Recent Developments in Nova Scotian Administrative Law

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I. Introduction

In 1976, in the first of these surveys, I dealt exclusively with Nova Scotia decisions involving the substantive grounds of judicial review — jurisdictional error, error of law on the face of the record and breach of the rules of natural justice. Remedies were scarcely mentioned for the very good reason that in the period then under review there were few, if any cases, raising important remedial problems. Now, just over a year later, the situation is the reverse. Most of the interesting judicial review cases of the last eighteen months in Nova Scotia have been ones involving remedial problems. Indeed, in one or two instances, these difficulties were quite novel in Canadian administrative law jurisprudence. Accordingly, the bulk of this survey article will be devoted to those cases. However, I would remiss if I failed to discuss those few important substantive issues that surfaced during the year and they will be dealt with in the second part of the article.

II. Judicial Review in Nova Scotia — Remedial Alternatives

(a) Effect of the Quashing of a Decision by Certiorari

In the first of these Nova Scotia survey issues of the Dalhousie Law Journal, much attention was paid in both the article on Administrative Law\(^2\) and that on Labour Law\(^3\) to the difficulties that the Nova Scotia Labour Relations Board was having with the courts

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1. \(1976\), 2 Dalhousie L.J. 870
2. \textit{Id.} at 871-83
over its certification procedures. These continued subsequently and, in *Little Narrows Gypsum Co. Ltd. v. Labour Relations Board (Nova Scotia)*, Cowan C.J.T.D. held that there was no authorization in the Trade Union Act for the holding of pre-hearing votes by the Board. This procedure had been adopted by the Board following the decision of the Appeal Division in *W. H. Schwartz & Sons Ltd. v. Bread, Cake, Biscuit, Crackers, Candy, Confectionery & Miscellaneous Workers' Union, Local 446*, a decision discussed fully in the last survey.

*Little Narrows Gypsum* raises some nice statutory interpretation questions but these have now become academic as a result of subsequent amendments to the Trade Union Act itself. However, this case did not end with the quashing of the Board’s decision to certify the union as a bargaining unit and the decision of Hallett J. in *Little Narrows Gypsum Co. Ltd. v. Labour Relations Board (Nova Scotia No. 2)* raises a significant remedial issue: What is the effect of the quashing of a decision on an application for relief in the nature of certiorari? [Ed. note: The decision of Hallett J. in the *Little Narrows* case was reversed by the Nova Scotia Court of Appeal after this comment was written. The judgment of MacKeigan J.A. bears out many of the points made here about the effect of an order in the nature of certiorari.]

After *Little Narrows Gypsum (No. 1)*, counsel for the Labour Relations Board requested Cowan C.J.T.D. to remit the matter back to the Board for reconsideration. This request was refused. Undaunted, the Board indicated that it would proceed to rehear the application, this time presumably according to the Act. The ability

5. (1975), 12 N.S.R. (2d) 606; 65 D.L.R. (3d) 506 (S.C., A.D.)
6. Supra, note 1 at 871-83 and note 3 at 797-819
7. S.N.S. 1977, c. 70 (assented to by the Lieutenant Governor on May 19, 1977 and in force immediately). The new procedure, provided for in an amended section 24, calls for the Board to take a vote every time an application for certification is made (subs. 1). The section then provides for the situations in which the vote will be counted by Board (subs. 7) and the situations in which the vote may be disregarded in the certification decision (subs. 9, 10 and 11).
8. Unreported decision of Hallett J. of the Trial Division of the Supreme Court of Nova Scotia, delivered: April 15, 1977 (S.H. No. 13900)
9. This application was made separately after the decision was handed down and is referred to in Hallett J.’s judgment. Supra, note 8 at 1.
of the Board to do this was contested by the company, which then made an application for prohibition to the Supreme Court to prevent the rehearing.

Relief was granted by Hallett J.. The rather brief judgment, which is bereft of any authority, seems to be based on two separate grounds. First, the judge seems to hold that the only way a matter can be reheard legitimately, without the filing of the application for certification all over again, is where the applicant has sought and been awarded *mandamus* to compel a rehearing in conjunction with *certiorarí* to quash the original decision or, implicitly, where the judge has specifically remitted the matter back to the tribunal for rehearing.

Secondly, he seems to be saying that the tribunal should not be rehearing this matter again anyway.

... [T]here is on the record a patent lack of support for the Union... the application is now almost seven months old... the Board's practice of requiring petitioners to attend... is onerous... the expense of re-hearing this application that on its face is likely to fail... the Board's persistence in processing this application upon the avowed principle that it is simply doing its duty on the facts of this case is not credible.

This recital speaks to an absence of good faith on the part of the Board and an abuse of its own processes.

Let me now deal with each of these reasons in turn.

Hallett J. referred to the apparent lack of authority in Nova Scotia to support the right of the tribunal simply to proceed again on the basis of the original application. He then appeared to suggest that the jurisdiction to deal with the application for certification was exhausted by its initial decision.

The Board performed its duty and exercised the jurisdiction required of it under the Act.

10. *Id.* at 2
11. *Id.* at 1. He notes the refusal of Cowan C.J.T.D. to remit the matter back to the Board for reconsideration. However, there is nothing in the judgment to indicate that he would have had any objection if the Chief Justice had in fact done this even though *mandamus* was not sought in the original proceedings. I have discussed the subject of this type of action in situations where *mandamus* is not sought in the first of these surveys (*supra*, note 1 at 895-97), in discussing the decision of the Appeal Division in *Walker v. Keating* (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.).
12. *Supra*, note 8 at 2-3
13. *Id.* at 2
14. *Id.* It is interesting to contrast the decision in this case with that of Verchere J. of the British Columbia Supreme Court in *Re Lornex Mining Corporation Ltd. and*
The absence of judicial or statutory authority to support the Board's action should not, of course, be necessarily fatal given that there is no authority against resuming the proceedings. What, therefore, was required was a consideration of the fundamental nature of the remedy of certiorari. The historical procedure for certiorari, and the one continued today in the new Nova Scotia Rules of Civil Procedure, is for the record of the inferior tribunal to be certified and sent to the reviewing court for scrutiny. If one of the available grounds for review is made out then the decision or order is quashed.

Note that it is the decision or order that is quashed, not the proceedings themselves. That this is so becomes clear when one examines the role of certiorari in two situations. First, it is trite law that when an order is given in excess of jurisdiction, the court may in certain instances sever the offensive part of the order and quash it, leaving the valid part intact. Secondly, where a decision is reviewed for non-jurisdictional error of law on the face of the record, there is clear authority for the proposition that the tribunal may reconsider the matter without a new application being filed. Indeed, in R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw, the English Court of Appeal decision which

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16. See Rule 56.07

17. See de Smith, supra note 15 at 91-92 and 380

"revived" review for error of law on the face of the record, there are the following two statements by Denning L.J. (as he then was):

The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so.\(^\text{19}\) and

The decision must be quashed and the tribunal will then be able to hear the case again and give the correct decision.\(^\text{20}\)

Of course, if the reason for quashing the decision or order is that the tribunal lacked jurisdiction over the subject matter or person then the whole basis of the application is destroyed. However, this is obviously not the case with intra-jurisdictional error nor would there appear to be any reason in principle for distinguishing between such errors and procedural deficiencies or excesses of jurisdiction in fulfilling a correctly assumed jurisdiction. The quashing of the decision in such cases does not affect the initial assumption of jurisdiction or the original initiation of the matter.

What is also significant theoretically is that the quashing of the decision or order means that there never in law has been a completed exercise of the jurisdiction. The decision of the tribunal, which seemed to deal with a matter finally, is for legal purposes a "nothing", or nullity, after the quashing. Hence, the argument that the jurisdiction is exhausted once a decision is made does not stand up, given the effect of a judicial quashing.

It is true that mandamus is sometimes sought along with certiorari; certiorari to quash a decision and mandamus to compel its reconsideration in accordance with the law.\(^\text{21}\) In this case, however, the applicant for relief, the company, was scarcely likely to seek mandamus. Its objective was almost certainly to avoid or delay certification. Moreover, the purpose of seeking mandamus as well as certiorari in such cases is to compel the tribunal to do its job again — this time, correctly. This compelling remedy is scarcely necessary given an obviously willing tribunal. Also, there is no warrant in any of the cases for believing that mandamus, as well as compelling the reconsideration of the matter, has the effect of

\(^\text{19}\) Id. at 347; [1952] 1 All E.R. at 127
\(^\text{20}\) Id. at 354; [1952] 1 All E.R. at 132
\(^\text{21}\) e.g. Battaglia v. Workmen's Compensation Board (1960), 24 D.L.R. (2d) 21; 32 W.W.R. 1 (B.C.C.A.)
restoring to life an otherwise exhausted original application which was dealt with finally by the original tribunal decision. *Mandamus* assumes the existence of a duty the performance of which has been requested properly and which is presently due and owing. Without an application presently existing in proper form there is simply no basis for the grant of the remedy.

In the last of these articles, commenting on *Walker v. Keating*, I commended the Appeal Division for adding

... a new and desirable dimension to the law of *certiorari* by not only quashing a decision but ordering its remission.

It was this which Cowan, C.J.T.D. refused to do in *Little Narrows Gypsum (No. 1)*. Why he refused, we are not told by Hallett J. However, for the reasons stated above, I think a very strong theoretical argument can be made for saying that his failure to do so does not affect the right of the tribunal to proceed again on the basis of the original application. Moreover, there are also practical reasons for this. Persons who commence proceedings before administrative tribunals should not be prejudiced by errors committed by those tribunals in exercising their jurisdiction, at least not to the extent of having to go to the time, trouble and expense of recommencing the proceedings from scratch again. It makes much more sense to salvage whatever can be salvaged from the original proceedings once the ultimate decision or order has been quashed. This has particular significance in the labour relations certification process where the work necessary for the filing of an application is considerable. Of course, allowing the good part to be salvaged and the application to proceed means that the opponents of any application will have to go through part of the process again but, in many instances, they too may be saved inconvenience by not insisting that the whole process be recommenced.

This, of course, leads into the second basis of Hallett J’s judgment; the assertion that the Board was in effect abusing the powers conferred on it by the Trade Union Act in persisting in rehearing this matter. Because of its intimate relationship with the remedial issue, I will consider it here rather than in the section of the article dealing with substantive law.

Nowhere, in the course of his decision does Hallett J.


23. *Supra*, note 1 at 896
characterize this basis of judicial review. However, what the reasons stated by the judge amount to are an assertion that the Board was using its powers for improper purposes by going ahead with a hopeless application for certification.

Using statutory authority for improper purposes has always been an accepted ground of judicial review. However, recently there has been some evidence of the emergence of a new ground on which prohibition is available — abuse of process. The original modern proponent of this basis for review was Berger J. of the British Columbia Supreme Court who in one case prohibited criminal proceedings for abuse of process, which he also characterized as a breach of the rules of natural justice. This was in context of a Crown Prosecutor breaking a promise not to prosecute someone in return for information. The historical precedents cited for this as a separate ground of review or as part of the rules of natural justice are not convincing, yet the arguments for its recognition are arguably considerable.

25. This can be related to the issues of substantive due process which I discuss infra in dealing with the topic of review for inconsistency.
26. (1974), 22 C.C.C. (2d) 268 (B.C.S.C.). In fact the genesis of this ground of review is to be found in one of his earlier decisions where the possibility was considered and rejected on the facts. See Re Regina Croquet, [1972] 5 W.W.R. 285; 8 C.C.C. (2d) 241; 21 C.R.N.S. 232 (B.C.S.C.). On appeal in Croquet, the majority of the British Columbia Court of Appeal left this issue for further consideration. See [1973] 5 W.W.R. 654; 12 C.C.C. (2d) 331; 23 C.R.N.S. 274
27. Abuse of process was not, of course, a novel argument as far as the criminal process was concerned. What was somewhat unusual was the attempt to link it to breach of the rules of natural justice and the availability of prerogative relief. Of the authorities cited by Berger J., the only one of any real assistance to the precise matter in hand was the decision of R. ex re Fraser v. Halpin, [1933] 1 D.L.R. 781; [1933] 1 W.W.R. 255; 59 C.C.C. 230 (Alta. S.C., A.D.), but, even there, relief was refused. Since this note was first written, the decision of the Supreme Court of Canada in Rourke v. The Queen (1977), 76 D.L.R. (3d) 193; 16 N.R. 181; [1977] 5 W.W.R. 487; 35 C.C.C. (2d) 129; 38 C.R.N.S. 268 (S.C.C.), has been reported and the judgment of Pigeon J. (with whom Martland, Ritchie, Beetz and de Grandpré J. J. concurred) seems to say quite clearly that the courts have no jurisdiction, whether by way of certiorari prohibition or otherwise to stay criminal proceedings regularly instituted for abuse of process. See 76 D.L.R. (3d) at 209; 16 N.R. at 185; [1977] 5 W.W.R. at 505; 35 C.C.C. (2d) at 145; 38 C.R.N.S. at 272. Quaere whether this prevents the use of abuse of process arguments in any criminal proceedings. Kenneth L. Chasse in an annotation at 38 C.R.N.S. 270-71 suggests that the ratio of the case may be confined to stays of the whole proceedings rather than the stay of interlocutory matters. Another possible argument is that the
In the present context, however, the real question is whether, whatever the theoretical basis for intervention, the reasoning of Hallett J. in awarding prohibition on this ground is convincing. At the outset, it must be noted that the courts are generally very reluctant indeed to attribute bad faith or improper motives to a tribunal. Unlike an allegation of bias which depends upon appearances to objective observers and which may be quite unintentional on the part of the decision-maker himself, bad faith or improper motives in the exercise of statutory authority constitutes an extremely serious allegation against a statutory authority. It connotes, in this context, that the Board is either deliberately out to subject the company to procedures which it knows are doomed to failure or, alternatively, that it intends to make an attempt to certify this union by the use of any technicality it can against the real wishes of the employees.

Most regrettably, the judgment provides little convincing evidence that either of these things is true. Given the first issue that decision simply relates to the oppressive initiation of proceedings as opposed to the oppressive conduct or continuation of proceedings. Whether these represent realistic distinctions or not, the decision has obviously thrown into considerable doubt this emerging ground of judicial review and the use of the prerogative writs for this purpose in the criminal law area. Outside of the criminal process, however, it still presents a possible ground of review, supplementing the present acknowledged authority of the courts to prohibit or enjoin proceedings for bad faith or a reasonable apprehension of bias. It is also interesting to note that, before Rourke, quite a lot of authority had sprung up in support of Berger J., both on the issue of the availability of abuse of process arguments in relation to the criminal process and, in some cases, on the availability of prerogative relief on that basis. See the judgment of Laskin C.J.C. (with whom Judson, Spence and Dickson J.J. concurred): 76 D.L.R. (3d) at 202; 16 N.R. at 194-95; [1977] 5 W.W.R. at 496; 35 C.C.C. (2d) 138; 38 C.R.N.S. at 282-83. See, however, Re Forrester & The Queen (1976), 73 D.L.R. (3d) 736; [1977] 1 W.W.R. 681; 33 C.C.C. (2d) 221; 37 C.R.N.S. 320 (Alta. S.C., T.D.); Re Caria and The Queen (1975), 29 C.C.C. (2d) 513 (B.C.S.C.); Re Stewart and The Queen (No. 2) (1977), 35 C.C.C. (2d) 281 at 285 (Ont. C.A.), where Arnup J.A. expresses considerable doubt about the availability of certiorari to control abuse of the criminal process, despite the submission of a list of some seventy cases by counsel for the appellant applicant.

28. For example, if a prosecution or laying of an information is delayed unduly for the sole purpose of making the defence more difficult, there is arguably room for judicial enjoining of the continuation of those proceedings, irrespective of whether they are still technically within the relevant statutory provisions. Interestingly, in Rourke, id., Laskin C.J.C. was not willing to go as far as Pigeon J. and reject out of hand the possibility of judicial intervention on the ground of abuse of process constituted by this kind of delay. He also discusses at length the utility of the concept of abuse of process in other contexts.

29. "Bad faith" as a ground of review is discussed by de Smith, supra, note 15 at 293-94.
arose in this case, the facts as stated by the judge are equally consistent with the Board thinking itself legally obliged to continue to deal with the original application, even after the quashing of the original certification order. Indeed, the Board may well have suspected the company of trying to jeopardize and delay this application for certification. Now, it may well be that there was direct evidence before the Court to suggest that the Board was acting for improper motives which the judge did not mention specifically. Instead, all that he seems to rely upon to draw the inference of improper motives is a set of facts which are susceptible to an equally convincing alternative explanation. If there was no other evidence, then clearly the Board should have been given the benefit of the doubt on this issue and, if that evidence did exist, then it deserved to be detailed and elaborated upon in the course of the judgment instead of being present only by innuendo. Not to do this is to fly in the face of a long-standing practice when such allegations are made.

(b) Stay of Administrative Proceedings Pending Judicial Review or Statutory Appeal

One of the arguments apparently made in Little Narrows Gypsum (No. 2), to justify the Board’s position was that an analogy could be drawn between the ability of the tribunal to proceed with a matter, notwithstanding that an application for review had been made to a court, and the argument that a tribunal could rehear a matter on the basis of the original application despite the quashing of its decision. Like Hallett J., I find the argument difficult to see. However, it does lead conveniently into another remedial problem which confronted the Nova Scotia courts in the period under review; that of the ability of the courts to stay the proceedings of statutory authorities pending judicial review or the exercise of a statutory appeal right to the courts.

In 1963, Laidlaw J.A. in the Ontario Court of Appeal decision of R. v. Ontario Labour Relations Board, Ex parte Ontario Food Terminal Board, stated that, where a question of jurisdiction or pure law was raised before a tribunal, the tribunal should cease its consideration of the matter and allow it to be determined by a court. Whether this was intended as a statement of law or a piece

30. Supra, note 8 at 2
31. [1963] 2 O.R. 91 at 93; 38 D.L.R. (2d) 530 at 532 (C.A.)
of advice to tribunals is not completely clear. However, whatever its
status, subsequent authorities make it clear that it is not the law\textsuperscript{32} and, indeed, one case goes so far as to suggest that it is not part of
the role of the courts to give such advice to tribunals.\textsuperscript{33} Such laying
down of guidelines was described by Arnup J.A., of the same
Court, as “not only unwise but unwarranted” because it related to a
matter over which the tribunal had been given exclusive jurisdiction
— its own processes.\textsuperscript{34}

This statement suggests that not only should tribunals not be
obliged to adjourn proceedings once an application for judicial
review is made but that the courts should not have any reviewing
power over the discretion of the tribunal to adjourn or not. Indeed,
in that case, Arnup J.A. went on to hold that the Ontario courts do
not have authority to grant stays of the proceedings of statutory
authorities pending judicial review.\textsuperscript{35}

Interestingly, the opposite conclusion was reached by Jones J. of
the Trial Division of the Nova Scotia Supreme Court in 1974. This
recently-reported decision raises an important procedural issue and I
wish to discuss it from two viewpoints, first, the law relied upon by
Jones J. and, secondly, the policy considerations attaching to the
issue.

\textit{Canadian Automatic Sprinkler Association v. Nova Scotia
Labour Relations Board}\textsuperscript{36} involved an application for the stay of
accreditation proceedings before the Nova Scotia Labour Relations
Board pending the disposition of an application for orders in the
nature of \textit{certiorari} and prohibition. In reaching the conclusion that
he had jurisdiction to order a stay of these proceedings, Jones J.

\textsuperscript{32} See e.g. \textit{Re Cedarvale Tree Services Ltd. and Labourers’ International Union
of North America, Local 183, [1971] 3 O.R. 832 at 838-42, particularly at 840; 22
D.L.R. (3d) 40 at 41-50, particularly at 48 (C.A.). Arnup J.A., delivering the
judgment of the Ontario Court of Appeal in the case, referred particularly to the
judgment of McRuer C.J.H.C. in \textit{R. v. Ontario Labour Relations Board, Ex parte
42 D.L.R. (2d) 320 (C.A.) (Note, in the light of the discussion of the status of
boards to argue before courts discussed, \textit{infra}, it is interesting that Arnup J.A. had
no problem at all in allowing the Board to be heard on this procedural issue; [1971]
3 O.R. at 832; 22 D.L.R. (3d) at 46).}

\textsuperscript{33} \textit{Re Cedarvale Tree Services, id.} at 840-41; 22 D.L.R. (3d) at 48-9

\textsuperscript{34} \textit{Id.} at 841; 22 D.L.R. (3d) at 49

\textsuperscript{35} \textit{Id.} at 842; 22 D.L.R. (3d) at 50. \textit{Quaere} the effect of section 4 of the \textit{Judicial
Review Procedure Act}, S.O. 1971, c. 48. This provides for the grant of \textit{interim}
relief pending the determination of an application for judicial review and clearly
has the potential to justify stays of administrative proceedings.

\textsuperscript{36} (1974), 15 N.S.R. (2d) 89 (S.C., T.D.)
relied upon a provision in the Judicature Act and two precedents allegedly upholding the inherent power of the courts to grant such applications.\textsuperscript{37}

Section 38(8) of the Nova Scotia Judicature Act\textsuperscript{38} provides as follows:

The Court in the exercise of the jurisdiction invested in it in every proceeding pending before it shall have power to grant and shall grant either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties hereto appear to be entitled to in respect to any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters determined.

There is no specific mention of a stay of proceedings in these words. However, Jones J., while acknowledging that the section seemed directed primarily towards the remedies that may be granted on the disposition of an action, thought it broad enough to cover stays of proceedings pending judicial review.\textsuperscript{39} It is, however, somewhat difficult to see this, particularly given the last part of the section, starting with "so that". This seems to speak to the final disposition of the matter putting an end to all aspects of the dispute between the parties and, apparently, qualifies the rest of the provision. Of course, an argument could be made in relation to an application for prohibition that a stay is available because, if that is not granted, the tribunal proceedings may be concluded by the time of the hearing of the prohibition application. This would mean that prohibition would no longer be available and \textit{certiorari} to quash the decision would have to be sought. In other words, a stay is arguably necessary to allow the application for prohibition finally to determine the matter and avoid further legal proceedings.

Interestingly, there is an almost identical provision in the Ontario \textit{Judicature Act}\textsuperscript{40} and this was not referred to by Arnup J.A. in \textit{Re}

\textsuperscript{37} \textit{Id.} at 90-92
\textsuperscript{38} \textit{S.N.S.} 1972, c.2
\textsuperscript{39} (1974), 15 N.S.R. (2d) 89 at 91
\textsuperscript{40} R.S.O. 1970, c. 228, s. 18(8). Both sections are based on the English Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, s. 24(7), now Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V., c. 49, s. 43. Note that 2 \textit{The Supreme Court Practice 1966} (London: Sweet, Maxwell) states, at para. 3367, that the section was designed to enable all divisions of the English High Court to
Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183, the decision in which the Ontario Court of Appeal decided that there was no authority in that province for the granting of a stay of proceedings pending a judicial review application. The authority cited for this was Re Holman & Rea, a 1912 decision of the Ontario Divisional Court, and this in turn relied on In re Miron v. McCabe, an 1867 Ontario decision which contrasted the specific English provision with the lack of any express authority in Ontario.

Cedarvale Tree Services is not mentioned in Jones J.'s judgment. However, he does refer in passing to another Ontario Court of Appeal decision, Talsky v. Talsky, for the proposition that the courts have an inherent power to issue such stays besides the authority conferred by section 38(8). However, Talsky was concerned with a different problem; the staying of further proceedings pending an appeal from the High Court to the Court of Appeal. All of the authorities cited for the proposition that the courts have an inherent jurisdiction were in fact appeal situations. Indeed, given that the judgment was delivered by Arnup J.A., it is very difficult to argue that the Court intended to overrule Cedarvale Tree Services by implication.

