ANNUAL SURVEY OF CANADIAN LAW

PART 2

ADMINISTRATIVE LAW*

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I. INTRODUCTION

The phenomenal growth of the administrative leviathan needs no emphasis here. The creation of new bureaucracies, both within and outside the public sphere, an increase in reported cases before the courts and the sudden spurts of energy to find solutions for coping with this swelling "fourth branch"[1] of government, all bespeak the present dynamism of this legal process.

Continuing to function within the narrow bounds of judicial review, one response to the fear of having individual liberties decimated by the collective action of groups within society, particularly the one represented by government, has been the statute that codifies the procedures which a tribunal in the course of its proceedings must follow. This apotheosis of "natural justice" and "due process," best exemplified by the American Administrative Procedure Act[2] and Model State Administrative Procedure Act of the Uniform Law Commissioners, was in part one of the recommendations of the McRuer Report[3] and has been adopted by Alberta[4] where after languishing for some time in a state of inertia, this statute has finally been ordered[5] applicable to eight tribunals. A similar piece of legislation in Ontario[6] has not yet reached fruition, but in reply to the Report's criticisms

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*This survey represents the state of the law as of September, 1970.

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[1] J. LANDIS, THE ADMINISTRATIVE PROCESS 47 (1966). *See generally* Hogg, *Judicial Review of Action by the Crown Representative*, 43 AUSTL. L.J. 215 (1969); Mason, *Judicial Review of Inquiries in Administrative Law*, 6 SYD. L. REV. 206 (1969); Anthony, Chairman, *Roundtable on Administrative Law*, 22 J. LEGAL ED. 363 (1970).

[2] 5 U.S.C. §§ 551-59, 701-06, 3105, 3344, 5362, 7521 (1967). See Carter, *The National Energy Board of Canada and the American Administrative Procedure Act—A Comparative Study*, 34 SASK. L. REV. 104 (1969).

[3] 1 ROYAL COMM'N INQUIRY INTO CIVIL RIGHTS, REPORT No. 1, ch. 14 (1968). (Hereinafter cited as the McRUER REPORT).

[4] Alta. Stat. 1966 c. 1.

[5] Alta. Reg. 123/70 (1970).

[6] Bill 130, Statutory Powers Procedure Act (Ont. 1968).

of the procedures followed by that province's self-governing professions [7] there has been quite a flurry of activity in the legislature on the part of these bodies. Closely related to this reform was the one recommending that the multipicity of procedures governing the various remedies for obtaining judicial review be reduced to one. [8] However, proposed legislation for simplifying the route to the courts [9] apparently still remains in abeyance.

The cases [10] tell the tale of another measure of reform, one that would pass beyond mere judicial review and give the individual a right of appeal to the courts. The fatal flaw of giving too much power to a judiciary whose earlier lack of sympathy helped to accelerate the growth of the administrative process is obvious and helps to explain a present tendency to adopt a system more akin to the French *conseil d'état* and proposed many years ago by William Robson. [11] So, for example, we find the English Law Reform Commission seriously considering various facets of this suggestion; [12] New Zealand constituting a new Administrative Division of its Supreme Court, that may include lay assessors, to hear appeals and assume full control over judicial review; [13] and finally the Canadian Federal Court Bill [14] seeking to give to a new Federal Court the exclusive authority to hear appeals and applications for judicial review from federal tribunals.

Of late, the use of the ombudsman has gained further attention. Not only have two more provinces, Manitoba [15] and Quebec, [16] adopted this form of "self-control," but the Alberta Ombudsman Act [17] was submitted to the scrutiny of the court which found, on the specific question placed before it, that the ombudsman had power to question the decision of the Provincial Planning Board in spite of the fact that it performed a judicial function. The court, after quoting at great length from the report of a legislative committee which in 1965 had inquired into the state of administrative law in Alberta, [18] also held on the more general issue of how to define this officer's task that "the basic purpose of an ombudsman is provision of a 'watch dog' designed to look into the entire workings of administrative laws. I am sure this must involve scrutiny of the work done by the various tri-

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[7] 3 McRUER REPORT § 4.

[8] 1 McRUER REPORT ch. 22.

[9] Bill 129, Statutory Judicial Review Act (Ont. 1968).

[10] See text accompanying notes 188-201. *See also* Keith, *Appeals from Administrative Tribunals*, 5 VICT. U. OF WELL. L. REV. 123 (1969).

[11] W. ROBSON, JUSTICE AND ADMINISTRATIVE LAW 326-36 (2d ed. 1951). *See also* 1 McRUER REPORT ch. 15.

[12] CMND. 4059 (1969).

[13] N.Z. Stat. 1968, No. 18. *See also* Northey, *An Administrative Division of the New Zealand Supreme Court—A Proposal for Law Reform*, 7 ALTA. L. REV. 62 (1969).

[14] Bill C-192 (Can. 1969).

[15] Man. Stat. 1969 c. 26.

[16] Que. Stat. 1968 c. 11.

[17] Alta. Stat. 1967 c. 59. See Friedmann, *Alberta Ombudsman*, 20 U. TORONTO L.J. 48 (1970).

[18] REPORT OF THE SPECIAL COMMITTEE ON BOARDS AND TRIBUNALS TO THE LEGISLATIVE ASSEMBLY OF ALBERTA (1965).

bunals which form a necessary part of such administrative laws." [19] More recently, however, Alberta's ombudsman has had his wrists slapped by a former Chief Justice who criticized the manner in which he had conducted investigations into the disciplinary proceedings taken by an Edmonton Real Estate Board against one of its members. [20]

II. Ultra Vires and Error of Law

A more considered than usual discussion of the concept of jurisdiction was provided by the majority of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission.* [21] However, whereas Lord Reid would have confined jurisdiction to its "narrow and original sense of the tribunal being entitled to enter on the inquiry in question" [22] but found that certain errors made in the course of the tribunal's inquiry could cause its decision to be a "nullity," [23] Lord Pearce saw no distinction between "jurisdiction" and "nullity." [24] Moreover, Lord Wilberforce, perhaps aware of the futility of trying to define these terms but agreeing with Lord Pearce's wider view,[25] referred to a tribunal's "derived authority . . . from statute" and to the field within which it operates as "marked out and limited";[26] within that designated field or area it is the duty of the courts "to attribute autonomy of decision of action to the tribunal" and "as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed." [27] It may be important to decide which of these two views is the correct one when damages and the date from which they are to run are in issue, or when it is sought to use the shield of a privative clause against the review of the decision of a quasi-judicial body that has breached the rules of natural justice. [28] It is pertinent to refer here to the approval given recently by the Supreme Court of Canada to all three of these judgments in *Anisminic*, albeit within the context of expressing itself as having no need to discuss the case and arguments of counsel on how the court should act "when called upon to decide whether a tribunal exercising powers conferred

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[19] Re Ombudsman Act, 72 W.W.R. (n.s.) 176, at 190, 10 D.L.R.3d 47, at 58 (Alta. Sup. Ct. 1970).

[20] Royal Commission Inquiry on the Operations of the Edmonton Real Estate Board Co-operative Listing Bureau Limited (Alberta 1970).

[21] [1969] 2 A.C. 147, [1969] 1 All E.R. 208, [1969] 2 W.L.R. 163. *See also* Wade, *Constitutional and Administrative Aspects of the Anisminic Case*, 85 L.Q.R. 198 (1969); Smillie, *Jurisdictional Review of Abuse of Discretionary Power*, 47 Can. B. Rev. 623 (1969); Sykes & Maher, *Excess of Jurisdiction—A Problem in Administrative Law*, 7 Melborne Univ. L. Rev. 385 (1970).

[22] [1969] 2 A.C. at 171, [1969] 1 All E.R. at 213, [1969] 2 W.L.R. at 170.

[23] *Id.*

[24] [1969] 2 A.C. at 194-95, [1969] 1 All E.R. at 233-34, [1969] 2 W.L.R. at 191-92.

[25] [1969] 2 A.C. at 207-08, [1969] 1 All E.R. at 243-44, [1969] 2 W.L.R. at 203-04.

[26] *Id.*

[27] *Id.*

[28] See text accompanying notes 177 to 180.

on it by statute has exceeded those powers conferred on it by statute or has otherwise acted without jurisdiction." [29] Nominalism in the law is not so easily dismissed.

Where certain preliminary conditions have not been fulfilled, the tribunal may not possess the power even to enter into its deliberations or to make an order. The power to deport members of a family against whom an order of deportation has been made could not be exercised until the conditions specified in the Immigration Inquiries Regulations, which required that such member be "first . . . given an opportunity of establishing . . . that he should not be so included," [30] had been met. [31] Again, the arbitral board which, in preparing the provisions to be included in the collective agreement between the parties, failed to fix the time within which they were to execute the document, breached a mandatory condition of the act and therefore lost the power to make its award. [32] It may be difficult at times to identify how essential is this preliminary *desidertum*, for it is recognized that a formal requirement may be merely directory and not intended as a condition *sine qua non* to the tribunal's jurisdiction. [33] The courts find no difficulty in their characterization when the statutory requirement apparently replaces a common law one such as the rules of natural justice; [34] when it demands that an industrial training board state in its assessment notice "the board's address for the service of a notice of appeal" to overcome interference with so important a matter as a person's right of appeal; [35] or when the order of a labour relations board enforceable as an order of the court by penal or contempt proceedings contains a fatal ambiguity. [36] However, this genuflexion to formalities is always in danger of becoming too submissive: in one case, [37] suspension of a licence was authorized for conduct that the Ontario Racing Commission "considers to be contrary to the public interest," but because the commission's reasons referred only to a positive urine test and not to "the public interest," a court held that it did not set out its jurisdiction on the face of its record and hence acted without jurisdiction. Since, in the absence of a statutory requirement, a tribunal need give no reasons at all for its order, [38] this sort of reasoning is unlikely to embolden it to do otherwise

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[29] Metropolitan Life Ins. Co. v. International Union of Operating Eng'rs, Local 796, 11 D.L.R.3d 336 (Sup. Ct. 1970).

[30] Immigration Inquiries Regulations, § 11 (1967).

[31] Moshos v. Minister of Manpower and Immigration, [1969] Sup. Ct. 886, 7 D.L.R.3d 180.

[32] Regina v. Schiff, [1970] 1 Ont. 752, 9 D.L.R.3d 434 (High Ct. 1969), *aff'd*, [1970] 3 Ont. 476.

[33] S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 126-29 (2d ed. 1968).

[34] Moshos v. Minister of Manpower and Immigration, [1969] Sup. Ct. 886.

[35] Agricultural, Horticultural and Forestry Indus. Training Bd. v. Kent, [1970] 2 W.L.R. 426 (C.A. 1969).

[36] *Re* United Steelworkers of America Local 663, 3 D.L.R.3d 577 (B.C. Sup. Ct. 1969).

[37] Regina v. Ontario Racing Comm'n, [1970] 1 Ont. 458, 8 D.L.R.3d 624 (High Ct. 1969).

[38] See *infra* at note 156.

than simply reproduce the magic words of the statute.

