From the Cornfields of Ontario to Double Breasting in Newfoundland - What Does it all Mean

The Standard of Judicial Review Applicable to Labour Tribunals

Mr. Justice W.J. VANCISE**[1]

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The standard of review of decisions of labour tribunals once thought to be settled by *Canadian Union of Public Employees Local 963* v. *New Brunswick Liquor Corporation*[1] has been undergoing subtle changes for the past number of years. Those subtle changes have now sparked a debate concerning the "correct" approach or interpretation of the standard of review established in *C.U.P.E.* It is that debate as it bears on the changing role of the courts in reviewing decisions of statutory tribunals that I want to examine.

The standard of judicial review of decisions of labour tribunals protected by a privative clause was radically changed when Dickson J. (as he then was) first used the "patently unreasonable" test in *C.U.P.E.* Not only did he establish a new standard of review, he articulated a rational explanation for insulating, from judicial review, decisions made by labour boards in the exercise of their statutory mandate. The decision heralded an era of judicial restraint and deference, although it was not to last long, to decisions of labour tribunals. The Courts of appeal followed the admonition of Dickson J. and were for a period of time "reluctant" to brand what was essentially an interpretation of the constituent statute or the very question that statutory tribunals were empowered to decide as jurisdictional and therefore susceptible to review.

The approach by Dickson J. was regarded as a watershed in the development of judicial review in this country. It was the first in a series of decisions which established a standard of review based on whether the interpretation was one which the legislation could reasonably bear. That test was extended in later decisions to consensual boards of arbitration and statutory arbitrators.[2] In light of the Supreme Court' s recent decisions in *Paccar,*[3] *National Corn Growers,*[4] *Lester*[5] and *P.S.A.C.*,[6] it is necessary to examine the rationale leading up to the watershed and the near tranquillity which followed, in an effort to understand what appears to be the current movement away from such position.

C.U.P.E. signalled a policy change. A change from an era of judicial activism characterized by the decisions of the l960s and early 1970s where the courts as guardians of the rule of law were ever vigilant to ensure that statutory tribunals made decisions which were strictly

within their delegated legislative authority. The courts were quick to brand as jurisdictional, the questions submitted to and decided by a statutory tribunal. Tests of judicial review were so broadly framed as to permit almost any question to be classified as jurisdictional.

The courts were reluctant to permit statutory tribunals to exercise their delegated function. There are those who argue that such reluctance reflected a lack of comprehension of the nature and purpose of statutory tribunals protected by privative clauses. Dickson J. described the rationale of the privative clause and the reason for judicial restraint in these terms:

> *The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.*
>
> *The usual reasons for judicial restraint upon review of labour board decisions are only reinforced in a case such as the one at bar. Not only has the Legislature confided certain decisions to the administrative board, but to a separate and distinct Public Service Labour Relations Board. That Board is given broad powers - broader than those typically vested in a labour board - to supervise and administer the novel system of collective bargaining created by the* Public Service Labour Relations Act. *The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of the Board members is all the more required if the twin purposes of the legislation are to be met. Nowhere is the application of those skills more evident than in the supervision of a lawful strike by public service employees under the Act.*[7]

The effect of *C.U.P.E.* is clear. The courts are to respect the legislative choice of the statutory tribunal to resolve disputes. The legislature has made a decision to have its legislative policy interpreted by a statutory tribunal and that authority has the primary responsibility for the programs and decisions to be made within that legislative framework.

C.U.P.E. points out to the courts that they may not be as well equipped or qualified to provide interpretations of a statutory agency's constituent statute as a specialized statutory tribunal. As Professor Arthurs has noted:

> *There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well aware of the effect upon the purpose of the various alternate interpretations.*[8]

Professor Janisch put it in different terms: He was "by no means persuaded that the courts and the law have all the answers. As to the courts, I would agree with Justice Frankfurter's comment [in *Federal Communications Commission* v. *Pottsville Broadcasting*][9] that they are not charged with `. . . general guardianship against all potential mischief in the complicated tasks of government'".[10] The policy adopted by the Supreme Court of Canada was one of judicial restraint in reviewing decisions involving the interpretation of the constituent statute. The Court reinforced that policy and stated that it was not prepared to interfere with a specialized tribunal's interpretation of its constituent statute, unless the interpretation given to it was patently unreasonable. That policy was reconfirmed by La Forest J. in *Paccar.*[11]

I. C.U.P.E. - A NEW STANDARD OF REVIEW

What did *C.U.P.E.* decide? Dickson J. was seeking to change the standard of judicial review applicable to statutory tribunals whose decisions were protected by a privative clause. Prior to *C.U.P.E.*, courts had been reluctant to accept that labour tribunals should not be subject to the same standard of review as courts. He built upon an analysis which he started in *Service Employees' International Union, Local 333* v. *Nipawin District Staff Nurses Association,*[12] and *Jacmain* v. *Attorney General of Canada.*[13]

In *Jacmain* (in dissent) he signalled that a categorization of a question as jurisdictional should not be used as the basis to review questions or subject matter which were intended by the legislature to be dealt with exclusively by the tribunal. The courts were urged to use restraint, to allow latitude in jurisdictional review and to determine whether there is a rational basis for the interpretation of the constituent statute before deciding whether to intervene.[14]

Dickson J. followed that rationale in *Nipawin Staff Nurses* where he articulated the rationality test. If a board's decision could be rationally supported by a construction which the relevant legislation could bear, the Court would not intervene.[15]

In *C.U.P.E.*, Dickson J. held that the interpretation of the statute was not a question of law which was a preliminary or collateral question necessary to grant the Board jurisdiction. He stated:

> *With respect, I do not think that the language of `preliminary or collateral matter' assists in the inquiry into the Board's jurisdiction.* […] *Underlying this sort of language is, however, another and, in my opinion, a preferable approach to jurisdictional problems, namely, that jurisdiction is typically to be determined at the outset of the inquiry.*
>
> […]
>
> *One cannot therefore suggest that the Board did not have `jurisdiction in the narrow sense of authority to enter upon an inquiry.* […][16]