The authority principally relied upon by Jones J. for the inherent power of the court to grant such applications is even more seriously open to question. This was the decision of the Saskatchewan Court of Appeal in Blackwoods Beverages Ltd. v. Dairy Employees, Truck Drivers and Warehousemen, Local No. 834. Here, a stay of

give all of the remedies that could be given by any other division — not to create new remedies.
42. (1912), 27 O.L.R. 432 at 439; 9 D.L.R. 234 at 237-38; 21 C.C.C. 11 at 15 (H.C.)
43. (1867), 4 P.R. (Ont.) 171 at 177
44. (1974), 15 N.S.R. (2d) 89 at 92
47. (1956), 3 D.L.R. (2d) 529; 18 W.W.R. 481 (sub nom. Re Blackwoods Beverages Ltd. and Dairy Employees, Truck Drivers and Warehousemen, Local No. 834 (Man. C.A.)
proceedings was granted pending the disposition of an application for the quashing of a reinstatement order. However, rather than being a case of the exercise of inherent powers, the Court relied specifically on a provision in the Crown Procedure Rules of Saskatchewan which makes the English Crown Office Rules applicable if there is no equivalent Saskatchewan provision. These English rules did provide for stays and there is no Nova Scotia equivalent. That this is the basis for stays in Saskatchewan is also made clear in the subsequent decision of

There is, however, some support for the position of Jones J. to be found in the decision of the Manitoba Court of Appeal in Hannon v. Eisler, which Arnup J.A. refused to follow in Cedarvale Tree Services. This is not referred to by Jones J. but, in delivering judgment, Coyne J.A. disagreed with Re Holman & Rea and said that, even if it were not restricted to criminal charges, it did not apply in Manitoba by virtue of an unnamed statute and the rule of "implied, incidental and auxiliary powers". This last statement would seem to suggest the existence of an inherent power to grant stays of proceedings.

Before turning to a discussion of the policy issues surrounding this debate, let me deal with other possibilities for preventing the continuation of proceedings pending judicial review and also clarify, as far as possible, the position concerning appeals from statutory authorities to the courts.

One method of obtaining a stay might of course be to seek an interlocutory injunction. However, two problems raise themselves here. Interlocutory injunctions are normally supplementary of an injunction and there remains some considerable
doubt as to whether an injunction can be sought, instead of prohibition and certiorari, with respect to judicial or quasi-judicial tribunals. Secondly, the common law rule about not combining prerogative and non-prerogative relief in the same proceedings would seem to preclude the grant of such interlocutory relief where the principal remedy being sought is prohibition or certiorari. Nevertheless, if the authority is not a judicial or quasi-judicial one, the interlocutory injunction, as a supplement to seeking of an injunction, is obviously a viable possibility. Furthermore, the provisions of the 1972 Nova Scotia Rules of Civil Procedure, allowing for the combining of all forms of relief in the one proceeding, may well have opened up the possibility for the obtaining of an interlocutory injunction even where the principle relief being sought is prerogative in nature.

Where what is being sought is the restraining of execution of a decision pending the hearing of an application for relief in the nature of certiorari, prohibition is a possibility, provided the tribunal is not considered functus officio. However, this makes little sense in a regime where there is no difference between the time that you have to wait for the hearing of a certiorari application and that for


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prohibition. Moreover as prohibition is a final remedy, depending on the same grounds as certiorari, it is obviously the remedy to seek initially without certiorari in a situation where prohibition applications are dealt with more quickly than those for certiorari.

However, this possibility has raised itself in the context of the Federal Court Act where, on at least one occasion, prohibition has been sought from the Trial Division of the Court pending the disposition of an application to the Federal Court of Appeal under section 28 of the Act to review and set aside a decision. Wardair Canada Ltd. v. C.T.C. involved an attempt to prevent the C.T.C. proceeding with a review hearing pending the determination of a section 28 application. Walsh J. of the Trial Division noted that the Federal Court Rules made no specific provision for the grant of a stay and basically then held that prohibition could not be used to make up for this gap in the Rules. He also held that, even if prohibition was available in such cases, it was a matter of discretion and that, in the circumstances, the C.T.C. Review Committee had exercised its discretion to continue properly.

Subsequently, in Penner v. Representation Commission for Canada, an interlocutory injunction was sought from the Trial Division for the same purpose. This time the denial of relief was placed on a broader basis, namely, that as the award of an interlocutory injunction involved at least some consideration of the validity of the decision subject to the section 28 application it was almost certainly precluded from Trial Division scrutiny by virtue of section 28(3) which provides:

Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision of order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order [emphasis added].

60. S.C. 1970-71-72, c. 1
62. Id. at 602-03. See, however, the recent decision of Re Madden & The Queen (No. 2) (1977), 35 C.C.C. (2d) 385 (Ont. H.C.), where prohibition was granted to stay criminal proceedings before a County Court Judge, pending the outcome of certiorari and mandamus applications.
63. Id. at 603
65. Note, Walsh J. also had the argument before him in the Wardair case but decided not to rest his decision upon it. See [1973], F.C. 597 at 599 and 602.
This, of course, does not preclude the possibility of an interlocutory injunction where the decision or proceedings in question are not subject to exclusive, original Court of Appeal jurisdiction.

As far as statutory appeals are concerned, Rule 62.10 of the Nova Scotia Rules of Civil Procedure would seem to open up the possibility of an application to stay execution of a tribunal decision or order pending the disposition, by the Appeal Division of the Nova Scotia Supreme Court, of appeals from statutory authorities. Rule 62 covers both appeals from other courts and “tribunal appeals” and, unlike two other provisions in Rule 62, Rule 62.10 appears to make no differentiation between appeals from other courts and appeals from tribunals. A similarly broad interpretation has in fact been given by the Ontario Court of Appeal to the Ontario equivalent, R 506. This was in the decision of Re Occhipinti and Discipline Committee of the Ontario College of Pharmacy.

Of course, not all statutory appeals in Nova Scotia are to the Appeal Division. If the appeal is to the Trial Division, the situation is a little less clear. Rule 62.01 defines “Court” to mean the Appeal Division for the purposes of Rule 62. However, the opening words of the Rule, “unless the context otherwise requires” potentially opens up Rule 62.10 for application to statutory appeals to the Trial Division. If not, the only other possibility rests in the inherent power of the Court for which ample authority was given in Talsky v. Talsky (No. 2), the Ontario decision of Arnup J.A. referred to earlier. Ontario Rule 506 did not apply here as the issue was the power of the High Court of Ontario to stay one of its own decisions pending an appeal to the Supreme Court of Canada.

On many occasions, when prohibition is sought, the statutory tribunal will of its own motion call a halt to its proceedings pending the disposition of the judicial review application. A typical example

66. See e.g. Rules 62.02, 62.03, 62.04, 62.07, 62.12
67. [1970] 1 O.R. 741 (C.A.). Note also section 25(1) of the Statutory Powers Procedure Act, S.O. 1971, c. 47. This provides that an appeal from a tribunal coming under Part I of that Act to a court or other appellate tribunal operates as a stay unless the appeal body otherwise orders. However, section 25(2) provides that this provision does not apply to judicial review proceedings. Note, however, section 4 of the Judicial Review Procedure Act, S.O. 1971, c. 48, which allows for interim relief (Supra, note 35)
68. See e.g. section 15, Boxing Authority Act, S.N.S. 1973, c. 3; section 35, Medical Act, S.N.S. 1969, c. 15; section 18, Public Accountants Act, R.S.N.S. 1967, c. 245
is provided in the Supreme Court of Canada decision of Bell v. Ontario Human Rights Commission. There, Professor Tar-nopolsky halted his inquiry under the Ontario Human Rights Code so that the courts could rule on whether or not he had jurisdiction over the property which was the subject matter of the inquiry. There are obvious reasons for doing this. If, in fact, there is no jurisdiction, then to have proceeded will not only have been a waste of the tribunal’s time but also will have put the parties to unnecessary expense and trouble.

In the Ontario Food Terminal Board case, the justification for the rule that the tribunal should stop was that tribunals really have no authority to determine questions of law, including questions of jurisdiction, so that, once an objection is raised, the proceedings should halt till a superior court has cleared the right of the tribunal to continue. However, in Bell and in other cases, the right of the tribunal to come to at least preliminary or tentative conclusions even on jurisdictional issues has been established clearly. Indeed, at times the courts will refuse to deal with an application for prohibition because of a lack of timeliness or prematurity in the proceedings. In other words, even if a jurisdictional question is raised, the courts may require a proper record before they will deal with the issue and, particularly, if there are disputed facts, the courts will await the tribunal’s finding before adjudicating. This, of course, suggests that at times tribunals also should recognize the prematurity of an application for prohibition and refuse to stay further proceedings, at least until such time as the reviewing court

71. Then S.O. 1961-62, c. 93
72. [1963] 2 O.R. 91 at 93; 38 D.L.R. (2d) 530 at 532 (However, Laidlaw J.A. did acknowledge their ability to make these findings provided no objection was made).
73. [1971] S.C.R. 756 at 771; 18 D.L.R. (3d) 1 at 16 (per Martland J., delivering the judgment of the majority)
75. This is referred to in passing in Bell by Martland J. See [1971] S.C.R. 756 at 775; 18 D.L.R. (3d) 1 at 19, where he states that because a neat question of law in an uncontradicted factual setting was before the Court, arguments of prematurity were not available. However, it is clear that he would have decided differently if there was conflicting testimony which the Board of Inquiry had not yet ruled upon. See also Re Dilts and University of Manitoba Faculty Association (1973), 43 D.L.R. (3d) 401; [1974] 1 W.W.R. 22 (sub nom. Dilts v. Manitoba Labour Board) (Man. C.A.)
will be able to determine the jurisdictional issue on the basis of a full record.

It is also clear, that applications for review are on many occasions tactical, with delay of the administrative process the prime consideration. If tribunals were obliged to halt their proceedings every time an objection was made to their jurisdiction or procedures, a very powerful weapon indeed would be placed in the hands of those seeking to frustrate the particular legislative purpose e.g. proper consideration of an application by a trade union for certification as a bargaining agent under the Trade Union Act. For this reason, particularly, there can be little doubt that the courts have been right to leave the issue up to the discretion of the tribunal, at least initially.

The real question, however, is whether that exercise of discretion should be subject to judicial scrutiny, whether by way of an application for a stay or otherwise. The general policy of Canadian remedial law on this point is reflected in the availability of interlocutory injunctions to stop a wide range of conduct pending trial of the principle action. The basis for the availability of this relief makes a lot of sense. If a person has a prima facie arguable case and would suffer irreparable damage if the interlocutory injunction was not awarded then there would seem to be every reason in sound policy for the protection of his interest. This is particularly so if that interest outweighs the interests of others involved and there can be some financial adjustment made for losses suffered by others as a result of the interlocutory injunction if the principle action is eventually unsuccessful. While these considerations may not fit all that neatly into the context of administrative tribunal decision-making, they certainly do suggest a basis for the development of principles of court intervention. What are the costs of delay? What is the likelihood of success of the application for judicial review (or the statutory appeal, for that matter)? Is the applicant acting in a bona fide manner?

To a limited extent, this kind of analysis can be seen in the judgment of Jones J. in the Canadian Automatic Sprinkler Association case. He refers to the lack of delay in the bringing of the applications for prerogative relief and refers to the principle

76. See e.g. Asptogan Ltd. v. Laurence (1974), 10 N.S.R. (2d) 614 (S.C., A.D.); Indal Ltd. and Brampton Aluminum Products Ltd. v. Halko (1976), 1 C.P.C. 121 (Ont. H.C.)
applications as being meritorious, though without any elaboration. He then goes on to talk about the matter "materially affect[ing] the rights of the applicant" and here the lack of elaboration becomes most unfortunate. In most cases, where certiorari and prohibition are being sought, the rights of the applicant are in issue. Indeed, it is sometimes asserted that they must be, so that if this is all that is required, stays potentially could be granted in every case and this would seem to go too far. Of course, it may well be that there was evidence here of particularly damaging consequences if a stay was not granted; a detriment which outweighed all the interests of others involved. Unfortunately, we are not told and I would suggest that without a proper judicial development and articulation of principles in this area, this otherwise legitimate development of the common law by Jones J. could result in incredible confusion and inconsistency.

This same lack of sophisticated treatment of the topic emerges from R. v. Board of Governors of University Hospital, Ex parte Marian, a case involving the dismissal of a doctor from the hospital. Here, it was suggested that it was the Court’s duty to preserve the applicant’s rights till the application for certiorari was dealt with, the only qualification being one that was not met in that case — that the applicant be acting bona fide and have an arguable case. Once again, however, there is no discussion of the actual balance of convenience. What would the doctor in fact suffer if the stay was not granted, particularly having regard to the fact that the decision, if quashed, would be a nullity, meaning that he always was a

77. (1974), 15 N.S.R. (2d) 89 at 90
78. Id.
79. I refer here to the much-criticized but still used “rights” test of Atkin L.J. in R. v. Electricity Commissioners, Ex parte London Electricity Joint Committee, [1924] 1 K.B. 171 at 205 (C.A.). For a recent example of this, see Cluney v. Registrar of Motor Vehicles (1975), 11 N.S.R. (2d) 256 (S.C., T.D.), commented on in the first of these surveys, supra, note 1 at 899-902. This decision was however reversed on appeal, 11 N.S.R. 247; 53 D.L.R. (3d) 468 (S.C., A.D.).
81. Id. at 328; 74 W.W.R. 55 at 59, citing Blackwoods Beverages Ltd. (No. I) (1956), 3 D.L.R. (2d) 529 at 533; 18 W.W.R. 481 at 486. Here, the stay was refused because the court concluded that the function being exercised was purely administrative and therefore not amenable to either certiorari or to arguments for the application of the rules of natural justice (id. at 329-33; 74 W.W.R. at 60-65). This was confirmed by the Court of Appeal: (1970), 15 D.L.R. (3d) 767; [1971] 1 W.W.R. 58 (Sask. C.A.).
member of the hospital entitled to his salary?\textsuperscript{82} Were there any interests of the hospital that deserved consideration?

The ability of the Nova Scotia courts to grant a stay in the administrative process pending judicial review is basically a desirable development in the law, albeit not one strongly supported by either statute or precedent. What now remains is the development of coherent criteria for deciding when relief of this kind should be granted.

(c) \textit{Statutory Authorities — Their Status in Judicial Review Applications and in Appeals Involving their Decisions}

(i) \textit{Introduction}

In \textit{Re Holman and Rea}, a decision just discussed in the section on stay of administrative proceedings, Middleton J. suggested that one of the reasons for tribunals acceding to requests for stays of their proceedings was that to do so was "more consistent with judicial dignity".\textsuperscript{83} He elaborated:

It would be more seemly for all tribunals charged with the administration of justice to act in such a way as to avoid any suspicion that the course adopted is in any way the result of temper.\textsuperscript{84}

This kind of thinking about the dignity and place of administrative tribunals has also manifested itself recently in two Nova Scotia decisions. At the end of the judgment of the Appeal Division in \textit{Re City of Dartmouth},\textsuperscript{85} MacKeigan C.J.N.S. commented on the role of counsel for the Public Utilities Board in that case which was an appeal by way of case stated.

We should note our appreciation of the assistance rendered by Mr. Duncan, counsel for the Board. I should gently suggest, however, that our hearing him, and we could not have legally refused to hear him, must not be construed as encouraging Boards and other tribunals to be separately represented by counsel, except in a watching capacity, to defend the correctness of their own decisions. Their independence and impartiality are better protected and the Court more effectively assisted if, where private parties may not adequately expose all aspects of the case,

\textsuperscript{82} Assuming, that is, that all his income came from salary. The paradigmatic case is, of course, \textit{Ridge v. Baldwin} [1964] A.C. 40; [1963] 2 All E.R. 66 (H.L. (E.)).

\textsuperscript{83} (1912), 27 O.L.R. 432 at 439; 9 D.L.R. 234 at 237; 21 C.C.C. 11 at 15 (H.C.)

\textsuperscript{84} \textit{Id.}

\textsuperscript{85} (1976), 17 N.S.R. (2d) 425 (S.C., A.D.)
the public interest were represented on an adversary basis by counsel for the Attorney General. A Board should not feel compelled to support its own decision by separate counsel, any more than should or do magistrates or judges when their decisions come before us on stated case, *certiorari*, appeal or otherwise.\(^86\)

Then, in *Re Workmen's Compensation Board of Nova Scotia and Treige*,\(^87\) Coffin J.A. had the following to say in refusing leave to the Workmen's Compensation Board to appeal to the Appeal Division from a decision of the Workmen's Compensation Appeal Board:

> There indeed seems something inherently wrong for a Board such as this, which performs quasi-judicial duties, to act in an adversary fashion to defend its decisions on appeal or, as here, to try to reinstate its decision when it has been overruled by an intermediate administrative tribunal. For the Board then to prosecute or defend an appeal from its own decision seems almost an incongruous as for a trial Judge or Magistrate to do so, which, of course, would be unthinkable.\(^88\)

These statements raise three very closely related issues. First, can an administrative tribunal appeal from the setting aside or reversal of its decisions by either a superior court or, in the case of appeal, by an appeal court or an intermediate tribunal? Secondly, what role can an administrative tribunal play in appeal or review proceedings in which it is a respondent or defendant? Finally, there is the issue, suggested by MacKeigan C.J.N.S.'s judgment in the *City of Dartmouth* case, of the position of an administrative tribunal after it has stated a case to a court. As with my discussion of stay of proceedings I will first examine the existing law on these issues then consider the policy issues which they raise.

(ii) Status of Tribunal as an Appellant

In *Treige*, the denial by Coffin J.A. of leave to appeal was couched in the following terms.

> The right of the [Board] to obtain leave to appeal has not been established to my satisfaction and I would dismiss the application.\(^89\)

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86. *Id.* at 440
87. (1976), 14 N.S.R. (2d) 693; 72 D.L.R. (3d) 246 (S.C., A.D. — single judge on leave to appeal)
88. *Id.* at 702-03; 72 D.L.R. (3d) at 252-53
89. *Id.* at 702; 72 D.L.R. (3d) at 252
This suggests that the judge had not been shown sufficient reasons to exercise his discretion in the Board's favour. However, the tone of the rest of the judgment suggests quite clearly a rule of law that the Board had no status to make such an appeal because it is not an "aggrieved" person.\textsuperscript{90}

No Canadian authority is cited by the judge. Rather he relies upon\textsuperscript{91} a series of English cases generally involving English local authorities endeavouring to appeal the reversal of their decisions by summary jurisdiction courts.\textsuperscript{92} To quote from S.M. Thio:

As the cases now stand, a local authority which has had its order reversed, is not per se a ‘person aggrieved’ by the reversal. However, if the reversal of the order casts a legal burden on the local authority or reverses a legal obligation imposed on the latter which was sought to be discharged through the order, the local authority acquires the status of a person aggrieved so as to be entitled to appeal to the courts.\textsuperscript{93}

In terms of the exceptions stated by Thio, the award of costs by the summary jurisdiction court has been held to be sufficient\textsuperscript{94} as has the court discharge of a council order directing a person to provide a dustbin, which had the effect of reviving an implied obligation on the part of the council itself to provide a dustbin as part of its mandatory statutory duty to collect refuse.\textsuperscript{95} Both these examples seem somewhat artificial exceptions to the general rule. However, coffin J.A. in \textit{Treige} rejected what was a seemingly stronger argument for the application of the exception namely, that the increase of compensation awarded by the Appeal Board cast an additional burden on the Board itself as custodian or trustee of the Accident Fund which it administered.\textsuperscript{96} This, according to Coffin

\textsuperscript{90} Id. at 698-702; 72 D.L.R. (3d) at 249-52
\textsuperscript{91} Id. at 700-01; 72 D.L.R. (3d) at 250-51
\textsuperscript{93} Locus Standi and Judicial Review (Singapore: Singapore University Press, 1971) at 225
\textsuperscript{94} Id. at 223, referring to R. v. Surrey Quarter Sessions, Ex parte Lilley, [1951] 2 K.B. 749; [1951] 2 All E.R. 659 (K.B.) This case is also referred to by Coffin J.A. (14 N.S.R. (2d) at 701; 72 D.L.R. (3d) at 251) as is another decision on this point: R. v. Lancashire Quarter Sessions, Ex parte Huyton — with — Roby Urban District Council, [1955] 1 Q.B. 52; [1954] 3 All E.R. 225 (Q.B.)
\textsuperscript{95} Id. at 224, referring to R. v. Nottingham Quarter Sessions, Ex parte Harlow, [1952] 2 Q.B. 601; [1952] 2 All E.R. 78. Coffin J.A. in fact acknowledges that this case could help the Board’s argument here. Indeed, it was raised by counsel for the Board. (14 N.S.R. (2d) at 700; 72 D.L.R. (3d) at 250)
\textsuperscript{96} (1976), 14 N.S.R. (2d) 693 at 701; 72 D.L.R. (3d) 246 at 252
J.A., "would be stretching the meaning of the cases beyond reason". 97 Subsequently, he also stated that the Board, as a Crown Agency, was perhaps in a somewhat different position from a municipal authority because the Attorney-General was always there, if only in theory, as the guardian of public interest. 98

Interestingly, about two months after the decision in Treige, the Supreme Court of Canada dealt with this issue not in relation to an appeal to the courts from the decision of an intermediate administrative tribunal but rather in the context of an appeal by a tribunal from the setting aside of one of its decisions by the Federal Court of Appeal under section 28(1) of the Federal Court Act.

This was the decision of a seven person court in Re Canada Labour Relations Board and Transair Ltd. 99 There was already Supreme Court of Canada authority for the proposition that a tribunal could appeal an adverse order relating to its jurisdiction 100 and the issue in the case was what constituted jurisdictional error for these purposes and indeed whether the right to appeal could be extended further to non-jurisdictional errors of law.