But the statutory requirements may be of a non-procedural nature and nonetheless constitute conditions to the tribunal's jurisdiction. Where legislation empowered a board to declare a trade union was not entitled to represent the employees of the unit, it could not ignore the preliminary demand that the trade union be an uncertified one and at the same time meet a preliminary condition of fact as to its jurisdiction.[39] Similarly, where a labour relations board is authorized to order any person to refrain "from engaging in any unfair labour practice," it must first pass on this question of whether an unfair labour practice in fact has been committed;[40] where certification is at stake, the board must consider first the appropriateness of the bargaining unit;[41] and where empowered to order a vote amongst the employees to determine whether a majority "are in favour of accepting the employer's final offer," the board is faced with the collateral issue of whether the employer's offer was in truth a final one.[42] On the other hand, a decision by the tribunal on this subordinate issue of fact often must be distinguished from the recognition by it that one indeed must be made. The former identifies the situation where the tribunal has satisfied itself on the presence of the factual condition and has reached a conclusion with which the court will not interfere; the latter points to the total non-fulfilment of the condition and, in effect, sends the matter back to the administrative body for a decision on this issue.[43]

In fixing exclusive responsibility on a tribunal, or granting it power in its own opinion or discretion, to decide whether a trade union is a proper bargaining agent or employer-dominated;[44] to determine a proper bargaining unit;[45] to adjudge the acceptability of the employees' votes;[46] or to interpret for itself the breadth of a statutory provision excluding guards as a certifiable bargaining unit,[47] legislatures underscore the almost boundless powers they can confer on their tribunals. Of course, as we have seen, limits in the form of statutory conditions may hedge in these powers: once a board of arbitration has made its award and settled the terms of the collective

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[39] Regina v. Ontario Lab. Rel. Bd., [1969] 2 Ont. 597, 6 D.L.R.3d 274 (High Ct.).

[40] Regina v. Saskatchewan Lab. Rel. Bd., 3 D.L.R.3d 763 (1969).

[41] *Re* Belledune Fertilizer Ltd., 1 N.B.2d 272 (Sup. Ct. 1969); Noranda Mines Ltd. v. The Queen, [1969] Sup. Ct. 898, 69 W.W.R. (n.s.) 321, 7 D.L.R.3d 1.

[42] Smith-Roles Ltd. v. Saskatchewan Lab. Rel. Bd., 71 W.W.R. (n.s.) 290, 10 D.L.R.3d 273 (Sask. Q.B. 1969).

[43] Dome Petroleum Ltd. v. Swan Swanson Holdings Ltd., 72 W.W.R. (n.s.) 6 (Alta. 1969).

[44] Retail Store Union, Local 980 v. Board of Indus. Rel., 70 W.W.R. (n.s.) 226, 5 D.L.R.3d 709 (Alta. Sup. Ct. 1969).

[45] Noranda Mines Ltd. v. The Queen, [1969] Sup. Ct. 898, 69 W.W.R. (n.s.) 321, 7 D.L.R.3d 1; Regina v. Saskatchewan Lab. Rel. Bd. 10 D.L.R.3d 284 (Sask. 1970).

[46] International Woodworkers of America v. Waskesiu Holdings Ltd., 73 W.W.R. (n.s.) 260 (Sask. 1970).

[47] Regina v. Ontario Lab. Rel. Bd., [1969] 2 Ont. 116, 4 D.L.R.3d 485 (High Ct.); Labourers' Int'l Union v. Knight Security Guards Ltd., [1969] Can. Cur. L. 421; appeal dismissed, The Globe and Mail (Toronto), April 16, 1969, at 42, col. 8.

agreement it is then too late to amend or issue corrigenda to it;[48] where notice of appeal from a deportation order had been given prior to the enactment of the Immigration Appeal Board Act, then section 33(a) denies a deportee the right of appeal to this Board;[49] the commission of inquiry acting under a statute that reposes the authority to define its subject-matter of investigation in "the opinion of the Governor-General" is pre-empted from itself defining the scope of an inquiry;[50] or, having found that a contract of employment had been properly terminated, a board of reference may have destroyed its power then to order continuance of that agreement.[51] This last example also serves to illustrate the converse of what we had earlier observed of the situation in which a statutory condition left unanswered by the tribunal removed the foundations for its ultimate decision. Here it is not its response to this question of fact that is in doubt but rather whether the language of the statutory instrument permits that answer to support the tribunal's decision.[52]

Last year there appeared that *rara avis*, the collateral fact and whether the court[53] could inquire into the applicability of the term "self-contained dwelling unit" in section 3 of the Ontario Human Rights Code to the premises in respect of which a board of inquiry had been established. At the trial level this fact was held to be collateral and Mr. Justice Stewart found that the premises in question fell outside the ambit of this provision; on appeal,[54] however, this judgment was overturned on grounds of prematurity.

But to return to the examination of the wide discretion that may have been granted a tribunal, it is clear that the body given the "power" or discretion to do an act is under no obligation to exercise this power.[55] Nor does the discretion exercised by a planning authority in such a way as to destroy, without compensation, an owner's right to do with his land as he sees fit lead to an excess of power, even if proceeding to fulfil the same object under another statute would have given the individual compensation for his loss.[56] On the other hand, by adopting a rigid policy in advance of its decision, a tribunal will be refusing to exercise any discretion and may conse-

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[48] Regina v. Andrews, [1970] 1 Ont. 247, 8 D.L.R.3d 193 (High Ct. 1969); Regina v. Saskatchewan Lab. Rel. Bd., 10 D.L.R.3d 284 (Sask. 1970).

[49] Regina v. Immigration Appeal Bd., 2 D.L.R.3d 437 (B.C. 1968).

[50] Rajah Ratnagapol v. Attorney-General, [1969] 3 W.L.R. 1056 (P.C.).

[51] Regina v. Vannini, [1970] 1 Ont. 402, 8 D.L.R.3d 516 (High Ct. 1969). *Cf.* Regina v. McCulloch, [1969] 2 Ont. 331, 5 D.L.R.3d 289.

[52] Regina v. Weatherill, [1970] 2 Ont. 301, 10 D.L.R.3d 533 (1969).

[53] Regina v. Tarnopolsky, 6 D.L.R.3d 576 (Ont. High Ct. 1969). *See also* Eastern Irrigation Dist. v. Board of Indus. Rel., 73 W.W.R. (n.s.) 466 (Sup. Ct. 1970).

[54] Regina v. Tarnopolsky, [1970] 2 Ont. 672 (1969); presently on appeal to Supreme Court of Canada.

[55] Regina v. Ontario Lab. Rel. Bd., [1970] 2 Ont. 40, 9 D.L.R.3d 669 (High Ct. 1969). *Cf.* Dome Petroleum Ltd. v. Swan Swanson Holdings Ltd., 72 W.W.R. (n.s.) 6 (Alta. 1969).

[56] Westminster Bank Ltd. v. Minister of Housing and Local Gov't, [1970] 1 All E.R. 734, [1970] 2 W.L.R. 645 (H.L.).

quently be guilty of declining or abusing its powers.[57] Equally fatal will be the discretion exercised in response to irrelevant considerations. If in the interpretation of its legislative authority, a tribunal adds a further legal requirement to what the statute already demands;[58] instead of asking itself whether the employees were members of the trade union, it composes novel and unauthorized considerations;[59] or it[60] fails to pay attention to all the factors "which it was required to take into account,"[61] then it will have erred in law and very possibly have strayed beyond its discretionary powers. But if in the course of deciding the question of certification a board is governed by the factor of the present unit increasing tenfold within the next year, it has directed its attention at the vital question of how appropriate is the unit and has not been moved by an irrelevant consideration.[62] The difficulty facing a court is that in seeking to determine whether a tribunal has been influenced by an irrelevant consideration, it must carefully search the statute for its legislative intent, but that process makes it no easier to understand why a tribunal seized of the issue of what is a proper bargaining unit and having none of the legislative guidelines found in the *Stedelbauer*[63] case should be held justified in taking into account the potential size of the unit, in one case,[64] and, in another,[65] not authorized to take more pains in assessing union membership amongst those in the unit than the court required. By addressing itself to the very question of the proper bargaining unit posed by by the statute, but undertaking to pursue conscientiously the responsibility imposed by its act that the employees were members of the trade union, the Board entered into destructive detail and destroyed its jurisdiction, whereas it might have proceeded safely merely by giving a brief reply to the general question of whether the employees were members of the trade union. Again, the courts have emphasized the dangers inherent in a tribunal's disclosure of the reasons for its decision.

The above cannot be divorced from the further difficulty which attends the conclusion of finding that a tribunal erred in law. By imposing further legal conditions on itself other than those found in the statute, or by omitting

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[57] Jackson v. Beaudry, 70 W.W.R. (n.s.) 572, 7 D.L.R.3d 737 (Sask. Q.B. 1969); *Re* Armstrong and Canadian Nickel Co., [1970] 1 Ont. 708, 9 D.L.R.3d 330 (1969).

[58] Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 A.C. 147, [1969] 1 All E.R. 208, [1969] 2 W.L.R. 163.

[59] Metropolitan Life Ins. Co. v. International Union of Operating Eng'rs, Local 796, 11 D.L.R.3d 336 (Sup. Ct. 1970).

[60] Newhall v. Reimer, 67 W.W.R. (n.s.) 258, 2 D.L.R.3d 498 (Man. 1968).

[61] Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 A.C. at 171, [1969] 1 All E.R. at 213, [1969] 2 W.L.R. at 170 (Lord Reid).

[62] Noranda Mines Ltd. v. The Queen, [1969] Sup. Ct. 898, 69 W.W.R. (n.s.) 321, 7 D.L.R.3d 1. *See also Re* Belledune Fertilizer Ltd. and Local 1150 Int'l Bhd. of Elec. Workers, 1 N.B.2d 272 (Sup. Ct. 1969); Rural Co-operative Soc'y v. Thomson, [1969] N.Z.L.R. 300 (Sup. Ct. 1968).

[63] Board of Indus. Rel. v. Stedelbauer Chevrolet Ltd., [1969] Sup. Ct. 137, 65 W.W.R. (n.s.) 344, 1 D.L.R.3d 81 (1968).

[64] Noranda Mines Ltd. v. The Queen, [1969] Sup. Ct. 898, 69 W.W.R. (n.s.) 321, 7 D.L.R.3d 1.

[65] Metropolitan Life Ins. Co. v. International Union of Operating Eng'rs, Local

to consider others which it contains, a tribunal has clearly breached the act. Where contrary to the legislation the tribunal takes cognizance of whether a plaintiff's successor is a British national;[66] replaces the simple issue of whether proposed employees of a bargaining unit are members of the union with four other requirements;[67] in granting employees leave of absence, flies in the face of the express conditions laid down by the collective agreement;[68] ignores the factors specifically required by the legislation to be considered;[69] gives a party notice of proceedings in the form of a duplicitous charge;[70] or offends the statutory incorporation of the civil rules of evidence by hearing two separate charges together and allowing hearsay testimony,[71] it has erred in law. Now this flaw, appearing on the face of the record in a certiorari proceeding, is remediable, but, as we shall see,[72] not when confronted by a widely framed privative clause. Therefore, very often because of the remedy being asked for or the presence of such a clause, it will not be enough to reach the conclusion that the tribunal has made a false step in law; to succeed, the complainant must go one step further and destroy the tribunal's jurisdiction to make the decision in question. And it is this imponderable, which attempts to distinguish between the error of law made within its jurisdiction and the one leading it to exceed its authority, that creates so much anguished dismay amongst the readers of law reports.