He then rejected the second argument that the Board's interpretation was so patently unreasonable as to take "the exercise of its powers outside the protection of the privative clause."[17] It was when considering this ground that he formulated the "patently unreasonable" standard of judicial review. He said:

> *Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation*

so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the Court upon review?[18]

Professor Mullan,[19] suggests that Dickson J.'s approach to the preliminary or collateral jurisdictional error is a throwback to the "pure theory of jurisdiction" described by Professor S.A. de Smith in his textbook *Judicial Review of Administrative Action*.[20] Dickson J. acknowledges that what is jurisdictional and thus permits a court to intervene, and what is not jurisdictional "is often very difficult to determine".[21] He warns, however, against branding as jurisdictional those things that are doubtfully jurisdictional, so as to subject a decision to broader judicial review.[22]

C.U.P.E. was an attempt to curb the tendency of the courts to find a method to subject labour tribunals to judicial review. The Supreme Court of Canada had previously held in *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers, Local 796*,[23] that labour tribunals who had jurisdiction at the outset of a process could lose or exceed their jurisdiction thus permitting the courts to intervene. The authority for intervening in such cases is to be found in *Anisminic Ltd.* v. *Foreign Compensation Commission*,[24] which stated that the tribunal has either "done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity."[25] That statement of Lord Reid, of which the above excerpt forms a small part, was adopted by the Supreme Court of Canada in *Metropolitan Life*.[26] Evans describes *Metropolitan Life* as the "high water mark" of activist review in Canada.[27]

By categorizing or defining excess of jurisdiction in terms of the tribunal asking the wrong question, almost nothing is beyond the scope of curial review because it is possible to categorize all errors of law as resulting from excess of jurisdiction.[28] One can leap ahead ten years to *P.S.A.C.* to see the return to such an approach. Dickson J. did not adopt that approach. As noted, he had earlier considered the question in *Nipawin Staff Nurses* and stated:

> *There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct* […] *But if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene.*[29]

The wrong question was reduced from misinterpretation of the statute to ignoring the requirements of the statute.

Prior to *C.U.P.E.* it was not clear how the courts could resolve the test in *Metropolitan Life* to determine excess of jurisdiction by failing to ask the right question, and the rationality test adopted in *Nipawin Staff Nurses* to determine preliminary or collateral error. Dickson J. expanded his formulation of the patently unreasonable test on the "construction [which] cannot be rationally supported by the relevant legislation" by using the description he set out in *Nipawin*, such as acting in bad faith, basing the decision on extraneous matters, etc.,[30] as a means by which the tribunal could act in a patently unreasonable way and "lose jurisdiction". Thus if the answer or interpretation is not patently unreasonable, the tribunal did not misinterpret the statutory provisions. In other words, the interpretation of the statute is the core of specialized jurisdiction. It is the reason that the legislatures have sought to isolate decisions of labour tribunals from judicial review.

This then is the starting point for an examination of judicial review. If *Metropolitan Life* was the high water mark of judicial activism, *C.U.P.E.* was the genesis of curial deference. It was the linchpin for a restricted theory of judicial review which eventually encompassed consensual arbitration,[31] statutory arbitrators,[32] and some would argue statutory tribunals not protected by a privative clause.[33]

It can be argued, and indeed Wilson J. does adopt in *National Corn Growers*[34] the theory of Brian Langille, that the Court developed a unified restrictive theory of judicial review and

adopted a policy of **not** interfering with the specialized tribunal's interpretation of constituent legislation within its expertise, where the interpretation was not patently unreasonable. It is not necessary for our purposes to examine those cases in detail. Suffice it to say that if the high water mark of judicial activism was *Metropolitan Life,* the high water mark of judicial restraint was *Teamsters Union Local 938 v. Massicotte,*[35] where Laskin C.J.C. stated:

> *What this judgment* [C.U.P.E.] *and that in Nipawin clearly convey is that mere doubt as to correctness of a labour board interpretation of its statutory power is no ground for finding jurisdictional error, especially when the labour board is exercising powers confided to it in wide terms to resolve competing contentions. In so far as the* Anisminic *and* Metropolitan Life Insurance *cases deal with the so-called `wrong question' test of jurisdiction, they have no relevance here. It is impossible to say that the Canada Labour Relations Board asked itself the wrong question in any sense of departing from the inquiry in which it was engaged. It addressed itself to the issue raised by the complaint and exercised powers in relation thereto which it clearly had. At bottom, the objection is to the consequential results of that exercise, but this is a long way from any jurisdictional issue.*[36]

It is perhaps useful to remember, in light of statements made recently by the Supreme Court of Canada regarding the right of the Court to intervene for jurisdictional error, to note that Dickson J.'s admonition regarding restraint to identify jurisdictional error was not embraced enthusiastically by all members of the Court. In *Attorney General of Quebec* v. *Labrecque,*[37] Beetz J. accepted that "no evidence" constituted jurisdictional error.[38] He returned to the same theme in *Blanco* v. *Rental Commission,*[39] where he found that the Commission had appropriated a jurisdiction which it did not possess by extending their discretion.[40] He found as a secondary ground that there was "no evidence" that the alleged conduct had occurred on leased premises and that consisted of jurisdictional error.[41] Those comments are interesting in light of the intention by Lamer J. in *Blanchard* v. *Control Data Canada Ltd.,*[42] the standard of judicial review articulated in *C.U.P.E.* and McLachlin J.'s comments in *Lester.*[43]

II. C.B.C. - JURISDICTION REVISITED

The movement away from *C.U.P.E.* began long before *Paccar, National Corn Growers* and *Lester*. The first and arguably the most important in a line of cases which began to move the standard of judicial review away from that established by Dickson J. in *C.U.P.E.* is *Syndicat de Employés de Production du Québec et de l'Acadie* v. *C.L.R.B.*[44] In *C.B.C.* Beetz J. did not rely on the patently unreasonable test but promulgated a new test now labelled the "describe limit or list" test.[45] The import of such a test is that where the legislation describes, lists, or limits the powers of a statutory tribunal, the standard of review of the tribunal's decisions is correctness because such descriptors or limits go to jurisdiction. There is thus no room for error, no judicial deference or the assertion of the patently unreasonable standard of judicial review. While *C.U.P.E.* did not unequivocally resolve the standard of review, Dickson J. disagreed with the distinction between preliminary and central questions and stated that it was preferable for jurisdiction to be determined at the outset of each case.[46] He warned against subjecting decisions of statutory tribunals to broader curial review under the guise of determining a jurisdictional question.[47] As noted above, he neatly dealt with *Metropolitan Life* by dealing with interpretation of the provisions of the Act by reference to an interpretation which was not "patently unreasonable".

