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## Recent Developments in Nova Scotian Administrative Law

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*I. Introduction*

Unlike a number of the subject areas covered by this symposium, Administrative Law in a Nova Scotia context has been much written about in the last three years. There have been two conferences on judicial review of administrative action sponsored by the Dalhousie University Law School Public Services Committee.<sup>2</sup> Many of the papers appearing in the proceedings of those conferences have a distinctly Nova Scotian flavour.<sup>3</sup> Indeed, the 1975 "University and the Law" Conference sponsored by the same Committee also featured a number of papers with a Nova Scotia Administrative Law bent,<sup>4</sup> albeit of a much more specialized kind. Then in recent months there have been two further Continuing Legal Education conferences at Dalhousie on Regulation.<sup>5</sup> Hudson Janisch has made

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1. I acknowledge gratefully the comments and criticisms which I received when writing this article from my colleagues Professors Donald H. Clark, Brian Hansen and Hudson Janisch.

2. See H. N. Janisch, ed., *Administrative Law Remedies* (Halifax: Faculty of Law, Dalhousie University, 1974) and H.N. Janisch, ed., *Current Issues in Administrative Law* (Halifax: Faculty of Law, Dalhousie University, 1975). The first of these Conferences was held on December 8, 1973 and the second on December 7, 1974.

3. See, particularly, J. Kavanagh, "What is Meant by the Term "Judicial" for the Purposes of the Prerogative Remedies?" at 9; G. McConnell, "Who Has *Locus Standi* for a Remedy in Administrative Law?" at 36; D. Mullan, "What Use Can and Should Be Made of a Declaratory Judgment in Modern Administrative Law?" at 44; W. B. Gillis, "When is a *Mandamus* Available as an Administrative Law Remedy?" at 57; Panel Discussion at 80 in *Administrative Law Remedies* and B. Flemming, "Bias in a Modern Context" at 30; R. Murrant, "*Certiorari* in Criminal Matters" at 50; I. Christie, "*Metropolitan Life* and Jurisdictional Control" at 59; G. McConnell, "Regulations and the *Ultra Vires* Doctrine" at 76; G. Cooper, "*Mandamus* and Building Permits" at 84 and Panel Discussion — "Practice and Procedure of Administrative Boards" at 113 in *Current Issues in Administrative Law*.

4. Held February 28-March 1, 1975. See H.N. Janisch, ed., *The University and the Law* (Halifax: Faculty of Law, Dalhousie University, 1975).

5. (i) "Government Regulation and the Law" — held October 18, 1975 — Proceedings, H.N. Janisch, ed. (Halifax: Faculty of Law, Dalhousie University, 1975).

(ii) "Telecommunications Regulation at the Crossroads" — held February 27-28,

two contributions to Nova Scotia Law News on the subject of Administrative Law,<sup>6</sup> while Tim McBride has written of Nova Scotia's Ombudsman in the Dalhousie Law Journal.<sup>7</sup> Finally, I have contributed a piece to an earlier issue of the Law Journal on the use of the declaration as an Administrative Law remedy in this province.<sup>8</sup>

As a result of this hive of activity on the Administrative Law front, I have decided in this survey to avoid repetition and, for the most part, to confine myself to decisions that have not attracted any written attention until now. However, I will be taking up a theme discussed by Professor Innis Christie at December 1974's "Current Issues in Administrative Law" Conference,<sup>9</sup> the theme of the Nova Scotia courts' perception of the proper scope of judicial review of administrative action.<sup>10</sup> The first three cases dealt with will all be discussed against this particular background. The rest of the article will then be devoted to a survey of the Nova Scotia courts' handling in recent months of issues concerned with the duty of decision-makers to give a hearing to affected persons and the rules of natural justice as they apply to particular hearings.

## *II. W. H. Schwartz & Sons Ltd.*

Speaking at the 1974 "Current Issues in Administrative Law" Conference,<sup>11</sup> Professor Innis Christie, Chairman of the Nova Scotia Labour Relations Board,<sup>12</sup> appeared to be quite optimistic about the willingness of the Nova Scotia Supreme Court — Appeal Division to allow administrative tribunals in this province to interpret their empowering legislation unhindered by judicial review. He remarked<sup>13</sup>:

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1976 — Proceedings, H.N. Janisch, ed. (Halifax: Faculty of Law, Dalhousie University, 1976).

6. H. N. Janisch, *Administrative Law: Alive and Well and Living in Nova Scotia* (1974), 1 Nova Scotia Law News (No. 1) at 3 and H.N. Janisch, *Regulations: Publish or Perish* (1974), 1 Nova Scotia Law News (No. 1) at 11.

7. T.J. McBride, *The Nova Scotia Ombudsman* (1975), 2 Dalhousie L.J. 182.

8. D. Mullan, *The Declaratory Judgment: Its Place as an Administrative Law Remedy in Nova Scotia* (1975), 2 Dalhousie L.J. 91.

9. *Supra*, note 2.

10. I. Christie, "Metropolitan Life and Jurisdictional Control", *id.* at 59.

11. *Supra*, note 2.

12. *Supra*, note 10.

13. *Id.* at 60-69.

My point is simply that the courts should, and in Nova Scotia probably will, be prepared to entertain arguments directed to the function which the legislature obviously contemplated for the inferior tribunal whose decision is under review. If the court can be persuaded that in interpreting its own statute the tribunal is performing a function which the legislature quite evidently intended that *it* rather than the judges should perform, the court will be loath to hold that the tribunal has “embark[ed] on an inquiry or answer[ed] a question not remitted to it”, to refer to the language used by Mr. Justice Dickson in the *Nipawin Nurses’* case.<sup>14</sup>

In this respect, he referred<sup>15</sup> to the decision of the Nova Scotia Supreme Court — Appeal Division in *Re Nova Scotia Liquor Commission*<sup>16</sup> in which the Court had refused to interfere with the decision of the Labour Relations Board that the managers of Liquor Stores were “employees” within the meaning of the Trade Union Act.<sup>17</sup> At one point in his judgment, Coffin J.A. speaking for the Court had in fact said<sup>18</sup>

. . .if the inferior Court has jurisdiction to decide a matter and enters upon the adjudication and does so decide, its conclusions will not be reviewed.

Of course, in some situations, the courts have placed considerable qualifications on the autonomy of tribunals deciding matters which the legislature has entrusted to them.<sup>19</sup> However, the whole

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14. *Service Employees’ International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 at 389; 41 D.L.R. (3d) 6 at 12.

15. *Supra*, note 10 at 68.

16. (1974), 9 N.S.R. (2d) 248; 47 D.L.R. (3d) 99 (*sub nom. Re Nova Scotia Office and Clerical Workers’ Union, Local 1670 C.L.C. and Nova Scotia Liquor Commission*) (S.C., A.D.).

17. S.N.S. 1972, c. 19.

18. (1974), 9 N.S.R. (2d) 248 at 260-261; 47 D.L.R. (3d) 99 at 108.

19. Probably the most commonly-cited Canadian examples are the two labour cases: *Jarvis v. Associated Medical Services Inc.*, [1964] S.C.R. 497; 44 D.L.R. (2d) 407 and *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; 11 D.L.R. (3d) 336. In this latter case, the Supreme Court seemingly opened the door to the wholesale review of tribunal decisions despite strongly-worded privative clauses by its adoption of a very broad test for jurisdictional error from the House of Lords’ decision in *Anisimic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147; [1969] 1 All E.R. 208 (See the judgment of Cartwright C.J.C. at 435; 11 D.L.R. (3d) at 344). However, the judgment in *Nipawin* indicates that *Metropolitan Life* may not be as wide as was thought originally. For the pertinent literature see, in addition to Professor Christie’s paper: P. Weiler, *In the Last Resort* (Toronto: Carswell Methuen, 1975) at 120-154 and *The ‘Slippery Slope’ of Judicial Intervention* (1971), 9 Osgoode Hall L.J. 1; P. Hogg, *The Supreme Court of Canada and Administrative Law, 1949-71* (1973), 11

philosophy of Coffin J.A.'s judgment in the *Liquor Commission* case suggested significant judicial restraint at least in relation to the functioning of the Labour Relations Board.

Nevertheless, at least one subsequent decision does not seem to have borne out Professor Christie's assessment and arguably makes any prediction of when the courts will find reviewable error just as uncertain as ever. In *W. H. Schwartz & Sons Ltd. v. Bread, Cake, Biscuit, Crackers, Candy, Confectionery & Miscellaneous Workers Union, Local 446 and Labour Relations Board*,<sup>20</sup> the Appeal Division was confronted by a decision of the Nova Scotia Labour Relations Board to certify a union as a bargaining agent for a unit of employees without first holding a vote of the employees. The applicant company was seeking an order in the nature of *certiorari* to quash the certification and an order in the nature of *mandamus* to compel the Board to hold a vote of the employees of the proposed unit. These remedies had been refused by Hart J. at first instance<sup>21</sup> and an appeal was taken to the Appeal Division.

The statutory background is crucial to the decision. Under s. 24(2) (b) of the Trade Union Act a vote must be held where the Board is satisfied that between forty and sixty per cent of the unit are members in good standing of the union applying for certification. However, s. 24(2) (c) then goes on to provide a dispensation from the mandatory provisions of subs. (b)

(c) notwithstanding clause (b) hereof, if the Board is satisfied that the applicant trade union has as members in good standing more than fifty per cent of the employees in the appropriate unit and the Board is satisfied that no useful purpose will be served by conducting a vote among the employees in the unit, it may certify the trade union as the bargaining agent of the employees in the unit.

There is no indication in the Act as to the principles upon which the Board is to exercise its discretion not to order a vote. However, in December 1973, the Governor in Council made a regulation<sup>22</sup> which bears upon the discretion. The relevant parts of this regulation were as follows:

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Osgoode Hall L.J. 187 and *Judicial Review: How Much Do We Need?* (1974), 20 McGill L.J. 157; J.N. Lyon, Comment (1971), 49 Can. B. Rev. 365. Note also of course, that where there is no privative clause the courts possess the ability to review tribunal decisions for all errors of law appearing on the face of the record.

20. (1975), 12 N.S.R. (2d) 606 (S.C., A.D.).

21. Unreported judgment.

22. Strictly speaking, the Governor in Council repealed a regulation made on June

2(1) In considering whether any useful purpose will be served by conducting a vote among the employees under Section 24 of the Act the Board shall have regard only to evidence as to the true wishes of the employees, expressed by petition filed not later than the terminal date fixed in accordance with subsection (2).

. . .

(3) For purposes of this Section, a petition is any evidence in writing of any honest and voluntary statement by an employee or employees either that they wish to be represented by the applicant trade union or that they no longer wish to be represented by the applicant trade union provided the Board is satisfied that it has been:-

(a) signed by each employee so signifying and

(b) supported by oral testimony in the personal knowledge and observation of the witness as to the origination of the petition and the manner in which each signature was obtained.

In *Schwartz*, an application has been made for certification of a unit consisting of forty-nine employees. It was conceded that the unit was an appropriate one for collective bargaining as required by s. 24(1) and also that members of the Union in good standing numbered between fifty and sixty per cent. Whether a vote was to be held therefore came within the Board's discretionary powers under s. 24(2) (c). As a result of advertisement of the certification application in the employer's premises and a letter to the employees from the employer's solicitor advising them of their rights and containing forms which could be returned to the Board expressing their wishes, nineteen employees wrote to the Board saying they were not members of the Union and did not wish to be represented by it. Another six stated that they had joined the Union but no longer wished to be represented by the Union. At a hearing the Board took evidence from eight of these "petitioners" and then resolved not to order a vote before deciding on certification.

The Board's order dealt briefly with the question of a vote.<sup>23</sup>

In the opinion of the Board the distribution by the employer to

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14, 1972 and substituted a new regulation (R.N.S. 1973 at 161). The Governor in Council is given power to make regulations under s. 9 of the Trade Union Act. Note, also, s. 17(a) and (b) which gives the Board itself power to make regulations (under (b), with the approval of the Governor in Council). For the legislative history of the regulations, see I. Christie, *Trade Union Certification: New Regulations* (1974), 1 Nova Scotia Law News (No. 1) 1.

23. Set out in the judgment of MacKeigan C.J.N.S.: (1975), 12 N.S.R. (2d) 606 at 610.

each employee of the Solicitor's letter and forms constitutes interference with the expression of true wishes by the employees such that no useful purpose would be served by conducting a vote.

It was on this sentence that the applicant company in essence founded its challenge to the Board's decision. It was argued that the Board had thereby laid itself open to review by asking itself the wrong question or by taking into account an irrelevant factor. By asking whether the distribution of the letter constituted interference with the true wishes of the employees, it was argued that the Board had trespassed outside the narrow compass laid down for it in Reg. 2, a compass which confined the Board seemingly to a consideration of the petitions presented by employees.

This argument was accepted by the Court. MacKeigan C.J. N.S. delivering the judgment of himself, Coffin and Macdonald J.J.A. stated:<sup>24</sup>

In the present case I must conclude that the Board made no attempt to apply the test which the Nova Scotia *Act* and Regulations prescribe and rather introduced a legally irrelevant issue and applied an erroneous test. It thus erred in law on the face of the record and exceeded its jurisdiction in wrongly deciding the preliminary question upon which its jurisdiction to certify without a vote was dependent. Applying in this case the words of Lord Pearce in *Anisminic Ltd. v. The Foreign Compensation Commission et al.*, [1969] 1 All E.R. 208 (H.L.) at pp. 213-4, we can say that the Board:

. . . misconstrued the provisions giving it power to act so that it failed to deal with a question remitted to it and decided some question which was not remitted to it.

