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Court file no. 661/89

SUPREME COURT OF ONTARIO
(DIVISIONAL COURT)

BETWEEN:

NSP INVESTMENTS LIMITED

Applicant

- and -

THE JOINT BOARD (ESTABLISHED UNDER SECTION 4 OF THE CONSOLIDATED HEARINGS ACT, 1981, S.O. 1981, C. 20, AS AMENDED), THE REGIONAL MUNICIPALITY OF HALTON, THE CORPORATION OF THE TOWN OF MILTON, THE CORPORATION OF THE CITY OF BURLINGTON, THE WEST BURLINGTON CITIZENS' GROUP, THE MILTON AREA CITIZENS' COALITION, THE HALTON FEDERATION OF AGRICULTURE, WATKIN AND DOREEN MARTIN, WALTER TOMOSKY, THOMAS AND MARY-JEAN MARTIN, MICHAEL AND CYNTHIA REED, AND THE HONOURABLE JAMES BRADLEY, IN HIS CAPACITY AS THE MINISTER OF THE ENVIRONMENT

Respondents

Application under the Judicial Review Procedure Act, R.S.O. 1980, c. 224, Subsections 2(1), 2(3) and 2(4) and Rule 68 of the Rules of Civil Procedure

BOOK OF AUTHORITIES

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BOOK OF AUTHORITIES

I N D E X

TAB

ABSENCE OF EVIDENCE TO SUPPORT KEY FINDINGS

1. Skogman v. The Queen, [1984] 2 S.C.R. 93, 101 and 104 per Estey J. — 1

2. Blanchard v. Data Control Canada Ltd., [1984] 2 S.C.R. 476, 494-495 per Lamer, J. — 2

TAB

15. Szuts v. Commissioner of Social Services, unreported, February 11, 1986 (Ont. Div. Ct.) 15

16. Burton v. Minister of Community and Social Services (1985), 10 O.A.C. 263 (Ont. Div. Ct.) 16

SUBSTITUTION BY THE JOINT BOARD OF ITS OWN OPINION FOR THAT OF QUALIFIED EXPERTS

17. S.A. De Smith, Judicial Review of Administrative Action (4th ed.) pp. 126-139; 302-232; and 407 17

18. Re Reddall and College of Nurses of Ontario (1983), 42 O.R. (2d) 412 (C.A.), 416-417 18

19. David v. Minister of Natural Resources (1976), 15 A.P.R. 300 (N.B.S.C.) 19

FAILURE TO REFER TO, CONSIDER OR EVALUATE ESSENTIAL EVIDENCE

20. Ontario Public Service Employees Union et al. v. Ministry of Correctional Services (1984), 2 O.A.C. 351 (Ont. Div. Ct.), 358 20

21. Oakwood Development Ltd. v. Rural Municipality of St. Francois Xavier, [1985] 2 S.C.R. 164, 174 21

22. Villarroel v. Minister of Employment and Immigration, [1979] 31 N.R. 50 (F.C.A.), 53 and 55 22

23. S.A. De Smith, *supra*, pp. 126-139 and 407 17

USE AND RELIANCE ON UNDISCLOSED CRITERIA FOR THE DETERMINATION OF HYDROGEOLOGIC SUITABILITY

24. Sarco Canada Limited v. Anti-Dumping Tribunal, *supra*, 263 7

25. S.A. De Smith, *supra*, pp. 203-212 17

26. Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association et al., [1975] 1 S.C.R. 382, 388-89 per Dickson J. 23

TAB

27. College of Physicians and Surgeons of Ontario v. Petrie (1989), 68 O.R. (2d) 100 (Ont. Div. Ct.) 24

28. Corporation of the Town of Flamborough et al. v. National Energy Board et al. (1987), 81 N.R. 229 (F.C.A.), 232 25

29. Danakas v. War Veterans Board (1985), 10 Admin. L.R. 110 (F.C.A.) 26

30. Vance v. Hardit Corp. et al. (1985), 18 Admin. L.R. 111 (Ont. Div. Ct.), 116 27

31. McLean v. Weir et al., [1977] 5 W.W.R. 609 28

Larry Cliff Skogman *Appellant*;

and

Her Majesty The Queen *Respondent*.

File No.: 17031.

1982: November 22; 1984: July 26.

Present: Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Preliminary hearing — Committal for trial — Charge of conspiracy — Whether any evidence of conspiracy involving the accused — Whether certiorari available to quash committal if no evidence on an essential ingredient of the charge — Criminal Code, R.S.C. 1970, c. C-34 (as am. by R.S.C. 1970 (2nd Supp.), c. 2, s. 8), s. 475.

Certiorari — Committal for trial — Charge of conspiracy — Application to quash committal for trial — Whether evidence supporting the committal — Whether certiorari available if no evidence on an essential ingredient of the charge — Criminal Code, R.S.C. 1970, c. C-34 (as am. by R.S.C. 1970 (2nd Supp.), c. 2, s. 8), s. 475.

Appellant with two others was charged with conspiracy to use a forged document contrary to s. 326 of the *Criminal Code*. At the preliminary hearing, the Provincial Court Judge was satisfied that there was sufficient evidence upon which a jury properly instructed could convict and accordingly committed the appellant for trial. Appellant successfully petitioned the Supreme Court of British Columbia for *certiorari* to quash the committal for trial on the ground that there was no evidence before the Provincial Court Judge of his membership in the conspiracy, an essential ingredient of the offence charged, and that therefore, it was beyond the Provincial Judge's jurisdiction to commit in the circumstances. On appeal, the Crown conceded that there was no evidence of a conspiratorial agreement but argued that, in any event, *certiorari* did not lie to review a committal order under s. 475 of the *Code* in circumstances where there was no evidence to support that order. The Court of Appeal set aside the order to quash. Hence this appeal.

Larry Cliff Skogman *Appelant*;

et

Sa Majesté La Reine *Intimée*.

N° du greffe: 17031.

1982: 22 novembre; 1984: 26 juillet.

Présents: Les juges Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer et Wilson.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit criminel — Enquête préliminaire — Renvoi au procès — Accusation de complot — Y a-t-il des éléments de preuve de l'existence d'un complot impliquant l'accusé? — Peut-on recourir au certiorari pour annuler un renvoi au procès en l'absence d'éléments de preuve concernant un élément essentiel de l'accusation? — Code criminel, S.R.C. 1970, chap. C-34 (mod. par S.R.C. 1970 (2e Supp.), chap. 2, art. 8), art. 475.

Certiorari — Renvoi au procès — Accusation de complot — Demande visant à annuler un renvoi au procès — Y a-t-il des éléments de preuve justifiant le renvoi au procès? — Peut-on recourir au certiorari en l'absence de preuve concernant un élément essentiel de l'accusation? — Code criminel, S.R.C. 1970, chap. C-34 (mod. par S.R.C. 1970 (2e Supp.), chap. 2, art. 8), art. 475.

L'appelant a été accusé, en même temps que deux autres personnes, d'avoir comploté en vue d'utiliser un document contrefait contrairement à l'art. 326 du *Code criminel*. À l'enquête préliminaire, le juge de la Cour provinciale s'est dit convaincu qu'il y avait suffisamment d'éléments de preuve pour qu'un jury ayant reçu des directives appropriées puisse rendre un verdict de culpabilité. L'appelant a présenté avec succès à la Cour suprême de la Colombie-Britannique une demande de *certiorari* visant à annuler le renvoi au procès pour le motif que le juge de la Cour provinciale ne disposait d'aucune preuve de sa participation au complot, qui est un élément essentiel de l'infraction reprochée, et que par conséquent le juge de la Cour provinciale n'avait pas compétence pour ordonner le renvoi au procès dans ces circonstances. En appel, la poursuite a reconnu qu'il n'y avait aucune preuve de l'existence d'une entente qui aurait constitué un complot mais elle a soutenu que, de toute façon, on ne pouvait recourir au *certiorari* pour réviser un renvoi au procès ordonné en vertu de l'art. 475 du *Code*, en l'absence d'éléments de preuve justifiant ce renvoi. La Cour d'appel a infirmé l'ordonnance d'annulation. D'où ce pourvoi.

Held (Beetz, McIntyre and Chouinard JJ. dissenting): The appeal should be allowed.

Per Dickson, Estey, Lamer and Wilson JJ.: The committal of an accused for trial in the absence of evidence on an essential ingredient of the charge constitutes a jurisdictional error reviewable on *certiorari*. Under section 475 of the *Criminal Code*, a judge sitting on a preliminary inquiry is called upon to form an opinion as to whether or not the evidence is sufficient to put the accused on trial. "No evidence" on an essential element of the charge can never amount to "sufficient evidence" under s. 475. The Court must independently assess the record to determine whether there was any evidence to support the committal: it is not bound to accept the Crown's view of the evidence or its submission. The parties cannot alter the record nor convert the appeal into a request for an advisory opinion. Here, where there was some evidence of the accused's membership in the conspiracy, the reviewing judge erred in quashing the committal order. The Crown, however, in the exercise of its enforcement discretion, took as its sole position both here and below that even in the absence of any evidence of an essential element of the charge no review of the decision to commit lay by *certiorari*; and which position was tantamount to a submission of a reference on a point of law. Instead of seeking a reversal of the order on a ground known to law, the Crown is trying to extend a principle or even to establish new law. This Court, in finding that the order of the reviewing judge should not have been invalidated by the Court of Appeal on the basis advanced by the Crown, is free to restore that order and so leave the Crown in the same position as if it had elected not to appeal the order of the reviewing judge. The prosecutorial arm of the state holds the view that there is no evidentiary basis for the charge against this accused and accordingly he should not be put on trial.

[*Re Martin, Simard and Desjardins and The Queen* (1977), 20 O.R. (2d) 455, affirmed *sub nom. Martin v. The Queen*, [1978] 2 S.C.R. 511; *Re Guttman and The Queen* (1981), 64 C.C.C. (2d) 342; *Procureur général du Québec v. Poirier*, [1981] C.A. 228, *sub nom. Re Poirier and The Queen* (1981), 62 C.C.C. (2d) 452; *Re Leroux and The Queen* (1978), 43 C.C.C. (2d) 398; *Re Robar and The Queen* (1978), 42 C.C.C. (2d) 133; *Re Mackie and The Queen* (1978), 43 C.C.C. (2d) 269;

Arrêt (les juges Beetz, McIntyre et Chouinard sont dissidents): Le pourvoi est accueilli.

Les juges Dickson, Estey, Lamer et Wilson: Le renvoi d'un accusé à son procès en l'absence d'éléments de preuve concernant un élément essentiel de l'accusation constitue une erreur de compétence susceptible de révision par voie de *certiorari*. L'article 475 du *Code criminel* exige que le juge qui préside à une enquête préliminaire détermine si la preuve est suffisante pour faire passer l'accusé en jugement. «L'absence d'éléments de preuve» concernant un élément essentiel de l'accusation ne peut jamais équivaloir à une «preuve suffisante» au sens de l'art. 475. La Cour doit procéder à une appréciation indépendante du dossier afin d'établir s'il y a des éléments de preuve qui justifient le renvoi au procès: elle n'est pas tenue de retenir l'interprétation donnée à la preuve par la poursuite ni ses arguments. Les parties ne peuvent pas également modifier le dossier ni transformer l'appel en renvoi. En l'espèce, vu qu'il y avait des éléments de preuve de la participation de l'accusé au complot, le juge qui a effectué la révision a commis une erreur en annulant le renvoi au procès. Toutefois, dans l'exercice de son pouvoir discrétionnaire, la poursuite a adopté une seule position en cette Cour et en Cour d'appel, savoir que, même en l'absence d'éléments de preuve concernant un élément essentiel de l'accusation, la décision de renvoyer l'accusé à son procès ne peut faire l'objet d'une révision par voie de *certiorari*. Cette position équivaut à un renvoi sur un point de droit. Au lieu de demander l'annulation de l'ordonnance pour un motif reconnu en droit, la poursuite cherche à élargir la portée d'un principe ou même à établir une nouvelle règle. Cette Cour, en concluant que la Cour d'appel n'aurait pas dû, en se fondant sur le moyen mis de l'avant par la poursuite, infirmer l'ordonnance du juge qui a effectué la révision, a toute liberté pour rétablir ladite ordonnance et mettre ainsi la poursuite dans la même situation où elle se serait trouvée si elle avait choisi de ne pas interjeter appel de cette ordonnance. Les autorités investies par l'État du pouvoir de poursuivre sont d'avis qu'il n'y a aucune preuve à l'appui de l'accusation portée contre l'accusé et que, par conséquent, il ne devrait pas être renvoyé à son procès.

[Jurisprudence: *Re Martin, Simard and Desjardins and The Queen* (1977), 20 O.R. (2d) 455, confirmé *sub nom. Martin c. La Reine*, [1978] 2 R.C.S. 511; *Re Guttman and The Queen* (1981), 64 C.C.C. (2d) 342; *Procureur général du Québec c. Poirier*, [1981] C.A. 228, *sub nom. Re Poirier and The Queen* (1981), 62 C.C.C. (2d) 452; *Re Leroux and The Queen* (1978), 43 C.C.C. (2d) 398; *Re Robar and The Queen* (1978), 42 C.C.C. (2d) 133; *Re Mackie and The Queen* (1978), 43

Stillo v. R. (1981), 22 C.R. (3d) 224; *Forsythe v. The Queen*, [1980] 2 S.C.R. 268; *Patterson v. The Queen*, [1970] S.C.R. 409; *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *R. v. Botting*, [1966] 3 C.C.C. 373; *R. v. Norgren* (1975), 27 C.C.C. (2d) 488; *United States of America v. Shephard*, [1977] 2 S.C.R. 1067; *Douglas Aircraft Company of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245; *Hodgkinson v. Fernie* (1857), 3 C.B. (N.S.) 189; *Re King and Duveen*, [1913] 2 K.B. 32; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382; *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227; *City of Toronto v. Polai* (1969), 8 D.L.R. (3d) 689; *R. v. Kopan* (1975), 3 B.C.L.R. 102, referred to.]

APPEAL from a judgment of the British Columbia Court of Appeal (1982), 66 C.C.C. (2d) 14, [1982] 3 W.W.R. 367, allowing the Crown's appeal from a judgment of Bouck J. (1981), 62 C.C.C. (2d) 385, allowing appellant's application for *certiorari* to quash his committal for trial. Appeal allowed, Beetz, McIntyre and Chouinard JJ. dissenting.

B. A. Crane, Q.C., and *Christopher Brennan*, for the appellant.

A. M. Stewart, for the respondent.

The judgment of Dickson, Estey, Lamer and Wilson JJ. was delivered by

ESTEY J.—The essential characteristic of this appeal is derived from the stance adopted by the Crown here and below, namely that *certiorari* does not lie for the review of a committal order under s. 475 of the *Criminal Code* even where there is no evidence to support the order committing the accused for trial. The Crown factum on this point in this Court stated:

> In the Court of Appeal, the Crown took the position that this case should be viewed as a case in which there was "no evidence" to support the justice's opinion that the accused should be committed for trial (A.B. 283). The issue before the Court of Appeal, said the Crown, was the scope of the remedy available by way of an application for an order in the nature of *certiorari*.

C.C.C. (2d) 269; *Stillo v. R.* (1981), 22 C.R. (3d) 224; *Forsythe c. La Reine*, [1980] 2 R.C.S. 268; *Patterson c. La Reine*, [1970] R.C.S. 409; *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *R. v. Botting*, [1966] 3 C.C.C. 373; *R. v. Norgren* (1975), 27 C.C.C. (2d) 488; *États-Unis d'Amérique c. Shephard*, [1977] 2 R.C.S. 1067; *Douglas Aircraft Company of Canada Ltd. c. McConnell*, [1980] 1 R.C.S. 245; *Hodgkinson v. Fernie* (1857), 3 C.B. (N.S.) 189; *Re King and Duveen*, [1913] 2 K.B. 32; *Union internationale des employés des services, local no. 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382; *Syndicat canadien de la Fonction publique, section local 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *City of Toronto v. Polai* (1969), 8 D.L.R. (3d) 689; *R. v. Kopan* (1975), 3 B.C.L.R. 102.]

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1982), 66 C.C.C. (2d) 14, [1982] 3 W.W.R. 367, qui a accueilli l'appel de la poursuite à l'encontre d'un jugement du juge Bouck (1981), 62 C.C.C. (2d) 385, qui avait accueilli la demande de *certiorari* faite par l'appelant en vue d'annuler le renvoi à son procès. Pourvoi accueilli, les juges Beetz, McIntyre et Chouinard sont dissidents.

B. A. Crane, c.r., et *Christopher Brennan*, pour l'appelant.

A. M. Stewart, pour l'intimée.

Version française du jugement des juges Dickson, Estey, Lamer et Wilson rendu par

LE JUGE ESTEY—Ce pourvoi se distingue surtout par le fait que la poursuite, aussi bien ici qu'en Cour d'appel, a soutenu qu'on ne peut, par voie de *certiorari*, obtenir la révision d'une ordonnance de renvoi au procès rendue en vertu de l'art. 475 du *Code criminel*, et ce, même en l'absence de preuves à l'appui de ladite ordonnance. Dans le mémoire qu'elle a produit en cette Cour, la poursuite affirme à ce sujet:

> [TRADUCTION] Selon la position adoptée par la poursuite en Cour d'appel, il fallait procéder comme s'il n'y avait «aucun élément de preuve» justifiant l'opinion du juge qu'il y avait lieu d'ordonner le renvoi de l'accusé à son procès (dossier d'appel, à la p. 283). La poursuite a affirmé que la question à trancher en Cour d'appel concernait la portée du redressement qu'on peut obtenir par voie de demande d'ordonnance de la nature d'un *certiorari*.

This was the ultimate response of the Crown to the grounds upon which the appellant-accused brought his motion in the Supreme Court of British Columbia for an order in the nature of *certiorari* to quash the order of committal.

THAT proof of an "agreement" is an essential ingredient of the charge alleged against LARRY CLIFF SKOGMAN; that there was no evidence led at the preliminary inquiry to prove such an "agreement" and that without such evidence it was beyond the jurisdiction of His Honour Judge Giles to commit LARRY CLIFF SKOGMAN to stand trial.

This litigation has proceeded, since the order of Bouck J., on the footing that there was no evidence of the conspiratorial agreement which, of course, is the bedrock requirement in a charge of conspiracy.

The following is the history of these proceedings in the courts below.

a) The appellant was committed to trial, after a preliminary inquiry, on a conspiracy charge. The committing judge was "satisfied that there [was] sufficient evidence to put to a jury and sufficient evidence upon which a jury properly instructed could convict". In his reasons for committal, the learned judge adopted the submissions of Crown counsel including the submission that there was evidence from which an inference could be drawn that the appellant had joined the common purpose of tendering forged bonds.

b) The appellant petitioned the Supreme Court for an order in the nature of *certiorari* to quash the committal for trial. The ground upon which relief was sought was that the committing judge exceeded his jurisdiction by committing the appellant to trial when there was no evidence of an essential element of the offence with which he was charged, that is, of a conspiratorial agreement.

C'est là l'argument fondamental que la poursuite a opposé aux moyens invoqués par l'accusé appelant lorsqu'il a présenté, en Cour suprême de la Colombie-Britannique, sa demande d'ordonnance de la nature d'un *certiorari* visant à annuler le renvoi au procès. La demande porte notamment:

[TRADUCTION] QUE la preuve de l'existence d'une «entente» est un élément essentiel de l'accusation portée contre LARRY CLIFF SKOGMAN; que la preuve soumise au cours de l'enquête préliminaire n'établit pas l'existence d'une telle «entente» et que, dans ces circonstances, le juge Giles n'avait pas compétence pour renvoyer LARRY CLIFF SKOGMAN à son procès.

Depuis que le juge Bouck a rendu son ordonnance, on a tenu pour acquis, tout au cours du litige, qu'il n'y avait aucune preuve de l'existence d'une entente qui constitue, évidemment, l'exigence fondamentale dans le cas d'une accusation de complot.

Voici l'historique des procédures devant les cours d'instance inférieure:

a) À l'issue d'une enquête préliminaire, l'appelant a été renvoyé à son procès relativement à une accusation de complot. Le juge qui a présidé à l'enquête s'est dit [TRADUCTION] «convaincu qu'il y a[vait] suffisamment d'éléments de preuve à soumettre à un jury et suffisamment d'éléments de preuve qui permettraient à un jury ayant reçu des directives appropriées de rendre un verdict de culpabilité». Le savant juge a adopté, comme motifs du renvoi au procès, l'exposé du substitut du procureur général, y compris l'argument selon lequel on pouvait déduire de la preuve que l'appelant s'était joint à l'entreprise commune visant à négocier des coupons contrefaits.

b) L'appelant a présenté à la Cour suprême une demande d'ordonnance de la nature d'un *certiorari* visant à annuler le renvoi au procès. Le motif du redressement demandé était que le juge qui a présidé à l'enquête a outrepassé sa compétence en renvoyant l'accusé à son procès alors qu'il n'y avait aucune preuve de l'existence d'une entente qui aurait constitué un complot, laquelle entente est un élément essentiel de l'infraction imputée.

c) Bouck J., who heard the petition to quash, held that:

i) there was no evidence that the accused was a member of the conspiracy alleged;

ii) a committal order can be quashed by *certiorari* when there is a loss of jurisdiction during the preliminary inquiry;

iii) in this case the committing judge lost his jurisdiction when he committed the accused for trial when there was no evidence of his membership in the conspiracy alleged.

Bouck J. accordingly quashed the committal order.

d) The Crown appealed to the British Columbia Court of Appeal from the order quashing the committal for trial. The Crown formally abandoned, before the Court of Appeal, the ground of appeal as to whether there was sufficient evidence before the committing judge to support a committal for trial. The appeal was then argued on the basis that Bouck J. was correct in finding that there was no evidence that the appellant had joined the conspiracy.

e) The British Columbia Court of Appeal allowed the Crown's appeal and restored the committal for trial. One cannot be certain whether the majority opinion proceeded on the basis that, in fact and in law, there was 'no evidence' or 'some evidence' in relation to the essential elements of the charge. On the one hand, it is stated by the majority:

If, as is assumed for the purposes of this appeal, there was no evidence to support the Provincial Court Judge's opinion that the evidence was sufficient to put the respondent on trial, the Judge made an error in the exercise of a jurisdiction which he did possess.

On the other hand, this statement is followed by the statement:

I think the Chambers Judge erred in substituting his opinion of the sufficiency of the evidence for the opinion of the Provincial Court Judge on that question.

c) Le juge Bouck, qui a entendu la demande d'annulation, a conclu:

i) qu'il n'y avait aucune preuve de la participation de l'accusé au complot reproché;

ii) qu'une ordonnance de renvoi au procès peut être annulée par voie de *certiorari* lorsqu'il y a perte de compétence au cours de l'enquête préliminaire;

iii) qu'en l'espèce le juge qui a présidé à l'enquête a perdu compétence lorsqu'il a renvoyé l'accusé à son procès alors qu'il n'y avait aucune preuve de sa participation au complot reproché.

En conséquence, le juge Bouck a annulé le renvoi au procès.

d) La poursuite a interjeté appel devant la Cour d'appel de la Colombie-Britannique contre l'ordonnance annulant le renvoi au procès. En Cour d'appel, la poursuite a formellement renoncé au moyen d'appel portant sur la question de savoir si le juge qui a présidé à l'enquête disposait d'une preuve suffisante pour justifier un renvoi au procès. On a donc tenu pour acquis en appel que c'est avec raison que le juge Bouck a conclu qu'il n'y avait pas de preuve que l'appelant s'est joint au complot.

e) La Cour d'appel de la Colombie-Britannique a accueilli l'appel de la poursuite et rétabli le renvoi au procès. Il n'est pas certain que la cour à la majorité ait tenu pour acquis qu'en fait et en droit il y avait «absence de preuve» ou «certains éléments de preuve» concernant les éléments essentiels de l'accusation. D'une part, la cour à la majorité affirme:

[TRADUCTION] Si, comme on le suppose aux fins du présent appel, il n'y avait aucun élément de preuve à l'appui de l'opinion du juge de la Cour provinciale que la preuve était suffisante pour renvoyer l'intimé à son procès, le juge a commis une erreur dans l'exercice d'une compétence qu'il possédait.

D'autre part, on affirme ensuite dans la phrase suivante:

[TRADUCTION] Je crois que le juge en chambre a commis une erreur en substituant sa propre opinion sur le caractère suffisant de la preuve à celle du juge de la Cour provinciale sur la même question.

The concurring opinion by Lambert J.A. on this point includes the statement:

> This is not a case where there is no evidence at all in the sense of an entire absence of proper material as the basis for the foundation of a judicial opinion that the evidence was sufficient to put the accused on trial. Nor is this a case where there is no evidence to provide a platform for the committing Judge's exercise of his powers, or for his assumption of jurisdiction in accordance with the jurisdictional prescriptions of s. 475 of the *Criminal Code*.

In restoring the committal order, the British Columbia Court of Appeal held that the committing judge did not lose his jurisdiction in committing the appellant and that *certiorari* does not lie in the circumstances. Lambert J.A. concurring, did not wish to adopt what the learned justice took to be *obiter* in the decision of this Court in *Martin v. The Queen*, [1978] 2 S.C.R. 511, that a committal order, unsupported by any evidence on each essential issue of the charge, can be quashed by writ of *certiorari*. The learned justice preferred to follow *R. v. Kopan* (1975), 3 B.C.L.R. 102, in allowing the appeal.

f) Argument before this Court, by all counsel, proceeded on the basis that Bouck J. was correct in finding that there was no evidence of an essential element of the offence. In its factum, at p. 4, para. 5, the Crown stated that it was proceeding "on the basis that the issue before this Court is whether or not *certiorari* should be granted in such circumstances."

consent than no avail

issue:

This calls into question the reach of the writ of *certiorari* as a tool for the review of committals for trial at preliminary hearings. In its earliest application by the courts, the prerogative or royal writs, including *certiorari*, were a mechanism whereby the Royal Courts of Justice maintained a surveillance over the conduct of the inferior tribunals of the land. Gradually, as the organization of justice and the judiciary developed, these review mechanisms were broadened in their reach and

Le juge Lambert, dans ses motifs concourants, affirme notamment à ce sujet:

> [TRADUCTION] Nous ne sommes pas ici en présence d'un cas où il n'y a absolument aucune preuve au sens d'une absence totale d'éléments permettant de fonder une opinion judiciaire que la preuve était suffisante pour renvoyer l'accusé à son procès. Il ne s'agit pas non plus d'un cas où il n'y a aucune preuve justifiant que le juge qui préside à l'enquête exerce ses pouvoirs ou qu'il décide qu'il a compétence conformément aux dispositions de l'art. 475 du *Code criminel*, en matière de compétence.

