evidence before it, the refusal of a Board of Police Commissioners to exercise its discretion in favour of issuing a carnival licence to the applicants would not be disturbed.[159] Nor did the court feel capable of questioning the discretion given impliedly to the minister by the Immigration Act to determine the place of destination of a deportee.[160] However, the House of Lords has now extended some hope to those dispirited by the court's apparent unwillingness to interfere with this

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[152] Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 W.L.R. 163, [1969] 1 All E.R. 208 (per Lords Reid, Pearce, Wilberforce and Pearson). The penchant of Lord Reid to speak of "nullity" as synonomous with lack of jurisdiction is frowned upon by Lord Wilberforce and its concomitant, namely, whether the tribunal's decision is void ab initio or only voidable, is severely criticized by Akehurst, *Void or Voidable?—Natural Justice and Unlawful Meanings*, 31 MODERN L. REV. 2, 138 (1968); and by Wade, *Unlawful Administrative Action: Void or Voidable*, 83 L.Q.R. 499 (1967) and 84 L.Q.R. 95 (1968).

[153] 66 W.W.R. (n.s.) 79, 70 D.L.R.2d 313 (Alta. 1968).

[154] *Id.* at 89-94, 70 D.L.R.2d at 321-24. *See also* Regina v. Liquor Licensing Comm'n (Sask.), 1 D.L.R.3d 448 (Sask. Q.B. 1968), *appeal dismissed*, 70 W.W.R. (n.s.) 316 (Sask. 1969), and Association Int'le des Commis du Detail v. Quebec Lab. Rel. Bd., [1968] Qué. B.R. 601 (1967).

[155] Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 W.L.R. 163, [1969] 1 All E.R. 208, where some doubt is thrown upon the restrictive reasoning of Smith v. East Elloe R.D.C., [1956] A.C. 736.

[156] *Supra* at p. 491.

[157] Regina v. Ontario Lab. Rel. Bd., *supra* note 132.

[158] Board of Indus. Rel. of Alberta v. Stedelbauer Chevrolet Oldsmobile Ltd., *supra* note 132.

[159] *Re* Powell, [1968] 2 Ont. 613, 70 D.L.R.2d 178 (High Ct.).

[160] Moore v. Minister of Manpower & Immigration, [1968] Sup. Ct. 839, 69 D.L.R.2d 273.

general discretion conferred upon some tribunals.[161] There, under the Agricultural Marketing Act,[162] which provided for the establishment of milk marketing schemes, the minister was empowered to refer any complaint to a committee of investigation. When certain producers did complain to the minister, he refused to appoint such a committee and this application for mandamus followed. The Law Lords closely examined the authority given the minister under the act and expressly welded "the true limits of his discretion" to this jurisdiction.[163] The power which a court may wield over an apparently unfettered statutory discretion is evident in these words of Lord Reid:

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.[164]

To that end, their Lordships pitted the actions of the minister against what Parliament must have intended as "the public interest" in its statute and found the former wanting: his reasons for refusing to refer the applicants' complaint disclosed a failure to promote this legislative intent.

VI. REMEDIES

The technical nature of the available remedies often assumes greater significance than the substantive considerations themselves and though criticism of this emphasis upon procedure abounds,[165] recent case law demonstrates that the requirements of, and limitations upon, each of these remedies are only too vital to one's mastery of administrative law.

Certiorari[166] and its statutory emendations still appear to be the most

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[161] Padfield v. Minister of Agriculture, [1968] A.C. 997, [1968] 2 W.L.R. 924, [1968] 1 All E.R. 694. *See also* Commission des Relations de Travail du Québec v. L'Association Unie des Compagnons et Apprentis de la Plomberie et Tuyauterie des Etats-Unis et du Canada, [1969] Sup. Ct. 466, where a patent error in the board's construction of § 33 of the Quebec Labour Code, QUE. REV. STAT. c. 141 (1964) led to an improper failure by it to exercise the discretion given it by that provision.

[162] 6 & 7 Eliz. 2, c. 47, § 19 (1957-58).