Laskin C.J.C., who gave the majority judgment on the substantive review issue, held that jurisdictional error included, as it did in other contexts, breach of the rules of natural justice. 101 Moreover, he seemed to accept a general discretion on the part of the courts to allow the tribunal to be heard on issues of

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97. Id.
98. Id. at 703; 72 D.L.R. (3d) at 253
100. Labour Relations Board of Saskatchewan v. Dominion Fire Brick & Clay Products Ltd., [1947] S.C.R. 336; [1947] 3 D.L.R. 1. This was also accepted by the Ontario Court of Appeal in International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board (1958), 18 D.L.R. (2d) 588; [1959] O.W.N. 149 (sub nom R. v. Ontario Labour Relations Board, Ex parte Genaire Ltd.) Both these decisions are discussed by Laskin C.J.C. in Transair at 727-28; 67 D.L.R. (2d) at 424-25; 9 N.R. at 185-86 and also by Spence J. at 745-46; 67 D.L.R. (2d) at 439; 9 N.R. at 203-04. It is significant that the Supreme Court of Canada in the Dominion Fire Brick & Clay Products case seems quite clear that where jurisdiction is concerned, that in itself is sufficient warrant for allowing the tribunal not only to defend but also to appeal against an adverse decision. In such cases, the award of costs against the tribunal by a reviewing or appellate court is in no way determinative. See Kerwin J. (with whom Rinfret C.J. concurred) at 339; [1947] 3 D.L.R. at 2-3; Estey J. at 340; [1947] 3 D.L.R. at 6-7.
intra-jurisdictional law as well, particularly if they were linked with a jurisdictional issue such as natural justice.\textsuperscript{102} As that was the case, he was disposed to exercise his discretion favourably in this instance.\textsuperscript{103}

However, Laskin C.J.C. was in a minority on the procedural issue, two members of the merits majority\textsuperscript{104} siding with the merits minority judgment delivered by Spence J. who held that not only was the right to appeal confined to jurisdictional issues but that, for these purposes, jurisdictional error did not include breach of the rules of natural justice, whatever might be the position in other contexts.\textsuperscript{105} To allow the tribunal to argue about whether it had fulfilled the requirements of natural justice "would not indicate the impartiality of the Board or emphasize its dignity", by now a familiar refrain in this area.\textsuperscript{106} Actually, this reasoning contrasts starkly with that of Laskin C.J.C. who said:

\begin{quote}
I do not regard the Board's participation as making it an adversary party as if there were a \textit{lis} between it and the respondent Transair. Its counsel properly submitted to this Court that the Board was seeking an elucidation of the scope of its authority under its constituent statute, and it was to be expected that counsel would have to take a position on the questions at issue if he was to be of any help to the Court.\textsuperscript{107}
\end{quote}

Of course, the decision in \textit{Transair} does not resolve all difficulties. If jurisdiction does not include natural justice, are there any other matters now usually thought of as jurisdictional which are excluded \textit{e.g.} the tribunal asking itself or taking into account irrelevant factors.\textsuperscript{108} It also raises the question of the relationship between appeals from judicial review and appeals from an intermediate statutory appeal. Coffin J.A. seems to exclude \textit{any} possibility of a tribunal appeal in the latter situation, at least where the intermediate appeal body is another tribunal rather than court.

\begin{itemize}
\item \textsuperscript{102} \textit{Id.} at 728; 67 D.L.R. (3d) at 425; 9 N.R. at 186
\item \textsuperscript{103} \textit{Id.}
\item \textsuperscript{104} See the judgment of Beetz J. (\textit{id.} at 756; 67 D.L.R. (3d) at 448; 9 N.R. at 202). Pigeon J. concurred with Beetz J. (\textit{id.} at 756; 67 D.L.R. (3d) at 448; 9 N.R. at 184). Only Judson J. concurred with Laskin C.J.C. on this issue (\textit{id.} at 726; 67 D.L.R. (3d) at 439; 9 N.R. at 184
\item \textsuperscript{105} \textit{Id.} at 747; 67 D.L.R. (3d) at 439-40; 9 N.R. at 203-04
\item \textsuperscript{106} \textit{Id.} at 747; 67 D.L.R. (3d) at 440; 9 N.R. at 204
\item \textsuperscript{107} \textit{Id.} at 730; 67 D.L.R. (3d) at 426; 9 N.R. at 188
\item \textsuperscript{108} See e.g., \textit{Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796, [1970] S.C.R. 425 at 435; 11 D.L.R. (3d) 336 at 344. See, however, notes 303-04, infra}
\end{itemize}
Can this be reconciled with Transair? Can any legitimate distinction be drawn between the two situations? It is hard to think of any. Of course, Coffin J.A. may simply not have considered the possibility of such an intermediate appeal body having to resolve issues of jurisdiction and, as a result, the ratio of Treige may arguably only relate to appeals on the merits.

(iii) Status of Tribunal when Respondent or Defendant

In Transair, the following statement by Spence J. indicates that he saw no difference between the role of an administrative tribunal as appellant and its role as respondent or defendant:

The issue of whether or not a board has acted in accordance with the principles of natural justice is surely not a matter upon which the board, whose exercise of its functions is under attack, should debate, in appeal, as a protagonist and that issue should be fought out before the appellate or reviewing Court by the parties and not by the tribunal whose actions are under review [emphasis added].

Two months later, this seemed confirmed by another decision of the Supreme Court of Canada (this time a nine person Court) again involving the Canada Labour Relations Board but in the role of respondent in an appeal against the refusal of judicial review. De Grandpré J. delivering the judgment of the Court held that the Board really had no standing before the Court "inasmuch as the jurisdiction of the Board as such has not been challenged". However, it must be admitted that the second part of that same sentence perhaps admits of the possibility of the Court in its discretion agreeing to hear counsel for the Board: "... and counsel appearing for the Board was not invited to address [the Court]".

The other interesting aspect of this case was that the issues of law involved could quite easily have been rephrased in terms of the Board having lost jurisdiction by asking itself the wrong question but apparently this argument was not raised.

111. Id. at 544; 9 N.R. at 352
112. Id.
113. The applicants in this case were seeking review under section 28 of the
This disposition of the issue of the role of the tribunal as respondent or defendant also served to confirm what Coffin J.A. had said in Treige:

I leave aside matters where a board or Magistrate is questioned by prerogative writ on purely jurisdictional matters and then must appear or be represented before the reviewing Court.\(^{114}\)

In other words, where jurisdictional issues are involved the tribunal as defendant or respondent can appear and take an active role. After this, the only question perhaps left unresolved is the role of the Board as respondent before an intermediate appeal tribunal but, once again, there would appear to be no reason for differentiation.

(iv) **Status of Tribunal Where Stating a Case**

In *Re City of Dartmouth*,\(^{115}\) the Appeal Division of the Nova Scotia Supreme Court was dealing with the hybrid situation of an appeal by way of case stated. Each of the three questions of law directed to the Court in the case stated was framed in terms of whether the Board of Public Utilities ""had authority"" to do certain things.\(^{116}\) Superficially anyway, that kind of question would seem to raise issues of jurisdiction rather than intra-jurisdictional error of law. It so and, if *Transair* and *Central Broadcasting Co.*, the appeal cases, are applied, then the Public Utilities Board would seem to have a clear right to appear on the appeal and make submissions.

This, of course, was not contradicted by MacKeigan C.J.N.S. He simply said that, while he could not legally refuse to hear counsel

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Federal Court Act, S.C. 1970-71-72, c. 1. The alleged basis of review was error of law on the face of the record. Because there was no operative privative clause, it was irrelevant for those alleging error whether these alleged errors were ones affecting jurisdiction. However, they arguably were, at least in the sense of the tribunal asking itself the wrong question. Indeed, that this was the basis in which the case was argued is suggested strongly by de Grandpré J.'s reference to *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796* [1970] S.C.R. 425; 11 D.L.R. (3d) 336 and his statement that this case did not come within the principles of *Metropolitan Life* (id. at 541; 9 N.R. at 349). If true, this means that the plaintiff was arguing about a matter generally regarded as jurisdictional (see notes 108, 303-04 and accompanying text) and, on the *Transair* theory, this should have given status to the Board. However, it is, I think, too flimsy a basis for stating dogmatically that *Central Broadcasting Ltd.* has narrowed further the ambit of jurisdictional error for the purpose of the status of a tribunal to appear and argue.

114. 14 N.S.R. (2d) 693 at 703; 72 D.L.R. (3d) 246 at 253
115. N.R.S. (2d) 425
116. Id. at 427
for the Board, he did not think as a matter of practice that counsel should be involved actively in the appeal. This "gentle" criticism goes somewhat further than the Supreme Court of Canada which, in the two appeal cases, made no suggestion that, even in cases raising jurisdictional issues, it would be better if counsel for the Board was not heard from.

The question of the role of a tribunal in a pure case stated situation does not appear to have been considered recently, though it is of interest that counsel for the National Energy Board took a leading role in the case of *In re Canadian Artic Gas Pipeline Ltd.*, both at the Federal Court of Appeal\(^{117}\) and Supreme Court of Canada levels.\(^{118}\) This was the case in which the Board asked the Federal Court under section 28(4) of the *Federal Court Act* whether its chairman, Marshall Crowe, was disqualified from participating in the pipeline inquiry because of a reasonable apprehension of bias. It may well be that such active involvement would not have been allowed had the proceedings been commenced after the decision in *Transair*. The only possible distinction that could be made, I suppose, is that there is less chance of the tribunal being perceived to be other than impartial if it argues a case in court which the tribunal itself has commenced than in a situation where it is involved in proceedings commenced by one of the parties to a hearing. However, this is somewhat artificial. For example, in the *Crowe* case, the application by the Board was made to avoid the possibility of those objecting to Crowe's presence seeking prohibition or waiting till the hearing was over and applying to set the decision aside. In other words, the application was forced by some of the parties if not technically commenced by them.

(v) What Should the Law Be?

First, there does not appear to be any reason for differentiating between the tribunal as stater of cases, appellant or respondent/defendant. If it has a legitimate interest to protect by appearing and arguing before a court, the legitimacy of that interest should not really be affected by the context in which it is necessary to pursue that interest. For example, if one admits that a tribunal has

the right to defend its jurisdiction as defendant or respondent in a lower court, then it makes little sense to deny it the right to appeal and appear if the lower court rules against it. To accept this is in a way to treat the tribunal as a second class litigant. The contradictory nature of such a rule is also borne out when it is realized that if the first instance court rules in favour of the tribunal's jurisdiction, the tribunal will in fact be able to appear before the appeal court should the applicant appeal.

If this is accepted, then it comes down to a question of the type of orders or issues that tribunals should be able to argue about. Unfortunately, aside from appeals to the need for tribunals to appear impartial and retain their dignity as quasi-judicial or judicial bodies, there has been no close analysis of the issues that are involved here. At base, the question has to be whether the tribunal is able to contribute anything to the satisfactory resolution of issues that are raised in review applications, on appeal or in proceedings by way of case stated and the answer to that question seems fairly obvious. The tribunal in most instances is going to be far more familiar with its empowering statute and its history and purposes than the reviewing court. It is also going to be far more familiar with the legal issues that confront it in its day to day activities. As a result, its explanation of why it assumed jurisdiction in a particular matter or why it has given a section of its empowering Act a certain reading is likely to be extremely useful to the court, if that court wants to be able to perform its task in as informed a manner as possible. The same is also obviously true of situations where procedural unfairness is alleged. Given the flexibility of the rules of natural justice and the search that is involved in trying to strike a balance between the demand of those affected for procedural protections and the tribunal's legitimate concern for efficient, effective decision-making, it surely seems incumbent on the court to allow the tribunal to explain why certain procedures have or have not been adopted.

Of course, it might be argued that the tribunal can protect its position by giving adequate reasons for all of its decisions but this assumes that the issues raised before courts subsequently will all be ones that the tribunal itself has had to confront and rule upon. While this assumption will usually be correct in relation to the merits of the matter and issues of law within the merits, it will certainly not always be true of issues of jurisdiction and procedural fairness. Frequently, these will not be raised at the tribunal hearing. In fact, they may not even have been perceived at that time. The argument
also assumes that the tribunal will always have time to give full reasons for its decisions and this is not necessarily true either. Moreover, in some situations, the reasons of tribunals, while making sense to those involved in the process, may only be fully comprehensible by an outsider when examined against the background of extensive information about the statutory context and past precedents and practices of the tribunal. In other words, what may be full reasons for those who are parties to the decision may not be for an outsider, such as a reviewing court, and to expect administrative tribunals to always write their decisions for the benefit of outsiders and particularly with regard to the possible subsequent involvement of a reviewing court would be to decrease the efficiency of the tribunal's work.

There are, however, occasions on which involvement by the administrative tribunal other than nominally in subsequent judicial proceedings would seem to be inappropriate. A clear example is afforded by cases where matters of partiality or bad faith on the part of the tribunal are alleged. Allegations of a lack of objectivity because of concern with the actual or apparent state of mind of the members of a tribunal are fairly obviously of a different order than allegations of lack of jurisdiction, error of law or procedural unfairness and, in such cases, whether, by virtue of a rule of law or simply wisdom, it would seem better for the tribunal not to take an active role. To assert vigorously no lack of partiality may have the tendency to increase everyone's apprehensions about the tribunal's partiality.

The cases in this area also fail to make any differentiation between various types of tribunal. Instead, all judicial or quasi-judicial tribunals tend to be equated with inferior courts and, just because inferior courts do not appeal against reversals of their decisions or contest appeal and review proceedings directed against them except where jurisdiction is involved, it seems to be assumed that tribunals should not do so either. However, inferior courts not only exercise types of jurisdiction that superior courts are generally familiar with but typically they are also dealing with disputes involving a plaintiff and a defendant or a prosecutor and defendant and applying reasonably well-defined legal principles. Now, there are administrative tribunals that do that kind of thing and thus, for example, it may be quite inappropriate for a disciplinary tribunal to take an active role on an appeal to the courts from the merits of its decisions. Normally, there will be a prosecuting authority who will
be there to defend the finding of guilt. But this argument of judicial dignity and impartiality and comparison with ordinary inferior courts bears little or no relation to an administrative tribunal charged with the development and implementation of policies under a very broad statutory framework. In such cases, there would seem to be a very good case for the tribunal to be able to defend even the merits of its decisions in subsequent judicial proceedings.

In the two Nova Scotia decisions, the judges refer to the office of the Attorney-General and suggest that the Attorney-General is the proper person to make arguments on behalf of the public interest — not the Board itself. In particular, it seems to be suggested in the Treige case that the Board’s position could have been protected by the launching of an appeal by the Attorney-General in the exercise of his inherent rights. Such suggestions would seem to make a charade out of this whole matter. If Mr. Duncan, a lawyer with the Attorney-General’s Department, as well as counsel to the Public Utilities Board, had appeared in the City of Dartmouth case in his former rather than his latter capacity, would that really have made a substantial difference? If, in Treige, the Workmen’s Compensation Board had requested the Attorney-General’s Department to launch an appeal rather than doing so itself, would that have made a substantial difference? It can be argued that the Attorney-General’s office is theoretically in a neutral position in relation to the Board and it is always better to have the Board represented by independent counsel rather than personally arguing its own cause but surely the Board itself can instruct someone other than its own lawyer. The position of the Attorney-General really only serves as a smokescreen to the real issue. Should administrative boards be entitled to have representation at court proceedings involving their decisions and contest judicial review applications and statutory appeals on a proper adversary basis?

Too often, complaints are heard about the insensitivity of courts to the needs of the administrative process and the statutory context in which that process has been developed. The formulation of a rule which circumscribes the extent to which administrative tribunals can appear and argue in court can only further that lack of understanding, particularly as the number of statutory authorities

119. Re City of Dartmouth (1976), 17 N.S.R. (2d) 425 at 440; Re Workmen’s Compensation Board of Nova Scotia and Treige (1976), 14 N.S.R. (2d) 693 at 703; 72 D.L.R. (3d) 246 at 253
continues to proliferate. The tribunal’s point of view deserves to be put in virtually every case and put in a true adversary framework.

(d) *Judicial Review in the Face of a Statutory Appeal*

Statutory appeals, either to the courts or to intermediate administrative tribunals, have been the focus of a perhaps surprising number of significant cases in recent months in Nova Scotia. Yet when one realizes that much of the courts’ involvement with the administrative process is in the context of statutory appeals it appears that the only surprising thing about the amount of recent litigation of this kind is that it took such matters so long to become prominent in the law reports. I have already looked at two problems relating to statutory appeals in this survey;\(^{120}\) notably, the power of the courts to grant a stay of proceedings pending the disposition of an appeal and the status of the administrative tribunal itself before the appellate body. However, in the period under review, the Nova Scotia courts were also concerned with two of the more traditional issues relating to statutory appeals — the availability of traditional judicial review where there is a statutory appeal and the room for intervention that exists by virtue of such appeals. The first issue will be dealt with here and the second in the section on substantive law.

*Re Burgess and Storage Transport Ltd.*\(^{121}\) involved an application for an order in the nature of *certiorari* with respect to a decision of the Public Utilities Board in a motor carrier licensing matter and one of the preliminary points that the trial judge, Morrison J., had to consider was the effect of section 97 (1) of the Public Utilities Act.\(^{122}\) This provides:

> An appeal shall lie to the Appeal Division of the Supreme Court from any order of the Board upon any question as to its jurisdiction or upon any question of law, but such appeal can be taken only by permission of a judge of the said Court, given upon a petition presented to him within fifteen days after the rendering of the decision and upon such terms as the judge may determine.

It has not been the general practice of the Canadian courts to refuse to consider the grant of a judicial review remedy when there is a statutory right of appeal.\(^{123}\) Indeed, in a number of contexts,

120. *Supra,* at and
122. R.S.N.S. 1967, c. 258
this attitude is easily supportable. For example, where the statutory appeal is by way of trial *de novo* or rehearing it may not make much sense to compel an affected person to use that route to have a typical judicial review issue, such as natural justice, error of law or jurisdiction, determined. In such cases, judicial review will almost certainly provide a more convenient and expeditious method of determining the question than would the statutory appeal, which is essentially designed for a complete reconsideration of the merits. However, where the statutory appeal provision itself speaks specifically to typical judicial review issues, it would seem to indicate quite clearly that the legislature intended the courts' intervention to be by way of statutory appeal rather than by judicial review.

Section 97 of the Public Utilities Act is obviously such a provision in that it speaks to questions of law and jurisdiction as being the scope of the appeal provided. Significant also are the leave and time-limit provisions of the section, as well as the fact that the right of appeal is not to the Trial Division of the Supreme Court but to the Appeal Division. All these features of the section give the impression of a carefully thought out exclusive code for the scope of judicial scrutiny of the proceedings of the Public Utilities Board.

The decision of the Appellate Division of the Alberta Supreme Court in *Re Chad Investments Ltd.* in fact supports this approach. There, the court was dealing with a similar statutory regime and an attempt to secure judicial review by way of *certiorari* in proceedings commenced after the limitation period for the statutory appeal.

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124. On this point, see particularly the judgment of Hall J.A. in *Re McGavin Toastmaster*, *id.* at 118; [1973] 5 W.W.R. at 407. A further consideration may be the notion that, in the absence of a provision authorizing specifically appeals in questions of jurisdiction, an appeal on a question of law does not include such an appeal. "An error of jurisdiction makes the decision a nullity and you cannot appeal from a nullity" or so the argument goes. This argument is discussed later. See notes 297 and 298 and accompanying text

right of appeal had elapsed. McDermid J.A. delivered the judgment of the Court denying relief:

It is a wrongful exercise of judicial discretion, unless there are special circumstances, to grant an order of certiorari where the party aggrieved has been given an effective right of appeal [emphasis added] which the party has not taken advantage of and which has expired. I think this is supported by the majority of the authorities.

... ...

Here the Legislature has given the right of appeal upon a question of jurisdiction or law, but has provided that application for leave must be made within 30 days after the making of the decision, and that the Appellate Division shall hear the appeal as speedily as possible. Under the Alberta Rules of Court an application for certiorari must be made within six months of the decision. To grant certiorari in a situation such as this would, in effect, circumvent the clear intention of the Legislature that time is a critical and important factor in planning matters.\(^{126}\)

Though McDermid J.A. related this part of his judgment to an allegation of error of law on the face of the record, the reasons he advances seem just as relevant with respect to allegations of jurisdictional error. Moreover, the legislature’s preference for a limited right of appeal would seem just as pertinent during the thirty days in which leave had to be sought as in the period after that time.

In Burgess, Morrison J. referred to\(^{127}\) the Chad Investments decision\(^ {128}\) but then indicated that when issues of jurisdiction are involved he was more inclined to favour the availability of certiorari, notwithstanding an unexercised statutory appeal right.\(^ {129}\)

Presumably, his preference for this result is conditioned by a concern that the important issue of jurisdiction should not be kept away from the courts by a shorter than normal limitation period and that the access of affected individuals to the court should not be dependent on the grant of leave. Yet, in the last analysis, such a result would seem to fly in the face of legislative intention and, if so, is only supportable if there is in existence an overriding power of review for jurisdictional error by the courts, an argument of highly contentious constitutional validity.\(^ {130}\)

What the result also speaks to

\(^{126}\) Id. at 631; [1971] 5 W.W.R. at 93
\(^{127}\) (1976), 72 D.L.R. (3d) 231 at 236
\(^{129}\) (1976), 72 D.L.R. (3d) 231 at 237-38
\(^{130}\) For recent discussions of this issue, see P. W. Hogg, *Is Judicial Review of*
is the need for greater legislative clarity on the point. As with
typical privative clauses, only the clearest possible language will
normally suffice to convince the courts that their traditional review
powers have been circumscribed legislatively.

Interestingly, however, Morrison J. did not base the existence of
a discretion to grant judicial review in the face of the appeal
provision entirely on this point. He also relied on the uncertainty
as to whether or not section 97(1) of the Public Utilities Act applied
to appeals from the Public Utilities Board exercising jurisdiction
under the provincial Motor Carrier Act and the federal Motor
Vehicle Transport Act. This point had been raised but not
determined in an earlier case and Morrison J. made a plea that the
matter be decided on a reference to the Appeal Division by the
Public Utilities Board, though legislative clarification would
appear to be a more satisfactory way of determining the problem.

Presumably, this ground for considering the grant of certiorari
would have made some sense even if there was a general principle
that statutory appeal provisions with respect to law and jurisdiction
prevail over the availability of judicial review. Lack of legislative
clarity as to whether the appeal provision applies to a particular
situation should not prejudice affected persons and, given a
reasonable doubt as to the effect of the section, the applicant for
judicial review should not be gainsaid. In fact, the best approach for
the court to take in such cases would seem to be to allow the
application for judicial review to proceed but at the same time to
make a ruling on whether the appeal provision governs such
situations, that ruling to have prospective effect only on the right to
seek judicial review.

It is interesting, however, to contrast Re Burgess Transport Ltd.
with the subsequent decision of the Appeal Division in Hatt v.
Hebb on this question of the availability of judicial review in the

Administrative Action Guaranteed by the British North America Act (1976), 54
Can. B. Rev. 716 and H. W. Arthurs, "The Dullest Bill": Reflections on the
Labour Code of British Columbia 280 at 329-39. However, see W. R. Lederman,
"The Supreme Court of Canada and the Canadian Judicial System in (1975), 13
Transactions of the Royal Society of Canada, Series 4 at 221-24 and J. N. Lyon,
Note (1971), 49 Can. B. Rev. 465
131. (1976), 72 D.L.R. (3d) 231 at 236 and 238
133. Re Hartlen's Petroleum Transport Ltd. and Eastern Transport Ltd. (1964),
49 D.L.R. (2d) 83 at 87 (N.S.S.C., T.D.)
134. (1976), 72 D.L.R. (3d) 231 at 236
135. (1977), 18 N.S.R. (2d) 346 (S.C., A.D.)
face of a statutory right of appeal. This case involved an attempt by the appellant to secure *mandamus* to compel the Registrar of the Court of Probate to grant letters of administration. There was some doubt expressed about whether the Registrar had a discretion in this matter and, of course, if he did, *mandamus* would be an inappropriate remedy since, except in the rarest of cases, it is not available to compel the exercise of a discretion in a particular way. However, in a very short judgment affirming MacIntosh J's denial of relief in this case, the Appeal Division preferred not to deal with the case on this basis. Rather, they held that *mandamus* was not available because of the existence of a statutory right of appeal under the Probate Act. In doing so, they quoted from MacIntosh J’s judgment to the effect that “the granting of the remedy of mandamus is discretionary and may be refused because of another no less convenient and effective remedy such as an appeal”.

The existence of such a discretion with respect to the remedy of *mandamus* is clearly supported by the authorities. However, it serves to point out an anomalous aspect of the present law with respect to statutory appeals and their relationship with judicial review. On the basis of *Re Burgess Transport Ltd.*, if the Registrar had wrongly assumed jurisdiction, his decision could have been quashed in *certiorari* proceedings, notwithstanding the existence of a statutory right of appeal. However, reverse the situation and have a wrongful declining or refusal of jurisdiction and the statutory right of appeal has to be utilized. Surely, it would make more sense to deny the prerogative remedy in each instance as long as the exercise of the right of appeal is “no less convenient and effective”. Beyond this, of course, there may also be situations, as arguably in *Re Burgess Transport Ltd.*, where irrespective of questions of

136. *Id.* at 347
137. Only in situations where there are but two courses of action open to a particular decision-maker and to take one would be an exercise of power that would be subject to review for abuse of discretion. See *e.g.* *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 97; [1968] 1 All E.R. 694 (H.L. (E.))
138. (1977), 18 N.S.R. (2d) 346 at 347
139. *Id.* at 347-48
140. *Id.* at 347
141. See de Smith, *supra*, note 15 at 502-03. However, as de Smith notes, *mandamus* has in fact issued on many occasions despite the existence of a statutory right of appeal
convenience and effectiveness, the statutory appeal provision is obviously intended to be the exclusive method of questioning a tribunal's proceedings.

