NATURAL JUSTICE AND FAIRNESS IN THE ADMINISTRATIVE PROCESS

A paper delivered to a seminar on Judicial Review of Administrative Rulings organized by the Canadian Institute for the Administration of Justice in Montreal, Quebec, November 11 and 12, 1982.

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The purpose of this paper is to focus on the procedural requirements which the courts have imposed on persons who exercise powers which have been delegated to them by either the federal Parliament or the provincial Legislatures. Until recently, "natural justice" was the phrase used to denote these procedural requirements, and was itself comprised of two principal sub-rules: *audi alteram partem* and *nemo judex in sua causa debet esse*. The content of natural justice varied from case to case and from context to context. Over the years, the applicability of natural justice - or, perhaps, the availability of *certiorari* for the breach of natural justice - was restricted to only those delegated powers which could be characterized as judicial or quasi-judicial in nature. As a result, a wide range of administrative (and legislative) powers were exempt from judicial review for procedural error. In the last few years, the English and Commonwealth courts have developed the concept of the "duty to be fair", either as embodying the principles of natural justice or as an extension of them. The result has been to re-assert the courts' power to review administrative powers which cannot be characterized as being judicial or quasi-judicial in nature, and to eliminate some of the need for extreme care in choosing the correct remedy for seeking judicial review.

This paper examines the following aspects of the "duty to be fair":

(A) the development of the duty to be fair, its relationship to natural justice, and its

effect on the need to characterize functions and the choice of remedy;

(B) the applicability of the duty to be fair to legislative functions and to decisions of the Cabinet;

(C) theoretically incorrect attempts to make the duty to be fair apply to the merits of a decision;

(D) the relationship between the duty to be fair and the "principles of fundamental justice" contained in section 7 of the Charter of Rights and Liberties; and

(E) the effect of a breach of the duty to be fair.

Professor Patrice Garant will address the duty to be fair in the Quebec context, the problems posed by sections 18 and 28 of the Federal Court Act, the duty to be fair (including the right to legal representation) in the administration of prisons.

A. THE DEVELOPMENTS OF THE DUTY TO BE FAIR

[Note: This section consists of an article first published in (1980) 18 Alberta Law Review 351 under the title "Administrative Fairness in Alberta".]

ADMINISTRATIVE FAIRNESS IN ALBERTA

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This article discusses the recent development in the scope of the administrative law concept of the "duty to be fair" and the effect of that development on judicial review and on the need to characterize functions. The author examines in depth five recent cases, including Martineau *v.* Matsqui Institution Disciplinary Board *(No. 2), decided by the Supreme Court of Canada in December 1979, insofar as they involve application of the concept of fairness.*

I. INTRODUCTION

The "duty to be fair" is one of the most important recent developments in Canadian Administrative Law. Although the concept of fairness has long been used by the courts as a rough test for determining whether the principles of natural justice have been breached in a particular case, the Canadian courts have now followed the English jurisprudence[1] which gives the duty to be fair a much broader scope than merely determining the content of natural justice. Thus, an administrative body has a duty to be fair, even though the principles of natural justice do not apply to its decision-making process; a breach of that duty is subject to judicial review; and *certiorari* is available in Alberta even though no *quasi*-judicial function is involved. Indeed, one may speculate that the development of the duty to be fair has now totally supplanted the need to characterize a particular function as either *quasi*-judicial or merely administrative before determining what (if any) remedy is available.

The purpose of this article is to review briefly both the history and the theoretical foundations of the duty to be fair, and to examine in detail five recent cases involving the application of this principle: *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*,[2] *Martineau* v. *Matsqui Institution Disciplinary Board* (No. 2)[3] (both decided by the Supreme Court of Canada); and *Harvie* v. *Calgary Regional Planning Commission*,[4] *Campeau Corporation* v. *Council of the City of Calgary*,[5] and *McCarthy* v. *Trustees of Calgary Separate School District*[6] (all decided by the Court of Appeal of Alberta).

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1. For an excellent summary of the English cases, *see* D. J. Mullan, "Fairness: The New Natural Justice" (1975) 25 *U. of T.L.J.* 281. *See also Alberta Union of Provincial Employees* v. *Alberta Classification Appeal Board* [1978] 1 W.W.R. 193, 81 D.L.R. (3d) 184, 9 A.R. 462 (Alta. S.C.T.D.).

2. (1979) 88 D.L.R. (3d) 671 (S.C.C.); *revg.* (1977) 69 D.L.R. (3d) 13 (Ont. C.A.); *revg.* (1976) 61 D.L.R. (3d) 36 (Div. Ct.).

3. [1980] 1 S.C.R. 602.

4. (1979) 8 Alta. L.R. (2d) 166 (Alta. S.C.A.D.), *revg.* (1978) 5 Alta. L.R. (2d) 301.

5. (1979) 7 Alta. L.R. (2d) 294 (Alta. S.C.A.D.) *revg.* (1978) 8 A.R. 77. This litigation subsequently came before the courts again after City Council had reconsidered the application for rezoning. In *Campeau* (No. 2), the Court of Appeal declined to interfere with Council's actions, which it specifically held to be legislative in nature.

6. [1979] 4 W.W.R. 725 (per Laycraft J. as he then was); *affd.* unanimously by the Court of Appeal in an unreported decision on October 8, 1979. The application for *certiorari* was subsequently heard by Chief Justice Sinclair, who granted it. No appeal was taken from that decision by the Board, which however, at the time of writing, was in the process of re-enacting the dismissal proceedings to comply with the duty to be fair.

II. THEORETICAL CONSIDERATIONS

Until recently, it was generally assumed that the following tautology was true: if there was a *quasi*-judicial function, then the principles of natural justice applied, and *certiorari* was available to superintend any breach of those procedural requirements. Conversely, if the function was not *quasi*-judicial in nature, but merely administrative, the principles of natural justice did not apply, nor was *certiorari* available. Thus the question of fairness only arose to determine the content of natural justice *assuming that a* quasi-*judicial function was involved.*

Unfortunately, the distinction between a *quasi*-judicial function on the one hand, and a merely administrative one on the other, was never clear. However, because the availability of *certiorari* depended upon this characterization, a great deal of litigation occurred, for each case had to be determined by itself, and provided virtually no precedent for subsequent litigation. Although there is considerable elasticity in what constitutes a *quasi*-judicial function (and the courts variously did stretch or narrow the concept), at some point it is simply not possible to characterize something as *quasi*-judicial, no matter how unfair the procedure used, or how desirable it would be for *certiorari* to issue in the circumstances.

The duty to be fair is a much more robust concept. In the first place, it avoids premising the availability of judicial review on the existence of a *quasi*-judicial function, which is not a clear concept in any event. Secondly, it openly articulates the question at least subconsciously asked by the courts in determining whether judicial review should issue for procedural reasons. And, finally, it provides an accurate rubric for administrators of all descriptions to bear in mind when exercising their various functions.

Of course there will be continuous litigation over the question of whether a particular administrator's procedure was in fact fair. It is submitted, however, that this may well not generate any more litigation than that previously arising out of the meaning of "*quasi*-judicial". Rather, the focus of argument will have shifted to the real question at issue: was this decision arrived at fairly? And the judicial answers to this question should, in each case, provide considerably better guidance about acceptable procedures in particular circumstances. No longer will a court's finding that no *quasi*-judicial function is involved effectively grant the administrator *carte blanche* to adopt any procedure no matter how unfair.

It is not possible to dismiss the development of the duty to be fair as merely fleshing out the content of natural justice.[7] On the contrary, it significantly extends the ambit of judicial review beyond the existence of *quasi*-judicial functions (to which only it previously was argued that natural justice applied). And the recent jurisprudence clearly holds that *certiorari*—which historically only issued to quash a *quasi*-judicial function—is available to remedy any breach of the duty to be fair, even if no *quasi*-judicial function is involved.[8] Accordingly, the old trilogy uniting

7. As has often been suggested. While the essence of natural justice may be fairness, the duty to be fair applies even where natural justice may not. In particular, the requirement of fairness is not limited to *quasi*-judicial functions (however they are defined).

8. Laycraft J.'s decision in *McCarthy*, unanimously upheld by the Court of Appeal, is clear authority for this proposition. So is the reasoning of Dickson J. in *Martineau* (No. 2), although Pigeon J.'s majority judgment in that case is less clear on this point. It seems

the existence of a *quasi*-judicial function, the applicability of the rules of natural justice, and the availability of *certiorari* has now been shattered.

Let us, therefore, turn to the Canadian cases which have accomplished this revolution.

III. THE *NICHOLSON* CASE

The *Nicholson* case arose in Ontario under the Judicial Review Procedure Act,[9] and concerned the termination of a probationary police constable. Although section 27 of the Police Act[10] generally provided that

> . . . [n]o chief of police, constable or other police officer is subject to any penalty under this Part except after a hearing and final disposition of a charge on appeal as provided by this Part,

there was a specific exception preserving the authority of a police board:

> (b) to dispense with the services of any [probationary] constable within eighteen months of his becoming a constable.

Nicholson was not told why he was dismissed, nor was he given notice or any opportunity to make representations before his services were terminated. He applied for judicial review. This was granted by Hughes J. at first instance,[11] who relied heavily on the reasoning of the House of Lords in *Ridge* v. *Baldwin*,[12] to classify the legal position of a police constable as an "office". Therefore, notwithstanding the existence of section 27(b), His Lordship held that, while the Board's[13]

> . . . deliberations may be untrammelled by regulations made under the Police Act, . . . this court should not allow them to proceed as if the principles of natural justice did not exist.

The Court of Appeal, however, reversed, having answered the following question in the affirmative.[14]

> Can the services of a police constable be dispensed with within eighteen months of his becoming a constable, without the observance by the authority discharging him of the requirements of natural justice, including a hearing?

In effect, the Ontario Court of Appeal focussed on the statutory provisions dealing with appeals for permanent constables, noted the absence of similar provisions for probationary members who were employed "at pleasure", applied the maxim *expressio unius est exclusio alterius*,[15] and washed their hands of any general judicial responsibility for enforcing the observance of fair procedures by administrative bodies. In a five-to-

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certain, therefore, that the reasoning of the Supreme Court of Canada in *Calgary Power Ltd.* v. *Copithorne* [1959] S.C.R. 24, (1959) 16 D.L.R. (2d) 241, is no longer good law.