For example, it may seem obvious now to conclude that by adding conditions to those set forth in the statute, a tribunal's misinterpretation of its provisions will necessarily lead to deliberations never contemplated by this legislation and consequently to a decision-making process outside its ambit. But how is one to decide whether this misinterpretation produces but an erroneous answer to the very question which the legislation asks, or gives forth this reply because it never did consider the matter with which it was seized? Is it not likely that the misconstruction arose because in the course of trying to apply the facts before it to the applicable enactment the tribunal added to, or subtracted from, its provisions certain matters which a superior court subsequently held were irrelevant and erroneous? So, in the past year we have had displayed disagreements over this very question of when an error of law does or does not defeat jurisdiction; the crux of this controversy appears most cogently analyzed in the trial judgment of Mr. Justice

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796, 11 D.L.R.3d 336 (Sup. Ct. 1970).

[66] Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 A.C. 147, [1969] 1 All E.R. 208, [1969] 2 W.L.R. 163.

[67] Metropolitan Life Inc. Co. v. International Union of Operating Eng'rs, Local 796, 11 D.L.R.3d 336 (Sup. Ct. 1970).

[68] Regina v. Weatherill, [1970] 1 Ont. 656, 9 D.L.R.3d 238 (High Ct. 1969).

[69] Newhall v. Reimer, 67 W.W.R. (n.s.) 258, 2 D.L.R.3d 498 (Man. 1968).

[70] Johnston v. Association of Professional Eng'rs, 70 W.W.R. (n.s.) 600 (Sask. Q.B. 1969), *aff'd* on other grounds 75 W.W.R. (n.s.) 740 (Sask. 1970).

[71] Kerster v. College of Physicians and Surgeons, 72 W.W.R. (n.s.) 321 (Sask. Q.B. 1970). *See also* Sloan v. General Medical Council, [1970] 1 W.L.R. 1130 (P.C.).

[72] See text accompanying notes 171-76.

Browne [73] and in the division of opinion in the House of Lords. [74] Often the distinction is veiled by a court which, because the error of law does appear on the face of the record in a certiorari application, can be somewhat careless in its reasons for granting relief, [75] with the result that the reader is often left to ponder why, for example, the failure to consider all the statutory factors [76] or the presence of a duplicitous charge [77] could not as easily have been considered jurisdictional errors of law.

If the total absence of any evidence to support a finding of fact affords a ground for overturning a tribunal's decision, a premise that remains still in some doubt, again the problem that may then arise is whether the error committed is or is not a jurisdictional one. [78] It has been held that a finding of fact "totally unsupported by any evidence" [79] gives rise to an appealable "question of law"; but within the context of judicial review and in the absence of a right of appeal the question remains whether this is a ground for quashing the decision. One case [80] felt compelled to follow *Nat Bell* [81] and rule that no such ground exists, but another [82] reached the conclusion that that decision only prevented this ground from tainting jurisdiction and that if a tribunal "acted on no evidence, or admitted illegal evidence, or rejected legal evidence or misdirected itself in some way, it merely erred in law, and unless that error is manifest on the face of the record, the award cannot be challenged on proceedings for an order of certiorari." [83] But there is also recent authority on the other side which would have the complete absence of evidence affect a tribunal's jurisdiction. [84]

Even more fundamental defects in a tribunal's capacity to become seized of a particular matter may render its entire proceedings ultra vires. There may arise grave doubts as to whether an employer carries on a business over which the Canada Labour Relations Board has any constitutional

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[73] Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 A.C. at 235-244.

[74] Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 A.C. 147, [1969] 1 All E.R. 208, [1969] 2 W.L.R. 163. *Compare* the opinion of Lord Morris with those of Lords Reid, Pearce and Wilberforce: *See also Re* Belledune Fertilizer Ltd., 1 N.B.2d 272 (Sup. Ct. 1969).

[75] *E.g.*, Regina v. Weatherill, [1970] 1 Ont. at 661, 9 D.L.R.3d at 243; Regina v. Weatherill, [1970] 2 Ont. at 304, 10 D.L.R.3d at 536. *Cf.* Newhall v. Reimer, 67 W.W.R. (n.s.) 258, 2 D.L.R.3d 498 (Man. 1968), and Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 A.C. 147, [1969] 1 All E.R. 208, [1969] 2 W.L.R. 163.

[76] Newhall v. Reimer, 67 W.W.R. (n.s.) 258, 2 D.L.R.3d 498 (Man. 1968).

[77] Johnston v. Association of Professional Eng'rs, 70 W.W.R. (n.s.) 600 (Sask. Q.B. 1969).

[78] See Molot, *Annual Survey of Canadian Law: Administrative Law*, 3 OTTAWA L. REV. 465, at 484 (1969).

[79] *Re* McCann, [1970] 2 Ont. 117, at 120, 10 D.L.R.3d 103, at 106.

[80] Rural Co-operative Soc'y v. Thomson, [1969] N.Z.L.R. 300 (Sup. Ct. 1968).

[81] Rex v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128 (P.C.).

[82] Regina v. Board of Arbitration, [1970] 1 Ont. 99, 7 D.L.R.3d 571 (High Ct. 1969).

[83] *Id.* at 108, 7 D.L.R.3d at 580.

[84] See Molot, *supra*, note 78, at 484.

jurisdiction, [85] or whether the tribunal purporting to act can do so at all. With respect to the latter, there was the case of the provincially appointed arbitrator who also happened to be a county court judge prohibited by the Judges Act from acting in such a capacity [86] and the instances in which the maxim *delegatus non potest delegare* was argued against the power of the officer in question to act at all in the matter. However, it was decided the legislation expressly conferred on the assistant clerk of the Privy Council the authority to sign an order-in-council [87] and, because of the hierarchy of authority and in spite of the special dispensation given to Ministers of the Crown in the *Carltona* case, [88] an implied delegation of authority clothed a police inspector with the powers of the commissioner of police. [89] In permitting a delegation of authority, one case went to some pains to demonstrate that that authority was not a quasi-judicial one and was subject to appeal; [90] and another pointed out that in granting a development permit subject to certain matters being carried out to the satisfaction of the city engineer, a tribunal had not surrendered its powers but had required some phases of construction to meet requirements "which would, it appears to me, normally be dealt with by the official referred to" in its decision. [91]

Lastly, there is the fraud perpetrated on a tribunal, which thereby interferes with its function of finding the facts and causes it to act "beyond its powers." [92] The court in such instances will overturn its decision, but only if the fraud is discovered after the order was made and hence had been successful in deceiving the tribunal. Where perjured testimony constituted the alleged fraud, it was reasoned that "perjury in a collateral area not affecting a material issue or perjury discovered and exposed during the trial or hearing do not have the effect of undiscovered perjury on a material issue which could reasonably be considered as having had the effect of causing the misled Court or tribunal to tip the scale in favour of the fraudulent party." [93]

III. Natural Justice

Whether natural justice will apply to a tribunal's proceedings and

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[85] Three Rivers Boatman Ltd. v. Canada Lab. Rel. Bd., [1969] Sup. Ct. 607; Agence Maritime Inc. v. Canada Lab. Rel. Bd., [1969] Sup. Ct. 851.

[86] Regina v. Moore, [1969] 2 Ont. 677, 6 D.L.R.3d 465 (High Ct.).

[87] Regina v. Huculak, 69 W.W.R. (n.s.) 238 (Sask. 1969).

[88] Carltona Ltd. v. Works Comm'rs, [1943] 2 All E.R. 560 (C.A.). *But cf.* H. Lavender & Son Ltd. v. Minister of Housing & Local Gov't, [1970] 1 W.L.R. 1231 (Q.B. 1969).

[89] Nelms v. Roe, [1969] 3 All E.R. 1379, [1970] 1 W.L.R. 4 (Q.B. 1969).

[90] Attorney-General of Nova Scotia v. Halifax, 2 D.L.R.3d 576 (1968). *See In Re* Shier, [1970] 1 Q.B. 160, [1969] 1 All E.R. 949, [1969] 2 W.L.R. 708 (Visitors to Grey's Inn 1969).

[91] Figol v. Edmonton City Council, 71 W.W.R. (n.s.) 321, at 336, 8 D.L.R.3d 1, at 16 (Alta. 1969).

[92] 1 McRuer Report 257. *See* Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 A.C. at 171, [1969] 1 All E.R. at 213, [1969] 2 W.L.R. at 170.

[93] Regina v. Saskatchewan Lab. Rel. Bd., 6 D.L.R.3d 296, at 307-08 (Q.B. 1969).

whether the remedies of certiorari and prohibition can be obtained still require a court first to determine that that body is exercising a quasi-judicial function. The distinction between a quasi-judicial and an administrative function has been described as "almost as elusive as the Scarlet Pimpernel," [94] but this cry for reform has not daunted the Canadian Department of Justice which has imported this judicially created morass into its Federal Court Bill and given it a potential legislative sanctity which it ill deserves. [95]

In trying to characterize the tribunal's function, the courts may be assisted in finding it to be administrative by statutory language which empowers dismissal of a police officer holding office "during pleasure" [96] or authorizes the Director of a Securities Commission to act "in his discretion." [97] Similarly, certain situations may possess the stamp of a judicial act. For example, revocation [98] or suspension [99] of a licence or membership in an association is considered a judicial act. If in spite of the tribunal's power merely to make recommendations to another authority and not pass judgment and assess the ultimate penalty, a court is able to find that its report only requires "the seal of approval of the Minister" [100] before it becomes an unappealable judgment, or that by forming an opinion it sets "in motion a chain of events which could lead to penalties, after a determination of rights," [101] the tribunal will be considered to be exercising a judicial function. In accordance with *Ridge v. Baldwin*, [102] it is now no longer so much the procedures to be followed by the tribunal that characterizes its act as it is the degree and immediacy of impact its actions will have on the rights of the individual, but this fall of the two-prong test apparently went unnoticed by the Saskatchewan Court of Appeal. [103] The Ontario Court of Appeal has recently stated: "From the power to affect such civil rights is to be in-

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[94] Voyageur Explorations Ltd. v. Ontario Sec. Comm'n, [1970] 1 Ont. 237, at 242, 8 D.L.R.3d 135, at 140 (High Ct. 1969).

[95] Bill C-192, § 28(1) (Can. 1969).

[96] White v. Liverpool, 8 D.L.R.3d 173 (N.S. Sup. Ct. 1969). *See also* Marian v. Board of Governors of Univ. Hosp., 74 W.W.R. (n.s.) 55 (Sask Q.B. 1970), *aff'd*, [1971] 1 W.W.R. 58 (Sask. 1970), where the employee-employer relationship between the parties (at 65) removed any judicial quality from the act of dismissal.

[97] Voyageur Explorations Ltd. v. Ontario Sec. Comm'n, [1970] 1 Ont. at 242; Breen v. Amalgamated Eng'r Union, [1970] 2 All E.R. 179 (Q.B.); Thorpe v. Village Motor Hotel Ltd., 70 W.W.R. (n.s.) 316, 8 D.L.R.3d 186 (Sask. 1969).