This left open, however, the power to establish whether in the definition or determination or the allocation of decision-making functions the Board exercised its power to embark upon the inquiry correctly. In *C.B.C.*, Beetz J. sets out four ways that an administrative tribunal can commit an error which would subject it to judicial review: (1) it can err in law in the interpretation of a statute other than its constituent statute; (2) it can commit an error going to jurisdiction if the interpretation of its constituent statute is patently unreasonable; (3) it can commit an error relating to matters that are preliminary or collateral; and (4) it can err in the interpretation and application to the facts of each provision that confers jurisdiction, that is, one which describes, limits, and lists its powers.[48] Beetz J. equates the Court's power to review an

administrative agency's decisions for excess of its statutory power to review on constitutional grounds. He stated:

> *The power of review of the courts of law has the same historic basis in both cases, and in both cases it relates to the same principles, the supremacy of the Constitution or of the law, of which the courts are the guardians.*[49]

Professor Evans[50] notes that the Court categorized as jurisdictional the patently unreasonable test which Beetz J. described as "a fraud on the law or a deliberate refusal to comply with the Act; and is "treated as an act done arbitrarily or in bad faith and contrary to the principles of natural justice".[51] He states:

> *Two points may be made here about the Court's description of `patent unreasonableness' as a species of jurisdictional error. First, it has become a very difficult ground of review to establish, apparently requiring proof of a wilful, or at least reckless, disregard by the tribunal of the relevant document: in any event, the Court seems to have opened a very wide gap between `unreasonable' and `wrong'. Second, the Court's equation of review for unreasonableness with breach of natural justice is striking, and resembles the association that courts have sometimes seen between natural justice and the requirement that decisions should be based on findings of fact for which there was some logically probative evidence on which the tribunal could rely. A tribunal that makes such perverse findings of fact or law has been so unresponsive to the parties' submissions that it cannot have held a genuine hearing, but was merely going through the motions.*[52]

I prefer a test which while severe is not based on bad faith, rather one which defines the standard as one which no reasonable statutory tribunal could have made - that is, a decision which is clearly wrong. To argue that the interpretation must be so unreasonable that it amounts to a fraud on the law akin to bad faith opens up another area of jurisdictional judicial intermeddling. There has been a movement away from clearly wrong or unreasonableness as postulated by Laskin C.J.C. in *Shalansky* v. *Board of Governors of Regina Pasqua Hospital*,[53] and a move toward a more stringent test.

C.B.C. is, however, not the only indication of a retreat or backsliding from the deferential standard enunciated in *C.U.P.E.* In *Blanchard,* which was delivered the same day as *C.B.C.*, Lamer J. applied the *C.U.P.E.* standard to judicial review and concluded that the patently unreasonable test of *C.U.P.E.* applied to unreasonable findings of fact as well as to law.[54] He held that a statutory tribunal which bases its decision on inadequate evidence commits jurisdictional error, and that an unreasonable finding of fact, in his opinion, constitutes an error of law even when the decision is protected by a privative clause.[55] When one examines the standard of review set out in *Blanchard,* one wonders whether the test for review of findings of fact by a reviewing court exercising a judicial review function is any different from an appellate function. Can the Court find jurisdictional error only when there is "no evidence" or, when there is "inadequate evidence" or an "unreasonable interpretation" of the facts or an "unreasonable finding"? That brings up a supplemental question - how can the reviewing court find an unreasonable interpretation or finding of fact when the review process is confined to "error on the face of the record"?

It appears that the decision-making process of a tribunal is being opened up to significant scrutiny, not just the interpretation given by the tribunal of its constituent statute but its interpretation of the facts as well as its conclusion. There has been some suggestion that the advent of the *Canadian Charter of Rights and Freedoms*[56] is causing the Supreme Court to advocate a more intensive scrutiny of the administrative process.[57] Indeed, the decision by the Supreme Court of Canada that the "principle of fundamental justice" had substantive as well as procedural content increases the potential for scrutiny of administrative decision-making.[58] There are those who make the argument that the Charter has been interpreted by some judges as requiring a greater commitment to the rule of law, which Professor Mullan has translated as judicial regulation of the administrative process.[59]

III. PACCAR TO LESTER - INTERPRETATION OF REQUIREMENTS OF CONSTITUENT STATUTE

Do these cases represent a continuation of or perhaps a headlong rush towards judicial intervention? The answer is not hard to find but let us be patient and examine the cases.

Paccar was an application for judicial review of a decision of the British Columbia Industrial Relations Council which held that an employer could unilaterally alter the terms and conditions of employment after the expiry of the collective agreement. The union alleged that the council's decision was "patently unreasonable". There was no question of lack of original jurisdiction. The sole question was whether the Board lost jurisdiction by making a decision which was patently unreasonable. Mr. Justice La Forest noted that *C.U.P.E.* is the starting point for any analysis of the law relating to judicial review.[60] Interestingly enough, that is the same starting point used by Gonthier J. in *National Corn Growers*.[61] The use of the standard of judicial review established in *C.U.P.E.* by each of them is, however, startlingly different. In *Lester*, McLachlin J. commenced her analysis of the standard of judicial review with *Nipawin Staff Nurses*, not *C.U.P.E.*[62] That may have no significance given that *C.U.P.E.* is a continuation of the analysis that Dickson J. began in *Nipawin*. On the other hand, it may signal an attempt by the Court to downplay the era of judicial deference well articulated in *C.U.P.E.*

La Forest J., in *Paccar*, noted that the underlying basis for accepting the interpretation of expert administrative tribunals within the area of their expertise is that the "tribunal is the best judge of what actions would develop `effective' industrial relations […]".[63] He then summarized the Court's position to the review of decisions of statutory tribunals protected by a privative clause as follows:

> *[T]his Court has indicated that it will only review the decision of the Board if that Board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function; see* Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., *[1979] 2 S.C.R. 227. The tribunal has the right to make errors, even serious ones, provided it does not act in a manner `so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the Court upon review' (p. 237). The test for review is a `severe test'; see*

> Blanchard *v.* Control Data Canada Ltd., *[1984] 2 S.C.R. 476, at p. 493. This restricted scope of review requires the Courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction Courts resort to when they are in agreement with the decisions of the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result `patently unreasonable'. The Courts must be careful to focus their inquiry on the existence of a* ***rational basis for the decision*** *of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result. Privative clauses, such as those contained in ss. 31 to 34 of the Code, are permissible exercises of legislative authority and, to the extent that they restrict the scope of curial review within their constitutional jurisdiction, the Court should respect that limitation and defer to the Board. (Emphasis added.)*[64]

The reference to a rational basis for the decision is a reference to the rationality test referred to in *Nipawin Staff Nurses*. The issue is whether the construction is one which the legislation will reasonably bear. He expressly rejected the idea that the Court should determine whether the tribunal was correct. This can be described as the classic approach to *C.U.P.E.* The emphasis is on the reasonableness of the interpretation of the statute. He found that the statutory tribunal's interpretation was as reasonable as the alternative and therefore not patently unreasonable. In determining whether a tribunal has exceeded its jurisdiction by answering a question of law within its jurisdiction in a patently unreasonable manner, La Forest J. adopted[65] as a first step in the inquiry, the functional approach established by Beetz J. in *U.E.S., Local 298* v. *Bibeault.*[66]

Mr. Justice Sopinka on the other hand, differed with the approach of La Forest J. in as he described it, "an important respect".[67] He contends that *C.U.P.E.* does not prevent a court from making a detailed examination of the merits of the decision. He categorized the approach as:

> *When a court says that a decision under review is `reasonable' or `patently unreasonable' it is making a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made.* […] *in my*

view, curial deference does not enter the picture until the court finds itself in disagreement with the tribunal.[68]

IV. GOOD MORNING, JUDICIAL INTERVENTION!

Sopinka J. suggests that one must first determine whether the decision is correct. If it is, then no further analysis is required. It cannot be unreasonable because it accords the interpretation, the "correct" interpretation, and presumably the only correct interpretation of the Court. It cannot, therefore, by definition, be unreasonable. If it is not, then the Court must determine whether the tribunal's decision, while not correct, is not patently unreasonable.[69] This sort of analysis lends itself to a requirement of correctness in patently unreasonable clothing. The requirement that the Court determines a set of basic premises relating to the merits of the issue or issues before the tribunal, lets the courts establish a very narrow range of conclusions which they could uphold. It could be argued that this permits the Court, under the guise of permitting the tribunal to interpret its own statute, to dictate a correct decision, that is, one that is correct in the eyes of the Court. For the purpose of this analysis, I will not dwell on the dissenting opinion of Wilson J. which is based on a disagreement with a policy choice, which in her view is incompatible with the fundamental policy issues. Suffice it to say that it is difficult to reconcile Wilson J.'s opinion in *National Corn Growers* and *Lester* where she argues that the issue is not whether the conclusion is patently unreasonable but rather whether the interpretation of the provisions are patently unreasonable,[70] with her opinion in *Paccar*. She states in *Paccar* that the Court must not defer to *decisions* which are patently unreasonable.[71] She finds the decision patently unreasonable, essentially because the Board opted for a policy choice different from her own - and therefore in her opinion made a decision it had no jurisdiction to make. What is the difference between this and the position of McLachlin J. in *Lester*?

The opinion of L'Heureux-Dubé J., in *Paccar*, is interesting from three perspectives. First, she agrees with La Forest J. on the standard of judicial review and that an administrative tribunal will exceed its jurisdiction because of error only if: "(1) it errs in a patently unreasonable manner in respect of a question which is within its jurisdiction; or, (2) it commits a simple error in respect of a legislative provision limiting the tribunal's powers [...]."[72] Secondly, she concludes that the interpretation by the Board of the *Labour Code* is patently unreasonable.[73] Thirdly, her dissent is not based solely on a policy difference but rather on an interpretation of the objectives of the statute as it related to the question posed which she found to be patently unreasonable.[74]

Central to her analysis is the interpretation of the fundamental purposes and objectives which are set out in section 27 of the *Labour Code*. That purpose is the promotion of effective industrial relations, an issue which was crucial to the complaint before the Board. She argues that the Board in interpreting its constituent statute must take into account this legislative intent and purpose. The Board, however, in interpreting the *Labour Code* as it related to the right of an employer to unilaterally change the terms and conditions of employment failed to consider the effect of section 27. That failure caused the Board in the opinion of L'Heureux-Dubé J. to interpret the *Labour Code* in a patently unreasonable manner.[75]

This is more than a simple disagreement with a policy choice. It is the review of the interpretation of a constituent statute which she finds to have been interpreted in a way which is not rationally consistent with the purpose of the Act and therefore patently unreasonable. It is interesting to note that her opinion in *Lester* is consistent with her position in *Paccar.* In *Lester* she agreed with Wilson J. that the Board's interpretation of the relevant section of the labour statute was consistent with the overall objective of effective labour management relations and not patently unreasonable.[76]

V. NATIONAL CORN GROWERS - THE DEBATE HEATS UP

National Corn Growers was an application for judicial review of a decision of the Canadian Import Tribunal which involved the interpretation of the provisions of the *Special Import Measures Act*[77] dealing with protection from subsidized imports. Gonthier J. delivered the majority decision. He began his analysis of the standard of judicial review with *C.U.P.E.* and cited it as authority for the proposition that the courts "in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law."[78] He refers to the test in *C.U.P.E.* as he reformulated it in *Bell Canada* v. *C.R.T.C.*[79]

Gonthier J. states that the courts will only interfere with the interpretation of the facts or the law if such interpretation is patently unreasonable. In addition, he notes that the Court can intervene where the "conclusions" cannot be rationally supported by the relevant legislation.[80] Immediately thereafter he embarks on a detailed examination and consideration of the enabling statute, the General Agreement on Tariffs and Trade (the GATT) and the principles of interpretation regarding the effect of international legal obligations to domestic law.[81] It is significant that before embarking on this voyage he notes that some cases lend themselves to be determined without reference to the **record**, others, however, require, or will require an in-depth analysis and interpretation and application of the facts.[82] In his opinion, *National Corn Growers* was obviously such a case, although he does not set out how to determine which cases require an examination of the record and which cases do not.[83] He also does not explain how the transcript of evidence forms part of the record on an application for judicial review.

