SHOULD THERE BE JUDICIAL REVIEW WHERE THERE IS AN ADEQUATE RIGHT OF APPEAL?

JACK GILES, Q.C.

ADDRESS TO THE CONFERENCE ON
JUDICIAL REVIEW OF ADMINISTRATIVE RULINGS

MONTREAL, November 10-11-12, 1982

CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE

Should there be judicial review where there is an adequate right of appeal?

Jack Giles, Q.C.

Introduction:

My answer to this issue is: Never, except in special circumstances.

There are two aspects to this issue.

The first is the appeal aspect. Can there be an appeal at all where the "decision" is a nullity? Is a nullity a decision? What is a nullity? Does it include a breach of natural justice? These questions are thoroughly canvassed by Mr. David in his paper under the heading "Void or Voidable". I do not take issue with anything he says. However, I will be contending that insofar as a right of appeal is concerned, the question whether a decision is void or voidable should be beside the point. I will return to this.

The second aspect of the issue is the judicial review aspect. Where there is an appeal, what are the rules governing judicial review? Is it out generally (subject to special circumstances) in certain cases? or in all cases? I say it is clear that it

is out (subject to special circumstances) in all cases (including breach of natural justice) with the exception of decisions void ab inintio for lack of jurisdiction, provided the appeal procedure is adequate. I contend it ought to be out (subject only to special circumstances) in these cases as well. This contention though is advanced on the assumption the appeal procedure is an adequate one. This should be the only important question.

What constitutes an "adequate" appeal will not be explored on this paper. It is an important question which merits a paper of its own. The last word appears to be the decision of the Supreme Court of Canada in Harlekin v. University of Regina (1979), 96 D.L.R. (3d) 14. This decision appears to have changed the law in British Columbia at any rate. Hitherto in British Columbia an appeal was only adequate if it lay to a court. R. v. Spalding (1955), 5 D.L.R. 374.

I. The appeal aspect:

In Calvin v. Carr (1979), 2 W.L.R. 755, one question was whether an appeal lay from a void decision. The contention was that as an appeal can only be taken from a "decision", no appeal lay from a void decision because there was then no "decision" within the meaning of that word in the statute. Mr. David in his paper refers to this dilemma as one of the consequences of the issue; "Void or Voidable". The Court held that "when the

question is whether an appeal lies" the decision cannot ever be regarded as "totally void" in the "sense of being legally non existent". It is clear that in saying this the Court was having regard to the practical consequence of the decision. No matter how "void" or "vitiated", "null" or "non existent", the man still sits in jail or is out of his club, union or job as the case may be. The same reasoning applies to the situation in criminal proceedings. Lord Wilberforce, who delivered the judgment for the Court in the Calvin case referred to Crane v. Public Prosecutor, [1921] 2 A.C. 299, which held there was an appeal to the Court of Criminal Appeal notwithstanding that irregularities at the trial rendered it a nullity. At page 331 of the Crane case Lord Sumner said:

> "Were it otherwise Crane, who has never had a legal trial at all though imprisoned under sentence on the strength of it, would have to serve his time and apparently be without remedy."

It is for these reasons I contend that where the question is whether an appeal lies (a most important qualification) the question of whether a "decision" is void or voidable is irrelevant. This reasoning is apparent from the result (if not the dicta) in White v. Kuzych, [1951] A.C. 585 as well as the decision of Privy Council in Annamunthodo v. Oilfields Workers' Trade Union, [1961] 3 W.L.R. 650.

It can be argued, however, that the authority of these cases, including the Calvin case is limited to decisions which are called null and void as a result of a breach of natural justice rather than the absence or lack of jurisdiction at the outset. This distinction is the one drawn by Lord Sumner in Rex v. Nat Bell Liquor, [1932] A.C. 128 between a wrong exercise of jurisdiction and a usurpation of jurisdiction. If there is no jurisdiction the decision is a nullity whether the Court quashes or not. If there is jurisdiction, the decision stands good until quashed.

I contend this distinction is one which should not be made where the issue is whether an appeal lies from the decision in question. I say this because the consequences of the decision (i.e. imprisonment, expulsion, dismissal, etc.) are not (unlike the applicability of a privative clause) effected by either the reasons for or the extent of its invalidity. Ask the man sitting in jail or out of a job or denied participation in his club or union and he will tell you the decision though "a nullity" is real to him! This is the thrust of the reasoning in the criminal cases and I say there is no rational basis why it should not be equally applicable in civil cases.

The result of this view is (where the question is whether an appeal lies) there can be no basis for saying a "decision" is not a decision.

In Harlekin at page 49 Beetz, J. speaking for the majority said:

> "Furthermore, and even if it can be said that the decision of the council committee was a nullity, I believe it was still appealable to the senate committee for the simple reason that the senate committee was given by statute the power to hear and decide upon appeals from the decisions of the council, whether or not such decisions were null."