9. S.O. 1971, c. 48.
10. R.S.O. 1979, c. 351.
11. (1976) 61 D.L.R. (3d) 36 (Ont. Div. Ct.).
12. [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.).
13. *Supra* n. 11 at 45.
14. (1977) 69 D.L.R. (3d) 13 at 14.
15. *Id.* at 17-22. *See also* the application of this maxim by the majority of the Supreme Court of Canada in *French* v. *The Law Society of Upper Canada* [1975] 2 S.C.R. 767, 49 D.L.R. (3d) 1. It is submitted that this application of the *expressio unius* rule is wrong in principle. Natural justice is presumed to apply to decisions, unless specifically ousted by Parliament. Specifying certain procedural steps in some circumstances only reinforces the applicability or flushes out the content of natural justice in those cases; it does not indicate Parliament's intention specifically to exclude natural justice in other circumstances. In short, the onus is on the decision-maker to show Parliament's clear intent to exempt him from complying with natural justice or procedural fairness.

four decision,[16] however, the Supreme Court of Canada reversed the Ontario Court of Appeal, and reinstated the result reached by Hughes J.—thereby quashing the termination of Nicholson's employment (which by then had exceeded the eighteen month probation period!).

Two principal issues underlie the majority decision of the Supreme Court, written by Chief Justice Laskin:

1. Was the status of a probationary constable sufficient to attract the principles of natural justice to termination proceedings?

and 2. Is there a general duty to be fair even if the principles of natural justice do not apply?

The first issue raises the question whether a probationary constable occupies an "office" which cannot be terminated without cause (to which the principles of natural justice apply, following *Ridge* v. *Baldwin*) or is a mere employee who can be dismissed at pleasure. Indeed, this precise issue divided Hughes J. and the Court of Appeal. Chief Justice Laskin, however, held[17] that the lower courts' references to the common law position of policemen were inapt in light of the existence of the Police Act, which made no reference whatever to the concept of employment "at pleasure". It was therefore not necessary to rely upon the *Constitutional Reference* case[18] (as Hughes J. had done) to fit Nicholson's employment into the third category adopted by Lord Reid in *Ridge* v. *Baldwin*, instead of into the second.[19] Nor was it necessary to re-examine whether the law should continue to recognize employment at pleasure, even in light of the decision by the House of Lords in *Malloch* v. *Aberdeen Corporation*.[20] Rather, Chief Justice Laskin held that the Police Act forms a complete code, ". . . a turning away from the old common law rule even in cases where the full [probationary] period of time has not fully run".[21] Accordingly, his Lordship was:[22]

> . . . of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than eighteen months' service, he cannot be denied any protection. He should be treated "fairly" not arbitrarily.

It is important to note that this reasoning does not necessarily apply to an employee who truly is engaged at pleasure—although that precise issue did arise in the *McCarthy* case (discussed below).[23] Indeed, this difference in characterizing the nature of Nicholson's employment provides the basis for the dissenting judgment in the Supreme Court. For Martland J. simply held that Nicholson was dismissable at pleasure, that that was the very purpose of the eighteen month probationary period, and that (unlike *Malloch's* case) there were no procedures governing this type of case in the Police Act. Accordingly, Martland J. was of the opinion that

16. Chief Justice Laskin's judgment was concurred in by Ritchie, Spence, Dickson and Estey JJ.; Martland J.'s dissent was concurred in by Pigeon, Beetz and Pratte JJ.
17. (1979) 88 D.L.R. (3d) 671 at 677.
18. *Reference re Power of Municipal Council to Dismiss Chief Constable*, etc. (1957) 7 D.L.R. (2d) 222, 18 C.C.C. 35, [1957] O.R. 28, sub nom. *Re a Reference under the Constitutional Questions Act*.
19. *Supra* n. 12. Lord Reid's three categories in *Ridge* v. *Baldwin* were: first, pure master-servant relationships; secondly, offices held at pleasure; and, thirdly, offices terminable only for cause.
20. [1971] 2 All E.R. 1278 (H.L.).
21. *Supra* n. 17 at 680.
22. *Id.*
23. *See* Part VI.

there was no breach of any legal duty to the appellant in the exercise of this purely administrative function.

This leads to the second issue facing the court: Is there a general duty to be fair even if the principles of natural justice do not apply? Martland J. did not even refer to the "duty to be fair", and it is clear that His Lordship did not recognize it as a concept different from natural justice. Because only an administrative (and not a *quasi*-judicial) function was involved in terminating a probationary constable, the rules of natural justice simply did not apply in this case. *Cedit questio.*

On the other hand, Chief Justice Laskin equally clearly recognized a distinction between the "duty to be fair" and the principles of natural justice. He specifically adopted Megarry J.'s *dictum* in *Bates* v. *Lord Hailsham*:[24]

> that in the sphere of the so-called *quasi*-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness.

The Chief Justice also referred to De Smith's explanation[25] of the relationship between fairness and natural justice, and to the:[26]

> realization that the *classification of statutory functions as judicial, quasi-judicial or administrative is often difficult,* to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function involved. . . .

Finally, the Chief Justice cited several English decisions[27] on the duty to be fair to support his view that this concept is now part of the common law. Because of the unfairness of the method adopted by the Board in deciding to terminate Nicholson, its decision was quashed.

Note that Chief Justice Laskin adopted the concept of the duty to be fair as a remedy for procedural unfairness where no *quasi*-judicial function is involved. He thus tacitly recognized the continuing need to characterize functions as *quasi*-judicial or merely administrative, however difficult that characterization may be. On the one hand, this approach is consistent with the recent English cases; and it undoubtedly permits judicial review of purely administrative functions. On the other hand, it perpetuates the need to distinguish between *quasi*-judicial and merely administrative functions, and it does not decide whether *certiorari* is available as a remedy for a breach of the duty to be fair where no *quasi*-judicial function is involved.[28] Although the seminal importance of *Nicholson* cannot be underestimated, these problems nevertheless were precisely the issues which arose in *McCarthy*[29] and *Martineau* (No. 2).[30]

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24. [1972] 1 W.L.R. 1373 (Ch.D.) at 1378.
25. S. A. De Smith, *Judicial Review of Administrative Action* (3d ed., 1973) at 208-9.
26. *Supra* n. 17 at 681; emphasis added.
27. *Pearlberg* v. *Varty (Inspector of Taxes)* [1972] 1 W.L.R. 534 (H.L.); *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660 (P.C.); *Russel* v. *Duke of Norfolk* [1949] 1 All E.R. 109, 118; *Selvarojan* v. *Race Relations Board* [1976] 1 All E.R. 13 (C.A.).
28. In *McCarthy*, it was argued by the School Board that *Nicholson* should be confined to proceedings under the Ontario Judicial Review Procedure Act, and should not be applied to *certiorari* in Alberta. Laycraft J. rejected this narrow interpretation of *Nicholson*, and Dickson J. in *Martineau* (No. 2) confirms that the broader view is correct.
29. *Supra* n. 6.
30. *Supra* n. 3.

IV. THE *CAMPEAU* CASE

The duty to be fair was also an important element in the subsequent decisions of the Appellate Division of the Supreme Court of Alberta in *Campeau Corporation* v. *Council of City of Calgary*,[31] and *Harvie and Glenbow Ranching Ltd.* v. *Calgary Regional Planning Commission*.[32]

Campeau involved an application to the City Council to have the land use classification of certain lands changed from "agricultural-future residential" to "direct control" for a multiple-family development, pursuant to section 106(2) of the former Planning Act.[33] The land in question, however, was ideally suited for a park. After lengthy proceedings, City Council decided not to approve the requested amendment to the land use classification guidelines, even though it also declined to purchase the land for use as a park. The landowner applied to the Trial Division for an order either (i) approving the reclassification, or (ii) directing Council to re-hear the matter without taking into account the land's possible use as a park. Milvain C.J.T.D. rejected this application, after having noted that even an affirmative resolution by Council to reclassify the land would have required further approval by the provincial Planning Board:[34]

> Such being the case I am satisfied the decision was no more than an administrative act, done in the performance of a divided concept as to what was a public duty. The decision is not subject to judicial review and the application before me is dismissed.

The Appellate Division unanimously reversed this decision. Lieberman J.A., writing the opinion for the court—one month before *Nicholson* was decided by the Supreme Court of Canada—noted the "difficulties and uncertainties inherent" in characterizing functions as *quasi*-judicial or merely administrative. He went on to note [indeed, predict!] that:[35]

> . . . there is a discernible trend in the decisions of the Supreme Court of Canada to examine the conduct of a tribunal's proceedings or even the exercise of ministerial discretion where a person's rights are affected in order to determine whether they were conducted and exercised fairly and in good faith. If not, the court will, whenever possible, intervene and right the injustice suffered by the aggrieved party by the use of one of the prerogative writs.