There is nothing controversial about the language in which the Court expressed its conclusion. Indeed, given that the determination of whether there should be a vote was probably not protected by a privative clause,<sup>25</sup> the Court really did not have to speak in terms of

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24. *Id.* at 615-16.

25. Section 18(1) of the Trade Union Act contains a standard privative clause. However, the issues of whether a vote should be ordered or whether petitions are free and voluntary are not protected expressly by that section. Among the list of protected decisions the only possibilities are (g) ("a group of employees is a unit appropriate for collective bargaining") and (i) ("a person is a member in good standing of a trade union"). However, looking at the structure of s. 24 of the Act, these matters would seem to be prior and separate issues. Indeed, MacKeigan C.J.N.S. may be taken to have recognized this in that in the extract cited he also speaks of error of law on the face of the record as well as jurisdictional error (*id.*).

jurisdictional error. Rather, the case could have been decided on the basis that there was a non-jurisdictional error of law on the face of the record.<sup>26</sup> However, the real question is whether a court with greater sympathy to legislative purpose and the role of the Board could have found a satisfactory way of refusing to review.

There were, it seems, three possible ways that the Court could have upheld the Board's decision. The first and probably strongest argument is that advanced to the Court by Mr. Pink appearing for the respondent Union. This argument is to the effect that while the Board may be able to consider petitions and petitions only in deciding whether to hold a vote, Reg. 2 (3) defines petitions as "evidence in writing of an honest and voluntary statement". From this, it could perhaps be inferred that the Board's finding that there was employer interference was in reality a finding in terms of the legislation that the petitions were not in fact "honest and voluntary".<sup>27</sup>

The Court did not accept the invitation to give the Board the benefit of the doubt on this point.<sup>28</sup>

. . . I cannot find a word in the Board's decision which suggests to me that it directed its attention to whether the petitions were in fact voluntary or the effect of the petitions.

Admittedly, the Board's decision was cryptic and went no way towards linking explicitly the reasons for its decision to the language of the legislation. Indeed, in my opinion, it is most unfortunate that the Labour Relations Board does not submit to the discipline of giving full reasons for its decisions.<sup>29</sup> Nevertheless, sufficient judicial respect for the role and expertise of the Board could quite easily have persuaded a sympathetic court to fill in the gaps in the reasoning process and to infer that the Board had acted in accord with the Regulation.

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26. See the extract from MacKeigan C.J.N.S.'s judgment just referred to. Of course, a court wishing to justify a comprehensive examination of whether the petitions were free and voluntary could have described this issue as one of jurisdictional fact, thereby allowing itself to substitute its opinion for that of the Board not only on questions of law but also of fact. Nevertheless, despite the use of the word "preliminary" by MacKeigan C.J.N.S., it is difficult to classify this question as a preliminary and collateral one of jurisdictional fact. It would seem to be too far into the heart of the Board's jurisdiction to allow such a classification to be made.

27. *Id.* at 612.

28. *Id.* at 613.

29. Discussed *infra*, in relation to *Canada Automatic Sprinkler Association v. Labour Relations Board* (1974), 14 N.S.R. (2d) 36 (S.C., T.D.).

However, not only was the Court not prepared to go that far but it also indicated that, even if the decision had been related to the language of the statute, the application would still have been granted. According to the Court, there was simply no evidence that the petitions were involuntary and dishonest; thus, this lack of evidence also constituted reviewable error.<sup>30</sup>

The ability of a court to review the decision of an administrative tribunal on the ground of a lack of evidence has always been controversial, principally because of the extreme flexibility of a rule that a decision made on the basis of no evidence involves a reviewable error of law.<sup>31</sup> What does “no evidence” mean? Absolutely no evidence? No evidence of probative value? No legally admissible evidence? No reasonable evidence? Given this range of possibilities within the “no evidence” test, there is a danger that the courts will use this as a basis for a review of the merits of a particular decision. Indeed, this is demonstrated amply by the following extract from MacKeigan C.J.N.S.’s judgment.<sup>32</sup>

If the Board’s decision can be construed, which I very much doubt, as a finding that mere distribution of the solicitor’s letter and forms was *per se* an act which made involuntary any petitions using such forms, such a conclusion would in my opinion be clearly illogical and wrong. The mere fact that an employee uses a form supplied by the employer does not prove that the employee, in using that form letter, was necessarily not expressing honestly and voluntarily his true wishes. Suspicion may well arise in an employer-employee relationship that an employee may, out of fear or out of desire to curry favour, do what he thinks his employer may want him to do, even though contrary to his true desire. Suspicion, however, is far short of proof.

In essence, what the “no evidence” test seems to have become here is a standard whereby the Board will be reviewed unless the court is satisfied that it has been proved that the petitions are not free and voluntary. To go this far is, of course, to take over completely the task assigned by the legislation to the Board. However, it may be that all the statement involves is an assertion that forms sent out by the employer have no evidential value on their own on the question

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30. (1975), 12 N.S.R. (2d) 606 at 613.

31. For a comprehensive discussion of this issue as it pertains to Administrative Law see D.W. Elliott, “No Evidence”: A Ground of Judicial Review in Canadian Administrative Law (1972), 37 Sask. L. Rev. 48.

32. (1975), 12 N.S.R. (2d) 606 at 613.

of honesty and voluntariness. But, even this can be seen as an instance of the reviewing court second-guessing the expert tribunal on the probative value of evidence.

Moreover, later on in the course of the judgment, MacKeigan C.J.N.S. gives a further indication of his willingness to become involved in the essence of a determination which has been left by the legislature to the expert Board.<sup>33</sup>

And, if a majority of employees in the bargaining unit, including, of course, some who had previously signed up as union members, presented petitions claiming that they did not want the union to represent them, the Board would, I suggest, have no option but to order a vote despite suspicion or even strong evidence of employer influence (provided such evidence fell short of proving the petitions to be non-voluntary).

It is hard to interpret this statement as anything but a direction from the Court to the Board as to how the Board is to exercise its discretion in particular cases. Indeed, the Chief Justice, while talking in the hypothetical, presumably had this very case in mind. On the petitions twenty-five out of forty-nine had indicated an unwillingness to be represented by the Union. Having found that there was “no evidence” of involuntariness, the Chief Justice must be saying that the Board had no choice in this particular instance. This also constitutes a significant trespass into the heart of the Board’s jurisdiction. Perhaps the only justification for such a statement is if it is seen as an attempt by the Court to draw the Board’s attention to the extreme situation in which it would be prepared to review a Board decision for abuse of discretion on the basis that no reasonable tribunal in the circumstances could ever have failed to order a vote.<sup>34</sup>

The argument put forward by Mr. Pink required the Court to read the Board’s reasons sympathetically and infer from those reasons that the Board had in mind its statutory mandate. Not only was such

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33. *Id.* at 615.

34. See the judgment of Coffin J.A. (discussed *infra*) in *N.S. Forest Industries v. N.S. Pulpwood Marketing Board* (1975), 12 N.S.R. (2d) 91 at 115-17; 61 D.L.R. (3d) 97 at 125-27 (*sub nom. Re Stora Kopparbergs Bergslags Aktiebolag and Nova Scotia Woodlot Owners’ Association*) (S.C., A.D.) for an example of this ground of review. Interestingly enough, a later case, in which *Schwartz* was followed, would almost seem to amount to another example of review on this basis. In the as yet unreported decision of *Dominion Stores Ltd. v. Labour Relations Board (Nova Scotia)* (S.H. 07063, judgment delivered:- October 21, 1975), Cowan C.J.T.D. ostensibly ruled in favour of review on the basis that

a reading not forthcoming but the Court indicated its preparedness to review the decision even if that argument was accepted and, in the course of discussing the “no evidence” test, hinted at a significant willingness to second-guess the Board in the exercise of its discretionary power. Such an approach scarcely bears out the optimistic tone of Professor Christie’s address.

A second possible argument that might have been made was that, even if the Board was justified in considering the petitions and only the petitions in deciding whether to order a vote, it could still look at the circumstances under which the petitions originated. In other words, when Reg. 2(1) speaks of having regard only to petitions, it is not to be read as restricting the Board to the contents of the petitions but rather, to borrow a term from the law of Evidence, allows the Board to look at the *res gestae*. Once again, this is a way that a sympathetic court could have approached the problem and inferred from the Board’s reasons that the petitions were being discounted because of the interference by the employers which gave rise to the making of those petitions. The weakness of this argument is that it addresses itself to the freeness and voluntariness of the petitions, a matter already covered specifically under Reg. 2(3). The argument is in fact foreshadowed by the first argument based on subs. 3 and made by Mr. Pink.

The final possible argument is quite fascinating. If one studies the legislative history of Reg. 2,<sup>35</sup> it appears that the purpose of the Regulation was not in fact to compel the Board to look only at petitions but rather to require the Board in looking at petitions to pay attention to only those petitions which are honest and voluntary. Indeed, it is hard to think of reasons why the Governor in Council

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. . . it is quite clear from the transcript that the Board did not direct itself to the question as to whether the petitions, or any of them, were “honest and voluntary statements”. (Reasons for Judgment at 27).

Yet, in this case, there was nothing in the reasons of the Board to suggest that the correct question had not been asked and those extracts from the transcript cited by Cowan C.J.T.D. would seem to indicate that the Board was indeed concerned with whether the petitions were honest and voluntary. If that is accurate, then the Board was reviewed because the judge disagreed with the Board on this point. A further factor in this case may of course have been the fact that the Board decided this matter before the Appeal Division decision in *Schwartz* had been delivered, this perhaps leading the Chief Justice to assume that the Board must have gone about its task in the wrong manner.

35. See I. Christie’s comment, *supra*, note 22. Also discussed by Brian Hansen, John MacPherson and Larry Steinberg, *Recent Developments in Labour Law in Nova Scotia* (1976), 2 Dalhousie L.J. 791 at 806-808.

would want to make a regulation preventing the Board from looking at anything beside petitions in deciding whether to order a vote.<sup>36</sup> The real interests of the Board are in having as much flexibility as possible in the factors it can take into account in deciding whether or not to order a vote. On the other hand to avoid the possibility of inappropriate judicial review, the Governor in Council may understandably have wanted to provide that the Board could discount or disregard petitions considered to be either dishonest or involuntary.<sup>37</sup>

Given that this was the “legislative” purpose in making the regulation could the Court have taken it into account in this particular instance? Looking once again at the provisions of Reg. 2(1) which state that “the Board shall have regard only to evidence as to the true wishes of the employees, expressed by petition. . .”, it would in fact seem structurally impossible to interpret those words as requiring the Board to look at only certain of the petitions but leaving it free to look at other material as well as petitions. The separation of subsections (1) and (3) does not help. Moreover, whether “only” is regarded as referring to “evidence” or “true wishes”, there would seem to be no grammatically feasible way of avoiding the interpretation that petitions and petitions alone were to be taken into account.

The question then becomes whether the reviewing court could have simply ignored the rules of grammar, excused the sloppiness of the drafting and allowed the legislative purpose to be achieved. After all, it might be argued that the Board had a role in the making of the Regulation; it knew what the Regulation was intended to

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36. This argument would, of course, assume more force if the Board itself had made the regulation under s. 17 of the Trade Union Act.

37. It is, however, difficult to think of a court reviewing a decision for failure to take account of relevant factors simply because the Board discounted or disregarded petitions after having considered them. Nevertheless, the Board may have been jumpy after having been reviewed in *Sobeys Stores Ltd. v. Nova Scotia Labour Relations Board* (1973), 13 N.S.R. (2d) 231; 41 D.L.R. (3d) 641 (*sub nom. Re Sobeys Stores Ltd. and Canadian Food and Allied Workers' Union, Local P-1157*) (S.C., T.D.) for deciding the issue of the percentage of those in the proposed unit who were members in good standing of the Union as at the date of the application, as opposed to the date of the hearing of the application. This was followed in *Gulf Oil Canada Ltd. v. N.S. Labour Relations Board*, judgment of Jones J., as yet unreported, judgment delivered: 1973, and in *Therault & Son Ltd. v. Industrial Union of Marine and Shipbuilding Workers of Canada, Local 27*, judgment of Jones J., as yet unreported. Indeed, this rationale is implicit in Professor Christie's comment, *supra*, note 22.

achieve and everyone in the labour relations community knew what the Regulation was really getting at so no harm was done by twisting the words a little. However, to do that would be to ignore virtually the words altogether and even under the most extreme purposive view of statutory interpretation the words used are not completely irrelevant.<sup>38</sup> Perhaps the Board in its non-legislative functions can use words in a unique sense and say things which do not have the meaning that would normally be associated with them. However, it is somewhat different when the Governor in Council or the Board is making publicly promulgated regulations. In that context, the courts cannot be expected to abandon all attention to the words used and give effect to the legislative purpose, even if to do that would be to promote the shared expectations of most groups involved in the collective bargaining process.<sup>39</sup> “Alice in Wonderland” logic has no place in the interpretation of public enactments of a legislative body.