Madam Justice Wilson, after a review of the law of judicial review in general and *C.U.P.E.* in particular, disagreed strongly with the approach taken by Gonthier J. I will refer to her analysis when considering the apparent effect of this decision and *Lester* to the approach to be taken in judicial review of decisions of statutory tribunals protected by privative clauses. Suffice it to say at this point that she is of the opinion that a true reading of *C.U.P.E.* does not require a detailed review of the record and an examination of the tribunal's conclusions.[84] According to Wilson J., the Court should only determine whether the tribunal undertook an

approach to interpretation that was patently unreasonable. If the tribunal's interpretation is not patently unreasonable, that is the end of the matter. It is not necessary for the Court to then assess the conclusions of the tribunal made within its jurisdiction.[85] It is interesting to note the final comments of Gonthier J. defending his examination of the record. He stated:

> *I do not understand how a conclusion can be reached as to the reasonableness of a tribunal's interpretation of its enabling statute without considering the reasoning underlying it, and I would be surprised if that were the effect of this Court's decision in* C.U.P.E. […] *I would however note that this consideration must be undertaken in light of the overall question for determination, namely, whether or not the interpretation ultimately arrived at is patently unreasonable.*[86]

Although he makes no reference to Sopinka J.'s approach in *Paccar*, it is clear that the conclusion is more important than the reasonableness of the interpretation of the constituent statement.

VI. LESTER - WHEN IS DOUBLE BREASTING SUITABLE?

Lester involves an application by an employer for judicial review of a decision of the Newfoundland Labour Relations Board. The Board had decided that where an employer establishes two companies, one union, the other non-union, the sharing of management expertise between the two companies - that is, the movement back and forth of the estimator and the preparer of bids - brought them within the scope of the successor rights provisions of the *Labour Relations Act* of Newfoundland.[87] The issue here, as in *Paccar* and *National Corn Growers*, was one of interpretation. The Court assumed for the purpose of the judgment that the Board had jurisdiction to make the successor rights determination.[88] The Board was interpreting its constituent statute. Wilson J., after affirming the reasons she gave in *National Corn Growers*, sought to reemphasize the importance of the principles of judicial deference to the decisions of administrative tribunals.[89] She pointed out that the interpretation given to the relevant section by

McLachlin J. in her judgment is a reasonable one but it is by no means the only interpretation that the section could reasonably bear.[90] It is useful to remember Laskin C.J.C.'s comments in *Shalansky* concerning whether more than one interpretation of the statute is reasonable. In those circumstances, neither of the interpretations is patently unreasonable.[91] As Wilson J. pointedly remarks:

> *The limited nature of judicial review is supported, in my view, by the presence in the Act of a privative clause, s. 18. The existence of such a clause is, as I observed in* National Corn Growers, *a clear indication from the legislature that the ordinary courts are not the appropriate forums for review of the decisions of specialized tribunals. It is not appropriate for courts to undertake a meticulous analysis of the tribunal's reasoning as my colleague has done here. To do so sets at naught both the privative clause in the legislation and the judicial restraint advocated in* C.U.P.E. [emphasis added].[92]

McLachlin J. examined the relevant section at issue and concluded that the interpretation given to it by the Newfoundland Labour Board was at odds with the interpretation given to similar sections by other labour boards in the country. She stated:

> *The first question must be how s. 89 should be construed. What arrangements and relationships does it cover? The answer to that question determines what sort of evidence is required to bring the section into play*.[93]

She then canvassed the legislative provisions in other jurisdictions relating to union successorship and double breasting and noted the interpretation given to such successorship provisions by other labour boards and courts across the country.[94] She concluded that notwithstanding the broad discretion given to labour boards, there was a common element to virtually all of them, that is, that something must be relinquished by the predecessor company and obtained by the successor company to bring the transaction within the section.[95] This then is the basic premise within which the Labour Board of Newfoundland must interpret the section. She finds that it must be established that some aspect of this business be conveyed to the second company, that common shareholdings and common business enterprise are not enough.[96]

Obviously, the interpretation given to the relevant section by McLachlin J. restricts the interpretation that the labour tribunal can give to the section. It is not open to the labour tribunal to determine what policy options are open to it and how the relationship between labour and management in its jurisdiction is best regulated. That policy decision is proscribed by an interpretation of the constituent statute made by the court and not by the tribunal which has the primary responsibility of determining that policy. The issue is circumscribed by the "correct approach" to successorship. McLachlin J. seems to assume that the labour tribunal is not able to interpret its constituent statute in a way different from other labour relations boards.[97]

Notwithstanding her comments regarding judicial deference[98] and that the Court is not concerned with whether or not the decision is "correct",[99] McLachlin J. seems to forget the comments made by La Forest J. in *Paccar* that a "tribunal has the right to make errors, even serious ones, provided it does not act in a manner `so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review.'"[100]

McLachlin J. did not, however, find that the interpretation given to the legislation was patently unreasonable. She asked, instead, whether there was evidence capable to support the finding of successorship - but not as defined by the Board - as defined by her.[101] She found after a review of the transcript that the "evidence was incapable" of supporting the tribunal's *conclusion* that there had been a disposition under section 89 of the Act.[102] In another place she speaks of there being "no evidence […] sufficient" to satisfy a section 89 transfer.[103]

What is interesting is that there was "some evidence" but not, in her opinion, "sufficient evidence" to support a transfer on her interpretation of the section;[104] an interpretation of the very issue which the Board was called upon to decide and which it was agreed was within its jurisdiction to decide. Thus the evidence required must be tailored to the basic premise, that is, the correct interpretation of the meaning of successorship as found by the Court not by the labour tribunal.