His Lordship then referred at length to the Supreme Court of Canada's decisions in *Roper* v. *Royal Victoria Hospital*;[36] *Minister of Manpower & Immigration* v. *Hardayal*;[37] and *St. John* v. *Fraser*;[38] as well as to the recent English cases on the duty to be fair in purely administrative proceedings.[39]

Notwithstanding this disquisition on the duty to be fair, Lieberman J.A. nevertheless held[40] that it was unnecessary to characterize the council's function in handling the application for reclassification of the land. For the principal basis of His Lordship's judgment does not concern the duty to be fair at all, but rather the use of a statutory power for an

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31. *Supra* n. 5.
32. *Supra* n. 4.
33. R.S.A. 1970, c. 276 (since revised: S.A. 1977, c. 89).
34. (1978) 8 A.R. 77 at 86.
35. (1979) 7 Alta. L.R. (2d) at 302.
36. [1975] 2 S.C.R. 62, 50 D.L.R. (3d) 725.
37. [1978] 1 S.C.R. 470, 75 D.L.R. (3d) 465, 15 N.R. 396, *rev'g.* [1976] 2 F.C. 746, 67 D.L.R. (3d) 738.
38. [1935] S.C.R. 441, 64 C.C.C. 90, [1935] 3 D.L.R. 465.
39. *Supra* n. 1.
40. *Supra* n. 35.

improper purpose—namely, to acquire a park without paying full market value for it. Yet a breach of the principles of natural justice (or of the duty to be fair) has traditionally been treated as a separate ground for judicial review from actions made for an improper purpose, or based on irrelevant evidence, or on the lack of relevant evidence, or those which are simply *ultra vires* the governing legislation. Of course, in some circumstances, the procedures used by administrators acting in bad faith or for an improper purpose or on irrelevant evidence *may* also contravene the principles of natural justice (or the duty to adopt fair procedures). But, with respect, this coincidence of grounds for judicial review is precisely that: a coincidence. Accordingly, it is submitted that the real *ratio decidendi* of the *Campeau* decision concerns improper purpose, which is a substantive matter, and not procedural unfairness. Nevertheless, Lieberman J.A.'s *obiter dicta* on the duty to be fair accurately presaged the subsequent development of the law.[41]

V. THE *HARVIE* CASE

Although decided after *Nicholson* had been reported, and despite numerous references to the duty to be fair, the *ratio decidendi* of the unanimous judgment of the Appellate Division in *Harvie and Glenbow Ranches Ltd.* v. *Calgary Regional Planning Commission*[42] clearly characterizes the subdivision process in Alberta as *quasi*-judicial. Accordingly, the court held that Glenbow Ranches Ltd. had the right to notice and to appear before the Planning Commission on an application by a neighbouring landowner to subdivide the latter's land. The duty to be fair, in this case, did not stand in contradistinction to the principles of natural justice, but rather was relevant to concluding that there was a *quasi*-judicial function involved. The judgment, therefore, demonstrates the elastic nature of the concept of a *quasi*-judicial function.

To reach this conclusion, it was necessary for the court to overcome the judgment in a strikingly similar English case, *Gregory* v. *London Borough of Camden*,[43] to the effect that a neighbouring landowner has no "rights" affected when subdivision on development approval is granted to the applicant. This precedent, and his perception that subdivision was merely a "mechanical process",[44] had led Quigley J. to refuse judicial review over a purely administrative function. Clement J.A., writing for the unanimous court[45] on appeal, came to a different conclusion. First, he noted that it is not possible to compartmentalize judicial and administrative functions, and that the label of "*quasi*-judicial" is apt to describe a composite function which involves both judicial and administrative duties.[46] Secondly, His Lordship rejected the argument that a *quasi*-judicial function was not involved because none of Glenbow's *rights* were involved.[47] He quoted the following passage from the judgment of Martland J. in *Calgary Power Ltd.* v. *Copithorne*:[48]

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41. Particularly in *Nicholson*, decided on October 3, 1978—just about a month after Lieberman J.A.'s judgment in *Campeau* (rendered on September 8, 1978).
42. *Supra* n. 4.
43. [1966] 1 W.L.R. 899, [1966] 2 All E.R. 196 (Q.B.).
44. (1978) 5 Alta. L.R. (2d) 301 at 303.
45. Composed of Clement, Moir and Haddad JJ.A.—the latter two of whom formed the court with Lieberman J.A. in *Campeau*.
46. *Supra* n. 4 at 180.
47. *Id.* at 180-185.
48. *Id.* at 180; emphasis added.

> With respect to the first point, the respondent submitted that a function is of a judicial or *quasi*-judicial character when the exercise of it effects the extinguishment or modification of private rights or interests in favour of another person, unless a contrary intent clearly appears from the statute. *This proposition, it appears to me, goes too far in seeking to define functions of a judicial or* quasi-*judicial character.* In determining whether or not a body or an individual is exercising judicial or *quasi*-judicial duties, *it is necessary to examine the defined scope of its functions and then to determine whether or not there is imposed a duty to act judicially.* . . .

Now Martland J.'s judgment in *Calgary Power*[49] has generally been interpreted to mean that there are two necessary requirements for the existence of a *quasi*-judicial function: first, that *rights* are affected; and, secondly, that there is a super-added duty to act judicially. Indeed, Martland J. in *Calgary Power* goes on to quote Lord Chief Justice Hewart's famous *dictum* to this effect from *R.* v. *Church Assembly Legislative Committee; ex p. Haynes Smith:*[50]

> In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially.

Clement J.A., however, referred to *Nicholson,* and rejected this traditional test. To paraphrase, he said that the traditional proposition that rights must be affected went too far in seeking to define a judicial or *quasi*-judicial function.[51] He accepted de Smith's view[52] that:

> . . . the term "rights" is to be understood in a very broad-sense, and it is not to be confined to the jurisprudential concept of rights to which correlative legal duties are annexed. It comprises an extensive range of legally recognized interests, the categories of which have never been closed.

Although Glenbow Ranches did not have any cause of action against either the developer or the Commission, nevertheless Clement J.A. held that its interests were so affected by the proposed subdivision that judicial review should issue in the circumstances:[53]

> Administrative law in the statutory sense reflects the concepts of legislatures to meet the difficulties in society arising out of increasing population densities, changing relationships between subjects and between subjects and government, and other societal stresses. The new concepts are expressed in a legislative framework in which various rights, interests, duties and powers are created, for varied purposes and objectives, many unknown to the common law and some of far-reaching effect on traditional concepts. All of these must be given their proper effect. Jurisdiction over their administration is entrusted to newly-created tribunals or, in some cases, to existing tribunals. It is, in my view, necessary to the maintenance of the supervisory jurisdiction of the courts in the general public interest that these new rights and interests be viewed and weighed in the light of the legislative concept that created them, not in the shadow of narrower considerations expressed in times past under different societal conditions. When a new right or interest has been created by statute it must be examined, not in isolation, but in the context of the whole. I am of opinion that the nature and extent of the right or interest is a vitally important facet of the complex judicial process necessary to determine whether, in a particular case, there is a duty on a tribunal to conform wholly or to some degree to the principles of natural justice in coming to a decision affecting the person asserting the interest.

This passage justifies the extension of the concept of a *quasi*-judicial function to a process which only affects "interests" and not technical

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49. [1959] S.C.R. 24 at 30-34.
50. [1928] 1 K.B. 411 at 415.
51. *Supra* n. 4 at 183.
52. *Op. cit., supra* n. 25 at 344.
53. *Supra* n. 4 at 184.

"rights". Unfortunately, it still maintains the distinction between *quasi*-judicial and merely administrative powers, and thus the need to characterize functions. At some point, it simply will not be possible to stretch the elastic concept of *quasi*-judicial to cover a purely administrative function which clearly cries out for judicial review. Thus, with respect, it is unfortunate that Clement J.A. did not follow *Nicholson* (from which he quoted extensively)[54] to its logical conclusion, nor did he in the end give effect to his bold statement of the expanding ambit of judicial review:[55]

> In late years there has been an emerging recognition that the supervisory jurisdiction of the court must keep pace with the increasing variety and scope of what are classified as administrative functions of tribunals, when a decision in the exercise of such functions has an appreciable effect on a right or interest of a subject which is, in the view of the court, of sufficient importance to warrant recognition.

The duty to be fair, therefore, in *Harvie* was relevant because its breach constituted a breach of the principles of natural justice, which applied because a *quasi*-judicial function was involved.

VI. THE *McCARTHY* CASE

A bolder approach to the duty to be fair was taken by the Court of Appeal in unanimously upholding Laycraft J.'s judgment in *McCarthy* v. *Board of Trustees of Calgary Roman Catholic Separate School District No. 1 et al.*[56] Mr. McCarthy was the superintendent of the Calgary Separate School system, and was dismissed by the Board without notice and without reasons. He sought (*inter alia*) *certiorari* to quash his purported dismissal; and the Board countered by asking for a preliminary determination whether *certiorari* could even apply in these circumstances, which it said involved only a master-servant relationship. Milvain C.J.T.D. rejected[57] the Board's application for a preliminary determination, but this was reversed by the Court of Appeal.[58] Laycraft J.'s judgment, therefore, deals with the availability of *certiorari* in these circumstances.

Laycraft J. held[59] that McCarthy occupied a statutory office under the School Act,[60] and that the reasoning adopted by the majority of the Supreme Court of Canada in *Nicholson* applied squarely to this case. Nevertheless, the Board argued that *Nicholson* was decided under the Ontario Judicial Review Procedure Act,[61] and was not authority in Alberta for extending the availability of *certiorari* to supervise the exercise of a purely administrative function. Laycraft J. rejected this argument, even though he specifically held that:[62]

> . . . the function of the board in this case must be characterized as administrative and not as judicial or *quasi*-judicial in the sense that those terms have been distinguished from each other in Canadian cases.

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54. *Id.* at 185-187.
55. *Id.* at 185.
56. [1979] 4 W.W.R. 725. *See supra* n. 6.
57. On November 20, 1978; *Id.* at 727.
58. *Id.* at 728-9.
59. *Id.* at 731-734.
60. R.S.A. 1970, c. 329.
61. S.O. 1971, c. 48.
62. *Supra* n. 56 at 735.

But this characterization clearly poses the problem so neatly avoided by Lieberman J.A. in *Campeau* and Clement J.A. in *Harvie* who both managed to eke a *quasi*-judicial function out of the statutory powers involved in those cases. By holding that only an administrative function was involved in *McCarthy*, Laycraft J. had to consider both (i) whether the duty to be fair had been breached, and also (ii) whether *certiorari* was even available as a remedy for such a breach. His Lordship held that *Nicholson* not only recognized the right of the citizen to fairness in administrative procedure, but also necessarily recognized that *certiorari* was available to enforce that right:[63]

> To hold otherwise is to say that, though administrative acts in Alberta are subject to control by the courts, the only means of control is by the declaratory action. In some cases that result may follow as, for example, where the record produced on the motion under the Crown Practice Rules is inadequate or where the court in the exercise of its discretion decides that the case is not appropriate for a prerogative writ. In many cases, however, it would be highly undesirable that there be no power to quash an administrative decision made contrary to statutory power. When the Supreme Court of Canada recognized the right of the citizen to fair treatment in the exercise of such powers, it must also be taken to have recognized the traditional remedy by which the right might be enforced.