Of course, one response to this is that the courts should be able to break through the normal use of language when not to do so would produce an absurdity.<sup>40</sup> That a failure to do this produces an absurdity here is to some extent illustrated by the earlier Appeal Division decision of *Aerovox Canada Ltd. v. International Brotherhood of Electrical Workers, Local 625 and Nova Scotia Labour Relations Board*.<sup>41</sup> This raised the issue of the role of the Board if there are no petitions filed. If the Board can take into account petitions and petitions alone, does that mean that the Board can take no decision if there are no petitions or, more accurately, that the Board cannot exercise its discretion not to order a vote if there are no petitions because there is no evidential basis for the exercise of that discretion? Not so, said the Appeal Division!<sup>42</sup>

38. Felix Frankfurter has probably captured the sense of the judge’s task in interpreting statutes as well as anybody. He speaks of interpretation as not being ‘. . . an opportunity for a judge to use words as ‘empty vessels into which he can pour anything he will’ — his caprices, fixed notions, even statesmenlike beliefs in a particular policy’. Rather the task is to find “[w]hat is below the surface of the words and yet fairly a part of them”. See *Some Reflections on the Reading of Statutes* (1947), 47 Col. L. Rev. 527 at 529 and 533.

39. This statement reflects a belief on my part that the opportunity for the ‘twisting’ of words may be greater when one is concerned, for instance, with a bilateral contractual document than with a public enactment relied on generally.

40. The so-called “Golden Rule” of statutory construction. Discussed in *Craies on Statute Law*, ed. S.G.G. Edgar (7th ed. London: Sweet & Maxwell, 1971) at 84-86.

41. (1975), 12 N.S.R. (2d) 55 (S.C., A.D.).

42. *Id.* at 58.

. . . In this case, there were no such petitions before the Board and therefore no basis for it to consider whether a vote should be held.

The Board's decision [not to order a vote] is clearly one which it had the sole discretion to make and which was fully within its discretion.

Yet to do this would seem to contradict the philosophy of s. 24 — there should be a vote if there is between fifty and sixty per cent union membership *unless* there are grounds for the Board dispensing with that requirement.

What the Court's decision in the *Aerovox* case seems to amount to is that the Board has a completely unfettered discretion if there are no petitions but that the moment the Board in the exercise of this discretion looks at evidence other than petitions it is committing a reviewable error. In so far as this amounts to a prohibition on sensible inquiry it is an absurd result. Almost as absurd, however, would be a result in which the Court had held that the Board had to order a vote if there were no petitions. That also defeats sensible inquiry.

In the end it seems that all the Board can do if there are no petitions is to play around with numbers. *E.g.*, If there is only fifty-three per cent membership a vote will be ordered but if there is fifty-nine per cent membership there is no need for a vote. Such rules of thumb are of course not completely illogical. However, even this limited form of inquiry is thrown into jeopardy by the following statement of MacKeigan C.J.N.S. in *Schwartz*:<sup>43</sup>

In the *Aerovox* case . . . there were no petitions and thus no evidence upon which a decision to hold a vote could be based.

This suggests that even playing with numbers is out and that the Board cannot order a vote unless there are some free and voluntary petitions. In so far as this goes back on the statement in *Aerovox* itself that the Board has an unfettered discretion if there are no petitions, it amounts to an even greater contradiction of the philosophy of s. 24.

Essentially, the result of all this is a Regulation drafted in a manner so confusing as to place the courts in an impossible dilemma. The Act suggests that, if there is between fifty and sixty per cent membership, there should be a vote unless there is evidence to the contrary. Yet, under the Regulation, as interpreted in

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43. (1975), 12 N.S.R. (2d) 606 at 615.

*Schwartz*, the only admissible evidence is evidence which tends to show that there should *not* be a vote. Only by rewriting the Regulation could the courts reach a result that would promote effectively the desired policy. However, to do this would be to go beyond the judicial mandate. In *Schwartz*, a satisfactory result could have been reached by accepting Mr. Pink's argument, but even that argument does not solve the "Catch 22" dilemma of *Aerovox* and the situation where no petitions are filed. Redrafting of the Regulation is the only satisfactory solution.

In summary, the Court in *Schwartz* was not as attuned as it might have been to the function of the Board. However, the Board may be viewed as having contributed to a large extent to its own misfortunes in this case; first, by a badly-drafted regulation and, secondly, by a failure to articulate clearly in its decision the reasoning process which led to the decision not to order a vote. Perhaps in the end, *Schwartz* tells little about the Court's philosophy on the role of tribunals, though it must be admitted that some of the *dicta* in the case hint at a greater willingness to interfere than was suggested by Professor Christie in his lecture.

### *III. Nova Scotia Forest Industries*

*Schwartz* was not the only case in the period under survey where the Appeal Division reviewed for jurisdictional error. In *N.S. Forest Industries v. N.S. Pulpwood Marketing Board*,<sup>44</sup> jurisdictional error was again the ground for the Court's award of relief in the nature of *certiorari*, an award which as in *Schwartz* was a reversal of the trial judge's decision.<sup>45</sup>

Against a background of growing discontent on the part of woodlot owners at the price they were receiving for pulpwood from the large sawmills, the Nova Scotia legislature in 1972 enacted the Pulpwood Marketing Act.<sup>46</sup> This legislation, unlike other provincial marketing schemes, provided for a form of collective bargaining. Under the Act, the Pulpwood Marketing Board was made responsible for the certification of groups to engage in collective

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44. (1975), 12 N.S.R. (2d) 91; 61 D.L.R. (3d) 97 (*sub nom. Re Stora Kopparbergs Bergslags Aktiebolag and Nova Scotia Woodlot Owners' Association*) (S.C., A.D.).

45. (1974), 12 N.S.R. (2d) 131; 54 D.L.R. (3d) 740 (*sub nom. Re Stora Kopparbergs Bergslags Aktiebolag and Nova Scotia Woodlot Owners' Association*) (N.S.S.C., T.D.).

46. S.N.S. 1972, c. 15.

bargaining with the mills over the price of pulpwood. This role was quite different from the normal role of a provincial marketing board. Such bodies usually are the licensors and price-setters and frequently the agency through which a particular commodity is exclusively sold. The introduction of such a marketing plan for the sale of pulpwood under the Natural Products Marketing Act<sup>47</sup> had not proved feasible and the Pulpwood Marketing Act of 1972 represented a compromise response.

Under s. 4(1) of the Act, the Board was given power to register any association as bargaining agent “for all or any group or groups of producers or buyers of pulpwood”. This was expanded upon by s. 8(1):

An association may make application to the Board to be registered as the bargaining agent for all or any group or groups of producers or buyers of pulpwood and upon registration by the Board shall be the sole bargaining agent for the producers or buyers for which it is registered as bargaining agent, and before registering any such association as a bargaining agent the Board shall hold a public hearing.

However, compared with the Trade Union Act, the provisions of the legislation are for the most part “very general in form and, indeed, sketchy”.<sup>48</sup> For example, and of particular relevance in the decision of the Appeal Division,<sup>49</sup>

[t]he Act pointedly refrains from requiring, as the *Trade Union Act* does, various percentages of membership in the union or association. The Board merely has to ascertain the support or desires of the sellers in a general way.

This in fact had been adverted to by the then Minister of Lands and Forests<sup>50</sup> in leading off the Second Reading Debate of the Act in the House of Assembly.<sup>51</sup>

If the bill seems to avoid details and to establish powers that are permissive rather than mandatory, this is by design. I believe, Mr. Speaker, that a carefully selected board working closely with all sections of the forest industry, will be able to develop an effective marketing plan.

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47. R.S.N.S. 1967, c. 206 as am. S.N.S. 1970-71, c. 54.

48. (1975), 12 N.S.R. (2d) 91 at 126; 61 D.L.R. (3d) 97 at 104 (*per MacKeigan C.J.N.S.*).

49. *Id.* at 129; 61 D.L.R. (3d) at 107.

50. The Honourable B. Comeau.

51. N.S. H. of A. Debates (May 4, 1972) at 2331 (Volume 3, 1972).

The Nova Scotia Woodlot Owners' Association represented most of the small woodlot owners in the province and it was largely for their benefit that the legislation was passed. Nevertheless, the small woodlot owner was not the only person potentially covered by the legislation in that the term "producer" was defined in the Act to include anyone who sold pulpwood in the province.<sup>52</sup> Such a wide definition caught not only the small woodlot owners but also the larger commercial producers of pulpwood as well as the five large mills in the province which as part of their business sold pulpwood at times.

In 1974, the Woodlot Owners' Association applied to the Board under s. 8(1) for registration as bargaining agent for all "primary producers".<sup>53</sup> A little later an application was received from the Nova Scotia Forest Products Association, essentially the association of the larger commercial producers, for registration as the bargaining agent for all producers throughout the province excluding the five large mills. The ultimate result of these somewhat opposing applications was that the Board certified the Nova Scotia Woodlot Owners' Association as the bargaining agent for *all* producers of pulpwood in the province and then declared that a bargaining situation existed between the Woodlot Owners Association and the five large mills in the province, including the appellant.

The appellant sought an order in the nature of *certiorari* from Jones J. to quash both these decisions of the Board but was successful only with respect to the latter.<sup>54</sup> As a result an appeal and cross-appeal were launched. One of the issues raised was the failure of the Board to observe the rules of natural justice and this is one of the bases on which Coffin J.A. was prepared to quash the

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52. See s. 1(i):

. . . "producer" is a person who sells pulpwood and "production" includes the selling of pulpwood . . .

53. It was never clear what the term "primary producers" meant. However, MacKeigan C.J.N.S. assumed all along that it was not intended as a simile for "all producers" but rather connoted a lesser group. ((1975), 12 N.S.R. (2d) 91 at 128-29; 61 D.L.R. (3d) 97 at 106-07). However *cf.* the trial judgment of Jones J. ((1975), 12 N.S.R. (2d) 131 at 145-46; 54 D.L.R. (3d) 740 at 752):

I think it was clear to all concerned that the Woodlot Owners' Association was asking to represent all producers in the Province.

54. Jones J. quashed the second decision because of a failure to observe the rules of natural justice. *Id.* at 147-48; 54 D.L.R. (3d) at 754-55.

certification decision.<sup>55</sup> However, both Coffin J.A. and MacKeigan C.J.N.S. were also of the opinion that there had been a jurisdictional error and it is here that the case is of interest for present purposes, particularly as the judges took superficially divergent routes in reaching this conclusion. (Incidentally, Macdonald J.A. concurred without reasons in both judgments.<sup>56</sup>)

At a superficial level there are three things about the Board's certification decision which are immediately striking. First, the Woodlot Owners only asked to be certified as agent for primary producers and the Board in fact certified them to represent all producers of pulpwood in the province.<sup>57</sup> Secondly, members of the Woodlot Owners' Association only accounted for approximately seven per cent of the pulpwood supplied to the province's five largest mills. Thirdly, the members of the Forest Products Association which supplied the bulk of that wood were quite opposed to being represented by the Woodlot Owners' Association.

In the course of his judgment MacKeigan C.J.N.S. discussed quite extensively the logistics of the pulpwood industry in Nova Scotia and the background to the legislation including his own involvement as a government-appointed conciliator attempting<sup>58</sup>

. . . to reconcile the Woodlot Owners and the Forest Products Association as to a form of marketing plan.

Indeed, it is quite significant that although conciliation proved impossible the Chief Justice had recommended that the government introduce collective bargaining as an attempt to resolve the problem.

The Chief Justice then went on to distill what he saw as the essence of a collective bargaining system. There<sup>59</sup>

. . . are two essential principles which must be observed if any collective bargaining is to be just and effective, or even possible. The first is that the group or groups for whom the agent is to be permitted to bargain should be, to use labour law terms, "appropriate for collective bargaining". The second, a corollary of the first, is that the bargaining agent must be shown to have the support of the sellers of the group . . .

. . . A group of sellers to be appropriate for collective bargaining and one for which the agent "can bargain best" . . . must be

55. Discussed *infra*.

56. (1975), 12 N.S.R. (2d) 91 at 94; 61 D.L.R. (3d) 97 at 130.

57. See, however, *supra*, note 53.

58. (1975), 12 N.S.R. (2d) 91 at 126; 61 D.L.R. (3d) 97 at 104.

59. *Id.* at 127-28; 61 D.L.R. (3d) at 105-06.

reasonably homogeneous with a real community of interest in that they grow, cut, and sell pulpwood in much the same way and are subject to the same economic forces and incentives. The sellers in the group must be more or less equally affected by the terms of the prospective agreement to be made for them all.

Having identified the philosophy which he saw behind the scheme created by the legislation, the Chief Justice analyzed in *Anisminic* terms<sup>60</sup> how the Board had committed reviewable error by asking itself the wrong question. It failed to deal with the appropriateness of the group which the Woodlot Owners wished to represent.<sup>61</sup> Indeed it certified the Woodlot Owners as bargaining agent for a wider group than the association had asked to represent.<sup>62</sup> It failed to have regard to the fact that a significant number of “producers” clearly did not want the Woodlot Owners to represent them.<sup>63</sup> In summary it disregarded what MacKeigan C.J.N.S. regarded as<sup>64</sup>

. . . the basic principles of collective bargaining . . . [which] go to the very heart of the task the Board was to perform.