[163] *Supra* note 161, at 1058, [1968] 2 W.L.R. at 966 and [1968] 1 All E.R. at 717 (per Lord Upjohn).

[164] *Id.* at 1030, [1968] 2 W.L.R. at 941, [1968] 1 All E.R. at 699.

[165] Recent examples of this may be found in 1 MCRUER REPORT 20-22; Akehurst, *Void or Voidable?—Natural Justice and Unlawful Meanings*, 31 MODERN L. REV. 2, 138 (1968) and Wade, *Unlawful Administrative Action: Void or Voidable*, 83 L.Q.R. 499 (1967) and 84 L.Q.R. 95 (1968).

[166] *See* Regina v. Nova Scotia Lab. Rel. Bd., 65 D.L.R.2d 613 (N.S. Sup. Ct. 1968) for a discussion of procedures to obtain certiorari and mandamus in Nova Scotia

popular means of attacking the acts of an administrative tribunal. A recent decision of the Supreme Court of Canada has reiterated, however, one of the basic strictures that bind it and its brother, the writ or order of prohibition: they "will not lie against a non-statutory tribunal." [167] Therefore, the Court found it necessary to determine whether the body in question, here a board of arbitration under the Ontario Labour Relations Act, [168] was a statutory body to which the parties were compelled by legislation to have resort for the redress of their grievances. [169] However, this reasoning must now be read subject to *Regina v. Criminal Injuries Compensation Board* [170] where the divisional court found that this board, not constituted by statute but under the Crown's prerogative, was amenable to certiorari the limits of which were recognized by Lord Chief Justice Parker to be a tribunal that was "performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned." [171] If a tribunal must be "public," with powers "affecting subjects," [172] as distinct from one that is "private" and consensual, it might perhaps be wondered whether statutes requiring collective agreements to provide for the settlement of grievances "by arbitration or otherwise" have not now stamped the procedures adopted by the parties with a sufficiently public and non-consensual quality.

Who are proper parties before a court hearing an application to quash a tribunal's decision is a question that has been posed where an aggrieved individual claimed that that tribunal either surrendered or never possessed any jurisdiction over him. For example, in the consideration of a development permit by a municipal council, the applicant's neighbour was held to be an interested party who in the absence of notice to him was entitled to ask for certiorari. [173] Equally, the employee in a bargaining unit whose conduct had been the subject of grievance procedures in which he had been left unrepresented by an antipathetic and adverse trade union was entitled to claim standing before the courts when no notice of proceedings was given to him. [174] On

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and Regina v. Alder, 67 D.L.R.2d 513 (B.C. Sup. Ct. 1968) for what British Columbia demands of a notice of motion for certiorari.

[167] Port Arthur Shipbuilding Co. v. Arthurs, [1969] Sup. Ct. 85, at 90, 70 D.L.R.2d 693, at 697 (1968).

[168] ONT. REV. STAT. c. 202, § 34 (1960).

[169] *See also* Regina v. Barber, [1968] 2 Ont. 245, 68 D.L.R.2d 682; Regina v. Board of Arbitration, 67 D.L.R.2d 135 (N.S. 1968) where though certiorari failed as an appropriate remedy the applicant was still able to invoke the Nova Scotia Arbitrations Act, N.S. REV. STAT. c. 12 (1967), as a means of quashing the decision of this private tribunal. The alternative common-law grounds for reviewing such a private decision were discussed in the *Port Arthur* case, *supra* note 167.

[170] [1967] 2 Q.B. 864, [1967] 3 W.L.R. 348, [1967] 2 All E.R. 770.

[171] *Id.* at 882, [1967] 3 W.L.R. at 358, [1967] 2 All E.R. at 778.

[172] *Id.* at 892, [1967] 3 W.L.R. at 366, [1967] 2 All E.R. at 784 (per Ashworth, J.).

[173] Michie v. M.D. of Rocky View, 64 W.W.R. (n.s.) 178 (Alta. Sup. Ct. 1968).