En rétablissant le renvoi au procès, la Cour d'appel de la Colombie-Britannique a conclu que le juge qui a présidé à l'enquête n'a pas perdu compétence en renvoyant l'appelant à son procès et que, dans ces circonstances, il n'y a pas lieu à *certiorari*. Le juge Lambert, qui est arrivé à la même conclusion, n'a pas voulu adopter l'opinion, incidente d'après lui, exprimée par cette Cour dans l'arrêt *Martin c. La Reine*, [1978] 2 R.C.S. 511, portant qu'un renvoi au procès qui n'est pas appuyé par des éléments de preuve concernant chaque élément essentiel de l'accusation, peut être annulé par voie de *certiorari*. Le savant juge, tout en accueillant l'appel, a préféré suivre l'arrêt *R. v. Kopan* (1975), 3 B.C.L.R. 102.

f) En cette Cour, les avocats des deux parties ont tenu pour acquis que le juge Bouck a eu raison de conclure qu'il y avait absence de preuve quant à un élément essentiel de l'infraction. Dans son mémoire, à la p. 4, par. 5, la poursuite affirme qu'elle tient pour acquis [TRADUCTION] «que la question en cette Cour est de savoir s'il y a lieu à *certiorari* en pareil cas».

Cela exige qu'on examine la portée du bref de *certiorari* comme moyen de révision d'un renvoi au procès ordonné lors d'une enquête préliminaire. À l'origine, les brefs de prérogative ou les brefs royaux, y compris le *certiorari*, étaient des mécanismes grâce auxquels les Cours royale de Justice pouvaient exercer un contrôle sur la conduite des tribunaux inférieurs du royaume. Peu à peu, au fur et à mesure que se poursuivait l'organisation des cours et du système de justice, on a élargi la portée

refined in the degree of control until, by 1878, *certiorari* was available not only for the review of jurisdictional transgressions by statutory tribunals, but also for errors committed by those tribunals in the course of the discharge of their assigned function, where such errors were apparent on the face of the record. See Williams J. in *Hodgkinson v. Fernie* (1857), 3 C.B. (N.S.) 189. During this same epoch, there developed a parallel procedure by way of application to a court of general jurisdiction for the judicial control of non-statutory tribunals and emanations of the state which did not have the attributes of an inferior court. Limitations, as will be seen in *Re King and Duveen*, [1913] 2 K.B. 32, *per* Channell L. J., were gradually introduced whereby *certiorari* review was precluded in the case of a tribunal determining a question of law submitted to it for determination as the primary issue by the parties to the proceeding. Other refinements in this branch of the law have come and gone; for example, the concept of collateral issues whereby the doctrine of *certiorari* review was limited to calling into question in the court of general jurisdiction decisions made by the lesser tribunals which were a prelude to the exercise of the primary or principal jurisdiction of the body whose conduct was under review. We are no longer concerned with such matters: *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382; *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation.*, [1979] 2 S.C.R. 227.

In the result, *certiorari*, or the newer term of judicial review, runs largely to jurisdictional review or surveillance by a superior court of statutory tribunals, the term 'jurisdiction' being given its narrow or technical sense. In the absence of a privative clause, the Court may also review for error of law on the face of the record. However, even then, under the most recent authorities, the error must assume a jurisdictional dimension.

de ces mécanismes de révision, les perfectionnant sur le plan du degré de contrôle, de sorte que dès 1878 il était possible de recourir au *certiorari* non seulement lorsqu'un tribunal établi en vertu d'une loi refusait d'exercer ou outrepassait sa compétence, mais aussi dans le cas d'erreurs commises par un tel tribunal dans l'exercice des fonctions qui lui étaient conférées, lorsque ces erreurs étaient manifestes à la lecture du dossier. Voir la décision du juge Williams, *Hodgkinson v. Fernie* (1857), 3 C.B. (N.S.) 189. Pendant cette même période s'est développée une procédure parallèle qui consistait à demander à une cour de juridiction générale le contrôle judiciaire des tribunaux non établis en vertu d'une loi et des organismes créés par l'État qui ne possédaient pas les caractéristiques d'une cour inférieure. Il ressort des motifs du lord juge Channell dans la décision *Re King and Duveen*, [1913] 2 K.B. 32, qu'on a peu à peu introduit des restrictions ayant pour effet d'exclure la révision par voie de *certiorari* lorsqu'un tribunal était appelé à trancher une question de droit qui constituait le principal point en litige entre les parties. D'autres changements dans ce domaine du droit se sont révélés peu durables; c'est le cas notamment du concept des questions préliminaires, suivant lequel le recours par voie de *certiorari* ne pouvait être exercé que pour contester devant la cour de juridiction générale les décisions rendues par les tribunaux inférieurs sur des questions préalables à l'exercice de la compétence première ou principale de l'organisme dont la conduite faisait l'objet d'un examen. Mais cette distinction n'est plus pertinente de nos jours: voir les arrêts *Union internationale des employés des services, local no. 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227.

En définitive, le *certiorari*, ou ce qu'on appelle maintenant l'examen judiciaire, permet dans une large mesure d'obtenir qu'une cour supérieure contrôle la façon dont les tribunaux établis en vertu d'une loi exercent leur compétence; dans ce contexte, il s'agit de «compétence» au sens restreint ou strict. En l'absence d'une clause privative, la cour peut également procéder à la révision lorsqu'il y a erreur de droit manifeste à la lecture du dossier.

These authorities and the development and Darwin-like elimination of subdoctrines are reviewed in *Douglas Aircraft Company of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245, particularly at pp. 265-78. It is clear, however, that *certiorari* remains available to the courts for the review of the functioning of the preliminary hearing tribunal only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction or has acted in breach of the principles of natural justice which, by the authorities, is taken to be an excess of jurisdiction (see *Forsythe v. The Queen*, [1980] 2 S.C.R. 268). It need only be added by way of emphasis that such *certiorari* review does not authorize a superior court to reach inside the functioning of the statutory tribunal for the purpose of challenging a decision reached by that tribunal within its assigned jurisdiction on the ground that the tribunal committed an error of law in reaching that decision, or reached a conclusion different from that which the reviewing tribunal might have reached.

Toutefois, la jurisprudence la plus récente établit que, même dans ce cas, il doit s'agir d'une erreur qui touche à la compétence. Cette jurisprudence ainsi que le développement et l'élimination à la Darwin des sous-doctrines font l'objet d'un examen dans l'arrêt *Douglas Aircraft Company of Canada Ltd. c. McConnell*, [1980] 1 R.C.S. 245, particulièrement aux pp. 265 à 278. Il est toutefois clair que les cours peuvent encore, par voie de *certiorari*, contrôler le fonctionnement du tribunal devant lequel se déroule l'enquête préliminaire, mais seulement lorsqu'on reproche à ce tribunal d'avoir outrepassé la compétence qui lui a été attribuée par la loi ou d'avoir violé les principes de justice naturelle, ce qui, d'après la jurisprudence, équivaut à un abus de compétence (voir l'arrêt *Forsythe c. La Reine*, [1980] 2 R.C.S. 268). Soulignons en outre qu'un tel contrôle par voie de *certiorari* ne permet pas à la cour supérieure d'examiner le fonctionnement du tribunal établi en vertu d'une loi afin d'attaquer une décision rendue par ce tribunal dans l'exercice de la compétence qui lui est conférée, pour le motif qu'il a commis une erreur de droit en rendant cette décision ou qu'il est arrivé à une conclusion différente de celle qu'elle aurait pu tirer elle-même.

This brings me to the question of the reviewability by the writ of *certiorari* of the conduct of a judge sitting in preliminary hearing under s. 475 of the *Criminal Code*. Section 475 states:

> **475.** (1) When all the evidence has been taken by the justice he shall,
>
> (*a*) if in his opinion the evidence is sufficient to put the accused on trial,
>
> (i) commit the accused for trial, or
>
> (ii) order the accused, where it is a corporation, to stand trial in the court having criminal jurisdiction; or
>
> (*b*) discharge the accused, if in his opinion upon the whole of the evidence no sufficient case is made out to put the accused on trial.

At minimum, this section calls upon the presiding justice to form an opinion as to whether evidence is "sufficient" or whether "no sufficient case is made out" so as to justify a conclusion by the presiding

Voilà qui m'amène à la question de la possibilité de réviser, par voie de *certiorari*, la conduite d'un juge qui préside à une enquête préliminaire tenue en vertu de l'art. 475 du *Code criminel*. L'article 475 est ainsi rédigé:

> **475.** (1) Lorsque le juge de paix a recueilli tous les témoignages, il doit,
>
> *a*) si, à son avis, la preuve est suffisante pour faire passer la personne inculpée en jugement,
>
> (i) renvoyer la personne inculpée pour qu'elle subisse son procès, ou
>
> (ii) si la personne inculpée est une corporation, ordonner qu'elle subisse son procès devant la cour ayant juridiction criminelle; ou
>
> *b*) libérer la personne inculpée, s'il estime, d'après toute la preuve, qu'on n'a établi aucun motif suffisant pour la faire passer en jugement.

Tout au moins, cet article oblige le juge de paix qui préside à déterminer si la preuve est «suffisante» ou si «on a établi aucun motif suffisant» de manière à justifier sa décision soit de «faire passer

justice "to put the accused on trial" or not to commit the accused to trial. There is no rule within the statutory framework adopted by Parliament for arbitrary action by the tribunal. The question therefore arises as to whether or not the reviewing judge can commit an accused for trial where there is no evidence on an essential element on a charge with which the accused is faced. In applying the test of the applicability of *certiorari* in such circumstances, we are not concerned with the older test of the presence or absence of an error of law on the face of the record, but rather we are concerned with ascertaining whether the preliminary hearing tribunal has discharged its assigned jurisdiction under s. 475. This Court, speaking through Judson J. in *Patterson v. The Queen*, [1970] S.C.R. 409, stated at p. 411 with reference to the review of preliminary hearing:

> . . . there is only one ground for action by the reviewing Court and that is lack of jurisdiction.

This is the starting point, the theorem of review applicable in determining the availability of the prerogative writ of *certiorari* for the purpose of calling into question a committal for trial under s. 475. Spence J., in dissent, agreed, however, with regard to the availability of *certiorari* when he said, at p. 419:

> I am, however, of the view that *certiorari* does lie to quash a magistrate's committal for trial when he has exceeded his jurisdiction or when he has refused to exercise his jurisdiction.

Patterson emerged from this court after an extensive review of the subject in the provincial Courts of appeal; *vide R. v. Botting*, [1966] 3 C.C.C. 373 (Ont. C.A.) and *R. v. Norgren* (1975), 27 C.C.C. (2d) 488 (B.C. C.A.) All of these authorities draw their principal support from the judgment of Lord Sumner in *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128. While that judgment of the Privy Council deals with the review of a conviction under a provincial statute, it has long been regarded as applicable in determining the review jurisdiction in the superior court of the proceedings at preliminary hearing: *Re Martin, Simard and Desjardins and The Queen* (1977), 20 O.R. (2d) 455, at p.

[la personne inculpée] en jugement», soit de ne pas renvoyer la personne inculpée à son procès. Il n'existe dans le cadre législatif adopté par le Parlement aucune règle autorisant le tribunal à procéder de façon arbitraire. Il se pose donc la question de savoir si le juge qui effectue la révision peut renvoyer un accusé à son procès lorsqu'il n'y a pas de preuve concernant un élément essentiel de l'accusation portée contre ce dernier. En déterminant s'il y a lieu à *certiorari* dans ces circonstances, nous n'avons pas à appliquer le critère plus ancien de la présence ou de l'absence d'une erreur de droit manifeste à la lecture du dossier; il faut plutôt déterminer si le tribunal devant lequel a été tenue l'enquête préliminaire a exercé la compétence que lui confère l'art. 475. Dans l'arrêt *Patterson c. La Reine*, [1970] R.C.S. 409, à la p. 411, le juge Judson, s'exprimant au nom de cette Cour, affirme au sujet de la révision d'une enquête préliminaire:

> . . . il n'y a qu'un seul motif qui permette la révision d'un renvoi à procès, c'est le défaut de compétence.

C'est donc là qu'il faut commencer si l'on veut déterminer la possibilité de contester par voie de *certiorari* un renvoi au procès ordonné en vertu de l'art. 475. Le juge Spence, dissident, est toutefois d'accord quant à la possibilité de recours au *certiorari* lorsqu'il affirme, à la p. 419:

> Je suis cependant d'avis qu'il y a lieu à *certiorari* en vue de casser le renvoi du prévenu à son procès quand le magistrat a outrepassé sa compétence ou refusé de l'exercer.

Avant que cette Cour ne rende l'arrêt *Patterson*, la question avait fait l'objet d'un examen approfondi des cours d'appel provinciales; voir les arrêts *R. v. Botting*, [1966] 3 C.C.C. 373 (C.A. Ont.), et *R. v. Norgren* (1975), 27 C.C.C. (2d) 488 (C.A. C.-B.) Chacun de ces arrêts est fondé principalement sur les motifs de lord Sumner dans l'arrêt *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128. Bien que cet arrêt du Conseil privé porte sur la révision d'une déclaration de culpabilité prononcée en vertu d'une loi provinciale, on considère depuis longtemps qu'il est applicable pour déterminer la compétence qu'ont les cours supérieures pour exercer un contrôle sur les procédures au stade de l'enquête

486. Lord Sumner, at p. 144 in the Appeal Cases, said in part:

On certiorari, so far as the presence or absence of evidence becomes material, the question can at most be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court: . . .

Some complication has, on occasion in the past, resulted from the presence in the *Nat Bell* judgment, *supra*, of observations which were directed at the position of the reviewing tribunal where the action below consisted not of a preliminary hearing committal or discharge but rather a conviction in a quasi-criminal process conducted in a tribunal of restricted jurisdiction, which was the actual case before the Privy Council in *Nat Bell*. The Ontario Court of Appeal in *Martin*, *supra*, in examining a *certiorari* review of a preliminary hearing, stated at pp. 486-87:

. . . we conclude that the learned Provincial Court Judge here acted within his jurisdiction, unless it can be said that he committed these respondents on the counts specified without any evidence at all, in the sense of an entire absence of proper material as a basis for the formation of a judicial opinion that the evidence was sufficient to put the accused on trial. That is quite a different question from the question "whether in the opinion of the reviewing tribunal there was evidence upon which a properly instructed jury acting judicially could convict". It remained, therefore, to examine the excerpts of evidence, as placed before this Court from the lengthy transcript taken at the preliminary hearing, in order to determine whether there was any evidence at all on which the committing tribunal was able to base its opinion to commit, as required by the terms of the *Code* . . .

The Court of Appeal of Ontario then concluded:

. . . in the case of each of the three respondents there is sufficient evidence relating to the charges and the counts in issue to call upon the learned Provincial Judge to form an opinion as to whether there was sufficient evidence to commit the accused for trial, pursuant to s.

préliminaire: *Re Martin, Simard and Desjardins and The Queen* (1977), 20 O.R. (2d) 455, à la p. 486. Lord Sumner, à la p. 144 de l'arrêt *Nat Bell*, affirme notamment:

[TRADUCTION] Dans le cas du *certiorari*, pour autant que la présence ou l'absence d'éléments de preuve importe, on ne peut que se demander si un élément de preuve quelconque a été présenté au sujet du point essentiel mentionné. Son poids est laissé entièrement à l'appréciation du tribunal inférieur: . . .

L'arrêt *Nat Bell*, précité, a parfois causé certaines difficultés du fait qu'il contient des observations relatives à la position du tribunal qui effectue la révision lorsqu'il doit se prononcer non pas sur un renvoi au procès ou une libération prononcée à l'issue d'une enquête préliminaire, mais sur une déclaration de culpabilité intervenue dans le cadre d'une procédure quasi pénale devant un tribunal de compétence restreinte, laquelle situation est celle dont le Conseil privé a été saisi dans l'affaire *Nat Bell*. Dans l'arrêt *Martin*, précité, la Cour d'appel de l'Ontario, en examinant une révision par voie de *certiorari* d'une enquête préliminaire, affirme, aux pp. 486 et 487:

[TRADUCTION] . . . nous concluons que le savant juge de la Cour provinciale n'a pas outrepassé sa compétence en l'espèce, à moins qu'on ne puisse dire que sa décision de renvoyer ces intimés pour subir leur procès sur les chefs d'accusation indiqués ne repose sur aucun élément de preuve, au sens d'une absence totale d'éléments qui auraient pu servir de fondement à l'opinion judiciaire que la preuve est suffisante pour renvoyer les accusés à leur procès. Voilà qui est tout à fait différent de la question «de savoir si, de l'avis du tribunal qui effectue la révision, il y avait suffisamment d'éléments de preuve qui permettraient à un jury ayant reçu des directives appropriées de prononcer un verdict de culpabilité». Il a donc fallu procéder à l'examen des extraits tirés de la transcription volumineuse de l'enquête préliminaire, qu'on a produits en cette Cour, afin de déterminer s'il y avait, comme l'exige le *Code*, suffisamment d'éléments de preuve pour justifier le renvoi au procès . . .

Puis, la Cour d'appel de l'Ontario arrive à la conclusion suivante:

[TRADUCTION] . . . la preuve relative aux chefs d'accusation en cause était suffisante dans le cas de chacun des trois intimés pour que le savant juge de la Cour provinciale puisse se faire une opinion sur la question de savoir s'il existait des éléments de preuve suffisants pour ren-

475 .... Having properly directed his mind to the evidence and to the question of whether there was "sufficient evidence" to commit, his decision is not subject to review.

(Emphasis added.)

An appeal was dismissed by this Court, [1978] 2 S.C.R. 511, the Chief Justice concluding as follows, at p. 514:

... the review on sufficiency must be a review to determine whether the committal was made arbitrarily or, at the most, whether there was some evidence upon which an opinion could be formed that an accused should go to trial.

More recently, this Court engaged the problem of review of the preliminary hearing process in *Forsythe v. The Queen*, *supra*. Again it was Chief Justice Laskin, speaking for the Court, and in reference to *Patterson*, *supra*, who stated at pp. 271-72:

In speaking of lack of jurisdiction, this Court was not referring to lack of initial jurisdiction of a judge or a magistrate to enter upon a preliminary inquiry. This is hardly a likelihood. The concern rather was with the loss of this initial jurisdiction and, in my opinion, the situations in which there can be a loss of jurisdiction in the course of a preliminary inquiry are few indeed. However, jurisdiction will be lost by a magistrate who fails to observe a mandatory provision of the *Criminal Code*: see *Doyle v. The Queen*, [1977] 1 S.C.R. 597. Canadian law recognizes that a denial of natural justice goes to jurisdiction: ...

A helpful comparison was drawn by Ritchie J. in *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080, between the standard applied by the tribunal under s. 475 (s. 475(1)) and the function performed by a judge sitting at trial with jury:

I agree that the duty imposed upon a 'justice' under s. 475(1) is the same as that which governs a trial judge sitting with a jury in deciding whether the evidence is 'sufficient' to justify him in withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.

The Ontario Court of Appeal in *Stillo v. R.* (1981), 22 C.R. (3d) 224, was faced with the issue

voyer les accusés à leur procès, conformément à l'art. 475 ... Puisqu'il a bien analysé la preuve et la question de savoir si la «preuve [était] suffisante» à cet égard, sa décision n'est pas susceptible de révision.

(C'est moi qui souligne.)

Le pourvoi formé devant cette Cour a été rejeté: [1978] 2 R.C.S. 511. À la page 514, le Juge en chef conclut ce qui suit:

... l'examen de la suffisance de la preuve doit viser à déterminer si le renvoi a été ordonné arbitrairement ou, tout au plus, s'il existait quelque élément de preuve qui pouvait permettre de renvoyer l'accusé à son procès.

Plus récemment, dans l'arrêt *Forsythe c. La Reine*, précité, cette Cour s'est penchée sur le problème de la révision du processus d'enquête préliminaire. Là encore, c'est le juge en chef Laskin qui a rédigé les motifs de la Cour. Aux pages 271 et 272, il affirme au sujet de l'arrêt *Patterson*, précité:

En parlant du défaut de compétence, cette Cour ne faisait pas référence au défaut de compétence initial du juge ou du magistrat de commencer une enquête préliminaire. C'est un cas peu probable. Il s'agissait plutôt de la perte de cette compétence initiale et, à mon avis, il n'y a que fort peu de cas où il peut y avoir perte de compétence pendant une enquête préliminaire. Cependant, un magistrat perdra compétence s'il omet de se conformer à une disposition impérative du *Code criminel*: voir l'arrêt *Doyle c. La Reine*, [1977] 1 R.C.S. 597. Le droit canadien reconnaît qu'un déni de justice naturelle porte atteinte à la compétence: ...

Dans l'arrêt *États-Unis d'Amérique c. Shephard*, [1977] 2 R.C.S. 1067, à la p. 1080, le juge Ritchie fait une comparaison utile entre la norme appliquée par le tribunal en vertu de l'art. 475 (par. 475(1)) et la fonction remplie par un juge du procès qui siège avec un jury:

Je conviens que le devoir imposé à un «juge de paix» aux termes du par. (1) de l'art. 475 est le même que celui du juge du procès siégeant avec un jury lorsqu'il doit décider si la preuve est «suffisante» pour dessaisir le jury selon qu'il existe ou non des éléments de preuve au vu desquels un jury équitable, ayant reçu des directives appropriées, pourrait conclure à la culpabilité.

La Cour d'appel de l'Ontario, dans l'arrêt *Stillo v. R.* (1981), 22 C.R. (3d) 224, était appelée à

of reviewability of a committal where there was no evidence capable of corroborating a minor's testimony in a charge of indecent assault. The reviewing court, the High Court of Justice of Ontario, had quashed the committal because of the jurisdictional error committed by the tribunal at the preliminary hearing in committing the accused. Morden J.A., speaking for the Court of Appeal of Ontario, stated, at p. 227:

> In our view, there was no evidence in this case satisfying these requirements. There was, in law, no evidence at all upon which a finding of guilt could be made. Mr. Watt conceded, accurately and fairly, in our view, that if failure to meet a mandatory corroboration requirement has to result in a case being taken from a jury, which it does, then he could not reasonably argue that a different result should occur with respect to a preliminary inquiry, unless it could be said that the error fell short of being of a jurisdictional nature. In our view, it is established that complete absence of evidence does amount to jurisdictional error.

The courts of this country have, since the judgment in *Martin*, *supra*, generally adopted the rule that a committal of an accused at a preliminary, in the absence of evidence on an essential ingredient in a charge, is a reviewable jurisdictional error. See: *Re Guttman and The Queen* (1981), 64 C.C.C. (2d) 342 (Que. S.C.); *Procureur général du Québec v. Poirier*, [1981] C.A. 228, *sub nom. Re Poirier and The Queen* (1981), 62 C.C.C. (2d) 452; *Re Leroux and The Queen* (1978), 43 C.C.C. (2d) 398 (Que. S.C.); *Re Robar and The Queen* (1978), 42 C.C.C. (2d) 133 (N.S.C.A.), leave to appeal to the Supreme Court of Canada refused, October 3, 1978, [1978] 2 S.C.R. x; *Re Mackie and The Queen* (1978), 43 C.C.C. (2d) 269 (Ont. H.C.); *Stillo v. R.*, *supra*: "No evidence" on an essential element of the charge against the accused cannot amount to "sufficient evidence" under s. 475. In my view, this is the state of the law in this country on this issue.

statuer sur la question de la possibilité de réviser un renvoi au procès ordonné en l'absence d'éléments de preuve susceptibles de corroborer le témoignage d'un mineur relativement à une accusation d'attentat à la pudeur. La cour qui avait effectué la révision, en l'occurrence la Haute Cour de Justice de l'Ontario, avait annulé le renvoi au procès parce le juge qui avait présidé à l'enquête préliminaire avait commis une erreur de compétence en renvoyant l'accusé à son procès. Le juge Morden, s'exprimant au nom de la Cour d'appel de l'Ontario, affirme, à la p. 227:

> [TRADUCTION] À notre avis, la preuve en l'espèce ne satisfait pas à ces exigences. Du point de vue juridique, il n'y avait aucun élément de preuve justifiant une déclaration de culpabilité. M[e] Watt a reconnu, à juste titre selon nous, que, si le défaut de satisfaire à une exigence de corroboration doit entraîner le dessaisissement du jury, ce qui est le cas, il serait à ce moment-là déraisonnable de prétendre qu'il doit en être autrement dans le cas d'une enquête préliminaire, à moins de pouvoir dire que l'erreur n'est pas vraiment une erreur de compétence. À notre avis, il ne fait pas de doute que l'absence totale d'éléments de preuve équivaut à une erreur de compétence.

Depuis l'arrêt *Martin*, précité, les tribunaux canadiens ont généralement adopté la règle selon laquelle le renvoi d'un accusé à son procès à l'issue d'une enquête préliminaire constitue, en l'absence d'éléments de preuve concernant un élément essentiel de l'accusation, une erreur de compétence susceptible de révision. Voir: *Re Guttman and The Queen* (1981), 64 C.C.C. (2d) 342 (C.S. Qué.); *Procureur général du Québec c. Poirier*, [1981] C.A. 228, *sub nom. Re Poirier and The Queen* (1981), 62 C.C.C. (2d) 452; *Re Leroux and The Queen* (1978), 43 C.C.C. (2d) 398 (C.S. Qué.); *Re Robar and The Queen* (1978), 42 C.C.C. (2d) 133 (C.A. N.-É.), autorisation de pourvoi devant la Cour suprême du Canada refusée le 3 octobre 1978, [1978] 2 R.C.S. x; *Re Mackie and The Queen* (1978), 43 C.C.C. (2d) 269 (H.C. Ont.); *Stillo v. R.*, précité. «L'absence d'éléments de preuve» concernant un élément essentiel de l'accusation portée contre l'accusé ne peut équivaloir à une «preuve suffisante» au sens de l'art. 475. À mon avis, c'est là l'état du droit au Canada sur cette question.

I return, therefore, to the essential characteristic of this proceeding, accepting for the moment the concession by the prosecutorial authority that there is no evidence whatever of the involvement of the accused in the allegedly conspiratorial agreement which underlies and sustains, if it be sustainable, the charge before the preliminary hearing tribunal. In my view, with all respect to those including the courts below who may hold the view to the contrary, a committal cannot survive in these circumstances. The purpose of a preliminary hearing is to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process. In addition, in the course of its development in this country, the preliminary hearing has become a forum where the accused is afforded an opportunity to discover and to appreciate the case to be made against him at trial where the requisite evidence is found to be present. The status of the preliminary inquiry in the United Kingdom is discussed by Patrick Devlin in *The Criminal Prosecution in England* (1960), at p. 10:

> The preliminary inquiry before the magistrates is now a purely legal proceeding; it was designed as an instrument of the prosecution for finding the culprit and preparing the evidence against him; it has become a shield for the defence, allowing the defendant to ascertain precisely what the material is that is to be used against him and relieving him from the expense and odium of a trial if in the judgment of impartial persons there is not enough evidence to justify it.