She appears to follow the lead of Sopinka J. in *Paccar* by establishing certain basic premises, that is, the correct approach to successorship, which then gives the Court the right to assess the reasonableness of the decision and hence to examine the evidentiary base necessary to satisfy the criteria developed by the Court, not the criteria on which the decision was based as a result of the interpretation given the section by the labour tribunal.

The tribunal's decision was patently unreasonable because of the absence of evidence, not because the interpretation given to it by the Board was patently unreasonable.[105] In the opinion of McLachlin J., the Board construed the relevant section in an "unprecedented and unjustified manner".[106] I do not equate that with being "patently unreasonable". It was construed in a way which did not accord with McLachlin J.'s interpretation. However, as Wilson J. points out, that was not the only interpretation that could be given to the section.[107] On the question of "no evidence" Wilson J. concluded that:

> *While much of the evidence was equivocal regarding the specifics of the relationship between* [the two companies], *there was certainly evidence upon which the Board could reasonably conclude, as it did, that the skill and expertise of the principals Brent and Wade Lester were transferred back and forth between the two companies in order to enable them to bid on both union and non-union jobs and to carry these jobs to completion.*[108]

Thus, where there was "some evidence" the court ought not to substitute its opinion for that of the tribunal. Even in appellate review the court would not be justified in interfering with such a finding of fact. I wonder how a court can justify it in the more limited sense of judicial review. The Supreme Court has established strict limits to the review of facts by appellate tribunals in *Lensen* v. *Lensen.*[109] It would be strange indeed if the standard of review of findings of facts by reviewing courts was less stringent.

Lester and *National Corn Growers* raise the question of what material is available on an application for judicial review. What is the record? These are questions which go beyond the

scope of what I want to review here, but are clearly going to cause difficulty in jurisdictions where the record does not include a transcript of the evidence.[110]

VII. PUBLIC SERVICE ALLIANCE OF CANADA - JURISDICTION TO DECIDE OR NOT

The Public Service Alliance of Canada v. *A.G. Can.*[111] is the latest foray by the Court into the jurisdictional arena. Both the majority judgment of Sopinka J.[112] and the dissent of Cory J.[113] accept that the courts have been directed in *Paccar* to adopt the pragmatic and functional approach elaborated by Beetz J. in *Bibeault*, when determining whether decisions of administrative tribunals are made within their jurisdiction. In *P.S.A.C.* jurisdiction was the central issue. The question to decide was whether the Public Service Staff Relations Board (the Board) had the jurisdiction to determine whether the teachers, who were the subject matter of this dispute, were members of the bargaining unit. The Court divided on the issue. Cory J. found that it did - Sopinka J., for the majority, found that it did not. Cory J. formulated the question to be decided as whether the Board had jurisdiction to find that the teachers were employees within the meaning of the relevant legislation.[114]

The approach of both jurists is interesting and instructive. Sopinka J. agreed with Cory J. that it was necessary to consider whether the Board was interpreting a statutory provision which confers or limits jurisdiction.[115] He, however, posed the problem as follows:

> *Essentially, this requires a determination as to whether the interpretation of s. 33 of the* Staff Relations Act *and, in particular the word "employees" contained therein, was intended by Parliament to be left to the Board or whether it is a provision limiting jurisdiction. If it is the latter, then the Board's interpretation is reviewable if it is wrong. If, however, the interpretation of s. 33, and more specifically the meaning of the term "employees", was intended to be left to the Board then its decision is not reviewable unless the interpretation placed upon those provisions is patently unreasonable and the Board thereby exceeded its jurisdiction.*[116]

Thus, the difference is reduced to one of categorizing the statutory power. Sopinka J. sets out in some detail the functional approach developed by Beetz J. in *Bibeault* against which it is necessary to consider the relevant legislation to determine whether the statutory tribunal has exceeded its jurisdiction.[117] He concludes, using the pragmatic functional approach elaborated by Beetz and mandated by *Paccar,* that Parliament did not intend to confer jurisdiction on the Board to deal with employees who are not members of the Public Service,[118] and that the Board therefore: (1) assumed a jurisdiction it did not have; (2) committed an error of law; and, (3) as a result its decision was reviewable.[119]

Sopinka J. reveals that he (and through him the majority) is far less ready to rely on the expert opinion of a statutory tribunal than Cory J. The signals which he first gave in *Paccar* are reaffirmed in *P.S.A.C.* There appears to be a return to the *who but lawyers or judges are better equipped to determine the real intention of the legislature or Parliament* philosophy which was prevalent in the 1960s and early 1970s. There is a penchant for restricting the role of statutory tribunals in interpreting their own legislation. While the Court pays lip service to *C.U.P.E.*, the bottom line is that there is little or no judicial restraint.

Cory J. on the other hand, applying the same pragmatic functional approach, elaborated by Beetz J. in *Bibeault* and mandated by *Paccar*, found that "the Board was carrying out a function that, in the words of Dickson J., in *C.U.P.E.*, `would seem to lie logically at the heart of the specialized jurisdiction confided to the Board'".[120] In his opinion, the wording of the relevant legislation taken as a whole conferred jurisdiction on the Board to determine whether the teachers were members of the bargaining unit.[121]

Contrary to the approach adopted by Sopinka J., Cory J. uses the reason for the creation of a statutory board with expertise in the area of labour relations whose primary purpose is the resolution of labour-management disputes to buttress his conclusion that the Board had jurisdiction.[122] He notes that the Board has been given wide powers and the protection of a

privative clause.[123] He adopts a deferential approach to the decision of the statutory tribunal and accepts the analysis of Hugessen J. in dissent in the Federal Court of Appeal.[124] Cory J. concluded that the Board's interpretation of the relevant legislation was not patently unreasonable and accordingly it did not lose jurisdiction.[125]

CONCLUSION

As I asked at the beginning, where does this take us? Where are we going? Or, more properly, where are "they" going? Has the hunting season on decisions of statutory tribunals, after having been closed, except for conservationist purposes, suddenly been declared open? Clearly, if anything is clear in examining the latest cases, lawyers who until recently have concluded that little would be gained by challenging decisions of statutory tribunals in the courts because of the judicial deference accorded them by most Courts of Appeal in this country, will (I was going to say, dust off their precedents but in this day and age it no longer applies), reactivate their word processors with applications for judicial review.