At one level it is possible to see the judgment of the Chief Justice as another example of a court interfering too readily with the decision of an expert board. When the Chief Justice describes the decision of the Board as involving “grievous error” it sounds much more like the language of appeal than of review.<sup>65</sup> However, in this instance there is much more to the decision than just that. First, the Court was here confronted by a new agency dealing with a new statute containing no privative clause. In such a context, the arguments of tribunal expertise and legislative signposting of judicial restraint are not quite so strong as for example when a court is confronted by a decision of the long-established Labour Relations Board many of whose determinations are protected by a privative clause. Secondly, we have the Court dealing with a concept with which it was familiar as a result of many encounters with the Nova

60. As in *Schwartz* (*supra*, note 24), MacKeigan C.J.N.S. purported to cite from the judgment of Lord Pearce in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 at 171; (1969) 1 All E.R. 208 at 213-14 (*id.* at 130; 61 D.L.R. (3d) at 108). He was in fact quoting Lord Reid. Note also that as in *Schwartz*, there being no privative clause, it did not matter to MacKeigan C.J.N.S. whether the error was described as jurisdictional or as one appearing on the face of the record (at 130; 61 D.L.R. (3d) at 108).

61. *Id.* at 128-29; 61 D.L.R. (3d) at 108.

62. *Id.*

63. *Id.* at 129; 61 D.L.R. (3d) at 107.

64. *Id.* at 130; 61 D.L.R. (3d) at 108.

65. *Id.* at 129; 61 D.L.R. (3d) at 107.

Scotia Labour Relations Board. With respect to the general parameters of that concept the Court because of its experience was almost certainly in a better position than the marketing board. Thirdly, the judgment of MacKeigan C.J.N.S. identifies that this was not a case in which the expert board had after careful consideration reached a decision which would normally be entitled to judicial deference. Rather the Board's approach or perhaps lack of approach indicated a total disregard, even failure to consider the legislative scheme within which it was operating. Of course it could be argued that the legislation was left deliberately sketchy to enable the Board to develop its own peculiar form of collective bargaining. However, even this does not excuse such disregard of what MacKeigan C.J.N.S. describes uncontroversially as the bedrock principles of any scheme of collective bargaining. What seems to have happened here is that the Board has lost sight of the scheme of the legislation and the position of other parties and accorded too great a consideration to the fact that the legislation was intended primarily for the benefit of members of the Woodlot Owners' Association.

In summary, what we have in this instance is an example of a judge doing what judges do best in judicial review proceedings. To use the terminology of an advocate of very limited judicial review, Peter W. Hogg, the Court is acting here to preserve "general values".<sup>66</sup> It is not becoming involved in the *minutiae* of a complex, specialized statutory scheme. Rather, the judgment of MacKeigan C.J.N.S. measures the conduct of the Board against the general philosophy of the Act and finds a clear case of aberration.

Though Coffin J.A. reaches the same conclusion, he does not paint with the same broad brush as the Chief Justice. The legislative history is scarcely considered with the result that the judgment is not predicated explicitly on what the judge regards as the fundamental scheme of the Act. Rather, he asserts after the citation of much authority that the Board has committed jurisdictional error because it has made a decision which is so unreasonable that no reasonable tribunal would ever have made it.<sup>67</sup> First, he finds it unreasonable

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66. See *Judicial Review: How Much Do We Need?*, *supra*, note 19 at 164-167. I should say, however, that the use of Professor Hogg's terminology here is perhaps not a use with which he would agree. The "general values" that he refers to are more the general shared values of our society rather than the general values that might be seen as the background of a particular piece of legislation.

67. (1975), 12 N.S.R. (2d) 91 at 117; 61 D.L.R. (3d) 97 at 127.

“for 6.8% to represent 100% of the suppliers”<sup>68</sup> and, secondly, he finds reviewable error in the Board’s failure to consider the constitutions of the various constituent members of the Woodlot Owners’ Association, constitutions which in a number of instances are highly restrictive of membership, meaning that many of those producers certified to be represented by the Woodlot Owners’ Association could not be members of that Association.<sup>69</sup>

It is perhaps pertinent to make a comment on each of these findings. In contrast to Coffin J.A., MacKeigan C.J.N.S. was not prepared to find anything necessarily unreasonable in 6.8% representing 100% of producers.<sup>70</sup> Rather for the Chief Justice, the principal concern was whether the Board had made any attempt to consider the wishes of the other 93.2%. On the second point, it is not a necessary incident of collective bargaining that all members of the unit be eligible for membership of the representative body,<sup>71</sup> though of course the relevant constitution will be a significant matter as far as any certifying board is concerned and failure to take account of membership restrictions can perhaps justifiably be regarded as giving rise to jurisdictional error. Nevertheless, to review on this basis is to exhibit a somewhat narrower and less generalist approach to the legislation than that of the judgment of the Chief Justice.

From the point of view of the grounds of judicial review, Coffin J.A.’s judgment is quite significant as one of the very few cases in which a judge has been prepared to review an exercise of discretion on the bases of reasonableness.<sup>72</sup> Nevertheless, even though

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68. *Id.*

69. *Id.* at 121; 61 D.L.R. (3d) at 130.

70. *Id.* at 130; 61 D.L.R. (3d) at 107-08.

71. See e.g. s. 92(4) of the Ontario *Labour Relations Act*, R.S.O. 1970, c. 232. This subsection was a response to the decision of the Supreme Court of Canada in *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; 11 D.L.R. (3d) 336 and provides that ineligibility for membership does not necessarily mean that someone cannot be a member of the union for the purposes of the statute provided that the union has an established practice of admitting such persons to membership despite the eligibility requirements. This reflects the Ontario LRB practice before *Metropolitan Life*. (See J. Sack and M. Levinson, *Ontario Labour Relations Board Practice* (Toronto: Butterworths, 1973). *Quaere*, however whether *Metropolitan Life* might have been applied in *N.S. Forest Industries*.)

72. For two Canadian examples, see *Re Pecseyne and Hamilton Police Commissioners Board*, [1973] 1 O.R. 142; 30 D.L.R. (3d) 418 (D.C.) and *Chaulk v. Town of South River* (1971), 2 N. & P.E.I.R. 1 (Nfld. S.C.). However, it is

MacKeigan C.J.N.S. uses the rubric of the Board asking itself the wrong question, it is relatively easy to see how he could also have used the language of unreasonableness to justify his result. A decision taken in face of basic principles of collective bargaining just as well merits the description of manifest unreasonableness as it does that of asking the wrong question.

At one time administrative lawyers used to think of abuse of discretion and jurisdictional error as separate categories of judicial review. Manifest unreasonableness, irrelevant factors, failure to take account of relevant factors, acting under dictation tended to be the language of abuse of discretion. Preliminary and collateral error and asking the wrong question tended to be the language of jurisdictional error. The myth of this separation was exploded dramatically in *Anisminic*<sup>73</sup> and, in cases such as the *N.S. Forest Industries* decision, we see the aftermath of *Anisminic* in which one judge uses the old language of abuse of discretion to justify review while the other uses the language of jurisdictional error. Indeed, Coffin J.A. speaks of unreasonableness and asking the wrong question virtually as if they are the same thing.<sup>74</sup>

Even less than *Schwartz*, *N.S. Forest Industries* is not a case which tells us too much about the Appeal Division's willingness to second-guess tribunals. This is mainly so because the Board's decision showed a flagrant disregard of legislative purpose, a disregard which was accentuated by Coffin J.A.'s additional finding of breach of the rules of natural justice. Indeed, in contrast to the rather cryptic judgment of Coffin J.A., the judgment of MacKeigan C.J.N.S. in this case represents a sensitive and sensible approach towards the scope of judicial review. It is a judgment characterized by a well-tempered use of legislative history and a generalist approach rather than one that descends into the heart of matters confided in the Board.

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worth noting that in *Pecseyne* the court really seemed to be talking about lack of good faith more than the merits and *Chaulk* was a statutory appeal and not a judicial review application.

73. Particularly in Lord Reid's much-quoted statement where he describes reviewable error in very broad terms and mixes the language of review for jurisdictional error and review for abuse of discretion: [1969] 2 A.C. 147 at 171; [1969] 1 All E.R. 208 at 213-14. The statement was in fact cited *in toto* by Coffin J.A. in the *N.S. Forest Industries* case ((1975), 12 N.S.R. (2d) 91 at 113-14; 61 D.L.R. (3d) 97 at 124).

74. *Id.* at 115-16; 61 D.L.R. (3d) at 125-26.

#### IV. *Walker v. Keating*

In *Anisminic v. Foreign Compensation Commission*,<sup>75</sup> the House of Lords defined jurisdictional error so widely that commentators expressed the view that there would no longer be any need to consider the availability of review for error of law on the face of the record.<sup>76</sup> Jurisdictional error as defined in *Anisminic* seemed wide enough to embrace any error of law that a tribunal might make in the course of its decision-making process. With the approval of *Anisminic* by the Supreme Court of Canada in *Metropolitan Life*,<sup>77</sup> the same seemed to be true in this country and, while there has been some retreat from *Anisminic* and *Metropolitan Life*<sup>78</sup> lately, the judgment of MacKeigan C.J.N.S. in the *N.S. Forest Industries* decision reflects the degree of overlap that there has come to be.<sup>79</sup>

The Board's errors in disregarding the basic principles of collective bargaining invalidate the registration order which must accordingly be quashed. They go to the very heart of the task the Board was to perform. It matters little whether they are labelled excess of jurisdiction, errors of law on the face of the record or failure to exercise jurisdiction.

Nevertheless, despite this assimilation, error of law on the face of the record continues to have a significant existence in the administrative law cases of this province. It is of course frequently invoked in applications to quash arbitration awards.<sup>80</sup> Indeed, it has always been the most common ground for setting aside such awards. Also, error of law on the face of the record continues to be pleaded in applications to review the decisions of statutory tribunals. Habit probably explains a lot. However, simply to rely on

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75. [1969] 2 A.C. 147; [1969] 1 All E.R. 208.

76. See e.g. S. A. de Smith, *Judicial Review of Administrative Action* (3d ed. London: Stevens, 1973) at 357.

77. [1970] S.C.R. 425 at 435; 11 D.L.R. (3d) 336 at 344.

78. Discussed by Innis Christie in "*Metropolitan Life* and Jurisdictional Control", *supra*, note 3 at 64-72. See the decisions referred to in those pages.

79. (1974), 12 N.S.R. (2d) 91 at 130; 61 D.L.R. (3d) 97 at 108.

80. See e.g. *Otis Elevator Co. v. International Union of Elevator Constructors, Local 125* (1973), 5 N.S.R. (2d) 437; 36 D.L.R. (3d) 402 (*sub nom. Re Otis Elevator Co. and International Union of Elevator Constructors, Local 125*) (S.C., A.D.); *Canadian General Electric Co. v. Oil, Chemical and Atomic Workers International Union, Local 9-832* (1975), 11 N.S.R. (2d) 550; 56 D.L.R. (3d) 745 (*sub nom. Re Oil, Chemical & Atomic Workers International Union, Local 9-832 and Canadian General Electric Co. Ltd.*) (S.C., A.D.); *Canadian Keyes Fibre Co. v. United Paperworkers International Union, Local 574* (1974), 8 N.S.R. (2d) 81; 44 D.L.R. (3d) 305 (S.C., A.D.).

jurisdictional error can still be dangerous and pleading error of law on the face of the record in the alternative is a prudent safeguard against a situation where the court finds error of law but does not classify the error as jurisdictional. Indeed, in some instances, despite *Anisminic*, it is much easier to think of the error of law that is being alleged as one within jurisdiction rather than one going to jurisdiction. One such recent case in Nova Scotia is the decision of the Appeal Division in *Walker v. Keating*,<sup>81</sup> a decision which not only emphasizes the continued existence of review for error of law on the face of the record but which also highlights the continued lack of clarity in the law as to just what constitutes the record for such purposes.

Walker was a teacher employed by the West Hants Municipal School Board. After five years of service he was told that he would not be needed for the 1972-73 school year. Aggrieved by his dismissal, Walker commenced an appeal to an appeal board constituted under the Education Act.<sup>82</sup> His principal contention on appeal was that he was the holder of a 'permanent contract'<sup>83</sup> in terms of the Education Act and could only be dismissed for 'just cause'.<sup>84</sup> To establish his status, Walker relied upon the following provision.<sup>85</sup>

A teacher who has had a contract or contracts with a school board for more than two consecutive years, inclusive of the school year 1971-72, shall be deemed to have had a permanent contract.

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81. (1973). 6 N.S.R. (2d) 1; 42 D.L.R. (3d) 105 (*sub nom. Re Walker and West Hants Municipal School Board*) (S.C., A.D.).

82. R.S.N.S. 1967, c. 81 as am. S.N.S. 1972, c. 29.

83. As defined in s. 76(1) (a) of the Education Act, R.S.N.S. 1967, c. 81 as am. S.N.S. 1972, c. 29.

84. Section 76(5) (b) (1).

85. Section 76(16). Walker's problem was a little more complicated in that he had been dismissed before the amendments to the Education Act had received Royal Assent and was not able to bring himself within the normal twenty day time limit for appeals (s. 76(7)). However, to make it even clearer that the Act was intended to have retroactive effect, s. 76(18) provided:

(18) Notwithstanding subsection (7) hereof, where subsequent to the twenty-ninth day of February, 1972, and prior to the date this Act receives Royal Assent a teacher has had his permanent contract terminated, he may appeal only upon the merits of the case the termination by giving written notice of appeal to the school board within twenty days of the date this Act receives Royal Assent.

Walker received notice of termination of March 22, 1972, and appealed within twenty days of May 15, 1972, the date on which the amendments received Royal Assent.

However, the appeal board refused to accept that Walker could rely on this section, its decision being based on the presumption that legislation does not have retroactive effect. On the application for relief in the nature of *certiorari*, it was argued and accepted by Hart J.<sup>86</sup> and the Appeal Division that this constituted an error of law on the face of the record.<sup>87</sup> Indeed, there is very little doubt that the courts were right and the board wrong on this point. The structure of the legislation makes it abundantly clear that the relevant section was included to clarify the position of those teachers with more than two years' service prior to the passing of the Act.