[174] Hoogendoorn v. Greening Metal Prods. & Screening Equip. Co., [1968] Sup. Ct. 30, 65 D.L.R.2d 641 (1967). *See also* Rossman, *Labour Arbitration and Natural Justice*, 26 U. TORONTO FAC. L. REV. 1 (1968) and Carr, *The Development of the Duty of Fair Representation in Ontario*, 6 OSGOODE HALL L.J. 281, at 291-93 (1968).

the other hand, the proceedings and order made against a municipal council did not permit the mayor in his personal capacity to apply to invalidate the order. [175] Also, in an application to the Canada Labour Relations Board for the certification of employees of a commercial common carrier who leased his tractor trucks from lease operators, it was considered doubtful whether this employer had any standing to question the jurisdiction of the board for its failure to serve notices of proceedings upon these lease operators. [176] If the latter did not choose to complain, why should the employer be allowed to take their part? But a defendant too may wish to question whether he has properly been made a party to an application before the courts, an issue that prompted the Manitoba Court of Appeal to conclude that the Crown and a minister could be impleaded in proceedings to quash a deportation order. [177]

Mandamus presents a petitioner with a form of redress by which he can compel a tribunal to exercise the public powers and duties that have been conferred upon it and, therefore, unlike certiorari and prohibition, it is less concerned with correcting past or threatened errors than with actively requiring the performance of a particular lawful act. [178] But because the essence of this remedy inheres in the public nature of the duty which the court orders to be carried out, mandamus will issue even against a private person, however non-public and unofficial he be, upon whom such an obligation rests. [179] Therefore, where a student, whose complaints in respect of the university's failure to award him a degree had been investigated and reported upon by the university council and an appeal committee of the senate, claimed a rehearing and sought mandamus to compel one under the University Act, [180] the court held that because this provision had been complied with and the university had already fulfilled its duty to the applicant none would lie. However, the statutory requirements were vital to the issue of whether the university was subject to this remedy, for ordinarily "such matters as the enforcement of the regulations or statutes of the university itself; the holding of examinations or the conferring of degrees, are domestic questions within the exclusive jurisdiction of the visitor." [181] Although the statute appears

[175] Durayappah v. Fernando, [1967] 2 A.C. 337, [1967] 3 W.L.R. 289, [1967] 2 All E.R. 152 (P.C.).

[176] Midland Superior Express Ltd. v. Truckers, Local 362, 63 W.W.R. (n.s.) 53, 66 D.L.R.2d 639 (Alta. 1968) (per McDermid, J.A.).

[177] Carlic v. Reginam, 62 W.W.R. (n.s.) 229 (Man. 1967).

[178] Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 W.L.R. 163, at 192-93, [1969] 1 All E.R. at 234 (per Lord Pearce). *See* Law Soc'y of British Columbia v. MacKrow, 64 W.W.R. (n.s.) 550, at 558, 68 D.L.R.2d 179, at 185-86 (B.C. 1968), where applicant sought the wrong remedy; and Regina v. University of Saskatchewan, 1 D.L.R.3d 721 (Sask. 1968) where it was stated that mandamus is not the appropriate remedy to correct a denial of natural justice *aff'd*, 68 W.W.R. (n.s.) 745 (Sup. Ct. 1969); *cf.* Regina v. Royal Institution for the Advancement of Learning, 2 D.L.R.3d 129 (Que. Q.B. 1968).

[179] *Re* Corner Brook, 53 Mar. Prov. 305 (Nfld. 1966).

[180] SASK. REV. STAT. c. 181, § (*c*) (1965).

[181] Regina v. University of Saskatchewan, 1 D.L.R.3d 721, at 723 (Sask. 1968), *aff'd*, 68 W.W.R. (n.s.) 646, 6 D.L.R.3d 120 (Sup. Ct. 1969). On the general subject of the university's accountability to the courts, see Sheridan, *Sacking Professors and*

to have bestowed a very wide discretion rather than a specific duty, the courts are still able to conclude that the tribunal's failure to act was founded upon matters extraneous to the legislative scheme and to command that this time it exercise its discretion properly "according to law." [182]