The development of the institution of the preliminary hearing has taken a slightly different course in our country:

> The Canadian preliminary inquiry stems from an inquisitorial system of criminal investigation and prosecution in England, in which justices of the peace originally performed all of the investigative functions now performed by the police. The role of the justice of the peace gradually changed and eventually began to take on judicial characteristics. At the same time the inquiry over which the justice of the peace presided also changed, becoming mainly a judicial examination of the justification and need for pre-trial detention of the

Je reviens donc à la caractéristique essentielle de la présente espèce, acceptant pour l'instant la reconnaissance par la poursuite de l'absence totale d'éléments de preuve quant à la participation de l'accusé à la prétendue entente qui auraient constitué le fondement, si fondement il y a, de l'accusation de complot dont le tribunal a été saisi à l'enquête préliminaire. Avec égards pour ceux, y compris les juges des cours d'instance inférieure, qui peuvent soutenir le point de vue contraire, j'estime que, dans ces circonstances, on ne saurait maintenir le renvoi au procès. L'objet d'une enquête préliminaire est d'empêcher l'accusé de subir un procès public inutile, voire abusif, lorsque la poursuite ne possède aucun élément de preuve justifiant la continuation de l'instance. De plus, l'enquête préliminaire a évolué au Canada de manière à fournir à l'accusé, lorsqu'on juge que les éléments de preuve nécessaires existent, la possibilité de découvrir et d'apprécier la nature de la preuve qui sera déposée contre lui à son procès. La situation actuelle de l'enquête préliminaire au Royaume-Uni est traitée par Patrick Devlin dans *The Criminal Prosecution in England* (1960), à la p. 10:

> [TRADUCTION] L'enquête préliminaire devant les magistrats est devenue une procédure de caractère purement juridique. Conçue à l'origine pour permettre à la poursuite de découvrir l'auteur d'un crime et de recueillir des preuves de sa culpabilité, l'enquête préliminaire est devenue un bouclier pour la défense et elle permet maintenant au défendeur de déterminer avec exactitude les preuves dont on se servira contre lui et d'éviter les dépenses et l'odieux d'un procès, si, de l'avis de personnes impartiales, la preuve n'est pas suffisante pour en justifier la tenue.

Au Canada, le processus d'enquête préliminaire a évolué de façon légèrement différente:

> Notre enquête préliminaire provient d'un système inquisitoire d'investigation du crime, où les juges de paix assumaient toutes les fonctions d'enquête aujourd'hui conférées à la police; le rôle du magistrat enquêteur a été peu à peu modifié pour devenir judiciaire plutôt que policier et son enquête est devenue un examen sommaire des motifs justifiant la détention de l'accusé et la tenue d'un procès. La poursuite devait donc à ce stade convaincre le juge de paix qu'elle détenait suffisamment de preuve contre un prévenu pour établir une forte pré-

accused as well as an examination of the need for a trial itself. In this proceeding the prosecution was required to present its case, or at least to present sufficient evidence to establish a *prima facie* case. [Footnotes omitted.]

(Law Reform Commission of Canada Study Report: *Discovery in Criminal Cases* (1974), at p. 8.)

It is interesting to go back to a description applied by G. Arthur Martin, Q.C., to the preliminary hearing in Canada:

> The preliminary hearing has two aspects. Its primary purpose, of course, is to ascertain whether or not there is sufficient evidence to warrant the accused being placed upon his trial. In determining this, a magistrate, who is conducting a preliminary hearing is not determining whether or not the accused is guilty or not guilty. His function is to ascertain whether or not there is sufficient evidence to induce the belief in the mind of a cautious man that the accused is probably guilty. Therefore, considerations of reasonable doubt have no application at this stage of the proceedings.
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> . . .
>
> From the point of view of defence counsel the preliminary hearing has another aspect. It affords counsel an opportunity of ascertaining the nature and the strength of the case against his client and it may be likened in that respect to an Examination for Discovery.

(G. Arthur Martin, Q.C.: "Preliminary Hearings", Special Lectures of the Law Society of Upper Canada, 1955, p. 1.)

In the course of a preliminary hearing, evidence may be adduced through witnesses, exhibits, or admissions. The purpose of adducing evidence is to enable the judge to exercise his jurisdiction by making determinations of fact, applying the law to those facts, and finally, to exercise his discretion to commit or discharge the accused. Where the record established in the preliminary hearing does not include evidence relating to each essential element of the charge brought against the accused, a committal of the accused to stand trial can be brought forward by way of a writ of *certiorari* to a superior court and can be quashed. I return then to explore the precise effect on these proceedings of the Crown's concession made here and in the Court of Appeal.

somption de culpabilité, et être ainsi autorisée à procéder plus avant contre lui. La poursuite devait donc dès lors dévoiler sa preuve, ou tout au moins suffisamment de preuve pour établir une cause *prima facie*. [Renvois supprimés.]

(Document de recherche de la Commission de réforme du droit du Canada: *Communication de la preuve en droit pénal* (1974), à la p. 8.)

Il est intéressant de lire la description de l'enquête préliminaire au Canada donnée par G. Arthur Martin, c.r.:

> [TRADUCTION] L'enquête préliminaire comporte deux aspects. Son objet principal, évidemment, est de déterminer s'il existe suffisamment d'éléments de preuve pour justifier le renvoi de l'accusé à son procès. Ce faisant, le magistrat qui préside à l'enquête préliminaire ne se prononce pas sur la culpabilité de l'accusé. Son rôle consiste à déterminer s'il y a des éléments de preuve suffisants pour amener un homme prudent à croire que l'accusé est probablement coupable. Il s'ensuit que la question de l'existence d'un doute raisonnable ne se pose pas à ce stade des procédures.
>
> . . .
>
> Du point de vue de l'avocat de la défense, l'enquête préliminaire revêt un autre aspect. Elle lui fournit l'occasion de déterminer à la fois la nature et le poids des éléments de preuve recueillis contre son client et, en cela, elle peut se comparer à un interrogatoire préalable.

(G. Arthur Martin, c.r.: «Preliminary Hearings», Special Lectures of the Law Society of Upper Canada, 1955, à la p. 1.)

La preuve produite au cours d'une enquête préliminaire peut prendre la forme de témoignages oraux, de pièces ou d'aveux. Cette preuve a pour objet de permettre au juge d'exercer sa compétence en tirant des conclusions de fait, en appliquant les règles de droit à ces faits et, enfin, en exerçant son pouvoir discrétionnaire de renvoyer l'accusé à son procès ou de le libérer. Lorsque le dossier établi au cours de l'enquête préliminaire ne contient pas d'éléments de preuve concernant chaque élément essentiel de l'accusation portée contre l'accusé, le renvoi d'un accusé à son procès peut être soumis par voie de *certiorari* à une cour supérieure qui peut alors l'annuler. Cela m'amène donc à analyser l'incidence précise, sur les présentes procédures, de la reconnaissance faite par la poursuite en cette Cour et en Cour d'appel.

The argument, agreement or undertaking, as the case may be, of a Crown agent as to the consequence to be drawn from testimony taken at trial is not in any way binding upon the Court. Indeed, quite the opposite is true. The Court still must be satisfied that the evidentiary test has been passed or failed, as the case may be, as a matter of law. This includes a burden of proof in some cases and in others the presence or absence, as here, of some evidence to support a committal under s. 475. Neither party, separately or jointly, can alter the record nor convert the appeal into a request for an advisory opinion. It follows that the court is not in any way bound to accept the Crown's view of this evidence nor the Crown submission of law based upon the Crown's view of that evidence. Rather, the Court must independently assess the record to determine whether there was any evidence to support the committal for trial.

In my view, here there was some evidence of the essential element of an agreement. The evidence at the preliminary hearing reveals that the accused came into possession of the bogus bond which had been prepared by others alleged to be the accused's co-conspirators. The evidence further revealed that at an earlier time a person alleged to be a co-conspirator had caused the counterfeit bond to be created and had unsuccessfully attempted to persuade an employee at a branch of a trust company to cash the counterfeit bond. The accused, according to the evidence, later took the bogus bond to the same branch of the trust company where the aforementioned employee worked, and cashed the bond. It should here be noted that the evidence includes a denial by the unindicted co-conspirator and by the employee of the trust company, unsuccessfully importuned as aforesaid, of any knowledge of or relationship with the accused. The evidence further reveals that the accused, in presenting the bond at the trust company, did not approach that employee for the purpose of cashing the bond. From this evidence it is remotely but nonetheless possible, in my view, to distill an agreement between the accused and the creators of the counterfeit bond to convert the bond to cash by presenting it to a trust company or a bank. This evidence approaches the traditional

Tout argument, entente ou promesse, selon le cas, du substitut du procureur général quant aux conclusions à tirer des témoignages recueillis au procès ne lient en aucune façon la Cour. Loin de là, car, en droit, il est encore nécessaire que la Cour soit convaincue qu'on a satisfait au critère en matière de preuve. Cela inclut dans certains cas un fardeau de preuve et, dans d'autres cas comme en l'espèce, la présence ou l'absence d'éléments de preuve justifiant un renvoi au procès en vertu de l'art. 475. Les parties ne peuvent ni séparément ni conjointement modifier le dossier ni transformer l'appel en renvoi. Il s'ensuit que la Cour n'est nullement tenue de retenir l'interprétation donnée à cette preuve par la poursuite ni les points de droit que cette dernière soulève en conséquence. Au contraire, la Cour doit procéder à une appréciation indépendante du dossier afin d'établir s'il y a des éléments de preuve qui justifient le renvoi au procès.

Selon moi, il y a en l'espèce des éléments de preuve concernant l'élément essentiel d'une entente. D'après la preuve soumise au cours de l'enquête préliminaire, l'accusé est entré en possession de la débenture contrefaite préparée par d'autres personnes qui seraient ses coconspirateurs. La preuve révèle aussi qu'un présumé coconspirateur avait antérieurement fait préparer la débenture contrefaite et avait tenté, sans succès, de convaincre une employée d'une succursale d'une compagnie de fiducie de l'encaisser. Toujours selon la preuve, c'est l'accusé qui est allé par la suite encaisser la débenture à cette même succursale où travaillait l'employée susmentionnée. Notons ici que, d'après la preuve, le coconspirateur non inculpé et l'employée de la compagnie de fiducie, à qui on s'est adressé sans succès comme nous l'avons dit, ont affirmé ne pas connaître l'accusé et ne pas avoir eu le moindre rapport avec lui. La preuve révèle en outre que, lorsque l'accusé s'est présenté à la compagnie de fiducie pour encaisser la débenture, ce n'est pas à ladite employée qu'il s'est adressé. À mon avis, il est donc possible, bien que cette possibilité soit très faible, de déduire de cette preuve que l'accusé et les auteurs de la débenture contrefaite s'étaient entendus pour convertir cette débenture en espèces en la présentant à une compagnie de fiducie ou à une banque. Sans

expression "a scintilla of evidence" but falls short of what may be classified as fanciful. Consequently, there can be gleaned from the record 'some evidence' to support the action of committal. In so stating, it must always be added that the "some evidence" and "no evidence" rules must relate to all the essential elements of the charge in question.

tomber dans le domaine de la pure fantaisie, cette preuve se rapproche de ce qu'on appelle traditionnellement [TRADUCTION] «un soupçon de preuve». Par conséquent, on peut glaner du dossier «des éléments de preuve» justifiant le renvoi au procès. Cela dit, il faut ajouter que, dans chaque cas, la présence ou l'absence d'éléments de preuve doit se rapporter à chacun des éléments essentiels de l'accusation en question.

The conclusion which I have reached, that there was a scintilla of evidence to support the committal of the appellant to trial, brings us back full circle to the unusual procedural history of this case. On appeal, the Crown did not seek to impeach the finding of Bouck J. that there was 'no evidence' of a conspiratorial agreement. Rather, it was argued that in any event *certiorari* was not available to review for 'no evidence' at all on the essential elements of the charge. The executive branch of government has assumed primary responsibility for the enforcement of the criminal law. The historic ascendency of the executive branch as the agency for the enforcement of criminal law in the community is recognized in Canada today, in fact and in law, in the *Criminal Code* where it is given an ascendency at critical junctures of a prosecution over the private prosecutor. This branch may, in its wisdom, decide to lay or not to lay a charge. It might decide at any stage in the process to withdraw the charge. The Attorney General of the province, as represented by the Crown agent in the courtroom, might, for example, decide to withdraw a charge in the course of a preliminary hearing. Similarly, the charge might be withdrawn with the permission of the Court in the course of a trial. The following dicta of Schroeder J.A. in *City of Toronto v. Polai* (1969), 8 D.L.R. (3d) 689 in a different context, accurately, in my view, reflects the importance of the role assumed by the executive with respect to criminal prosecutions (at p. 697):

Ma conclusion qu'il y a un soupçon de preuve justifiant le renvoi de l'appelant à son procès nous ramène au point de départ, savoir le caractère inhabituel du déroulement des procédures en l'espèce. En appel, la poursuite n'a pas cherché à attaquer la conclusion du juge Bouck qu'il n'y avait «aucun élément de preuve» de l'existence d'une entente qui aurait constitué un complot. Elle a plutôt fait valoir que, de toute façon, on ne peut obtenir la révision par voie de *certiorari* lorsqu'il n'y a absolument «aucun élément de preuve» concernant les éléments essentiels de l'accusation. C'est le pouvoir exécutif qui assume la responsabilité première en matière d'application du droit criminel. Au Canada, la dominance traditionnelle de l'exécutif en tant que responsable de l'application du droit criminel dans la collectivité est reconnue aujourd'hui, en fait et en droit, dans le *Code criminel* qui, aux stades critiques d'une poursuite, privilégie l'exécutif par rapport au poursuivant privé. L'exécutif peut, à sa guise, choisir de porter ou de ne pas porter une accusation. Il pourrait, à n'importe quelle étape des procédures, décider de retirer l'accusation. Le procureur général de la province, représenté à l'audience par son substitut, pourrait, par exemple, décider de retirer une accusation au cours de l'enquête préliminaire. De même, l'accusation pourrait, avec l'autorisation de la cour, être retirée au cours du procès. L'opinion incidente suivante formulée par le juge Schroeder de la Cour d'appel dans l'arrêt *City of Toronto v. Polai* (1969), 8 D.L.R. (3d) 689, dans un contexte différent, exprime avec exactitude à mon avis l'importance du rôle que joue l'exécutif dans le domaine des poursuites en matière criminelle (à la p. 697):

The decision whether or not the Attorney-General should prosecute or sue is a matter for him, and the

[TRADUCTION] Il appartient au procureur général de décider s'il doit poursuivre et les tribunaux n'ont aucun

Courts have no power to question his right to do so or to refrain from doing so as distinct from his right to relief.

The Attorney-General is in a different position from the ordinary litigant, for he represents the public interest in the community at large; . . .

The Crown agent in this case might have decided, in its exclusive discretion as the public enforcement agency of the community, the executive branch, not to oppose the application for an order to quash; or the Crown might have decided not to appeal from the quashing order. Here the Crown exercised its enforcement discretion by asking the Court of Appeal, and this Court as well, to set aside the quashing order on a ground not known to the law. No other request was made by the Crown, and indeed, the Crown expressed its agreement that the Court should dispose of the appeal on the one ground selected by the Crown. The sole position taken by the Crown on this appeal in this Court, and apparently in the court below, is tantamount to a submission of a Reference on a point of law to this Court. The Crown does not here seek a reversal of the order of the reviewing judge of first instance on a ground known to the law. Rather the Crown seeks to establish a new or extended rule of law.

Whether there is, in the judicial sense, 'no evidence' revealed in the record, is a question of law. In finding there was 'no evidence' in the record at the preliminary hearing, the learned reviewing judge committed an error of law. Such a finding, unsupported by the record, is, in my view, a reversible error which, in the absence of other overriding considerations, would dispose of the appeal.

There now remains to be examined the question as to whether these proceedings reveal a further and finally controlling factor which ordains another disposition of the proceeding. This Court, on the review of the proceedings below, must conclude that, while the committing judge was in law correct in his order under s. 475, and the reviewing judge was wrong in law in quashing the committal, the quashing order was attacked by the

droit de regard sur son droit de poursuivre ou de ne pas poursuivre, par opposition à son droit de redressement.

Le procureur général n'est pas dans la même situation qu'un plaideur ordinaire, car il représente l'intérêt public dans l'ensemble de la collectivité; . . .

En l'espèce, le substitut du procureur général aurait pu, dans l'exercice du pouvoir discrétionnaire dont il jouit comme organe exécutif responsable de l'application des lois, décider de ne pas contester la demande d'annulation; ou encore, il aurait pu décider de ne pas interjeter appel de l'ordonnance portant annulation. Dans le cas qui nous occupe, la poursuite a exercé son pouvoir discrétionnaire en demandant à la Cour d'appel, et aussi à cette Cour, d'infirmer l'ordonnance portant annulation, et ce pour un motif qui n'est pas reconnu en droit. Aucune autre demande n'a été formulée par la poursuite et, en fait, elle s'est dit d'accord que l'appel devait être tranché en fonction du seul moyen qu'elle avait choisi d'invoquer. La position adoptée par la poursuite en cette Cour, et apparemment en Cour d'appel, équivaut à un renvoi à cette Cour sur un point de droit. Ce que la poursuite demande ici n'est pas l'annulation, pour un motif reconnu en droit, de l'ordonnance du juge qui a effectué la révision. Elle cherche plutôt à établir une nouvelle règle ou à élargir la portée de la règle actuelle.

La question de savoir si, au sens juridique, le dossier ne révèle «aucun élément de preuve» est une question de droit. En concluant qu'il n'y avait «aucun élément de preuve» dans le dossier de l'enquête préliminaire, le savant juge qui a effectué la révision a commis une erreur de droit. Une telle conclusion, non étayée par le dossier, constitue, à mon avis, une erreur qui justifie une annulation et qui, en l'absence d'autres considérations essentielles, suffirait à trancher le pourvoi.

Reste maintenant à examiner la question de savoir s'il se dégage des procédures qui nous intéressent quelque autre facteur qui soit déterminant et qui oblige à trancher le litige d'une façon différente. En examinant les procédures qui se sont déroulées devant les instances inférieures, cette Cour doit conclure que, du point de vue juridique, le juge qui a présidé à l'enquête a eu raison d'ordonner le renvoi au procès conformément à

Crown on a basis unknown to the law. The Crown in its executive role can, at that point, elect not to appeal or to appeal on a limited basis, or to appeal from the order on all possible grounds known to the law. The Crown role continues at this stage in the same way as in the earliest stages of the process when it determines whether to lay a charge, against whom the charge should be laid, and if so, whether to proceed to or by way of the preliminary hearing.

In determining the proper disposition to be made of this appeal, one should not overlook the effect the position taken by the Crown in the appellate process has had, not only upon the criminal process itself but upon the accused. The accused has not been called upon to address the issue of 'no evidence' in either the Court of Appeal or in this Court. He has not been called upon to meet the 'no evidence' or 'some evidence' issue because of the quasi-reference approach taken by the Crown in the *form* of an appeal from the order of Bouck J.

As a result of all these proceedings and steps, this Court, making the order which is respectfully found to be the order which the Court of Appeal should have made, finds that this appeal should be allowed and the order of the reviewing judge restored. This is the disposition which must, in law, follow from the course chosen by the executive branch in the discharge of its function as an agency charged with law enforcement in the province. The Crown having pursued this course, as in its wisdom it is free to do, the result must be the restoration of the order quashing the committal. The focus of this entire process is on the liberty of the subject. The appellant stands accused under the criminal law. The agency charged with the administration of justice on behalf of the Crown in the right of the province has, upon its investigation and initial prosecutorial steps, determined that the community is possessed of no evidence that the

l'art. 475 et que c'est à tort que le juge qui a effectué la révision a annulé ce renvoi au procès, mais que la poursuite a fondé son attaque contre l'ordonnance portant annulation sur un moyen qui n'est pas reconnu en droit. À ce stade, la poursuite, en tant qu'organe exécutif, peut choisir soit de ne pas interjeter appel, soit d'interjeter un appel de portée restreinte, soit d'interjeter contre l'ordonnance un appel fondé sur tous les moyens possibles qui sont reconnus en droit. Le rôle de la poursuite est alors le même que celui qu'elle joue au cours des étapes initiales du processus lorsqu'elle décide si elle doit porter une accusation, contre qui l'accusation doit être portée et, le cas échéant, s'il y a lieu de tenir une enquête préliminaire.

En déterminant la façon dont le présent pourvoi doit être tranché, il ne faut pas oublier l'effet que la position adoptée par la poursuite au cours du processus d'appel a eu non seulement sur le processus criminel lui-même mais également sur l'accusé. L'accusé n'a pas été amené à aborder la question de «l'absence de preuve» ni en Cour d'appel ni en cette Cour. Il n'a pas été amené à répondre à la question de «l'absence de preuve» ou de la présence de «certains éléments de preuve» en raison de la façon de procéder adoptée par la poursuite dont l'appel interjeté contre l'ordonnance du juge Bouck équivaut pour ainsi dire à un renvoi.

Par suite de toutes ces procédures et étapes, cette Cour, en rendant l'ordonnance qui, à son avis, aurait dû être rendue par la Cour d'appel, accueille ce pourvoi et rétablit l'ordonnance du juge qui a effectué la révision. Voilà la conclusion qui, en droit, découle inévitablement de la façon dont l'exécutif a choisi de s'acquitter de sa fonction d'application des lois dans la province. La poursuite ayant procédé ainsi, comme elle avait d'ailleurs le droit de le faire, l'ordonnance annulant le renvoi au procès doit être rétablie. Tout ce processus est centré sur la liberté individuelle. L'appelant est accusé en vertu du droit criminel. L'entité chargée d'administrer la justice pour le compte de Sa Majesté du chef de la province a, après avoir mené une enquête et entamé des poursuites, décidé qu'il n'y a aucune preuve que l'accusé est coupable du complot imputé. Peut-on s'attendre à ce que la collectivité tolère, encore

accused is guilty of the conspiracy charged. Can the community be expected to tolerate, let alone support, a law which permits a person, against whom the state enforcement agency claims possession of no evidence of guilt as charged, to be prosecuted on such a charge with the full power and resources of the state? This is not an absence of process; it is an abandonment of process. It is fundamental to our criminal law traditions that no citizen shall be called upon to answer a charge in this stark circumstance. Any other criminal law technique is but organized tyranny focussed on the wrongly accused in the view of the arm of the state empowered to initiate and process that accusation. Section 475 cannot, in my opinion, be properly construed in the tradition of statutory interpretation of criminal statutes as requiring such a startling result in a free society.

It follows that in doing so, the Court has not treated itself as bound by, nor indeed in any way has it acted upon, the submission by the Crown that there was no evidence of each essential element of the charge. Rather, the Court has responded to the only position taken by the prosecution.

I therefore would allow the appeal and restore the order of Bouck J. in Chambers in the Supreme Court of British Columbia.

The reasons of Beetz, McIntyre and Chouinard JJ. were delivered by

MCINTYRE J. (*dissenting*)—This appeal again raises the question of an application in the nature of *certiorari* to quash a committal for trial after preliminary hearing where it was agreed between the Crown and the appellant that there was no evidence adduced before the committing Provincial Court Judge on an essential ingredient of the offence charged.

The appellant was charged with two others named Grenon and Pellerin, and others unknown, with conspiracy to use a forged document as if it were genuine, contrary to s. 326 of the *Criminal Code*. At the opening of the preliminary hearing a

moins à ce qu'elle appuie, un régime juridique qui permet qu'une personne, à l'égard de laquelle l'entité chargée de l'application de la loi dit ne posséder aucune preuve de culpabilité de l'infraction imputée, soit poursuivie sous ce chef d'accusation avec toute la rigueur et toutes les ressources de l'État? Ce n'est pas là simplement une absence de voies de droit, ce n'est ni plus ni moins qu'un abandon des voies de droit. Suivant la tradition qui existe en droit criminel canadien, nul citoyen n'est obligé de répondre à une accusation dans ces circonstances. Toute dérogation à ce principe fondamental ferait de celui qui est accusé à tort par les autorités investies par l'État du pouvoir de formuler une accusation et d'engager des poursuites, la victime d'une tyrannie organisée. À mon avis, la tradition qui a cours en matière d'interprétation des lois pénales ne permet pas que l'on interprète l'art. 475 de manière à produire un résultat aussi étonnant dans le contexte d'une société libre.

Il s'ensuit que, ce faisant, la Cour ne s'est pas estimée liée par l'argument de la poursuite portant qu'il n'y avait pas d'éléments de preuve concernant chaque élément essentiel de l'accusation ni n'a en aucune façon tenu compte de cet argument. La Cour a plutôt simplement répondu à la seule position adoptée par la poursuite.

Je suis donc d'avis d'accueillir le pourvoi et de rétablir l'ordonnance rendue en chambre par le juge Bouck de la Cour suprême de la Colombie-Britannique.

Version française des motifs des juges Beetz, McIntyre et Chouinard rendus par

LE JUGE MCINTYRE (*dissident*)—Le présent pourvoi porte sur une demande de la nature d'un *certiorari* visant à annuler un renvoi au procès ordonné après enquête préliminaire, alors que la poursuite et l'appelant étaient d'accord pour dire qu'il y avait, devant le juge de la Cour provinciale qui a présidé à l'enquête, absence de preuve sur un élément essentiel de l'infraction imputée.

L'appelant a été accusé, en même temps que deux autres personnes nommées Grenon et Pellerin et d'autres personnes inconnues, d'avoir comploté en vue d'utiliser un document contrefait comme s'il était authentique, contrairement à l'art. 326 du

stay of proceedings was entered in respect of Grenon, who gave evidence for the Crown, and Pellerin did not appear. The hearing proceeded in respect of the appellant Skogman.

The evidence revealed that Grenon worked in the office of the Queen's Printer in Victoria. Early in the year 1980 he stole an unnumbered British Columbia School District's Capital Financing Authority debenture having a face value of $25,000. The debenture was dated May 1, 1966 and it had coupons attached, each in the amount of $781.25, dated November 1 and May 1 for each year up to 1986. He retained it in his possession until October, 1980 when he mentioned it to his co-accused, Pellerin. They decided to negotiate the bond or the coupons or both. The two, Grenon and Pellerin, went to the office of the Queen's Printer where Grenon made a casting of a serial number so that it could be stamped on the debenture and its coupons. He gave the casting to Pellerin who by this time had the debenture. Pellerin then spoke to a woman friend who was employed by the Royal Trust Company at its branch on Grant Street in Victoria. He endeavoured to make arrangements with her to negotiate the debenture, but she refused.

At about the end of October the appellant Skogman opened an account at the Grant Street Branch of the Royal Trust Company in the name of one Brune who was an acquaintance, but who knew nothing of the account. The appellant then handed over for negotiation the coupons from the debenture. The coupons bore a fictitious number and had a face value of $14,843.75. On surrender of the coupons the appellant received from the trust company $2,500 cash, and the remaining $12,343.75 was deposited to the account he had opened in the name of Brune.

There was evidence identifying the appellant as the person who handed over the coupons to the Royal Trust Company on October 31 at the Grant Street branch, but there was no direct evidence of any association between the appellant and the other alleged conspirators. However, in argument

Code criminel. À l'ouverture de l'enquête préliminaire, un arrêt des procédures a été ordonné à l'égard de Grenon qui a témoigné pour la poursuite; Pellerin n'a pas comparu. L'enquête préliminaire s'est poursuivie à l'égard de l'appelant Skogman.