Accordingly, *certiorari* is available to correct a breach of the duty to be fair, even where only an administrative function is involved. It is no longer necessary to stretch the concept of a *quasi*-judicial function to fit the particular facts in which it is alleged that a breach of procedural fairness has occurred. Nor is it necessary to find some other remedy (such as a declaration) for procedural unfairness in a purely administrative matter. In other words, the tautology that *certiorari* is only available to correct breaches of the principles of natural justice, which are only relevant to *quasi*-judicial functions, has been broken.

Laycraft J.'s judgment was unanimously upheld by the Court of Appeal,[64] and must be taken now to represent the law of Alberta—particularly in light of the subsequent decision of the Supreme Court of Canada in *Martineau* (No. 2).

VII. *MARTINEAU* (No. 2)

Precisely the same question which confronted Laycraft J. and the Alberta Court of Appeal in *McCarthy* faced the Supreme Court of Canada in *Martineau* v. *Matsqui Institution Disciplinary Board* (No. 2):[65] is *certiorari* available to remedy a breach of the duty to be fair when a purely administrative function is involved? Although the Supreme Court was unanimous in granting *certiorari*, it divided six-to-three[66] in the reasons for this outcome. The reasoning adopted by the court is, therefore, extremely relevant to the Alberta cases on the duty to be fair, even though *Martineau* arose under the peculiar provisions of the Federal Court Act.[67]

Mr. Martineau was sentenced to fifteen days in solitary confinement for a "flagrant or serious" disciplinary offence. His application for judicial review under section 28 of the Federal Court Act was rejected by

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63. *Id.* at 737.
64. In October 1979; unreported.
65. [1980] 1 S.C.R. 602.
66. Martland, Ritchie, Beetz, Estey and Pratte JJ. concurred with Pigeon J.; Laskin C.J.C. and McIntyre J. concurred with Dickson J.'s reasons.
67. R.S.C. 1970 (2d Supp.), c. 10.

the Supreme Court of Canada in *Martineau* (No. 1),[68] because the "directives" governing the procedure for dealing with disciplinary offences were administrative rather than "law", and therefore could not be *quasi*-judicial in nature. Martineau, therefore, proceeded with his second action, under section 18 of the Federal Court Act, for an order of *certiorari* to quash the Disciplinary Board's decision. Mahoney J. at first instance, treating the matter as an application for a preliminary determination of a question of law, held that:[69]

> . . . a public body, such as the respondent, authorized by law to impose a punishment, that was more than a mere denial of privileges, had a duty to act fairly in arriving at its decision to impose the punishment. Any other conclusion would be repugnant. The circumstances disclosed in this application would appear to be appropriate to the remedy sought. I am not, of course, deciding whether the remedy should be granted but merely whether it could be granted by the Federal Court of Canada, Trial Division. In my view it could.

The Federal Court of Appeal reversed this[70] on the basis that a conviction for a disciplinary offence was a purely administrative function with respect to which *certiorari* was not available. The consequence of this view, of course, is that Parliament must be taken to have transferred all supervising jurisdiction over *quasi*-judicial federal bodies to the Federal Court of Appeal under section 28 of the Act, so that the reference in section 18 to *certiorari* in the Trial Division is hollow, leaving no effective judicial review over purely administrative functions.

Pigeon J., writing for the majority of the Supreme Court, refused to accept this view of the law. Rather, he understood *Nicholson* to stand for the "common law principle":[71]

> . . . that in the sphere of the so-called *quasi*-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness[.];

and the further principle that a breach of the duty could be enforced by judicial review. Policy may require that full-blown judicial procedures not be applicable to disciplinary proceedings,[72] thereby preventing their characterization as *quasi*-judicial for the purpose of judicial review under section 28 of the Federal Court Act. Nevertheless, there is still a general supervisory jurisdiction to ensure that purely administrative proceedings are conducted fairly—and, under the Act, that jurisdiction is assigned to the Trial Division under section 18. Although:[73]

> . . . it is specially important that the remedy be granted only in cases of serious injustice and that proper care be taken to prevent such [disciplinary] proceedings from being used to delay deserved punishment so long that it is made ineffective, if not altogether avoided [,].

Pigeon J, upheld[74] Mahoney J.'s ruling that *certiorari* is available under section 18 of the Federal Court Act to supervise a breach of the duty to be fair in purely administrative proceedings.

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68. [1976] 2 F.C. 198 (F.C.A.); [1978] 1 S.C.R. 118.
69. [1978] 1 F.C. 312 (F.C.T.D.) at 318-9.
70. [1978] 2 F.C. 637 (F.C.A.).
71. *Supra* n. 65 at 634. Quoting (with emphasis added) from Megarry J.'s judgment in *Bates v. Lord Hailsham* [1972] 3 All E.R. 1019 at 1024; 1 W.L.R. 1373 at 1378 (H.L.); and referring specifically to *Nicholson* as the acceptance in Canada of the duty to be fair as a "common law principle".
72. *Supra* n. 65 at 636-637.
73. *Id.* at 637.
74. *Id.* Note that—curiously—Pigeon J. referred to the proceeding under section 28 of the Federal Court Act as being "in the nature of a right of appeal". Is this to be contrasted to judicial review?

While the remaining three members of the court concurred in the outcome reached by Pigeon J., the reasons written on their behalf by Dickson J. were considerably lengthier, and addressed three specific issues: first, sorting out the respective supervisory jurisdictions of the Trial and Appellate Divisions of the Federal Court under sections 18 and 28 of the Act; secondly, the duty to act fairly; and, finally, the ambit of *certiorari* in Canada.

On the first issue, Dickson J. agreed with Pigeon J. both in the present case, and his *dicta* in *Howarth* v. *National Parole Board*,[75] in rejecting the Federal Court of Appeal's interpretation that section 28 of the Act completely supplants the jurisdiction of the Trial Division to grant *certiorari*. While a breach of the duty to be fair by itself alone is not sufficient to bring an administrative body within the definition of "*quasi*-judicial" required to give the Federal Court of Appeal jurisdiction under section 28,[76] the converse is not true either. Therefore, while the lack of a *quasi*-judicial function may well deprive the Court of Appeal of jurisdiction, it does not mean that the Trial Division cannot remedy a breach of the duty to be fair.[77] And the duty to be fair is procedural in nature, and means more than merely good faith.[78]

Dickson J. then turned his attention to the availability of *certiorari* to remedy a breach of the duty to be fair procedurally. He referred to Atkin L.J.'s famous quotation in *R.* v. *Electricity Commissioners, ex. p. London Electricity Joint Committee Company (1920), Limited*:[79]

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling authority of the King's Bench Division exercised in these Writs.

Dickson J. noted the danger of construing this quotation too restrictively. In particular:[80]

> There has been an unfortunate tendency to treat "rights" in the narrow sense of rights to which correlative legal duties attach. In this sense, "rights" are frequently contrasted with "privileges", in the mistaken belief that only the former can ground judicial review of the decision-maker's actions.

His Lordship thus rejected such a narrow concentration on "rights", and focussed instead on the public policy underlying judicial review:[81]

> When concerned with individual cases and aggrieved persons, there is the tendency to forget that one is dealing with public law remedies, which, when granted by the courts, not only set aright individual injustice, but also ensure that public bodies exercising powers affecting citizens heed the jurisdiction granted to them. *Certiorari* stems from the assumption by the courts of supervisory powers over certain tribunals in order to assure the proper functioning of the machinery of government. To give a narrow or technical interpretation to "rights" in an individual sense is to misconceive the broader purpose of judicial review of administrative action. *One should, I suggest, begin with the premise that any public body exercising power over subjects may be amenable to*

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75. [1976] 1 S.C.R. 453.
76. *Supra* n. 65 at p. 613 of Dickson J.'s judgment. Note, however, that a breach of the duty to act fairly may predispose the court to characterize an impugned function as being *quasi*-judicial as occurred in both the *Campeau* (No. 1) and *Harvie* cases discussed above.
77. *See also The Minister of Manpower and Immigration* v. *Hardayal* [1978] 1 S.C.R. 470, 479; *Roper* v. *Executive of Medical Board of Royal Victoria Hospital* [1975] 2 S.C.R. 62, 67.
78. *Supra* n. 65 at 614.
79. [1924] 1 K.B. 171 (C.A.). Quoted *supra* n. 65 at 617.
80. *Supra* n. 65 at 618.
81. *Id.* at 619; emphasis added.

judicial supervision, the individual interest involved being but one factor to be considered in resolving the broad policy question of the nature of review appropriate for the particular administrative body.

If judicial review will issue even where "rights" are not technically affected, must there nevertheless be a duty to act judicially before *certiorari* is available? Again, Dickson J. rejected such a restriction on the availability of *certiorari*—relying principally upon Lord Reid's judgment in *Ridge* v. *Baldwin*, and on the now long line of English cases on the duty to be fair.[82] These authorities indicated to His Lordship that:[83]

> . . . the application of a duty of fairness with procedural content does not depend upon proof of a judicial or *quasi*-judicial function. *Even though the function is analytically administrative, courts may intervene in a suitable case.* . . . In my opinion, *certiorari* avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person.

What, then, is the relationship of the principles of natural justice to the duty to be fair? As the reader will recall, Laskin C.J.C. in the *Nicholson* case and Laycraft J. in the *McCarthy* case both treated the duty to be fair as quite distinct from the existence of a *quasi*-judicial power on the one hand, or natural justice on the other. Both Lieberman J.A. in *Campeau* and Clement J.A. in *Harvie*, by contrast, used the concept of fairness to establish that a *quasi*-judicial function was involved, and that the principles of natural justice had been breached. Dickson J. in *Martineau* (No. 2) deals with this contradiction expressly:[84]

> Conceptually, there is much to be said against such a differentiation between traditional natural justice and procedural fairness, but if one is forced to cast judicial review in traditional classification terms as is the case under the Federal Court Act, there can be no doubt that procedural fairness extends well beyond the realm of the judicial and *quasi*-judicial, as commonly understood.

Thus:[85]

> In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework. The Federal Court Act, however, compels classification for review of federal decision-makers.