The real interest of the case lies in three other points.

1. The Appeal Division's conception of what constituted the record.
2. The Appeal Division's reversal of the trial judge's remission of the matter back to a differently-constituted board of appeal.
3. The Appeal Division's treatment of the Board's elaboration of what constituted "just cause".

### *1. The Record*

The most commonly cited exposition of what constitutes the record for the purposes of error of law on the face of the record challenges, and indeed the one used by Cooper J.A. delivering the judgment in *Walker*,<sup>88</sup> is that of Denning L.J. (as he then was) in *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw*<sup>89</sup>:

. . . I think the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them.

However, it seemed as if the common law position had been changed in Nova Scotia by virtue of the 1972 Civil Procedure Rules.<sup>90</sup>

56.07 (1) There shall be endorsed upon an originating notice for an order in the nature of *certiorari* a notice to the following

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86. (1973), 6 N.S.R. (2d) 15; 39 D.L.R. (3d) 63 (S.C., T.D.).

87. (1973), 6 N.S.R. (2d) 1 at 10-11; 42 D.L.R. (3d) 105 at 111-12 (*per* Cooper J.A., delivering the judgment of himself, McKinnon C.J.N.S. and Coffin J.A.).

88. *Id.* at 5; 42 D.L.R. (3d) at 107-08.

89. [1952] 1 K.B. 338 at 352; [1952] 1 All E.R. 122 at 131 (C.A.).

90. These came into force March 1, 1972.

effect, adapted as may be necessary and addressed to the judge, magistrate, justice or justices, officer, clerk or tribunal,

“You are hereby required forthwith after service of this originating notice on you to return to the prothonotary at . . . . ., Nova Scotia, the judgment, order, decision or reasons for judgment, together with the process commencing the proceeding, the evidence and all exhibits filed, if any, and all things touching the proceeding as fully and entirely as they remain in your custody, together with this notice”

(2) All things required by paragraph (1) to be returned to a prothonotary shall, for the purposes of an application for an order in the nature of *certiorari*, be deemed to be part of the record.

On its face, this would seem to indicate that the reasons for the decision as well as the evidence are to be considered part of the record for review purposes, whether specifically incorporated as part of the formal order or not.

In *Walker*, the dissenting member of the appeal board had returned to the Court handwritten notes of evidence that he had taken during the hearing. Not surprisingly it was held that such notes were not included as part of the record under Rule 56.07, principally because the tribunal as a whole had not adopted or agreed upon them as being a true record of the proceedings.<sup>91</sup> However, Cooper J.A. (delivering the judgment of the Court) continued:<sup>92</sup>

I may add that, in any event, I do not think that Rule 56.07(2) was intended to alter the substantive law governing the use of evidence by a Court in *certiorari* proceedings. The principles applicable are that the evidence may only be examined in a search for errors of jurisdiction and not with respect to its sufficiency or weight . . . . If the evidence were examined for sufficiency or weight, the Court would put itself in the position of exercising an appellate rather than a supervisory jurisdiction.

Even allowing for a presumption against the common law being altered by subordinate legislation,<sup>93</sup> it is difficult to agree with this narrow interpretation of the word “record”. Given the confusion that has surrounded the precise nature of the record for the purposes of review for error of law on the face of the record,<sup>94</sup> the most likely

91. (1973), 6 N.S.R. (2d) 1 at 7; 42 D.L.R. (3d) 105 at 109.

92. *Id.*

93. See *Craies on Statute Law*, *supra*, note 40 at 339-40, for examples of where this presumption has been applied.

94. For a good discussion of this problem, see R. F. Reid, *Administrative Law and*

reason for a provision such as Rule 56.07 is to clear away the doubts created by the common law. More specifically, there has been criticism of Denning L.J.'s position in *Shaw* — that whether the evidence and the reasons are part of the record depends on whether the tribunal incorporates them formally in its order. The record, it is argued, should not depend on the whim of the tribunal, particularly in relation to the reasons given for decisions. Thus, Rule 56.07 can be seen as a provision which eliminates an undesirable discretionary power of tribunals and makes the evidence and reasons part of the record in all instances.

In the light of this, the interpretation given to the word “record” by Cooper J.A. would seem to be quite strained in that it in effect confines the record as defined in Rule 56.07 to situations where the challenge is on the basis of jurisdictional error. Where the ground of challenge is non-jurisdictional error of law, the record continues to have its uncertain common law content. Cooper J.A. is also wrong in his justification of the interpretation. When he asserts that evidence can only be looked at for jurisdictional error but not on questions of sufficiency or weight, he is failing to take account of the fact that the evidence may also reveal non-jurisdictional error of law. To quote de Smith:<sup>95</sup>

If the order purports to incorporate all the relevant evidence, error of law will be apparent if there is no evidence in support of a recorded finding of primary fact or in support of any material fact, or if the record shows that inadmissible evidence was admitted or admissible evidence rejected.

To look at the evidence does not necessarily involve one of two alternatives — a legitimate search for jurisdictional error or an illegitimate review of sufficiency or weight. There are other legitimate reasons for looking at such material.

Of course, Cooper J.A.'s general remarks about Rule 56.07 are only *dicta* in that the material in question in this case was clearly outside Rule 56.07 anyway. It is therefore to be hoped that this question will be given further consideration at another time.

## 2. Remission Back to Another Appeal Board

Naturally, the applicant Walker wanted the matter determined

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*Practice* (Toronto: Butterworths, 1971) at Chapter 14, “What is the Record?” (367). See also A. S. Abel, *Materials for Consideration in Certiorari* (1963-64), 15 U. Toronto L.J. 102.

95. *Supra*, note 76 at 360.

properly by an appeal board.<sup>96</sup> It is therefore surprising that he did not seek an order in the nature of *mandamus* to compel an appeal board to hear the matter in accordance with the law in addition to an order in the nature of *certiorari*. This failure did not however trouble either the Trial Court or the Appeal Division, both of which added a new and desirable dimension to the law of *certiorari* by not only quashing the decision but also ordering its remission.<sup>97</sup>

The point at which the two courts disagreed however was whether the power to remit also included the power to remit to a

96. At least this would be the normal assumption. Note, however, the following remarks by one of Walker's counsel:

We sought to question [the decision of the *ad hoc* board] and faced a real problem. As one of the grounds was a failure to observe the rules of natural justice, we had difficulty in deciding whether to ask for certiorari quashing the board's decision per se and correcting it, or for a mandamus requiring the board to rehear the appeal following the rules of natural justice. We opted for certiorari hoping to get a final decision from the trial judge on the matter . . . [However, as a result of the Appeal Division decision remitting the matter back] we ended up in exactly the position we tried to avoid by seeking certiorari, i.e. a rehearing which we thought would be the result of an order in the nature of mandamus.

(W. B. Gillis in "When is a *Mandamus* Available as an Administrative Law Remedy", *supra*, note 3 at 59).

This attitude would however appear to misconceive the nature of *certiorari*. *Certiorari* can only quash. It does not allow the court to make the decision it thinks the appeal body should have made. This would be to transform *certiorari* from a review to an appellate remedy. Therefore, in this situation, even though the appeal board's decision was quashed the original dismissal continues untouched and short of a direct attack on that dismissal, the only appropriate course of action for Walker was to have the matter sent back to the appeal board.

97. There would appear to be no basis for this either in the common law or the new N.S. Code of Civil Procedure. (See de Smith, *supra*, note 76 at 357-58: "The jurisdiction to quash for error of law on the face of the record is not an appellate jurisdiction. Thus, the court cannot vary the inferior tribunal's order unless the defective part is severable so that the remainder can be left intact; nor can it substitute its own order or refer the order back to the inferior tribunal with directions as to the proper application of the law. To this extent review by way of appeal is to be preferred to review by certiorari. But if any applicant seeks not only an order of certiorari to quash but also an order of mandamus to compel the tribunal to rehear and determine the matter according to law, the court may, in granting the application, indicate to the tribunal what are the correct legal principles by which it must guide itself [footnotes omitted]"). Note, however, s. 52(d) of the *Federal Court Act*, S.C. 1970-71-72, c. 1, which gives the Federal Court of Appeal, on an application to review and set aside the decision of a federal statutory decision-maker under s. 28, power to

. . . refer the matter back to the board, commission or other tribunal for determination in accordance with such directions as it considers to be appropriate.

newly-constituted board.<sup>98</sup> The Appeal Division judgment emphasizes the supervisory role of the courts and in effect states that the Court would be exceeding that role if it took the decision-making power away from the original board and directed the formation of a new one, merely because the original board had already made an error of law.<sup>99</sup>

Undoubtedly, what was at the back of Hart J.'s mind in remitting to a new board was that the old board was not really suited to the task because it had already decided the matter in a manner adverse to the applicant. There was no suggestion, however, of any bias on the part of the original board. Of course if this had been argued and a reasonable likelihood of bias established, Hart J. would undoubtedly have been justified in remitting the matter to a new board. However, as a result of the Appeal Division's decision, it is now clear that previous errors of law and an adverse decision in the same matter do not disqualify a board from rehearing the case. Indeed, in the absence of bias, they have a right to do so.

### 3. "Just Cause"

If Walker was a probationary teacher as had been contended by the school board and the appeal board he could have had his contract terminated at the end of any year.<sup>100</sup> However, notwithstanding the finding that he was a probationary employee, the appeal board went on to consider whether there was just cause for his dismissal. From this, the argument could be made that the error of law was immaterial in that the board in fact dealt with him in the alternative as if he had a permanent contract.<sup>101</sup>

However, Cooper J.A. refused to accept this argument. Because one member of the Board had misconceived the applicant's status, he did not really look at the question of "just cause" in its proper statutory context.<sup>102</sup> In other words, Cooper J.A. saw a difference between asking whether there was "just cause" to terminate a

98. Hart J. without discussion had remitted the matter to a new *ad hoc* board: (1973), 6 N.S.R. (2d) 15 at 37; 39 D.L.R. (3d) 63 at 81.

99. (1973), 6 N.S.R. (2d) 1 at 14-15; 42 D.L.R. (3d) 105 at 115.

100. Section 76(5) (a).

101. For an example of a refusal to review on the basis of the immateriality of an error of law, see *R. v. Alberta Oil and Gas Conservation Board, Ex parte Mountain Pacific Pipelines Ltd.* (1965), 55 D.L.R. (2d) 189; 54 W.W.R. 693 (*sub nom. Mountain Pacific Pipelines Ltd. v. Canadian Hydrocarbons Ltd.*) (Alta. S.C. -Chambers).

102. (1973), 6 D.L.R. (2d) 1 at 12-13; 42 D.L.R. (3d) 105 at 113-114.

probationary contract at the end of any particular year and asking whether there was “just cause” to dismiss someone with a permanent contract.<sup>103</sup> This approach parallels that of Macdonald J.A. in a later case where the Court was asked to set aside an arbitration award<sup>104</sup> and the justification for the approach comes through quite strongly in the following extract.<sup>105</sup>

. . . The Board thus did deal with the issue of “reasonable and just cause” but did so as part of their consideration of the issue whether the penalty of discharge was excessive and not within the framework of the real and only issue submitted. There is no way of knowing if the Board would have found the non-existence of reasonable and just cause had they treated the issue properly and not looked at it as a disciplinary matter. Frankfurter, J. in *Rogers v. Helvering*, 320 U.S. 410, 413 (1943) said:

In law also the right answer usually depends on putting the right question.

The other majority member of the board had however clearly considered the matter of “just cause” in the alternative. Given that there was already an error of law finding against one of the majority decisions, the Court did not need to go on and deal with the second majority decision. Nevertheless, Cooper J.A. agreed with the trial judge and held that the other member of the majority had misconceived the legal meaning of “just cause”.<sup>106</sup> Of course, when the question of “just cause” arises the distinction between error of law and error of fact becomes very difficult. Nevertheless, in terms of the other majority decision, a finding that the principal of the school recommended the dismissal of Walker responsibly does not amount in any way to an assessment of whether there was “just cause” for the dismissal.<sup>107</sup>

*Walker v. Keating* is not a very controversial case in the finding of error of law on the face of the record. Whether the statute was retroactive or not was an issue on which the Court was just as, indeed more, competent than the appeal board and, though the issue

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103. Of course, someone on a probationary contract could be let go for any reason, so the question can be asked as to whether the Court’s interpretation of the Chairman’s reasoning process is really accurate.

104. *Canadian General Electric Co. v. Oil, Chemical and Atomic Workers International Union, Local 9-832* (1975), 11 N.S.R. (2d) 550; 56 D.L.R. (3d) 745 (S.C., A.D.).

105. *Id.* at 563-64; 56 D.L.R. (3d) at 754.

106. (1973), 6 D.L.R. 1 at 13; 42 D.L.R. (3d) 105 at 114.

107. See the trial judgment of Hart J.: (1973), 6 N.S.R. (2d) 15 at 36-37; 39 D.L.R. (3d) 63 at 80-81.

of “just cause” is one on which the appeal board decision would be entitled normally to some deference, the majority members of the appeal board in this instance really misconceived the legal significance of the term. However, it is in the relatively minor issues that the decision will have an impact beyond its facts. The holding that the “record” as defined in Rule 56.07 does not constitute the record for error of law on the face of the record review leaves this area of the law in an unfortunate state. However, this is to be contrasted with the new flexibility that the Appeal Division attributed to *certiorari*, a flexibility which allows *certiorari* to fill some of the role occupied traditionally by *mandamus*.