La preuve a révélé que Grenon travaillait au bureau de l'Imprimeur de la Reine, à Victoria. Au début de 1980, il a volé une débenture non numérotée de l'organisme de financement en capital des districts scolaires de la Colombie-Britannique d'une valeur nominale de 25 000 $. La débenture était datée du 1er mai 1966 et comportait des coupons de 781,25 $ chacun, datés du 1er novembre et du 1er mai de chaque année jusqu'à 1986. Il l'a conservée en sa possession jusqu'en octobre 1980 alors qu'il en a parlé à son coaccusé Pellerin. Ils ont décidé de négocier la débenture ou les coupons ou les deux à la fois. Grenon et Pellerin se sont rendus au bureau de l'Imprimeur de la Reine où Grenon a fabriqué un numéro de série qui pourrait être apposé sur la débenture et les coupons. Il a remis la plaque à Pellerin qui était alors en possession de la débenture. Pellerin a communiqué avec une amie qui travaillait pour la compagnie Royal Trust, à la succursale de la rue Grant, à Victoria. Il a tenté de prendre des arrangements avec elle en vue de négocier la débenture, mais celle-ci a refusé.

Vers la fin d'octobre, l'appelant Skogman a ouvert un compte à la succursale de la compagnie Royal Trust, rue Grant, au nom d'un nommé Brune, une connaissance qui ignorait tout de ce compte. L'appelant a remis pour négociation les coupons de la débenture. Les coupons portaient un numéro fictif et avaient une valeur nominale de 14 843,75 $. En échange des coupons, l'appelant a reçu de la compagnie de fiducie 2 500 $ en argent comptant et le solde de 12 343,75 $ a été versé au compte qu'il avait ouvert au nom de Brune.

Il y a des éléments de preuve qui identifient l'appelant comme la personne qui a remis les coupons à la compagnie Royal Trust le 31 octobre, à sa succursale de la rue Grant, mais il n'y a eu aucune preuve directe de l'existence d'une association quelconque entre l'appelant et les autres cons-

at the preliminary hearing, counsel for the Crown said:

> Mr. Pellerin gained access and custody of the coupons. He showed them to Heather Robb and Heather Robb says, "Yes, those are the items and I told him that they wouldn't pass muster because they look smudged and they are obvious forgeries."
>
> The coupons then go from Mr. Pellerin somehow to Mr. Scogman [*sic*] and an inference can be drawn—and I suggest it is the only inference that can be drawn—that Mr. Scogman [*sic*] then joins the common purpose.
>
> We have the identification of the coupons in Pellerin's hands and we next have Mr. Scogman [*sic*] showing up at Royal Trust.

And at the conclusion of the hearing, the Provincial Court Judge said in part:

> I am adopting, as my reasons for committing, the submissions made by Crown counsel, Mr. Macdonald, who summarized the case. He summarized the facts very succinctly and I can do no better than merely adopt them as reasons.
>
> I therefore am satisfied that there is sufficient evidence to put to a jury and sufficient evidence upon which a jury properly instructed could convict.
>
> I therefore commit the accused for trial before Judge and Jury at the next court of competent jurisdiction and I am referring to the accused, Larry Cliff Scogman [*sic*].

The appellant petitioned the Supreme Court for an order in the nature of *certiorari* to quash the committal for trial. Essentially, the grounds upon which relief was sought were that evidence of an agreement between the appellant and one or more of his co-conspirators, a necessary ingredient of the charge of conspiracy, had not been tendered. It was contended that there was no evidence before the committing Provincial Court Judge of any such agreement between the appellant and the others and, therefore, there was not sufficient evidence to justify a committal. It was therefore beyond the jurisdiction of the Provincial Court Judge to commit in the circumstances.

pirateurs visés dans l'acte d'accusation. Toutefois dans son argumentation à l'enquête préliminaire, le substitut du procureur général a dit:

> [TRADUCTION] M. Pellerin s'est procuré les coupons et les a conservés. Il les a montrés à Heather Robb et celle-ci a dit «Oui ce sont bien les pièces, mais je lui ai dit qu'elles ne résisteraient pas au contrôle parce qu'elles ont l'air trafiquées et qu'il est évident que ce sont des documents contrefaits».
>
> Les coupons sont alors passés de M. Pellerin à M. Skogman on ne sait trop comment et on peut en déduire—et je suis d'avis que c'est la seule déduction possible—que M. Skogman s'est alors joint à l'entreprise commune.
>
> Nous avons l'identification des coupons en la possession de Pellerin puis voilà que M. Skogman se présente à la Royal Trust.

À la fin de l'enquête préliminaire, le juge de la Cour provinciale a affirmé notamment:

> [TRADUCTION] J'adopte, comme motifs du renvoi au procès, l'exposé du substitut du procureur général, Me Macdonald, qui a résumé l'affaire. Il a résumé les faits de façon très succincte et je ne puis qu'adopter ce résumé à titre de motifs.
>
> Je suis donc convaincu qu'il y a suffisamment d'éléments de preuve à soumettre à un jury et suffisamment d'éléments de preuve qui permettraient à un jury ayant reçu des directives appropriées de rendre un verdict de culpabilité.
>
> Je renvoie donc l'accusé à son procès devant un juge et un jury à la prochaine session du tribunal compétent et je parle de l'accusé Larry Cliff Skogman.

L'appelant a présenté à la Cour suprême une demande d'ordonnance de la nature d'un *certiorari* visant à annuler le renvoi à procès. Essentiellement les motifs du redressement qu'il demande sont que l'on n'a pas fourni la preuve de l'existence d'une entente entre l'appelant et l'un ou plusieurs de ses coconspirateurs, qui est un élément essentiel de l'accusation de complot. On soutient que le juge de la Cour provinciale qui a présidé à l'enquête préliminaire ne disposait d'aucune preuve de l'existence d'une telle entente entre l'appelant et les autres et qu'il y avait donc insuffisance de preuve pour justifier le renvoi au procès. Le juge de la Cour provinciale n'avait donc pas compétence pour ordonner le renvoi au procès dans ces circonstances.

The Chambers Judge in the Supreme Court who heard the petition wrote a detailed and carefully considered judgment in which he reviewed many of the authorities on this question and concluded that the relief sought should be granted. He quashed the committal. At the conclusion of his reasons for judgment the Chambers Judge conveniently summarized his conclusions under six headings. The second conclusion he reached was in these terms:

(2) At the preliminary hearing, there was no evidence the accused was a member of the conspiracy alleged in the information. Put another way, there was an entire absence of evidence as a basis for the formation of a judicial opinion that the evidence was sufficient to put the accused on trial. There was only circumstantial evidence which gives rise to rational inferences other than his membership in the conspiracy.

The fourth, fifth and sixth conclusions were in these terms:

(4) The Supreme Court of Canada has approved the practice of quashing committal orders by *certiorari* when there is a loss of jurisdiction during the preliminary enquiry. Examples of how this can occur include denial of natural justice and failure to observe a mandatory provision of the *Criminal Code*.

(5) There was no breach of the rules of natural justice by reason of the committal proceedings.

(6) The Provincial Court Judge lost jurisdiction at the preliminary inquiry when he failed to observe s. 475 of the *Criminal Code* because he committed the accused for trial when there was no evidence of his membership in the conspiracy which justified the committal order, or put another way, there was an entire absence of evidence as a basis for the formation of a judicial opinion by him that the evidence of his membership in the conspiracy was sufficient to put the accused on trial.

The Court of Appeal was unanimous in allowing the Crown's appeal. McFarlane J.A. wrote reasons with which Craig J.A. concurred. Lambert J.A. concurred in the result but wrote separate reasons. McFarlane J.A., after outlining the facts, said:

Le juge en chambre de la Cour suprême qui a entendu la demande a rédigé un jugement détaillé et bien motivé dans lequel il examine une bonne partie de la jurisprudence sur la question et il a conclu qu'il y avait lieu d'accorder le redressement demandé. Il a annulé le renvoi à procès. À la fin de ses motifs de jugement, le juge en chambre résume utilement ses conclusions en six paragraphes. Sa deuxième conclusion se lit comme suit:

[TRADUCTION]

(2) À l'enquête préliminaire, on n'a pas fait la preuve que l'accusé a participé au complot mentionné dans la dénonciation. Autrement dit, il y a une absence totale d'éléments de preuve qui auraient pu servir de fondement à l'opinion judiciaire que la preuve est suffisante pour renvoyer l'accusé à son procès. Il n'y a qu'une preuve indirecte qui permet raisonnablement de conclure à autre chose que sa participation au complot.

Les quatrième, cinquième et sixième conclusions se lisent comme suit:

[TRADUCTION]

(4) La Cour suprême du Canada a approuvé l'annulation des ordonnances de renvoi au procès par voie de *certiorari* lorsqu'il y a perte de compétence au cours de l'enquête préliminaire. Cette perte de compétence peut se produire notamment par suite d'un déni de justice naturelle et de l'inobservation d'une disposition impérative du *Code criminel*.

(5) Il n'y a pas eu de manquement aux règles de justice naturelle à cause de ce renvoi au procès.

(6) Le juge de la Cour provinciale a perdu compétence à l'enquête préliminaire parce qu'il ne s'est pas conformé à l'art. 475 du *Code criminel* en renvoyant l'accusé à son procès alors qu'il n'y avait pas de preuve de sa participation au complot pour justifier le renvoi au procès, ou, autrement dit, il y avait absence totale d'éléments de preuve qui auraient permis au juge de considérer que la preuve de la participation de l'accusé au complot était suffisante pour le renvoyer à son procès.

La Cour d'appel a accueilli de façon unanime l'appel interjeté par la poursuite. Le juge McFarlane a rédigé des motifs auxquels le juge Craig a souscrit. Le juge Lambert est arrivé à la même conclusion, mais il a rédigé des motifs distincts. Après avoir exposé les faits, le juge McFarlane affirme:

The appeal by the Crown to this Court is presented on the assumption that there was no evidence to support the Provincial Court Judge's opinion. It is, of course, not conceded or assumed that the circumstances did not require the Provincial Court Judge to apply his mind to the question whether he should or should not be of opinion that the evidence was sufficient to put the accused on trial. It is not suggested that there was such a complete absence of evidence that s. 475(1) could not be invoked or applied at all. The contrary is the case. There can be no doubt that at the conclusion of hearing of the evidence presented by the Crown, the Provincial Court Judge was required to form his opinion on the application of s-s. 1(*a*) and 1(*b*), *i.e.*, to commit or discharge. The distinction is important because it points up the difference between the acquisition of jurisdiction by the Provincial Court Judge and the loss of a jurisdiction once properly acquired.

After reviewing the authorities, including *Re Martin, Simard and Desjardins and The Queen* (1977), 20 O.R. (2d) 455 (C.A.), affirmed *sub nom. Martin v. The Queen*, [1978] 2 S.C.R. 511; *R. v. Norgren* (1975), 27 C.C.C. (2d) 488 (B.C.C.A.); *Patterson v. The Queen*, [1970] S.C.R. 409; *R. v. Kopan* (1975), 3 B.C.L.R. 102; *Attorney General of Quebec v. Cohen*, [1979] 2 S.C.R. 305; *Forsythe v. The Queen*, [1980] 2 S.C.R. 268, he went on to say:

> In the present case there was clearly no lack of jurisdiction to enter upon the preliminary inquiry. If, as is assumed for the purposes of this appeal, there was no evidence to support the Provincial Court Judge's opinion that the evidence was sufficient to put the respondent on trial, the Judge made an error in the exercise of a jurisdiction which he did possess. I think the Chambers Judge erred in substituting his opinion of the sufficiency of the evidence for the opinion of the Provincial Court Judge on that question. The question whether circumstantial evidence is equally, or more consistent with innocence than with guilt, is a question for the trial Judge or jury.

As has been said, Lambert J.A. reached the same conclusion and expressed disagreement with certain dicta from *Re Martin, Simard and Desjardins and The Queen* and *Forsythe v. The Queen*, as argued by counsel for the accused, and he followed *R. v. Kopan* which had held that a total lack of

[TRADUCTION] Pour les fins de son appel à cette Cour la poursuite tient pour acquis qu'il n'y avait aucun élément de preuve qui justifiait l'avis du juge de la Cour provinciale. Il n'est certes ni admis ni supposé que les circonstances n'exigeaient pas que le juge de la Cour provinciale se demande s'il devait considérer que la preuve était suffisante pour renvoyer l'accusé à son procès. On ne soutient pas qu'il y avait une absence de preuve telle que le par. 475(1) ne pouvait ni s'appliquer ni être invoqué. C'est plutôt le contraire. Il ne fait aucun doute qu'après l'audition de la preuve soumise par la poursuite, le juge de la Cour provinciale devait se faire une opinion quant à l'application des sous-al. 1*a*) et 1*b*), c'est-à-dire décider s'il fallait renvoyer l'accusé à son procès ou le libérer. La distinction est importante parce qu'elle souligne la différence entre l'acquisition de compétence par le juge de la Cour provinciale et la perte de compétence régulièrement acquise.

Après avoir étudié la jurisprudence, dont les arrêts *Re Martin, Simard and Desjardins and The Queen* (1977), 20 O.R. (2d) 455 (C.A.), confirmé *sub nom. Martin c. La Reine*, [1978] 2 R.C.S. 511; *R. v. Norgren* (1975), 27 C.C.C. (2d) 488 (C.A. C.-B.); *Patterson c. La Reine*, [1970] R.C.S. 409; *R. v. Kopan* (1975), 3 B.C.L.R. 102; *Procureur général du Québec c. Cohen*, [1979] 2 R.C.S. 305 et *Forsythe c. La Reine*, [1980] 2 R.C.S. 268, il poursuit:

> [TRADUCTION] En l'espèce, il est clair qu'il n'y avait pas absence de compétence pour entreprendre l'enquête préliminaire. Si, comme on le suppose aux fins du présent appel, il n'y avait aucun élément de preuve à l'appui de l'opinion du juge de la Cour provinciale que la preuve était suffisante pour renvoyer l'intimé à son procès, le juge a commis une erreur dans l'exercice d'une compétence qu'il possédait. Je crois que le juge en chambre a commis une erreur en substituant sa propre opinion sur le caractère suffisant de la preuve à celle du juge de la Cour provinciale sur la même question. Il appartient au jury ou au juge du procès de déterminer si la preuve indirecte est aussi compatible avec la culpabilité de l'accusé qu'avec son innocence ou plus compatible avec l'une qu'avec l'autre.

Comme je l'ai déjà dit, le juge Lambert est arrivé à la même conclusion mais s'est dit en désaccord avec certaines opinions incidentes des arrêts *Re Martin, Simard and Desjardins and The Queen* et *Forsythe c. La Reine* invoquées par l'avocat de l'accusé. Il a plutôt suivi l'arrêt *R. v. Kopan* où

evidence on a preliminary hearing would not go to jurisdiction and permit a quashing by *certiorari*.

In this Court argument proceeded on the basis that there was no evidence before the Provincial Court Judge of association by the appellant with either of his co-accused, an essential ingredient of the crime of conspiracy, and therefore no basis existed for a committal for trial. The appellant argued that while there was no case directly on point in this Court, the weight of authority established that *certiorari* was available in Canada to quash a committal for trial and that an absence of evidence on an essential point was a ground for such relief. The Court was referred to many authorities, including *Re Robar and The Queen* (1978), 42 C.C.C. (2d) 133 (N.S. C.A.); *Procureur général du Québec v. Poirier*, [1981] C.A. 228, *sub nom. Re Poirier and The Queen* (1981), 62 C.C.C. (2d) 452; *Stillo v. R.* (1981), 22 C.R. (3d) 224 (Ont. C.A.); *R. v. Boylan* (1979), 8 C.R. (3d) 36 (Sask. C.A.); *Re Leroux and The Queen* (1978), 43 C.C.C. (2d) 398 (Que. S.C.); *Re Mackie and The Queen* (1978), 43 C.C.C. (2d) 269 (Ont. H.C.); *Re Harrigan* (1977), 17 N.B.R. (2d) 478 (C.A.); *Chromium Mining and Smelting Corp. v. Fortin*, [1968] Que. Q.B. 536; *R. v. Gibbon, Bell and Faryon* (1965), 45 C.R. 314 (Man. Q.B.) Particular reliance was placed on the case of *Re Martin, Simard and Desjardins and The Queen*.

Counsel for the Crown argued that the point had been settled sixty years ago in *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128, and that sound grounds of policy and law supported the proposition that had been established in the British Columbia Court of Appeal to the effect that an absence of evidence will not be grounds for review of a committal for trial by *certiorari*. He reviewed many of the cases on the subject which illustrate the different views that have been adopted in different appellate courts in Canada and submitted that this Court should set the matter at rest with a clear pronouncement.

l'on a statué que l'absence totale de preuve lors de l'enquête préliminaire ne touche pas à la question de compétence et ne permet pas l'annulation par voie de *certiorari*.

En cette Cour, les débats ont eu lieu en tenant pour acquis qu'il n'y avait eu, devant le juge de la Cour provinciale, aucune preuve de l'existence d'une association entre l'appelant et l'un ou l'autre de ses coaccusés, laquelle est un élément essentiel du crime de complot, et que le renvoi au procès n'était donc pas fondé. L'appelant a soutenu que même si aucun arrêt de cette Cour ne porte directement sur ce point, la jurisprudence prépondérante veut qu'au Canada on puisse avoir recours au *certiorari* pour annuler un renvoi au procès et que l'absence de preuve quant à un élément essentiel justifie un tel redressement. On a renvoyé la Cour à de nombreuses décisions dont *Re Robar and The Queen* (1978), 42 C.C.C. (2d) 133 (C.A. N.-É); *Procureur général du Québec c. Poirier*, [1981] C.A. 228 *sub nom. Re Poirier and The Queen* (1981), 62 C.C.C. (2d) 452; *Stillo v. R.* (1981), 22 C.R. (3d) 224 (C.A. Ont.); *R. v. Boylan* (1979), 8 C.R. (3d) 36 (C.A. Sask.); *Re Leroux and The Queen* (1978), 43 C.C.C. (2d) 398 (C.S. Qué.); *Re Mackie and The Queen* (1978), 43 C.C.C. (2d) 269 (H.C. Ont.); *Re Harrigan* (1977), 17 N.B.R. (2d) 478 (C.A.); *Chromium Mining and Smelting Corp. v. Fortin*, [1968] B.R. 536; *R. v. Gibbon, Bell and Faryon* (1965), 45 C.R. 314 (B.R. Man.) On a particulièrement insisté sur l'arrêt *Re Martin, Simard and Desjardins and The Queen*.

Le substitut du procureur général a soutenu que ce point a été tranché il y a soixante ans dans l'arrêt *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128, et qu'il y a des motifs valables de droit et de principe à l'appui de la proposition de la Cour d'appel de la Colombie-Britannique portant que l'absence de preuve ne justifie pas la révision d'un renvoi au procès par voie de *certiorari*. Il a étudié un bon nombre d'arrêts sur le sujet qui illustrent les différents points de vue adoptés par diverses cours d'appel au Canada et il a soutenu que cette Cour devait trancher la question de façon définitive par une décision non équivoque.

orders of committal had been made after a preliminary hearing and then quashed in the High Court on *certiorari*. The basis of the quashing order in the High Court was that there was error of law on the face of the record. The issue in the Court of Appeal then became, in the words of Estey C.J.O. (as he then was), "whether *certiorari* is available to quash a committal for trial where there is an error of law on the face of the record" (p. 484). He went on to say that the Court of Appeal of Ontario had already applied the principle that excess or want of jurisdiction was the only ground upon which *certiorari* might apply and referred on this point to the Ontario cases of *R. v. Botting*, [1966] 3 C.C.C. 373 and *Re Stewart and The Queen (No. 2)* (1977), 35 C.C.C. (2d) 281, and to the *Norgren* case in the British Columbia Court of Appeal. He then observed, as I have done, that these cases find their roots in the *Nat Bell* case. As to the extent of review on jurisdictional grounds, he referred to the words of Lord Sumner in the *Nat Bell* case to the effect that:

> On *certiorari*, so far as the presence or absence of evidence becomes material, the question can, at most, be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court: . . .

Estey C.J.O. then went on to say, at pp. 486-87:

> The *Code* asserts this principle. Where there is any evidence at all upon a charge or issue arising thereunder, the Provincial Court Judge is called upon by s. 475 of the *Code* to hear it and determine "if in his opinion the evidence is sufficient to put the accused on trial . . . "; and his decision is not subject to review.

Applying these judgments, some of which are binding upon this Court, we conclude that the learned Provincial Court Judge here acted within his jurisdiction, unless it can be said that he committed these respondents on the counts specified without any evidence at all, in the sense of an entire absence of proper material as a basis for the formation of a judicial opinion that the evidence was sufficient to put the accused on trial. That is quite a

moins soulevé un doute à leur sujet. Dans l'arrêt *Martin*, les ordonnances de renvoi au procès ont été prononcées après une enquête préliminaire et ensuite annulées par la Haute Cour, par voie de *certiorari*. Le motif de l'annulation en Haute Cour a été qu'il y avait une erreur de droit manifeste à la lecture du dossier. La question alors soumise à la Cour d'appel était, pour reprendre les termes du juge Estey, alors juge en chef de l'Ontario, [TRADUCTION] «de savoir si on peut recourir au *certiorari* pour annuler un renvoi au procès lorsqu'il y a une erreur de droit manifeste à la lecture du dossier» (p. 484). Il a poursuivi en disant que la Cour d'appel de l'Ontario avait déjà appliqué le principe selon lequel l'abus ou l'absence de compétence sont les seuls motifs qui peuvent donner lieu à *certiorari* et a mentionné à ce propos les arrêts ontariens *R. v. Botting*, [1966] 3 C.C.C. 373 et *Re Stewart and The Queen (No. 2)* (1977), 35 C.C.C. (2d) 281, ainsi que l'arrêt *Norgren* de la Cour d'appel de la Colombie-Britannique. Il a fait ensuite remarquer, comme je l'ai fait, que ces arrêts découlent de l'arrêt *Nat Bell*. Quant à la portée de la révision pour des motifs de compétence, il cite les propos suivants de lord Sumner dans l'arrêt *Nat Bell*:

> [TRADUCTION] Dans le cas du *certiorari*, pour autant que la présence ou l'absence d'éléments de preuve importe, on ne peut que se demander si un élément de preuve quelconque a été présenté au sujet du point essentiel mentionné. Son poids est laissé entièrement à l'appréciation du tribunal inférieur: . . .

Le juge Estey, juge en chef de l'Ontario, ajoute aux pp. 486 et 487:

> [TRADUCTION] Le *Code* affirme ce principe. S'il y a un élément de preuve quelconque au sujet d'une accusation ou d'une question qui en découle, le juge de la Cour provinciale doit, en vertu de l'art. 475 du *Code*, l'entendre et déterminer «si, à son avis, la preuve est suffisante pour faire passer la personne inculpée en jugement . . . »; et sa décision n'est pas susceptible de révision.

En appliquant ces décisions, dont certaines lient la Cour, nous concluons que le savant juge de la Cour provinciale n'a pas outrepassé sa compétence en l'espèce, à moins qu'on ne puisse dire que sa décision de renvoyer ces intimés pour surbir leur procès sur les chefs d'accusation indiqués ne repose sur aucun élément de preuve, au sens d'une absence totale d'éléments qui auraient pu servir de fondement à l'opinion judiciaire que la preuve

different question from the question "whether in the opinion of the reviewing tribunal there was evidence upon which a properly instructed jury acting judicially could convict". It remained, therefore, to examine the excerpts of evidence, as placed before this Court from the lengthy transcript taken at the preliminary hearing, in order to determine whether there was any evidence at all on which the committing tribunal was able to base its opinion to commit, as required by the terms of the *Code* already cited. There is, of course, a considerable volume of evidence, testimonial and documentary, and it is my view that in the case of each of the three respondents there is sufficient evidence relating to the charges and the counts in issue to call upon the learned Provincial Judge to form an opinion as to whether there was sufficient evidence to commit the accused for trial, pursuant to s. 475, ... Having properly directed his mind to the evidence and to the question of whether there was "sufficient evidence" to commit, his decision is not subject to review.

The order to quash was reversed. The appeal to this Court was dismissed.

In the *Martin* case Estey C.J.O. went far to rationalize the conflicting case law on this question. As I read his judgment in that case, he recognized that the remedy of *certiorari* was jurisdictional and that it could be invoked only to cure jurisdictional error. He went on to say that it would lie to quash a committal for trial on this basis only where there was a total absence of evidence before the committing justice on which he could commit. He went on to state the test of sufficiency of evidence for a committal and drew a distinction between that amount of evidence which would warrant a committal for trial, and that lesser amount which, though not being sufficient to warrant a committal, would be sufficient to compel the committing justice to examine the evidence and reach a judicial opinion as to its sufficiency. He concluded by saying that there was such evidence, that is, evidence sufficient to put the committing justice to a decision as to its sufficiency and that, after the committing justice had addressed his mind to the evidence and reached his conclusion, the decision was not reviewable on *certiorari* even though wrong in law. This judgment was affirmed in this Court and is, in my view, consistent with the judgment of this

est suffisante pour renvoyer les accusés à leur procès. Voilà qui est tout à fait différent de la question «de savoir si, de l'avis du tribunal qui effectue la révision, il y avait suffisamment d'éléments de preuve qui permettraient à un jury ayant reçu des directives appropriées de prononcer un verdict de culpabilité». Il a donc fallu procéder à l'examen des extraits tirés de la transcription volumineuse de l'enquête préliminaire, qu'on a produits en cette Cour, afin de déterminer s'il y avait, comme l'exige le *Code*, suffisamment d'éléments de preuve pour justifier le renvoi au procès. Il y a certes une preuve testimoniale et documentaire considérable et j'estime que la preuve relative aux chefs d'accusation en cause était suffisante dans le cas de chacun des trois intimés pour que le savant juge de la Cour provinciale puisse se faire une opinion sur la question de savoir s'il existait des éléments de preuve suffisants pour renvoyer les accusés à leur procès, conformément à l'art. 475 ... Puisqu'il a bien analysé la preuve et la question de savoir si la «preuve [était] suffisante» à cet égard, sa décision n'est pas susceptible de révision.

L'ordonnance d'annulation a été infirmée. Le pourvoi interjeté à cette Cour a été rejeté.

Dans l'arrêt *Martin*, le juge Estey, juge en chef de l'Ontario, a tenté de rationaliser la jurisprudence contradictoire sur cette question. Selon mon interprétation de ses motifs dans cet arrêt, il reconnaît que le *certiorari* porte sur la compétence et qu'on ne peut l'invoquer que pour remédier à une erreur de compétence. Il poursuit en disant qu'il serait possible d'y recourir pour annuler un renvoi au procès pour ce motif seulement s'il y avait absence totale d'éléments de preuve qui auraient permis au magistrat qui a présidé à l'enquête préliminaire d'ordonner le renvoi au procès. Il énonce ensuite le critère de la preuve suffisante applicable à un renvoi au procès et fait la distinction entre la mesure de preuve qui justifierait un renvoi au procès et la mesure moindre qui, bien qu'insuffisante pour justifier un renvoi au procès, suffirait pour obliger le magistrat qui préside à l'enquête préliminaire à examiner la preuve et à se faire une opinion quant à son caractère suffisant. Il conclut en disant qu'une telle preuve existait, c'est-à-dire une preuve suffisante pour obliger le magistrat qui préside à l'enquête préliminaire à décider si celle-ci est suffisante et que, après que le magistrat eut prêté attention à la preuve et tiré sa conclusion, sa décision n'était pas susceptible de

Court in *Forsythe* in which case it was held that only a denial of natural justice or a failure to obey the jurisdictional prescriptions of s. 475 of the *Criminal Code* would justify a review and quashing of a committal by *certiorari*.