(e) **Proceedings Against the Crown Act — Scope**

When the issue of the legality of action taken under a statute is raised, the appropriate remedy to seek will often be a declaratory judgment against the Attorney General. The Attorney General is generally regarded as an appropriate person to name as defendant when the Crown itself is being sued. Furthermore, many agencies of the Crown are not made suable entities by their empowering statutes and, while the possibility exists that they will be held to be suable by implication, the safer course is to sue the Attorney General instead.

Thus, in two recent cases, *MacNeil v. Nova Scotia Board of Censors* and *Bedford Service Commission and Cunningham v. Attorney General of Nova Scotia*, the Attorney General, along with others, was named as defendant in the first instance in a case involving a challenge to the validity of legislation and, in the second, in relation to the legality of certain government action over the establishment of a rubbish dump.

In both cases, however, it was argued that the Nova Scotia Proceedings Against the Crown Act applied and that section 17 of that statute, requiring two months notice in writing of a


146. R.S.N.S. 1967, c. 239
contemplated action against the Crown, had not been complied with. These preliminary objections, of course, raised the question of what constitutes "proceedings against the Crown" for the purposes of the Nova Scotia statute.

Superficially, the Act would seem to constitute a complete code for situations in which the Crown in right of Nova Scotia is being sued. This is particularly emphasized by section 24(1) which provides:

Except as provided in this Act, proceedings against the Crown are abolished.

Nevertheless, in both cases, the Nova Scotia courts read the term "proceedings against the Crown" narrowly. The starting point in both instances was an examination of the ambit of the Act, particularly as set out in sections 3 and 4. From these sections, it is clear that the main purpose of the statute is to provide a method by which the Crown in right of Nova Scotia could be sued in contract, tort or in relation to property claims. In most jurisdictions this type of legislation was intended to replace the previous cumbersome Petition of Rights procedure and, to a large extent, this explains provisions such as section 24(1). Nova Scotia, however, did not, prior to the enactment of the Act in 1951, have even a Petition of Rights procedure and, as explained in Hart J's judgment in MacNeil, the difficulties in the way of suing the Crown in contract and tort were immense. Against this background, the Act can be seen as fulfilling a particular need and not as affecting a situation where the Attorney General is named as a defendant in proceedings which question the validity of action taken under a statute by the Crown or one of its agents.

This is confirmed by the availability in other jurisdictions of declaratory relief against the Attorney General as representative of

147. McNeil: See 9 N.S.R. (2d) at 508; 46 D.L.R. (3d) at 262 (S.C., T.D.); 9 N.S.R. (2d) at 487-88; 53 D.L.R. (3d) at 262-63 (S.C., A.D.). Bedford Service Commission: See 18 N.S.R. (2d) at 159. This section provides as follows:- Subject to this Act, a person who has a claim against the Crown may enforce it as of right by proceedings against the Crown in accordance with this Act in all cases which;

(a) the land, goods or money of the subject are in possession of the Crown; or
(b) the claim arises out of a contract entered into by or on behalf of the Crown; or
(c) a claim is based upon liability of the Crown in tort to which it is subject by this Act.

148. 9 N.S.R. (2d) at 508; 46 D.L.R. (3d) at 262
the Crown outside of the Petition of Right procedures. The authorities are outlined in judgment of MacDonald J.A. in the Appeal Division decision in *MacNeil*\(^{149}\) and most rely on the 1911 English Court of Appeal decision in *Dyson v. Attorney General*,\(^{150}\) where a declaration of right was granted with respect to demands made by the Commissioners of Finance. The statutory basis for the grant of relief in this case was what was then Order 25, rule 5 of the Rules of the Supreme Court:

> No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.\(^{151}\)

The Nova Scotia equivalent is today Rule 5.14 of the Civil Procedure Rules.

Given this great weight of authority which supports the existence of a separate cause of action, coupled with the obviously narrow ambit of the Proceedings Against the Crown Act, the Nova Scotia courts were quickly persuaded in both cases that the Act was not intended to abolish this possibility by a sideswipe. In many ways, this is highly desirable as there is no purpose to be served generally in trying to fit legislation into a context for which it is not designed.

This is also confirmed by a consideration of the seeming reasons for requiring two months’ notice of intention to commence an action against the Crown. Such provisions, which obviously give the Crown a favoured position over other defendants, are generally designed to give the Crown forwarning of a potential civil suit so that evidence can be preserved. They ensure against a situation where the claim is commenced but the writ not served in the hope that defending the cause of action will thereby become more difficult because of a lack of reasonably early notice. However, this rationale, bears little relation to a situation where someone is seeking a declaration as to the invalidity of action taken under a statute.

As in *Dyson*, such actions will often be in response to a demand made by the Crown. Generally, the person affected will be

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151. Now Order 15, r. 16
commencing proceedings as soon as possible. This is exemplified by the *Bedford Service Commission* case where the object of the litigation was to forestall a government plan. Moreover, given that such cases depend generally on the determination of questions of law rather than fact, the preservation of evidence will seldom be a consideration.

The only possible problem with the two decisions rests in some of the language used to describe why these were not "proceedings against the Crown". In both cases, it is stated that the proceedings are concerned with the rights of the public. However, just because the public are interested in or affected by the decisions under challenge, does not make the actions any the less proceedings against the Crown. Similarly, in the Appeal Division in *MacNeil*, MacDonald J.A., relying on other authority, made reference to the fact that the rights of the Crown were only being affected "indirectly". This perhaps suggests that the Crown in such cases, represented by the Attorney General, is only a nominal or incidental defendant, but this is obviously not true in most instances. A Crown agency is said to have acted unlawfully. A Minister of the Crown is similarly challenged. The Lieutenant Governor in Canada is said to have made ultra vires regulations. In all these cases, the Crown is a real defendant and its actions are affected directly by the outcome of the proceedings.

More accurately, the Act does not apply for the reason given originally by Farwell L.J. in *Dyson* and cited with approval later in MacDonald J.A.'s judgment: the *estate of the Crown is not directly affected*. This also serves to emphasize that not all cases

153. 9 N.S.R.: (2d) at 490-91; 53 D.L.R. (3d) at 264-65
154. [1911] K.B. 410 at 421
155. 9 N.S.R. (2d) at 491-92; 53 D.L.R. (3d) at 265. It is worth noting that the result in these two cases does not necessarily govern in other jurisdictions. For example, the decision of the Ontario Divisional Court in *MacLean v. Liquor Licence Board of Ontario* (1975), 9 O.R. (2d) 597; 61 D.L.R. (3d) 236 seems to indicate clearly that notice would be required of intention to commence proceedings by virtue of that province's *Proceedings Against the Crown Act*, R.S.O. 1970, c. 365, ss. 7 and 18. See particularly: *id.* at 607; 61 D.L.R. (3d) at 247. How the difference in results can be justified, however, I do not know. Indeed, the arguments accepted in Nova Scotia would appear to be even more compelling in relation to the Ontario statute. In the Ontario Act, there is no equivalent of section 24 of the Nova Scotia statute. Moreover, the equivalent of section 3 makes it clear that the Act is aimed at those matters which had to be dealt with by the petition of right procedure previously. Perhaps the only argument is that
in which a declaration is sought against the Crown fall outside the ambit of the Act. If the claim for a declaration in fact relates to the estate of the Crown and is in effect an action in contract or tort, it goes beyond being what is frequently called a "bare" declaration and clearly comes within the scope of the Act.

(f) The Availability of Declaratory Relief

This discussion of the availability of a declaration against the Crown outside the Proceedings Against the Crown Act and the *Bedford Service Commission* case links nicely with a consideration of the general principles governing the availability of declaratory relief against statutory authorities. This was also an issue in the *Bedford Service Commission* case as it was, perhaps more directly, in *Shore Disposal Ltd. v Ed de Wolfe Trucking Ltd.*

(i) *Shore Disposal Ltd. v. Ed de Wolfe Trucking Ltd.*

The plaintiff in this case sought a declaration that the defendants were violating the Motor Carrier Act by engaging in the collection and disposal of garbage without a licence. It also sought to have the alleged breaches of the statute enjoined. At first instance, Morrison J. refused to grant an injunction because of the adequacy of remedies in the statute itself. However, he granted a declaration.

MacLean involved a claim for damages as well as declaratory relief and that it is the damages element of the claim that the court was concerned about in holding that the notice provisions governed. However, the judgment is certainly not clear on this point. Indeed, it suggests that it applies in whatever circumstances a Crown agency is being sued.

156. (1976), 16 N.S.R. (2d) 538; 72 D.L.R. (3d) 218 (S.C., A.D.)

157. Unreported. See judgment of MacKeigan C.J.N.S. (id. at 541-43; 72 D.L.R. (3d) at 220). For other more recent decisions involving this same issue, see *Beattie v. Governors of Acadia University* (1976), 18 N.S.R. (2d) 466; 72 D.L.R. (3d) 718 (S.C., A.D.) and *Terrace View Apartments Ltd. v. Attorney General of Nova Scotia*, unreported decision of Jones J. of Nova Scotia Supreme Court, Trial Division, delivered: July 6, 1977 (S.H. No. 15157). In *Beattie*, the Appeal Division was dealing with actions for a declaration, an injunction, and damages with respect to an alleged breach of the Human Rights Act, S.N.S. 1969, c. 11. A board of inquiry appointed under that Act had recommended a reference of the issue to the Supreme Court for determination as to whether the Act applied. However, this had not been acted on by the Attorney General. MacKeigan C.J.N.S., in delivering the judgment of the Court, expressed grave doubts as to whether relief was available. However, he did not decide the case on this point but moved on to consider the merits. See 18 N.S.R. (2d) 466 at 471-72; 72 D.L.R. (3d) 718 at 722-23. See also the judgment of Cooper J.A. at 477; 72 D.L.R. (3d) at 726. Coffin J.A. concurred with MacKeigan C.J.N.S. (id. at 467; 72 D.L.R. (3d) at
as requested. There was no appeal against the refusal of the injunction. However, the defendants appealed against the grant of a declaration and this was allowed.

Nevertheless, this would clearly seem to be an even more compelling case than *Shore Disposal*. First, the plaintiff was a person who claimed the benefit of direct protection under the Act. (To describe his claim as a "negative privilege" as MacKeigan C.J.N.S. did, at 471; 72 D.L.R. (3d) at 722, is scarcely illuminating and potentially destructive of the whole purpose of human rights legislation). Secondly, there were no proceedings pending before the Human Rights Commission. The recommendation of its Board of Inquiry had been ignored. This contrasts with *Shore Disposal*, where an application for a licence as well as a prosecution were both pending. Perhaps the only justification for the attitude of the Court may be that the Board of Inquiry did not fulfill its obligations under the statute and that the appropriate remedy was *mandamus* to compel that completion. This is perhaps suggested by *Ryan v. Eaton*, unreported decision of the Nova Scotia Supreme Court, Trial Division discussed *infra* at footnote 327 and accompanying text. However, given the lack of specificity of the obligations of a Board of Inquiry under the Human Rights Act, difficulties could also be encountered with this route. See *Hall v. Administration of Family and Child Welfare* (1974), 9 N.S.R. (2d) 677; 52 D.L.R. (3d) 237 (sub nom. Re *Hall and Johnson*) (S.C., A.D.), discussed in the last survey, *supra*, note 1 at 911-13. In *Terrace View, Shore Disposal* was again relied upon, this time to prevent the plaintiff company seeking a declaration as to the application of certain fire prevention regulations and a counterclaim by the Attorney General for a contradictory declaration as to applicability of regulations and an injunction preventing the plaintiff company using its premises contrary to the regulations. According to Jones J., the only way of testing the applicability of the regulations was in the context of a criminal prosecution. (This, at least, is what appears from the digest of the case in (1977), 4 Nova Scotia Law News, No. 2 at 1). In such a case, it is very difficult to see how the court could deny the standing of the plaintiff company to seek a declaration and, more particularly, the Attorney General wishing to know the scope of the regulation. See *de Smith*, *supra*, note 15 at 441-43 and the discussion, *infra*, particularly on the discretions of the Attorney General wishing to know the scope of the regulation. See *de Smith*, *supra*, note 15 at 441-43 and the discussion, *infra*, particularly on the discretions of the Attorney General. It is also to be contrasted with the statements of Laskin J. (as he then was) in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 at 148-49; 1 N.R. 225 at 230-31; 43 D.L.R. (3d) 1 at 8-9, where he rejected the prosecution argument as defeating the claim to declaratory relief in constitutional matters. Since that time, the philosophy of *Thorson* has been adopted by the Nova Scotia courts in a number of non-constitutional cases. See e.g. *Re Brodee and City of Halifax* (1974), 9 N.S.R. (2d) 390; 46 D.L.R. (3d) 528 (S.C., T.D.), rev'd (but not on this point) (1974), 9 N.S.R. (2d) 380; 47 D.L.R. (3d) 454 (S.C., A.D.); *Willin Construction Ltd. v. Dartmouth Hospital Commission* (1977), 75 D.L.R. (3d) 145 (S.C., T.D.); *Fraser v. Town of New Glasgow* (1976), 76 D.L.R. (3d) 79 (S.C., T.D.). See also *Stein v. City of Winnipeg*, (1974), 48 D.L.R. (3d) 223; [1974] 5 W.W.R. 484 (Man. C.A.) and *Re Doctor's Hospital and Minister of Health* (1976), 12 O.R. (2d) 164; 68 D.L.R. (3d) 220; 1 C.P.C. 164 (Div. Ct.) for other seeming adoptions in a non-constitutional case. See, however, *Rosenburg v. Grand River Conservation Authority* (1976), 12 O.R. (2d) 496; 69 D.L.R. (3d) 384; 1 C.P.C. (C.A.); *Rothmans of Pall Mall Canada Ltd. v. M.N.R. (No. 1)*, [1976] 2 F.C. 500;
When a continuing breach of the law is occurring and the enforcement authorities are refusing to take action, a number of remedial possibilities suggest themselves for the private citizen. These are: 1. Private prosecution; 158 2. An injunction to restrain the breach of the law; 159 3. A declaration as to the breach; 160 4. *Mandamus* to compel the enforcement authorities to enforce the law. 161 Each of these remedial alternatives is surrounded by a number of technical difficulties which may make them generally inappropriate or unavailable in the particular case. However, if those technical difficulties are swept away, at least for the moment, the basic question that is raised in this class of case is the role of the private prosecutor. Should private citizens be able to secure enforcement of the law and, if so, by what means? This, of course, suggests an issue of general principle about law enforcement. Traditionally, Canadian law has always tolerated a certain level of private statutory law enforcement but it is clearly beyond the scope of this article to deal with all the parameters of that situation. However, I will attempt to identify some of the general principles behind this toleration which may help in dealing with a particular statutory context. Given the structures created by this particular Act, is there any room for private enforcement and, if so, of what kind?

In the *Shore Disposal Ltd.* case, the Appeal Division probably did not have to face the question directly. Relief by way of a declaration has always been regarded as discretionary 162 and there

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158. For a discussion of the law relating to private prosecutions in Canada, see Peter Burns, *Private Prosecutions in Canada: The Law and a Proposal for Change* (1975), 21 McGill L.J. 269


160. See also *Gouriet v. Union of Post Office Workers*, id. See also de Smith, *supra*, note 15 at 446-48 and 457-60

were two facts present in this case that would have given the Court ample scope for denying relief on the basis of judicial discretion without deciding on the availability of a declaration as a matter of principle. First, an information had been laid against the defendant in Provincial Magistrate's Court for breaches of the Act.\textsuperscript{163} Secondly, the defendants had also now applied for a licence.\textsuperscript{164} Indeed, MacKeigan C.J.N.S., in judgment with which MacDonald J.A. concurred, ultimately seems to base his decision on these facts:

\begin{quote}
It is better, however, to base our judgment on the principle that the Court, in proceedings where the plaintiffs are virtually private prosecutors, should not grant a declaration that the defendant has committed an offence. Such a declaration is gratuitous and almost impertinent advice to the summary conviction Court and to the Public Utilities Board . . . .\textsuperscript{165}
\end{quote}

However, this came only after a lengthy discussion and a quite clear rejection of the plaintiff's status to seek such a remedy.\textsuperscript{166} It was also linked to arguments that to award a declaration "may also in effect be an injunction, disregard of which may put upon the defendant penalties harsher than the Legislature ordained"\textsuperscript{167} and that basic freedoms would be infringed if the protection of the criminal process were denied by in effect laying a criminal charge in a civil court.\textsuperscript{168}

Cooper J.A., the third member of the Court, also referred to the initiation of criminal proceedings and the application for a licence\textsuperscript{169} but he too paid most attention to the question of the status of the applicant and the place of the Board as "exclusive master of licensing".\textsuperscript{170}

As already mentioned, there would have been nothing controversial about the case if it were simply an instance of the exercise of judicial discretion in refusing a remedy. However, the issue of principle that is raised by this case is a fascinating one meriting close examination. At the outset, therefore, it is appropriate to identify in more detail the various reasons why in this context that issue was decided against the plaintiff.

\textsuperscript{163} (1976), 16 N.S.R. (2d) at 549; 72 D.L.R. (3d) at 225
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id}. at 550; 72 D.L.R. (3d) at 225
\textsuperscript{166} \textit{Id} at 544-49; 72 D.L.R. (3d) at 221-25
\textsuperscript{167} \textit{Id} at 550; 72 D.L.R. (3d) at 225
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id}. at 559; 72 D.L.R. (3d) at 231
\textsuperscript{170} \textit{Id}. at 554-58; 72 D.L.R. (3d) at 228-31
1. The plaintiffs did not have any private right that has been interfered with nor had they suffered special damage.\textsuperscript{171}

2. Equitable relief is not available to restrain criminal conduct unless the statute is construed as giving a private right of action. In fact, to grant a declaration would have been in effect to enjoin the conduct complained of and would therefore have been no different from granting an injunction. Moreover, the principles on which declaratory and injunctive relief are given are virtually identical.\textsuperscript{172}

3. The statute did not give a private right of action here because of the presence of the Licensing Board as an effective prosecutor and regulator, the absence of any vested right to a licence in the plaintiff, and the possibility for criminal proceedings in another court.\textsuperscript{173}

In these reasons, much obviously depended upon the finding that the plaintiffs did not have any interest in the matter that distinguished them from the rest of the public. Given that they were business rivals of the alleged unlicensed carrier, this immediately raises questions. It also leads into a more fundamental inquiry as to why members of the public, whether specially affected or not, should not be able to seek observance of criminal laws in the civil courts.

On the question of special status, it is indeed true that the Motor Carrier Act provides that the grant of a licence does not confer any perpetual or exclusive right.\textsuperscript{174} It also provides that a public hearing need only be held on an application for a licence in the discretion of the Board.\textsuperscript{175} Licences can also be cancelled or suspended in the discretion of the Board.\textsuperscript{176} However, it is also equally clear from the statute that present licensees are not without some sort of status under the Act. Not only do applications for licences have to be advertised\textsuperscript{177} but the Board is obliged to consider objections by existing licensees\textsuperscript{178} and, in doing so, to consider the effect that the

\begin{itemize}
\item \textsuperscript{171} Id. at 544-47; 72 D.L.R. (3d) at 221-24 (per MacKeigan C.J.N.S.); id. at 555-59; 72 D.L.R. (3d) at 229-31 (per Cooper J.A.)
\item \textsuperscript{172} Id. at 542-43 and 548; 72 D.L.R. (3d) at 220-21 and 224-25 (per MacKeigan C.J.N.S.); id. at 554; 72 D.L.R. (3d) at 228 (per Cooper J.A.)
\item \textsuperscript{173} Id. at 549-50; 72 D.L.R. (3d) at 225-26 (per MacKeigan C.J.N.S.); id. at 555-59; 72 D.L.R. (3d) at 229-31 (per Cooper J.A.)
\item \textsuperscript{174} R.S.N.S. 1967, c. 190, s. 8(1) (Relied upon by MacKeigan C.J.N.S.); id. at 544; 72 D.L.R. (3d) at 222
\item \textsuperscript{175} Sections 10(2) and (3)
\item \textsuperscript{176} Sections 15 and 16
\item \textsuperscript{177} Section 10(1)
\item \textsuperscript{178} Section 11(a)
\end{itemize}
grant of the licence would have on existing services.\textsuperscript{179} Moreover, as we have already seen in discussing the \textit{Burgess Transport Ltd.} case,\textsuperscript{180} a competitor may have a statutory right of appeal against the grant of a licence on questions of law and jurisdiction and also can seek the preogative writs. These factors would all seem to indicate that, theoretically as well as realistically, the holder of an existing licence is in a different position than the ordinary member of the public.

Of course, recognition of this does not automatically answer the question which is always asked in cases of this kind: Does the Act confer a right of civil action even on persons affected? In other words, where declaratory relief is being sought in relation to the commission of a criminal or regulatory offence, the problem is not dealt with simply as a question of standing in the normal sense of that word. It is not just a situation of having to decide whether the plaintiff is affected by the activity in question. Rather, the plaintiff would seem to have to go beyond this and, directly or by inference from the statute, establish a positive right to intervene and attempt to secure observance of the statute. Special status may help but is not necessarily sufficient.

In this instance, the statute itself afforded very little assistance to the plaintiff. In fact, for the Appeal Division of the Nova Scotia Supreme Court, it spoke against his claim. The Court obviously viewed the Act as creating a regulatory regime over an activity which in all respects was under the control of the Nova Scotia Public Utilities Board.\textsuperscript{181} It was to decide which licences would be granted and then, by the exercise of discretion in relation to prosecutions, would decide the extent to which those licences would be protected against competition, not only in the context of applications for other licences but also in relation to prosecutions for breaches of the Act and its regulations. The extent of control by the Public Utilities Board is also exemplified by the broad discretion as to cancellation, suspension and renewal\textsuperscript{182} and by section 28 authorizing the Board to enquire into possible breaches of the Act. In other words, the structure of the statute provides considerable

\textsuperscript{179} Section 11(b)
\textsuperscript{180} (1976), 72 D.L.R. (3d) 231 (N.S.S.C., T.D.). Discussed \textit{supra} at footnote 121 and accompanying text.
\textsuperscript{181} (1976), 16 N.S.R. (2d) 538 at 549 (per MacKeigan C.J.N.S.) and 557 (per Cooper J.A.); 72 D.L.R. (3d) 219 at 225 (per MacKeigan C.J.N.S. and 229-30 (per Cooper J.A.)
\textsuperscript{182} Sections 15 and 16
warrant for believing that all matters in relation to motor carriers in the province are within the exclusive ambit of the Board. Added to this is the argument, referred to by the Court,\footnote{183} that it is somehow or other inconsistent to allow equitable remedies to be sought from the Supreme Court when the only judicial remedy provided by the Act is a criminal proceeding before a Provincial Magistrate’s Court.