[98] Regina v. Ontario Racing Comm'n, [1970] 1 Ont. 458, 8 D.L.R.3d 624 (High Ct. 1969). *Re* Lipp's Certiorari Application, 69 W.W.R. (n.s.) 564 (B.C. Sup. Ct. 1969).

[99] John v. Rees, [1969] 2 All E.R. 274, [1969] 2 W.L.R. 1294 (Ch.).

[100] Regina v. Tarnopolsky, [1970] 2 Ont. 672 (1969); presently on appeal to Supreme Court of Canada. *See also* Ladner Transfer Ltd. v. Board of Indus. Rel., 69 W.W.R. (n.s.) 481, 6 D.L.R.3d 663 (B.C. 1969); *Re* Rosenfeld, [1970] 2 Ont. 438 (High Ct.); Reich v. College of Physicians and Surgeons, 71 W.W.R. (n.s.) 360 (Alta. Sup. Ct. 1969).

[101] *Re* Schumacher, 70 W.W.R. (n.s.) 309, at 314, 8 D.L.R.3d 473, at 479 (B.C. Sup. Ct. 1969). *But cf.* Attorney-General of Nova Scotia v. Halifax, 2 D.L.R.3d 576 (1968).

[102] [1964] A.C. 40.

[103] Thorpe v. Village Motor Hotel Ltd., [1970] 1 Ont. at 318, 8 D.L.R.3d at 189.

ferred the duty of such a body to act judicially." [104] Consequently, one finds that last year the courts characterized as judicial the exercise of the disciplinary authority conferred on the head of a correctional camp operating under the Penitentiary Act [105] and, despite the supervisory jurisdiction of the visitor, the power of a university to hear an appeal from the refusal to grant a degree [106] and to ask a student to withdraw after failing an examination. [107]

The courts now lay their emphasis on the effects which the tribunal's action is likely to have on the person involved. No longer is it enough to draw the dichotomy between prima facie and final determinations, [108] or perhaps even between the grant and revocation of a licence. [109] One must delve more deeply into the tribunal's powers to determine their impact on a person's rights and, for example, whether "a decision that a prima facie case has been made out may have substantive and serious effects as regards the person affected, as by removing from him an otherwise good defence or by exposing him to a new hazard, or as when he is prevented, however temporarily, from taking action which he wishes to take." [110] Recently, Lord Denning expressed the view that the distinction between judicial and administrative proceedings is no longer relevant to the question of the applicability of the rules of natural justice, [111] but though continuing to make the former a prerequisite for the requirement of fair procedures before a tribunal, the House of Lords [112] has reasoned that clearing this first hurdle still leaves to be answered the scope and extent of natural justice or fair procedure to be applied in the circumstances.

1. *Bias* [113]

Most commonly, bias is established because there exists a reasonable likelihood of bias in the tribunal, a test that demands that "a real apprehension be raised in the mind of a reasonable and intelligent man, fully apprised of the circumstances." [114] Last year, this kind of bias was found to taint the

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[104] Regina v. Beaver Creek Correctional Camp Head, [1969] 1 Ont. 373, at 376-77, 5 Can. Crim. (n.s.) 317, at 321.

[105] *Id.*

[106] King v. University of Saskatchewan, [1969] Sup. Ct. 678, 68 W.W.R. (n.s.) 746, 6 D.L.R.3d 120. *See also* Bell v. University of Aukland, [1969] N.Z.L.R. 1029 (Sup. Ct.).

[107] Regina v. Aston Univ. Senate, [1969] 2 Q.B. 538, [1969] 2 All E.R. 964, [1969] 2 W.L.R. 1418.

[108] Wiseman v. Borneman, [1969] 3 All E.R. 275, [1969] 3 W.L.R. 706 (H.L.).

[109] Regina v. Gaming Bd., [1970] 2 W.L.R. 1009, at 1016-17 (C.A.). *Cf.* Thorpe v. Village Motor Hotel Ltd., 70 W.W.R. (n.s.) 316, 8 D.L.R.3d 186 (Sask. 1969); Delmonico v. Director of Wildlife, 67 W.W.R. (n.s.) 340, at 343 (B.C. County Ct. 1969).

[110] Wiseman v. Borneman, [1969] 3 All E.R. at 285, [1969] 3 W.L.R. at 719 (H.L.).

[111] Regina v. Gaming Bd., [1970] 2 W.L.R. at 1016-17.

[112] Wiseman v. Borneman, [1969] 3 All E.R. 275, [1969] 3 W.L.R. 706 (H.L.).

[113] See Reid, *Bias and the Tribunals*, 20 U. TORONTO L.J. 119.

[114] Regina v. Moore, [1969] 2 Ont. at 684, 6 D.L.R.3d at 472 (High Ct.). *See also* Board of School Trustees v. Proudfoot, 71 W.W.R. (n.s.) 703 (B.C. Sup. Ct. 1969); Metropolitan Properties Co. v. Lannon, [1969] 1 Q.B. 577, [1968] 3 All E.R. 304, [1968] 3 W.L.R. 694 (C.A.).

chairman of an arbitration board, empowered under the Police Act to conclude a collective agreement between the Oakville Board of Commissioners of Police and the city's police force, who at the same time was a member of many other boards of commissioners of police;[115] the nominees of the school board and teachers of a district, who as arbitrators of terms of employment, were trustees and teachers in other school districts;[116] members of a local education authority who were also governors of the school at which the teacher whose conduct was being inquired into taught but who had not sat with their brethren when it was decided to press the complaint;[117] the deputy chief of police who proffered the charges against a member of the force;[118] the chief of police who in cross-examination upon his affidavit admitted that before the disciplinary hearing was held he believed the policeman in question to be guilty;[119] the members of the council of a pharmaceutical association who in considering the reports of its investigating committee composed of all but two members of council reviewed "in reality, its own report."[120] On the other hand, no such bias was found against the members of the council of a professional association who voluntarily rescinded the penalities imposed on one of its members and then proceeded to hear the same charges subsequently re-laid against that person;[121] the member of the labour relations board who, as an officer of the labour federation with which the trade union involved in the dispute was affiliated, was appointed under the act as a "representative of the views of the employees" and against whom there was no evidence of that "undue interest" expressly forbidden by the legislation;[122] or the magistrate who on several occasions publicly expressed the view that shoplifters should be put in jail until the incidence of this crime dropped in the community.[123]

Some of the dangers inherent in a multitude of appeals within a particular administrative process are apparent in *King v. University of Saskatchewan*[124] where further proceedings were taken before three appeal committees of the university. A great deal of duplication in the membership of these successive tribunals occurred, but the Supreme Court of Canada brushed this aside: the cases outlawing bias based on the tendency to favour one's

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[115] Regina v. Moore [1969] 2 Ont. 677, 6 D.L.R.3d at 472 (High Ct.).

[116] Board of School Trustees v. Proudfoot, 71 W.W.R. (n.s.) 703 (B.C. Sup. Ct. 1969).

[117] Hannam v. Bradford Corp., [1970] 1 W.L.R. 937 (C.A.).

[118] Regina v. Carroll, [1970] 1 Ont. 66, 7 D.L.R.3d 506 (High Ct. 1969).

[119] *Id.*

[120] Irwin v. Alberta Pharmaceutical Ass'n, 70 W.W.R. (n.s.) 561, at 567 (Alta. Sup. Ct. 1969).

[121] Regina v. Association of Professional Eng'rs, 2 D.L.R.3d 588 (Sask. 1969).

[122] C. A. E. Indus. Ltd. v. Manitoba Lab. Rel. Bd., 67 W.W.R. (n.s.) 645 (Man. Q.B. 1969), 3 D.L.R.3d 583, at 588, *affirmed without reasons*, 68 W.W.R. (n.s. 608, 6 D.L.R.3d 451 (1969).

[123] Regina v. Menzies, [1970] 1 Ont. 120 (High Ct.).

[124] [1969] Sup. Ct. 678, 68 W.W.R. (n.s.) 746, 6 D.L.R.3d 120.

previous decision [125] were held "inappropriate" to university bodies where "it was inevitable that there would be duplication as one proceeded from one body to another." [126] Why the usual tests for determining the. reasonable likelihood of bias are considered more inappropriate to this body than to the tribunal of a self-governing profession is never explained. Why duplication is "inevitable" in the setting of a university is given no firmer foundation than some vapid, if not supine, references to the ordinary duties resting on the university's faculty members and the special fitness for office of the president who sat on all three committees. Of course, it is admittedly quite proper for him to have sat as a member of the body to which he was appointed by statute, [127] but given the size of a university's academic community, far larger than the council of a profession from which its investigating committee will be drawn, one would have thought it a far easier task for the university to have prevented this questionable duplication of membership. It is unfortunate that the court still continues to display this reluctance to examine the affairs of the university, an institution which, because of its chartered or statutory base, the vast amount of public funds contributing to its support and its ever increasing importance, if not indispensability, to the economy and fabric of the society in which it wishes to thrive, should be no less subject to the controls of judicial, or some other form of independent, review than the professions and other administrative bodies. [128] Why, it may be asked, are they any better qualified to determine correctly the extent of their powers and the procedures they must follow than, for example, are the law societies? And yet, how many times have the courts found the latter to have proceeded in error? [129]

2. *Audi Alteram Partem*

The most commonly committed breach of the rules of natural justice is the failure to give a party proper notice of proceedings. At one extreme may lie a total absence of any notice and opportunity to be heard at all; [130]

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[125] Irwin v. Alberta Pharmaceutical Ass'n, 70 W.W.R. (n.s.) at 561; Reich v. College of Physicians and Surgeons, 71 W.W.R. (n.s.) 360 (Alta. Sup. Ct. 1969).

[126] King v. University of Saskatchewan, [1969] Sup. Ct. 678, at 690, 68 W.W.R. (n.s.) 746, at 757, 6 D.L.R.3d 120, at 131.

[127] Regina v. Law Soc'y, 64 D.L.R.2d 140 (Alta. 1967); Reich v. College of Physicians and Surgeons, 71 W.W.R. (n.s.) 360 (Alta. Sup. Ct. 1969).

[128] See Holland, *The Student and the Law*, 22 CURRENT LEGAL PROBLEMS 61 (1969); and in the non-university setting, Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. OF PA. L. REV. 373 (1969); Sweezey, *Free Speech and the Student's Right to Govern his Personal Appearance*, 7 OSGOODE HALL L.J. 293 (1970). *See also* the recent report of a committee of the University of Alberta recommending an ombudsman for the University (1970).

[129] See Gordon, *Professional Discipline*, 4 U.B.C.L. REV. 109 (1969); Arthurs, *Discipline in the Legal Profession in Ontario*, 7 OSGOODE HALL L.J. 235 (1970); Bastedo, *A Note on Lawyers' Malpractice: Legal Boundaries and Judicial Regulations*, 7 OSGOODE HALL L.J. 311 (1970).