To apply the above proposition to the case at bar, it should first be recognized that the parties argued the case before us on the basis that there was no evidence before the trial judge. Counsel for the Crown put it that there was no evidence of an essential ingredient of a charge of conspiracy, that is, evidence of agreement. While it could be said then that there was no evidence sufficient to meet the test for a committal—evidence which, if believed by a properly instructed jury, would justify a conviction—it could not be said that there was no evidence at all. The evidence disclosed that Grenon had stolen the debenture and the coupons. He had then given them to Pellerin and made a moulding from which a false serial number was made and put on the documents. The evidence also showed that Pellerin had approached an employee of the Royal Trust Company branch office on Grant Street in Victoria and had attempted to arrange for the negotiation of the debenture or coupons. She refused to cooperate but, after a day or two, the appellant went to the same branch of the Royal Trust Company, opened an account and negotiated the debenture coupons under a false name.

Now the parties have conceded that there was no direct evidence of association. Whatever one might think of the validity of such a concession by the Crown, it is abundantly clear that the committing justice, having heard the evidence described above, was confronted with the task of deciding whether or not there was evidence of association, and whether or not there was evidence to warrant a committal. There was no absolute lack of evi-

révision par voie de *certiorari*, même si elle était erronée en droit. Cette Cour a confirmé cet arrêt qui, à mon avis est compatible avec l'arrêt *Forsythe* dans lequel cette Cour a statué que seul le déni de justice naturelle ou l'omission de se conformer aux dispositions de l'art. 475 du *Code criminel* qui portent sur la compétence pourrait justifier la révision et l'annulation du renvoi au procès par voie de *certiorari*.

Pour appliquer l'énoncé ci-dessus à la présente espèce, il faut d'abord reconnaître que les parties ont débattu l'affaire devant nous en tenant pour acquis qu'aucun élément de preuve n'avait été soumis au juge du procès. Le substitut du procureur général a soutenu qu'il y avait absence de preuve sur un élément essentiel de l'accusation de complot, c'est-à-dire la preuve de l'existence d'une entente. Bien qu'on puisse dire alors qu'il n'y avait pas de preuve suffisante pour satisfaire au critère applicable à un renvoi au procès—une preuve qui, si un jury ayant reçu des directives appropriées y avait ajouté foi, aurait justifié une déclaration de culpabilité—on ne peut pas dire qu'il y avait absence totale de preuve. La preuve a démontré que Grenon avait volé la débenture et les coupons. Il les a donnés à Pellerin et a fabriqué un moule à partir duquel un faux numéro de série a été produit et apposé sur les documents. La preuve a aussi révélé que Pellerin était entré en communication avec une employée de la Compagnie Royal Trust, à la succursale de la rue Grant à Victoria, et qu'il avait tenté de prendre des arrangements en vue de négocier la débenture ou les coupons. L'employée a refusé son concours, mais un jour ou deux plus tard, l'appelant s'est présenté à la même succursale de la compagnie Royal Trust, a ouvert un compte et négocié les coupons de la débenture sous un faux nom.

Les parties reconnaissent maintenant qu'il n'y a eu aucune preuve directe de l'existence d'une association. Quoiqu'on puisse penser de la valeur d'une telle reconnaissance par la poursuite, il est très clair qu'après avoir entendu la preuve mentionnée ci-dessus, le magistrat qui a présidé à l'enquête préliminaire devait décider s'il y avait ou non une preuve de l'existence d'une association et s'il y avait ou non une preuve qui justifiait un renvoi au

dence, as described by Estey C.J.O. in *Martin*. The formation of a judicial opinion by the committing justice was therefore required under s. 475 of the *Criminal Code*. The justice's words in giving judgment reveal that he addressed the evidence and formed his opinion as to its sufficiency. His judgment then is not reviewable in proceedings by *certiorari*. It should be remembered that there were no concessions as to sufficiency of evidence made before the committing justice. He was required to address the question and reach his own conclusion. He did so, and, even though it may have been wrong in law, it is, in my view, unreviewable.

This question came to this Court again in the case of *Forsythe v. The Queen*. In that case, on a preliminary inquiry concerning a charge of rape, the appellant was denied the right to question the complainant with respect to her past sexual conduct with persons other than the accused in the *in camera* hearing held under s. 142 of the *Criminal Code*. He was also refused the right to examine the notes of a police officer made during an interview with the complainant and to cross-examine on them. He was committed for trial. He applied for an order quashing the committal which was denied in the Supreme Court of Ontario and his appeal to the Court of Appeal was dismissed. He appealed to this Court. The Chief Justice wrote the judgment for a unanimous Court and held that *certiorari* may be involved to quash a committal. He referred to the *Patterson* case and said, at pp. 271-72:

> In speaking of lack of jurisdiction, this Court was not referring to lack of initial jurisdiction of a judge or a magistrate to enter upon a preliminary inquiry. This is hardly a likelihood. The concern rather was with the loss of this initial jurisdiction and, in my opinion, the situations in which there can be a loss of jurisdiction in the course of a preliminary inquiry are few indeed. However, jurisdiction will be lost by a magistrate who fails to observe a mandatory provision of the *Criminal Code*: see *Doyle v. The Queen* [1977] 1 S.C.R. 597. Canadian law recognizes that a denial of natural justice goes to jurisdiction: see *Alliance des Professeurs catholiques de*

procès. Il n'y avait pas absence totale de preuve comme le mentionne le juge Estey, juge en chef de l'Ontario, dans l'arrêt *Martin*. Le magistrat qui présidait à l'enquête préliminaire était donc tenu de se faire une opinion judiciaire en vertu de l'art. 475 du *Code criminel*. Les mots employés par le magistrat dans ses motifs de jugement révèlent qu'il a prêté attention à la preuve soumise et qu'il s'est fait une opinion sur son caractère suffisant. Sa décision n'est donc pas susceptible de révision par voie de *certiorari*. Il faut se rappeler que l'on n'a pas reconnu le caractère suffisant de la preuve devant le magistrat qui a présidé à l'enquête préliminaire. Il devait se poser la question et tirer sa propre conclusion. C'est ce qu'il a fait et même s'il peut avoir commis une erreur de droit, j'estime qu'elle n'est pas susceptible de révision.

La même question a été soumise de nouveau à cette Cour dans l'arrêt *Forsythe c. La Reine*. Dans cette affaire, l'appelant s'était vu refuser, à l'enquête préliminaire portant sur une accusation de viol, le droit d'interroger la plaignante sur son comportement sexuel antérieur avec des personnes autres que l'accusé, lors d'une audition à huis clos tenue en vertu de l'art. 142 du *Code criminel*. Il s'était également vu refuser le droit de prendre connaissance des notes rédigées par un policier pendant une entrevue avec la plaignante et de contre-interroger à leur propos. L'appelant a été renvoyé à son procès. La Cour suprême de l'Ontario a rejeté sa demande d'annulation du renvoi au procès et l'appel qu'il a interjeté à la Cour d'appel a été rejeté. Il s'est pourvu en cette Cour. Le Juge en chef a rédigé le jugement unanime de la Cour et statué qu'on peut recourir au *certiorari* pour faire annuler un renvoi au procès. Il a mentionné l'arrêt *Patterson* et affirmé, aux pp. 271 et 272:

> En parlant du défaut de compétence, cette Cour ne faisait pas référence au défaut de compétence initial du juge ou du magistrat de commencer une enquête préliminaire. C'est un cas peu probable. Il s'agissait plutôt de la perte de cette compétence initiale et, à mon avis, il n'y a que fort peu de cas où il peut y avoir perte de compétence pendant une enquête préliminaire. Cependant, un magistrat perdra compétence s'il omet de se conformer à une disposition impérative du *Code criminel*: voir l'arrêt *Doyle c. La Reine*, [1977] 1 R.C.S. 597. Le droit canadien reconnaît qu'un déni de justice naturelle porte atteinte à la compétence: voir l'arrêt *Alliance*

Montréal v. Labour Relations Board of Quebec [1953] 2 S.C.R. 140. In the case of a preliminary inquiry, I cannot conceive that this could arise otherwise than by a complete denial to the accused of a right to call witnesses or of a right to cross-examine prosecution witnesses. More disallowance of a question or questions on cross-examination or other rulings on proffered evidence would not, in my view, amount to a jurisdictional error. However, the judge or magistrate who presides at a preliminary inquiry has the obligation to obey the jurisdictional prescriptions of s. 475 of the *Criminal Code*.

des Professeurs catholiques de Montréal c. Commission des relations de travail du Québec, [1953] 2 R.C.S. 140. Dans le cas d'une enquête préliminaire, je ne peux concevoir que cela se produise à moins que l'accusé ne se voie totalement refuser le droit de citer des témoins ou de contre-interroger les témoins de la poursuite. Le simple rejet d'une ou de plusieurs questions en contre-interrogatoire ou d'autres décisions sur la preuve avancée ne constituent pas, à mon avis, une erreur portant atteinte à la compétence. Cependant, le juge ou le magistrat présidant à l'enquête préliminaire doit obéir aux dispositions relatives à la compétence de l'art. 475 du *Code criminel*.

He went on to comment on the case of *Attorney General of Quebec v. Cohen*. The *Forsythe* appeal was dismissed.

Il a ensuite commenté l'arrêt *Procureur général du Québec c. Cohen*. Le pourvoi *Forsythe* a été rejeté.

It is evident then that this Court has held that only a denial of natural justice or a failure to "obey the jurisdictional prescriptions of s. 475 of the *Criminal Code*" will serve to permit the quashing of a committal for trial by *certiorari*.

Il est donc manifeste que cette Cour a statué que seuls le déni de justice naturelle ou l'omission d'«obéir aux dispositions relatives à la compétence de l'art. 475 du *Code criminel*» peuvent permettre d'annuler un renvoi au procès par voie de *certiorari*.

How would this apply to the case at bar? It has never been suggested that there was any denial of natural justice. The inquiry was conducted in a normal open fashion and the appellant was in no way impeded in the conduct of the case. What of the jurisdictional prescriptions of s. 475? Section 475 is reproduced hereunder:

Comment cela s'applique-t-il à l'espèce? On n'a jamais soutenu qu'il y a eu déni de justice naturelle. L'enquête s'est déroulée normalement et ouvertement et l'appelant n'a aucunement été gêné au cours des procédures. Qu'en est-il des dispositions de l'art. 475 relatives à la compétence? Voici le texte de l'art. 475:

475. (1) When all the evidence has been taken by the justice he shall,

(*a*) if in his opinion the evidence is sufficient to put the accused on trial,

(i) commit the accused for trial, or

(ii) order the accused, where it is a corporation, to stand trial in the court having criminal jurisdiction; or

(*b*) discharge the accused, if in his opinion upon the whole of the evidence no sufficient case is made out to put the accused on trial.

475. (1) Lorsque le juge de paix a recueilli tous les témoignages, il doit,

a) si, à son avis, la preuve est suffisante pour faire passer la personne inculpée en jugement,

(i) renvoyer la personne inculpée pour qu'elle subisse son procès, ou

(ii) si la personne inculpée est une corporation, ordonner qu'elle subisse son procès devant la cour ayant juridiction criminelle; ou

b) libérer la personne inculpée, s'il estime, d'après toute la preuve, qu'on n'a établi aucun motif suffisant pour la faire passer en jugement.

The committing judge is required upon the conclusion of the evidence to form an opinion either that the evidence is sufficient for a committal or that it is not. If, in his opinion, it is sufficient, he must commit, and if, in his opinion, it is not, he must discharge. In his reasons the Provincial Court

Le juge qui préside à l'enquête préliminaire est tenu, après avoir recueilli tous les témoignages, de se faire une opinion sur la question de savoir si la preuve suffit pour ordonner le renvoi au procès. Si, à son avis, elle est suffisante il doit renvoyer la personne inculpée à son procès et si, à son avis, elle

Judge clearly addressed this issue and complied with the jurisdictional prescriptions of the section by forming a judicial opinion as to the sufficiency of the evidence. His words in this respect have already been referred to. Even if he was wrong in forming his opinion, it cannot be said that he lost jurisdiction in the last act of a heretofore properly conducted hearing merely by making a mistake in law. There was clearly before him enough evidence, in the words of Estey C.J.O., to require him to address the question and to form a judicial opinion as to its sufficiency for a committal. This he did with no suggestion of bias or other improper motive. Even if he was wrong, he addressed his mind to the issues and his determination is not reviewable on *certiorari*.

I would dismiss the appeal and I would say that where, in a preliminary hearing, there is no denial of natural justice then, even in an absence of evidence on an essential point in an offence charged, where the committing magistrate has addressed his mind to the requirements of s. 475 of the *Criminal Code* and decided that in his opinion there is sufficient evidence to commit, the resulting order of committal is unreviewable on *certiorari*. If it is thought necessary to provide a means of appeal or a review of committals, Parliament may do so.

Appeal allowed, BEETZ, MCINTYRE *and* CHOUINARD JJ. *dissenting*.

Solicitor for the appellant: Christopher Brennan, Victoria.

Solicitor for the respondent: The Ministry of the Attorney General of British Columbia, Victoria.

ne l'est pas, il doit la libérer. Dans ses motifs, le juge de la Cour provinciale a clairement abordé cette question et il s'est conformé aux dispositions de l'article relatives à la compétence en se faisant une opinion quant au caractère suffisant de la preuve. J'ai déjà mentionné ses paroles à ce propos. Même s'il a commis une erreur en se faisant une opinion, on ne peut dire qu'il a perdu compétence à la toute fin d'une enquête régulièrement tenue jusque-là, uniquement parce qu'il a commis une erreur de droit. La preuve dont il disposait était nettement suffisante, selon l'expression du juge Estey, juge en chef de l'Ontario, pour qu'il doive se poser la question et se faire une opinion quant à son caractère suffisant pour justifier un renvoi au procès. Il l'a fait sans apparence de préjugé ou d'un autre motif irrégulier. Même s'il s'est trompé, il a prêté attention aux questions en présence et sa décision n'est pas susceptible de révision par voie de *certiorari*.

Je suis d'avis de rejeter le pourvoi et j'ajouterais que s'il n'y a pas de déni de justice naturelle à l'enquête préliminaire, et si, même en l'absence de preuve sur un élément essentiel de l'infraction imputée, le magistrat qui préside à l'enquête a prêté attention aux exigences de l'art. 475 du *Code criminel* et a conclu que, à son avis, il y avait une preuve suffisante pour renvoyer l'accusé à son procès, le renvoi qui en découle n'est pas susceptible de révision par voie de *certiorari*. S'il est jugé nécessaire de prévoir un moyen d'appel ou une révision des renvois au procès, le législateur pourra le faire.

Pourvoi accueilli, les juges BEETZ, MCINTYRE *et* CHOUINARD *sont dissidents*.

Procureur de l'appelant: Christopher Brennan, Victoria.

Procureur de l'intimée: Le ministère du Procureur général de la Colombie-Britannique, Victoria.

Denis Blanchard *Appellant*;

and

Control Data Canada Limited *Respondent*;

and

Jean-Paul Lalancette *Mis en cause.*

File No.: 17680.

1984: March 15; 1984: November 22.

Present: Beetz, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Judicial review — Labour law — Arbitral award — Complaint of dismissal without good and sufficient cause — Alteration by arbitrator of penalty imposed by employer — Writ of evocation — Privative clause — Powers of arbitrator — Whether arbitral award reasonable and sufficient reasons given — Act respecting labour standards, R.S.Q., c. N-1.1, ss. 124, 125, 126, 127, 128, 129 — Labour Code, R.S.Q. 1977, c. C-27 as am., s. 139 — Code of Civil Procedure, art. 846.

Appellant, contrary to his employer's policies and despite a previous prohibition, accepted a trip to Jamaica offered by the radio station with which he was negotiating an advertising purchase contract on behalf of his employer. Appellant was dismissed and submitted to the Commission des normes du travail a complaint of dismissal without good and sufficient cause. After examining the evidence submitted by the parties, the arbitrator concluded that appellant's insubordination did not justify such a penalty. Relying on s. 128 of the *Act respecting labour standards*, he substituted for the dismissal a suspension without pay for four months. Respondent applied to the Superior Court for a writ of evocation. The application was dismissed. A majority of the Court of Appeal reversed the judgment and authorized the writ to be issued. The majority of the Court held that the arbitrator had the power under s. 128 to amend the penalty chosen by the employer, but in the case at bar had exceeded his jurisdiction by making an unreasonable award. Additionally, they considered that the arbitrator's reasons were only an expression of opinion and that therefore the decision could be regarded as void and rendered entirely without jurisdiction. The present appeal raises three questions: whether (1) the existence of "good and sufficient cause for dismissal" is a prerequisite for the exercise by the arbitrator of his

Denis Blanchard *Appelant*;

et

Control Data Canada Limitée *Intimée*;

et

Jean-Paul Lalancette *Mis en cause.*

N° du greffe: 17680.

1984: 15 mars; 1984: 22 novembre.

Présents: Les juges Beetz, McIntyre, Chouinard, Lamer et Wilson.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Contrôle judiciaire — Droit du travail — Sentence arbitrale — Plainte de congédiement sans cause juste et suffisante — Modification par l'arbitre de la sanction imposée par l'employeur — Bref d'évocation — Clause privative — Pouvoirs de l'arbitre — La sentence arbitrale est-elle raisonnable et suffisamment motivée? — Loi sur les normes du travail, L.R.Q., chap. N-1.1, art. 124, 125, 126, 127, 128, 129 — Code du travail, L.R.Q. 1977, chap. C-27 et mod., art. 139 — Code de procédure civile, art. 846.

Contrairement aux politiques de son employeur et malgré une interdiction antérieure, l'appelant a accepté un voyage en Jamaïque offert par la station radiophonique avec laquelle il négociait un contrat d'achat de publicité pour le compte de son employeur. Congédié, l'appelant a soumis à la Commission des normes du travail une plainte pour congédiement sans cause juste et suffisante. Après avoir examiné la preuve soumise par les parties, l'arbitre a conclu que l'insubordination de l'appelant ne justifiait pas une telle sanction. S'appuyant sur l'art. 128 de la *Loi sur les normes du travail*, il a substitué au congédiement une suspension sans paye de quatre mois. L'intimée s'est alors adressée à la Cour supérieure pour obtenir la délivrance d'un bref d'évocation. La requête a été rejetée. La Cour d'appel à la majorité a infirmé le jugement et autorisé la délivrance du bref. Les juges majoritaires ont statué que l'arbitre avait le pouvoir en vertu de l'art. 128 de modifier la sanction choisie par l'employeur mais, qu'en l'espèce, il avait excédé sa juridiction en rendant une sentence déraisonnable. De plus, ils ont estimé que les motifs de l'arbitre n'étaient que l'expression d'une opinion et qu'en conséquence la décision pouvait être considérée comme nulle et rendue en l'absence de toute juridiction. Le présent pourvoi vise à déterminer trois questions: (1) l'existence d'une «cause juste et suffisante de congédie-

jurisdiction; (2) in light of the powers conferred on him by s. 128, the arbitrator exceeded his jurisdiction by making an "unreasonable" award; and (3) in view of the requirement in s. 129 of the Act that the arbitral award be supported by reasons, should this Court intervene and vacate the award if it is not supported by sufficient reasons?

Held: The appeal should be allowed.

Per curiam: On the first question: the existence of good and sufficient cause for dismissal is not a prerequisite to the exercise of the arbitrator's jurisdiction, but is an intra-jurisdictional question, since it is the very subject of the inquiry. It is the only question which the arbitrator must decide before making the order he thinks proper.

Per Beetz, Chouinard and Wilson JJ., agreeing on the two other questions with the reasons of Monet J.A., dissenting, in the Court of Appeal. Moreover, on the second question: the complaint which the majority of the Court of Appeal made against the arbitrator was not, strictly speaking, that he committed an error of law or fact, but more precisely, that he committed an abuse of authority like that referred to in para. 4 of art. 846 *C.C.P.* Whatever the arbitrator's decision, an abuse of power amounting to fraud and of such a nature as to cause a flagrant injustice would divest him of his jurisdiction and be a basis for judicial review by evocation, regardless of any privative clause. In the case at bar, however, the arbitrator's award did not constitute such an abuse. It cannot be said that the less severe penalty imposed by the arbitrator is, in view of all the circumstances, clearly abusive, flagrantly unjust, absurd, contrary to common sense and lacking any basis in the evidence as a whole.

Per McIntyre and Lamer JJ., agreeing in substance on the second and third questions with the reasons of Monet J.A., dissenting, in the Court of Appeal. The Supreme Court has tended in exercising its power of review to avoid intervening when the decision of the administrative tribunal, whether erroneous or not, is reasonable in view of the applicable legislation. Where there is a privative clause, however, judicial review may only be exercised on questions of jurisdiction. The distinction between error of law and fact then becomes superfluous: an unreasonable finding, whatever its origin, impairs the jurisdiction of the tribunal and justifies judicial intervention. In the case at bar the arbitrator did not exceed his jurisdiction. His interpretation of s. 128 and of the powers it confers is not only reasonable but correct. An arbitrator acting under that section has a power to substitute another penalty for the dismissal

ment» est-elle une condition préalable à l'exercice de la compétence de l'arbitre? (2) Compte tenu des pouvoirs qui lui sont conférés par l'art. 128, l'arbitre a-t-il excédé sa juridiction en rendant une sentence «déraisonnable» et (3) compte tenu de l'obligation de motiver la sentence arbitrale énoncée à l'art. 129 de la Loi, cette Cour doit-elle intervenir et déclarer la sentence nulle faute de motivation suffisante?

Arrêt: Le pourvoi est accueilli.

La Cour: Sur la première question: l'existence d'une cause juste et suffisante de congédiement n'est pas une condition préalable à l'exercice de la compétence de l'arbitre, mais bien une question intrajuridictionnelle puisqu'il s'agit de l'objet même de l'enquête. C'est la seule question que l'arbitre doit trancher avant de rendre l'ordonnance qu'il estime appropriée.

Les juges Beetz, Chouinard et Wilson sont, sur les deux autres questions, d'accord avec les motifs du juge Monet, dissident en Cour d'appel. Au surplus, sur la deuxième question: le reproche que la majorité de la Cour d'appel adresse à l'arbitre n'est pas à proprement parler, d'avoir commis une erreur de droit ou de fait mais, plus précisément, d'avoir commis un abus de pouvoir comme celui que vise l'al. 4 de l'art. 846 *C.p.c.* Quelle que soit la juridiction de l'arbitre, un abus de pouvoir équivalant à fraude et de nature à entraîner une injustice flagrante lui ferait perdre juridiction et donnerait ouverture à la révision judiciaire par voie d'évocation, nonobstant toute clause privative. En l'espèce, toutefois, la décision de l'arbitre ne constitue pas un tel abus. Il est en effet impossible d'affirmer que la sanction moins sévère imposée par l'arbitre est, compte tenu de toutes les circonstances, clairement abusive, manifestement injuste, contraire au sens commun et sans aucun fondement dans l'ensemble de la preuve.

Les juges McIntyre et Lamer sont, sur la deuxième et la troisième questions, d'accord pour l'essentiel avec les motifs du juge Monet, dissident en Cour d'appel. La tendance de la Cour suprême dans l'exercice de son pouvoir de révision est d'éviter d'intervenir lorsque la décision du tribunal administratif, erronée ou non, est raisonnable compte tenu de la législation pertinente. En présence d'une clause privative, le contrôle judiciaire ne peut toutefois s'exercer que sur des questions de compétence. La distinction entre l'erreur de droit et l'erreur de fait devient alors superflue: une conclusion ou une détermination déraisonnable, quelle qu'en soit la source, porte atteinte à la juridiction du tribunal et justifie l'intervention judiciaire. En l'espèce, l'arbitre n'a pas excédé sa juridiction. Son interprétation de l'art. 128 et des pouvoirs qu'il confère est non seulement raisonnable mais aussi exacte. Un arbitre qui agit en vertu de cet article a

imposed by the employer if, in his opinion, there is not a cause significant enough to warrant that penalty. As regards the award, it was not shown that in view of the facts considered by the arbitrator and his privileged position he rendered an unreasonable award by imposing a lesser penalty on appellant. A court may not agree with the arbitral award, but that does not authorize it to substitute its own opinion for that of an arbitrator who has acted in accordance with his enabling legislation and in a manner which is not "patently unreasonable".

In addition, the arbitral award is not void because insufficient reasons were given for it. Even if the decision was not very well formulated, the arbitrator's reasons are intelligible and it is possible to understand the basis for his decision. In any case, even assuming that the reasons were insufficient, this is an error of law apparent of the face of the record. Where there is a privative clause such errors are generally beyond judicial review.

Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227; *Teamsters Union, Local 938 v. Massicotte*, [1982] 1 S.C.R 710; *Alberta Union of Provincial Employees v. Board of Governors of Olds College*, [1982] 1 S.C.R. 923; *St. Luc Hospital v. Lafrance*, [1982] 1 S.C.R. 974; *C.L.R.B. v. Halifax Longshoremen's Association*, [1983] 1 S.C.R. 245; *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269; *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382; *Parkhill Bedding & Furniture Ltd. v. International Molders & Foundry Workers Union* (1961), 26 D.L.R. (2d) 589, considered; *Lafrance v. Commercial Photo Service Inc.*, [1980] 1 S.C.R. 536, distinguished; *Pearlman v. Keepers and Governors of Harrow School*, [1979] 1 All E.R. 365, not followed; *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768; *Jacmain v. Attorney General of Canada*, [1978] 2 S.C.R. 15; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Port Arthur Shipbuilding Co. v. Arthurs*, [1969] S.C.R. 85; *Newfoundland Association of Public Employees v. Attorney General of Newfoundland*, [1978] 1 S.C.R. 524; *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union*, [1980] 3 W.L.R. 318 (U.K.); *Re Racal Communications Ltd.*, [1980] 2 All E.R. 634, referred to.

le pouvoir de substituer au congédiement imposé par l'employeur une autre sanction si, dans son esprit, il n'existe pas une cause suffisamment importante pour justifier cette sanction. Pour ce qui est de la sentence, il n'a pas été démontré que, en regard des faits considérés par l'arbitre et de sa position privilégiée, il a rendu une sentence déraisonnable en imposant une sanction moindre à l'appelant. Une cour peut être en désaccord avec la sentence arbitrale, mais cela ne l'autorise pas à substituer son opinion à celle d'un arbitre qui a agi conformément à sa loi habilitante et d'une façon qui n'est pas manifestement déraisonnable.