It is open to argument whether this view turns upon the particular appeal provision in that case or whether it is also supported by the reasoning in the criminal case that the right of appeal turns on the mere existence of the decision as a conclusion in terms of effect or consequence regardless of the reasons for or the extent of its invalidity. It is questionable whether Harlekin stands for the latter proposition because on the facts it was a case of a breach of natural justice and therefore the decision was void because of an abuse rather than a usurpation of jurisdiction.

Support for the approach advocated in this paper is found in the second point which emerges from the Calvin case. It was held that it was wrong to say an appeal can never cure a breach of natural justice occurring at the original stage of the proceedings. On this point the Court held that what is required is an examination of the hearing process as a whole, i.e. the appeal as well as the original stage. This examination may show in some cases that a defect in the original stage is by itself regardless

of all else fatal. However, in many cases the same defect may not have that effect having regard to the whole process. On the basis of this reasoning it may be contended that a judgment as to whether the proceedings are without jurisdiction ab initio cannot be made until the entire proceedings are complete. Lord Wilberforce put it this way at page 766:

> "...the conclusion to be reached, on the rules and on the contractual context, is that those who have joined in an organisation, or contract, should be taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect."
>
> Their Lordships held that such cases existed and then said:
>
> "In them it is for the court, in the light of the agreements made, and in addition having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have acccepted when they joined the association."

The court concludes on this point by expressing the view that the tendency of the court in the matter of domestic disputes should be to leave them to be settled by the provided methods without requiring the formalities of judicial processes to be introduced.

In the result it is contended that the question of whether an appeal lies should not be influenced by the extent or degree of the invalidity of the original decision.

II. The judicial review aspect

This aspect is considered on the basis an adequate right of appeal does exist. What is its effect on judicial review? Is it different where the decision is void from where it is voidable? In this relation does a breach of natural justice render the decision void or voidable?

It seems to be agreed on all sides that judicial review is discretionary. The difficulty concerns the principles governing the exercise of this discretion. Is there a general rule that where a right of appeal exists (and provided it is adequate) the discretion will not be exercised unless there are special circumstances?

The minority in the Harlekin case were of the view that this general rule only applied to errors "within jurisdiction" e.g. mistakes of law not going to jurisdiction. They also concluded that a breach of natural justice did not fall within this category. The majority held that a breach of natural justice did not call for the exercise of the discretion where there was an adequate right of appeal unless there were special circumstances. The majority described as a "dubious assumption" that cases involving a denial of natural justice could be equated with those involving a lack of jurisdiction. For this reason the decision does not constitute authority for the proposition that in the

absence of special circumstances an adequate right of appeal should be a bar to judicial review in all cases.

The clear result of Harlekin is that in the case of a denial of natural justice and in all cases of error within jurisdiction an adequate right of appeal is a bar to review (absent special circumstances).

The question I raise is why should there be judicial review in any case where there is an adequate right of appeal - at least until the appeal has been exhausted. To put it positively: an adequate right of appeal from a decision void ab initio should stand as a bar to judicial review in the absence of special circumstances. The decision in the Harlekin case (except by the most tenuous implication) does not go this far.

It is interesting to consider what the situation is where a right of appeal exists and has been invoked. Should the doctrine of election bar judicial review? This rule applies in reverse, i.e. Lissenden v. C.A.V. Bosch Ltd., [1940] A.C. 412 where it was held that an appeal will not be entertained where the appellant reprobates it by approbating the decision he seeks to appeal. Is a party who invokes an adequate right of appeal reprobating judicial review by his approbation of the process provided in the

case. The issue was mooted in the House of Lords in the Calvin case and at page 770 Lord Wilberforce said:

> "The defendants took other points against the plaintiff, notably that having elected to take his case to the committee on appeal, he had lost his right of resort to the court. Their Lordships need say no more of this argument than that it appears to present difficulties both on the authorities and in principle. But they need come to no conclusion upon it."

However, the judgment of the Court appealed from in the Calvin case (1977) 2 N.S. W.L.R. p. 308 went against this application of the doctrine of election. In doing so it relied on a finding to the same effect in Ridge v. Baldwin, 2 All E.R. p. 66 at p. 81. While it has been held that the doctrine of election does not apply so that the appellant is to be considered as having abandoned his right to judicial review, it is still open to contention that while not abandoned, the right to judicial review should at any rate be postponed until after the disposition of the appeal.

If invoking a right of appeal postponed the right to judicial review, why should a person who deliberately chooses not to pursue adequate appeal rights be in any better position?

A final point is that if the appellant body can hear the appeal whether the error is within or without jurisdiction, why should a court be doing the same thing? There is much to be said

for the argument that a matter should be settled internally without judicial intervention except as a last resort. Court time is in short supply and the parties should be left to work out their disputes if at all possible by the machinery provided in the case.

III. Conclusion:

The general rule should be that where there is an adequate right of appeal, judicial review should not be available in any case excepting only special circumstances. It is obviously undesirable to attempt to restrict special circumstances by definition, but clearly they would include cases of great urgency and flagrant injustice, including corruption or bias. However, whether a circumstance was special or not would have nothing to do with any legalistic concepts of void or voidable.