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R. A. Macdonald*

Delanoy v. *Public Service Commission Appeal Board*

Rarely does an Administrative Law decision raise the issue of the proper relationship between boards and courts as starkly as the recent Federal Court of Appeal judgment in *Delanoy* v. *Public Service Commission Appeal Board.*[1] Generally, judicial review tends to focus upon the limits of natural justice (*i.e.* procedural questions) rather than the problems of formal (non-procedural) jurisdiction and therefore permits courts to assert legalistic values under the guise of "due process". However, almost as if impelled by the favourable comments that their incursions into this field have drawn from academics, the courts have manifested in recent years an almost insatiable desire to arrogate to themselves the additional role of developing and policing administrative policy-making. The *Delanoy* case seems to be one instance where the Court so inappropriately assumed such a role that some of the parameters of judicial review on non-procedural grounds can be explored usefully.

The facts are not complex.[2] On August 4, 1975, Mr. Delanoy was promoted from the civil service rank of PM-2 (as a Program Administrator level 2 Field Auditor in Revenue Canada, Taxation) to the rank of PM-3. From November 1 until December 31, 1975, while temporarily on loan from his new permanent position, he performed various functions as an AU-1 Business Auditor in the Business Audit Section. Towards the middle of November of 1975, an opening for an AU-1 Auditor was advertised. This in fact was the position Mr. Delanoy was filling temporarily and consequently, he applied for the job. On December 4, 1975, he was informed that he had been screened out of the competition because he had failed to meet one of the basic requirements for the position, *viz.*, that he had not held his previous position, or its equivalent, for one year. This requirement, which was clearly marked on the competition poster, was adopted by the Public Service Commission on August 28,

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1. Judgment delivered: August 3, 1976; No. A-78-76, not yet reported. Page numbers refer to the memorandum report.
2. The facts are taken from the "Admission of Facts and Issue" before the Civil Service Appeal Board, as reported in the judgment.

1975.[3] It reads as follows:

> An employee must have spent a minimum of one year in his/her current position or in a position classified in the same group and at the same level to be eligible for appointment to a position in this occupational group which has a maximum rate of pay that is higher than the maximum rate of pay of the position he/she is currently occupying.

Informed of his right to appeal from this decision by letter dated December 15, 1975, Mr. Delanoy subsequently exercised this right and appeared before the Public Service Commission Appeal Board on January 27, 1976. The basis of the appeal was an allegation that he had been improperly screened out of the competition and that, therefore, his qualifications had not been assessed in relation to other candidates. On February 3, 1976, the Chairperson of the Appeal Board rendered a decision, concluding her reasons for dismissal of the appeal in the following language:

> Since the Selection Standards for AU-1 positions contained the Basic Requirement quoted above and since there is no dispute that the employee was currently occupying a PM-3 position to which he was appointed on August 4, 1975, less than one year prior to the closing of the competition, the Appeal Board cannot fault the Selection Board for eliminating the appellant from further consideration and the Appeal Board will not intervene in this case.[4]

Mr. Delanoy then applied to the Federal Court of Appeal under section 28 of the *Federal Court Act*[5] for an order setting aside the decision of the Appeal Board. Ryan J., delivering judgment for a unanimous Court, granted the application and referred the matter back to the Board for "disposition on the basis that the basic requirement in question is invalid".[6]

There are few aspects of this decision which recommend themselves to future courts seeking guidance in this area. However, the case can serve two useful pedagogical purposes. First, it illustrates the inadequate reasoning employed by most courts faced with non-procedural applications for judicial review, and secondly, it isolates some of the inarticulate policy reasons which underlie judicial incursions into the administrative process.

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3. The requirement was promulgated by Public Service Commission Bulletin No. 75-20.
4. At 5
5. S.C. 1970-71-72, c.1
6. At 9. The panel consisted of Jackett C.J., Ryan J. and Kerr D.J.