As against these arguments, there are however a number of points that can be made. First, the Act does not restrict the category of person who may commence a prosecution against a person allegedly breaching the Act and, as a result, there seems little doubt that a private prosecution could be commenced.\footnote{184} So, to this extent anyway, enforcement of the Act is not completely in the hands of the Public Utilities Board. Secondly, notwithstanding the fact that the Act only talks about prosecutions launched in a Provincial Magistrate’s Court, the Attorney-General of the Province or a private individual with the Attorney-General’s support could undoubtedly seek declaratory and even injunctive relief in the Supreme Court and this is acknowledged by MacKeigan, C.J.N.S.\footnote{185}

Given both these factors, it is relevant to ask just how strong the presumption against a civil action by a private individual should be in this kind of situation. Interestingly, this question was subsequently faced by the English Court of Appeal in the important decision of \textit{Gouriet v. Union of Post Office Workers}, decided in early 1977.\footnote{186} This was an attempt by a private individual to obtain a declaration and injunction with respect to threatened breaches of

\footnote{183}{(1976), 16 N.S.R. (2d) 538 at 550 (per MacKeigan C.J.N.S.) and 557 (per Cooper J.A.); 72 D.L.R. (3d) 219 at 225-26 (per MacKeigan, C.J.N.S.) and 230 (per Cooper J.A.)}

\footnote{184}{See Burns, \textit{supra}, note 158 at 276-78, dealing with summary conviction offences}

\footnote{185}{(1976), 16 N.S.R. (2d) 538 at 542-43; 72 D.L.R. (3d) 219 at 220-21}

\footnote{186}{[1977] 2 W.L.R. 310; [1977] 1 All E.R. 696 (C.A.). [Since this article was written, \textit{Gouriet} has been reversed by the House of Lords. See [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70 (H.L. (E.)). Basically, the decision to reverse stemmed from the House of Lords’ conviction that in matters involving public rights and the prevention of public wrongs, the Attorney General was the only one who could sue to protect the public interest. Individuals could not sue on behalf of the public but only if they have actually suffered or will suffer damage directly as a result of the wrong. In delivering one of the judgments, Lord Wilberforce described the Supreme Court of Canada decision in \textit{Thorson v. Attorney General of Canada}, [1975] 1 S.C.R. 138; 1 N.R. 225; 43 D.L.R. (3d) 1 as recognizing this position but adopting a different rule for constitutional matters. (id. at 311; 3 All E.R. at 82). None of the other Law Lords mentioned the Canadian authority, which had been
the Post Office Act by members of the defendant union. What made
the case so controversial was that the Court was here faced with
proceedings in which the Attorney General had refused to give his
support to the action and it was argued that, after that refusal, the
Court could not proceed. All three members of the Court of Appeal
agreed that they could not question the Attorney General's
discretion directly.\(^{187}\) However, they also accepted that they had a
discretion to grant declaratory relief in cases of this kind.\(^{188}\) On the
question of an injunction, Lord Denning M.R. clearly thought that
such relief was available but no longer necessary on the facts of the
case.\(^{189}\) Lawton L.J. seemed similarly inclined.\(^{190}\) Ormrod L.J.
rejected the possibility, however.\(^{191}\) All three judges placed
considerable emphasis on the public interest in the preservation of
the Rule of Law and also the fact that the plaintiff was here
intervening to protect the interest of the public as a whole in the
maintenance of the mail service and the observance of that statute
creating duties to deliver the mail.\(^{192}\) They also noted the
availability of the private prosecution route for individual citizens
when breaches of the Act occurred.\(^{193}\) In fact, in the mind of Lord
Denning M.R.,\(^{194}\) one of the strongest precedents for allowing the
action for a declaration to proceed was the judgment of the Supreme
Court of Canada in *Thorson v. Attorney General of Canada*.\(^{195}\)

\(^{187}\) Relied upon by Lord Denning M.R. in the Court of Appeal. See [1977] 2 W.L.R. at 329; [1977] 1 All E.R. at 716. For Canada, the question remains whether *Thorson* and the principles enunciated therein are in fact confined to constitutional litigation, a matter of continuing dispute. For *Shore Disposal*, it can be reiterated that the plaintiffs were in fact asserting a personal interest rather than the public interest, though it was not accepted by the Appeal Division.

\(^{188}\) Id. at 328-29 (per Lord Denning M.R.); at 335 and 337 (per Lawton, L.J.); at 340 (per Ormrod L.J.); [1977] 1 All E.R. at 716 (per Lord Denning M.R.); at 721 and 723 (per Lawton L.J.); and 726 (per Ormrod L.J.)

\(^{189}\) Id. at 328-29 (per Lord Denning M.R.); at 338 (per Lawton L.J.) at 345; (per Ormrod L.J.); [1977] 1 All E.R. at 716 (per Lord Denning M.R.); at 724 (per Lawton L.J.); at 731 (per Ormrod L.J.)

\(^{190}\) Id. at 331-32; [1977] 1 All E.R. at 718-19

\(^{191}\) Id. at 339-40; [1977] 1 All E.R. at 725-26

\(^{192}\) Id. at 345-46; [1977] 1 All E.R. at 731

\(^{193}\) Id. at 326-26 (per Lord Denning M.R.); at 334 (per Lawton L.J.); at 344-45 (per Ormrod L.J.); [1977] 1 All E.R. at 714 (per Lord Denning M.R.); at 720-21 (per Lawton L.J.); at 730 (per Ormrod L.J.)

\(^{194}\) Id. at 331 (per Lord Denning M.R.); at 334 (per Lawton L.J.); at 345 (per Ormrod L.J.); [1977] 1 All E.R. at 718 (per Lord Denning M.R.); at 721 (per Lawton L.J.); at 730 (per Ormrod L.J.)

\(^{195}\) Id. at 329; [1977] 1 All E.R. at 716

\(^{196}\) [1975] 1 S.C.R. 138; 1 N.R. 225; 43 D.L.R. (3d) 1
Gouriet reflects a totally different attitude towards the question of public intervention in the law enforcement process than does Shore Disposal Ltd. Technically, of course, it might be argued that the case is distinguishable in that the plaintiff had endeavoured to secure the assistance of the Attorney General first, something which did not happen in Shore Disposal. However, if that is ignored as well as the discretionary reasons for denying relief which were identified earlier, there is not much difference between the two cases. As in Shore Disposal, the only indication in the empowering statute in favour of private law enforcement was the availability of the private prosecution route. Of course, it might be argued that failure to deliver the mail much more directly affects the public as a whole than a garbage collector operating without a licence, but against this, there is the fact that it was not an ordinary member of the public who was seeking relief in the Shore Disposal case but a business competitor.

One cannot, in fact, criticize the decision in Shore Disposal Ltd. from the point of view of precedent. There are a number of decisions (mostly English) supporting both the approach and the result. Indeed, if there is to be any criticism on this score it might be with the English Court of Appeal in Gouriet, where the judges tended to concentrate on the decisions relating to the Attorney-General’s discretion rather than on those with respect to injunctions and declarations sought by private individuals to restrain criminal conduct. Nevertheless, there was sufficient ambiguity in those authorities to have caused the Nova Scotia Court to deal with the basic policy issue in more depth.

Certainly, it can be argued that the criminal law process and the protection it affords should not be able to be circumvented by resorting to civil remedies. Nevertheless, there are other ways of answering such arguments such as exercising discretion against the grant of declaratory and injunctive relief if the commission of an offence is not patently clear. Furthermore, it is never a particularly

196. See the judgment of MacKeigan C.J.N.S. (16 N.S.R. (2d) at 542-44 and 545-49; 72 D.L.R (3d) at 220-21 and 222-25) particularly

197. To be fair to the Court of Appeal, they recognized the difficulties involved in securing declaratory and injunctive relief with respect to criminal conduct and made it quite clear that, as far as plaintiffs on behalf of the public interest were concerned, they were dealing with a highly unusual situation in that the Attorney General was both refusing to proceed in his personal capacity and denying his support to the plaintiffs in relator proceedings.
appealing argument to say that an injunction or declaration may be a more harsh remedy than criminal sanctions for breach. What this amounts to, of course, is tacit approval of a system of administering criminal justice where periodic fines or short terms of imprisonment are but licence fees for continuing breaches of the law. While this obviously is a practice in some areas, it scarcely enhances the reputation of the courts for it to be given as a reason for not granting injunctive or declaratory relief. Moreover, the availability of that kind of relief at the suit of the Attorney General obviously means that there is no general policy of the law against the remedy.

In *Thorson*, the Supreme Court of Canada acknowledged that, in constitutional matters at least, the private individual has a role to play and in appropriate cases can seek a declaratory judgment as to the unconstitutionality of legislation. He is no longer in that context regarded automatically as a mere busybody or troublemaker. Those who in fact are busybodies can be dealt with by judicial discretion. The question that now arises is how far the principles accepted in that case apply in other contexts. *Gouriet* suggests that they are of general application. *Shore Disposal Ltd.*, by its result if nothing else, is negative, though perhaps in a strange sort of way the fact that the plaintiff was a business competitor rather than just a member of the public, lessened the chances of success. By focusing on his status as a business competitor, the Appeal Division overlooked the possibilities for even unaffected members of the public to intervene suggested by

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199. See, in particular, Lord Denning's use of *Thorson* in a non-constitutional (validity of legislation case) ([1977] 2 W.L.R. 310 at 329; [1977] 1 All E.R. 696 at 716). This must of course now be read subject to the House of Lords' reversal of the Court of Appeal's decision and, in particular, Lord Wilberforce's rejection of any application of *Thorson* outside the constitutional area. ([1977] 3 W.L.R. 300 at 311; [1977] 3 All E.R. 70 at 82)
200. In this respect, it must be compared with the judgment of MacKeigan C.J.N.S. in the *Bedford Service Commission* case, where he indicated some criticism of the Ontario Court of Appeal's decision in *Rosenburg v. Grand River Conservation Authority* (1976), 12 O.R. (2d) 496; 69 D.L.R. (3d) 384; 1 C.P.C. 1 which also thought that *Thorson* was restricted to constitutional cases. See (1976), 18 N.S.R. (2d) 132 at 142-45; 72 D.L.R. (3d) 639 at 644-45. Of course, other aspects of the statutory regime were obviously highly significant in the *Shore Disposal* case. However, the lack of any attempt to relate the limited rights of access accepted in the decisions discussed in *Shore Disposal* to the greater rights of access suggested in the *Bedford Service Commission* case is the disappointing feature of this decision. See also notes 157, 186 and 222 for other references to subsequent treatment of the *Thorson* decision in non-constitutional cases.
Thorson and other authorities.\textsuperscript{201}

Ultimately, this is not in fact an argument against the result reached in Shore Disposal Ltd. The issue is in fact a very difficult one from a policy point of view and there is undoubtedly considerable weight in some of the factors discussed by the Appeal Division in the case, particularly the availability of alternative enforcement techniques in the statute itself and the degree of control possessed by the regulatory authority. What is unfortunate, however, is the failure of the Appeal Division to place the issue raised in its broadest but true context, that of the role of private law enforcement in Canadian law, and to discuss it in relation to the other situations where we presently tolerate private law enforcement, as exemplified by the decision on Thorson and the availability of private prosecutions for summary conviction offences.

ii) \textit{Bedford Service Commission v. Attorney General of Nova Scotia}\textsuperscript{202}

According to MacKeigan C.J.N.S. in \textit{Bedford Service Commission v. Attorney-General of Nova Scotia}, the question to be asked in deciding whether or not someone has standing is:

Does \textit{this} plaintiff have the right to take \textit{this} action against \textit{this} defendant?\textsuperscript{203}

He then used this test as a taking off point for considering whether the plaintiffs had an arguable or, as he described it, "justiciable" case,\textsuperscript{204} and, on examining the matters raised in the statement of claim, found that they did not.\textsuperscript{205} The allegations of illegality which he found in that statement of claim were said to be in fact

\ldots non-legal matters of morality, politics, the propriety of administrative processes (where not illegal), or the wisdom or fairness of governmental action (where not illegal).\textsuperscript{206}

These reasons would of course have afforded ample justification for striking out the statement of claim as revealing no reasonable

\textsuperscript{201} Gouriet in the House of Lords will obviously provide considerable ammunition against these broader claims in future


\textsuperscript{203} Id. at 147-55; 72 D.L.R. (3d) at 646-51

\textsuperscript{204} Id. at 147; 72 D.L.R. (3d) at 645

\textsuperscript{205} Id. at 155; 72 D.L.R. (3d) at 651

\textsuperscript{206} Id. at 147; 72 D.L.R. (3d) at 646
cause of action. However, that was not the ostensible object of the applications *inter partes* commenced in this case. As revealed in the judgment of MacIntosh J., those applications involved attempts to have the Attorney General of Nova Scotia removed from the action because the Proceedings Against the Crown Act had not been complied with and also various of the plaintiffs removed from the action as not having capacity or status.\(^{207}\)

The issue therefore becomes whether, in relation to the allegations of lack of status or capacity, it was appropriate for the Appeal Division to become involved in the potential merits of the allegations. In reviewing the decision of the Appeal Division in this case, the Supreme Court of Canada quite obviously thought that it was not.\(^{208}\) However, in a way the Supreme Court of Canada itself may have been responsible for the path that the Chief Justice of Nova Scotia took.

In *McNeil v. Nova Scotia Board of Censors*, Laskin, C.J.C. made the following statement in the course of deciding whether McNeil, a private citizen, had standing to challenge the validity of legislation on constitutional grounds:

> In granting leave, this Court indicated that where, as here, there is an arguable case for according standing, it is preferable to have all the issues in the case, whether going to procedural propriety or to the merits, decided at the same time. A thoroughgoing examination of the challenged statute could have a bearing in clarifying any disputed question on standing.\(^{209}\)

At first instance, in the *Bedford Service Commission* case, MacIntosh J. expressed the view that this direction in *Thorson* was not mandatory, that it would be a considerable time before the merits could be tried, and that fairness to the parties dictated that these preliminary objections be dealt with separately and at that time.\(^{210}\)

MacKeigan C.J.N.S., while not quoting this extract from *McNeil*, obviously seems to have been influenced by it in the way in which he defined the question to be asked in standing cases. If he is correct, a preliminary objection to a plaintiff's or applicant's standing would in fact raise, *inter alia*, the same questions as a motion to strike out the statement of claim as disclosing no cause of action. Have these people an arguable case on the merits? The

\(^{207}\) (1976), 18 N.S.R. (2d) 155 at 156
\(^{208}\) (1977), 19 N.S.R. (2d) 310; 14 N.R. 413
\(^{209}\) [1976] 2 S.C.R. 265 at 269; 12 N.S.R. (2d) 85 at 87; 5 N.R. 43 at 45
\(^{210}\) (1976), 18 N.S.R. (2d) 155 at 158
question that now must be asked is whether the Supreme Court by reversing MacKeigan's judgment, has in fact retreated from its position in *McNeil* that the merits of the case are relevant in deciding whether to accord standing.

It is important to realize that in *McNeil*, the Supreme Court of Canada was dealing with someone who did not have standing under the normal or traditional tests; he was not specially affected or suffering personal damage beyond that suffered by the public at large. It was therefore in the context of deciding, as a matter of discretion, whether to accord standing to someone who did not come within the normal rules that the Court declared that a consideration of the merits was relevant. Now, it may be that what the Appeal Division did in the *Bedford Service Commission* would have passed muster if the plaintiffs, as persons without the traditionally required status, were seeking an exercise of judicial discretion in their favour. However, it is abundantly clear from the judgment of MacKeigan C.J.N.J. that he himself was not treating the case on that basis.

Some questions had obviously been raised by counsel about whether the liberalization of the standing rules by *Thorson* and *McNeil* had any application outside of the constitutional arena and in particular where the validity of administrative action was being challenged on other than constitutional grounds. However, that brought forth the following response from MacKeigan C.J.N.S.

In the present case we need not decide whether the broader rule extends beyond constitutional challenges of provincial or federal legislation to attack on the legal validity of other acts of public bodies, including municipal legislation, since the plaintiffs here have interests which may be specially affected in a substantial way.\(^2\)

He then went on to formulate the question that had to be asked: "Does *this* plaintiff etc.‘’ In other words he was attempting to apply the test to persons who in his view came within the category traditionally regarded as having standing and thereby was in fact engaged in rewriting the normal standing rules.

It is also interesting that, at an earlier stage, the Court, through the Chief Justice, had seen itself as having authority to deal with whether there was an arguable cause of action here irrespective of issues of standing and without the issue having been raised by

\(^2\)18 N.S.R. (2d) 132 at 146; 72 D.L.R. (3d) at 645. See notes 157 and 198 for discussion of the acceptance of *Thorson* and *McNeil* in non-constitutional settings
counsel. After oral argument had been completed on the appeal, the Chief Justice sent a memorandum to counsel asking them to respond in writing on the issue of whether the declarations sought raised an arguable cause of action. This matter had not been raised at the oral hearing. That had been confined to argument on whether the Bedford Service Commission had standing in the traditional sense. To quote from that memorandum:

This appeal requires us, I suggest, not only to answer the initial questions raised by counsel, but also to consider which of the declarations sought can be properly permitted to be asked and against which parties respectively.  

It is suggested that such an approach is not only highly unusual but also inappropriate. First, by raising matters that counsel for the appellant chose not to raise or neglected to raise, the Court not only took away the normal degree of procedural control possessed by the litigants but also left itself open to allegations of partiality. Secondly, the respondent in this case, in being asked to respond to the Chief Justice's memorandum in writing within seven days, was seemingly deprived of his normal right to present oral argument. Thirdly, the Appeal Division, by raising this issue for the first time and indicating its intent to rule on the matter, in fact converted itself into a court of first impression.

One expects that the Supreme Court of Canada was not unaware of this in allowing the appeal, though the very brief judgment of the Court mentions none of these factors. However, another reason was given for allowing the appeal which relates to the way in which the Appeal Division acted. The appellants only appealed against the failure of the trial judge to deny status to the Bedford Service Commission. There was no appeal against the decision of the trial judge in relation to the plaintiff Cunningham, as the representative

212. This procedure is not referred to in MacKeigan C.J.N.S.'s decision nor in the Supreme Court of Canada decision. However, a copy of it was made available by counsel for the plaintiffs. It was received in their office on September 30, 1976.

213. Perhaps one justification for judicial intervention of this kind is to save the parties the time and trouble of expensive litigation and to prevent scarce judicial resources being used in settling matters that could be much more simply resolved on another basis. Quaere whether this ever justifies the unilateral striking out of an action as revealing no reasonably arguable case when that issue has not been raised by the application of one of the parties.

214. The Supreme Court of Canada judgment was very brief; only a page in both the Nova Scotia Reports and the National Reporter. (1977), 19 N.S.R. (2d) 310 at 311-12; 14 N.R. 413 at 414-15 (S.C.C.)
in a class action. Indeed, her personal capacity to bring the cause of action was not even in question. Given that Cunningham was not heard on the appeal, the Supreme Court ruled that the Appeal Division could not strike out the action entirely as against all parties. Despite the fact that Cunningham and the Bedford Service Commission were represented by the same counsel, there would seem no doubt that the Supreme Court of Canada was correct. To allow a cause of action to be struck out in these circumstances without notice to one of the litigants would seem to be completely wrong in principle.

In all of this, the initial questions as to the standing of the Bedford Service Commission and Cunningham, in her own right and in a representative capacity, tended to become lost. In fact, given that there was no challenge to the personal capacity of Cunningham, it is rather difficult to see why this case was even appealed to the Appeal Division, once the Proceedings Against the Crown Act argument was lost and not appealed. The strength of the case in no way depended on who was the plaintiff. However, in the last analysis, there can be little quarrel with the Supreme Court of Canada's ruling that the Bedford Service Commission, given its statutory position, particularly in relation to garbage disposal, had a sufficient interest to bring the proceedings. Indeed, this was accepted at all three levels. Of somewhat more interest is the unappealed ruling of MacIntosh J. that Cunningham, a resident of the Bedford district, could bring a class action on behalf of all other residents of the district.

In Nova Scotia, the availability of class actions is governed by Rule 5.09(1) of the Civil Procedure Rules. This provides:

Where numerous persons have the same interest in a proceeding . . . . the proceeding may be begun and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

The major problem with class actions has always been the establishment of whether the members of the class have the requisite

215. Id.
217. (1976), 18 N.S.R. (2d) 155 at 161-63
“common” or “identical”218 interest and, in this instance, the class was defined in the headings as all members of the district “whose interests are, or might be adversely affected” by the decision under challenge.219 This, according to the trial judge, was “too vague and wide”,220 so he ordered that the statement of claim be amended by the removal of the offending words, leaving the class as all members of the district. Of course, rather than narrowing the class, this had the effect of widening it, though it did have the merit of making it clearer. However, given that all members of the class are required to have a common interest and given that that interest must be one which creates standing to seek declaratory relief, the amendment is very puzzling. Does it mean that all members of the class have a common interest and standing to seek declaratory relief, whether or not they are affected adversely? Or, does it mean that the trial judge considered that all members of the District were adversely affected by the decision?

If the former is the case, then the Court has accepted a very liberal standard for according standing in cases of declaratory actions concerned with unlawful administrative action. Normally, the plaintiff in such proceedings is required to be “peculiarly affected”.221 Of course, in Canada, in the arena of constitutional litigation, this has changed recently and Macintosh J’s reference to the Thorson and McNeil decisions may indicate that he sees them as having relevance in other than constitutional cases, something which has been rejected in a number of other decisions.222 It is also possible that, contrary to the generally accepted theory,223 MacIntosh J. considered that, in aggregate, the members of the district had a claim even though individually none of the group or class would have had sufficient standing.

Indeed, even if the judge considered that all members of the class were “adversely affected”, his recognition of the class is indicative

218. In all the common law jurisdictions of Canada except Alberta, the language of the equivalent rule uses the word “same”. In Alberta the rule (Alberta R. 42), the word used is “common”. However, in a recent decision, Goodfellow v. Knight (1977), 2 Alta. L.R. (2d) 17; 2 C.P.C. 209 (S.C., T.D.), Laycraft J. (at 212) decided that this made no difference in substance to the law in Alberta.
219. (1976), 18 N.S.R. (2d) 155 at 161
220. Id.
221. See de Smith, supra, note 15 at 453
222. (1976), 18 N.S.R. (2d) 155 at 162. See notes 159 and 198 for further discussions of this issue
223. See e.g. Cowan v. CBC, [1966] 2 O.R. 309 at 315; 56 D.L.R. (2d) 578 at 584 (C.A.)
of a liberal approach to questions of standing to seek declaratory
relief. The requirement of "peculiarly affected" has at times been
used to mean that the plaintiff must be affected in a different way
from other members of the community to which he belongs224 and
this, of course, is anathema to a situation where the whole group
would have standing. In such cases, the Attorney General was
viewed as being the appropriate prosecutor of the group's
interest.225 Such an approach is, of course, very confining indeed in
relation to the use of the declaratory action both as an individual and
as a group remedy and the general tendency today is to be less
rigorous.226

The judgment in fact eschews any attempt at analysis of the
nature of the interests for which the group or class was allowed to
seek protection here. Three, in particular, were identified as having
been presented by the plaintiffs:
1. Special susceptibility to damage;
2. Interference with the public right to the observance of the law;
3. Interference with the private right to the enjoyment of
property.227

To these arguments, the judge responded:

In this day of public awareness and public concern by informed
citizens, it would hardly be in keeping with the demands of
justice if our Courts adopt a restrictive interpretation relative to
the carriage of class actions. The growth of bureaucratic controls
in our society demands an increasing awareness by our Courts of
the possibility of infringements upon the rights of our citizens.228

This approach, which may be heralded as a eminently sensible one,
also avoids two difficult problems in the whole area of class actions.
The second interest identified by the plaintiff naturally raised once
more the issue of the availability of group action to protect public
rights, the traditional role of the Attorney General. The second and
third suggest that the members of the group will have a cause of
action in nuisance if their fears of the effect of that rubbish dump are
well-founded. However, the role of class actions in nuisance has

224. De Smith, supra, note 15 at 453
225. Id. at 401-03 and 452
226. Id. at 453. See also previous discussions in this article as to the effect of
Thorson and McNeil in non-constitutional matters and, particularly, notes 159 and
198 and accompanying text.
227. (1976), 18 N.S.R. (2d) 155 at 162
228. Id. at 162
always been controversial. For example, in *Preston v. Hilton*, a 1920 Ontario High Court decision, it was held that class actions were not possible in nuisance.

There is no community of interest here. In this case each person whom the plaintiff claims to represent has a distinct and separate cause of action . . . for the special injury or damage, if any, which that person may sustain by reason of the alleged nuisance or threatened nuisance. It is only because of that special injury that the individual can sue at all. To the extent that the injury affects each one as a member of the public, relief can be obtained at the suit of the Attorney General. That the plaintiff cannot avoid this rule, by claiming to represent all those members of the public who are affected by the wrongful act is established by *Parsons v. City of London*, [1911] 3. O.W.N. 55.