Is there or are there trends which have emerged or are emerging? The answer to that question is clearly, "yes". First, one can separate the last four cases into two groups: (1) *P.S.A.C.* - where the issue was jurisdiction, and (2) *Corn Growers et al.* - where the tribunal had jurisdiction or was assumed to have jurisdiction for the purpose of the case to embark upon the specific inquiry.

I choose to separate the two simply for an attempt at purity and not to show that there is a difference in treatment in either case. I think the trend lines apply equally to a decision where the statutory tribunal is determining questions relating to its jurisdiction or embarking on a specific inquiry which it has jurisdiction to determine.

A. P.S.A.C.

The application of *Bibeault* in *P.S.A.C.* appears to signal a willingness to brand that which is questionably jurisdictional, as jurisdictional, and to intervene where, in the opinion of the Court, the result is not correct, notwithstanding the clear policy choice by the legislature to have such matters determined by statutory tribunals.

B. Corn Growers et al.

In my opinion, a majority of the Supreme Court has moved towards accepting a position of more judicial intervention in the review of decisions of statutory tribunals. Judicial deference which grew out of the pluralism contended for by Professor Arthur on which the theory of review in *C.U.P.E.* was based has been replaced by a new sense of urgency to determine the merits of decisions. It appears that the Court is no longer prepared to concede that decisions of statutory tribunals acting within the scope of their jurisdiction and which reasonably interpret the tribunal's constituent legislation are entitled to be insulated from judicial review. The conclusion of the inquiry, is that the correct answer is deemed to be more important than the interpretation by the specialized labour tribunal of questions within its authority as mandated by the legislature.

It is too early to tell whether or not this interventionism will apply with equal rigor when an application is brought by a trade union to quash a decision of the labour relations board. It is interesting to note that in *Paccar* (setting aside for the moment the specific issue), an application was brought by a trade union to set aside a decision of the Labour Board on the basis that it was patently unreasonable. That application was rejected. In my opinion, the principles of judicial review as enunciated by La Forest in *Paccar* were correct and I simply signal the issue. *Lester* was a successful application by an employer to set aside a decision of the Labour Relations Board. Again in *P.S.A.C.* we have a successful application by an employer to set aside a decision of a statutory tribunal.

I ask the question without answering it as to whether or not the result would have been the same had a trade union moved to set aside a decision of the Board in *Lester*.

The dispute concerning protection from the price of subsidized corn did not involve a labour management conflict and so does not aid us in this inquiry.

The more interesting question is how the various Courts of appeal are going to respond to these changes. Will the various Courts of appeal regard these cases as a change in direction which will enable them to examine the merits of the decisions of statutory tribunals, rather than the reasonableness of the interpretation? Only time will tell. As Hartley and Griffith have stated:

> *The fact is that in this area the courts are guided more by policy than by precedents, more by what they think is fair and reasonable than by rigid rules.*[126]

FOOTNOTES

1. *Canadian Union of Public Employees Local 963* v. *New Brunswick Liquor Corporation,* [1979] 2 S.C.R. 227 [hereinafter *C.U.P.E.*].

2. See *infra* notes 31 and 32.

3. *CAIMAW* v. *Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 [hereinafter *Paccar*].

4. *National Corn Growers Ass'n* v. *Canada (Import Tribunal),* [1990] 2. S.C.R. 1324 [hereinafter *National Corn Growers*].

5. *W.W. Lester (1978) Ltd.* v. *U.A.J.A.P.P.I. Local 740,* [1990] 3 S.C.R. 644 [hereinafter *Lester*].

6. *Canada (A.-G.)* v. *Public Service Alliance of Canada* (1991), 123 N.R. 161 (S.C.C.), [hereinafter *P.S.A.C.*].

7. *Supra* note 1 at 235-236.

8. H.W. Arthurs, "Protection Against Judicial Review" in *Judicial Review of Administrative Rulings* (Proceedings: Canadian Institute for the Administration of Justice Conference held in Montreal, 10, 11 and 12 November 1982) (Montreal: Yvon Blais, 1983) 149 at 161.

9. *Federal Communications Commission* v. *Pottsville Broadcasting,* 309 U.S. 134 at 146 (1940).

10. H.N. Janisch, "Beyond Jurisdiction: Judicial Review and the Charter of Rights" *ibid.* in *Judicial Review of Administrative Rulings* (Pr4oceedings: Canadin Institute for the Administration of Justicew Conference held in Montreal, 10, 11 and 12 November 1982) (Montreal: Yvon Blais, 1983) 273 at 279.

11. *Supra* note 3 at 1003-1004.

12. *Service Employees' International Union, Local 333* v. *Nipawin District Staff Nurses Association,* [1975] 1 S.C.R. 382 [hereinafter *Nipawin Staff Nurses*].

13. *Jacmain* v. *Attorney General of Canada,* [1978] 2 S.C.R. 15 [hereinafter *Jacmain*].

14. *Ibid.* at 29.

15. *Supra* note 12 at 389.

16. *Supra* note 1 at 233-234.

17. *Ibid.* at 237.

18. *Ibid.*

19. D.J. Mullan, "Developments in Administrative Law: The 1978-79 Term" (1980) 1 Supreme Court L.R. 1 at 23.

20. S.A. de Smith, *Judicial Review of Administrative Action,* 3d ed., (London: Stevens & Sons, 1973) at 96.

21. *Supra* note 1 at 233.

22. *Ibid.*

23. *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers, Local 796,* [1970] S.C.R. 425 [hereinafter *Metropolitan Life*].

24. *Anisminic Ltd.* v. *Foreign Compensation Commission,* [1969] 2 A.C. 147 (H.L.).

25. *Ibid.* at 171.

26. *Supra* note 23 at 435.