Although not stated clearly in the judgment, it appears that the ground upon which the Court based its decision was that the Public Service Commission Appeal Board committed a reviewable "error of law" under section 28(b) of the *Federal Court Act* by accepting the impugned Selection Standard requiring one year's experience.[7] The thrust of the applicant's argument, which the Court accepted, appeared to be a collateral attack on the jurisdiction of the Public Service Commission to promulgate the Selection Standard in question. The Commission's power to establish Selection Standards derives from section 12 of the *Public Service Employment Act*[8] which provides:

> The Commission may, in determining pursuant to section 10 the basis of assessment of merit in relation to any position or class of positions, prescribe selection standards as to education, knowledge, *experience*, language, age, residence, or any other matters that, in the opinion of the Commission, are necessary or desirable having regard to the nature of the duties to be performed . . .[emphasis added]

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7. As in many Federal Court of Appeal judgments, it is difficult to determine the precise reason for the Court's intervention. There are two other possibilities apart from "error of law", both of which relate to an aspect of "abuse of power". The Court may be suggesting that the Board lost its jurisdiction by "taking an irrelevant factor into account" in reaching its decision. *Cf. Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 2 A.C. 147; [1969] 2 W.L.R. 163 (H.L.). The difficulty with this approach is that it requires the Board to make a preliminary determination as to the validity of a selection standard which appears formally *intra vires*. Given the close connection between the Public Service Commission Appeal Board and the Commission itself (section 21 of the Act authorizes the Commission alone to appoint the Appeal Board), it is perhaps unrealistic for the Court to impose such a requirement.

A second ground upon which the Court may have based its order in this case is that the Appeal Board "declined jurisdiction" by failing to determine the legality of the disputed selection standard. In the second last paragraph of the judgment, Ryan J. in fact raised this point. Section 21 of the Act empowers the Board "if the appointment has not been made, [to] make or not make the appointment". The Court suggested (at 9) that "the question of the validity of the requirement was directly involved in the appeal . . . [and] . . . the Board ought to have taken a position on the question". It is not difficult to imagine, based on the Supreme Court decision in *Metropolitan Life Insurance Company* v. *International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; 11 D.L.R. (3d) 336, that, if the Board had indeed taken such a position, its decision would have been subject to section 28 review on the basis that it "asked itself the wrong question" or "failed to deal with the question remitted to it".

Nevertheless, given the paucity of explanation which appears in the judgment, either of these two other grounds may have in fact been the basis of the Court's decision.

8. R.S.C. 1970, c. P-32

Prima facie, it is difficult to see how an express power to prescribe standards relating to "experience" does not authorize the standard in question. But, even if the standard promulgated cannot be considered related to "experience", authority for its prescription surely can be found in the Commission's power to enact standards on "any other matters that, in the opinion of the Commission, are necessary or desirable having regard to the nature of the duties to be performed . . .".[9] Ryan J. attempted to overcome this obvious difficulty by suggesting that "the authority granted to the Commission by section 12 . . . is an authority to prescribe standards for the purpose of selecting, from qualified candidates, the person or persons who best merit appointment".[10] In fact, the statute authorizes the Commission to prescribe standards in order to determine "the basis of assessment of merit". Whereas the Court believed that the standards must themselves reflect "merit" assessments, an exact reading of section 12 reveals that the standards need only relate to criteria which in the opinion of the