Finally, Dickson J. had to determine whether the duty to be fair applied in disciplinary cases. He noted that there were a number of precedents for the courts refusing to review disciplinary procedures.[86] Nevertheless, Dickson J. held that, while these may be counsels of caution, the rule of law must run within penitentiary walls:[87]

> It seems clear that although the courts will not readily interfere in the exercise of disciplinary powers, whether in the armed services, the police force or the penitentiary,

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82. In particular, *R.* v. *London Borough of Hillington, ex p. Royco Homes Ltd.* [1974] 2 All E.R. 643 (Q.B.D.); *R.* v. *Barnsley Metropolitan Borough Council, ex p. Hook* [1976] 3 All E.R. 452; *In re H.K. (an infant)* [1967] 2 Q.B. 617; *Liverpool Taxi Owners* case [1972] 2 All E.R. 589; *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660 (P.C.).

83. *Supra* n. 65 at 622-3; emphasis added.

84. *Id.* at 623.

85. *Id.* at 629.

86. In particular, *R.* v. *Army Council, ex p. Ravenscroft* [1917] 2 K.B. 504; *Dawkins* v. *Lord Rolseby*, L.R. 8 Q.B. 255; *Re Armstrong and Whitehead* [1973] 2 O.R. 495; *Fraser* v. *Mudge* [1975] 3 All E.R. 78 (C.A.); *R.* v. *Board of Visitors of Hull Prison, ex p. St. Germain* [1979] 2 W.L.R. 42 (C.A.), *revg.* [1978] 2 W.L.R. 598 (Div. Ct.); *Daemar* v. *Hall* [1978] 2 N.Z.L.R. 594; *The Queen and Archer* v. *White* [1956] S.C.R. 154; *Regina* v. *Institutional Head of Beaver Creek Correctional Camp, ex p. McCaud* [1969] 1 C.C.C. 371; *Wolff* v. *McDonnell*, 418 U.S. 539 (1975).

87. *Supra* n. 65 at 628.

there is no rule of law which necessarily exempts the exercise of such disciplinary powers from review by *certiorari*.

Accordingly, Dickson J., on behalf of the minority of the court, concurred with Pigeon J.'s conclusion that, in principle, *certiorari* was available to review the disciplinary proceedings complained of by Mr. Martineau.

VIII. CONCLUSION

One must conclude, therefore, that these five cases have significantly extended the ambit of judicial review in Canada. The duty to be fair is now undoubtedly part of our law. And a breach of the duty to be fair can be corrected by *certiorari*, even if no judicial or *quasi*-judicial function is involved.

Instead of characterizing functions as judicial or administrative, the courts must now concentrate squarely on the real question which has always been before them: Was the procedure used in this case fair in all the circumstances? While different judges may answer this question differently, and it may therefore be difficult to advise either clients or administrators of the answer to that question, it is nevertheless submitted that this approach is totally consistent with the policy underlying the historical judical power to review procedures for breaches of natural justice—to ensure that justice is not only done, but manifestly and undoubtedly perceived to be done. It is submitted, therefore, that the courts' recognition of the duty to be fair should be welcomed by everyone concerned with Administrative Law.

Alas, however, it is probably too early to forget about *quasi*-judicial functions. In the first place, there is still the great danger that other courts in the future will unduly narrow the duty to be fair to apply only to those functions which otherwise would be called *quasi*-judicial. In effect, this would adopt the very same technique used by Lieberman J.A. in *Campeau* and Clement J.A. in *Harvie*—to equate the duty to be fair with the existence of a *quasi*-judicial function—but for the reverse purpose of narrowing judicial review. So long as judges are human, different ones are going to decide differently that fairness was or was not breached in a particular case. What must be avoided, however, is attempting to justify those decisions by reference to the obsolete tool of characterizing the function as purely administrative.

Secondly, the concept of a *quasi*-judicial function is likely to remain important for determining whether that function may be delegated without breaching the rule that *delegatus non potest delegare*.[88] Similarly, administrators' immunity from suit is likely to continue to refer to the qualified immunity of a judicial or *quasi*-judicial officer.[89]

Finally, the duty to be fair does not affect legislative functions at all.[90] Those cases which say that the exercise of a legislative function for an improper purpose is *ultra vires* do not relate to the *procedure* used. Hence, *Campeau* is not really on point. Indeed, for some reason the principles of

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88. *See, e.g., Vic Restaurant* v. *The City of Montreal* (1959) 17 D.C.R. (2d) 813 (S.C.C.); *A.G. (Can.)* v. *Brent* [1956] S.C.R. 318; and *Brant Dairy Co. Ltd.* v. *Milk Commission of Ontario* (1973) 30 D.L.R. (3d) 559 (S.C.C.).

89. *See de Smith, supra* n. 25 at 97-98; 106-107; f. pp. 295-296.

90. *See* the decision of the Alberta Court of Appeal in *Campeau* (No. 2), unreported, judgment rendered May 23, 1980. *Sed quaere* the duty to be fair should not apply to the exercise of legislative powers—particularly delegated legislative powers.

natural justice have never applied to the exercise of a legislative power, and this principle has not been affected at all by the development of the duty to be fair. The distinction between a legislative function on the one hand, and a judicial, *quasi*-judicial or administrative one on the other hand, will continue to be important.

Nevertheless, the duty to be fair is undoubtedly one of the most important recent developments in Canadian Administrative Law.

[continued on page 18 overleaf]

B. THE APPLICABILITY OF THE DUTY TO BE FAIR TO LEGISLATIVE FUNCTIONS AND TO DECISIONS OF THE CABINET

The duty to be fair regulates the procedure adopted by statutory delegates in the exercise of their powers. It generally applies to the exercise of discretionary powers.[91] One does not normally think of it in the context of an exercise of a duty where prereemptory consequences follow the existence of a given state of facts, although Cooper v. Wandsworth Board of Works[92] involved precisely this circumstance (as does much of the courts' normal workload). Does the duty to be fair apply to a delegate exercising the power to make delegated legislation?[93] And does the duty to be fair apply to the Cabinet,[94] exercising any kind of power which the federal Parliament or a provincial Legislature has delegated to it?

(i) Legislative Powers

Under the positivistic philosophy of our system of law, it is for Parliament to make the laws and for the courts to enforce them; and the courts will not generally enquire into the procedure followed by Parliament in enacting laws, no matter how directly anyone's rights are affected. The only question is whether the Act in fact appears upon the parliamentary roll.[95]

This blind judicial obedience to legal positivism has never been total under our federal system, for the question could always be raised whether a particular statute lay within the legislative competence of the legislative branch which purported to enact it. The Charter of Rights and Freedoms will increase the ambit of judicial review of parent (and subsidiary) legislation. Nevertheless, neither of these grounds for judicial review has any direct bearing on procedure or the duty to be fair.

A more difficult problem arises when the power to legislate has been delegated to a subordinate. At first glance, the delegate is in precisely the same position as any other delegate who exercises discretionary powers to which the duty to be fair applies. After all, the content of the delegated legislation is a matter of discretion. Almost always, its quality will be improved as a result of publicity and comment by those likely to be affected by it. The public policy rationale underlying both the audi alteram partem rule and the duty to be fair appears to apply to delegated legislation as well as to judicial, quasi-judicial or other discretionary powers which are subject to judicial review on procedural grounds. Indeed, this appears to have been recognized recently by the legislative branch in a number of cases where draft rules and regulations must be published and circulated prior to their final implementation: e.g.: under Bill 101 in Quebec,[96] and under both

the Canada[96a] and Alberta Business Corporations Acts,[96b] and under the Canada Post Act.[97] Further, this appears to be the standard practice of the United States federal government.[98]

Nevertheless, the law in Canada appears to be clear that judicial review is not available against the procedure used in implementing delegated legislation. Indeed, in the sequel to the Campeau case,[99] the Alberta Court of Appeal specifically excluded the availability of judicial review because a legislative function was involved. The same point has been made by Mr. Justice David McDonald in R. in Right of Alberta v. Beaver,[100] involving the unsuccessful attempt to quash first reading of a municipal by-law; and by Megarry, J., in Bates v. Lord Hailsham of St. Marylebone[101] which involved the proclamation of a new tariff of solicitors' fees.

Still, the concept of procedural fairness is important in the legislative context, and - as with all delegated powers - the legislative branch might profitably spend considerably more attention on specifying the process by which its delegates are to determine the content of the legislation which they enacting the name of Parliament or the Legislatures, as well as reviewing ex post facto the way the delegated legislative power in fact has been used.[102]

(ii) The Cabinet and The Duty To Be Fair

In principle, the duty to be fair applies to the exercise of all delegated discretionary powers[103] including those execised by the Cabinet. The prerogative remedies are traditionally not available against the Crown - because they are the Crown's remedies, and she can hardly grant a remedy against Herself. This rationale for restricting judicial review, however, is of an extremely personal and narrow nature; and cannot apply to any circumstance where Parliament has delegated powers to the Cabinet or to a particular Minister.[104] Such delegations are subject to all of the normal rules of Adminstrative Law, including the doctrine of ultra vires and the principles of natural justice (or the duty to be fair). The Executive Government[105] is not immune from judicial review; and the fact that some - but by no means all - of its powers are exercised on behalf of the Crown does not entitle it to Her Majesty's extensive personal immunity from judicial action. Two recent cases deal with the susceptibility of the Cabinet to judicial review, and in the particular context of the duty to be fair.

(a) A.G. (Canada) v. Inuit Tapirisat of Canada [106]

The Inuit Tapirisat case has been said - wrongly, it is submitted - to stand for the proposition that the Cabinet owes no duty to be fair in exercising a broad appellate power granted to it by statute, and that judicial review is not available against

the Cabinet if it does not adopt a fair procedure for exercising such a power.

The case arose out of an application to the Canadian Radio-Television and Telecommunications Commission by Bell Canada to raise certain of its rates. The Indian Tapirisat appeared as intervenants before the C.R.T.C., and appealed its decision to the Governor-in-Council under section 64 of the National Transportation Act.[107] The Cabinet disposed of the appeal after receiving Bell Canada's response thereto, but prior to any further reply by the Tapirisat. The actual written submissions of the parties were not presented to the Cabinet, which instead obtained materials from officials of the Department of Communication as to: (i) what the Department thought were the parties' positions; (ii) the Department's position on the issues; (iii) whether the appeal should be allowed. In addition, the C.R.T.C. was requested to advise the Cabinet as to its views on the proper disposition of the appeal. The Minister of Communications participated actively in advancing the submissions of both the departmental officials and the C.R.T.C. (which were not communicated to the appellants, who were given no opportunity to reply) but still participated in Cabinet's decision to reject the appeals.