En outre, la sentence arbitrale n'est pas nulle faute de motivation suffisante. Quoique la formulation de la sentence ne soit pas des plus heureuses, les motifs de l'arbitre sont intelligibles et permettent de comprendre les fondements de sa décision. De toute façon, même en tenant pour acquis que les motifs sont insuffisants, il s'agirait là d'une erreur de droit apparente à la lecture du dossier. Or, en présence d'une clause privative une telle erreur est généralement à l'abri du contrôle judiciaire.

Jurisprudence: arrêts examinés: *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *Syndicat des camionneurs, section locale 938 c. Massicotte*, [1982] 1 R.C.S. 710; *Alberta Union of Provincial Employees c. Conseil d'administration de Olds College*, [1982] 1 R.C.S. 923; *Hôpital St-Luc c. Lafrance*, [1982] 1 R.C.S. 974; *C.C.R.T. c. Association des débardeurs d'Halifax*, [1983] 1 R.C.S. 245; *Banque Nationale du Canada c. Union internationale des employés de commerce*, [1984] 1 R.C.S. 269; *Bibeault c. McCaffrey*, [1984] 1 R.C.S. 176; *Union internationale des employés des services, local no. 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382; *Parkhill Bedding & Furniture Ltd. v. International Molders & Foundry Workers Union* (1961), 26 D.L.R. (2d) 589; distinction faite avec l'arrêt: *Lafrance c. Commercial Photo Service Inc.*, [1980] 1 R.C.S. 536; arrêt non suivi: *Pearlman v. Keepers and Governors of Harrow School*, [1979] 1 All E.R. 365; arrêts mentionnés: *Heustis c. Commission d'énergie électrique du Nouveau-Brunswick*, [1979] 2 R.C.S. 768; *Jacmain c. Procureur général du Canada*, [1978] 2 R.C.S. 15; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220; *Port Arthur Shipbuilding Co. v. Arthurs*, [1969] R.C.S. 85; *Newfoundland Association of Public Employees c. Procureur général de Terre-Neuve*, [1978] 1 R.C.S. 524; *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union*, [1980] 3 W.L.R. 318 (U.K.); *Re Racal Communications Ltd.*, [1980] 2 All E.R. 634.

APPEAL from a judgment of the Quebec Court of Appeal, [1983] C.A. 129, which reversed a judgment of the Superior Court refusing to issue a writ of evocation. Appeal allowed.

Robert Décary, Germain Canuel and *Michel Canuel*, for the appellant.

Jean-Jacques Rainville and *Réjean Rioux*, for the respondent.

English version of the judgment of Beetz, Chouinard and Wilson JJ. delivered by

BEETZ J.—I have had the benefit of reading the opinion of my brother Lamer J. I adopt his description of the facts and pleadings and I refer also to his statement of the three points in issue.

On the first point, I consider as he does that the existence of good and sufficient cause of dismissal is not a prerequisite to the exercise of the arbitrator's jurisdiction, but is the very subject of his inquiry, and it is the principal question which the arbitrator must decide before making any other order he thinks proper and reasonable in view of all circumstances.

On the other two points, like Lamer J. I concur with the reasons of Monet J.A., dissenting in the Court of Appeal, *Control Data Canada Ltée v. Lalancette*, [1983] C.A. 129, at pp. 137-43.

I cannot add very much to the reasons of Monet J.A.

However, I feel I should make certain observations on the second point at issue.

According to the prior decisions of this Court, a patently unreasonable error by an administrative tribunal in interpreting a provision which it has to apply within the limits of its jurisdiction will in itself cause the tribunal to lose its jurisdiction. Reference may be made to these precedents in the case at bar, at least by analogy. But it is an analogy, considering the nature of the reproach addressed to the arbitrator by the majority of the Court of Appeal, at pp. 134 and 135 of the

POURVOI contre un arrêt de la Cour d'appel du Québec, [1983] C.A. 129, qui a infirmé un jugement de la Cour supérieure qui avait refusé la délivrance d'un bref d'évocation. Pourvoi accueilli.

Robert Décary, Germain Canuel et *Michel Canuel*, pour l'appelant.

Jean-Jacques Rainville et *Réjean Rioux*, pour l'intimée.

Le jugement des juges Beetz, Chouinard et Wilson a été rendu par

LE JUGE BEETZ—J'ai eu l'avantage de lire l'opinion de mon collègue le juge Lamer. Je m'en remets à son exposé des faits et des procédures et je réfère également à son exposé des trois questions en litige.

Sur la première question, je pense comme mon collègue que l'existence d'une cause juste et suffisante de congédiement n'est pas une condition préliminaire à l'exercice de la compétence de l'arbitre mais qu'il s'agit de l'objet même de son enquête et que c'est la question principale que l'arbitre doit décider avant de rendre toute autre décision qui lui paraît juste et raisonnable, compte tenu de toutes les circonstances.

Pour ce qui est des deux autres questions, je suis, comme mon collègue, en accord avec les motifs du juge Monet, dissident en Cour d'appel, *Control Data Canada Ltée c. Lalancette*, [1983] C.A. 129, aux pp. 137 à 143.

Je ne puis guère ajouter aux motifs du juge Monet.

Je crois cependant utile de faire quelques observations à propos de la deuxième question en litige.

Selon la jurisprudence de cette Cour, l'erreur manifestement déraisonnable commise par un tribunal administratif en interprétant une disposition qu'il est chargé d'appliquer dans les cadres de sa juridiction suffit à lui faire perdre juridiction. On peut vraisemblablement invoquer cette jurisprudence en l'espèce, au moins par analogie. Mais c'est une analogie, compte tenu de la nature du reproche que la majorité de la Cour d'appel adresse à l'arbitre aux pp. 134 et 135 des *Recueils*

with the greatest respect, that this is coming close to confusing the appellant's actions and those of the arbitrator. I am far from certain that I would have decided as the arbitrator did, but I also cannot say that the less severe penalty which is imposed instead of the ultimate penalty is, in view of all the circumstances, clearly abusive, flagrantly unjust, absurd, contrary to common sense, and lacking any basis in the evidence as a whole.

I would dispose of the appeal as my brother Lamer J. suggests.

English version of the reasons of McIntyre and Lamer JJ. delivered by

LAMER J.—This case raises the problem of the extent of judicial review of the decisions of administrative tribunals. Appellant Blanchard is asking this Court to restore the decision of a judge of the Superior Court of Quebec who refused to issue a writ of evocation against the mis en cause arbitrator. A majority of the Court of Appeal of Quebec reversed this judgment and directed that the writ be issued.

Appellant Blanchard had been employed by the respondent since July 1973 and was dismissed on April 30, 1980. The circumstances resulting in this dismissal are essentially not in dispute. It was admitted that in November 1979, while working in advertising and promotion for the respondent, Mr. Blanchard accepted two tickets for a two-week stay in the Bahamas offered by station CJFM in connection with a contract for the purchase of advertising air time. These tickets were given by Mr. Blanchard to his subordinate Mr. Ducharme. It appeared that on the latter's return, Messrs. Blanchard and Ducharme were told by an officer of the company that such actions were contrary to professional ethics and the company's policies.

In April 1980, in similar circumstances, Mr. Blanchard accepted two tickets for a two-week stay in Jamaica, which he decided to use himself. Shortly after, on April 30, 1980, Mr. Blanchard was dismissed. It may be noted from the evidence admitted by the arbitrator that relations between Control Data Canada Limited and Mr. Blanchard

grands égards, que c'est là venir près de confondre entre la conduite de l'appelant et celle de l'arbitre. Je suis loin d'être certain que j'aurais rendu la même décision que l'arbitre mais je suis également incapable d'affirmer que la pénalité moins sévère qu'il a imposée en remplacement de la pénalité ultime est, compte tenu de toutes les circonstances, clairement abusive, manifestement injuste, absurde, contraire au sens commun, et sans aucun fondement dans l'ensemble de la preuve.

Je disposerais du pourvoi comme le propose mon collègue le juge Lamer.

Les motifs des juges McIntyre et Lamer ont été rendus par

LE JUGE LAMER—Cette affaire soulève le problème de l'étendue du contrôle judiciaire sur les tribunaux administratifs. L'appelant Blanchard demande à cette Cour de rétablir la décision d'un juge de la Cour supérieure du Québec qui refuse l'émission d'un bref d'évocation contre l'arbitre mis en cause. La Cour d'appel du Québec a renversé ce jugement à la majorité et a ordonné l'émission du bref.

À l'emploi de l'intimée depuis juillet 1973, l'appelant Blanchard a été congédié par cette dernière le 30 avril 1980. Les circonstances ayant mené à ce congédiement ne sont pas sérieusement contestées. Essentiellement, il est reconnu que M. Blanchard, alors qu'il était affecté à la publicité et à la promotion pour l'intimée, a accepté en novembre 1979 deux billets pour un séjour de deux semaines aux Bahamas offerts par la station CJFM dans le cadre d'un contrat pour l'achat de publicité sur les ondes. Ces billets ont été remis par M. Blanchard à son subalterne M. Ducharme. Il appert qu'au retour de ce dernier, MM. Blanchard et Ducharme ont été avisés, par un officier de la compagnie, que de tels agissements étaient contraires à l'éthique professionnelle et aux politiques de la compagnie.

En avril 1980, dans des circonstances similaires, M. Blanchard acceptait deux billets pour un séjour de deux semaines en Jamaïque, qu'il décidait d'utiliser lui-même. Peu après, le 30 avril 1980, M. Blanchard était congédié. Il est à noter, selon la preuve retenue par l'arbitre, que les relations entre Control Data Canada Limitée et M. Blanchard

had deteriorated before the latter trip, as the result of a complaint by Mr. Blanchard to the Commission de surveillance de la langue française.

On May 25, 1980, appellant submitted a complaint to the Commission des normes du travail for dismissal without good and sufficient cause, under ss. 124 *et seq.* of the *Act respecting labour standards*, R.S.Q., c. N-1.1.

DIVISION III

RECOURSE AGAINST DISMISSALS NOT MADE FOR GOOD AND SUFFICIENT CAUSE

124. An employee credited with five years of uninterrupted service with one employer who believes that he has not been dismissed for a good and sufficient cause may present his complaint in writing to the Commission within 30 days of his dismissal, except where a remedial procedure, other than a recourse in damages, is provided elsewhere in this act, in another act or in an agreement.

125. Upon receiving the complaint, the Commission may appoint a person who shall endeavour to settle the complaint to the satisfaction of the interested parties.

The Commission may require from the employer a writing containing the reasons for dismissing the employee. It must provide a copy of this writing to the employee, on demand.

126. Where no settlement is reached within 30 days of the filing of the complaint with the Commission, the employee may apply to the Commission to have his complaint referred to arbitration.

The Commission shall appoint an arbitrator whose name appears on the list provided for in the second paragraph of section 78 of the Labour Code (chapter C-27).

127. Sections 100.1 to 100.9, 100.11 and 100.12, 100.14 to 100.16, 101, 101.3, 101.4, 139 and 140 of the Labour Code (chapter C-27) apply, *mutatis mutandis*, to the arbitrator so appointed.

128. Where the arbitrator considers that the employee has not been dismissed for good and sufficient cause, he may

(1) order the employer to reinstate the employee;

(2) order the employer to pay to the employee an indemnity up to a maximum equivalent to the wage he would normally have earned had he not been dismissed;

s'étaient détériorées avant ce dernier voyage, en raison du dépôt d'une plainte par M. Blanchard auprès de la Commission de surveillance de la langue française.

Le 25 mai 1980, l'appelant soumettait une plainte à la Commission des normes du travail pour congédiement sans cause juste et suffisante, en vertu des art. 124 et suiv. de la *Loi sur les normes du travail*, L.R.Q., chap. N-1.1.

SECTION III

RECOURS À L'ENCONTRE D'UN CONGÉDIEMENT FAIT SANS UNE CAUSE JUSTE ET SUFFISANTE

124. Le salarié qui justifie de cinq ans de service continu chez un même employeur et qui croit avoir été congédié sans une cause juste et suffisante peut soumettre sa plainte par écrit à la Commission dans les 30 jours de son congédiement, sauf si une procédure de réparation, autre que le recours en dommages-intérêts, est prévue ailleurs dans la présente loi, dans une autre loi ou dans une convention.

125. Sur réception de la plainte, la Commission peut nommer une personne qui tente de régler la plainte à la satisfaction des intéressés.

La Commission peut exiger de l'employeur un écrit contenant les motifs du congédiement du salarié. Elle doit, sur demande, fournir une copie de cet écrit au salarié.

126. Si aucun règlement n'intervient dans les 30 jours du dépôt de la plainte à la Commission, le salarié peut demander à la Commission de déférer sa plainte à l'arbitrage.

La Commission nomme un arbitre dont le nom apparaît à la liste prévue par le deuxième alinéa de l'article 78 du Code du travail (chapitre C-27).

127. Les articles 100.1 à 100.9, 100.11 et 100.12, 100.14 à 100.16, 101, 101.3 et 101.4 et 139 et 140 du Code du travail s'appliquent à l'arbitre ainsi nommé, en faisant les changements nécessaires.

128. Si l'arbitre juge que le salarié a été congédié sans cause juste et suffisante, il peut:

1° ordonner à l'employeur de réintégrer le salarié;

2° ordonner à l'employeur de payer au salarié une indemnité jusqu'à un maximum équivalant au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;

(3) render any other decision he believes fair and reasonable, taking into account all the circumstances of the matter.

However, in the case of a domestic, the arbitrator may only order the payment to the employee of an indemnity corresponding to the wage and other benefits of which he was deprived due to dismissal up to a maximum period of three months.

129. The arbitration award must state the grounds on which it is based and be rendered in writing.

(Emphasis added.)

In an arbitral award on February 4, 1982 the mis en cause Jean-Paul Lalancette, relying on s. 128 of the Act, substituted for the dismissal a suspension without pay for four months and directed that Mr. Blanchard be reinstated retroactively to August 30, 1980, that is, the date of the suspension's expiry. In his reasons, the arbitrator reviewed the facts and the evidence presented by the parties, and concluded:

[TRANSLATION] Accordingly, there was insubordination by the complainant in view of the warning given by Mr. Jetté a year earlier; but once again, I am not persuaded that he was dismissed because of that, but rather because of all the events occurring in February, March and April 1980.

If we consider the three (3) events in turn, namely the reduction in performance, the complaint to the Commission and the acceptance of a trip to Jamaica, none of these events is a ground for dismissal in itself. Even if they were to be taken as a whole, I do not think that they constitute a ground for dismissal, as the demotion was to some extent negotiated by the two (2) parties; so far as the complaint is concerned, it was the complainant's right to make it even if it was an unfortunate move: he could perhaps have acted differently; and that leaves the trip to Jamaica.

Accordingly, I cannot conclude there should have been a dismissal, even though some penalty was required, and in the circumstances the arbitrator makes use of s. 128(3) of the Labour Standards Act, namely:

> "(3) render any other decision he believes fair and reasonable, taking into account all the circumstances of the matter."

WHEREAS complainant has no previous disciplinary record;

WHEREAS the employee's performance was excellent until early 1980;

3° rendre toute autre décision qui lui paraît juste et raisonnable, compte tenu de toutes les circonstances de l'affaire.

Cependant dans le cas d'un domestique, l'arbitre ne peut qu'ordonner le paiement au salarié d'une indemnité correspondant au salaire et aux autres avantages dont l'a privé le congédiement pour une période maximum de trois mois.

129. La sentence arbitrale doit être motivée et rendue par écrit.

(C'est moi qui souligne.)

Dans une décision arbitrale rendue le 4 février 1982, le mis en cause Jean-Paul Lalancette, s'appuyant sur l'art. 128 de la Loi, substituait au congédiement une suspension sans paye de quatre mois et ordonnait la réintégration de M. Blanchard avec effet rétroactif au 30 août 1980, soit à l'expiration de la suspension. Dans ses motifs, l'arbitre passe en revue les faits et la preuve des parties et conclut:

Il y a donc eu insubordination de la part du plaignant, en regard de l'avertissement fait par Monsieur Jetté, un an auparavant, mais je ne suis pas convaincu, encore une fois, que c'est à cause de cela qu'il a été congédié, mais plutôt à cause de tous les événements survenus au cours des mois de février, mars et avril 1980.

Si l'on examine l'un après l'autre les trois (3) événements, soit la baisse de rendement, la dénonciation à la Commission de Surveillance et l'acceptation d'un voyage en Jamaïque, aucun de ces événements en soi n'est un motif de congédiement. Même si l'on voulait les prendre comme un tout, je ne crois pas qu'il y ait là motif à congédiement, car la rétrogradation a été, en quelque sorte, négociée par les deux (2) parties; quant à la plainte, c'était le droit du plaignant de la faire, même s'il a été malhabile; il aurait peut-être pu faire autrement; reste donc le voyage en Jamaïque.

Donc, je ne peux pas conclure au congédiement, même s'il y a lieu à sanction et dans les circonstances, l'Arbitre se prévaut du troisième (3ième) paragraphe de l'article 128 de la Loi des Normes, à savoir:

> «3° rendre toute autre décision qui lui paraît juste et raisonnable, compte tenu de toutes les circonstances de l'affaire.»

CONSIDÉRANT que le plaignant n'a pas de dossier disciplinaire;

CONSIDÉRANT que le rendement de l'employé a été excellent jusqu'au début de 1980;

IN VIEW OF the events of February, March and April 1980;

WHEREAS disciplinary action was necessary, but dismissal was not appropriate;

WHEREAS in light of the offence committed;

WHEREAS it seems fair and reasonable to substitute for the dismissal a suspension of complainant without pay;

FOR ALL THESE REASONS, THE ARBITRATOR:

1. DIRECTS that complainant be rehired from the date on which this decision is received;

2. SUBSTITUTES for the dismissal of April 30, 1980 a suspension without pay for four (4) months, that is from April 30 to August 30, 1980;

3. DIRECTS the employer to pay complainant a wage of $410.00 bi-weekly, beginning August 30, 1980 until the date he is re-hired, plus the average salary increases paid to other employees, if any, and deducting for the four (4) weeks of salary paid, referred to in the letter of April 30, 1980, P-2, namely the salary paid up to May 2, 1980;

4. DECIDES that the whole shall bear interest at the legal rate, as specified in s. 100.15 (s. 88o of the Labour Code) referred to in s. 127 of the Labour Standards Act;

5. CONTINUES the rights and privileges of complainant as if he had not been dismissed, except for the suspension period;

6. DOES NOT AWARD any commission to complainant, pursuant to the employer's commissions plan, as complainant did not work;

7. RESERVES JURISDICTION to determine the amount owed under the provisions of s. 127 of the Labour Standards Act and 101.4 (89d of the Labour Code).

By a motion for a writ of evocation, respondent asked the Superior Court to quash the arbitrator's decision on three grounds:

—insufficient reasons were given for the decision;
—misinterpretation of s. 128 by the arbitrator;

—the arbitral award was unreasonable.

On April 5, 1982 Bisaillon J. dismissed the motion on the bench. In his opinion, the reasons given for the decision were quite sufficient since [TRANSLATION] "the conclusion arrived at by the

CONSIDÉRANT les événements de février, mars et avril 1980;

CONSIDÉRANT qu'il y a lieu à mesure disciplinaire, mais qu'il n'y a pas lieu à congédiement;

CONSIDÉRANT qu'en regard de la faute commise;

CONSIDÉRANT qu'il m'apparaît juste et raisonnable de substituer au congédiement une suspension sans paye au plaignant;

POUR TOUTES CES RAISONS, L'ARBITRE:

1. ORDONNE le réembauchage du plaignant, à compter de la réception de la présente décision;

2. SUBSTITUE au congédiement du 30 avril 1980, une suspension sans paye de quatre (4) mois, soit du 30 avril 1980 au 30 août 1980;

3. ORDONNE à l'Employeur de verser au plaignant un salaire de $410.00 par deux (2) semaines (bi-weekly), à compter du 30 août 1980 et cela jusqu'à la date de son réembauchage, plus les augmentations moyennes de salaires versées aux autres employés, s'il y en a eu, déductions faites, cependant, des quatre (4) semaines de salaires payées, dont il est question à la lettre du 30 avril 1980, P-2, soit le salaire payé jusqu'au 2 mai 1980;

4. DÉCIDE le tout portant intérêts au taux légal, comme le veut l'article 100.15 (article 88 o du Code du Travail) rapporté à l'article 127 de la Loi des Normes;

5. MAINTIENT les droits et privilèges du plaignant, comme s'il n'avait pas été congédié, sauf pour la période de suspension;

6. N'ACCORDE PAS, cependant, une commission quelconque au plaignant, en regard du plan de commissions de l'Employeur, le plaignant n'ayant pas travaillé;

7. SE RÉSERVE JURIDICTION quant à la détermination du montant dû et cela en vertu des dispositions de l'article 127 de la Loi des Normes et 101.4 (89 d du Code du Travail).

Par une requête pour obtenir l'émission d'un bref d'évocation, l'intimée a demandé à la Cour supérieure d'annuler la décision de l'arbitre pour trois motifs:

—l'insuffisance de la motivation de la décision;
—la mauvaise interprétation de l'art. 128 par l'arbitre;
—le caractère déraisonnable de la sentence arbitrale.

Le 5 avril 1982, le juge Bisaillon rejette la requête séance tenante. À son avis, la motivation de la décision est amplement suffisante puisque «la conclusion à laquelle en est arrivé l'arbitre découle

arbitrator proceeds logically from the analysis made by him of the evidence".

On section 128, respondent argued that the arbitrator's powers are alternative and not cumulative. According to this interpretation, in other words, the arbitrator could not both order that the employee be reinstated and suspended for four months. Bisaillon J. dismissed this argument, observing that the wording of s. 128 does not require such an interpretation, and that moreover, even if the arbitrator erred in this regard, his error was "intra-jurisdictional" and so excluded from judicial review by the privative clause.

On the third ground, Bisaillon J. stated:

[TRANSLATION] It was then argued that the arbitrator committed an abuse of authority by making an unreasonable award. What is reasonable and unreasonable is a very elastic concept, but as the argument was that there had been an abuse of authority, the error must amount to an abuse of authority of such a nature as to cause a flagrant injustice ([1977] 2 S.C.R. 568). I see no abuse of authority here, first, in the conclusion arrived at by the arbitrator that the action required a penalty and second, in the remedial measures adopted by him, all of which was within his jurisdiction. It might be argued that his award was too harsh, or that it was not harsh enough, but the arbitrator has sole control of the degree of harshness. That is his function, and if it appears to the Court that his award was too harsh or not harsh enough, the Court cannot allow evocation solely in order to revise it in one direction or the other and to substitute its own concept of harshness.

(Case of Appeal, at p. 37)

On appeal, the Court was divided, [1983] C.A. 129. Turgeon J.A., writing for himself and for Malouf J.A., set aside the judgment of the Superior Court. After reviewing the decisions of this Court on disciplinary arbitration (*Port Arthur Shipbuilding Co. v. Arthurs*, [1969] S.C.R. 85; *Newfoundland Association of Public Employees v. Attorney General of Newfoundland*, [1978] 1 S.C.R. 524, and *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768), Turgeon J.A. held that s. 128 expressly confers on the arbitrator a power to substitute some other penalty for that chosen by the employer, if this is justified by the circumstances. He therefore dismissed the argument of Control Data Canada

logiquement de l'analyse de la preuve qu'il a faite».

Quant à l'art. 128, l'intimée soutenait que les pouvoirs de l'arbitre sont alternatifs et non cumulatifs. Autrement dit, selon cette interprétation, l'arbitre ne pouvait en même temps ordonner la réintégration de l'employé et sa suspension pour quatre mois. Le juge Bisaillon rejette cet argument en indiquant que le texte de l'art. 128 n'appelle pas une telle interprétation; au surplus, même si l'arbitre avait erré à cet égard, son erreur serait «intra-juridictionnelle» et donc exclue du contrôle judiciaire par la clause privative.

Sur le troisième motif, le juge Bisaillon déclare:

On prétend ensuite que l'arbitre a commis un abus de pouvoir en rendant une décision déraisonnable. Mais les mots raisonnables et déraisonnables sont des mots bien élastiques, mais comme on parle d'abus de pouvoir, l'erreur doit équivaloir à un abus de pouvoir de nature à entraîner une injustice flagrante (no. 1977 (2) R.C.S. 568). Ici je ne vois pas d'abus de pouvoir, premièrement dans la conclusion à laquelle en était arrivé l'arbitre à l'effet que le geste méritait sanction et deuxièmement, dans les mesures correctives qu'il a adoptées, qu'il a toutes rendues dans les cadres de sa juridiction. On peut prétendre que sa sentence est trop sévère, on peut prétendre qu'elle n'est pas assez sévère, mais c'est lui seul l'arbitre qui est maître de sa sévérité. Il est là pour cela et s'il apparaît à la Cour que sa sentence est trop sévère ou pas assez sévère, la Cour ne peut permettre une évocation dans le seul but de la réviser dans un sens ou dans l'autre et de lui substituer son propre concept de sévérité.

(Dossier d'appel, à la p. 37.)

En appel, la Cour s'est divisée, [1983] C.A. 129. Le juge Turgeon, écrivant pour lui-même et le juge Malouf, a renversé le jugement de la Cour supérieure. Après avoir analysé la jurisprudence de cette Cour en matière d'arbitrage disciplinaire (*Port Arthur Shipbuilding Co. v. Arthurs*, [1969] R.C.S. 85; *Newfoundland Association of Public Employees c. Procureur général de Terre-Neuve*, [1978] 1 R.C.S. 524, et *Heustis c. Commission d'énergie électrique du Nouveau-Brunswick*, [1979] 2 R.C.S. 768), le juge Turgeon a décidé que l'art. 128 confère expressément à l'arbitre le pouvoir de substituer une autre sanction à celle choisie par l'employeur, si les circonstances le justifient. Il a donc rejeté l'argument de Control

Limited that the arbitrator had exceeded his jurisdiction by amending the penalty in the case at bar.

However, Turgeon J.A. held that the arbitrator had exceeded his jurisdiction by making an unreasonable award. Emphasizing the importance of the relationship of trust between an employer and his employee, Turgeon J.A. observed that [TRANSLATION] "if an employee's actions are likely to shake the trust an employer must have in him, it is not surprising that the latter decides to dispense with his services".

Applying these principles, therefore, Turgeon J.A. held that the acceptance of bribes by Mr. Blanchard constituted very serious misconduct for which the employer was justified in dismissing him.

As this misconduct is in addition a criminal offence, Turgeon J.A. concluded, at p. 134, that the arbitrator had lent his approval to unlawful acts, and that:

[TRANSLATION] The arbitrator committed an excess of jurisdiction by giving the facts an unreasonable interpretation: his award was totally lacking in reality and contrary to public order. In the case at bar, though recognizing that there had been insubordination and that this insubordination could cause conflicts of interest, the arbitrator directed that the mis en cause be reinstated subject merely to a suspension.

Additionally, Turgeon J.A. considered that the arbitrator's reasons were only an expression of opinion and that therefore the decision [TRANSLATION] "could be regarded as void and rendered entirely without jurisdiction".