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9. One of the greatest difficulties surrounding the assessment of the *vires* of regulations arises because this question is generally one of statutory interpretation. However, the courts rarely articulate the canons they apply. It is noteworthy that neither J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1935), 1 U. Toronto L.J. 286 nor E. A. Driedger, "Subordinate Legislation" (1960), 38 Can. B. Rev. 1, both of whom have reviewed exhaustively the area, advances any general principles which have been followed consistently. Aside from reliance on several common law presumptions attaching to instruments which interfere with existing rights and, absent bad faith, the courts have occasionally struck down subordinate legislation on the grounds that the regulation in question cannot reasonably fall within the scope of the empowering statute. (See the discussion in *A. -G. Canada* v. *Nolan*, [1952] 3 D.L.R. 433; [1952] A. C. 427 (*sub nom. A.-G. Can.* v. *Hallett & Carey Ltd.*); 6 W.W.R. 23 (*sub nom. Canadian Wheat Board* v. *Manitoba Pool Elevators*) (P.C.); *R.* v. *Cope*, [1970] 2 0.R. 518 (Co. Ct.); *Lanark County Board of Education* v. *Smith's Falls*, [1972] 1 O.R. 152; 22 D.L.R. (3d) 404 (C.A.). An example of a standard judicial approach to this problem can be seen in *R.* v. *CKOY Ltd.* (1975), 9 O.R. (2d) 549 (H.C.).

Insofar as regulation-making grants expressed in subjective terms, such as "any other matters, that in the opinion of the Commission, are necessary . . .", the courts have usually been reluctant to intervene unless the regulations are not reasonably related to the purposes sought to be achieved in the empowering statute. (*Trans-Canada Pipelines Ltd.* v. *Provincial Treasurer of Saskatchewan* (1968), 67 D.L.R. (2d) 694; 63 W.W.R. 541 (Sask. Q.B.); but compare *R.* v. *Bermuda Holdings Ltd.* (1970), 9 D.L.R. (3d) 595; 70 W.W.R. 754; 8 C.R.N.S. 328; [1970] 3 C.C.C. 374, where the British Columbia Supreme Court gave an unusually narrow interpretation to a grant of power which was stated in terms of "necessity" or "desirability". See *infra*, note 11 for a discussion of previous Federal Court cases construing section 12 of the *Public Service Employment Act*.

10. At 7

Commission ought to govern these assessments of merit.[11]

Having so misdirected himself, Ryan J. felt entitled to assess the appropriateness of the "one year" criterion as a standard relating to "merit". In rather blunt language, he observed:

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11. The exact scope and meaning of section 12 has never been resolved satisfactorily by the Federal Court although *Delanoy* is at least the sixth reported case in the past three years which deals with a similar aspect of the section. In *Moreau* v. *Public Service Appeal Board*, [1973] F.C. 593 (C.A.), Thurlow J. quashed an Appeal Board decision on the basis that an appointment was made of a person who did not meet the qualifications established by standards promulgated under section 12. At 594, the Court noted that the following were legitimate selection standards:

> -Eligibility for certification as a professional accountant, as defined on page 7; OR university graduation with an appropriate concentration in accounting, business administration, commerce, or finance
>
> -Demonstrated ability to conduct, under general supervision, audits of a type and complexity relevant to the assignment
>
> -Willingness to travel, in some assignments.

In accepting the above as appropriate standards, the Court seems to acknowledge that standards will at least to some degree operate as basic requirements or qualifications. However, in *Bauer* v. *Public Service Appeal Board*, [1973] F.C. 626; 40 D.L.R. (3d) 126 (*sub nom. Re Bauer and Public Service Appeal Board*); 6 N.R. 183 (*sub nom. Re Bauer*) (C.A.), Jackett C.J., after noting (at 630-31; 40 D.L.R. (3d) at 132; 6 N.R. at 188) that section 12 seems to replace a previous provision relating to "standards of duties, responsibilities and qualifications", suggests, at 638-39 n.5; 40 D.L.R. (3d) at 132 n.; 6 N.R. at 196 n.5, that "[s]election standards . . . [relating to language] will be used to determine whether a candidate has an adequate knowledge of the language that is required . . .". Such a view indicates that such standards must, of themselves, possess a degree of evaluation or examination. In *Demers* v. *A.-G. of Canada*, [1974] F.C. 270; 2 N.R. 89 (C.A.), the Chief Justice again considered the meaning of section 12, and observed, at 273 n.1; 2 N.R. at 93-4 n.1, that "some of the so-called 'selection standards' prescribed by the Commission under section 12 so resemble statements of qualifications that a superficial reading of them makes one wonder whether they are really 'selection standards' within section 12 at all". This query became the central focus of two subsequent section 28 applications. In *Brown* v. *Public Service Commission*, [1975] F.C. 345; 60 D.L.R. (3d) 311 (*sub nom. Re Brown and Appeals Branch, Public Service Commission*); 9 N.R. 493, Jackett C.J., at 372; 60 D.L.R. (3d) at 335-36; 9 N.R. at 526, again seemed to suggest that a distinction may be drawn between "qualifications" and "selections standards", the former being permitted as a holdover from pre-1967 days. This *dicta* was picked up in a subsequent case, *Bambrough* v. *Appeal Board Established by the Public Service Commission*, [1976] 2 F.C. 109 at 118, and repeated by Ryan J. in *Delanoy*.