#### V. Natural Justice

In the last two or three years, the Nova Scotia courts have encountered quite a number of cases raising natural justice issues. Indeed, the arguments made have virtually run the whole gamut of the natural justice spectrum. There have been two fascinating decisions involving allegations of bias — *Tomco v. Nova Scotia Labour Relations Board*<sup>108</sup> and *Hawkins v. Halifax County Residential Tenancies Board*.<sup>109</sup> However, I will not be dealing with this aspect of these two cases here in the light of Brian Flemming’s discussion of them in his paper “Bias in a Modern Context” delivered at the “Current Issues in Administrative Law” Conference.<sup>110</sup>

#### 1. Cluney<sup>111</sup>

The first case that I wish to touch upon is however one which raises the basic issue of remedial relief for failure to hold a hearing. Raymond Cluney had his driver’s licence suspended by the Registrar of Motor Vehicles under s. 251(1) (d) of the Motor Vehicle Act.<sup>112</sup> The basis for the suspension was that he was

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108. (1974), 9 N.S.R. (2d) 277 (S.C., A.D.). This case was dealt with at first instance by the Appeal Division having been reserved for its decision by Cowan C.J.T.D. On appeal to the Supreme Court of Canada, Laskin C.J.C., delivering the decision of the Court, found “the allegation [of bias] to be without substance”. (See (1975), 7 N.R. 317 at 330).

109. (1974), 47 D.L.R. (3d) 117 (N.S.S.C., T.D.).

110. *Supra*, note 3.

111. *Cluney v. Registrar of Motor Vehicles* (1975), 11 N.S.R. (2d) 247; 53 D.L.R. (3d) 468 (S.C., A.D.), *rev’g* (1974), 11 N.S.R. (2d) 256 (S.C., T.D.).

112. R.S.N.S. 1967, c. 191.

. . . an habitual, reckless or negligent driver of a motor vehicle  
. . .

However, while s. 251(1) gives the power of immediate suspension to the Registrar, there is a protection to the affected person afforded by subs. (2):

- (2) Whenever the Registrar suspends the license or the privilege of obtaining a license of any person for any reason set forth in sub-section (1), he shall immediately notify the licensee and afford him an opportunity of a hearing or of offering an explanation and upon such hearing or explanation the Registrar shall either rescind his order of suspension or, good cause appearing therefor, may suspend the license or the privilege of obtaining a license of such person for a further period or revoke said license.

Cluney was notified by the Registrar as required by the subsection and exercised his right to apply for a hearing. The hearing which then took place was an interview, not with the Registrar but with an Inspector Nicholson of the Nova Scotia Registry of Motor Vehicles. At that interview Cluney endeavoured to put his case for the removal of the suspension but Inspector Nicholson was adamant and confirmed the order made by the Registrar. A form to that effect was prepared but gave no indication of having been seen by the Registrar.

Discontented with the treatment which he had received, Cluney commenced proceedings in the Supreme Court for an order in the nature of *certiorari*. Having regard to the express wording of the section providing for an after the event hearing, there seemed little reason to suspect that Cluney was seeking the correct remedy. Indeed, Morrison J., the trial judge, had little difficulty in finding that the Registrar acting under s. 251(2) was exercising a *quasi*-judicial function,<sup>113</sup> the traditional requirement for the prerogative remedy of *certiorari*. He then, however, proceeded to treat Atkin L.J.'s famous *dictum* in the *Electricity Commissioners* case<sup>114</sup> as if it were a statute and held that the suspension of a driver's licence was not something "affecting the rights of subjects".<sup>115</sup>

113. (1974), 11 N.S.R. (2d) 256 at 257.

114. "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in their writs [of *certiorari* and prohibition]", *per* Atkin L.J. (as he then was) in *R. v. Electricity Commissioners, Ex parte London Electricity Joint Committee*, [1924] 1 K.B. 171 at 205 (C.A.).

115. (1974), 11 N.S.R. (2d) 256 at 258.

I conclude from this, that operating a motor vehicle on the highway in Nova Scotia is a privilege extended by the Province and not a right.<sup>116</sup>

Thus, for Morrison J., Cluney did not even have any entitlement to proceed to argue the merits of his case. He had sought the inappropriate remedy.

In so far as the authority to drive a motor vehicle on the roads of Nova Scotia depends on the discretion of the state, there is of course no doubt that that authority is a privilege in Hohfeldian terms.<sup>117</sup> Moreover, there has recently been a resurrection by the Supreme Court of Canada of the “rights” test for the implication of the duty to give a hearing and the availability of *certiorari*-type review when the statute is silent,<sup>118</sup> despite other courts’ movement away from such a test.<sup>119</sup> However, this use of the “rights” test has not been in contexts where the statute expressly provides for a hearing.

Accordingly, it comes as no surprise at all to learn that the Appeal Division had no difficulty in reversing Morrison J. on the point, finding that the express provision in the Act for a hearing was itself sufficient to make *certiorari* available.<sup>120</sup> Indeed, the matter had already been determined contrary to Morrison J.’s approach in a Manitoba Queen’s Bench decision. Freedman J. (as he then was) had stated in *Re Watt and the Registrar of Motor Vehicles*:<sup>121</sup>

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116. *Id.*

117. Not only does s. 251(2) use the word “privilege”, but, more importantly, s. 60(1) provides:

The Department with approval of the Minister may refuse to issue a driver’s license or a beginner’s license to any person.

Of course, once issued, the licence might be seen as a right that cannot be removed unless certain facts exist.

118. See *e.g.*, *R. v. Mitchell* (1975), 6 N.R. 389 (S.C.C.) and *Prata v. Minister of Manpower and Immigration* (1974), 52 D.L.R. (3d) 383; 3 N.R. 484 (S.C.C.) where parole and the ability of non-Canadians to remain in Canada are described as privileges.

119. See *e.g. Lazarov v. Secretary of State of Canada*, [1973] F.C. 827; 39 D.L.R. (3d) 738 (C.A.) (right to natural justice in citizenship application). Note however that in *Tomco v. N.S. Labour Relations Board* (1974), 9 N.S.R. (2d) 277 at 301 (discussed *infra*), MacKeigan C.J.N.S. was careful to characterize a cease and desist order issued by the Nova Scotia Labour Relations Board as a decision affecting Tomco’s rights.

120. (1975), 11 N.S.R. (2d), 247 at 253; 53 D.L.R. (3d) 468 at 473.

121. (1957), 13 D.L.R. (2d) 124 at 128; 24 W.W.R. 371 at 375; 27 C.R. 401 at 405 (Man. Q.B.). Note however s. 18(3) of the Manitoba Highway Traffic Act, R.S.M. 1954, c. 112, which seemingly gave the Minister of Highways a discretion with respect to the award of licences.

There is no doubt whatever that the Registrar of Motor Vehicles in deciding to cancel or suspend the driving licence of a person under s. 134 is determining a question affecting the right of a subject.

Morrison J. had cited but ultimately ignored this statement.<sup>122</sup> Not so the Appeal Division.<sup>123</sup>

Despite his ruling on the unavailability of the remedy being sought, Morrison J. went on and dealt briefly with the allegations of breach of the rules of natural justice. His cursory opinion was that no breaches had occurred.<sup>124</sup> Here too the Appeal Division had little difficulty in disagreeing. They found that s. 251(2), by necessary implication, required the decision to be taken by the Registrar and, in the absence of any express provision in the statute, implied the normal presumption that judicial or *quasi*-judicial functions cannot be delegated.<sup>125</sup> Indeed, the absence of any evidence of any consideration of the appeal by the Registrar did not even leave open the argument that he could delegate the hearing process provided he took the ultimate decision himself.<sup>126</sup> Whether this would have saved the decision if everything else had been satisfactory is not all that clear from the judgment of the Appeal Division. However a statement that “[t]he Registrar should now . . . hold a hearing” would seem to indicate that the Court intended that Cluney had a right to personal audience before the Registrar.<sup>127</sup>

As well as the wrongful delegation ground, the Appeal Division also found another breach of the rules of natural justice. According to the Court not only the affidavit of Cluney but also Inspector Nicholson’s record of the inquiry indicated that he had not approached his task with the proper frame of mind.<sup>128</sup> His attitude was one of trying to ascertain ways to improve the applicant’s driving habits rather than considering whether Cluney had any basis for his arguments that the suspension had been unjustly imposed.

## 2. *Re Otis*

All in all, *Cluney* was a clear case of reviewable breach of the

122. (1974), 11 N.S.R. (2d) 256 at 257.

123. (1975), 11 N.S.R. (2d) 247 at 253; 53 D.L.R. (3d) 468 at 473.

124. (1974), 11 N.S.R. (2d) 256 at 259.

125. (1975), 11 N.S.R. (2d) 247 at 254-55; 53 D.L.R. (3d) 468 at 475.

126. See e.g. *Tomco v. Nova Scotia Labour Relations Board* (1974), 9 N.S.R. (2d) 277 (S.C., A.D.), *aff’d* (1975), 7 N.R. 317 (S.C.C.), discussed *infra*.

127. (1975), 11 N.S.R. (2d) 247 at 255; 53 D.L.R. (3d) 468 at 475-76.

128. *Id.* at 254; 53 D.L.R. (3d) at 474.

rules of natural justice and the kind of case that you would normally expect to be resolved satisfactorily at the Trial Division level. However, not all the applicants for relief in the period under review had quite the same merit in their claim as Cluney. In *Otis Elevator Co. v. International Union of Elevator Constructors, Local 125*,<sup>129</sup> the Appeal Division rightly rejected an argument which would have had the effect of making it a breach of the rules of natural justice to make a wrong decision.<sup>130</sup> Natural justice as it is perceived in judicial review proceedings has never been a device with which to attack the merits of a decision. It has remained a source of procedural protection and given the scope afforded by other grounds of review for attacking the merits albeit indirectly, it should remain a procedural doctrine.

### 3. *Canada Automatic Sprinkler Association*

Of considerably more merit but equally doomed to failure from a precedent point of view was the argument that it was a breach of the rules of natural justice for the Nova Scotia Labour Relations Board not to give reasons for its decisions. In *Canada Automatic Sprinkler Association v. Labour Relations Board*,<sup>131</sup> Cowan C.J. T.D. held that the Board was not in breach of the rules of natural justice either in failing to give reasons for declaring a third party as an “interested party” at a certification hearing or in failing to give reasons for a previous decision which affected the proceedings presently before the Board. Though it has often been suggested and, indeed, is now statutorily provided in Ontario,<sup>132</sup> that a failure to give reasons should constitute reviewable procedural error, the weight of authority is clearly the other way.<sup>133</sup> The arguments of

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129. (1973), 5 N.S.R. (2d) 437; 36 D.L.R. (3d) 402 (*sub nom. Re Otis Elevator Co. and International Union of Elevator Constructors, Local 125*) (S.C., A.D.).

130. *Id.* at 450-51; 36 D.L.R. (3d) at 411.

131. (1974), 14 N.S.R. (2d) 36 at 62 (S.C., T.D.).

132. Under s. 17 of *The Statutory Powers Procedure Act*, S.O. 1971, c. 47, it is provided, with respect to tribunals coming within the ambit of that Act, that

. . . [a] tribunal shall give its final decision and order, if any, in any proceedings in writing and shall give reasons in writing therefor if requested by a party.

See *Re Di Nardo and Liquor Licence Board of Ontario* (1974), 5 O.R. (2d) 124 (Ont. H.C.) for a finding of inadequate reasons under s. 17.

133. See e.g. *Lazar v. Association of Professional Engineers of Manitoba*, [1971] 5 W.W.R. 614 (Man. Q.B.); *Re Gill Lumber Chipman (1973) Ltd. and United Brotherhood of Carpenters and Joiners of America, Local Union 2142* (1973), 7 N.B.R. (2d) 41; 42 D.L.R. (3d) 271 (C.A.).

course are that it is a valuable discipline for tribunals to have to go through the motions of delivering reasons and that affected persons after presenting a carefully argued case should be entitled to know how the tribunal disposed of their arguments. Contrary to this and in support of the present common law position are arguments such as: writing decisions is wasteful of administrative resources; the courts do not have to give reasons; giving reasons leads to greater review. (On this last point, and by way of digression, one presumes that after *Schwartz* particularly, the Nova Scotia Labour Relations Board may be even more reticent about giving reasons than it was previously). Another argument is that a requirement to give reasons can be met easily by simply reciting the facts and the conclusion reached, and therefore to require reasons is not worth the effort. In this respect it is significant that the as yet unproclaimed Nova Scotia Criminal Injuries Compensation Act<sup>134</sup> not only requires reasons to be given by the tribunal but also attempts to spell out what those reasons should contain in the same vein as an earlier version of the Ontario Statutory Powers Procedure Act.<sup>135</sup>

#### 4. *Tomco*

Cowan C.J.T.D. in the *Automatic Sprinkler Association* case also exhibited concern for the smooth functioning of the administrative process at another point when he held that it was no breach of the rules of natural justice to refuse a request for an adjournment to enable better preparation when notice of the hearing had been given well in advance.<sup>136</sup> Indeed, this concern also characterized another decision involving the province's labour relations process. *Tomco v. N.S. Labour Relations Board*<sup>137</sup> involved not only an allegation of bias against the Construction Industry Panel of the Nova Scotia Labour Relations Board but also an allegation that the Panel had prevented a fair hearing by failing to give sufficient notice before

134. S.N.S. 1975, c. 8. See s. 18.

135. Section 18 defines reasons to include

- . . . (a) any agreed findings of facts;
- (b) the findings of fact on the evidence; and
- (c) the conclusions of law based on the findings mentioned in clauses (a) and (b).