Monet J.A. agreed with the majority on the interpretation of s. 128, but dissented on the other two points at issue. Noting that the *Act respecting labour standards* changes the rules of the game regarding dismissals without good and sufficient cause and gives the arbitrator very wide powers, Monet J.A. concluded that the employer had not shown that the award was unreasonable. He noted the existence of the privative clause in s. 139 of the *Labour Code*, R.S.Q. 1977, c. C-27, which is made applicable to an arbitrator by s. 127 of the Act, he emphasized the advantage which the arbitrator

Data Canada Limitée voulant que l'arbitre ait excédé sa juridiction en modifiant la sanction en l'espèce.

Toutefois, le juge Turgeon a jugé que l'arbitre avait excédé sa juridiction en rendant une sentence déraisonnable. Insistant sur l'importance de la relation de confiance entre un employeur et son employé, le juge Turgeon a indiqué que «dès que les agissements d'un salarié sont susceptibles d'entamer la confiance que l'employeur doit avoir en lui, il n'est pas surprenant que ce dernier décide de se départir de ses services».

Dès lors, appliquant ces principes, le juge Turgeon a déclaré que l'acceptation de «pots-de-vin» par M. Blanchard constituait une faute très grave pour laquelle l'employeur était justifié de le congédier.

Considérant que cette faute est au surplus un acte criminel, le juge Turgeon a conclu à la p. 134 que l'arbitre avait cautionné des actes illicites et que:

C'est par une interprétation déraisonnable des faits de l'affaire que l'arbitre a commis un excès de juridiction: sa décision manque totalement de réalisme et est contraire à l'ordre public. Dans le présent cas, l'arbitre, tout en reconnaissant qu'il y a eu insubordination, que cette insubordination pouvait causer des conflits d'intérêt, ordonne la réintégration du mis en cause assortie d'une simple suspension.

Au surplus, le juge Turgeon a estimé que les motifs de l'arbitre n'étaient que l'expression d'une opinion et qu'en conséquence, la décision «pourrait être considérée comme nulle et rendue en l'absence de toute juridiction».

D'accord avec la majorité quant à l'interprétation de l'art. 128, le juge Monet a exprimé son désaccord en ce qui concerne les deux autres questions en litige. Rappelant que la *Loi sur les normes du travail* change les règles du jeu relativement aux congédiements sans cause juste et suffisante et donne des pouvoirs très larges à l'arbitre, le juge Monet a conclu que l'employeur n'avait pas démontré le caractère déraisonnable de la sentence. Soulignant l'existence de la clause privative de l'art. 139 du *Code du travail*, L.R.Q. 1977, chap. C-27, rendue applicable à l'arbitre par l'art.

has in seeing and hearing the witnesses, and he went on to say (at p. 142):

[TRANSLATION] Was it a resentment or a sense of honesty which led appellant to dismiss the mis en cause? In my view, the function of this Court in hearing this appeal is not to decide this question. Under the statute which is applicable, the powers of the arbitrator are autonomous, and in deciding not to simply vacate the dismissal he was exercising those powers. Similarly, he thought it fair to substitute a non-drastic disciplinary measure, that is, one which in light of his weighing of the evidence as a whole seemed fair and reasonable to him. His decision was not on the legality of the dismissal, but on whether the mis en cause was right in concluding that he had been unfairly treated by being dismissed. Surely this was his function, as specified by the Act.

After dismissing the second argument, Monet J.A. concluded on the final point at issue that sufficient reasons were given for the arbitral award and [TRANSLATION] "that it was even in accordance with the generally accepted principles in such matters".

With respect, I concur in the opinion of Monet J.A. and I conclude that the Court of Appeal erred in setting aside the decision of Bisaillon J. and authorizing that a writ of evocation be issued.

As I see them, the questions at issue are:

(a) in light of the respondent's factum is the existence of "good and sufficient cause for dismissal" a prerequisite for the arbitrator to exercise his jurisdiction?

(b) in light of the powers conferred on him by s. 128, did the arbitrator exceed his jurisdiction by making an award "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?" (*Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, at p. 237—the *C.U.P.E.* case.)

(c) in view of the requirement in s. 129 of the Act that the arbitral award be supported by reasons, should this Court intervene and quash

127 de la Loi, le juge Monet insiste sur l'avantage que possède l'arbitre de voir et d'entendre les témoins et déclare (à la p. 142):

Est-ce le ressentiment ou le sens de la loyauté qui a amené l'appelante à congédier le mis en cause? À mon avis, saisie du présent pourvoi, notre Cour n'a pas pour fonction de statuer sur cette question. Dans le cadre de la loi qui nous intéresse, l'arbitre a des pouvoirs autonomes. C'est d'ailleurs dans l'exercice de ces pouvoirs qu'il a décidé de ne pas annuler purement et simplement le congédiement. De la même façon, il a jugé équitable de substituer une mesure disciplinaire non draconienne, c'est-à-dire celle qui, compte tenu de son appréciation de l'ensemble de la preuve, était selon lui juste et raisonnable. Il n'a pas statué sur la légalité du congédiement mais sur la question de savoir si le mis en cause a raison de considérer qu'il a été traité injustement en étant congédié. N'est-ce pas là son rôle, tel que le veut la loi?

Après avoir rejeté le deuxième moyen, le juge Monet conclut, sur le dernier point en litige, que la sentence arbitrale est suffisamment motivée et «même qu'elle obéit aux préceptes généralement admis en la matière».

Avec respect, je partage l'avis du juge Monet et j'en conclus que la Cour d'appel a erré en renversant la décision du juge Bisaillon et en autorisant l'émission d'un bref d'évocation.

Les questions en litige, telles que je les vois, sont:

a) En regard du mémoire de l'intimée, l'existence d'une «cause juste et suffisante de congédiement» est-elle une condition préliminaire à l'exercice de la compétence de l'arbitre?

b) Compte tenu des pouvoirs qui lui sont conférés par l'art. 128, l'arbitre a-t-il excédé sa juridiction en rendant une sentence «déraisonnable au point de ne pouvoir rationnellement s'appuyer sur la législation pertinente et d'exiger une intervention judiciaire?» (*Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, à la p. 237—l'arrêt *S.C.F.P.*)

c) Compte tenu de l'obligation de motiver la sentence arbitrale énoncée à l'art. 129 de la Loi, cette Cour doit-elle intervenir et déclarer

the award if it is not supported by sufficient reasons?

Before answering these three questions, it is worth mentioning again that s. 127 of the Act makes the arbitrator subject to the provisions of s. 139 of the *Labour Code*, which on April 5, 1982 (the day of the judgment in the Superior Court) provided that:

139. No action under article 33 of the Code of Civil Procedure, or extraordinary recourse within the meaning of such code, or injunction shall be exercised against any council of arbitration, court of arbitration, arbitrator on grievances, certification agent, labour commissioner or the Court by reason of any act, proceeding or decision relating to the exercise of their functions.

Of course, as a result of the decision of this Court in *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, such a clause can in no way impede judicial review regarding questions of jurisdiction. However, it is recognized that these clauses bar judicial review of any question other than that of jurisdiction. Further, on May 11, 1982, subsequent to the decision by the Superior Court in the case at bar, the Quebec legislator amended s. 139 of the Code to bring it in line with this case law:

139. Except on a question of jurisdiction, no extraordinary recourse contemplated in articles 834 to 850 of the Code of Civil Procedure shall be exercised and no injunction granted against any council of arbitration, court of arbitration, certification agent, labour commissioner or the Court acting in their official capacities.

It is therefore necessary to bear in mind the effect of the old s. 139 as limited by decisions of this Court. That provision clearly indicated the intention of the legislator to make the arbitrator responsible for deciding completely and finally the questions submitted to him by the Act. This deference is undoubtedly based both on the respect of the legislator for the arbitrator's expert knowledge and on the importance of ensuring a quick settlement of labour law disputes.

As Dickson J., as he then was, observed in similar circumstances in *Heustis v. New Brunswick Electric Power Commission*, *supra*, at p. 781:

la sentence nulle faute de motivation suffisante?

Avant de répondre à ces trois questions, il importe de rappeler encore une fois que l'art. 127 de la Loi rend applicable à l'arbitre les dispositions de l'art. 139 du *Code du travail* qui prévoyait le 5 avril 1982 (au jour du jugement en Cour supérieure) que:

139. Nulle action en vertu de l'article 33 du Code de procédure civile, ni aucun recours extraordinaire au sens de ce code, ni aucune injonction ne peuvent être exercés contre un conseil d'arbitrage, un tribunal d'arbitrage, un agent d'accréditation, un commissaire du travail ou le tribunal en raison d'actes, d'actes de procédure ou de décisions se rapportant à l'exercice de leurs fonctions.

Bien entendu, en raison de la décision de cette Cour dans *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220, une telle clause ne peut aucunement empêcher le contrôle judiciaire en ce qui concerne les questions de compétence. Toutefois, il est reconnu que ces clauses empêchent l'intervention judiciaire dans des questions autres que des questions de compétence. D'ailleurs le 11 mai 1982, postérieurement à la décision en Cour supérieure dans la présente affaire, le législateur québécois modifiait l'art. 139 du Code en le rendant conforme à cette jurisprudence:

139. Sauf sur une question de compétence, aucun des recours extraordinaires prévus aux articles 834 à 850 du Code de procédure civile ne peut être exercé ni aucune injonction accordée contre un conseil d'arbitrage, un tribunal d'arbitrage, un agent d'accréditation, un commissaire du travail ou le tribunal agissant en leur qualité officielle.

On doit donc garder à l'esprit l'effet de l'ancien art. 139, tel que restreint par notre jurisprudence. Cette disposition indique clairement l'intention du législateur de laisser à l'arbitre le soin de décider de façon complète et définitive les questions qui lui sont soumises par la Loi. Cette déférence repose, on ne peut en douter, tant sur le respect du législateur pour l'expertise de l'arbitre que sur l'importance de la célérité du règlement des litiges en matière de droit du travail.

Comme le soulignait le juge Dickson, alors juge puîné, dans un contexte similaire dans l'affaire *Heustis c. Commission d'énergie électrique du Nouveau-Brunswick*, précitée, à la p. 781:

There is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final, and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained.

(Emphasis added.)

The courts must respect this choice made by the legislator and be extremely cautious in exercising their power of review. **They should only intervene** if they find a genuine excess of jurisdiction by the arbitrator, not simply where they disagree with his findings. Judicial review may only be exercised here on questions of jurisdiction.

It is in keeping with this approach and bearing these observations in mind that I now turn to a solution of the three questions stated above.

(A) The problem of the prerequisite to the exercise of the arbitrator's jurisdiction

In this Court, respondent argued that the existence of a "good and sufficient cause for dismissal" is a prerequisite to the exercise of the arbitrator's power to "render any other decision he believes fair and reasonable". Respondent maintained that s. 128 provides for a procedure which has two distinct stages: first, the arbitrator must decide whether good and sufficient cause exists for the dismissal. If such a cause exists, the arbitrator has no jurisdiction to intervene. If such a cause does not exist, the arbitrator may exercise the powers conferred on him by s. 128. In other words, respondent argued that since the arbitrator committed an error as to the existence of good and sufficient cause, he conferred on himself a jurisdiction which he did not have under the Act.

This argument by respondent is based on the well-known theory in administrative law of so-called "collateral" or "preliminary" questions, according to which an administrative tribunal cannot err on these questions because any error

Une très bonne raison de principe explique l'hésitation judiciaire à contrôler les arbitres dans l'exercice de leurs pouvoirs. Le but de l'arbitrage des griefs en vertu de la Loi est d'assurer un règlement rapide, définitif et exécutoire des différends résultant de l'interprétation et de l'application d'une convention collective ou d'une mesure disciplinaire imposée par l'employeur, le tout dans le but de maintenir la paix.

(C'est moi qui souligne.)

Les cours doivent respecter ce choix du législateur et être extrêmement prudentes dans l'exercice de leur pouvoir de révision. Elles ne doivent intervenir que si elles trouvent un véritable excès de juridiction de la part de l'arbitre et non simplement si elles se trouvent en désaccord avec ses conclusions. Le contrôle judiciaire ne peut s'exercer ici que sur des questions de compétence.

C'est en conformité avec cette attitude et avec ces réflexions à l'esprit que j'aborde maintenant la solution aux trois questions que j'ai énoncées plus haut.

A) Le problème de la condition préliminaire à l'exercice de la compétence de l'arbitre

Devant cette Cour, l'intimée a plaidé que l'existence d'une «cause juste et suffisante de congédiement» est une condition préliminaire à l'exercice du pouvoir de l'arbitre de «rendre toute autre décision qui lui paraît juste et raisonnable». L'intimée soutient que l'art. 128 prévoit une procédure en deux étapes distinctes: l'arbitre doit d'abord décider s'il existe une cause juste et suffisante de congédiement. Si une telle cause existe, l'arbitre est sans compétence pour intervenir. Si une telle cause n'existe pas, l'arbitre peut exercer les pouvoirs qui lui sont conférés par l'art. 128. En d'autres termes, selon les prétentions de l'intimée, puisque l'arbitre a commis une erreur quant à l'existence d'une cause juste et suffisante, il s'est conféré une juridiction que la loi ne lui accorde pas.

Cet argument de l'intimée est fondé sur la théorie bien connue en droit administratif des questions dites «collatérales» ou «préliminaires» et qui veut que sur ces questions, le tribunal administratif ne puisse errer parce que toute erreur équivaudrait à

would amount to assuming a jurisdiction which is different from what the legislator intended to confer on it.

In *Jacmain v. Attorney General of Canada*, [1978] 2 S.C.R. 15, Dickson J., dissenting, properly observed that this theory places the superior courts in an extremely difficult position (at p. 29):

> The intractable difficulty is this. It is hard to conceive that a legislature would create a tribunal with a limited jurisdiction and yet bestow on such tribunal an unlimited power to determine the extent of its jurisdiction. On the other hand, if the correctness of every detail upon which the jurisdiction of the tribunal depends is to be subject to re-trial in the Courts and the opinion of a judge substituted for that of the tribunal, then the special experience and knowledge of the members of such a tribunal and the advantage they have of hearing and seeing the witnesses may be lost. The power to review jurisdictional questions provides the Courts with a useful tool to ensure that tribunals deal with the type of issues which the Legislature intended. It enables the Courts to check unlawful attempts at usurpation of power. But the Courts, in my opinion, should exercise restraint in declaring a tribunal to be without jurisdiction when it has reached its decision honestly and fairly and with due regard to the material before it. The Court should allow some latitude in its surveillance of jurisdictional findings. It should ask whether there is substantial evidence for decisions of fact and a rational basis for decisions of law, or mixed decisions of fact and law. The error must be manifest. The role of the Court is one of review, not trial *de novo*.

Professor Paul P. Craig, in his text *Administrative Law*, London, Sweet & Maxwell, 1983, at pp. 299 *et seq.*, also emphasizes that the great weakness of the preliminary questions theory is the absence of any coherent test for distinguishing what is in fact preliminary.

To use the writer's words, at p. 302:

> The enabling statute always, explicitly or implicitly, states, *if* X_1, X_2, X_3 exist, you may or shall do [Y_1, Y_2, Y_3].

s'attribuer une juridiction différente de celle que le législateur entendait lui conférer.

Dans l'affaire *Jacmain c. Procureur général du Canada*, [1978] 2 R.C.S. 15, le juge Dickson soulignait avec justesse, en dissidence, que cette théorie place les juridictions supérieures dans une position extrêmement difficile (à la p. 29):

> La grande difficulté est la suivante: il est difficile de concevoir que le législateur puisse créer un tribunal à compétence limitée et qu'en même temps, il lui accorde un pouvoir illimité pour fixer l'étendue de sa compétence. Par contre, si l'exactitude de chaque détail dont dépend la compétence du tribunal est susceptible d'examen par une juridiction supérieure et si l'opinion d'un seul juge est alors substituée à celle du tribunal, on peut perdre le bénéfice de l'expérience et des connaissances spéciales des membres de ce tribunal et l'avantage qu'ils ont d'entendre et de voir les témoins. Le pouvoir de contrôle sur les questions de juridiction fournit aux cours de justice un bon outil pour s'assurer que les tribunaux connaissent du genre de litiges que le législateur leur a confié. Il leur permet de contrôler les tentatives d'usurpation de pouvoir. Mais, à mon avis, les cours de justice devraient hésiter à déclarer un tribunal incompétent quand sa décision est honnête et équitable et qu'il a correctement pris en considération la documentation qui lui a été soumise. Dans l'exercice de son contrôle sur les conclusions en matière de compétence, la Cour doit laisser place à une certaine latitude. Elle doit se demander si la preuve est suffisante pour étayer les conclusions de fait et si les conclusions de droit ou les conclusions mixtes de fait et de droit sont logiques. L'erreur doit être manifeste. La Cour a un rôle de révision; elle ne doit pas faire un nouveau procès.

Le professeur Paul P. Craig, dans son livre *Administrative Law*, London, Sweet & Maxwell, 1983, aux pp. 299 et suiv. souligne lui aussi que la grande faiblesse de la théorie des questions préliminaires est l'absence de principe cohérent pour distinguer ce qui est préliminaire de ce qui ne l'est pas.

Pour emprunter les mots de cet auteur, à la p. 302:

> [TRADUCTION] La loi habilitante prescrit toujours, explicitement ou implicitement, *si* X_1, X_2, X_3 existent, vous pouvez ou devez faire [Y_1, Y_2, Y_3].

It is clear that all the "X" conditions can to some extent be categorized as prerequisites to the exercise of the "Y" powers. In my view, there is no logical reason for distinguishing between condition X_1 and condition X_2 and concluding that one is preliminary and the other is not. Thus, if all the "X" conditions are said to be preliminary, the administrative tribunal has lost the capacity to err: it can only exercise the power conferred on it by the law if it is *right* in its interpretation of what is meant by X_1, X_2 and X_3. Ultimately, the distinction between an appeal and judicial review is somewhat fine. This distinction becomes non-existent if we also adopt the theory that the administrative tribunal cannot err as to the content of powers Y_1, Y_2 and Y_3, since it is then exercising a power that the law does not confer on it.

In short, it is important not to distort the superintending power of the superior courts, and to use the [TRANSLATION] "theory of prerequisites to the exercise of jurisdiction" with a great deal of caution. As Dickson J. observed in the *C.U.P.E.* case (at p. 233):

> The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

The current tendency is thus to limit the concept of a "preliminary question" as far as possible. Even those who favour retaining this concept limit it to questions concerning jurisdiction in the strict sense, of the initial power to proceed with an inquiry (*C.U.P.E.*, *supra*, at p. 234, and *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, at p. 389). These questions are identified by the fact that they fall outside the limits of the enabling legislation itself, and are not usually within the area of expertise of the administrative tribunal (*Parkhill Bedding & Furniture Ltd. v. International Molders & Foundry Workers Union* (1961), 26 D.L.R. (2d) 589).

Whether we reject the theory of preliminary questions or apply it in its limited form as is currently being done, I think it is clear that the

Or, il est clair que toutes les conditions «X» peuvent, dans une certaine mesure être qualifiées de conditions préliminaires à l'exercice des pouvoirs «Y». Il n'existe, à mon avis, pas de raison logique de distinguer entre la condition X_1 et la condition X_2 et déclarer l'une préliminaire et l'autre pas. Dès lors, si toutes les conditions X sont dites préliminaires, le tribunal administratif a perdu la faculté de se tromper: il ne peut exercer le pouvoir qui lui est conféré par la loi que s'il a *raison* quant à son interprétation de ce que X_1, X_2 et X_3 veulent dire. Au bout du compte, la distinction entre l'appel et le contrôle judiciaire est assez mince. Cette distinction devient inexistante si on retient aussi la théorie voulant que le tribunal administratif ne peut se tromper sur le contenu des pouvoirs Y_1, Y_2 et Y_3 puisqu'il exerce alors un pouvoir que la loi ne lui confère pas.

Bref, il importe de ne pas dénaturer le pouvoir de surveillance des juridictions supérieures et d'utiliser la «théorie des conditions préalables à l'exercice de la compétence» avec beaucoup de circonspection. Ainsi que le disait le juge Dickson dans l'arrêt *S.C.F.P.* (à la p. 233):

> À mon avis, les tribunaux devraient éviter de qualifier trop rapidement un point de question de compétence, et ainsi de l'assujettir à un examen judiciaire plus étendu, lorsqu'il existe un doute à cet égard.

La tendance actuelle est donc de restreindre autant que possible la notion de «question préliminaire». Même ceux qui favorisent le maintien de cette notion la limitent aux questions touchant à la compétence dans le sens strict du pouvoir initial de procéder à l'enquête (l'arrêt *S.C.F.P.*, précité, à la p. 234; *Union internationale des employés des services, local nº 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382, à la p. 389). On identifie ces questions par le fait qu'elles sont des questions qui sont en dehors des limites de la loi habilitante elle-même et qui ne relèvent pas normalement de l'expertise du tribunal administratif (*Parkhill Bedding & Furniture Ltd. v. International Molders & Foundry Workers Union* (1961), 26 D.L.R. (2d) 589).

Qu'on rejette la théorie des questions préliminaires ou qu'on l'applique dans son acception restreinte comme le veut la tendance actuelle, il me

existence of good and sufficient cause is not a prerequisite to the exercise of the arbitrator's jurisdiction. On the contrary, it is the very subject of the inquiry. It is the only question which the arbitrator must decide before making the order he thinks proper. The Act does not confer a remedial authority on the arbitrator in the abstract: this authority is given to him when he finds that there is a situation requiring his intervention, namely dismissal without good and sufficient cause. By analogy, the Superior Court is not acting without jurisdiction when it directs that damages be paid after having erroneously held a defendant delictually liable: *it is erring in the exercise of its jurisdiction.* In the same way, the arbitrator is not acting without jurisdiction when he substitutes a new penalty for that chosen by the employer after erroneously finding that there was no good and sufficient cause for dismissal: *he is erring in the exercise of his jurisdiction.*

This observation gains additional weight from the actual wording of s. 128: the arbitrator has the powers specified in that section "where [he] *considers* that the employee has not been dismissed for good and sufficient cause". Section 128 does not make the use of these powers conditional on the objective existence of that cause, but on the arbitrator's subjective assessment.

For all these reasons, I consider that the existence of good and sufficient cause for dismissal is not a prerequisite to the exercise of the arbitrator's jurisdiction, but is an intra-jurisdictional question. This leads on to the second problem, which is determining whether the arbitral award is so unreasonable as to constitute an excess of jurisdiction.

(B) Whether arbitral award unreasonable

In principle, where there is a privative clause the superior courts should not be able to review errors of law made by the administrative tribunals. However, it is now settled that some errors of law can cause the arbitrator to lose his jurisdiction. The debate turns on the question of *which* errors of law result in the loss of jurisdiction. Contrary to the

semble clair que l'existence d'une cause juste et suffisante n'est pas une condition préliminaire à l'exercice de la compétence de l'arbitre. Il s'agit au contraire de l'objet même de l'enquête. C'est la seule question que l'arbitre doit décider avant de rendre l'ordonnance qu'il estime appropriée. La loi ne confère pas un pouvoir réparateur à l'arbitre dans l'abstrait: ce pouvoir lui est conféré lorsqu'il prend connaissance d'une situation qui mérite intervention, soit le congédiement sans cause juste et suffisante. Par analogie, la Cour supérieure n'agit pas sans juridiction quand elle ordonne le paiement de dommages-intérêts après avoir erronément déterminé la responsabilité délictuelle d'un défendeur: *elle erre dans l'exercice de sa juridiction.* De la même façon, l'arbitre n'agit pas sans juridiction quand il substitue une nouvelle sanction à celle choisie par l'employeur après avoir erronément constaté l'absence de cause juste et suffisante de congédiement: *il erre dans l'exercice de sa juridiction.*

Cette constatation est renforcée par les termes mêmes de l'art. 128: l'arbitre dispose des pouvoirs prévus à cet article s'il «*juge* que le salarié a été congédié sans cause juste et suffisante». L'article 128 ne rend pas l'usage de ces pouvoirs conditionnel à l'existence objective de cette cause mais plutôt conditionnel à l'appréciation subjective de l'arbitre.

Pour toutes ces raisons, je suis d'avis que l'existence d'une cause juste et suffisante de congédiement n'est pas une condition préliminaire à l'exercice de la compétence de l'arbitre, mais bien une question intrajuridictionnelle. Cela nous amène au deuxième problème, qui est celui de déterminer si la sentence arbitrale est déraisonnable au point de constituer un excès de juridiction.

B) Caractère déraisonnable de la sentence arbitrale

En principe, compte tenu de la présence d'une clause privative, les juridictions supérieures ne devraient pas pouvoir réviser les erreurs de droit des tribunaux administratifs. Toutefois, il est maintenant établi que certaines erreurs de droit peuvent faire perdre juridiction à l'arbitre. La controverse porte plutôt sur la détermination de

decision of Lord Denning in *Pearlman v. Keepers and Governors of Harrow School*, [1979] 1 All E.R. 365, where he said (at p. 372) that "no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends" (subsequently disapproved by the Privy Council in *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union*, [1980] 3 W.L.R. 318, and *Re Racal Communications Ltd.*, [1980] 2 All E.R. 634), this Court has tended since *Nipawin*, *supra*, and *C.U.P.E.*, *supra*, to avoid intervening when the decision of the administrative tribunal was reasonable, whether erroneous or not. In other words, only unreasonable errors of law can affect jurisdiction. The following extract from *C.U.P.E.*, *supra*, at p. 237, frequently referred to in later cases, has become the classic statement of the approach taken by this Court:

> Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

This is a very severe test and signals a strict approach to the question of judicial review. It is nevertheless the test which this Court has applied and continues to apply:

—in *Teamsters Union Local 938 v. Massicotte*, [1982] 1 S.C.R. 710, in which Laskin C.J. observed at p. 724 "that mere doubt as to correctness of a labour board interpretation of its statutory power is no ground for finding jurisdictional error";

—in *Alberta Union of Provincial Employees v. Board of Governors of Olds College*, [1982] 1 S.C.R. 923, where Laskin C.J. applied the test mentioned above to a case involving a "quasi-privative" clause, which preserved the remedy of *certiorari* but conferred on the administrative tribunal a final jurisdiction not subject to appeal;

quelles erreurs de droit font perdre juridiction. Contrairement à la décision de Lord Denning dans l'affaire *Pearlman v. Keepers and Governors of Harrow School*, [1979] 1 All E.R. 365, où il est dit (à la p. 372) que [TRADUCTION] «aucune cour ni aucun tribunal n'a la compétence de faire une erreur de droit dont dépend l'issue de l'affaire» (désapprouvée par la suite par le Conseil privé dans *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union*, [1980] 3 W.L.R. 318, et *Re Racal Communications Ltd.*, [1980] 2 All E.R. 634), la tendance de cette Cour depuis les affaires *Nipawin*, précitée, et *S.C.F.P.*, précitée, a été d'éviter d'intervenir lorsque la décision du tribunal administratif, erronée ou non, était raisonnable. En d'autres termes, seules les erreurs de droit déraisonnables portent atteinte à la juridiction. L'extrait suivant de l'arrêt *S.C.F.P.*, précité, à la p. 237, cité à maintes reprises par la suite, est devenu l'énoncé classique de l'approche de cette Cour:

> Autrement dit, l'interprétation de la Commission est-elle déraisonnable au point de ne pouvoir rationnellement s'appuyer sur la législation pertinente et d'exiger une intervention judiciaire?