Once this distinction between "qualifications" and "selection standards" is drawn, it is a relatively simple matter to conclude, as does Ryan J., that any prescription which operates so as to exclude certain persons from the competition must be considered a "qualification", which he suggests, following *dicta* in *Bambrough* may not be prescribed under the authority of section 12. Such a position, however, effectively renders this section meaningless. For, if carried to

> . . . it is really not possible to perceive a rational link between the so-called basic requirement involved in this case and selection according to merit of the candidate for appointment best qualified to fill the advertised position.[12]

In other words, after imposing a spurious qualification on the power of the Commission to prescribe standards, the Court attempted to find *ultra vires* the selection standard which was in fact promulgated, because it bore no rational connection to this imposed qualification (*i.e.* it is unreasonable). However, even on this ground, traditional Administrative Law doctrine would seem to preclude a court from striking down the regulation.

The limits of a court's power to declare statutory instruments *ultra vires* as unreasonable have been long established, and recently have been reviewed in the Ontario High Court judgment, *Hanson* v. *Ontario Universities Athletic Association.*[13] In this case, Lieff J. considered several decisions on this question and concluded:

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its logical conclusion, this would mean that the only manner in which selection standards could be promulgated so as not to offend this requirement would be for the Commission simply to draw up a catalogue of criteria which it considers appropriate for each appointment. That is, the Commission would only be entitled to promulgate the following kinds of standards: "in determining merit for position X, the following factors shall be taken into account — age, residence, language . . .". Such criteria hardly could qualify as a selection standard in that they merely repeat section 12 without adding any particularity which would enable the Commission actually to differentiate between various applicants.

A further indication of the fallacy of this position can be demonstrated by contrasting the *Moreau* decision with Ryan J.'s remarks as to why the "one year" criterion cannot be considered a "standard related to merit selection". In suggesting at 8 of the judgment that a more meritorious candidate with 364 days experience would be excluded in favour of a less meritorious candidate with 365 days experience, the Court suggests that the standard is a qualification and therefore unauthorized. However, identical problems would have arisen had the criterion been related to language ("a knowledge of French") or age ("at least 30 years old") or residence ("within a 10 mile radius of Parliament Hill") or to education ("university graduation with an appropriate concentration") as in *Moreau.* If all such standards are to be considered as qualifications and therefore *ultra vires*, there is no meaningful content that could ever be ascribed to this section; and, as indicated in the text accompanying note 15, *infra*, in addition to denaturing section 12, such a view presupposes that some ultimate objective determination of merit can be made in the absence of any selection criteria whatsoever.

12. At 8

13. (1975), 11 O.R. (2d) 193; 65 D.L.R. (3d) 385 (H.C.). An interesting aspect of this decision is the Court's equation of "regulations" and "by-laws". At common law, there is ample authority for the view that regulations are not subject to challenge on the grounds of unreasonableness alone (*Sparks* v. *Edward Ash Ltd.*, [1943] K.B. 223 (C.A.); *Bacon* v. *Ontario Flue-Cured Tobacco Growers*