This is the same as s. 14(2) of Bill 130, 2d Session, 28th Legislature, Ontario, 1968-69.

136. (1974), 14 N.S.R. (2d) 36 at 67-71.

137. (1974), 9 N.S.R. (2d) 277 (S.C., A.D.); *aff'd* (1975), 7 N.R. 317 (S.C.C.).

making a cease and desist order against the plaintiff, Tomco, and his Union.

As in *Cluney*, the relevant legislation seemed to indicate that a hearing should be given before an order was made. Section 49(2) of the Trade Union Act<sup>138</sup> provided for the making of an *interim* order and s. 15(9) provided:

The Board shall determine its own procedure, but shall, subject to subsection (1), in every case give an opportunity to all interested parties to present evidence and make representation.

It was argued but quickly rejected by the Appeal Division that subs. 10 precluded the application of subs. (9) to s. 49(2).<sup>139</sup> According to subs. 10, the Board at the discretion of the Chairman could deal with a s. 49 matter

. . . by each member conferring separately with the Chief Executive Officer and each deciding the matter.

This exemption from actually convening as a Board was according to the Court without effect on the basic principles of natural justice enshrined in subs. (9).<sup>140</sup>

MacKeigan C.J.N.S. then went on to consider the rules of natural justice as they related to this decision-making process and the basis for his decision that the rules had not been broken in the case can be found in his peroration, a peroration which emphasizes the flexibility and variation of the principles of natural justice as they apply to various forms of tribunal decision-making.<sup>141</sup>

The rule is “that the parties be given adequate opportunity to be heard”. . . This does not mean that the matter has to be treated like a trial *inter partes*, which it is not, or that “adequate notice”

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138. S.N.S. 1972, c. 19.

139. (1974), 9 N.S.R. (2d) 277 at 300.

140. *Id.* Note, however, that Laskin C.J.C. delivering the judgment of the Supreme Court of Canada took a different view on this issue. He held that s. 49(2), when it provided that the Board may make an *interim* order after an investigation “*notwithstanding any provision of this Act*” [emphasis added], excludes reliance on s. 15(9) and the right to a hearing established thereunder. See (1975), 7 N.R. 317 at 331-32. To support this argument he pointed to the after the event hearing provided for in s. 49(4) (*id.* at 331). However, as I read the judgment, he did not exclude completely the possibility of arguing for certain procedural protections before a s. 49(2) order is made. This seems implicit in his separate finding that Tomco could not complain about the fairness of the investigation since he was fully aware of what was involved and had been given an opportunity to put his case to the Chief Executive Officer (*id.* at 329 and 332).

141. *Id.* at 301. See also Laskin C.J.C.’s judgment: 7 N.R. at 332. Laskin C.J.C. emphasised the emergency nature of the situation as well as the statutory context.

requires that all evidence be given or related to a person under investigation, or that the hearing be other than an invitation to talk, or that the “hearing” or the investigation referred to in S. 49 (1) has to be conducted by the Panel members personally. Section 15(10) contemplates that the Chief Executive Officer will conduct the investigation, advise the members of the results and co-ordinate their separate decisions. The basic question is whether the plaintiff was in fact fairly treated, having regard to the nature of the legislation and the facts of the particular case.

Basically, what the Chief Executive Officer had done in this case was to collect the facts after he had received a complaint, telephone the plaintiff and put those facts to him. The facts were not denied by the plaintiff who indicated an unwillingness as business agent of the union to order his men to stop picketing the complainant’s plant and to return to work. Indeed, this was a process with which the plaintiff was familiar from past experience and, which according to the Chief Executive Officer, was the usual practice in such cases. After completing his investigation the Chief Executive Officer contacted the three members of the panel, reported the situation, and received instructions to issue the order.

According to the Court, this procedure was quite adequate in the circumstances. Tomco knew “what it was all about”<sup>142</sup> and he had not raised any questions. If he had, and the Chief Executive Officer had refused to consider his representations, the position may have been different. The approach of the Court in this situation is quite obviously one which indicates a most desirable sensitivity to the legislative scheme as well as to the legitimate interests of the labour relations process. As well, from a more general point of view, it demonstrates the great range of decision-making processes encompassed by the principles of natural justice and fair hearings. As the Court emphasizes, in quoting de Smith,<sup>142a</sup> the absence of a formal hearing should not be fatal in a case such as this, particularly when the affected person is fully aware of the situation.

### 5. *Centennial Properties*

A desire not to make the rules of natural justice a millstone around the necks of tribunals can also be seen in the judgment of Jones J. in *Centennial Properties Ltd. v. Public Service*

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142. *Id.* at 303. See also 7 N.R. at 329.

142a. *Id.* at 303.

*Commission*.<sup>143</sup> This case concerned an arbitration award under which the applicants were ordered to transfer a water system to the City of Halifax for a nominal sum. During the course of its decision the arbitration board referred to engineering plans which were not put in as evidence at the hearing. However, the plans were referred to in the relevant agreement between the City and Centennial Properties, which of course was admitted in evidence. In a most sensible decision Jones J. ruled that the board could not be faulted for obtaining the plans, which were vital to the interpretation of the agreement, from the City rather than the parties to the agreement, particularly as the City was not a party to the arbitration and as there was no question raised as to the accuracy of the plans.<sup>144</sup> It was simply not a case of covertly taking evidence behind the parties' backs in circumstances where they had no chance to reply. Indeed, as in *R. v. Schiff, Ex parte Trustees of Ottawa Civic Hospital*,<sup>145</sup> an Ontario authority cited by Jones J.,<sup>146</sup> the evidence was a publicly available document known to both parties.

#### 6. *Re Busche*

In *Re Busche*<sup>147</sup> the court was confronted with an issue somewhat similar to that raised in *Tomco* but, because of the different factual context, decided in favour of the applicant and awarded relief in the nature of *certiorari*.

Busche was a school teacher who had written letters in the local press disagreeing with certain policies of the Nova Scotia Teachers' Union. This Union was given statutory recognition by the Teaching Profession Act<sup>148</sup> and, under s. 11 of that statute, the Professional Committee of the Union has certain disciplinary powers with respect to matters referred to it by a Local of the Union or the Union Executive.

The Executive, upset by the Busche criticisms, decided to refer the matter to the Professional Committee and Ms. Busche was informed that the Professional Committee would be considering a

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143. S.H. 05876. Judgment delivered April 1, 1975. As yet unreported.

144. See Reasons for Judgment at 11-12.

145. [1970] 3 O.R. 476; 13 D.L.R. (3d) 304 (C.A.).

146. See Reasons for Judgment at 12.

147. S.H. 06332. Judgment of Cowan C.J.T.D. delivered April 23, 1975. As yet unreported.

148. S.N.S. 1968, c. 109, as am. S.N.S. 1972, c. 131 and S.N.S. 1974, c. 127.

charge that she had breached the NSTU Code of Ethics.<sup>149</sup> No details were specified in this communication with Ms. Busche but subsequently she was informed in writing by the President that she was being charged with offences under two provisions in the Code — first, making defamatory or other disparaging remarks concerning another teacher and, secondly, taking individual action in a matter that should be dealt with by the NSTU. Seven days after this letter was written the hearings commenced and ultimately resulted in the Committee recommending that Ms. Busche be reprimanded in appropriate terms.

A number of issues were raised before Cowan C.J.T.D. in the Trial Division of the Supreme Court. The first argument, and one accepted by the Court, was that under s. 11 the Committee was given jurisdiction not over breaches of the Code of Ethics but rather over whether the accused was guilty of conduct unbecoming a teacher.<sup>150</sup> Secondly, it was argued that the details of the charge in the first communication were not sufficient notice in writing as required by s. 11(2) of the Act and once again the Court was prepared to accede to this argument.<sup>151</sup> Thirdly, it was argued that the mandatory thirty day notice provision prevented the defects of the first communication being cured. This also was accepted by the Court.<sup>152</sup> Finally, the Court agreed that even the second communication was not sufficient notice at least in that it did not name the teachers allegedly defamed or disparaged.<sup>153</sup> Indeed these names were not even given at the hearing.

It is of course possible to give the facts a reading more favourable to the Committee and the NSTU than did the Court. It could, for instance, be argued that a charge of breach of the Code of Ethics is tantamount to a charge of conduct unbecoming a teacher and that

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149. Under s. 10(1) (d) of the Act, the Council of the NSTU is given power to make by-laws dealing with discipline, subject to approval by the Governor in Council (subs. 3). However, the Code of Ethics was not brought about by this process.

150. See Reasons for Judgment at 17.

151. *Id.* at 17-18.

152. *Id.*

153. *Id.* It is also worth noting that Cowan C.J.T.D. would have been prepared to review the Professional Committee's decision on the basis of "no evidence" to support a finding of any breach of the Code of Ethics (See 19-21). He also rejected an argument that relief should be refused as a matter of discretion. He regarded the sanction, that of reprimand, "a serious matter" and felt that it was important that the remedy be granted so that the "name and reputation of the applicant should be cleared" (at 21).

the courts in dealing with tribunals such as this should not be too concerned with the niceties of the language in which the charge is framed. Similarly, it could be argued that, à la *Tomco*, Ms. Busche knew what it was all about. After all there had been previous correspondence between her and the NSTU and the original letter, while not precisely identifying the provisions of the Code of Ethics allegedly breached, at least identified the charges as stemming from the letters written to the local press. Also, while the charge when formulated more precisely did not name the teachers allegedly defamed or disparaged, it could be argued that it must have been abundantly clear to Ms. Busche in the circumstances that the teachers in question were the ones she had criticized in her letters.

Why the Court chose to go the way it did rather than espouse the *Tomco*-type approach is apparent in the following extract from Cowan C.J.T.D.'s judgment. Referring to the first letter to Ms. Busche, he stated<sup>154</sup>:

I find that the notice was deficient, in that it did not give notice of the charge, since it gave no particulars of any kind as to the section of the Code of Ethics alleged to have been broken by the applicant, and no particulars of the conduct of the applicant said to be a breach of any particular provision of the Code. By analogy, it would be patently absurd to consider that a charge in a criminal matter merely alleging that the accused had committed a breach of the Criminal Code of Canada, would constitute notice to the accused of the offence with which he is charged.

This analogy to the *Criminal Code* is instructive in that it shows the Chief Justice's attitude being influenced because of the *quasi*-criminal nature of this hearing. This, of course, becomes more acute when the possible range of sanctions under s. 11 are examined — as well as reprimands, it provides for expulsion or suspension from the union and recommendations to the Minister of Education.<sup>155</sup> Quite obviously the decision of the Committee could have a potentially serious impact on the teaching future of the accused. Of course, it could be argued that the sanction in *Tomco* was equally serious but at least the informality countenanced by the Appeal Division in that case had specific legislative sanction and was in response to situations which could be extremely urgent. Moreover, there was provision in *Tomco* for a further after the event

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154. *Id.* at 17-18.

155. See subs. 3.

hearing.<sup>156</sup> The legislation in issue in *Busche* gave no such indications of informality. Furthermore, and of crucial significance, is the fact that Tomco knew what was up in a much more precise way than Busche. Certainly, Busche knew of the general circumstances giving rise to the reference to the Committee but, in terms of how the NSTU planned to relate those general circumstances to the specifics of the Code of Ethics, she could but guess at which of the provisions of that Code were to be invoked against her. Accordingly, her knowledge lacked the precision necessary to enable her to consider and prepare any defences. Finally, given that a provision for thirty days' notice was presumably included for the very purpose of enabling a defence to be prepared, it is hardly surprising that the Court held the provision to be mandatory and the subsequent supply of information not to be curative. Indeed, the only possible criticism that might be made is that the Court was perhaps a little harsh in criticizing the lack of specificity of the second notice. If this had been provided thirty days in advance, the argument that Busche knew what was up assumes much more force.<sup>157</sup> Nevertheless, even on this point, the Committee indicated a certain lack of good judgment in even refusing to name the allegedly defamed or disparaged teachers at the hearing.

### 7. *N.S. Forest Industries*

A natural justice issue of a somewhat different kind was also raised in the *N.S. Forest Industries* case,<sup>158</sup> already discussed from a different perspective. In the course of his judgment, concurred in by Macdonald J.A., Coffin J.A. considered the argument that there was a breach of the natural justice rules in that the company "was never given any opportunity to deal with the totality of its position"<sup>159</sup> at the certification hearings. Of particular concern was the Board's indication that it would obtain certain evidence from both applicants and compare membership lists supplied by the applicants with production lists provided by the five major

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156. See s. 49(4) of the Trade Union Act, S.N.S. 1972, c. 19. This was adverted to in the Judgment of Laskin C.J.C. in the Supreme Court of Canada (7 N.R. at 331).

157. In fact, it was posted only seven days before the hearing.

158. (1975), 12 N.S.R. (2d) 91; 61 D.L.R. (3d) 97 (S.C., A.D.).

159. *Id.* at 98; 61 D.L.R. (3d) at 117.

160. *Id.* at 105; 61 D.L.R. (3d) at 111.

pulpwood buyers.<sup>160</sup> According to the company, this assurance induced it not to supply that information itself with the result that the subsequent breach of this assurance gave rise to a breach of the rules of natural justice.