The appellants brought an action in the Trial Division of the Federal Court for a declaration that the order-in-council giving effect to the Cabinet's rejection of the appeal was void;

and the Attorney-General for Canada moved to strike the statement of claim on the basis that it disclosed no reasonable cause of action. The Trial Division allowed the motion to strike out the statement of claim,[108] but this was reversed by the Appellate Division.[109] Estey J., writing the unanimous judgment of the Supreme Court of Canada, held that there was no reasonable cause of action, and struck out the statement of claim. His Lordship put the question as follows:[110]

> The substance of the question before this Court ... is this: is there a duty to observe natural justice in, or at least a lesser duty of fairness incumbent on the Governor in Council in dealing with parties such as the respondents upon their submission of a petition under s. 64(1)?

His Lordship then considered[111] the development of the duty to be fair, along the lines set out in Part I of this paper.

Estey J. then re-asserted the right of the courts to review the exercise of a statutory power by the Governor in Council, with particular reference to a breach of the terms of a condition precedent.[111a] He went on, however, to note that the present case did not deal with a condition precedent, but rather with the proper procedure to be adopted by the statutory delegate. His Lordship specifically stated that it was not necessary to characterize the Cabinet's functions as quasi-judicial in order to permit the Court to review its legality.

The Supreme Court then examined the nature of the appeal under section 64, in order to determine what would constitute a fair procedure thereunder. In particular, Estey J. noted that the Act provided a more conventional appeal from the decision of the C.R.T.C. to the Federal Court of Appeal on any point of law or jurisdiction, in addition to the "political route" of appealing to the Cabinet under section 64.[112] Further, the Cabinet's powers under section 64 could be exercised of its own motion, include the power to substitute its own ruling for that of the C.R.T.C., and (unlike the power delegated to the C.R.T.C.) contain no standards or guidelines for their exercise. His Lordship specifically thought that the identity of the delegate (i.e., the Cabinet) was relevant in determining the specific procedural requirements which Parliament must have intended the delegate to follow in reaching its decision:[113]

> While the C.R.T.C. must operate within a certain framework when rendering its decisions, Parliament has in s. 64(1) not burdened the executive branch with any standards or guidelines in the exercise of its rate review function. Neither were procedural standards imposed or even imlied. That is not to say that the courts will not respond today as in the Wilson case supra, if the conditions precedent to the exercise of power so granted to the executive branch have not been observed. Such a response might also occur if, on a petition being received by the Council, no examination of its contents by the Governor in Council were undertaken. That is quite a different matter (and one with which we are

not here faced) from the assertion of some principle of law that requires the Governor in Council, before discharging its duty under the section, to read either individiually or en masse the petition itself and all supporting material, the evidence taken before the C.R.T.C. and all the submissions and arguments advanced by the petitioner and responding parties. The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council. The executive branch cannot be deprived of the right to resort to its staff, to departmental personnel concerned with the subject matter, and above all the comments and advice of ministerial members of the Council who are by virtue of their office concerned with the policy issues arising by reason of the petition whether those policies be economic, political, commercial or of some other nature. Paliament might otherwise ordain, but in s. 64 no such limitation has been imposed on the Governor in Council in the adoption of the procedures for the hearing of petitions under subs. (1).

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Under s. 64 the Cabinet, as the executive branch of government, was exercising the power delegated by Parliament to determine the appropriate tariffs for the telephone services of Bell Canada. In so doing the Cabinet, unless otherwise directed in the enabling statute, must be free to consult all sources which Parliament itself might consult had it retained this function. This is clearly so in those instances where the Council acts on its own initiative as it is authorized and required to do by the same subsection. There is no indication in subs. (1) that a different interpretation comes into play upon the exercise of the right of a party to petition the Governor in Council to exercise this same delegated function or power. The wording adopted by Parliament in my view makes this clear. The Governor in Council may act "at any time." The guidelines mandated by Parliament in the case of the C.R.T.C. are not repeated expressly or by implication in s. 64. The

> function applies to broad, quasi-legislative orders of the Commission as well as to inter-party decisions. In short, the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1).

Strangely, His Lordship then went on to characterize the Cabinet's powers under section 64 as "...legislative action in its purest form where the subject matter is the fixing of rates for a public utility such as a telephone system".[114] His Lordship thought giving notice to everyone potentially affected by such rate-making power would be impractical for the Cabinet,[114a] and this too was relevant in minimizing the content of the procedural fairness required in the Cabinet's decision.

Estey J. recognized[115] that the obligation to comply with natural justice does not have to be imposed specifically by statute, but will generally be implied by the courts, who will also have to determine the content of such implied procedural requirements.[116] The fact that a broad (or, indeed, untrammelled) discretionary power does not - with respect to Estey J. - necessarily have any effect on the duty to adopt a fair procedure in exercising the discretionary power. After all, the discretion goes to the merits of the decision, not to the procedure by which it is reached. Nevertheless, Estey J. kept coming back to this point in reaching his judgment that no procedural unfairness had occurred.[117, 117a]

(b) The Gray Line Case

A different approach was recently taken by the Supreme Court of British Columbia in Gray Line of Victoria Ltd. v. Chabot.[118] Again, an appeal was involved to Cabinet from a licensing body; in this case, the Motor Carrier Commission for licences to operate sight-seeing services. The Lieutenant-Governor in Council (or a committee thereof) allowed the appeal and granted the licences. A group of objectors applied for judicial review of the Cabinet's decision on two grounds. The first attack dealt with the fact that new evidence had been led on the appeal, contrary to the published rules governing such appeals. Chief Justice McEachern clearly asserted[119] the power of the courts to review the procedure used by the Cabinet in exercising the appellate function delegated to it by the Legislature. Unlike in the Inuit Taparisat case, he did not even suggest that the fact the Cabinet was involved could either preclude judicial review of the delgated power or affected the content of the duty to be fair. On the facts, however, the Chief Justice held[120] that there was no unfairness involved in the procedure used because all parties adduced new evidence, and all were represented by Counsel who could answer the points made by other parties.

On the second point also dealing with natural justice, Chief Justice McEachern struck down the orders-in-council implementing the Cabinet's decision on the appeal. These orders-in-council referred to the entire Executive Council, but

in fact the appeal had been heard by only some members thereof. His Lordship stated that:[121]

> ...[t]he matter may be summarized by saying that in the discharge of its appellate jurisdiction natural justice and fairness requires [sic] the real decision to be made only by a majority of the members who hear the parties if there is a hearing. Where there is no hearing, the real decision may only be made by a majority of those members of the Executive Council who consider the submissions of the parties and who give the parties the required opportunity to respond to adverse submissions, etc.

Accordingly, His Lordship quashed the orders-in-council, and this case provides an example of judicial review of a Cabinet decision for a breach of the principles of natural justice (or fairness).

C. THEORETICALLY INCORRECT ATTEMPTS TO MAKE THE DUTY TO BE FAIR APPLY TO THE MERITS OF A DECISION

The phrase "duty to be fair" may give rise to mis-understanding because it does not clearly refer to procedural instead of substantive fairness. Its derivation, however, from the principles of natural justice[122] necessarily links it to questions of fair procedure. The obligation for a statutory delegate to adopt a fair procedure goes to the very terms of the power granted to him, and a breach of the duty to adopt a fair procedure goes to the very terms of the power granted to him, and a breach of the duty to adopt a fair procedure renders the decision void and therefore capable of judicial review.[123] In

the absence of a specific appellate power created by statute, the courts themselves have no jurisdiction to review the substantive fairness or any other aspect of the merits of a delegate's actions.[124] In other words, the distinction between judicial review and an appeal (of whatever breadth[125]) clearly endures notwithstanding the development of the duty to be fair.

Of course, certain substantive (as opposed to procedural) errors may sometimes also nullify a decision taken by a statutory delegate. For example, the Legislature is generally presumed to have implicitly limited all delegated discretionary powers within the realm of reasonableness.[126] Accordingly, an unreasonable exercise of delegated power[127] will be ultra vires, and therefore capable of judicial review (though not of an appeal unless one is specifically created). Similarly, all statutory delegates are assumed to be under an obligation to act in good faith, and for no ulterior purpose,[128] not to act upon irrelevant considerations,[129] and not to ignore relevant ones.[130] All of these are implied substantive limitations which go to the ambit of the power granted by the legislative branch to its delegate. Any breach of these substantive limitations will render the delegate's action ultra vires, and give rise to judicial review (but not necessarily to an appeal).

To some extent, it may be possible to characterize all of these substantive limitations on the delegate's jurisdiction as a duty to be fair, although none of them deal with procedural

matters. It is confusing to include these implied jurisdictional limitations on a delegate's powers under the rubric of the "duty to be fair", because of the tendency to widen the use of that phrase even further to refer to the merits of the case before the delegate. For example, Professor David Mullan has noted four recent cases where the courts may have overstepped their review powers to interfere with a delegate's discretion solely because they found it "unfair" on the merits.[131] Judicial review is not an appeal on the merits, and it is dangerous constitutionally for the courts to arrogate to themselves appellate powers which the legislative branch has not given to them.[132]

It may be difficult to distinguish the substance or merits of an delegate's decision from procedural limitations which Administrative Law has implied to circumscribe the ambit of power assumed to have been granted by the Legislature.[133] Conversely, the temptation on the courts to interfere with the merits of an administrative decision may indicate that the legislative branch should take considerably more care in defining the relevant factors to be considered by its delegates when exercising the discretions granted to them, the procedures to be followed, and the need for an appeal (including determining to whom the appeal should lie, and the nature of it).

D. THE RELATIONSHIP BETWEEN THE DUTY TO BE FAIR AND THE "PRINCIPLES OF FUNDAMENTAL JUSTICE" CONTAINED IN SECTION 7 OF THE CHARTER OF RIGHTS AND LIBERTIES

The "substantive fairness" problem may also now arise under section 7 of the Canadian Charter of Rights and Liberties, which provides as follows:[134]

> Everyone has the right to life, liberty and security of the person and the rights not to be deprived thereof except in acccordance with the principle of fundamental justice.