> First, in determining whether a by-law is invalid as being unreasonable, a Court may consider the authority upon which the by-law was made to see if it was made within the power of the creating body. This is reasonableness in the wide sense: it relates to the power of the creating body and is the only proper way for a Court to consider a by-law in terms of reasonableness.
>
> Second, reasonableness "in the narrow sense" relates to the merits of the policy and substance of a by-law. A Court should not direct its attention to reasonableness in the narrow sense when considering the validity of a by-law.[14]

Consequently, in assessing the reasonableness of the selection standard, a court must look only at whether the standard may reasonably be authorized according to the enabling statute.[15] Only through a total failure to appreciate the potential reasons why the Public Service Commission may have wished to promulgate this standard could the Court have come to the conclusion that it was not

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Marketing Board, [1959] O.W.N. 256 (H.C.)), even though some recent decisions involving the delegated legislation of self-governing professions seem to indicate that review of unreasonableness is not impossible (*Re College of Dental Surgeons (British Columbia) and Eggers* (1968), 68 D.L.R. (2d) 93 (B.C.C.A.); *Re Stilling* (1961), 28 D.L.R. (2d) 102; 35 W.W.R. 164 (B.C.S.C.)). However, since Lieff J. did not appear to distinguish by-laws and regulations, it may be that Ontario courts will now supervise the reasonableness of statutory regulations in the same way that they oversee the reasonableness of by-laws. In any event, this comment will assume that *Hanson* states accurately the current position.

14. *Id.* at 203; 65 D.L.R. (3d) at 395

15. *Cf.* the cases developing the doctrine laid down in *Attorney General & Ephraim Hutchings (relator)* v. *Directors etc. of the Great Eastern Railway Co.* (1880), 5 A.C. 473 (H.L.). See also *Kruse* v. *Johnson*, [1898] 2 Q.B. 91 (D.C.), which Lieff J. cites in the *Hanson* case (*id.* at 202-03; 65 D.L.R. (3d) at 394-95). At 99-100, Lord Russell of Killowen C.J. suggested criteria for determining when a regulation may be unreasonable in the wide sense:

> If for instance they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.

reasonably authorized. For it is only if the Court assumed that the Commission was attempting to impose by *fiat* a judgment that persons with less than one year's experience could not have "merit" that the possible irrationality of the standard could have been asserted. That this is the position adopted by Ryan J. is revealed by this statement:

> The stipulated requirement . . . could be met by service in a position unrelated to the position under competition either in respect of duties to be performed or qualities required. On the other hand, a well qualified candidate who had served for slightly less than a year in a clearly related position would be automatically eliminated. Such a requirement, whatever else it may be, is not a standard related to merit selection.[16]

Such a position assumes that a Public Service Commission has some transcendental knowledge of merit in every case, upon which it can draw in making such judgments. In actuality, it is possible, and more likely probable, that the reason behind the requirement of one year's experience at a certain level relates not to the magic of one year's experience as indicative of merit, but the fact that any *reasonable* assessment of a candidate's merit by his or her supervisor is not likely to be made accurately on less than one year's observation. Furthermore, assessments of a candidate's ability to relate to his or her superiors and equals, to supervise subordinates, to perform competently the administrative tasks associated with any position, or to master the basics of the job and begin to make worthwhile and innovative suggestions for improvement, is not likely possible on less than one year's observation. If, as a matter of policy, the Commission feels that one year is required as a general rule, this is certainly not outrageous, and given the desire to make truly meritorious appointments, may in fact be quite realistic. Finally, it should also be observed that this requirement does not relate to all positions in the Public Service but only to selected appointments in the Administrative, Foreign Service, Scientific and Professional categories of the Public Service.[17] The non-universal nature of the requirement lends additional weight to the view that it was in fact prescribed for certain upper level jobs with the express

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16. At 8
17. The subject of the amendment is expressed in Public Service Commission File no. 600-20 as "Amendment to Selection Standards — AC, AG, AR, AU, BI, CH, DE, ES, ED, EN, FO, HR, HE, LA, LS, MD, MT, NU, OP, PH, PC, PS, SG, SE, SW, UT, US Groups".

intention of ensuring that data necessary for the appropriate assessment of applicants could be assembled.