In dealing with this problem, Coffin J.A. considered cases where the courts had reviewed for breach of the rules of natural justice because of the tribunal not living up to assurances made to the parties<sup>161</sup> but then concluded quite ambiguously<sup>162</sup>

That is not quite the situation here and I would not decide the question on this point alone. . .

However, Coffin J.A. then decided that this argument in conjunction with the argument that the Board had not complied with its own rules and procedures had led to breach of the rules of natural justice.<sup>163</sup> Because there were many other things wrong with the actions of the Board in the *N.S. Forest Industries* case it is hard to fault the Court for skimming this problem superficially. Nevertheless, given the Board's assurance, the breach of the rules of natural justice argument is in fact hard to resist. The Board, by those assurances, prevented the company from presenting all the evidence that it would have normally. Because of this, the only argument that the breach of the assurance would not be a breach of the rules of natural justice would be if the evidence in question was not relevant to the inquiry, a finding that was not made in this case.

#### 8. *Hall v. Administrator of Family and Child Welfare*

I have left to last the only case with which I really have any serious quarrel. This is the decision of the Nova Scotia Supreme Court — Appeal Division in *Hall v. Administrator of Family and*

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161. *Id.* at 104-06; 61 D.L.R. (3d) at 116-18. The cases relied on were *Shareef v. Commissioner for Registration of Indian and Pakistani Residents*, [1965] 3 W.L.R. 704 (P.C.) (Ceylon) and *R. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association*, [1972] 2 Q.B. 299; [1972] 2 All E.R. 589 (C.A.). Interestingly enough, Coffin J. A. cites, with apparent approval, Lord Denning M.R.'s judgment in the *Liverpool Corporation* case, that procedural fairness was required and prohibition could issue, even though an administrative rather than a judicial or quasi-judicial function was in issue. This represents quite a divergence from conventional Canadian wisdom in this area though it was probably not necessary for the edcision in this case. See my article, *Fairness: The New Natural Justice* (1975), 25 U. Toronto L.J. 281 for a discussion of this issue. This is an expanded version of a paper which I delivered at the "Current Issues in Administrative Law Conference" (*supra*, note 2 at 1).

162. *Id.* at 107-08; 61 D.L.R. (3d) at 119.

163. *Id.* at 114; 61 D.L.R. (3d) at 124.

*Child Welfare*.<sup>164</sup> In fact it is not a case in which questions of natural justice are raised directly at all. However, the effect of the Appeal Division's decision was to deny to the applicant for relief the benefit of a right to a hearing, a right which seemed clearly established by statute.

The relevant facts are succinctly stated by Cooper J.A. delivering the judgment of the Court.<sup>165</sup>

The respondent made application by originating Notice (application inter partes) for an order in the nature of *mandamus* requiring the appellant in his capacity as Administrator of Family and Child Welfare for the province of Nova Scotia . . . to reveal information concerning the adoption of her child and particularly the date of the adoption and the court in which the adoption had taken place. The respondent sought this information to enable her to launch an appeal from the adoption order under S.13(1) of the *Adoption Act*, R.S.N.S., 1967, c. 2, which reads:

- (1) A person aggrieved by an order of a county court or a judge thereof made under this Act may appeal therefrom to the Supreme Court in like manner as appeals may be taken from other judgments or orders of the county court.

The Appeal Division's response to this situation was to reverse the trial judge's award of relief in the nature of *mandamus* in very short order. Nowhere in any statute was the Administrator obliged expressly to reveal the information requested by the applicant in her application for relief in the nature of *mandamus*.<sup>166</sup> This led the Court, after emphasizing the extraordinary nature of the relief sought<sup>167</sup> ( a real bootstraps argument), to hold that the remedy could only be granted if there was a clear legal duty imposed on the Administrator and owed to the applicant. Never was the remedy to be awarded in doubtful cases<sup>168</sup> and, given the absence of an imperative duty in either the Child Welfare Act<sup>169</sup> or the Adoption Act,<sup>170</sup> the applicant had to fail.<sup>171</sup>

If there was ever a case of the mysteries of the prerogative remedies defeating the substance of a claim, this could be it.

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164. (1974), 9 N.S.R. (2d) 677; 52 D.L.R. (3d) 237 (*sub nom. Re Hall and Johnson*) (S.C., A.D.).

165. *Id.* at 678; 52 D.L.R. (3d) at 238.

166. *Id.* at 681; 52 D.L.R. (3d) at 240.

167. *Id.* at 680; 52 D.L.R. (3d) at 239.

168. *Id.* at 680; 52 D.L.R. (3d) at 240.

169. R.S.N.S. 1967, c. 31.

170. R.S.N.S. 1967, c. 2.

171. (1974), 9 N.S.R. (2d) 677 at 681; 52 D.L.R. (3d) 237 at 240-41.

However, I prefer to see this case for what it really is — a clear example of the judges failing to deal properly with the prerogative remedies. Despite what the Court says, the applicant's contention that there was a legal duty to reveal the information sought would seem to arise by clear and necessary implication.<sup>172</sup> The Administrator was the only person possessed of all the relevant information, information without which the right of appeal conferred on the applicant by the Adoption Act was completely nullified. The rhetorical question scarcely bears asking but, in view of the Court's attitude, asked it must be. Why would the legislature go to the trouble of creating a right of appeal if that right of appeal could be nullified effectively by a departmental policy of non-revelation? Perhaps the policy has some sound sociological basis but it simply should not be able to be used to frustrate obvious legislative policy. Necessary implication of a duty is not unknown to the prerogative remedy of *mandamus*<sup>173</sup> and the Court's assertion that the argument for an "implied duty of disclosure" is "not sufficient"<sup>174</sup> is a totally inadequate response in the circumstances.

Fortunately in the recent development of the law relating to the rules of natural justice in this province, *Hall v. Administrator of Family and Child Welfare* stands as a remarkable exception to what have otherwise been generally sensitive decisions, demonstrating adequate concern with balancing the affected individuals' demands for fair procedures against the competing demands of the administrative process for flexibility of action unhampered by the trappings of court-like procedures.

## VI. Conclusion

My purpose in this article has been to survey some recent decisions in the Administrative Law area in Nova Scotia. For the most part I have avoided discussion of decisions written about elsewhere. However, even allowing for that, there has been a certain amount of subjective preference in the cases chosen. There has in fact been much activity on other fronts not discussed here or elsewhere — the validity of

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172. The trial judge Hart J. had no trouble with this notion. See 9 N.S.R. (2d) 682; 45 D.L.R. (3d) 757.

173. For example, it seems accepted that *mandamus* is available to compel a tribunal to adhere to a duty to give a hearing implied from a statute. See de Smith *supra*, note 76 at 209-10. See *e.g. R. v. Kent Police Authority, Ex parte Godden*, [1971] 2 Q.B. 662; [1971] 3 All E.R. 20 (C.A.).

174. (1974), 9 N.S.R. (2d) 677 at 681; 52 D.L.R. (3d) 237 at 240.

by-laws, zoning<sup>175</sup> and otherwise,<sup>176</sup> further cases on the availability of *mandamus* to compel the issue of building permits,<sup>177</sup> the status of actions against the Crown in this province,<sup>178</sup> the reviewability of arbitration awards,<sup>179</sup> the validity of regulations,<sup>180</sup> *locus standi*,<sup>181</sup> the constitutionality of a tribunal under the BNA Act<sup>182</sup> and the scope of statutory rights of appeal.<sup>183</sup>

175. *Lacewood Development Ltd. v. City of Halifax* (1975), 12 N.S.R. (2d) 692; 58 D.L.R. (3d) 383 (S.C., A.D.); *Hollett and Hollett v. City of Halifax* (1975), 13 N.S.R. (2d) 403 (S.C., A.D.); *City of Halifax v. Provincial Planning Appeal Board*, S.H. 06648, judgment delivered: May 26, 1975, as yet unreported (S.C., T.D.). See also *Brodie v. City of Halifax* (No. 2) (1974), 9 N.S.R. (2d) 415 (S.C., A.D.).

176. *Boutillier v. Cape Breton Development Corporation* (1972), 34 D.L.R. (3d) 374 (N.S.S.C., T.D.); *Coastal Insurance Ltd. v. Town of Wolfville* (1973), 13 N.S.R. (2d) 254; 40 D.L.R. (3d) 745 (S.C., T.D.).

177. *Country View Ltd. v. City of Dartmouth* (1974), 8 N.S.R. (2d) 1 (S.C., A.D.), *leave to appeal refused* 10 N.S.R. (2d) 546 (S.C.C.); *Country View Ltd. v. City of Dartmouth* (No. 2) (1974), 10 N.S.R. (2d) 361 (actually both these cases involved applications for a declaration of entitlement to a building permit rather than *mandamus*); *Chater v. City of Dartmouth*, S.H. 05346, judgment delivered: January 3, 1975, as yet unreported (S.C., T.D.). Note also that the Supreme Court of Canada has dismissed an appeal from the decision in *Dalhousie University v. City of Halifax* (1974), 9 N.S.R. (2d) 643; 53 D.L.R. (3d) 610, discussed by George Cooper in "Mandamus and Building Permits", *supra*, note 3. (Appeal dismissed without reasons, February 27, 1976).

178. *Braeside Farms Ltd. v. Nova Scotia Farm Loan Board* (1973), 5 N.S.R. (2d) 685; 42 D.L.R. (3d) 480 (S.C., A.D.); *McNeil v. Nova Scotia Board of Censors* (1975), 12 N.S.R. (2d) 85; 5 N.R. 43 (S.C.C.), *aff g* (1974), 9 N.S.R. (2d) 483; 53 D.L.R. (3d) 259 (*sub nom. MacNeil v. Nova Scotia Board of Censors*) (S.C., A.D.), *aff g* (1974), 9 N.S.R. (2d) 506; 46 D.L.R. (3d) 259 (*sub nom. MacNeil v. Nova Scotia Board of Censors*) (S.C., T.D.).

179. See cases listed in note 80, *supra*.

180. *International Union of Operating Engineers, Local No. 968 v. Labour Relations Board* (1973), 14 N.S.R. (2d) 271; 43 D.L.R. (3d) 402 (*sub nom. Re International Union of Operating Engineers, Local No. 968 and Michelin Tires Manufacturing Co. of Canada*) (S.C., T.D.).

181. *McNeil v. Nova Scotia Board of Censors* (1975), 12 N.S.R. (2d) 85; 5 N.R. 43 (S.C.C.), *aff g* (1974), 9 N.S.R. (2d) 483; 53 D.L.R. (3d) 259 (S.C., A.D.), *aff g* (1974), 9 N.S.R. (2d) 506; 46 D.L.R. (3d) 259; *Brodie v. City of Halifax* (1974), 9 N.S.R. (2d) 415; 46 D.L.R. (3d) 528 (*sub nom. Re Brodie and City of Halifax*) (S.C., T.D.), *rev'd* (1974), 9 N.S.R. (2d) 380; 47 D.L.R. (3d) 454 (S.C., A.D.), *leave to appeal refused* (1974), 10 N.S.R. (2d) 560; 3 N.R. 214 (S.C.C.).

182. *McNeil v. The Queen*, S.H. 03925, judgment delivered: February 2, 1976, as yet unreported (S.C., A.D.). The constitutional validity of s. 49 of the Nova Scotia Trade Union Act, S.N.S. 1972, c. 19, giving the Nova Scotia Labour Relations Board authority to issue cease and desist orders, was also in question in *Tomco v. Nova Scotia Labour Relations Board* (1975), 7 N.R. 317 (S.C.C.), *aff g* (1974), 9 N.S.R. (2d) 277 (S.C., A.D.).

183. *Re Michelin Tires (Manufacturing) Canada Ltd.* (1975), 13 N.S.R. (2d) 587

Because of space limitations, these very interesting matters will unfortunately have to be left for another time.

In Volume 1, Number 1 of the Nova Scotia Law News, Hudson Janisch wrote an article entitled "Administrative Law: Alive and Well and Living in Nova Scotia".<sup>184</sup> If the quantity of litigation is any indication that certainly still continues to be true. Indeed, viewed qualitatively the title is also reasonably apt. For the most part, the courts have been fact conscious, aware of the expertise of tribunals and not unduly willing to intervene. There have, of course, been exceptions to this generally high level of performance and some of these exceptions have been dealt with in this note. The major problem continues to be however the cut and paste nature of many of the judgments — long extracts from previous decisions and texts connected by a few cryptic sentences. Good decision-making would seem to demand clear articulation of the reasoning process leading to the result. Of all the decisions encountered in the period under review perhaps only the judgments of MacKeigan C.J.N.S. in the *N.S. Forest Industries* case and *Tomco* merit being followed as models.

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(S.C., T.D.), *rev'd* S.H. 00201, judgment delivered: March 15, 1976, as yet unreported (S.C., A.D.); *Re Imperial Oil Ltd.* (1974), 8 N.S.R. (2d) 370; 50 D.L.R. (3d) 739 (application for leave to appeal); *Imperial Oil Ltd. v. Board of Commissioners of Public Utilities* (1974), 10 N.S.R. (2d) 415; 52 D.L.R. (3d) 594 (*sub nom. Re Imperial Oil Ltd. and Board of Commissioners of Public Utilities*) (S.C., A.D.). I have discussed these cases in a paper delivered at the "Government Regulation and the Law Conference", *supra*, note 5. See "The Scope and Principles of Statutory Appeals from Administrative Action in Nova Scotia", *id.* at 81.

184. *Supra*, note 6.