[130] *Re* Lipp's Certiorari Application, 69 W.W.R. (n.s.) 564 (B.C. Sup. Ct. 1969); Regina v. Aston Univ. Senate, [1969] 2 Q.B. 538, [1969] 2 All E.R. 964, [1969] 2

or the otherwise proper notice given to a person who then is disciplined on grounds never included within its terms.[131] But the notice given may also be found to lack the necessary particularity and form. Thus, in one case the court held that where a man's vocation was in jeopardy the notice ought to be in writing, set forth the date and subject-matter of the hearing, the grounds of complaint, the basic facts in issue and the potential gravity of the results.[132] This common law requirement may very well be enhanced by statutory language that enables the court to hold that before reopening the matter and amending its award, a board of arbitration must give notice and the opportunity to reappear;[133] that a special inquiry officer must clearly give the wife of a deportee the opportunity of establishing that she should not be included within his order;[134] and that particulars of the charge must be sufficient "to enable him to properly prepare his defence" and consequently must include the name of the patients whom the accused doctor allegedly charged, details of these charges and the dates and descriptions of rendered services.[135] Moreover, a tribunal which receives *ex parte* representations from one side without disclosing them to the other has breached the rules of natural justice.[136]

But to harken back to the relativity that applies to the scope and extent of the rules of natural justice, one cannot be categorical about how the rules will apply to any particular tribunal. This is best exemplified when individuals seek access to the materials on which an administrative body may be assisted in reaching its decision. The more administrative and discretionary is the function being performed, the less likely is it that a court will order the tribunal to disclose the information upon which it may be acting.[137] On the other hand, where property or personal rights are likely to be immediately affected and the tribunal is exercising a more quasi-judicial function,

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W.L.R. 1418; Regina v. Beaver Creek Correctional Camp Head, [1969] 1 Ont. 373, 5 Can. Crim. (n.s.) 317 (1969); Delmonico v. Director of Wildlife, 67 W.W.R. (n.s.) 340 (B.C. County Ct. 1969); John v. Rees, [1969] 2 All E.R. 274, [1969] 2 W.L.R. 1294 (Ch.).

[131] Johnston v. Ass'n of Professional Eng'rs, 70 W.W.R. (n.s.) 600 (Sask. Q.B. 1969).

[132] Regina v. Ontario Racing Comm'n, [1970] 1 Ont. 458, 8 D.L.R.3d 624 (High Ct. 1969). *See also Re* Rosenfeld, [1970] 2 Ont. 438 (High Ct.); Evaskow v. International Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, 68 W.W.R. (n.s.) 415, 4 D.L.R.3d 684 (Man. Q.B. 1969), *rev'd on a different point*, 71 W.W.R. (n.s.) 565, 9 D.L.R.3d 715 (Man.).

[133] Regina v. Andrews, [1970] 1 Ont. 247, 8 D.L.R.3d 193 (High Ct. 1969).

[134] Moshos v. Minister of Manpower and Immigration, [1969] Sup. Ct. 886, 7 D.L.R.3d 180 (1969).

[135] Regina v. Discipline Comm. of College of Physicians and Surgeons, 69 W.W.R. (n.s.) 201, at 205, 6 D.L.R.3d 520, at 524 (1969). *See also Re* Lipp's Certiorari Application, 69 W.W.R. (n.s.) 564 (B.C. Sup. Ct. 1969).

[136] Evaskow v. International Bhd. of Boilermakers, 68 W.W.R. (n.s.) 415, 4 D.L.R.3d 684, *rev'd on a different point*, 71 W.W.R. (n.s.) 565, 9 D.L.R.3d 715; Regina v. Secretary of State for Wales, 113 SOL. J. 813 (Q.B. 1969).

[137] Collymore v. Attorney General of Trinidad and Tobago, [1970] A.C. 538, [1969] 2 All E.R. 1207, [1970] 2 W.L.R. 233 (P.C.); Local Gov't Bd. v. Arlidge, [1915] A.C. 120; Regina v. Secretary of State for Wales, 113 SOL. J. 813 (Q.B. 1969).

different considerations may well apply. But the duty on the arbitral tribunal to disclose to the parties the data from the Department of Labour on which it stated it had relied in reaching its award [138] was modified when the more private communications moving between the director of wildlife and his officials, [139] and the confidential information on which the gaming board depended in its efforts to ferret out the clubs associated with crime,[140] were involved. These tribunals were still under the obligation to act fairly, albeit to the lesser degree of requiring them not to give the applicant every detail but only "sufficient indication of the objections raised against him such as to enable him to answer them." [141] A further reduction in this duty to disclose was discussed in *Wiseman v. Borneman* [142] where a tribunal under the Finance Act was constituted to examine documentation submitted to it by the commissioners of inland revenue, including a counter-statement prepared by the latter which the taxpayer had never seen, in order to determine whether there was a prima facie case for the commissioners to proceed in the matter. The House of Lords carefully weighed the fairness in procedure to which the taxpayer was entitled against his subsequent rights of appeal against the commissioners, the knowledge of the commissioners' objections he would already have had and the summary procedures at this stage which obviously were intended by Parliament. In the result, disclosure was withheld from the complainant.

Certain variations on the theme of one's right to an adjournment arose last year: in failing to grant more than one adjournment, the Board of Industrial Relations had acted correctly, inasmuch as no party was "precluded . . . from presenting the whole case that was available for presentation"; [143] a party who fails to appear at proceedings that are adjourned one week may be unable to complain that testimony was taken behind his back if "all parties were notified or should have been aware" [144] of the date and purpose of the hearing; but despite the common law and statutory authority in a tribunal to govern its own procedures, the refusal of a labour relations board to exercise its legislatively conferred power to review any of its own decisions when it learns that the objectors and other employees had been misled into believing that an adjournment would be given and for that reason had not appeared at the hearing was held in error. [145] Other incidences of

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[138] Regina v. Schiff, [1970] 1 Ont. 752, 9 D.L.R.3d 434 (High Ct. 1969). *But cf.* Patterson v. The Queen, 9 D.L.R.3d 398 (Sup. Ct. 1970).

[139] Delmonico v. Director of Wildlife, 67 W.W.R. (n.s.) 340 (B.C. County Ct. 1969).

[140] Regina v. Gaming Bd., [1970] 2 W.L.R. at 1016-17.

[141] *Id.* at 1018.

[142] [1969] 3 All E.R. 275, [1969] 3 W.L.R. 706 (H.L.).

[143] Retail Store Union, Local 980 v. Board of Indus. Rel., 70 W.W.R. (n.s.) at 235, 5 D.L.R.3d at 717.

[144] Figol v. Edmonton City Council, 71 W.W.R. (n.s.) at 342, 8 D.L.R.3d at 22.

[145] Regina v. Ontario Lab. Rel. Bd., [1969] 2 Ont. 797, 7 D.L.R.3d 119 (High Ct.).

natural justice discussed in the cases found the English Court of Appeal,[146] hearing the matter by way of interlocutory proceedings, and a judge of the High Court, [147] trying the action itself, differ on the question of whether a person having his licence placed in the balance before the self-governing Greyhound Racing Association was entitled to legal counsel. Resolution of this important matter was thwarted when the parties reached agreement just outside the portals of the Court of Appeal. [148] Of course, a person may lay claim to more than a "right" to representation before a tribunal and, as in one case, [149] be able to have a legal duty imposed on a trade union to represent him in arbitration proceedings. If legislation gives a tribunal the power to subpoena witnesses and one of the parties notifies it that some of his witnesses refuse to attend the hearing voluntarily, then by failing to exercise this power the tribunal has refused "to hear relevant and pertinent evidence" [150] and to give a fair hearing. The general rule that guarantees a party a fair and adequate hearing, though not necessarily an opportunity to advance oral submissions, [151] may be modified by a statute which by giving the employer the right "to present evidence and make representation" the court can interpret in favour of oral representations. [152] On the subject of the openness of a hearing, the Ontario Court of Appeal recently has stated: "If there is any general rule applicable where the statute is silent, it is that the proceedings of a statutory tribunal should be conducted in public unless there be good reason to hold them *in camera*." [153] In matters of procedure and evidence, one case held that where the charge was duplicitous, certiorari would be granted to quash this error of law on the face of the record; [154] and another, in which the statute provided that "the rule of evidence . . . shall be the same as in civil cases," concluded that hearing two separate charges against a doctor at the same time and permitting the introduction of hearsay evidence were both erroneous procedures. [155] Then there was the judgment of a court of appeal which held that the common law rules of natural justice

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[146] Pett v. Greyhound Racing Ass'n, [1969] 1 Q.B. 125, [1968] 2 All E.R. 545, [1968] 2 W.L.R. 1471.

[147] Pett v. Greyhound Racing Ass'n (No. 2), [1970] 1 Q.B. 46, [1969] 2 All E.R. 221, [1969] 2 W.L.R. 1228.

[148] *Note*, [1970] 1 Q.B. 67, [1970] 1 All E.R. 243, [1970] 2 W.L.R. 256.

[149] Fisher v. Pemberton, 72 W.W.R. (n.s.) 575, 8 D.L.R.3d 521 (B.C. Sup. Ct. 1969).

[150] Furniture & Bedding Workers Union, Local 33 v. Alberta Bd. of Indus. Rel., 69 W.W.R. (n.s.) 226, at 231, 6 D.L.R.3d 83, at 87 (Alta. Sup. Ct. 1969).

[151] See Molot, *supra*, note 78, at 478-79.

[152] Ladner Transfer Ltd. v. Board of Indus. Rel., 69 W.W.R. (n.s.) 481, 6 D.L.R.3d 663 (B.C. 1969).

[153] Regina v. Tarnopolsky, [1970] 2 Ont. 672 (1969).

[154] Johnston v. Association of Professional Eng'rs, 70 W.W.R. (n.s.) 600 (Sask. Q.B. 1969).

[155] Kerster v. College of Physicians, 72 W.W.R. (n.s.) 321 (Sask. Q.B. 1969). *See also* Sloan v. General Medical Council, [1970] 1 W.L.R. 1130 (P.C.). *Cf. Re* Medical Act, 73 W.W.R. (n.s.) 627, at 631 (B.C. Sup. Ct. 1970), where the court held that the statute provides for the reception by the tribunal of "such evidence 'as it may think fit' and is not bound by the ordinary rules of evidence."

were not breached by the tribunal that refused to give reasons for its decision. [156] And finally, there were the decisions that discussed the pitfalls of proceeding without a quorum [157] and being careless about the composition of the body meeting to decide upon the penalty against a doctor two years after finding him guilty. [158]

The subject of review or rehearing by a tribunal was again before the courts last year. First, there is the situation in which the tribunal reconsiders its own decision as if it were hearing an appeal from itself. Such a power being "an extraordinary right and one which replaces a review by another tribunal or body" [159] can only emanate from legislation and without such authorization, a tribunal cannot rehear the matter. [160] This is to be contrasted with the situation in which a tribunal recognizes the error it may have committed and rescinds its original order and all the proceedings leading up to it. Then, so long as it proceeds correctly and in accordance with the dictates of natural justice in holding a new hearing and making its decision, no error can be attributed to it, [161] but it seems that this act of self-abnegation must precede any realization of a valid subsequent hearing and decision, in spite of the original order having been a nullity. [162] Somewhat similar is the cure given the error committed by one body wherein natural justice is followed by a superior tribunal rehearing the matter. [163] Lastly, there was the statutory power given a special inquiry officer to re-open a matter, but because of the introduction of the Immigration Appeal Board it was held that once an appeal was taken to the board, this power was lost to this officer who whereupon became *functus officio*. [164]

Two final matters under this heading concerned the power of domestic tribunals to legislate the rules of natural justice out of existence and the effect which a breach of these rules will have on the decision of the tribunal. As to the former, in one case, [165] Mr. Justice Megarry considered that the use of very clear language would exclude the application of these fundamental

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[156] Regina v. Gaming Bd., [1970] 2 W.L.R. 1009. See Akehurst, *Statements of Reasons for Judicial and Administrative Decisions*, 33 MODERN L. REV. 154 (1970).