An increasing reliance upon the more general remedies of declaration [183] and injunction has evoked a new flexibility in the available controls over administrative actions. Unfortunately, however, the procedural thicket has not thereby been overcome. In *Driver Salesmen, Local 987 v. Board of Industrial Relations of Alberta* [184] Mr. Justice Riley became deeply engrossed in the issues of injunctive relief upon proof of irreparable damage and of declaration and certiorari as mutally exclusive or alternative forms of relief. It must also be recalled that declaratory relief simply elucidates and declares without more the rights of the parties, [185] a result illustrated in *Hlookoff v. Vancouver* [186] where the plaintiffs complained of the improper suspension of their business licence which once restored to them less than one month later and still in good standing at the date of judgment left the court with "no need to declare their right to have such a licence." [187] However, where it is feared that protection may be needed against some future misuse of administrative powers, [188] or against a proposed, but not yet promulgated, new rule which the applicant establishes is ultra vires, [189] the court may in such instances exercise its discretion and grant the requested declaration and injunction.

Before passing on to the last of the remedies that presented the courts with vexing problems in the past year, I cannot omit to emphasize the discretionary quality of those writs and orders just referred to and this consequence, that despite the presence of substantive grounds for the relief requested a court may still refuse to exercise its discretion in the petitioner's favour. Examples of the impact of such an action have just been recited [190] and others too have demonstrated that, unless otherwise decreed by statute,[191]

Sending Down Students: Legal Control, in LAW, JUSTICE AND EQUITY 35 (R. Holland & G. Schwartzenberger eds. 1967).

[182] Padfield v. Minister of Agriculture, Fisheries & Food, [1968] A.C. 997, [1968] 2 W.L.R. 924, [1968] 1 All E.R. 694. *See also L'Association Unie des Compagnons et Apprentis de la Plomberie* case *supra* note 161.

[183] See I. ZAMIR, THE DECLARATORY JUDGMENT (1962) and Warren, *The Declaratory Judgment:Reviewing Administrative Action*, 44 CAN. B. REV. 610 (1966).

[184] 61 W.W.R. (n.s.) 484, at 488-92 (Alta. Sup. Ct. 1967).

[185] *See* Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 1 W.L.R. 163, at 210, [1969] 1 All E.R. 208, at 250 (per Lord Wilberforce).

[186] 63 W.W.R. (n.s.) 129, 67 D.L.R.2d 119 (B.C. Sup. Ct. 1968).

[187] *Id.* at 139, 67 D.L.R.2d at 128-29.

[188] Pulp & Paper Workers of Canada v. Attorney-General for British Columbia, 63 W.W.R. (n.s.) 497, at 504, 67 D.L.R.2d 378, at 385 (B.C. Sup. Ct. 1968).

[189] Pharmaceutical Soc'y of Great Britain v. Dickson, [1968] 3 W.L.R. 286, [1968] 2 All E.R. 686 (H.L.). *But cf.* Regina v. Ontario Milk Marketing Bd., [1969] 1 Ont. 309, 2 D.L.R.3d 346 (High Ct. 1968), *aff'd*, [1969] 2 Ont. 121, 4 D.L.R.3d 490, application to Sup. Ct. for leave to appeal dismissed April 22, 1969.

[190] Pulp & Paper Workers of Canada v. Attorney-General for British Columbia, *supra* note 188 and Pharmaceutical Soc'y of Great Britain v. Dickson, *supra* note 189.

[191] Regina v. Alder, 67 D.L.R.2d 513, at 516 (B.C. Sup. Ct. 1968).

provision for further review and appeal within the administrative process itself will not necessarily bar certiorari or a declaration where those questions raised before the court would not have been presented to the appeal tribunal; [192] nor can relief be refused because after the issue of a certificate to a trade union which the employer questions in certiorari proceedings the employer took "some fresh steps . . . directed to conciliation." [193] However, an application for mandamus to have the Ontario Workmen's Compensation Board produce certain medical reports failed on the ground that it was premature to make such an order when it had not been established that this information was unavailable from other medical sources. [194]

The less popular writ of quo warranto was the subject of two Canadian cases in which the offices of commissioners appointed under provincial Public Inquiries Acts were attacked, in one case successfully. [195] Two other decisions have discussed the civil remedy of damages against an offending tribunal, most spectacularly granted in the past in *Roncarelli v. Duplessis*, [196] and have confirmed that "fraud, collusion or malice" [197] must accompany the official's wrongful act. Therefore, if no such act itself could be established, [198] or if where a business licence had been revoked and the evidence disclosed neither bad faith on the part of the official in charge nor collusion between him and the mayor, [199] then the plaintiff's action on the case fails.