A second reason for questioning the Court's attempt to assess the reasonableness of the standard relates to the nature of the Public Service Commission's powers. In *Judicial Review of Administrative Action*, the late Professor S.A. de Smith noted:

> There is no reason of principle why a manifestly unreasonable statutory instrument should not be held to be *ultra vires* on that ground alone, provided that the subject matter of the grant of power is not so pregnant with "policy" considerations as to render the application of such a standard inappropriate.[18]

Perhaps the clearest indications of legislative intent to infuse a particular decision-making process with "policy" considerations can be found by evaluating the relative subjectivity of the power granted by the enabling Act. The more subjective the grant, the more Parliament can be taken to desire the administrative body to develop its own policy in a relatively unhindered manner. In the case of merit determinations by the Public Service Commission, Parliament has indicated clearly such an intention. Section 10, which empowers the Commission to make appointments, reads:

> Appointments to or from within the Public Service shall be based on selection according to merit, *as determined by the Commission*, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates *as the Commission considers* is in the best interest of the Public Service [emphasis added].

The words emphasised grant highly subjective powers. Moreover, section 12, which authorizes the prescription of selection standards, permits the Commission to enact standards "on any other matters that, *in the opinion of the Commission*, are necessary or desirable having regard to the nature of the duties to be performed [emphasis added]".

Once it is established that the standard in question is not only not unreasonable, but even if unreasonable in the narrow sense, immune from attack, (and in any event impregnated with policy determinations), the only other ground of attack which an overzealous court conceivably could advance for quashing on the facts of this case, relates to the question of improper purpose. Such

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18. S.A. deSmith, *Judicial Review of Administrative Action* (3d ed. London: Stevens & Sons, 1973) at 311-312

an insinuation appears to be raised early in the judgment, although it was not advanced expressly as a reason for decision. Ryan J. noted that a memorandum from a Mr. P. D. Drouillard originally requested the amendment for the following purposes:

> With a view to ensuring that the on-the-job experience of employees is of a standard level, and that excessive mobility not in the best interests of the Public Service is curbed, the following amendment to the Selection Standards is submitted for your consideration, to effect [*sic*] those Groups listed above.[19]

There are two reasons, however, why such a view is untenable. In the first place, Mr. Drouillard, as the Court pointed out, was only "presumably an official of the Commission".[20] There is no evidence that he actually performed an official policy-making function. Furthermore, it is improper to ascribe to the Commission as a whole the views of one of its employees who is not a voting member of the Commission. Without direct evidence of the actual motives of the Commission such ascription is absurd; to suggest that a superior adopts the suggestions of employees for all or any of the reasons *they* advance is not tenable in view of current knowledge of the dynamics of bureaucracies.

Secondly, even if the Court were to determine conclusively that the Commission followed the reasoning of Mr. Drouillard, there is only one phrase of the memo that could be taken as improper, *i.e.* "that excessive mobility not in the best interests of the Public Service be curbed"; the aim of ensuring a "standard level" of "on the job experience" is clearly a purpose which relates to the determination of merit. The most complete treatment of the problem of multiple purposes suggests that up to five different tests can be used in evaluating the effect of an improper purpose on *vires*.[21] First, what was the *true* purpose for which the power was exercised? Secondly, what was the *dominant* purpose for which the power was exercised? Thirdly, would the power still have been exercised if the actor had not desired to achieve concurrently an illicit purpose? Fourthly, was any of the purposes pursued an authorized purpose? Finally, was any of the purposes pursued an unauthorized purpose? Given the evidence available in this case, only the fifth test, "was any of the purposes pursued an unauthorized purpose?", would

19. The memo is contained in Public Service Commission File 600-200 and reproduced at 6 of the judgment.
20. At 5
21. deSmith, *supra*, note 18 at 288-290

permit judicial interference. Yet this test has apparently never been accepted in Canada as the relevant standard.[22]

Therefore, in view of the fact that there is no evidence that the Commission adopted any of the purposes offered by Mr. Drouillard, and, secondly, that even if it did, under current Canadian jurisprudence no accepted test for multiple purposes would have permitted intervention, the insinuation that the Commission acted to acheive an improper purpose and thus lost its jurisdiction is without merit.