[157] Reich v. College of Physicians and Surgeons, 71 W.W.R. (n.s.) 360 (Alta. Sup. Ct. 1969).

[158] *Re* Rosenfeld, [1970] 2 Ont. 438 (High Ct.).

[159] Regina v. Ontario Lab. Rel. Bd., [1969] 2 Ont. at 814, 7 D.L.R.3d at 136. *Cf.*, Regina v. Schiff, [1970] 1 Ont. 752, 9 D.L.R.3d 434 (High Ct. 1969), *aff'd*, [1970] 3 Ont. 476.

[160] C.I.L. v. Development Appeal Bd., 71 W.W.R. (n.s.) 635, 9 D.L.R.3d 727 (Alta. 1969).

[161] Regina v. Association of Professional Eng'rs, 2 D.L.R.3d 588 (Sask. 1969).

[162] C.I.L. v. Development Appeal Bd., 71 W.W.R. (n.s.) 635, 9 D.L.R.3d 727 (Alta. 1969); Poslums v. Toronto Stock Exch., [1968] Sup. Ct. 330, 67 D.L.R.2d 165.

[163] King v. University of Saskatchewan, [1969] Sup. Ct. 678, 68 W.W.R. (n.s.) 746, 6 D.L.R.3d 120.

[164] *Re* Giorgaras, [1970] 1 Ont. 222, 8 D.L.R.3d 120 (High Ct. 1969).

[165] Fountaine v. Chesterton, 112 SOL. J. 690 (Ch. 1968), reasons for judgment set out in part in John v. Rees, [1969] 2 All E.R. at 306-08, [1969] 2 W.L.R. at 1332-33. *See also* Gaiman v. National Ass'n *for Mental Health*, [1970] 2 All E.R. 362, at 379, [1970] 3 W.L.R. 42, at 60-61 (Ch.).

principles, but in two later decisions he was able to find that the language of the constitution was not sufficiently clear[166] and, for purposes of the interlocutory motion before him, he assumed that an express term could not exclude them.[167] More in keeping with this assumption were the words of Mr. Justice Laskin who spoke of the deprivation of union membership being unlawful in the absence of notice and a hearing: "This is a common law requirement where the constitution is silent. It may not be silent on these matters, but the Court would refuse to recognize expulsion or suspension without notice of the charges upon which it was based, even if the constitution provided otherwise."[168] Whether a breach of the rules of natural justice renders the decision of the tribunal void or voidable has importance in determining the effect of a declaratory order, in measuring damages and, perhaps, in estimating the scope of a privative clause. The majority[169] in the *Anisminic* case expressly lumped this error in with all the other ways in which a tribunal acts without jurisdiction and described the results as a "nullity." Although Lord Wilberforce was at pains to avoid the distinction, the majority in a later decision, reversed on the main point of whether the magistrate acting under the Extradition Act could inquire into whether natural justice had been denied a prisoner in Greece, had no doubts cast upon its reasoning that such a denial produced a nullity and a decision that was void *ab initio.*[170]

IV. Privative Clauses

The leading case of late in this area is *Anisminic Ltd. v. Foreign Compensation Commission*[171] in which the preclusion clause provided that a determination of the commission "shall not be called in question in any court of law." Of the four Law Lords who believed that the tribunal had misconstrued its regulatory powers, three held that the error took that body beyond its jurisdiction and made its decision a nullity. If, as Lord Morris found, the commission had only committed an error of law within its jurisdiction, the decision could not have been considered a nullity and would have remained a "determination," albeit one erroneous in law, and hence

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[166] John v. Rees, [1969] 2 All E.R. at 306-08, [1969] 2 W.L.R. at 1332-33.

[167] Gaiman v. National Ass'n for Mental Health, [1970] 2 All E.R. at 380, [1970] 3 W.L.R. at 61.

[168] Astgen v. Smith, [1970] 1 Ont. 129, at 164, 7 D.L.R.3d 657, at 692 (1969).

[169] Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 A.C. 147, [1969] 1 All E.R. 208, [1969] 2 W.L.R. 163, per Lords Reid, Pearce and Wilberforce.

[170] Regina v. Governor of Brixton Prison, [1969] 3 All E.R. 304, [1969] 3 W.L.R. 528 (Q.B.), *rev'd*, [1969] 3 All E.R. 1337, [1969] 3 W.L.R. 1107 (H.L.). *See* judgment of Lord Reid in House of Lords and *Re* Rosenfeld [1970] 2 Ont. at 456, where Mr. Justice Fraser replied to the respondent's plea: "It is fundamental that waiver cannot remedy a nullity nor can it give jurisdiction."

[171] *Supra*, note 169. See Norman, *Privative Clause: Virile or Futile?*, 34 Sask. L. Rev. 334 (1969).

protected by the express words of the privative clause. [172] But in promulgating a nullity, the commission had really only issued a purported determination and not one that could be considered to have the necessary legal existence to make it a "determination" within the meaning of this clause. [173] This case certainly confirms the line that has been drawn in Canada between the error of law destroying jurisdiction and the one made within the powers conferred on the tribunal. So, in the *Metropolitan Life Insurance* case, [174] the Supreme Court of Canada found that the Ontario Labour Relations Board's error of law led it to step beyond its jurisdiction and expressly agreed with the majority judgments in *Anisminic* that the sweeping privative clause before it could not immunize the board's purported certificate against an order of certiorari. [175] *A fortiori*, the error of fact which a liquor board may have made within its jurisdiction was protected by a privative clause. [176]

Whether a breach of the rules of natural justice will destroy a tribunal's jurisdiction for purposes of overcoming the effects of a privative clause has remained in some doubt. It has already been noted that the majority in *Anisminic* did speak of this defect as one associated with the other miscues of a tribunal that lead it to an excess of its powers and to a decision that is a nullity; [177] and that there appears now to be a preference for characterizing proceedings that do not observe natural justice as void *ab initio*. [178] This has been confirmed recently by two trial judgments from Ontario which denied any effect to the privative clauses in issue, when in one [179] the board refused to rehear the matter formerly decided in the absence of some of the parties and in the other [180] considered certain materials without giving the parties an opportunity to reply to them.

The exact terms of the clause in question may very well alter the rule of law to be applied. Where it is in the form of a "finality" clause, one court has stated that it would be improper for it to "make the declaration sought unless I am satisfied that the defendant was clearly wrong in his

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[172] *See, e.g.*, Regina v. Ontario Lab. Rel. Bd., [1969] 2 Ont. 116, 4 D.L.R.3d 485 (High Ct.).

[173] Anisminic Ltd. v. Foreign Compensation Comm'n, [1969] 2 A.C. at 169-71, 199-201, 210, [1969] 1 All E.R. at 212-14, 237-38, 246, [1969] 2 W.L.R. at 168-170, 196-97, 206.

[174] Metropolitan Life Ins. Co. v. International Union of Operating Eng'rs, Local 796, 11 D.L.R.3d 336 (Sup. Ct. 1970).

[175] *See also Re* Belledune Fertilizer Ltd. and Local 1150 Int'l Bhd. of Elec. Workers, 1 N.B.2d 272 (Sup. Ct. 1969); Regina v. Ontario Lab. Rel. Bd., [1969] 2 Ont. 597, 6 D.L.R.3d 274 (High Ct.); Smith-Roles Ltd. v. Saskatchewan Lab. Rel. Bd., 71 W.W.R. (n.s.) 290, 10 D.L.R.3d 273 (Sask. Q.B. 1969). *But cf.* Sanders v. The Queen, 10 D.L.R.3d 638, at 667-69 and 672-77 (Sup. Ct. 1969).

[176] Thorpe v. Village Motor Hotel Ltd., 70 W.W.R. (n.s.) 316, 8 D.L.R.3d 186 (Sask. 1969).

[177] Alta. Stat. 1966 c. 1.

[178] [1969] 2 A.C. 147, [1969] 1 All E.R. 208, [1969] 2 W.L.R. 163.

[179] Regina v. Ontario Lab. Rel. Bd., [1969] 2 Ont. 797, 7 D.L.R.3d 119 (High Ct.).

[180] Regina v. Schiff, [1970] 1 Ont. 752, 9 D.L.R.3d 434 (High Ct. 1969).

determination." [181] Again, the legislative reaction to the *Stedelbauer* [182] decision is reflected in a privative clause which enhances the right of the injured party to complain by granting him relief against an error of law made within the board's jurisdiction as well if he acts within thirty days of its decision. But perhaps more in keeping with the trend of legislation which favours appeals from tribunals' decisions to the courts rather than the retention of judicial review alone, is the statute of the British Parliament which, besides confirming the right to question "any determination of the Commission on the ground that it is contrary to natural justice," [183] provides for a single and final appeal to the Court of Appeal "on any question of law relating to the jurisdiction" [184] of the Foreign Compensation Commission and "as to the construction or interpretation of any provision" [185] of the order in dispute in *Anisminic.*

Finally, there was the attempt by the constitution of a domestic body to repose in its executive committee exclusive authority over the interpretation of the rules of the association and the subjugation of this privative provision by Mr. Justice Goff [186] to the principle of *Scott v. Avery,* [187] which prohibits this purported contractual ouster of the court's jurisdiction.

V. REMEDIES

Increasing in popularity is the right of appeal to a court of law. [188] Though what can be appealed will be defined by statute, and there may well arise the question of whether the right is confined to procedural irregularities and hence is limited to what can be raised on judicial review, [189] or whether it extends to an appeal on the merits of the case, it is not uncommon to find the appeal court reasoning exactly as it would have done had the appellant proceeded by judicial review. It may conclude that the administrative tribunal acted ultra vires in trying to impose an assessment which the statute did not authorize; [190] that it refused to exercise its discretion because it was guided by its own previously formulated general policy in preference to an

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[181] Helman v. Brown, 2 D.L.R.3d 715, at 717 (B.C. Sup. Ct. 1969).

[182] Board of Indus. Rel. v. Stedelbauer Chevrolet Ltd., [1969] Sup. Ct. 137, 65 W.W.R. (n.s.) 344, 1 D.L.R.3d 81 (1968). *See* The Alberta Labour Act, Alta. Stat. 1968 § 14.

[183] Foreign Compensation Act 1969 c. 20, § 3(10).

[184] *Id.* § 3(2).

[185] *Id.* § 3(1).

[186] Leigh v. National Union of Railwaymen, [1969] 3 All E.R. 1249, [1970] 2 W.L.R. 60 (Ch. 1969). *Cf.* text at notes 200-204.