VII. Delegated Legislation

In contrast to the administrative powers conferred upon subordinate bodies, the legislature may also delegate authority to create rules and regulations of more general impact. This legislative role is intended to meet the inflexibility and incompleteness of a statutory scheme enacted by a legislature that cannot possibly foresee every future contingency or set out all the detail necessary to the scheme's efficacy. In theory, therefore, the statute should provide the framework and standards within which valid subordinate legisla-

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[192] Regina v. Law Soc'y of Alberta, 64 D.L.R.2d 140, at 145-46; *Re* Kingston Enterprises Ltd., [1969] 1 Ont. 221 (High Ct. 1968), *appeal dismissed*, April 15, 1969; Regina v. Alder, *supra* note 191, at 517; Pharmaceutical Soc'y of Great Britain v. Dickson, *supra* note 189; *cf.* François Nolin Ltée. v. Québec Lab. Rel. Bd., [1968] Sup. Ct. 168, 68 Can. Lab. L. Cas. 11,571, ¶ 14,107 (1967).

[193] Regina v. Ontario Lab. Rel. Bd., [1968] 2 Ont. 269, 68 D.L.R. 2d 706, where the Court of Appeal appeared to differ with lower court on this point.

[194] Regina v. Workmen's Compensation Bd., [1968] 2 Ont. 337, 69 D.L.R.2d 291. *See also* Regina v. Royal Institution for the Advancement of Learning, 2 D.L.R.3d 129 (Qué. 1968).

[195] Regina *ex rel.* McPhee v. Sargent, 64 D.L.R.2d 153 (B.C. 1967). *See also* the extensive analysis in Regina *ex rel.* Shaw v. Trainor, 66 D.L.R.2d 605 (P.E.I. Sup. Ct. 1967).

[196] [1959] Sup. Ct. 121.

[197] Hlookoff v. Vancouver, 63 W.W.R. (n.s.) 129, at 142, 67 D.L.R.2d 119, at 132 (B.C. Sup. Ct. 1968).

[198] Campbell v. Ramsay, 87 W.N. (Pt. 2) (N.S.W.) 153 (1968).

[199] Hlookoff v. Vancouver, *supra* note 197.

tion will operate and consequently ought to contain sufficient principles and guidelines that the interstices and boundaries of the rule-making authority of these statutory delegates are clearly identifiable. However, as has been shown [200] practice does not necessarily accord with theory; the criteria only too often are vaguely delineated, the limits of this subordinate legislative role but faintly adumbrated. Nonetheless, the courts still must consider in the appropriate situation whether the subordinate legislation purporting to affect legal relationships is or is not valid, a question of vires that then leads to an assessment of its substance as against the reach of the primary authority upon which its life depends.

Comparison alone of the statutory rule-making power delegated to another with the actual content of that subordinate legislation usually will demonstrate whether or not the latter has confined itself within proper bounds. Authority to regulate "procedure" is limited to adjectival law which thereby prevents a tribunal from enacting substantive rules; [201] the "better guidance, government, discipline, and regulation of . . . the members" [202] of the College of Dental Surgeons is wide enough to support a regulation which deems it an unprofessional act to use a prosthenic appliance in a manner described therein. [203] However, "any other matter . . . which appears to [the Lieutenant-Governor in Council] necessary or advisable to the effectual working of the provisions of this Act" [204] does not permit him to make a rule which purports to define the phrase "member in good standing" and which would thereby limit the trade unions that may successfully apply for certification [205] Finally, "to maintain the honour and safeguard and promote the interests of the members in their exercise of the profession of pharmacy" cannot encompass subordinate rules that attempt to dictate the kind of premises in which a new pharmacy may carry on business and to restrict the range of products and services it may offer the public. [206]

But in their deliberations the courts can and do search beyond this mere literal accord. If statutory authority sets out as part of the rule-making procedures that the approval of some other body is necessary, then a failure to obtain this assent will effectively render the purported regulation void. [207] Similarly, a professional society operating under the general language of a

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[200] *E.g.*, 1 McRuer Report § 3.