Although there are no overt indications in the judgment, certain facts available from the record as well as several statements by Ryan J. reveal obliquely policy and value considerations which may have impelled the Court to seek legal grounds supporting intervention. Further, the number of recent reported and memorandum judgments of the Federal Court of Appeal in which judges have expressed disapproval of Public Service Commission decisions seems to reveal an inclination towards review of all Public Service appointments.

In rendering judgment, the Court noted that "the facts of this case amply illustrate that the basic requirement not only does not serve the purpose of merit selection, but may frustrate it".[23] Such language no doubt may have been motivated by a feeling that a person temporarily filling a Public Service position should not be excluded from a competition designed to select a permanent appointee. Yet it is possible that Mr. Delanoy was offered the temporary assignment precisely because he was known to be ineligible for the upcoming competition. A desire by the Public Service Commission not to be overruled by a court for favouring a particular candidate by providing him with on-the-job experience may have been the principal reason supporting the temporary

22. See, for example, *Warne* v. *Province of Nova Scotia* (1970), 1 N.S.R. (2d) 150 (S.C., T.D.). There is, however, the confusing case of *Shawn* v. *Robertson*, [1964] 2 O.R. 696; 46 D.L.R. (2d) 363 (H.C.), which might be taken as suggesting that an act may be "impeached by an allegation of bad faith, and that the Court can call for an answer to such an allegation if a *prima facie* case is made out". If a court is prepared to maintain that the existence of one improper purpose among a plurality of purposes expressed in an inter-office memorandum consitutes a *prima facie* case of bad faith, perhaps the fifth test (or a version of it) applies in Canada. In any event, the *Shawn* case would merely oblige the administrative authority to explain the true basis of their action. In *Delanoy*, there is no evidence to indicate that the Court felt such explanation was necessary, nor is there an indication that the Court found that a *prima facie* case had been made out.

23. At 8

assignment. Again, since the candidates eventually selected in this competition were the two other applicants rejected when Mr. Delanoy received his initial appointment at the PM-3 level, the Court may have felt that he had already demonstrated his superiority over them. However, in addition to the fact that different jobs were involved, there is no indication that either Mr. Clark or Mr. Heynen were unqualified for the first appointment for any substantial reason.

What is particularly troubling about the statement of Ryan J. regarding the relation of the selection standard to the question of merit is that, at bottom, it represents the mere substitution of a judicial opinion as to merit for an administrative one. Not only should a court generally not rely on its own assessment of the proper decision to be taken, [24] but, when the grant of power is expressed in subjective terms (in recognition of an acknowledged expertise), deference to administrative policy should be even stronger.[25]

The developing trend towards judicial activism in Administrative Law has been applauded almost without reservation. It is certainly true that greater willingness by the courts to supervise the exercise of procedural powers has produced a more detailed and sophisticated law of administrative due process, but such a result is not surprising; by training, inclination and necessity, courts and lawyers have been preoccupied with procedural questions. However, when review on non-procedural grounds becomes an opportunity to superimpose legalistic values on an inappropriate subject-matter, the merits of judicial activism may be questioned. A multiplication of decisions similar to *Delanoy* might nullify completely any benefits of expertise or efficiency resulting from the creation of administrative boards and tribunals.

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24. *Cf. Re Powell and Windsor Police Commissioners*, [1968] 2 O.R. 613; 70 D.L.R. (2d) 178 (H.C.)
25. *Cf. Association of Professional Engineers of B.C.* v. *Office and Technical Employees' Union* (1972), 24 D.L.R. (3d) 90; [1972] 3 W.W.R. 17 (B.C.S.C.)