[187] 5 H.L. Cas. 811 (H.L. 1856).

[188] See Keith, *Appeals from Administrative Tribunals,* 5 VICT. U. OF WELL. L. REV. 123 (1969).

[189] New Brunswick v. Budovitch, 1 N.B.2d 661, 7 D.L.R.3d 141 (1969).

[190] Cullen Stevedoring Co. v. Workmen's Compensation Bd., 1 N.B.2d 621, 5 D.L.R.3d 632 (1969), *rev'd on the matter of statutory interpretation,* 2 N.B.2d 435 (Sup. Ct. 1970).

examination of the merits of the case;[191] or that in some way this tribunal breached the rules of natural justice.[192] In considering whether the administrative body erred "on a question of law" under the statute, the court may also be led into deciding whether in light of the facts it misconstrued these legislative provisions,[193] or whether its finding of fact was "totally unsupported by any evidence."[194] Interestingly, the invalid "decision," which we saw earlier is considered non-existent for purposes of being afforded immunity from a privative clause, was held to be real and substantial enough to be the subject of an appeal to the courts.[195] On the more procedural side were the decisions that discussed the right of an appellant to a stay of execution under the rules of court[196] and the particularity required of the order granting him leave to appeal.[197]

But, of course, one of the distinctions between an appeal and judicial review is that the former may allow the court to enter into the merits of the matter. Thus where legislation empowered a court to confirm or reverse the tribunal's decision,[198] or to make such an order in the matter as it deemed proper,[199] it has examined the facts considered by the administrative body and decided for itself rather than remitting the matter to the tribunal as to whether the contents of that order were correct.

This question of appeal raises other interesting problems. It may be that the statutory procedures, be they appeal or some other form of attacking an administrative decision, are expressed in such a way as to demonstrate a clear legislative intention to oust the jurisdiction of the court from its usual supervisory role.[200] On the other hand, a legislature's failure to express

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[191] Jackson v. Beaudry, 70 W.W.R. (n.s.) 572, 7 D.L.R.3d 737 (Sask. Q.B. 1969); *Re* Armstrong, [1970] 1 Ont. 708, 9 D.L.R.3d 330 (1969).

[192] Kerster v. College of Physicians & Surgeons, 72 W.W.R. (n.s.) 321 (Sask. Q.B. 1970); Figol v. Edmonton City Council, 71 W.W.R. (n.s.) 321, 8 D.L.R.3d 1 (Alta 1969); *Re* Schumacher, 70 W.W.R. (n.s.) 309, 8 D.L.R.3d 473 (B.C. Sup. Ct. 1967); *Re* Rosenfeld, [1970] 2 Ont. 438 (High Ct. 1969); Delmonico v. Director of Wildlife, 67 W.W.R. (n.s.) 340 (B.C. County Ct. 1969).

[193] Quebec Hydro-Electric Comm'n v. Deputy Minister of Nat'l Revenue, 8 D.L.R.3d 480 (Sup. Ct. 1969); *Re* Armstrong, [1970] 1 Ont. 708, 9 D.L.R.3d 330 (1969); *Re* Medical Act, 73 W.W.R. (n.s.) 627 (B.C. 1970).

[194] *Re* McCann, [1970] 2 Ont. 117, 10 D.L.R.3d 103.

[195] City Abbatoir (Calgary) Ltd. v. Calgary, 70 W.W.R. (n.s.) 460, 8 D.L.R.3d 457 (Alta. 1969).

[196] *Re* Occhipinti, [1970] 1 Ont. 741 (1969).

[197] Figol v. Edmonton City Council, 71 W.W.R. (n.s.) 321, 8 D.L.R.3d 1 (Alta. 1969).

[198] Kerster v. College of Physicians & Surgeons, 72 W.W.R. (n.s.) 321 (Sask. Q.B. 1970); Delmonico v. Director of Wildlife, 67 W.W.R. (n.s.) 340 (B.C. County Ct. 1969).

[199] *Re* Rosenfeld, [1970] 2 Ont. 438 (High Ct. 1969).

[200] *Re* Al-Fin Corp's Patent, [1970] Ch. 160, [1969] 3 All E.R. 396, [1969] 2 W.L.R. 1405 (1969); Earle v. New Brunswick Liquor Control Comm'n, 1 N.B.2d 652, 5 D.L.R.3d 743 (1969); *Re* Edery, 70 W.W.R. (n.s.) 553, 7 D.L.R.3d 654 (B.C. Sup. Ct. 1969); Regina *ex rel.* Hennigar v. Stevens, 3 D.L.R.3d 668 (N.S. Sup. Ct. 1969); *Re* Wellington, [1970] 1 Ont. 177, 8 D.L.R.3d 29 (High Ct. 1969); Acadia Pulp and Paper Ltd. v. International Bhd. of Pulp, Sulphite & Paper Mill Workers, 2 N.B.2d 596 (Sup. Ct. 1970), where the court's jurisdiction was competing with the grievance

this intent in categorical language may lead a court to conclude that a party may still ask for a declaration, [201] or apply to a superior court for relief rather than be confined to the newly constituted Family Court. [202] A similar issue has bothered courts faced with proceedings brought against universities; by relying on common law contractual rights [203] and on express duties laid upon this institution by legislation, [204] the courts have been able to evade the allegedly exclusive jurisdiction of the visitor. But the appeal in question may only be one to some other tribunal within the administrative hierarchy, which will require a court to decide whether the administrative appeal provided is sufficient to answer the defect in proceedings. [205] Here the courts are dealing not with whether they have been denied the authority to become seized of the facts of the case but rather with the subsequent question of their discretion to give the remedy sought to the applicant, who has satisfied them that his rights have been infringed. This discretion has been exercised against the issue of a declaration or prerogative remedy where issue of the building permit would have created a less conforming use than presently existed; [206] where the court concluded that the meeting demanded would serve no useful purpose and the applicant represented but a fraction of the membership and did not appear to have the association's welfare in mind; [207] where the applicant delayed nine months before taking action; [208] and where because the building in issue had been completed by the time of the application the labour relations board could no longer make an adjudication "which would in any way, prejudically or otherwise, affect the rights of the applicants, and if the board does proceed to hear the complaint, its order can have no effect except in so far as it may establish a precedent to be used in similar situations in the future." [209] On the other hand, the court's discretion has been exercised in favour of relief where failure to notify the applicant of the decision in time meant that he had been denied his statutory rights of appeal

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procedures in a collective agreement and the Labour Relations Act, N.B. REV. STAT. c. 124 (1952). See Molot, *The Collective Labour Agreement and its Agency of Enforcement*, 5 ALTA. L. REV. 274 (1967) and *Labour Law-Collective Agreement-Right of Individual Employee to Sue Employer*, 45 CAN. B. REV. 354 (1967).

[201] Kingsway Investments (Kent) Ltd. v. Kent County Council, [1969] 2 Q.B. 332, [1969] 1 All E.R. 60, [1969] 2 W.L.R. 249 (C.A. 1968).

[202] B. v. S., 6 D.L.R.3d 57 (N.S. 1969).

[203] Bell v. University of Aukland, [1969] N.Z.L.R. 1029 (Sup. Ct.).

[204] King v. University of Saskatchewan, [1969] Sup. Ct. 678, 68 W.W.R. (n.s.) 746, 6 D.L.R.3d 120.

[205] *Re* Lipp's Certiorari Application, 69 W.W.R. (n.s.) 564 (B.C. Sup. Ct. Chambers 1969); Leigh v. National Union of Railwaymen, [1969] 3 All E.R. 1249, [1970] 2 W.L.R. 60 (Ch. 1969); C.I.L. v. Development Appeal Bd., 71 W.W.R. (n.s.) 635, 9 D.L.R.3d 727 (Alta. 1969); *Re* Kingston Enterprises Ltd., [1969] 1 Ont. 221 (High Ct. 1968), *appeal dismissed*, The Globe and Mail (Toronto), April 16, 1969, at 42, col. 8.

[206] *Re* Pellizzon, [1970] 2 Ont. 208, 10 D.L.R.3d 313.

[207] Smythe v. Anderson, 73 W.W.R. (n.s.) 536 (Sask. 1970).

[208] Regina v. Aston Univ. Senate, [1969] 2 Q.B. 538, [1969] 2 All E.R. 964, [1969] 2 W.L.R. 1418.

[209] Regina v. Ontario Lab. Rel. Bd., [1970] 1 Ont. at 172, 7 D.L.R.3d at 700.

and where "a new application (to the tribunal) would obviously bring a similar result." [210]

As discussed earlier, certiorari and prohibition require that the acts of the tribunal affect the rights of the individual or in some way imperil his interests. Consequently, subordinate legislation and the decisions of a board that were merely statements of intent were not believed amenable to certiorari. [211] In one interesting case, [212] the applicant had been disqualified from driving after being convicted of a traffic offence, and two later convictions for similar offences had led the justices to rely on the earlier one to increase disqualification ultimately to five years. But the Queen's Bench was able to quash this first order by way of certiorari and there then arose the question of how this would assist the applicant in his battle against the two later ones. It was resolved by the court reasoning that certiorari against only this first order would have no effect at all on the applicant's position and that, therefore, "by way of ancillary relief orders of certiorari should issue to quash" [213] these two later decisions. The difference between this writ and that of prohibition is the timing of their application and thus unless one can point to an error that has affected the body's jurisdiction at the moment the writ is requested, such as the tribunal's bias, it will be "premature to seek to stall its proceedings at their inception on the ground of an apprended error of law." [214] Recently, there has been a lengthy review of authorities on the issue of when the writ of prohibition is to be considered a discretionary remedy and when it must be granted as of right. [215]

Last year, mandamus was issued against an officer of the Crown having a duty imposed on him by statute. [216] The niceties of this writ were displayed in one case [217] where a mayor, who had required a vote to be passed by a two-thirds majority, when this was not necessary at all, was found to have entered upon the performance of his duty and only erred in the course of carrying it out, but was subjected to mandamus when he failed to comply with the by-law requiring the mayor, when challenged, to ask council whether his decision shall stand. In other cases, it was decided that mandamus

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[210] C.I.L. v. Development Appeal Bd., 71 W.W.R. (n.s.) at 640, 9 D.L.R.3d at 732.

[211] 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, *leave to appeal refused* [1969] Sup. Ct. vii (on a motion).

[212] Regina v. Middleton JJ., [1970] 1 Q.B. 216, [1969] 3 All E.R. 800, [1969] 3 W.L.R. 632 (1969).

[213] *Id.* at 220, [1969] 3 All E.R. at 802, [1969] 3 W.L.R. at 634.

[214] Regina v. Tarnopolsky, [1970] 2 Ont. 672 (1969). *See also* Regina v. Association of Professional Eng'rs, 2 D.L.R.3d 588 (1969); Regina v. Royal Institute for the Advancement of Learning, 2 D.L.R.3d 129 (Que. 1968).

[215] Regina v. Crowe, 10 D.L.R.3d 618 (N.S. Sup. Ct. 1970). This case also discussed the question of which court in Nova Scotia had jurisdiction to hear an application for a writ of prohibition.