In other words, the Ontario judge viewed the action in private nuisance as being a highly individual one and the rule that the Attorney General is normally the appropriate plaintiff in cases of public nuisance as not capable of circumvention.

Of course, the mere fact that there are serious difficulties in the way of bringing a class action with respect to a nuisance or threatened nuisance, whether private or public, does not necessarily mean that class actions are unavailable where the direct challenge is to the legality of administrative action, which may incidentally result in a nuisance. This brings the discussion full circle since the next inquiry is as to the interests which the action for a declaration of invalidity aims at protecting. More particularly how rigid is the requirement that the plaintiff be "peculiarly affected", because taken literally those two words might be read as indicating that the action for a declaration is as highly individual or personal in this context as that in private nuisance.

Obviously, the problems raised by class actions in the area of unlawful administrative action deserve and undoubtedly will receive greater judicial consideration than MacIntosh J. gave them in the *Bedford Service Commission* case, though ultimately the flexible approach that he adopted may prevail. In conclusion, though, I cannot forebear from asking, perhaps rhetorically, what was sought to be achieved, perhaps beyond an emotional impact, by bringing a class action in this case. Unless Cunningham had standing herself,

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229. See e.g. J.P.S. McLaren, *The Common Law Nuisance Actions and the Environmental Battle — Well-Tempered Swords or Broken Reeds* (1972), 10 Osgoode Hall L.J. 505 at 518-19
230. (1920), 48 O.L.R. 172 at 180; 55 D.L.R. 647 at 654 (H.C.)
the class, almost certainly, did not and, to quote from a recent article where the popularity of the declaration as a class remedy is discussed:

Unfortunately, this popularity quite often occurs when it is needed least, for in a majority of the situations when class plaintiffs obtained declaratory relief, it was clear that the same results could have been achieved had the individual representative chosen, instead, to sue only in his personal capacity, and not on behalf of a class.231

As mentioned earlier, the addition of a class action to Cunningham's personal action in this case added nothing to the chances of ultimate success in this case. Indeed, it led to some avoidable litigation by way of a preliminary application.

(g) *Habeas Corpus with Certiorari in Aid in Criminal Proceedings*

In *R. v. LaPierre*,232 the Appeal Division was concerned with a number of aspects of the availability of *habeas corpus* with *certiorari* in aid in Nova Scotia in criminal proceedings and, more particularly, as a device to quash a committal for trial after the preliminary hearing of a criminal charge.

The court, in a unanimous judgment delivered by MacDonald J.A., held that the remedy ceased to be a possibility after the presentment of a true bill or bill of indictment by the grand jury against the accused.233 The reasoning on which this result was based was to the following effect:

The presentment of such indictment by the grand jury after having heard the evidence gives this indictment an independent vitality of its own.234

In this situation, to quash the committal for trial "would avail him naught".235 For this proposition, MacDonald J.A. relied upon *R. v. Morin*,236 a 1917 decision of the Quebec Court of King’s Bench and *R. v. Nyczek*,237 a 1919 decision of the Manitoba Court of Appeal, though at the same time noting some authority of a more recent

232. (1976), 15 N.S.R. (2d) 361 (S.C., A.D.)
233. Id. at 366-371
234. Id. at 371
235. Id.
236. (1917), 28 C.C.C. 269 (Que. K.B.)
vintage to the contrary. He also discussed the role played by grand juries in the Province of Nova Scotia and, in particular, the fact that they apply virtually the same test as does a magistrate in deciding whether or not to commit an accused for trial. Of course, this theory makes less sense in those provinces where the grand jury has been abolished and where the presentment of an indictment is based directly on the evidence presented at the preliminary hearing. There, it is a little more difficult to argue that the indictment stands on its own feet and, if the foundation is invalid, then this may well also affect the indictments. In fact, this was the situation in one of the cases cited by MacDonald J.A. in the course of his judgment; R. v. Sednyk, a decision of Freedman J. (as he then was) of the Manitoba Queen's Bench.

As the grand jury had returned a true bill in this case, that meant that Lapierre's application was dismissed. However, because this ground had only been raised at the Appeal Division level, MacDonald J.A. went on to deal with the matters considered by the trial judge and, in particular, the foundation for and scope of habeas corpus with certiorari in aid in Nova Scotia.

One of the major debates in the whole area of judicial review of preliminary hearings and committals for trial relates to the scope for intervention and, in particular, whether the Supreme Court can intervene and review for an absence of evidence. There has been a plethora of conflicting writing in this area, including an article in

239. Id. at 368-70
240. By virtue of section 507(1) of the Criminal Code, R.S.C. 1970, c. C-34, grand juries are no longer necessary in any of the provinces and territories other than Nova Scotia.
241. (1976), 15 N.S.R. (2d) 361 at 366
243. (1976), 15 N.S.R. (2d) 361 at 371-80
the pages of this journal, and it usually runs the gambit from those who see no theoretical difference between review of committals for trial on habeas corpus alone, certiorari alone or habeas corpus with certiorari an aid to those who see differences between all three. To some extent, this is the result of difficulties over what materials can be placed before the court in each of these three types of proceedings. The matter is also complicated by virtue of the fact that the general law outside of the criminal area relating to review for an absence of evidence is in a state of considerable confusion. I do not intend to retread that same ground. Suffice it to say that the courts of Ontario seem to have circumvented any debate about the availability of review of a committal for trial for an absence of evidence by relying upon a pre-Confederation statute which is said to establish a statutory form of habeas corpus with certiorari in aid with considerable scope for judicial review on the ground of insufficiency of evidence.

This statute, which remains in force in Ontario by virtue of section 129 of the British North America Act and the inaction of the federal government, is entitled An Act for More Effectually securing the Liberty of the Subject and the particularly pertinent provision is section 5 under which the court may

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246. Discussed *id.* at 262-66. See also Harvey, *supra*, note 244 at 106-112; Letourneau, *supra*, note 244 at 294 at 294-301. See also, the discussion of this issue in *Mitchell v. The Queen*, [1976] 2 S.C.R. 570; 61 D.L.R. (3d) 77; 6 N.R. 389; [1976] 1 W.W.R. 577; 24 C.C.C. (2d) 241; *Re Pereira and Minister of Manpower and Immigration* (1976), 14 O.R. (2d) 355; 73 D.L.R. (3d) 673 (Ont. C.A.). Both these cases involved the effect of the *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 28 on the availability of habeas corpus with certiorari in aid, with respect to federal statutory authorities
248. 1866 (Can.), c. 45. See *Ex parte McGinnis*, [1971] 3 O.R. 783; 4 C.C.C. (2d) 262 (H.C.); *R. v. Pickett* (1975), 28 C.C.C. (2d) 297; 31 C.R.N.S. 239 (Ont. C.A.)
249. 30 & 31 Vict., c. 3; R.S.C. 1970, App. 11, No. 5, s. 129. This leaves intact pre-confederation statutes, subject to repeal etc. by the British Parliament in the case of English statutes and by the appropriate legislature (Parliament or provincial) in other cases
250. Since *Re Storgoff*, [1945] S.C.R. 526; [1945] 3 D.L.R. 673; 84 C.C.C. 1 it has been clear that Parliament has exclusive jurisdiction to legislate in relation to habeas corpus in a criminal matter and could therefore repeal the provincial pre-confederation statutes relating to habeas corpus in criminal matters, if it wanted to. See Létourneau, *supra*, note 244 at 77-78, 261-262; Harvey, *supra*, note 244 at 3-5
... direct the issuing of a writ of certiorari ... directed to the person or persons by whom or by whose authority any such person is confined or restrained of his liberty ... requiring him to certify and return ... the evidence, depositions, convictions, and all proceedings had or taken, touching or concerned with confinement or restraint of libery, to the end that the same may be viewed and considered by such judge or court, and to the end that the sufficiency thereof to warrant such confinement or restraint, may be determined by such judge or court.

Robert J. Sharpe has argued previously in the Dalhousie Law Journal that this section viewed properly is no more than a codification of the common law.\textsuperscript{251} Be that as it may, the provision has also been seen as a device for circumventing some troublesome authority (at least for defence lawyers) that only issues of jurisdiction can be reviewed on habeas corpus, even with common law certiorari in aid, and that a complete absence of evidence on a matter within the magistrate's jurisdiction is not a jurisdictional error.\textsuperscript{252} Further, it is seen as justifying a broader level of review than is usual under the "no evidence" test in that it speaks to an inquiry as to sufficiency rather than an inquiry as to whether there was any evidence at all.\textsuperscript{253}

\textsuperscript{251} Supra, note 245 at 256

\textsuperscript{252} See, particularly, Ex parte McGinnis, [1971] 3 O.R. 783; 4 C.C.C. (2d) 262 (H.C.), where Wright J. held that the decision of the Supreme Court of Canada in Patterson v. The Queen, [1970] S.C.R. 409; 9 D.L.R. (3d) 398; 72 W.W.R. 35; 2 C.C.C. (2d) 227; 10 C.R.N.S. 55, did not affect the law of Ontario with respect to habeas corpus with statutory certiorari in aid established by the Ontario Court of Appeal in R. v. Botting, [1966] 2 O.R. 121; 56 D.L.R. (2d) 25; [1966] 3 C.C.C. 373; 48 C.R. 73 (C.A.). In Patterson, the Supreme Court of Canada had held that review of a committal for trial on certiorari alone was restricted to questions of jurisdiction. This distinction has been maintained by the Ontario Court of Appeal in R. v. Pickett (1975), 28 C.C.C. (2d) 297 at 303-05; 31 C.R.N.S. 239 at 244-47. See also Re Barnes and Witter and the Queen (1977), 35 C.C.C. (2d) 329 (B.C.S.C.) for a recent decision in which the Nova Scotia and Ontario position is contrasted with that of British Columbia. However, it must also be noted that Patterson itself has been under attack recently. See e.g. R. v. Hubbard, [1976] 3 W.W.R. 152 (B.C.S.C.), where Bouck J. allowed review of a committal for trial on the basis of error of law on the face of the record, notwithstanding Patterson, on the argument that this was a clearly-established general ground of review. See also Re Ward and The Queen (1976), 31 C.C.C. (2d) 466; 35 C.R.N.S. 117 and Re Nichols and The Queen (1977), 34 C.C.C. (2d) 153, two decisions in which Cory J. avoided Patterson's seeming ruling that breaches of the rules of natural justice were not subject to attack by certiorari alone where a committal for trial was in issue. He did this by pointing to specific provisions in the Criminal Code with respect to certain guaranteed procedures and described failure to adhere to these as leading to jurisdictional error. The same tack was taken by the Quebec Court of Appeal in Re Cohen & The Queen (1977), 32 C.C.C. (2d) 446. This decision is
Until Lapierre, it was generally believed that statutory habeas corpus with certiorari in aid was an uniquely Ontario phenomenon at least in criminal matters. However, MacDonald J.A., on examining an equivalent unrepealed Nova Scotia statute, the Liberty of the Subject Act of 1864, held that it had the same effect as the Ontario Act, though in this instance it required reading two sections together. These were sections 6 and 8 and they provided:

6: Upon return to such order, the court or judge may proceed to examine into and decide upon the legality of the imprisonment, and make such order, require much verification, and direct such notices on further returns in respect thereof as may be deemed now on appeal to the Supreme Court of Canada. However, in other cases, the integrity of Patterson has been upheld. See e.g. Re Mitchell and Maynes and The Queen (1971), 31 C.C.C. (2d) 344, where McDonald J. specifically disagreed with the judgment of Bouck J. in Hubbard; Re Depagie and The Queen (1977), 32 C.C.C. (2d) 85, in which the Appeal Division of the Alberta Supreme Court applied Patterson in similar circumstances to where Cory J. had managed to distinguish it in Ward and Nichols. For a comment on Patterson, see (1970), 19 Alberta L. Rev. 141. See also Létourneau, supra, note 244 at 148-52

253. In certiorari alone cases the tendency of the courts is still to apply R. v. Nat Bell Liquors, [1922] 2 A.C. 128; 65 D.L.R. 1; [1922] 2 W.W.R. 30; 37 C.C.C. 129 (P.C.) and its perceived ratio that the courts have no concern at all with the sufficiency of the evidence. See e.g. R. v. Pickett (1975), 28 C.C.C. (2d) 297; 31 C.R.N.S. 239 (Ont. C.A.); Re Martin, Simard, Desjardens and The Queen (1977), 34 C.C.C. (2d) 453 (Ont. H.C.); R. v. Botting, [1966] 2 O.R. 121; 56 D.L.R. (2d) 25; [1966] 3 C.C.C. 375; 48 C.R. 73 (Ont. C.A.). Note however, the contrary authorities listed by Jessup J.A. in Pickett: 28 C.C.C. (2d) 305; 31 C.R.N.S. at 246-47. See also R. v. Pickett: 28 C.C.C. (2d) 305; 31 C.R.N.S. at 246-47. See also R. v. Amero (1974), 8 N.S.R. (2d) 615; 17 C.C.C. (2d) 228 (sub nom. Re Amero & The Queen); 29 C.R.N.S. 381 (S.C., A.D.); R. v. Rothberg (1976), 33 C.C.C. (2d) 56. See also Salhany, supra, note 244 at 33; Haines, supra, note 244 at 144-50; Hartt, supra, note 244 at 320-21; Koroway, supra, note 244 at 169; Sharpe, supra, note 244 at 77-74; Harvey, supra, note 244 at 20-21 and 103-24; Létourneau, supra, note 244 at 151-52. See also Woodward Stores (Westmount) Ltd. v. Alberta Assessment Appeal Board (1976), 69 D.L.R. (3d) 456; [1976] 5 W.W.R. 496 (Alta. S.C., T.D.), for a general reaffirmation of the Nat Bell Liquors decision. In particular, see the judgment of McDonald J. at 462; [1976] 5 W.W.R. at 509

254. See Harvey, supra, note 244 at 108-09, where he anticipates the arguments accepted in Lapierre, both in relation to Nova Scotia and New Brunswick. See also Létourneau, supra, note 244 at 300-01

255. R.S.N.S. 1864, c. 153. The successor of this statute still governs the availability of habeas corpus in civil matters in Nova Scotia. See R.S.N.S. 1967, c. 164. Sections 5 and 7 of the present statute are virtually the same as sections 6 and 8 of the 1864 Act. The Habeas Corpus Act of 1816 (56 Geo. 3, c. 100 (U.K.)) may also be in force in Nova Scotia. This only covered civil matters (s. 1).

256. (1976), 15 N.S.R. (2d) 361 at 372-76
necessary or proper for the purpose of justice;

8. In all cases whether under statute or at common law or under the provisions of this chapter, it shall be lawful for the court or judge to require the production of all such proceedings, documents and papers, relating to the matter in question before whomsoever and in whosoever possession as to the court or judge may appear necessary for the elucidation of the truth, and may also examine into the truth of the return to any writ of habeas corpus, or rule or order granted under this chapter, in the same manner as such examination is provided for in cases under the before mentioned act of parliament, passed in the fifty-sixth year of the reign of King George the third.

The warrant for inquiring into the sufficiency of the evidence, as opposed to whether there was any evidence at all, is not nearly so clear in these two provisions as it is in the Ontario statute. Nevertheless, the reference to an inquiry "into the truth" is suggestive.

MacDonald J.A., after a reference to the provisions of the new Nova Scotia Civil Procedure Rules as to the documents that have to be returned upon the service of an application for an order in the nature of certiorari, then proceeded to consider the role of the reviewing court on an application for statutory habeas corpus with certiorari in aid. In doing so, he discounted cases which involved habeas corpus or certiorari alone and, eventually, relying on Ontario authority, he formulated the following test:

The day is long gone when a mere scintilla of evidence will justify a committal for trial. On an application for criminal habeas corpus with certiorari in aid the evidence should be found sufficient if the reviewing court can say that on such evidence a jury, properly instructed and acting judicially could convict; any doubt on this question must be resolved in favour of the Crown. In so examining the evidence the superior court is not really substituting its discretion for that of the magistrate but determining whether the magistrate applied proper principles in ordering committal for trial.

257. Id. at 373-74, referring to Rule 58.07
258. Id. at 377-80
261. (1976), 15 N.S.R. (2d) 361 at 379
This statement clearly would seem to involve the reviewing court in going a good way into the merits of the matter before the presiding magistrate and is certainly a much stronger statement of the scope for judicial review than is usually found in cases where courts are prepared to go as far as admitting the possibility of review for an absence of evidence.262 For the most part, they are very circumspect indeed about the scope that that much-debated ground of review involves. Indeed, we can question whether MacDonald J.A. is not going too far here in the test that he is proposing and is not only assuming too much of the role of the presiding magistrate but also the subsequent task of the grand jury. Are three potential reviews of the evidence really necessary to protect the legitimate interests of the accused in not having to stand trial unjustifiably on an indictable offence?

Of course, it may be argued that the statute makes provision for such a review on statutory habeas corpus with certiorari in aid and the judge cannot ignore the statute. This, however, brings into question the wisdom of a situation where the scope of review is potentially much wider in the provinces of Ontario and Nova Scotia than elsewhere in Canada. Given the responsibility of the Parliament of Canada for matters of criminal procedure under section 91(27) of the British North America Act, confirmed in relation to habeas corpus by the Supreme Court of Canada in In re Storgoff,263 there would seem to be a strong argument for the repeal of both these statutes and the creation of a uniform method and scope of review of committals for trial. Indeed, there are extremely strong arguments for statutory codification of the whole law of judicial review relating to criminal proceedings. The confusion that is often thought to exist in the area of general judicial review is multiplied tenfold in this area where meaningless technicalities and distinctions abound, as does conflicting authority.

However, one final point deserves to be mentioned in passing before I leave this topic. The practical reality of the situation may well be that, since the Bail Reform Act264 the scope for review of

262. See D. W. Elliott, supra, note 247 at 67-80. See, however, the discussion of Cape Breton Development Corporation v. Penny (1977), 20 N.S.R. (2d) 292; 76 D.L.R. (3d) 186 (sub nom. Cape Breton Development Corporation v. Penny (No. 2) (S.C., A.D.), infra at footnote 308 and accompanying text.
the type just discussed may become very rare in both Ontario and Nova Scotia. Not only is bail more readily available but the previous practice of surrendering into custody so as to be able to seek the broader scope for judicial review provided by statutory habeas corpus may no longer work. According to Gilles Létourneau in The Prerogative Writs in Canadian Criminal Law and Procedure:

The common practice, prior to the Bail Reform Act, was for an accused to surrender himself into custody on the morning of the hearing so as to be entitled to habeas corpus. Such practice could be justified at that time since the pre-trial release expired with the committal for trial: a committal for trial by a judge meant a committal to jail unless a new bail was granted. However, the committal for trial does not involve that result any longer. It originates from one judge while the release order emanates from another and remains valid and unaffected by the committal. Therefore, an accused can hardly be said to be in detention for the purpose of challenging a committal for trial by habeas corpus when a valid order shows he was released and that such order of release is still valid and legally effective.265

Létourneau also goes on to question whether even an accused in custody at the time of his committal can resort to habeas corpus to question the committal, basically on the same ground of the different source of authority; this time for his detention.266 There is, in fact, recent Ontario authority to support the former of these two arguments.267 Thus another source of considerable confusion has been injected, albeit unconsciously, into this whole area and either legislative intervention or a Supreme Court of Canada decision or both will be needed to clarify the matter.

III. Judicial Review in Nova Scotia — Substantive Grounds

(a) Review for Inconsistency

In Re Burgess Transport and Storage Ltd.,268 already discussed in

265. (Toronto: Butterworths, 1976) at 254
266. Id. at 255-56
267. See Ex parte Pickett (1976), 12 O.R. (2d) 195; 28 C.C.C. (2d) 417 (H.C. and C.A.). Pennell J., in a judgment approved by the Court of Appeal held that “the writ of habeas corpus should be sufficiently elastic so that the Court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint”: id. at 199; 28 C.C.C. at 421. That there are still considerable procedural difficulties is evidenced, however, by Re Martin, Simard, Desjardeins and The Queen (1977), 34 C.C.C. (2d) 453 (Ont. H.C.).
the context of the availability of judicial review in the face of a statutory appeal provision, one of the arguments made by the applicant for *certiorari* was that the grant of the licence should be set aside on the ground of inconsistency. This argument was based on an assertion that a differently-constituted panel of the Board, twelve days after the Burgess hearing, but long before the decision in Burgess, had disallowed "a very similar" application for a licence.

The Court did not dwell long upon this allegation:

In the *Chapple* case cited by counsel for the applicant herein, the Board found that the applicant had not proven its case. In the case at bar, the Board apparently found that the applicant had proven its case. I would conclude that it was a question of the weight of the evidence.  

In other words, the Court found that there was in fact no inconsistency between the two decisions. Whether this is accurate is impossible to assess at least from the judgment since no details of the *Chapple* case are given. However, the more interesting point is to speculate upon what the Court would or should have done if it did find inconsistency between the two decisions.

In *Re Burgess*, the allegation of inconsistency formed part of a broader argument that the Board had "exceeded its jurisdiction through an abuse of its discretionary power by reaching a decision so unreasonable that no reasonable authority could [have] come to [it]".  

This ground of review had achieved acceptance in Nova Scotia in *Nova Scotia Forest Industries Ltd. v. Nova Scotia Pulpwood Marketing Board*, notably in the judgment of Coffin J.A., and this was referred to by Morrison J. However, despite the availability of review for manifest unreasonableness, I think it is clear that the courts are going to be most reluctant to grant judicial review for this reason. After all, what it involves is court scrutiny of the actual merits of the decision, something which the courts have been very reluctant to do, at least directly, in judicial review proceedings. This is in fact supported by the real paucity of

269. Id. at 245
270. Id. at 240
272. (1976), 72 D.L.R. (3d) at 240-41
cases in the Commonwealth where this type of allegation has been successful despite its seemingly universal acceptance.\textsuperscript{273}

Nevertheless, insofar as it is a ground for judicial review, one indication of manifest unreasonableness may arguably be inexplicable or unexplained inconsistency between cases with identical facts. Of course, whether the difference is inexplicable raises great problems. For example, is a statement to the effect that the tribunal has changed its policy since deciding the previous case an explanation? Furthermore, should inconsistency alone be a basis for judicial review? Rather, should the reviewing court generally not have to go further and consider whether, in the light of the inconsistency, it is the first decision or the one under review which is unreasonable? Indeed, it is also possible to argue that an unexplained inconsistency between two decisions does not render either of the decisions manifestly unreasonable. Persons acting reasonably frequently differ in the solutions they adopt to problems. Difference in itself does not mean that one result is necessarily unreasonable and the other reasonable.

In this light, it is interesting to consider a recent English Court of Appeal decision \textit{HTV Ltd. v. Price Commission},\textsuperscript{274} in which inconsistency was one of the grounds of judicial review. Indeed, this is the only Commonwealth authority I have been able to find where there has been review on this basis. Not surprisingly, one of the judges sitting on the Court of Appeal was Lord Denning M.R. The case involved the Price Commission acting contrary to its past practice in requiring the applicants to omit certain amounts from its costs calculations in trying to justify a price increase under price control legislation.\textsuperscript{275} Lord Denning M.R. rejected a technical argument to the effect that there had been a change in character in the amounts in question, justifying different treatment. He then went on to say:-

\begin{quote}
It is in my opinion, the duty of the Price Commission to act with fairness and consistency in their dealings with manufacturers and traders. Allowing that it primarily is for them to interpret and apply the code, nevertheless if they regularly interpret the words of the code in a particular sense — and regularly apply the code
\end{quote}

\textsuperscript{273} Supra, note 1 at 889-90, n. 72. See also de Smith, \textit{supra}, note 15 at 303-11, particularly at 310
\textsuperscript{274} [1976] 2 C.R. 170 (Q.B. and C.A.)
\textsuperscript{275} The Price Code contained in the Schedule to the Counter-Inflation (Price Code) Order 1974, promulgated under the Counter-Inflation Act 1973
in a particular way — they should continue to interpret it and apply it in the same way thereafter unless there is good cause for departing from it.\textsuperscript{276}

Scarman L.J. was somewhat more guarded, stating that "inconsistency is not necessarily unfair",\textsuperscript{277} but then going on to find that the new policy was in fact an unfair one in itself without reference to any inconsistency with past practice.\textsuperscript{278} Goff L.J., however, was, if anything, stronger than Lord Denning M.R.:

It is of the utmost importance that statutory tribunals should be consistent and this is a very clear instance on which the facts call for the exercise of [the courts] supervisory jurisdiction.\textsuperscript{279}

The interesting feature of Lord Denning's judgment is that he seems to treat the arguments about inconsistency not from the point of view of whether the particular result is in isolation manifestly unreasonable but rather from the point of view of whether inconsistency is just to those affected by it. In other words, it is an appeal to a widely held notion of justice that, all other considerations being equal, like cases deserve to be treated alike. Putting it another way, the decision is unreasonable, not because of considerations internal to the reasons given and result reached but in the much broader sense that unexplained inconsistency is always unreasonable.