27. J.M. Evans, *Administrative Law,* 3d ed., (Toronto: Emond Montgomery, 1989) at 565.

28. *Supra* note 19 at 28.

29. *Supra* note 12 at 388-389.

30. *Ibid.* at 389.

31. *Volvo Canada Ltd.* v. *U.A.W., Local 720,* [1980] 1 S.C.R. 178.

32. *Douglas Aircraft Co. of Canada* v. *McConnell,* [1980] 1 S.C.R. 245.

33. *Alberta Union of Provincial Employees, Branch 63* v. *Board of Governors of Olds College,* [1982] 1 S.C.R. 923.

34. *Supra* note 4 at 1340-1342.

35. *Teamsters Union Local 938* v. *Massicotte,* [1982] 1 S.C.R. 710 [hereinafter *Massicotte*].

36. *Ibid.* at 724.

37. *Attorney General of Quebec* v. *Labrecque*, [1980] 2 S.C.R. 1057.

38. *Ibid*. at 1078.

39. *Blanco* v. *Rental Commission*, [1980] 2 S.C.R. 827.

40. *Ibid.* at 832.

41. *Ibid.*

42. *Blanchard* v. *Control Data Canada Ltd.*, [1984] 2 S.C.R. 476 [hereinafter *Blanchard*].

43. *Supra* note 5 at 687-688.

44. *Syndicat de Employés de Production du Québec et de l'Acadie* v. *C.L.R.B.*, [1984] 2 S.C.R. 412 [hereinafter *C.B.C.*].

45. *Ibid*. at 420-421.

46. *Supra* note 1 at 233.

47. *Ibid.*

48. *Supra* note 44 at 420-421.

49. *Ibid.* at 444.

50. J.M. Evans, "Developments in Administrative Law: The 1984-85 Term" (1986) 8 Supreme Court L.R. 1.

51. *Supra* note 44 at 420.

52. *Supra* note 50 at 32.

53. *Shalansky* v. *Board of Governors of Regina Pasqua Hospital*, [1983] 1 S.C.R. 303 at 307 [hereinafter *Shalansky*].

54. *Supra* note 42 at 494-495.

55. *Ibid.*

56. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the Charter].

57. D.J. Mullan, "The Supreme Court of Canada and Jurisdictional Error: Compromising New Brunswick Liquor?" [1987-88] Can. J. Admin. Law and Practice 71 at 80.

58. See: *Singh* v. *Minister of Employment and Immigration,* [1984] 2 S.C.R. 476.

59. *Supra* note 57.

60. *Supra* note 3 at 1003.

61. *Supra* note 4 at 1370.

62. *Supra* note 5 at 668.

63. *Supra* note 3 at 1002.

64. *Ibid*. at 1003-1004.

65. *Ibid*. at 1000.

66. *U.E.S., Local 298* v. *Bibeault,* [1988] 2 S.C.R. 1048 [hereinafter *Bibeault*].

67. *Supra* note 3 at 1017.

68. *Ibid.* at 1018.

69. *Ibid.* at 1017-1020.

70. *National Corn Growers, supra* note 4 at 1337-1342; *Lester, supra* note 5 at 651-656.

71. *Supra* note 3 at 1021.

72. *Ibid.* at 1033.

73. *Ibid*.

74. *Ibid.* at 1042-1044.

75. *Ibid.*

76. *Supra* note 5 at 656.

77. *Special Import Measures Act,* R.S.C. 1985, c. S-15.

78. *Supra* note 4 at 1369-1370.

79. *Ibid*. at 1370; *Bell Canada* v. *Canada (C.R.T.C.),* [1989] 1 S.C.R. 1722 at 1744.

80. *Supra* note 4 at 1370.

81. *Ibid.* at 1371.

82. *Ibid.* at 1370.

83. *Ibid.*

84. *Ibid.* at 1346-1348.

85. *Ibid.* at 1347-1348.

86. *Ibid.* at 1383.

87. *Supra* note 5 at 657-658.

88. *Ibid.* at 651, Wilson J., and at 668, McLachlin J.

89. *Ibid.* at 650.

90. *Ibid.* at 655.

91. *Supra* note 53 at 307.

92. *Supra* note 5 at 655.

93. *Ibid.* at 670-671.

94. *Ibid.* at 671-673.

95. *Ibid.* at 676.

96. *Ibid.* at 684.

97. *Ibid.* at 693-694.

98. *Ibid.* at 669.

99. *Ibid.* at 687.

100. *Supra* note 3 at 1003.

101. *Supra* note 5 at 687-688.

102. *Ibid.* at 688.

103. *Ibid.* at 694.

104. *Ibid.* at 687-693.

105. *Ibid.* at 693.

106. *Ibid.*

107. *Ibid.* at 655.

108. *Ibid.* at 655-656.

109. *Lensen* v. *Lensen,* [1987] 2 S.C.R. 672. See also: *Long Lake School Div. No. 30 (Sask.) Bd. of Education* v. *Schatz,* [1986] 5 W.W.R. 355 (Sask. C.A.).

110. See: Queen's Bench Rules (Saskatchewan), r. 669, and *Saskatchewan Insurance Office and Professional Employees' Union* v. *Saskatchewan Government Insurance,* [1984] 4 W.W.R. 668, 34 Sask. R. 2.

111. *The Public Service Alliance of Canada* v. *A.G. Can.* (1991), 123 N.R. 161 [hereinafter *P.S.A.C.*].

112. *Ibid.* at 175-176.

113. *Ibid.* at 212.

114. *Ibid.* at 189.

115. *Ibid.* at 174.

116. *Ibid.*

117. *Ibid.* at 175-177.

118. *Ibid.* at 177.

119. *Ibid.*

120. *Ibid.* at 217.

121. *Ibid.*

122. *Ibid.*

123. *Ibid.* at 218.

124. *Ibid.* at 226.

125. *Ibid.* at 225.

126. T.C. Hartley & J.A.G. Griffith, *Government and Law* (London: Weidenfeld & Nicolson, 1975) at 30 (as quoted by H.N. Janisch in "Towards a More General Theory

of Judicial Review in Administrative Law" (1989) 53 Sask. L. Rev. 327 at 331).