[216] Regina v. Commissioners of Customs & Excise, [1970] 1 All E.R. 1068, [1970] 1 W.L.R. 450 (Q.B. 1969).

[217] *Re* Spear, 5 D.L.R.3d 556 (N.B. 1969).

could not command a tribunal to issue a permit without the conditions which it had lawfully imposed;[218] and that the necessary preliminary condition, which related a tribunal's refusal to give a building permit to the time of application and with which the applicant had not strictly complied, would on the balance of equities, not stand in the way of issue of the writ.[219] More interesting still was the granting of the writ against a tribunal merely empowered to subpoena witnesses, but the failure of which in the circumstances constituted a breach of its duty to abide by the rules of natural justice.[220] Other considerations may also raise a power to a duty and thereby subject an administrative body to mandamus for its nonfeasance.[221]

In *Helman v. Brown*[222] the court believed it had authority to make a declaration where "the defendant was clearly wrong in his determination,"[223] but, as has been pointed out, to declare simply that a tribunal has erred in law alone "can avail nothing, for the action is intra vires and remains lawful."[224] Procedural difficulties had to be answered in *Jones* v. *Gamache*[225] where it was decided that the Exchequer Court had jurisdiction to make a declaratory order against the Minister of Transport as Pilotage Authority under the Canada Shipping Act for the invalid regulations passed by it, and in *Poitras v. Attorney-General of Alberta*[226] where the dispute involved a determination of the parties capable of being made defendants in Alberta and the extensive protection against suit given to members of the Executive Council under section 24 of the Judicature Act.[227]

Before considering the action in damages that might lie against officialdom, I must not forget to mention the problem of standing.[228] The statute itself may help in this matter by providing that notice must be given to everyone who, in the tribunal's opinion, "may be affected."[229] This merely

[218] Hartford Holdings (1963) Ltd. v. Edmonton, 67 W.W.R. (n.s.) 673, 4 D.L.R.3d 27 (Alta. 1969). *Cf.* Napanee v. Doornekamp, [1970] 2 Ont. 419 (High Ct.); *Re* Walmar Investments Ltd., [1970] 1 Ont. 109.

[219] Regina v. Barrie, [1970] 1 Ont. 200 (1969).

[220] Furniture & Bedding Workers Union, Local 33 v. Alberta Bd. of Indus. Rel., 69 W.W.R. (n.s.) 226, 6 D.L.R.3d 83 (Alta. Sup. Ct. 1969).

[221] *Id.*; Regina v. Schiff, [1970] 1 Ont. 752, 9 D.L.R.3d 434 (High Ct. 1969), *aff'd*, [1970] 3 Ont. 476. *Cf.* Fisher v. Pemberton, 72 W.W.R. (n.s.) 575, 8 D.L.R.3d 521 (B.C. Sup. Ct. 1969); Regina v. Royal Institute for the Advancement of Learning, 2 D.L.R.3d 129 (Que. 1968). For a discussion of which court in Nova Scotia has jurisdiction to hear an application for the writ, *see Re Fairbanks*, 5 D.L.R.3d 657 (N.S. Sup. Ct. 1969).

[222] 2 D.L.R.3d 715 (B.C. Sup. Ct. 1969). *See generally* Nettheim, *The Place of the Declaratory Judgment in Certiorari Territory*, 6 SYD. L. REV. 184 (1969).

[223] 2 D.L.R.3d at 717.

[224] H. WADE, ADMINISTRATIVE LAW 112 (2d ed. 1967).

[225] [1969] Sup. Ct. 119, 7 D.L.R.3d 316 (1968).

[226] 7 D.L.R.3d 161 (Alta. Sup. Ct. 1969). *Cf.* Marian v. Board of Governors of Univ. Hosp., 74 W.W.R. (n.s.) 55 (Sask. Q.B. 1970), *aff'd*, [1971] 1 W.W.R. 58 (Sask. 1970).

[227] ALTA. REV. STAT. c. 164 (1966).

[228] Some of the difficulties found in the United States are discussed in Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

[229] C.I.L. v. Development Appeal Bd., 71 W.W.R. (n.s.) 635, 9 D.L.R.3d 727 (Alta. 1969); *Re* Thomas' Certiorari Application, 72 W.W.R. (n.s.) 54 (B.C. Sup. Ct. 1969).

mirrors the common law. On the one hand, it has been held that where the applicant elsewhere in the statute was given an avenue for proceeding in the matter, the only parties entitled to apply for amendment or rescission of an order made under it "would be those who were directly bound by the order when it was made";[230] and that standing was absent when the applicant was only "interested in the performance of a duty as a member of a class of persons, all of whom may be regarded as equally interested, but himself having no particular ground for claiming performance"[231] and was moved by the ulterior motive of putting others out of business.[232] On the other hand, this person must be contrasted with the municipal ratepayer who, without the intervention of the Attorney General, was able to sue the mayor directly in a representative action on behalf of himself and all the other ratepayers.[233]

Lastly, an individual who most likely will have suffered pecuniary loss as a result of the unlawful acts of a tribunal may well wish to seek reparation by way of an action in damages. A civil servant could maintain a right of action to claim the back wages owed to him by his employer,[234] and a faculty member, who pleaded that the refusal by a committee different from the one specified in his contract of service to promote him, was held to have a viable cause of action for breach of contract.[235] In the area of tort, the machinations of officers of a trade union led to their being found liable in civil conspiracy,[236] and the failure of a trade union to fulfil its legal duty of representing an employee in arbitral proceedings produced a judgment against its officers.[237] But the property owner who was issued a building permit under a by-law subsequently held invalid could not convince the courts that his loss resulted from any negligence on the part of the municipality that was of an actionable nature.[238]

VI. Subordinate Legislation[239]

The fruits of the power to pass such legislation cannot transgress the limits of the authority conferred on the legislature's delegate. Inherent in

[230] Regina *ex rel.* Int'l Woodworkers of America, Local 1-184 v. Labour Rel. Bd., 70 W.W.R. (n.s.) 38, at 45 (Sask. 1969).

[231] Regina v. Commissioners of Customs & Excise, [1970] 1 All E.R. at 1073, [1970] 1 W.L.R. at 456, quoting in part from 11 Halsbury, Laws of England 105 (3d ed. 1959). *See also* Regina v. Ontario Lab. Rel. Bd., [1970] 1 Ont. 168, 7 D.L.R.3d 696 (High Ct. 1969).

[232] Regina v. Commissioners of Customs & Excise, *id.*

[233] Barber v. Calvert, 8 D.L.R.3d 274 (Man. Q.B. 1969).

[234] Kodeeswaran v. Attorney-General of Ceylon, [1970] 2 W.L.R. 456 (P.C.).

[235] Bell v. University of Aukland, [1969] N.Z.L.R. 1029 (Sup. Ct.).

[236] Evaskow v. International Bhd. of Boilermakers, 68 W.W.R. (n.s.) 415, 4 D.L.R.3d 684 (Man. 1969), *rev'd*, 71 W.W.R. (n.s.) 565, 9 D.L.R.3d 715 (Man.).

[237] Fisher v. Pemberton, 72 W.W.R. (n.s.) 575, 8 D.L.R.3d 521 (B.C. Sup. Ct. 1969).

[238] Welbridge Holdings Ltd. v. Metropolitan Corp., 72 W.W.R. (n.s.) 705 (Man. 1970), *aff'd*, Supreme Court of Canada, Dec. 17, 1970.

[239] Arthurs, *Regulation-Making: The Creative Opportunities of the Inevitable*, 8 Alta. L. Rev. 315 (1970); Williams, *The Making of Statutory Instruments*, 8 Alta. L. Rev. 324 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965).

this proposition is its confinement to the area of jurisdiction granted its principal by the British North America Act. [240] Regulations have been held invalid which ignored the statute's command to adjust assessments on all land "on a common basis and fair and equitable as between one another" and adopted a reference manual that, in laying down different bases, distinguished between rural and urban lands; [241] and which interpreted the power to prohibit the driving of improperly equipped automobiles as including authority to prohibit the sale of such vehicles. [242] But rules passed by the Alberta Racing Commission in respect of veterinarians were held valid in spite of the existence of the self-government provided by the Veterinary Surgeons Act and a plea for the application of the *eiusdem generis* rule. [243] In other cases, the "ancillary rule" [244] and the presence of a *non obstante* clause [245] have assisted courts in finding in favour of the delegated legislation. Of course, the courts will be moved to confine powers of legislation within whatever statutory definitions have been provided [246] and are likely to construe words giving power to act where "he deems" it necessary [247] or where an agreement has "acquired a preponderant significance and importance" [248] in a way that favours a more subjective and exclusive opinion on the part of the delegate.

A more direct and immediate interference with the property rights and personal liberties of the subject may lead the courts to balk more readily at the powers to enact subordinate legislation. The licence held by a pilot gave him acquired rights "so that even Parliament could not be presumed to have adversely affected them, unless the intention to do so were clearly expressed." [249] Consequently, the attempt by regulation to establish criteria for reclassification of such licences was held invalid. A similar result was reached when subordinate legislation tried to expropriate property without compensation and could point to no specific authority for this exercise of power. [250] Again a by-law establishing the procedure for inquiring into the breach of one of its provisions was disputed for failing to stipulate the person

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[240] 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, *leave to appeal refused*, [1969] Sup. Ct. vii.

[241] *Re* Summer Village and Alberta Assessment Equalization Bd., 2 D.L.R.3d 572 (Alta. Sup. Ct. 1968).

[242] Regina v. Bermuda Holdings Ltd., 9 D.L.R.3d 595 (B.C. Sup. Ct. 1969).

[243] *Re* MacLean, 8 D.L.R.3d 371 (Alta. Sup. Ct. 1969).

[244] *Re* Schumacher, 70 W.W.R. (n.s.) 309, 8 D.L.R.3d 473 (B.C. Sup. Ct. Chambers).

[245] Baldwin v. Pouliot, [1969] Sup. Ct. 577, 7 D.L.R.3d 367.

[246] Steinberg's Ltée. v. Comité Paritaire de l'Alimentation au Détail, 5 D.L.R.3d 399 (Sup. Ct. 1968).

[247] Regina v. Vanek, 6 D.L.R.3d 591 (Ont. High Ct. 1969).

[248] Steinberg's Ltée. v. Comité Paritaire de l'Alimentation au Détail, 5 D.L.R.3d 399 (Sup. Ct. 1968).

[249] Jones v. Gamache, [1969] Sup. Ct. at 126, 7 D.L.R.3d at 321 (1968).

[250] C. J. Burland Pty. Ltd. v. Metropolitan Meat Indus. Bd., 43 AUSTL. L.J. 12 (High Ct. 1968). *Cf.* Westminster Bank Ltd. v. Minister of Housing & Local Gov't, [1970] 1 All E.R. 734, [1970] 2 W.L.R. 645, where the legislative scheme was held to allow a form of expropriation without compensation.

to hold this investigation and the procedures to be followed by him. The Supreme Court, however, interpreted the inquiry as one culminating simply in a report to the Pilotage Authority and incapable itself of directly affecting the rights of an accused. [251]

[251] Baldwin v. Pouliot, [1969] Sup. Ct. 577, 7 D.L.R.3d 367.