This phrase is borrowed from the earlier Canadian Bill of Rights,[135] and undoubtedly was intended to elevate the procedural aspects of natural justice to constitutional status in any matters dealing with life, liberty and the security of the person. Indeed, one of the federal Government's legal advisors so testified to the Joint Parliamentary Committee during its hearings on the Constitutional package.[136] Nevertheless, there are at least two reasons to suspect that the reference in section 7 to the "principles of fundamental justice" may ripen into a substantive limitation on the content of parent legislation which can be enacted, as well to provide a method to scrutinize the merits of a delegate's decision.

First, the very words used in section 7 are not restricted to procedural matters, but are equally capable of referring to substantive circumstances in which it would be "fundamentally unjust" to deprive someone of life, liberty or security of the person. Indeed, to insists upon restricting this phrase to procedural questions would largely nullify the constitutional protection accorded to life, liberty and the security of the person, because it would imply that all of these could be extinguished provided a proper procedure was followed. For example, suppose that Parliament passes a law stating that "Mr. X shall be executed tomorrow at twelve noon", and further provides that Mr. X shall be informed of this law (after enactment[136]), and given the opportunity to say anything he likes about his prospective demise. Mere procedural fairness in this context will be meaningless, because there is no discretion granted under the law to alter its application in light of anything Mr. X may say at his "hearing". Undoubtedly, the principles of natural justice apply to the delegate upon whom Parliament has imposed the duty to execute Mr. X: Cooper v. Wandsworth Board of Works;[137] but the requirement for a fair hearing is little guarantee that "fundamental justice" will be done to Mr. X.[138] Faced with a patently unjust law, perhaps preremptory and not discretionary in its application, what Canadian court will not be sorely tempted to strike down the

substance of the law on the strength of the reference in section 7 to "fundamental justice"?

Secondly, it is relevant to note that this has been precisely the experience of the United States courts in construing the Fifth and Fourteenth Amendments to their Constitution, which provide that:

> no person shall ... be derived of life, liberty, or property, without due process of law ...

and

> ...nor shall any State deprive any person of life, liberty of property, without due process of law ....

Even though the literal wording of the U.S. version is much weaker than the reference to the "principles of fundamental justice" contained in section 7 of our Charter, the U.S courts have interpreted these two amendments to require not only procedural fairness, but also "substantive due process" in certain circumstances.[139] In other words, the substance of legislation has been struck down by courts where it is unfair. This could, it is submitted, become the case in Canada; and the Canadian court will also be tempted to look at the merits of discretionary decisions taken by statutory delegates, as well as the content of the legislation itself.

Finally, on a different point, note that section 7 of the Charter at its very narrowest interpretation not only

specifically imports procedural fairness into any decision affecting life, liberty and the security of the person, it also eliminates the sovereignty of the legislative branch expressly to oust the principles of natural justice, at least so far as any question of life, liberty and the security of the person is involved; and any attempt to do so will be unconstitutional.

E. THE EFFECT OF A BREACH OF THE DUTY TO BE FAIR

Notwithstanding heretical dicta to the contrary,[140] the effect of a breach of natural jutice (or of the duty to be fair) is to render the decision void, not voidable, and therefore not protected by most privative clauses. The following explanation demonstrates the theoretical and practical importance of this statement.

Virtually all of Administrative Law depends upon two maxims: (i) Parliament is sovereign; and (ii) a delegate to whom Parliament has granted powers must act strictly within his jurisdiction, and the courts will determine whether his actions are ultra vires.

Now, a delegate's jurisdiction may depend upon certain preliminary or collateral matters. Thus, in Anisminic v. Foreign Compensation Commission, 141 the Commission was bound to consider a claim for compensation filed by a party whose property was sequestrated by the Egyptian Government after Suez,

party's successor-in-title. Entertaining a claim from someone who did not meet those conditions would clearly have been ultra vires the power or jurisdiction granted to the Commission by Parliament. Conversely, refusing even to receive a claim for a person who did meet those conditions would also have been ultra vires. Similarily, in Bell v. Ontario Human Rights Commission,[142] the Commission could only hear complaints of discrimination relating to the rental of self-contained residential premises. The question whether particular premises were self-contained is obviously a jurisdictional one. Again, if Parliament gives the delegate power to make a park, it is ultra vires for the delegate to try to use that power to build a highway. All of these are examples of what may be called substantive ultra vires.

Even if the delegate is acting substantively within the subject matter granted to him by Parliament (i.e., has correctly decided any preliminary or collateral point, or is in fact exercising the power granted to him), his actions may nevertheless be ultra vires if he commits any of the following errors:

(i) breaches the principle of natural justice or the duty to be procedurally fair,[143]

(ii) considers irrelevant evidence,[144]

(iii) ignores relevant evidence,[145]

(iv) acts for an improper purpose or out of malice.[146]

In each of these cases, the delegate does have jurisdiciton to commence his action, to deal with the matter, but steps outside of his jurisdiction by committing one of the errors listed above. His decision is clearly subject to judicial review. Now, with one exception,[147] the only theoretical basis upon which the superior courts are entitled to review the legality of a delegate's action is based upon their inherent power to keep inferior tribunals within their respective jurisdictions. The concept of jurisdiction thus underlies these four grounds for judicial review every bit as much as it underlies review of other substantive ultra vires actions by a delegate of the Legislature. The unstated premise, of course, is that Parliament never intended its delegate to act contrary to natural justice, or to consider irrelevant evidence, or to ignore relevant evidence, or to act maliciously or in bad faith, or unreasonably of course Parliament's sovereignty means that it would theoretically permit its delegates to act in any of these ways, and the courts would have to give effect to such specific legislative commandment. But the Legislature rarely does this and the courts continue to construe legislation and other powers[148]) on the assumption that these four requirements must be complied with in order for the delegate's action to be valid. In short, these requirements go to the substantive jurisdiction of the delegate, and must do so to authorize the courts to interfere with any such defective administrative action.

It is true that - for example - a breach of the principles of natural justice appears to be merely a procedural error, committed after the delegate has validly commenced his exercise of the power which Parliament has granted to him. But it would be incorrect to assume that such a procedural error is somehow less important or less substantive than a clear attempt by the delegate to do something completely unrelated to the power granted by Parliament (e.g., to build a highway instead of a park). For more than a century, the assumption has been that Parliament intends the procedural requirements of natural justice to be observed by certain delegates, as part and parcel of the power granted to them; any default renders the decision void.[149] Nor is it possible to say that such a decision is voidable. If it were, what would entitle the courts to intervene to correct it? For the decision would - on the voidable assumption - lie within the jurisdiction of the delegate, would not be ultra vires. Of course such an error undoubtedly constitutes an error of law[150] which could be corrected by the court under it anomalous power to grant certiorari to correct even errors of law not going to jurisdiction. But this power to correct errors of law clearly is not available if there is a privative clause depriving the courts of their inherent power to review decisions of such a delegate made within his jurisdiction. Yet the courts have consistently held that privative clauses do not protect "decisions" which are made outside of the delegate's

jurisdiction, because such decisions are void (not voidable), and therefore are not "decisions".[151] Nor is it difficult to find such cases involving breaches of natural justice, improper consideration of the evidence, or malice. None of these cases could have avoided the clear words of a privative clause if the decision involved were merely voidable instead of being void, because then there would have been a "decision" protected by the privative clause. It must be concluded, therefore, that the rule a breach of natural justice renders the decision <u>void</u> is of high constitutional importance, and must not be permitted to be eroded by loose dicta in cases where there is no privative clause.[152]

FOOTNOTES

Footnotes 1-90 are located at the bottom of the pages numbered 3 - 17.

91. A discretionary power is one where the legislative branch has granted the delegate power to exercise his discretion to do (or not do) certain things or to choose among a number of alternatives. Not all delegated powers are discretionary; for example, some are duties. Similarily, some powers involve the promulgation of delegated legislation of general applicability, instead of decisions in individual cases. Finally, not all discretionary powers can be classified as "quasi-judicial" under the old classification of functions; some are "merely administrative".

92. (1863) 143 E.R. 414.

93. Difficulties arise in determining what constitutes "legislation" and "delegated legislation". For example, not all orders-in-council are legislative in nature. Nor are all Acts of Parliament of general application. Similarly, land-use by-laws passed by municipalities are legislative in form but sufficiently quasi-judicial in nature that judicial review has frequently issued to strike down such bylaws enacted contrary to the principles of natural justice: see Campeau (No. 1) and (No. 2), supra, note 5. As a result, the importance of "legislative" functions may give rise to as many characterization problems as the dichotomy between quasi-judicial and administrative functions.

94. Or the Governor-in-Council, or the Executive Council, or any other group or committee closely related to what we know as the Cabinet.

95. Or has been printed by the Queen's Printer, and therefore is presumed to be an Act: The Alberta Evidence Act, R.S.A. 1980, c. A-21, ss. 29, 33.

96. S.Q. 1977, s. 94.

96a. S.C. 1974-75, c. 33, s. 254(2).

96b. R.S.A. 1981, s. 254(2).

97. S.C. 1980-81, c. 54, ss. 17(3)-17(7).

98. The U.S. Federal Administrative Procedure Act, 5 U.S.C.A. ss. 551-556. See W. Gellhorn and C. Byse, Administrative Law, 1974, The Foundation Press, Inc., Mineola, N.Y., p. 731 ff; and Appendix A. See also K.C. Davis, Administrative Law, 1973, The West Publishing Co., St. Paul, Minn., chapters 11 and 12.

99. Supra, note 90.

100. (1982) 20 Alta. L.R. (2d) 78 (C.Q.B.A.).

101. [1972] 1 W.L.R. 1373, [1972] 3 All. E.R. 1019 (Ch.).

102. As is done by the Joint Committee of the Senate and House of Commons on Regulations and other Statutory Instruments, whose preceedings are well worth reading. Not all provincial Legislatures have such standing committees to review how their powers have in fact been used by their delegates.

103. As well as to certain non-discretionary powers. See notes 92 and 93, supra.

104. For some unknown reason, the Canadian practice favours delegation to the Cabinet, and (unlike the British practice) not to a particular Minister. In principle, the distinction should make no difference to the amendability of the delegate to judicial review.

105. Not to be confused with Parliament or the Legislatures. The distiction is important because only the latter bodies are "sovereign" whereas the Executive Government has no autonomous power apart from statutory delegation to it or the narrow remnants of the Royal Prerogative.