[201] Pulp & Paper Workers of Canada v. Attorney-General for British Columbia, 63 W.W.R. (n.s.) 497, at 501, 67 D.L.R.2d 378, at 382 (B.C. Sup. Ct. 1968). *See also* Regina v. Ontario Milk Marketing Bd., *supra* note 189.

[202] Dentistry Act, B.C. Rev. Stat. c. 99, § 25(1) (1960).

[203] *Re* College of Dental Surgeons of British Columbia, 68 D.L.R.2d 93 (B.C. 1968).

[204] Labour Relations Act, B.C. Rev. Stat. c. 205, § 75 (1960).

[205] Pulp & Paper Workers of Canada v. Attorney-General for British Columbia, *supra* note 201, at 501-04, 67 D.L.R.2d at 381-84.

[206] Pharmaceutical Soc'y of Great Britain v. Dickson, [1968] 3 W.L.R. 286, [1968] 2 All E.R. 686 (H.L.).

[207] North Coast Air Services Ltd. v. Canadian Transp. Comm'n, [1968] Sup. Ct. 940, 69 D.L.R.2d 425 (Sup. Ct. 1968), where the Court looked at both the French and English texts of the statute to reach its result.

charter or statute is still subject to the doctrine of restraint of trade and thus its subordinate regulations will be struck down for infringing upon this principle. [208] Again, the objects of the statutory scheme may compel a less mechanical and more functional assessment. For example, the authority given a body to pass by-laws in relation to disciplining members by "expulsion, suspension or the imposition of any other penalty" [209] was read as permitting the institute to impose other penalties, namely, a fine, in addition to punishment by suspension or expulsion: "or" was construed distributively rather than disjunctively. [210]

One last interesting case asks how a court can deign to question subordinate legislation which for its validity hearkens to a statute that authorizes regulations "defining any expression used in this Act and not hereafter defined" [211] and then clothes them with the "same force and effect as if enacted by this Act." [212] Although the act expressly defined "tangible personal property" [213] and then proceeded to designate certain exceptions to this statutory interpretation, including "natural gas," [214] an order-in-council nevertheless purported to include natural gas within this definition and the province then claimed taxes thereon from the plaintiff. [215] In spite of an earlier opinion to the contrary by Lord Herschell that regulations described in a statute as having "the same force and effect as if enacted by this Act" could only mean that they must be treated "for all purposes . . . as if they were in the Act," [216] Justice Disbery held that such an expression did not in anywise exclude the jurisdiction of the courts to determine the validity of these as subordinate legislation and to inquire whether the rule-making body had exceeded the authority delegated to it. This subsequent inquiry led to the conclusion that the order-in-council indeed exceeded this statutory authority.

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[208] Pharmaceutical Soc'y of Great Britain v. Dickson, *supra* note 206. *Cf. Re* College of Dental Surgeons of British Columbia, 68 D.L.R.2d 93, at 95 (B.C. 1968).

[209] An Act to reconstitute The Institute of Chartered Accountants of Ontario, Ont. Stat. 1956 c. 7, § 8(1)(*e*).

[210] Regina v. Institute of Chartered Accountants of Ontario, [1968] 2 Ont. 691, 70 D.L.R.3d 366.

[211] The Education and Health Tax Act, SASK. REV. STAT. c. 66, § 38(2)(*f*) (1965).

[212] *Id.* § 38(3).

[213] *Id.* § 3(*g*).

[214] *Id.* § 6.

[215] Trans-Canada Pipe Lines Ltd. v. Provincial Treasurer, 63 W.W.R. (n.s.) 541, 67 D.L.R.2d 694 (Sask. Q.B. 1968).

[216] Institute of Patent Agents v. Lockwood, [1894] A.C. 347, at 360.