What this analysis suggests is that it might be more appropriate to describe review for inconsistency under the rubric of breach of the rules of natural justice than abuse of discretion. However, even if this is not accepted, what is clear is that review for inconsistency, if adopted as a ground of review to blur considerably the line between review for lack of natural justice and review for abuse of discretion. Indeed, what really is involved here is an extension of judicial review into the area of a lack of substantive due process.

In fact, Lord Denning M.R. has given other indications of his intention to move the law in this direction, notably in the case of \textit{R. v Barnsley Metropolitan Borough Council, Ex parte Hook}.\textsuperscript{280} Here a person lost his market stall licence for urinating in a street near the market. Among the grounds of judicial review advanced by Lord Denning in this decision was the excessive nature of the penalty; the

\begin{itemize}
\item \textsuperscript{276} [1976] 1 C.R. 170 at 185
\item \textsuperscript{277} Id. at 192
\item \textsuperscript{278} Id.
\item \textsuperscript{279} Id. at 195
\item \textsuperscript{280} [1976] 1 W.L.R. 1052; [1976] 3 All E.R. 452 (C.A.)
\end{itemize}
loss of livelihood for a trivial offence. Reference was also made to the fact that others found to have performed the same act had not been punished in this way; inconsistency again.

In *Hook*, Lord Denning purported to find support for this type of review in an older authority, unnamed, but said to be found in his 1952 judgment in *R. v Northumberland Compensation Appeal Tribunal, Ex parte Shaw*. The example he gives in *Hook* is that of commissioners of sewers having their decisions quashed by the Court of King’s Bench on the grounds that their fines were excessive. In *Shaw*, this is supported by a reference to *Commins v. Massam* and textbook authority.

*Commins v. Massam*, a 1642 decision, is one of the very famous decisions in the development of the remedy of *certiorari* and, to be sure, Bramston C.J. does say in that case:

I conceive in some clearness that [certiorari] may be granted where any fine is imposed upon any man by commissioner, which they have authority to by their commission, as appeareth by the statute to moderate it in case that it be excessive.

However, that was not the ground of review being considered there and no mention is made of this basis of review by any of the other judges. Indeed, the following statement appears in the

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281. Id. at 1057-58; [1976] 3 All E.R. at 456-57
282. Id. at 1057; [1976] 3 All E.R. at 456. Scarman L.J. expressed no opinion on this ground of review, resting his decision to quash on Lord Denning's primary basis for review (taking evidence in the absence of the applicant) (id. at 1062; [1976] 3 All E.R. at 461). Sir John Pennycuick did however rely on the excessiveness of the penalty (id. at 1063; [1976] 3 All E.R. at 461.
283. Id. at 1057; [1976] 3 All E.R. at 456-57
285. Id. at 350-51; [1952] 1 All E.R. at 130
286. (1666), March N.R. 196; 82 E.R. 473 (K.B.)
287. The reference to the textbook authority is omitted from the official reports version of the judgment. However, it does appear in the All England Law Reports version. It is *Callis on Sewers* (4th ed.: 1824) at 203, 204 and 342-44 and 2 *Chitty's General Practice of the Law* (1836) at 379. Only the second of these references was available to me and at 379 the general jurisdiction of the Court of King's Bench over Commissioners of the Sewers is discussed but without any reference to the ability of the Courts to quash on the grounds of an excessive penalty.
289. (1666), March N.R. 196 at 202; 82 E.R. 473 at 475
290. Basically, the case involved the jurisdiction of the commissioners to levy someone for the cost of rebuilding a sea wall destroyed in a storm.
judgment of Heath J.:

...[T]hey are enabled by the statute to proceed according to their discretions, & therefore if they proceed *secundum aequum & bonum*, we cannot correct them; but if they proceed where they have no jurisdiction, or without commission, or contrary to their commission, or not by jury, then they are to be corrected here... 291

While ambiguous, this statement seems to be more in accord with traditional notions of judicial review. It is also, of course, worth noting that, according to Edith Henderson, in *Foundations of English Administrative Law*, 292 the modern principles of judicial review did not emerge clearly till the eighteenth century. Indeed, up till 1702, the normal procedure on *certiorari* was for the court to retry the matter itself if it thought the inferior tribunal had committed a reviewable error. 293

Thus, it would seem that the precedents supporting review for inconsistency and excessive penalties are not strong and must realistically be seen as an outgrowth of the theory of the duty to act fairly, developed originally by Lord Denning and other English judges as a procedural doctrine to circumvent some of the difficulties in the traditional law governing the application of the rules of natural justice. 294 Now it seems as though the duty to act fairly is being converted into a substantive doctrine.

291. (1666), March N.R. 196 at 197-98; 82 E.R. 473 at 473
292. *Supra*, note 288 at 144
293. *Id.* at 107
294. I discuss this in detail in *Fairness: The New National Justice*? (1975), 21 U. Toronto L.J. 281. See also D. H. Clark, *Natural Justice: Substance and Shadow*, [1975] Public Law 27; G. D. S. Taylor, *Natural Justice: The Modern Synthesis* (1975), 1 Monash U.L.R. 258 and *Fairness and Natural Justice — Distinct Concepts or Mere Semantics?* (1977), 3 Monash U.L.R. 191; D. L. Matheson, *Executive Decisions and Audi Alteram Partem*, [1976] Public Law 242. It must however be noted that there is considerable American authority supporting review in some situations on the basis of inconsistency. See K. C. Davis at Ch. 17.07 in 2 *Administrative Law Treatise* (St. Paul: West, 1958); *Administrative Law Text* (St. Paul: West, 1972); *Administrative Law of the Seventies* (Rochester: Lawyers’ Co-operative Publishing Co. 1976). Another question raised but not discussed in the text is whether in the event of a favourable inconsistency, a court would be prepared to entertain an application for review from someone who was the subject of an earlier inconsistent decision. There would appear to be no reason in logic for denying standing in such a case once inconsistency is accepted in principle as a ground of judicial review. Note, also, the earlier discussion of abuse of process as a ground of review (*supra*, notes 25-27 and accompanying text). This emerging ground of judicial review may also be classifiable as a type of substantive due process.
The dangers in this approach are obvious. I have already noted the traditional reluctance of the courts to review for manifest unreasonableness because of the fact that it involves intermeddling with the merits of tribunal decision-making. The language of the test used is also used to determine whether the Court will intervene on that ground to discourage too ready an intervention. However, fairness in a substantive sense is arguably a much more vague criterion for intervention and, because of that, may be more easily seen as inviting review. A consideration of inconsistency as a ground for judicial review makes this clear. The creation of administrative tribunals is frequently justified on the basis that they will be able to perform tasks unhampered by the comparatively rigid rules of precedent that characterize the ordinary courts. Indeed, the common law has developed rules of judicial review that may be seen as designed to safeguard administrative tribunals from court-like tendencies with respect to precedents. It has been held to be an abuse of discretion to lay down policies in advance by which all future matters will be decided mechanically. To then suggest to tribunals that they will be subject to judicial review if they are inconsistent may be at odds with this and push them in the direction of being concerned with adhering to past practice in all cases at the expense of other considerations that we think are desirable.

Of course, the value that like cases be treated alike is one that has a considerable claim to recognition even in a broadly discretionary regime. The law, after all, does insist that virtually all forms of statutory discretion be principled and consistent, clear-headed treatment of individuals is of a high order of principle. However, the difficulty is in recognizing when a claim for review on the grounds of inconsistency is legitimate. As noted already, there may be great difficulty in even ascertaining whether there has been inconsistency. Secondly, once recognized, inconsistency is often capable of quite ready explanation in a discretionary decision-making context . . . . “We have been wrong up until now”; “We want to try another approach to this matter”; “Our policy has changed”. These, of course, are all claims that are readily understandable in the context of most decision-making by statutory authorities and to assess these claims fully for the purposes of second-guessing them will involve the court in a virtually total

reconsideration of not only the matter under review but also the whole area being regulated by the particular authority. This, it seems to me, is the kind of judicial review that we do not want. If inconsistency is to become a separate ground of judicial review I suggest that it only be available in the most flagrant case and that the reviewing court be prepared to accept very readily the explanations of the tribunal for the inconsistency in issue. Of course, it may well be that both inconsistency and excessive penalties will be relevant as evidence supporting other grounds of judicial review such as lack of good faith, bias or, as in Burgess Transport, as part of an argument of manifest unreasonableness. In such contexts, there cannot be quite the same concern since they will seldom, if ever, be treated as sufficient in themselves to justify judicial review on one of those bases but will generally be linked to other persuasive evidence before review is granted.

(b) Scope for Intervention by the Courts in Statutory Appeals

At the outset of consideration of the issues in this appeal I should make it clear that Michelin is before us pursuant to the statutory right of appeal given by S.19(7) of the Health Services Tax Act and not by way of certiorari to review the discretionary Ministerial powers. I do so because I sensed, perhaps wrongly, some misapprehension at the hearing before us as to the principles we are to follow for the determination of this appeal. As I have already said we are, by S.19(7) restricted to points of law alone; questions of fact are not to be decided by us. Insofar as any exercise of discretion is concerned we are not to review such exercise de novo but interfere with it only if in its exercise some principle of law was disregarded or a wrong principle of law was applied.296

This statement was made by Cooper J.A. of the Appeal Division in Re Michelin Tires Manufacturing (Canada) Ltd. and it suggests that the scope for judicial intervention in an appeal on questions of law is quite different from and narrower than that where the remedy being sought is certiorari. The accuracy of this statement is questionable. At the very least it is deceptive.

The grounds on which certiorari is available are for the most part uncontroversial; traditionally, jurisdictional error, including breach of the rules of natural justice, and error of law on the face of the record. The second of these grounds obviously raises questions of

law and it has generally been accepted that all varieties of jurisdictional error, including breach of the rules of natural justice and errors on jurisdictional facts, raise issues of law also. If this is so, then there would seem to be a clear overlap between appeals on questions of law and review by way of certiorari. Indeed, theoretically, an appeal on a question of law might be seen as broader in scope than review by way of certiorari in that, on appeal intra-jurisdictional errors of law do not have to appear on the face of the record. In practice, however, it is hard to imagine a situation where an appeal on a question of law would ever be successful except on the basis of the record. If this is so, then, for all practical purposes, review by way of certiorari and an appeal on a question of law may be identical in scope.297

The only possible flaw in this argument is that a right of appeal purely on a question of law, as opposed to an appeal on a question of law explicitly including jurisdiction, or an appeal on questions of law and jurisdiction, does not permit the raising of jurisdictional issues. This matter has never, as far as I am aware, been determined in Canada, though in other jurisdictions there has been acceptance of the argument that you cannot appeal from a nullity and, as jurisdictional error nullifies a decision, it is not included within the scope of an appeal on questions of law.298 Of course, if this argument is valid, it may explain why some courts have held that review is always available for jurisdictional error notwithstanding the existence of a statutory right of appeal, or, at least,


298. See the discussions of this problem by G.D.S. Taylor, When is an Appeal No Appeal? (1969), 3 N.Z.U.L.R. 442 and John Alder, Appeals and nullity (1975), 38 Mod. L.R. 573. I also discuss it in The Scope and Principles of Statutory Appeals, id. at 87; Administrative Law — Universities — Judicial Review of Administrative Action — Natural Justice (1971), 49 Can. B. Rev. 624; The Federal Court Act: A Misguided Attempt at Administrative Law Reform? (1973), 23 U. Toronto L.J. 14 at 47. See, however, Re Ludford (1972), 5 N.B.R. (2d) 155 (S.C., A.D.) for a decision in which the Court held that the particular wording of a statutory right of appeal made it clear that there was no right of appeal from decisions made without authority. There, judicial review was the only possibility.
notwithstanding a statutory right of appeal that does not mention specifically jurisdictional error. However, in so far as the argument depends on a word of such uncertain meaning in Administrative Law as "nullity", it is dubious at best, nor was it suggested by Cooper, J.A. as a limitation on the statutory right of appeal in Re Michelin Tires.

Rather, Cooper J.A., by reference to de Smith, went on to elaborate the scope for judicial intervention in an appeal on questions of law. Quoting de Smith's analysis of three Canadian tax appeals to the Judicial Committee of the Privy Council, he gave approval to the following grounds:

...[T]he discretion ... was not to be interfered with unless he had disregarded some principle of law, as by acting 'manifestly against sound and fundamental principles' or by acting in bad faith, arbitrarily or under the influence of irrelevant considerations.

Interestingly, these bases for intervention on appeal are phrased in the same language as the grounds of review for abuse of discretion, a ground of review which nowadays tends to be regarded as giving rise to a jurisdictional error. This classification has recently been questioned in England but even there it was recognized that such errors were reviewable by certiorari as appearing on the face of the record. So whether regarded as jurisdictional or not, the grounds

299. See the discussion of this issue, supra, note 123 and accompanying text.
300. Supra, note 15 at 250-51
301. (1976), 15 N.S.R. (2d) 150 at 165
303. (1976), 15 N.S.R. (2d) 150 at 165, quoting de Smith, supra, note 15 at 250-51. Interestingly, de Smith himself then goes on to suggest that, at least in one respect, these three decisions meant that the scope for intervention in statutory appeal was wider than that in judicial review at that time.
306. Id. Lord Denning M.R., who had earlier delivered his judgment on the basis
for a statutory appeal on questions of law suggested by Cooper J.A. would clearly seem to be grounds on which certiorari could also be sought, meaning of course that the arguments to be advanced in either context would not in fact differ, notwithstanding Cooper J.A.'s prefatory remarks.

Despite his conception that the scope for intervention was narrower than in certiorari proceedings, Cooper J.A. with the support of the other members of the Court went on to allow the appeal in Re Michelin Tires on the basis that a tax assessment under the Health Services Tax Act was incorrect in that it depended upon an ultra vires criterion.307 This is an issue to which I will return later.308

Re Michelin Tires was not however the only case in which the question of the proper scope of a statutory appeal was raised in the period under review. Another was Cape Breton Development Corporation v. Penny, an appeal by an employer from a decision of the Workmen's Compensation Appeal Board.309 This was one of a series of four decisions310 in which the Court of Appeal was faced with the question of whether employers had a right to apply for leave to appeal from the Appeal Board's decisions. As we have seen already, the Court had previously held that the Workmen's Compensation Board itself did not have such a right to apply for leave to appeal.311 Therefore, it was perhaps not surprising to find the Appeal Division according such a right to employers, notwithstanding the fact that they were held at the same time not to be parties entitled to be heard by the Appeal Board.312

of jurisdictional error, id. at 21; [1975] 2 All E.R. at 1079, then said, id.:-

I would like to say that I agree with the alternative way in which Browne L.J. put it

Brightman J. agreed (id.) with both Lord Denning M.R. and Browne L.J.

307. (1976), 15 N.S.R. 150 at 165-68 (per Cooper J.A.) and (per MacKeigan C.J.N.S.) at 173-76. Coffin J.A. (at 177) concurred in both judgments

308. Infra, see notes 346 ff and accompanying text.

309. (1977), 20 N.S.R. (2d) 292; 76 D.L.R. (3d) 186 (sub nom. Cape Breton Development Corporation v. Penny (No. 2)) (S.C., A.D.)

310. Cape Breton Development Corporation v. Penny, Berry and Buckingham (1977), 19 N.S.R. (2d) 474; 75 D.L.R. (3d) 471 (S.C., A.D.). All three were consolidated on this issue.


312. (1977), 19 N.S.R. 474 at 488-91 (per MacKeigan C.J.N.S.) and 493 (per Cooper J.A.); 75 D.L.R. (3d) 571 at 578-82 (per MacKeigan C.J.N.S.) and 584-85
creates a very weird structure but at least it ensures that a decision of the Appeal Board, favourable to an injured employee, is not immune from attack.

Having reached this conclusion, the Court in \textit{Penny} then went on to consider some general questions relating to the scope of a statutory appeal, which in this case was "upon any question as to [the Appeal Board's] jurisdiction or upon any question of law".\textsuperscript{313}

The allegation made by counsel for the appellant in \textit{Penny} was that the Appeal Board's decision

\ldots is entirely contrary to the preponderance of evidence and is one that no reasonable men acting judicially could have reached; \ldots \textsuperscript{314}

The Appeal Division quickly dispatched the first part of this allegation as not raising a "question of law"\textsuperscript{315} and, given the courts' traditional attitude that deciding against the weight of evidence does not raise an error of law,\textsuperscript{316} this was not surprising at all. However, the way in which the Appeal Division defined what is excluded from its ambit of consideration was somewhat surprising:

If we interfered, we would be reviewing questions of fact and evidence or mixed law and fact which are not subject to review unless, which is not the case here, they involve matters of jurisdiction.\textsuperscript{317}

The surprising part of this statement is the exclusion of questions of mixed law and fact from the ambit of a statutory appeal on questions of law.\textsuperscript{318} However, MacKeigan C.J.N.S. then goes on to make it clear that, while he would exclude the question of whether

\begin{itemize}
\item \textit{per} Cooper J.A.), MacDonald J.A. at 494-500; 75 D.L.R. (3d) at 585-89, dissented on this issue
\item Section 159(N) of Workmen's Compensation Board Act, S.N.S. 1968, c. 65, as amended by S.N.S. 1975, c. 43, s. 13
\item (1977), 20 N.S.R. (2d) 292 at 294; 76 D.L.R. (3d) 186 at 188
\item Id. at 294-95; 76 D.L.R. (3d) at 188
\item (1977), 20 N.S.R. (2d) 292 at 295; 76 D.L.R. (3d) 186 at 188
\item In some instances legislatures would seem to make this clear by referring in the statutory appeal provision to questions of law alone. \textit{See e.g. Re McCann}, [1970] 2 O.R. 117; 10 D.L.R. (3d) 103 (C.A.). However, if this is not done there will normally be seen to be some scope for intervention in the area of mixed law and fact. \textit{See K. J. Keith, \textit{supra} note 297 at 128-53; de Smith, \textit{supra}, note 15 at 111-120}
\end{itemize}
the law and facts have been integrated correctly from the scope of an appeal on questions of law, there is still some room for judicial intervention in the area of fact or law/fact application.

Thus, it is an error of law to decide a point on no evidence, which in this context I take as meaning no evidence of any material weight or value. It is nearly the same thing to say that it is an error of law if the decision is one that on the evidence no reasonable man could have reached.\textsuperscript{319}

The second part of this formulation is of course the second part of the appellant's allegation set out above and what the Court seems to be saying is that they will not ask specifically: "Do the facts as found \textit{actually} fall within the rule of law as established (a question of mixed fact and law)?" Rather they will restrict themselves to the question: "Are the facts as found \textit{reasonably capable} of falling within the rule of law as established?" Obviously, though, the line between these two questions is a very narrow one indeed.\textsuperscript{320}

Looking at the alternative formulation, there is also a very narrow line between what constitutes a legitimate finding of no evidence to support a decision and an illegitimate weighing of the evidence. Indeed, MacKeigan C.J.N.S. quotes\textsuperscript{321} Robert F. Reid in his \textit{Administrative Law and Practice} as saying that the question of how far the court should go in reviewing the evidence in an appeal on a question of law is "in any general sense unanswerable".\textsuperscript{322} Formulations such as that used by MacKeigan C.J.N.S. in this case ("no evidence of any material weight or value") tend to be for the most part question-begging and open-textured. In fact, much the same can be said of the other recent attempt by the Appeal Division to formulate the scope for intervention on the basis of "no evidence". This was in the case of \textit{Lapierre v. The Queen},\textsuperscript{323} discussed earlier, and was stated by MacDonald J.A. in the context

\textsuperscript{319} (1977), 20 N.S.R. (2d) 292 at 295; 76 D.L.R. (3d) 186 at 188-89
\textsuperscript{320} See, once again, K. J. Keith, \textit{supra}, note 297 at 128-53
\textsuperscript{322} \textit{Supra}, note 57 at 306
\textsuperscript{323} (1976), 15 N.S.R. (2d) 361
of proceedings seeking *habeas corpus* with *certiorari* in aid to quash a committal for trial. To repeat that test:-

The day is long gone when a mere scintilla of evidence will justify a committal for trial; thus on an application for criminal *habeas corpus* with *certiorari* in aid . . . . . the reviewing court should examine the evidence taken on the preliminary inquiry to determine its sufficiency to deprive the applicant of his liberty. The evidence should be found sufficient if the reviewing court can say that on such evidence a jury, properly instructed and acting judicially could convict; any doubt on this question must be resolved in favour of the Crown. In so examining the evidence the superior court is not really substituting its discretion for that of the magistrate but rather is determining whether the magistrate applied proper principles in ordering committal for trial.  

Obviously, there is little or no difference in principle between this statement by MacDonald J.A. and that by MacKeigan C.J.N.S. in *Penny* despite the point made earlier that the statement of law by MacDonald J.A. in *Lapierre* represents a wider formulation of the "no evidence" basis of review than is normal in other contexts. What is, however, significant about both statements is that, by linking the "no evidence" test to a test relating to the reasonableness of the decision-maker, both judges are at least making it clear that for them anyway a "no evidence" inquiry involves at least some assessment of the weight of the evidence. It does not mean "absolutely no evidence at all" but rather a "complete absence of reasonable evidence". This injection of reasonableness into the test, while not obviously opening the floodgates of judicial intervention on this basis, may at least result in this ground for judicial intervention becoming slightly more common in future. What is even clearer is the fact that there will be little difference in attitude on the part of the Appeal Division whether this question is raised in the context of a statutory appeal on questions of law or in a judicial review application. This of course provides further support for the argument developed previously that, notwithstanding Cooper J.A.'s statement in *Re Michelin Tires*, there is a very close correlation between the scope of judicial review and the scope of an appeal on questions of law.

324. *Id.* at 379
325. For a list of Canadian cases up to 1972, where this ground of judicial review has been invoked successfully, see D. W. Elliott, *supra*, note 247 at 65-66. Since then most of the action in this area has been in the area of judicial review of criminal proceedings. See note 253, *supra.*
(c) Error of Law on the Face of the Record

In the statutory appeal decision just discussed, Cape Breton Development Corporation v. Penny, MacKeigan C.J.N.S. refused to categorize questions of mixed fact and law as questions of law for the purpose of a statutory appeal. This issue of what constitutes an error of law also arose in the period under review in the context of an attempt to quash the decision of a board of inquiry appointed under the Nova Scotia Human Rights Act\textsuperscript{326} for error of law on the face of the record.

There was no privative clause in the Human Rights Act so clearly this was a permissible basis for judicial review\textsuperscript{327} and MacIntosh J., at least by the use of a quote from Robert F. Reid, Administrative Law and Practice,\textsuperscript{328} appears to have acknowledged as much in Ryan v. Eaton. However, he then went on to find that at least some of the errors alleged did not raise reviewable issues.