106. (1981) 115 D.L.R. (3d) 1 (S.C.C.).

107. R.S.C. 1980, c. N-17.

108. [1979] 1 F.C. 213; 87 D.L.R. (3d) 26.

109. [1979] 1 F.C. 710; 95 D.L.R. (3d) 665; 24 N.R. 361.

110. Supra, note 106, at p. 9.

111. Ibid., at pp. 9 - 11, and pp. 18 - 19.

111a. Note that later in his judgment, Estey J. asserts the right of the courts to review the Cabinet's exercise of the powergranted to it by Parliament, even where no condition precedent is involved: "...the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor-in-Council has performed it functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate." See p. 19, ibid.

112. Ibid., at p. 8.

113. Ibid., at p. 15 and p. 16.

114. Ibid., at p. 15; and see also pp. 18-19, where Estey J. considered the Bates case and concluded that:

> "...[i]t is clear that the orders in question in Bates and the case at bar were legislative in nature and I adopt the reasoning of Megarry J. to the effect that no hearing is required in such case. I realize, however, that the dividing line between legislative and administrative functions is not always easy to draw: see Essex County Council v. Minister of Housing, (1967) 66 L.G.R. 23.
> The answer is not to be found in continuing the search for words that will clearly and invariably differentiate between judicial and administrative on the one hand, or administrative and legislative on the other. It may be said that the use of the fairness principles as in Nicholson, supra, will obviate the need for the distinction in instances where the tribunal or agency is dischargng a function with reference to something akin to a lis or where the agency may be described as an "investigative body" as in the Selvarajan case, supra. Where however, the executive branch has been assigned a function performable in the past by the Legislature itself and where the res or subject-matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may be thought to arise. The fact that the function has been assigned as here to a tier of agncies (the CRTC in the first instance and the Governor in Concil in the second) does not, in may view, alter the political science pathology of the case. In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Council has performed its functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate.

115. Ibid., p. 17.

116. Ibid.

117. For example, immediately after noting that the duty to observe procedural fairness will generally be implied by the courts, Estey J. noted (at p. 17) that:

> ...[u]nder s. 64 the Cabinet, as the executive branch of Government, was exercising the power delegated by Parliament to determine the appropriate tariffs for the telephone services of Bell Canada. In so doing the Cabinet, unless otherwise directed in the enabling

> statute, must be free to consult all sources which Parliament itself might consult had it retained this function .... The wording adopted by Parliament in my view makes this clear. The Governor in Council may act "at any time". He may vary or rescind any order, decision, rule or regulation "in his discretion". The guidelines mandated by Parliament in the case of the CRTC are not repeated expressly or by implication in s. 64 [giving the appeal to Cabinet]. The function applies to broad, quasi-legislative orders of the Commission as well as to inter-party decisions. In short, the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64.
> [Emphasis added.]

117a Note also Estey J.'s reluctance to comment on the desirability of Parliament granting "political" appeals to Cabinet, and his reference to the recommendation of the Law Reform Commission of Canada that such appeals should be abolished, except in the case of the equivalent of the exercise of the prerogative of mercy or a decision based on humanitarian grounds. See Working Paper 25, 1980, "Independent Administration Agencies", esp. pp. 87-89.

118. [1981] 2 W.W.R. 635. The case is also reported subsequently, but on a different point (dealing with section 96 of the B.N.A. Act, 1867).

119. Ibid., at pp. 641-2.

120. Ibid., at p. 642.

121. Ibid., at p. 646.

122. See Part I above.

123. See Part V below.

124. See D.P. Jones, "Discretionary Refusal of Judicial Review in Administrative Law", (1981) 19 Alta. L. Rev. 483, esp. at pp. 485-487.

125. The word "appeal" does not connote any particular meaning, and in a particular context may mean an appeal de novo, an appeal on questions of law or jurisdiction, or (less frequently) a review of the record of the initial decision.

126. See H.W.R. Wade's Administrative Law, 4th ed., at pp. for a discussion of the availability of judicial review on the ground of unreasonableness.

127. Sed quaere whether the same rule should apply to unreasonable parent legislation.

128. See Roncarelli v. Duplessis, [1959] S.C.R. 120; Campeau Corporation v. Council of City of Calgary (No.1), (1979) 7 Alta. L. Rev. (2d) 294 (Alta.S.C. A.D.); Padfield v. Minister of Agriculture, etc., [1968] 2 W.L.R. 294 (H.L.).

129. See Padfield, supra, note 128; Dallinga v. City of Calgary, (1976) 62 D.L.R. (3d) 433 (Alta.S.C. A.D.); Smith and Rhuland v. The Queen, [1953] 2 S.C.R. 95.

130. Which may only really be the reverse of acting on irrelevant evidence, "unreasonableness" or lack of evidence as grounds for judicial review.

131. David J. Mullan, "Natural Justice and Fairness - Substantive as Well as Procedural Standards for the Review of Administative Decision-Making?", (1982) 27 McGill L.J. 250. The four cases are: (i) R. v. Barnsley Metropolitan Borough Council, ex parte Hook, [1976] 1 W.L.R. 1052 (Eng. C.A.); (ii) H.T.V. Ltd. v. Price Commission, [1976] I.C.R. 170, (1976) S.J. 298 (C.A.); (iii) Daganayasi v. Minister of Immigration, [1980] 2 N.Z.L.R. 130 (C.A.); (iv) Minister of Immigration and Ethnic Affairs, (1980) 31 A.L.R. 666 (F.C. Aust.).

132. See D.P. Jones, "A Constitutionally Guaranteed Role for the Courts", (1979) 57 Can. Bar Rev. 669.

133. See Mullan, supra, note 131.

134. Contained in the Constitution Act, 1982, which is Schedule B to the Canada Act, 1982 passed by the Parliament of the United Kingdon, and proclaimed in Ottawa on April 17, 1982. [Emphasis added.].

135. R.S.C. 1970, App. III. Section 2(e) of the Canadian Bill of Rights stated that no law of Canada shall be construed or applied so as to ... (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations". This reference to the "principles of fundamental justice" is clearly procedural. See Chief Justice Fauteux's comments on this point in Duke v. The Queen, [1972] S.C.R. 917, 923. Note further that section 7 of the new Charter in fact corresponds to section 1(a) - and not to section 2(e) - of the Canadian Bill of Rights. Section 1 recognizes and continues the existence of certain human rights and fundamental freedoms, including "...(a) the right of the individual to life, liberty, security of the peron and enjoyment of property, and the right not to

be deprived thereof except by due process of law". This reference to "due process" is (apart from the American concept of substantive due process) procedural in nature. Nevertheless, the substitution; see note 139 infra) of "principles of fundamental justice" for "due process" in section 7 of the Charter opens up the question of substantive justice now being protected.

136. See the testimony of Dr. Strayer, Minutes of proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Issue No. 46, at pp. 32-33.

137. Supra, note 92.

138. See Julius H. Grey's comment on "Can Fairness be Effective?", (1982) 27 McGill L.J. 360 for a good consideration of the extent to which requirements of procedural fairness ensure substantive justice on the merits.

139. See Gerald Gunther, Constitutional Law, 10th ed. 1980, The Foundation Press, Inc., Mineola, N.Y., esp. c. 9., and Lawrence H. Tribe, American Constitutional Law, 1978, The Foundation Press, Inc., Mineola, N.Y., esp. chapters 8, 10, 11 and 12.

140. See Harelkin v. The University of Regina, [1979] 2 S.C.R. 561 per Beetz J.; and the dicta of Kerans J. in Bridgeland-Riverside case, (1982), 19 Alta. L.R. (2d) 361 (C.A.).

141 [1969] 2 W.L.R. 163 (H.L.).

142 (1971) 18 D.L.R. (3d) 1 (S.C.C.).

143 See, e.g., Alliance des professeurs catholiques de Montréal v. Commission des relations ouvrières du Québec, [1953] 2 S.C.R. 140; Ridge v. Baldwin, [1964] A.C. 40 (H.L.); Cooper v. Wandsworth Board of Works, (1863) 143 E.R. 414.

144. Smith and Rhuland v. The Queen, [1953] 2 S.C.R. 95; Padfield v. Minsiter of Agriculture, etc., [1968] 2 W.R.L. 924 (H.L.); Dallinga v. City of Calgary, (1976) 62 D.L.R. (3d) 433 (Alta.S.C. A.C.).

145. Supra, note 130.

146. Roncarelli v. Duplessis, [1959] S.C.R. 120; Campeau Corporation v. Council of City of Calgary (No.1), (1979) 7 Alta. L.R. (2d) 294 (Alta. S.C. A.D.); cf. the Padfield case, supra note 144

147. Error of law on the face of the record, even though the error does not go to the delegate's jurisdiction. For an excellent historical explanation of its anomaly, see. R. v. Norhtunberland Compensation Appeal Tribunal ex. p. Shaw, [1952] 1 K.B. 338, [1952] 1 All E.R. 122 (C.A., cf. Lord Reid's judgment in Anisminic, supra note 141.

148. Including delegated legislaion such as rules and regulations, as well as delegated discretionary powers and duties.

149. Otherwise the decision in Cooper v. Wandsworth Board of Works, supra n. 143 would have been opposite, for the demoilition order there would have been valid and therefore a complete defence to the action in trespass (which is not a discretionary remedy). See H.W.R. Wade, "Unlawful Administrative Action: Void or Voidable?" Part I at (1967) 83 L.Q. Rev. 499; Part II at (1968) 84 L.Q.Rev. 95; Wade's Administrative Law (4th ed. 1977) esp. at pp. 296-301 and pp. 447-450. Cf. Durayappah v. Fernando, [1967] 2 A.C. 337 (P.C.)

150. Because a breach of the principles of natural justice, or of the duty to be fair, obviously is an error of procedure.

151. See, e.g., Anisminic, supra n. 141; Bell, supra note 142; Toronto Newspaper Guild v. Globe Printing Co., [1953] 3 D.L.R. 561 (S.C.C.). Cf. Pringle v. Fraser, (1972) 26 D.L.R. (3d) 28 (S.C.C.);

152. Such as Harelkin and Bridgeland, supra, note 140.