With deference to counsel for the plaintiff, whether questions involving height and weight qualifications, the plaintiff's ability to perform the night shift work required, etc., are discriminatory to the female sex, in the sense of being prejudicial, is not for the Court's consideration. These issues involved the question submitted to the Board for a finding. This is not an appeal. This court is "only concerned with the validity of the Board's finding, not its wisdom".\textsuperscript{329}

Whether this amounts to an assertion that the issues involved are not ones of law or that they are not reviewable whether they are issues of law or not is quite unclear. However, the former interpretation is obviously the one more favourable to the judge since the latter involves a rejection of a well-established ground of review and also contradicts the extract for Reid which the Judge had quoted earlier.

Why then are the issues that are described not issues of law? The question: "What constitutes discrimination for the purposes of the statute?" clearly would seem to be one that is capable of classification as an issue of law, albeit that primary or initial responsibility for answering that question lies with the Board of Inquiry. In the context of an assertion that certain admitted acts do not constitute discrimination, the role of the Board is to articulate

\textsuperscript{326} S.N.S. 1969, c. 11
\textsuperscript{327} Supra, note 322 at 331-33
\textsuperscript{328} Unreported decision of MacIntosh J. of the Trial Division of the Supreme Court of Nova Scotia, delivered: August 24, 1976 (S.H. No. 09674) at 11-12
\textsuperscript{329} Id.
general principles as to what discrimination involves and then to
decide whether the acts in question fit into that legal framework.
This of course is the area of law/fact application and it may well be
that, as MacKeigan C.J.N.S. was to do later explicitly in the Penny
case, in the context of a statutory appeal, MacIntosh J. is adopting
implicitly a definition of error of law that excludes law/fact
application from the ambit of review for error of law on the face of
the record.

There is also a further correlation between the judgment of
MacIntosh J. in this case and that of MacKeigan C.J.N.S. in the
subsequent Penny decision. MacIntosh J. quotes from the
judgment of Dickson J. in Service Employees' Union v. Nipawin
District Staff Nurses Association and the pertinent part of this
extract is the following:-

But if the Board acts in good faith and its decision can be
rationally supported on a construction which the relevant
legislation may reasonably be considered to bear, then the Court
will not intervene.

As with MacKeigan C.J.N.S.'s statement in Penny, what this
amounts to is a statement of review for error of law based on a
principle of deference to the tribunal's decision "We will not
intervene unless there is manifest or clear error" rather than "We
will decide the question of law for ourselves and, if our answer is
different from the tribunal's, we will intervene".

Such an approach to review for error of law on the face of the
record provokes a number of comments. First, it is significant that
Dickson J.'s statement about the principles of review was uttered in
the context of developing a theory of judicial review in the face of a
privative clause. As MacIntosh J. himself acknowledged that was
not the case in Ryan Secondly, the courts normally do not accept
a principle of deference when it comes to review for error of law on
the face of the record. Rather, they pride themselves in their ability
to deal de novo and authoritatively with all questions of law.

The

330. (1977), 20 N.S.R. (2d) 292 at 295; 76 D.L.R. (3d) 186 at 188. Discussed
supra at footnote 309 and accompanying text
331. Supra, note 328 at 12-13
657
333. Trade Union Act, S.S. 1972, c. 137, s. 21, a standard "no appeal" — "no
certiorari" clause, which is accepted universally as preventing review for errors of
law within jurisdiction or intro-jurisdictional error of law.
334. Supra, note 327 at 12
335. See e.g. Baldwin & Francis Ltd. v. Patents Appeal Tribunal, [1959] A.C.
following extract from the judgment of Scarman L.J. in *H.T.V. Ltd. v. Price Commission* exemplifies this:

These two paragraphs are — in truth as well as literally — the alpha and omega of the code. Their width lends credibility to the assertion of the commission that the interpretation and application of the code are very largely its business, and not the business of the courts. The commission says that the issue in this case is for it, and not the courts, to determine. I find the assertion acceptable, but only within short limits. Undoubtedly questions of fact and policy arising in the course of implementing the code are for the commission, not the courts. But the interpretation of statutory language (including the language of delegated legislation) is a matter of law . . . But at the end of the process of fact finding, which, when appropriate will include the application of common sense and knowledge, of ordinary English usage to ascertain the meaning of common words and the meaning of technical words, the interpretation of legislative language remains a question of law. It is, therefore, a matter for the courts, unless their jurisdiction has been expressly excluded.336

Nevertheless, there are sound arguments for the principle of deference in some, if not all, situations, and some recognition of these arguments can be seen in the courts’ narrow approach to review for error of law on the face of the record in arbitrations involving the interpretation of collective agreements.337 Normally there will not be intervention unless the construction of a document is one that it will not reasonably bear. The legal meaning of technical words may well be something on which the generalist court should be prepared to acknowledge the greater expertise of the designated statutory authority except in the case of manifest error. It is also true that words take their meaning from the context in which they are used; therefore, what may be the “ordinary” meaning of particular statutory language for a court may be quite different from the meaning quite legitimately attributed to it in a particular context by a statutory tribunal. Finally, and perhaps most importantly the language in which the mandate of a statutory authority is expressed

663; [1959] 2 All E.R. 433 (H.L. (E.))
337. This court will only intervene if the decision is one that the tribunal could not reasonably have reached. See e.g. *Ford Motor Co. of Canada Ltd. v. International Union, United Automobile Workers of America*, [1972] S.C.R. 625; 25 D.L.R. (3d) 180; *Re Taylor and Ford Motor Co. of Canada Ltd.* (1973), 1 O.R. (2d) 398; 40 D.L.R. (3d) 486 (H.C.). It is noteworthy, of course, that the courts take this stance notwithstanding the *ad hoc* nature of a board of arbitration *c.f.* my comments, *infra.*
will often be left deliberately vague because of a desire on the part of the drafters that the expert authority will develop a meaning for that language as part of its ongoing and growing experience with the regulated area. In other words, there will be a type of subdelegation of legislative authority.

Arguably, this last point justifies deference in a case such as *Ryan* in relation to the meaning and ambit of a term such as "discrimination". The word invites tribunal development. However, the crucial point may well be that what the court was dealing with in *Ryan* was not a standing tribunal but an *ad hoc* board of inquiry. In such contexts, the arguments about the role of the authority in relation to the development of a meaning for a word or language or even for deference to expertise are not nearly so convincing. Indeed, one might go further and argue that the real role of the statutory authority in the area of human rights legislation is to break through the very real evidential difficulties in the way of establishing discrimination and to develop special measurement tests and criteria for that purpose. On the question of what in law constitutes "discrimination", the generalist court may be seen as just as expert as the statutory authority. While this latter argument is not wholly convincing to me, it at least gains some strength from the absence of any privative clause in the relevant legislation, the most common and readily available device to prevent judicial review for error of law.

However, even if the need for deference to the decisions of the statutory authority on questions of law is accepted, the judgment of MacIntosh J. in *Ryan* is unsatisfactory in that it fails to pay any attention to the question which even he acknowledges can be asked by the reviewing court in this context. Is the construction placed on the word "discrimination" by the board one that the language or word can reasonably bear? That question at least deserved some detailed attention given the controversial nature of some of the matters alleged in this case; first, that a height and weight restriction did not involve sexual discrimination and, secondly, that Ms. Ryan was not hired because of the difficulties that the presence of a woman would cause on the night shift and consequent reluctance to have her work only days. The argument that discrimination is involved in both these matters is, to say the least, quite strong and the judge should have considered explicitly whether the word "discrimination" reasonably construed could rationally support an interpretation which did not include either of these matters. This
seems particularly so "as no bona fide occupational qualification was indicated by the employer". 338

(d) Abuse of Discretion and Elected Officials

In 1975, the Town Council of the Town of Yarmouth decided to disband its police force and to enter into a contract with the RCM Police for the provision of police services in the Township. Before this decision, a plebiscite was held which indicated that a majority of those voting were in favour of the proposed step. Subsequently, the Deputy Chief of Police sought a declaration that the relevant resolution of the Town Council was null and void and an injunction restraining the town from entering into a contract with the RCM Police. 339

One of the interesting arguments made on behalf of the Deputy Chief of Police was that the resolution was invalidated by virtue of the fact that two members of the majority voting for the disbandment of the police force did so because they wrongly considered themselves bound by the result of the plebiscite. Morrison J, however, found against the facts on which this allegation was founded:

I accept their evidence as they gave it, that is, that they did not vote as they did because they felt they were bound by the results of the plebiscite but rather on their own conscience and on their assessment of the feelings of the town, which was reached by a consideration of a number of factors of which the plebiscite was only one. 340

It is, however, interesting to speculate upon what the result would or should have been had it been clear that the councillors did consider themselves bound by the vote on the plebiscite.

In the course of his judgment, Morrison J. cited a number of authorities to the effect that the courts should be reluctant to interfere with the actions of duly-elected municipal councils whether exercised by resolution or by-law. 341 Typical is the following statement:

What is or is not in the public interest is a matter to be determined by the judgment of the municipal council; and what it determines, if in reaching its conclusion it acted honestly and

338. Supra, note 328 at 14
340. Id. at 596
341. Id. at 593-94
within the limits of its powers, is not open to review by the Court.342

However, such general statements do not assist very much in dealing with the particular question save that they establish a principle of great deference or reluctant interference.

Of course, considering oneself bound by the plebiscite might involve one of two states of mind; either an understanding that the law required you to adhere to the result of the plebiscite or, alternatively, a decision in advance that in this particular matter the vote of the populace rather than your own personal judgment should, as a matter of fact, govern the outcome.

Both these situations or states of mind can be viewed as having the potential for judicial review for abuse of discretion. In the first, it could be argued that there was a failure to exercise a discretion because of a misperception of the law as to voting obligations after the particular plebiscite. The second situation could be seen as giving rise to arguments about a wrongful delegation of authority or, even once again, of failure to exercise the discretion that the ability to vote on council resolutions involves. In Rogers, The Law Canadian Municipal Corporations, the following statement would appear to support this contention, albeit that it is made in the context of the corporate actions of councils rather than the individual votes of councillors:

Phrased conversely, it means that political power can be exercised only by those who are responsible in law for its execution. In terms of municipal law, this means that, in the absence of express statutory authority, a municipal council, as the recipient of delegated authority itself, cannot assign to an official or any other agency any legislative or discretionary authority vested in it. Moreover, it cannot deprive itself of a power conferred on it by requiring by by-law, as a preliminary step to the exercise of its powers, a petition of the ratepayers where the governing statute does not require it.343

Nevertheless, it may well be argued that, while the concillors of Yarmouth obtain their powers from the Towns Act344 and personally have to exercise the functions conferred on them by that

342. Id. at 594, citing Master J.A. in Re Howard and City of Toronto (1928), 61 O.L.R. 563 at 575; [1928] 1 D.L.R. 952 at 965 (C.A.)
343. (2d ed. Toronto: Carswells, 1971) at 368-69 (para. 63-41) (footnotes omitted)
344. R.S.N.S. 1967, c. 309. See section 208 particularly in relation the establishment of a police force. See also Police Services Act, S.N.S. 1969, c. 17, ss. 6-7
statute, the Act itself is designed to facilitate a certain kind of municipal democracy and that, against this background, the decision to return a particular issue to the theoretically original delegators of the power to govern, the voters, is of a quite different order from delegation of authority to a small committee or some private organization.

As against this, it can of course be said that the true nature of the democratic process at the municipal level is that the will of the electorate can only be determinative at the relatively frequent elections and that, in the period in between, those elected are expected to act personally in what they consider to be the best interests of the municipality.

Perhaps fortunately for the Court, it did not have to face this fundamental question about the nature of the democratic process in the Canty. Indeed, it may well remain an issue for debate at the theoretical level. After all, even if the theory that the councillors are supposed to vote on the basis of their own decision about a particular matter is accepted, the opinion of the electorate as expressed in a plebiscite is obviously not an irrelevant factor in the making of that decision and, given that, it is always going to be relatively easy for a court to say, as Morrison J. did in Canty,\(^345\) that the result of the vote was just one factor that the councillors took into account in deciding which way to vote on a particular resolution.

(e) *Re Michelin Tires Manufacturing Co. Ltd.*\(^346\)

Comment has already been made on this decision in the section dealing with the scope for judicial intervention in the case of a statutory appeal on questions of law and jurisdiction. However, the case is also highly significant because of the grounds on which the appeal was allowed.

Michelin Tires claimed to be entitled to an exemption from sales tax with respect to goods and materials used in the construction of an electrical sub-station which supplied electricity to its manufacturing plant. This exemption was said to arise under section 10 (h) of the Health Services Tax Act\(^347\) which provided:

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345. (1975), 72 D.L.R. (3d) 590 At 596 (S.C., T.D.)
347. R.S.N.S. 1967, c. 127
10. The following classes of tangible personal property are specifically exempted from the provisions of this Act:

... (h) machinery and apparatus as defined by the Minister and parts thereof, which in the opinion of the Minister are to be used directly in the process of manufacture and production of goods for sale.

The company's appeal to the Minister from the initial assessment of sales tax was rejected in principle, though a discount of twenty-eight per cent was allowed, and this decision was affirmed by Hart J. of the Trial Division on further appeal.348

The "definition" by the Minister which was relied upon in assessing sales tax was contained in a letter, dated July 9, 1969 and addressed to the Commissioner of the Hospital Tax Commission and it purported to change an earlier 1963 definition. The relevant part of the letter was as follows:

As stated in my letter of June 3, 1969, I concur in your recommendation that we exempt from tax only that portion of the machinery and apparatus that is used exclusively and directly in the process of manufacture or production of goods for sale.349

The only other facts that relate to the issues discussed by the Court in the case are those relating to the date of purchase of the goods that were the subject of the assessment and the "promulgation" of this order. To quote from the judgment of Cooper J.A.:

Most of the electrical machinery and apparatus was ordered for delivery in the Fall of 1970 and 95 per cent of it had arrived on the site by November or December, 1970.350

The new "definition" was not, however, published in any sense till early 1971 when all manufacturers listed in the Nova Scotia Directory of Manufacturing were notified by the Director of Health Services Tax Administration. As Michelin had not at that time started production, it was not listed and did not receive a copy. Indeed, despite attempts to secure information, it was not until a 1972 audit by the Commission that anyone at Michelin saw a copy of the "definition".

There were two substantial judgments delivered by members of the Appeal Division in this case, one by Cooper J.A. and one by MacKeigan C.J.N.S., with Coffin J.A. concurring in both as he

349. (1976), 15 N.S.R. (2d) 150 at 160
350. Id. at 154
saw them as being in no sense contradictory. Read together these two judgments produce a melange of reasons for allowing the appeal and they can be stated briefly:

(a) The new "definition" was not a definition in terms of the Act because it simply restated the language of the section and unlawfully delegated the making of a real definition to the Commission.352

(b) The new "definition" was *ultra vires*, notwithstanding the wide discretion given to the Minister ("in the opinion of"), because it added a requirement of "exclusivity", which is in no sense a test or definition of "directly" but a narrowing of that term.353

(c) The "definition" had not been published at the time that the purchase were made and publication is a requirement of effectiveness.354

(d) The "definition" had not come into effect till after the purchase because the Minister's delegate in the Commission had delayed the implementation of the new "definition" and the Minister was estopped from setting up a want of authority.355

As a result, the Court found that the 1963 definition applied to Michelin's situation and under this definition, it was entitled to an exemption.

The first two grounds of review are relatively uncontroversial and easy to understand. The only doubt that might be raised is in relation to the Court's intervention in the obviously broad power of definition given to the Minister.356 Should the courts be involved in a review of the Minister's opinion? Of course, the form in which the definition was issued by the Minister made it relatively easy to say that he was not so much defining as adding another requirement to the provisions of section 10(h), that of exclusivity of use. The conclusion reached by the Court may, however, have been a little more difficult to justify if the Minister had said "For the purposes of section 10(h) 'directly' means 'exclusively'". Nevertheless, even

351. *Id.* at 177
352. *Id.* at 175-76 (per MacKeigan C.J.N.S.)
353. *Id.* at 168 (per Cooper J.A.) and 173-75 (per MacKeigan C.J.N.S.)
354. *Id.* at 170-73 (per Cooper J.A.)
355. *Id.* at 168-170 (per Cooper J.A.)
if that device had been used, it would seem that the Court should be able to analyze the definition as opposed to an attempt to amend the section. In a slightly different context, the Ontario Court of Appeal recently expressed this same principle:

... even such a broad conferring of power to act on what the Board considers relevant would not extend to authorize the Board to make relevant a consideration which is patently irrelevant, simply by the act of Board expressing that it considers it be irrelevant.357

What is evident from the first two reasons, but particularly from the latter two, is an understandable concern with the operation of the subordinate law-making processes in the province of Nova Scotia and an attempt to impose strict requirements as to regularity before that law will become effective.

According to de Smith,358 statutory instruments are effective once made in the absence of some statutory provision to the contrary. Quite obviously, the rigid application of such a rule can give rise to considerable injustice and in the first Dalhousie Law Journal survey of Nova Scotia law, Professors Goode and Ortego commented on the development of the defence in criminal proceedings of ignorance of the law in relation to "secret" law.359 While the Michelin Tires case is concerned not with criminal liability, but tax liability, some of the same considerations are obviously relevant in this context. People are constantly planning their affairs on the basis of matters such as tax liability and to allow the government to rely upon undiscoverable law to frustrate those planning efforts is in most instances quite contrary to our sense of what is involved in the notion of the Rule of Law.

In Michelin Tires, the Court was able to respond to the challenge first by presuming from the facts that the Minister had delegated the determination of the effective date of the new definition to the Commission, though this was arguably quite invalid.360 Secondly,

357. Re Sheehan and Criminal Injuries Compensation Board (1975), 5 O.R. (2d) 781 at 786; 52 D.L.R. (3d) 728 at 733 (C.A.) (per Kelly J.A.)
358. Supra, note 15 at 127
360. On the basis that the date of the effectiveness of the new definition is an integral part of the defining power itself and that, therefore, any subdelegation
the Court seemed prepared to reject, at least in this context, the rule
stated by de Smith that subordinate legislation is valid when made
and instead to require some kind of publication. What
publication involves did not however need to be developed by the
Court. The machinery had all been purchased not only before the
manufacturers in the Directory were notified but before the date
which the Director had decided would be the effective date of the
new "definition".

A much harder case for the Court would have been one in which
the directive was considered effective by the Director and after he
had notified the manufacturers listed in the Directory, but before
Michelin had found out about it. Cooper J.A. hinted that even in
that situation he would have decided in favour of Michelin. He
cited with approval the following statement from R. v. Ross:

I think it hardly compatible with justice that a person may be
convicted and penalized, and perhaps lose his personal liberty by
being committed to jail in default of payment of any fine
imposed, for the violation of an order of which he had no
knowledge or notice at any material time.

He then transferred that reasoning to the present context:

We are here dealing with a defining power given to the Minister
of Finance in the very important area of taxation and, in my
opinion, it is of great importance that the exercise of that power
and the terms of that exercise be made known to the public.

The last part of the statement is, however, ambivalent. What does
making something known to the public involve in this context?
Notifying all manufacturers listed in the relevant trade document?
Publication in the Gazette? Publication in the local newspapers? Or,
actual notification to all affected? MacKeigan C.J.N.S. obviously
was not prepared to go as far as the last of these alternatives:

Where such formal issuance is not required, I would like to think
that effective issuance involves some reasonable minimum
publication, the nature and degree of which will depend on the
kind of order and the persons to whom it is directed. I must

offends the delegatus non potest delegare principle. See de Smith, supra, note 15
at 263-72
361. Supra, note 15 at 127. The "normal" rule was not in fact dealt with by the
Appeal Division
362. (1976), 15 N.S.R. (2d) 150 at 171-73
Co. Ct.)
364. Id. at 172-73
respectfully question, however, whether the Crown must prove
that the person to be bound has actual knowledge or notice of an
order, as seems to be suggested by Harrison, Co. Ct. J. in *R. v.
Ross*... \(^365\)

This in fact seems obvious given the impossibility of anticipating
all who will be affected in the future by the new "definition".
There are, of course, two separate questions that may be involved
here. First what publication, if any, is actually needed to make the
new definition effective? Secondly, assuming it is effective, will a
defence be available to anyone who does not actually have
knowledge of the definition? The answer to the second question
will, of course, be largely conditional by the answer to the first. The
more strict the publication requirement that is imposed, the less
scope there will be or should be for a defence of ignorance of law.
For example, if publication by writing to all persons listed in the
Nova Scotia Directory of Manufacturers, as took place here, was
considered to be effective, the court should perhaps be prepared to
excuse someone who was not so notified from the effects of the new
definition if, before purchase, they were unable to secure any
information from the Commission as to whether the definition had
been changed since 1963. On the other hand, if the change were
listed in the new Directory itself and this was considered publication
for the purposes of bringing the new definition into effect, it may
well be that ignorance should not excuse the company from
liability, particularly if the Directory is a common place for such
information.

Obviously, major difficulties are involved in the answering of
such questions and generally this would seem to be the type of issue
that should be clarified by legislation rather than having to be
developed by the courts on a case by case basis. However, in Nova
Scotia, the new Regulations Act\(^366\) which attempts to deal with
some of these problems remains unproclaimed some four and a half
years after its enactment. It must also be noted that it is doubtful
whether the Regulations Act, even if proclaimed, would serve to
answer the issue posed by *Re Michelin Tires*, if it arose again. By
virtue of section 4(6) and (7), Regulations have to be filed with the
Registrar before they become effective. There is then a general
publication requirement and for the most part, non-publication in

\(^{365}\) *Id.* at 176-77

\(^{366}\) S.N.S. 1973, c. 15
the Gazette provides an excuse unless other

. . . reasonable steps had been taken for the purpose of bringing
the purport of the regulation to the notice of the public or of the
persons likely to be affected by it or of the person charged.

There are obvious difficulties with this section. What is
reasonable may give rise to great problems in particular cases. Also,
is the section saying that a person may be charged if he is in fact
affected and if reasonable steps have been taken to bring it to the
attention of persons likely to be affected, if he was not in the class of
those who were likely to be affected? However, even more
pertinent, is the definition of "regulation".

(g) . . . a rule, order, proclamation, regulation, by-law, form,
resolution or tariff of costs or fees made in the exercise of a
legislative power conferred by or under an Act of the Legislature

. . .

(ii) by the Minister presiding over any department of the
public service.

Is a "definition" capable of being fitted within one of those words
used to describe the type of instrument by the statute? Hopefully, a
broad reading of the Act would ensure that it was.

IV. Conclusion

The decisions commented upon in this survey have concerned many
facets of judicial review of administrative action as well as statutory
appeals from administrative action. Because of this variety it is
very difficult to generalize and encapsulate in a few words the
general quality of the judgments of the Nova Scotia courts in this
area. The picture presented here is also somewhat deceptive in that
the decisions selected for comment are by and large ones that raise
controversial and novel points and for that reason may not be
representative.

However, a few comments of a general nature can be made. Many of the decisions discussed in this survey have looked at the
issues involved from far too narrow a perspective or, putting it
another way, without a full consideration of all the competing
interests involved. At times, for example, the position and the
concerns of the statutory authority were either ignored or dealt with
quite superficially. In other cases, judgments were cryptic and little
attempt was made to relate the rules of law accepted to an overall
philosophy of judicial review and its perceived role. Of course,
pressure on judicial time and inadequate presentation by counsel may explain a lot. Nevertheless, if the judicial review is to cease to have some of its bad name in this country, the judicial articulation of reasons for decisions is going to have to be fuller and more principled in a greater number of cases. This was a matter on which I commented in the first of these surveys and it is difficult to detect any general improvement in this regard, though one has to acknowledge the sensitive treatment given by the Appeal Division to the issues raised in the *Michelin Tires Ltd.* case. Perhaps not unexpectedly, there has been little evidence in the judgments surveyed of this degree of refinement in the Trial Division.