C'est là un test très sévère et qui marque une approche restrictive en ce qui concerne le contrôle judiciaire. C'est pourtant le test que cette Cour a appliqué et applique encore:

—dans l'affaire *Syndicat des camionneurs, section locale 938 c. Massicotte*, [1982] 1 R.C.S. 710, où le juge en chef Laskin soulignait, à la p. 724, «qu'un simple doute quant à l'exactitude d'une interprétation donnée par un conseil des relations du travail au sujet des pouvoirs que la loi lui attribue ne constitue pas un motif suffisant pour conclure à une erreur de compétence»;

—dans l'arrêt *Alberta Union of Provincial Employees c. Conseil d'administration de Olds College*, [1982] 1 R.C.S. 923, où le juge en chef Laskin appliquait le test énoncé plus haut en présence d'une clause «quasi-privative», qui préservait le recours au *certiorari* mais conférait au tribunal administratif une juridiction finale et sans appel;

—in *St. Luc Hospital v. Lafrance*, [1982] 1 S.C.R. 974, where Chouinard J. used the *C.U.P.E.* test in a case not involving any privative clause respecting evocation;

—finally, and more recently, *C.L.R.B. v. Halifax Longshoremen's Association*, [1983] 1 S.C.R. 245; *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269 and *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176.

As this argument does not question the arbitrator's initial jurisdiction to rule on the award or to substitute his opinion for that of the employer, I cite these decisions in support of a rule, and to the extent that they enunciate a rule, which clearly applies to non-jurisdictional errors, without thereby stating any position on the effect of these decisions on the rule that must be applied to errors granting jurisdiction.

In looking for an error which might affect jurisdiction, the emphasis placed by this Court on the dichotomy of the reasonable or unreasonable nature of the error casts doubt on the appropriateness of making, on this basis, a distinction between error of law and error of fact. In addition to the difficulty of classification, the distinction collides with that given by the courts to unreasonable errors of fact. An unreasonable error of fact has been categorized as an error of law. The distinction would mean that this error of law is then protected by the privative clause unless it is unreasonable. What more is needed in order that an unreasonable finding of fact, in becoming an error of law, becomes an unreasonable error of law? An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.

Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not

—dans l'arrêt *Hôpital St-Luc c. Lafrance*, [1982] 1 R.C.S. 974, où le juge Chouinard utilisait le test de l'arrêt *S.C.F.P.* en l'absence de toute clause privative quant à l'évocation;

—enfin, plus récemment, dans les affaires *C.C.R.T. c. Association des débardeurs d'Halifax*, [1983] 1 R.C.S. 245; *Banque Nationale du Canada c. Union internationale des employés de commerce*, [1984] 1 R.C.S. 269, et *Bibeault c. McCaffrey*, [1984] 1 R.C.S. 176.

Comme ce moyen ne conteste pas la compétence initiale de l'arbitre de se prononcer sur la sentence ni celle qu'il a de substituer son opinion à celle de l'employeur, je cite ces décisions au soutien d'une règle et dans la mesure où elles énoncent une règle qui s'applique sûrement aux erreurs non-attributives de compétence, sans pour autant me prononcer ici sur la portée de ces décisions sur la règle que l'on doit appliquer à celles qui sont attributives de compétence.

Dans la recherche de l'erreur portant atteinte à la juridiction, l'emphase placée par cette Cour sur la dichotomie du caractère raisonnable-déraisonnable de l'erreur remet en question l'opportunité de faire, à même celle-ci, la distinction entre l'erreur de droit et l'erreur de fait. Outre la difficulté de qualification, la distinction se bute à celle que les tribunaux ont donné aux erreurs de fait déraisonnables. L'erreur de fait déraisonnable a été qualifiée d'erreur de droit. La distinction voudrait qu'en un deuxième temps cette erreur de droit soit à l'abri de la clause privative à moins d'être déraisonnable. Que faut-il de plus à la conclusion de fait déraisonnable, pour que, en devenant erreur de droit elle devienne une erreur de droit déraisonnable. Le tribunal administratif a la compétence voulue pour se tromper, et même gravement, mais n'a pas celle d'être déraisonnable. Ce qui est déraisonnable n'atrophie pas moins la juridiction du fait que la conclusion en est une de fait plutôt que de droit. La justification de l'intervention judiciaire est la conclusion déraisonnable.

Non seulement la distinction entre l'erreur de droit et celle de fait est superfétatoire en regard d'une détermination ou d'une conclusion déraisonnable, mais la référence à l'erreur elle-même l'est

lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.

In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal. I hasten to add that the distinction between an error of law and one of fact is still entirely valid when the tribunal is not protected by a privative clause. Indeed, though all errors of law are then subject to review, only unreasonable errors of fact are, but no others.

Accordingly, the arbitrator in the case at bar only exceeded his jurisdiction if the award he made is unreasonable in light of the wording of s. 128 and/or the evidence. In this context, the arbitrator might have erred on four different points:

1. he interpreted the words "dismissed without good and sufficient cause" unreasonably;
2. he applied this test unreasonably to the facts of the case;
3. he gave an unreasonable interpretation of the various powers conferred on him by s. 128;
4. having regard to the evidence, he substituted an unreasonable penalty for that chosen by the employer.

It was not seriously argued in this Court that the arbitrator interpreted s. 128 unreasonably (questions 1 and 3). So far as the interpretation of the words "dismissed without good and sufficient cause" is concerned (question 1), respondent cited the decision of this Court in *Lafrance v. Commercial Photo Service Inc.*, [1980] 1 S.C.R. 536. In that case, five employees had submitted a complaint to the labour commissioner pursuant to s. 16 of the *Labour Code* (then s. 15), alleging that they had been dismissed because they exercised a right enuring to them under the Code.

15. When an employee is dismissed, suspended or transferred by the employer or his representative because of the exercise by such employee of a right arising from this Code, the labour commissioner may

tout autant. En effet, si toutes les erreurs n'aboutissent pas à des déterminations déraisonnables, toute détermination déraisonnable résulte d'une erreur (de droit, de fait, et d'une combinaison des deux, peu importe) qui, elle, est déraisonnable.

En conclusion, une détermination déraisonnable, quelle qu'en soit la source, porte atteinte à la juridiction du tribunal. Je m'empresse de rappeler que la distinction entre l'erreur de droit et celle de fait conserve par ailleurs toute son utilité lorsque le tribunal n'est pas à l'abri d'une clause privative. En effet, quoique toutes les erreurs de droit sont dès lors sujettes à révision, seules les erreurs de fait déraisonnables le sont, mais pas les autres.

Donc, l'arbitre en l'espèce n'a excédé sa juridiction que si la sentence qu'il a rendue est déraisonnable compte tenu du texte de l'art. 128 et de la preuve ou des deux. Dans ce contexte, l'arbitre est susceptible d'avoir erré sur quatre questions différentes:

1. il a interprété de façon déraisonnable les mots «congédié sans cause juste et suffisante»;
2. il a appliqué ce critère de façon déraisonnable aux faits de l'espèce;
3. il a interprété de façon déraisonnable les divers pouvoirs qui lui sont conférés par l'art. 128;
4. il a, en regard de la preuve, substitué une sanction déraisonnable à celle choisie par l'employeur.

Or, il n'y a pas, devant cette Cour, d'argument sérieux à l'effet que l'arbitre a interprété de façon déraisonnable l'art. 128 (questions 1 et 3). En ce qui concerne l'interprétation des mots «congédié sans cause juste et suffisante» (question 1), l'intimée a invoqué l'arrêt de cette Cour dans *Lafrance c. Commercial Photo Service Inc.*, [1980] 1 R.C.S. 536. Dans cette affaire, cinq salariés avaient soumis une plainte au commissaire du travail conformément à l'art. 16 du *Code du travail* (alors l'art. 15) alléguant avoir été congédiés à cause de l'exercice d'un droit résultant du Code.

15. Lorsqu'un salarié est congédié, suspendu ou déplacé par l'employeur ou son agent à cause de l'exercice par ce salarié d'un droit qui lui résulte du présent code, le commissaire du travail peut ordonner à l'em-

order the employer to reinstate such employee in his employment, within eight days of the service of the decision, with all his rights and privileges, and to pay him as an indemnity the equivalent of the salary and other benefits of which he was deprived due to dismissal, suspension or transfer.

That indemnity is due in respect of the whole period comprised between the time of dismissal, suspension or transfer and that of the carrying out of the order, or the default of the employee to resume his employment after having been duly recalled by his employer.

If the employee has worked elsewhere during the above mentioned period, the salary which he so earned shall be deducted from such indemnity.

16. An employee who believes that he has been illegally dismissed, suspended or transferred by reason of the exercise of a right which devolves on him under this code must, if he wishes to take advantage of section 15, present or mail his complaint in writing to the labour commissioner-general within fifteen days of the dismissal, suspension or transfer. The labour commissioner-general shall appoint a labour commissioner to make an investigation and decide as to the complaint.

17. If it is shown to the satisfaction of the labour commissioner seized of the matter that the employee exercises a right accorded to him by this code, there shall be a presumption in his favour that he was dismissed, suspended or transferred because he exercised such right, and the burden of proof that the employee was dismissed, suspended or transferred for another good and sufficient reason shall be upon the employer.

This was the context in which Chouinard J. had to interpret the final words of the presumption stated in s. 17 (then s. 16): "and the burden of proof that the employee was dismissed, suspended or transferred for *another good and sufficient reason* shall be upon the employer". After briefly reviewing the construction placed on these words by the courts, Chouinard J. concluded (at p. 547):

As his jurisdiction consisted of determining whether the other reason cited by the employer was a substantive reason as opposed to a pretext, and whether it constituted the true reason for the dismissal, by ruling on the severity of the penalty as compared with the seriousness of the wrongful act **the judge substituted his judgment for that of the employer.** In doing so he exceeded his jurisdiction, and this is the basis for the writ of evocation.

ployeur de réintégrer ce salarié dans son emploi avec tous ses droits et privilèges dans les huit jours de la signification de la décision et de lui verser, à titre d'indemnité, l'équivalent du salaire et des autres avantages dont l'a privé le congédiement, la suspension ou le déplacement.

Cette indemnité est due pour toute la période comprise entre le moment du congédiement, de la suspension ou du déplacement et celui de l'exécution de l'ordonnance ou du défaut du salarié de reprendre son emploi après avoir été dûment rappelé par l'employeur.

Si le salarié a travaillé ailleurs au cours de la période précitée, le salaire qu'il a ainsi gagné doit être déduit de cette indemnité.

16. Le salarié qui croit avoir été illégalement congédié, suspendu ou déplacé à cause de l'exercice d'un droit lui résultant du présent code doit, s'il désire se prévaloir des dispositions de l'article 15, soumettre sa plainte par écrit au commissaire général du travail dans les quinze jours du congédiement, de la suspension ou du déplacement, ou la mettre à la poste à l'adresse du commissaire générale du travail dans ce délai. Ce dernier désigne un commissaire du travail pour faire enquête et disposer de la plainte.

17. S'il est établi à la satisfaction du commissaire du travail saisi de l'affaire que le salarié exerce un droit lui résultant du présent code, il y a présomption en sa faveur qu'il a été congédié, suspendu ou déplacé à cause de l'exercice de ce droit, et il incombe à l'employeur de prouver que le salarié a été congédié, suspendu ou déplacé pour une autre cause, juste et suffisante.

C'est dans ce contexte que le juge Chouinard a été appelé à interpréter les derniers mots de la présomption énoncée à l'art. 17 (alors l'art. 16): «et il incombe à l'employeur de prouver que le salarié a été congédié, suspendu ou déplacé pour une *autre cause juste et suffisante*». Après une brève revue de l'interprétation jurisprudentielle de ces mots, le juge Chouinard conclut (à la p. 547):

Sa juridiction consistant à déterminer si l'autre cause invoquée par l'employeur est une cause sérieuse par opposition à un prétexte, et si elle constitue la cause véritable du congédiement, en se prononçant sur la rigueur de la sanction eu égard à la gravité de la faute, le juge a substitué son jugement à celui de l'employeur. En ce faisant il a excédé sa juridiction ce qui donne ouverture au bref d'évocation.

Respondent is therefore arguing that under s. 128 an arbitrator does not have to weigh the "sufficiency" of the cause and must refrain from acting once he finds there is a good cause for the penalty chosen by the employer.

I agree with the Court of Appeal that this case does not apply to the case at bar. The construction given by Chouinard J. must be placed in the context of ss. 15 *et seq.* of the *Labour Code*, which provide a remedy against dismissal that is unlawful because it results from the exercise by an employee of a right conferred on him by the Code. In the context of this remedy, the employee benefits from the presumption of s. 17 of the Code, and the commissioner's role is very limited in light of this presumption: he is only required to ensure that "the other reason" cited by the employer is not a pretext to mask an unlawful dismissal. This is a long way from s. 128 of the *Act respecting labour standards*, since a labour commissioner acting under ss. 15 *et seq.* of the *Labour Code* is not required, as an arbitrator appointed by the Commission des normes du travail is, to review the reasonableness of the exercise of the disciplinary power of the employer *but its legality*. Any question regarding the proportionality of the penalty is thus beyond the immediate limits of his inquiry.

For my part, I consider that the words "good and sufficient" in s. 128 must be given a meaning, and it is that there has to be a cause which in the arbitrator's opinion is significant enough to warrant a dismissal. In other words, there is no good and sufficient cause if the arbitrator considers that the penalty of dismissal was disproportionate to the wrongful act. This is the interpretation applied by the arbitrator in the case at bar: he concluded that there was no good and sufficient cause since in his view Mr. Blanchard's action was not wrongful enough to justify his dismissal. I therefore consider that the interpretation of these words by the arbitrator (question 1, *supra*) is not only reasonable but correct. I will return below to the question of how these words apply to the facts in the case at bar (question 2, *supra*).

L'intimée soutient donc que l'arbitre n'a pas, sous l'art. 128, à apprécier la «suffisance» de la cause et qu'il doit s'abstenir d'agir dès qu'il trouve une raison sérieuse motivant la sanction choisie par l'employeur.

Je suis d'accord avec la Cour d'appel que cet arrêt ne s'applique pas en l'espèce. L'interprétation retenue par le juge Chouinard doit être replacée dans le contexte des art. 15 et suiv. du *Code du travail*, qui prévoient un recours contre le congédiement illégal parce que fondé sur l'exercice par le salarié d'un droit qui lui est garanti par le Code. Dans le cadre de ce recours, le salarié bénéficie de la présomption de l'art. 17 du Code, et relativement à cette présomption le rôle du commissaire est très mince; il n'a qu'à s'assurer que «l'autre cause» invoquée par l'employeur n'est pas un prétexte camouflant un congédiement illégal. On est donc bien loin de l'art. 128 de la *Loi sur les normes du travail*, puisque le commissaire du travail agissant sous les art. 15 et suiv. du *Code du travail* ne se trouve pas, comme c'est le rôle de l'arbitre nommé par la Commission des normes du travail, à réviser le caractère raisonnable de l'exercice du pouvoir disciplinaire de l'employeur *mais sa légalité*. Toute question relative à la proportionnalité de la sanction est donc au delà des fins immédiates de son enquête.

Je suis d'avis, pour ma part, qu'il faut donner un sens aux mots «juste et suffisante» dans l'art. 128 et qu'ils signifient qu'il doit exister une cause qui, selon l'arbitre, est suffisamment importante pour justifier un congédiement. En d'autres termes, il n'y a pas de cause juste et suffisante si, dans l'esprit de l'arbitre, le congédiement est une sanction disproportionnée par rapport à la faute. C'est l'interprétation qu'a retenue l'arbitre en l'espèce: il a conclu à l'absence de cause juste et suffisante puisqu'à son avis la faute de M. Blanchard n'était pas assez importante pour justifier son congédiement. Je crois donc que l'interprétation de ces mots par l'arbitre (question 1, précitée) est non seulement raisonnable, elle est aussi exacte. En ce qui concerne l'application de ces mots aux faits de l'espèce (question 2, précitée), j'y reviendrai plus loin.

As regards the interpretation by the arbitrator of the powers conferred on him by s. 128 (question 3, *supra*), I consider that it is also reasonable and so beyond judicial review. The Court of Appeal referred to the decision of this Court in *Heustis*, *supra*, to determine the scope of the arbitrator's powers under s. 128.

In that case, the adjudicator appointed pursuant to the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25, had to determine whether the employer had good and sufficient reason to dismiss Mr. Heustis, but had no express power to substitute a lesser penalty. Dickson J., as he then was, concluded (at p. 783):

> There being nothing in either the agreement, or the Act, which expressly precludes the adjudicator's exercise of remedial authority, I am of the opinion that an adjudicator under the *Public Service Labour Relations Act* of New Brunswick has the power to substitute some lesser penalty for discharge where he had found just and sufficient cause for some disciplinary action, but not for discharge.

If that was true where there were no express remedial powers, *a fortiori* an arbitrator acting under s. 128 has the power to substitute a lesser penalty than that chosen by the employer. The terms of that section are clear: the arbitrator may order that the employee be reinstated, that an indemnity be paid to him, or he may "*render any other decision he believes fair and reasonable, taking into account all the circumstances of the matter*". In the case at bar, the arbitrator held that these provisions authorized him to substitute a four-month suspension for the dismissal, and once again, his construction of the law is reasonable and, be it said in passing, correct.

I therefore consider that the mis en cause arbitrator did not interpret the law unreasonably and did not exceed his jurisdiction (questions 1 and 3, *supra*).

However, a majority of the Court of Appeal held that the decision made by the arbitrator was unreasonable in view of the seriousness of appellant's act. In other words, the arbitrator was said

Quant à l'interprétation par l'arbitre des pouvoirs qui lui sont conférés par l'art. 128 (question 3, précitée) je suis d'avis qu'elle est tout aussi raisonnable et donc à l'abri du contrôle judiciaire. La Cour d'appel s'est référée à la décision de cette Cour dans l'affaire *Heustis*, précitée, pour déterminer l'étendue des pouvoirs de l'arbitre sous l'art. 128.

Dans cette affaire, l'arbitre des griefs nommé en vertu de la *Loi relative aux relations de travail dans les services publics*, L.R.N.-B. 1973, chap. P-25, devait déterminer si l'employeur avait une cause juste et suffisante pour congédier M. Heustis, mais ne disposait d'aucun pouvoir exprès de substituer une sanction moindre. Le juge Dickson, alors juge puîné, concluait (à la p. 783):

> En l'absence de quelque disposition de la convention et de la Loi interdisant expressément l'exercice de pouvoirs réparateurs par l'arbitre, je suis d'avis qu'un arbitre agissant en vertu de la *Loi relative aux relations de travail dans les services publics* du Nouveau-Brunswick a le pouvoir de remplacer un congédiement par une sanction moindre lorsqu'il conclut qu'une cause juste et suffisante justifie une mesure disciplinaire mais non un congédiement.

En effet, si tel était le cas en l'absence de pouvoirs réparateurs exprès, à fortiori l'arbitre agissant sous l'art. 128 a-t-il le pouvoir de substituer une sanction moindre à celle choisie par l'employeur. Les termes de cet article sont clairs: l'arbitre peut ordonner la réintégration du salarié, le paiement d'une indemnité, ou «*rendre toute autre décision qui lui paraît juste et raisonnable compte tenu de toutes les circonstances de l'affaire*». En l'espèce, l'arbitre a jugé que ces dispositions l'autorisaient à substituer une suspension de quatre mois au congédiement et encore une fois, son interprétation de la loi est raisonnable, et, soit dit en passant, exacte.

Je suis donc d'avis que l'arbitre mis en cause n'a pas interprété la loi de façon déraisonnable et n'a pas excédé sa juridiction (questions 1 et 3, précitées).

Toutefois, la majorité de la Cour d'appel soutient que la sentence rendue par l'arbitre est déraisonnable compte tenu de la gravité de la faute de l'appelant. En d'autres termes, ce qu'on reproche à

to have erred in his application of the law to the facts of the case (questions 2 and 4, *supra*).

As I mentioned earlier, the arbitrator was said to have erred in two ways, namely by deciding that appellant's wrongful act did not justify dismissal and by imposing a penalty which was too light in view of the seriousness of the act. The court will only intervene if it is persuaded that the arbitrator made an unreasonable award. In coming to such a conclusion, the courts should always be mindful of the fact that an arbitrator is in a far better position to assess the impact of the award. It needs to be said again that administrative tribunals exist to provide solutions to disputes that can be best solved by a decision-making process other than that available in the courts. Often, too, the administrative "judge" is better trained and better informed on the area of his jurisdiction, and has access to information which more often than not does not find its way into the record submitted to the court. To this must be added the fact that the arbitrator saw and heard the parties.

In the case at bar, he chose to impose a four-month suspension without pay for an act which was unquestionably very reprehensible. He found that appellant's wrongful act did not justify his dismissal, taking all the circumstances into account.

The Court naturally condemns the actions of appellant and is fully in agreement with the arbitrator that those actions should be penalized. As to whether the penalty should have been dismissal or something less is a question for the arbitrator to decide.

For my part I was not persuaded that the arbitrator's decision, that the dismissal was not justified in the circumstances, was not based on a rational and reasonable assessment of the circumstances of the case and the rules applicable to the matter.

This Court may or may not agree with an arbitrator's award, but that does not authorize it to substitute its own opinion for that of an arbitrator who has acted in accordance with his enabling

l'arbitre, c'est son application de la loi aux faits en l'espèce, (questions 2 et 4, précitées).

Comme je l'ai mentionné précédemment, on accuse l'arbitre d'avoir erré de deux façons soit en ayant jugé que la faute de l'appelant ne justifiait pas un congédiement et en ayant imposé une sanction trop légère compte tenu de la gravité de cette faute. La cour n'interviendra que si elle est satisfaite que l'arbitre a rendu une sentence déraisonnable. C'est une conclusion à laquelle les tribunaux ne devraient arriver qu'en se rappelant que l'arbitre est éminemment mieux placé pour juger de l'impact de la décision. En effet, faut-il encore le rappeler, les tribunaux administratifs répondent au besoin d'apporter des solutions à des conflits qui se prêtent mieux à un procédé décisionnel autre que celui qu'offrent les tribunaux judiciaires. Souvent, aussi, le «juge» administratif est mieux formé et mieux renseigné sur le milieu où s'exerce sa compétence, et a accès à des renseignements qui ne se retrouvent pas, plus souvent qu'autrement, au dossier soumis à la cour. À cela s'ajoute le fait que l'arbitre a vu et entendu les parties.

Il a choisi en l'espèce d'imposer une suspension de quatre mois sans salaire pour un geste qui est sans contredit très répréhensible. Il a jugé que la faute de l'appelant ne justifiait pas son congédiement, compte tenu de toutes les circonstances.

Bien entendu, la Cour réprouve les gestes de l'appelant et se dit pleinement d'accord avec l'arbitre que de tels gestes méritent sanction. Quant à savoir si cette sanction doit être le congédiement ou une sanction moindre, c'est là la question, même s'il n'y en avait qu'une, qui est du ressort de l'arbitre.

Pour ma part, on ne m'a pas convaincu que la décision de l'arbitre à l'effet que le congédiement n'était pas justifié en l'espèce n'est pas fondée sur une appréciation rationnelle et raisonnable des circonstances de l'affaire et des règles applicables en la matière.

Cette Cour peut être d'accord ou pas avec la sentence arbitrale, cela ne l'autorise pas à substituer son opinion à celle d'un arbitre qui a agi conformément à sa loi habilitante et d'une façon

legislation and in a manner which is not "patently unreasonable". It is clear that the arbitrator took into account all the circumstances surrounding the dismissal and that he concluded that Mr. Blanchard had been dismissed for various reasons, only one of which was his acceptance of bribes. It is conceivable that in most circumstances, such a wrongful act would be a good and sufficient reason for dismissal. However, it was not shown that in light of the facts considered by the arbitrator and his privileged position, he made an unreasonable decision by imposing a lesser penalty on appellant.

With respect, therefore, it seems to me that the Court of Appeal erred in accepting this argument of the employer.

(C) Insufficiency of reasons given

There remains the final argument of respondent, which was also accepted by the Court of Appeal, that insufficient reasons were given for the arbitrator's award and that therefore it is "void and rendered entirely without jurisdiction".

In my view, this argument must be dismissed. Assuming for the purposes of argument that the reasons were in fact insufficient or ambiguous, as respondent suggested, this is an error of law apparent on the face of the record.

[TRANSLATION] Error of law may also be pleaded to deal with insufficiency apparent on the record of the reasons given for the decisions of administrative bodies.

(*Principes de contentieux administratif*, G. Pépin and Y. Ouellette, 2nd ed., 1982, Yvon Blais Inc., at p. 277.)

Where there is a privative clause such errors are beyond judicial review except in accordance with the rules discussed above. Additionally, it is hard to see how such a deficiency in the reasons could affect the arbitrator's jurisdiction to hear the case and to render the decision he thinks proper, except to the extent that the insufficiency of the reasons is so great that it amounts to an infringement of the rules of natural justice.

qui n'est pas «manifestement déraisonnable». Or, il est clair que l'arbitre a tenu compte de toutes les circonstances entourant le congédiement et qu'il en a conclu que M. Blanchard a été congédié pour diverses raisons, dont l'acceptation de «pots-de-vin» n'est qu'un élément. Il est concevable que dans la plupart des circonstances, une telle faute sera une cause juste et suffisante de congédiement. Toutefois, il n'a pas été démontré que, en regard des faits qu'a considérés l'arbitre et de sa position privilégiée, celui-ci a rendu une sentence déraisonnable en imposant une sanction moindre à l'appelant.

Avec respect, il me semble donc que la Cour d'appel a erré en acceptant cet argument de l'employeur.

C) L'insuffisance de la motivation

Reste donc le dernier argument de l'intimée, que la Cour d'appel a accepté aussi, à l'effet que la sentence arbitrale est insuffisamment motivée et qu'elle est donc «nulle et rendue en l'absence de toute juridiction».

À mon avis, cet argument doit être rejeté. Tenant pour acquis, pour les fins de la discussion, que les motifs sont effectivement insuffisants ou ambigus, comme le suggère l'intimée, il s'agit d'une erreur de droit apparente à la lecture du dossier.

L'erreur de droit pourra aussi être plaidée pour contrôler l'insuffisance apparente au dossier de la motivation des décisions des organismes administratifs.

(*Principes de contentieux administratif*, G. Pépin et Y. Ouellette, 2e éd., 1982, Yvon Blais Inc., à la p. 277.)

Or, en présence d'une clause privative, de telles erreurs sont à l'abri du contrôle judiciaire, sauf en conformité avec les principes que j'ai énoncés précédemment. Au surplus, il m'est difficile de voir comment un tel défaut dans les motifs pourrait porter atteinte à la juridiction de l'arbitre d'entendre le litige et de rendre la décision qu'il juge appropriée, sauf dans la mesure ou l'insuffisance des motifs est tellement importante qu'elle équivaut à une violation des règles de justice naturelle.

That does not appear to be the case here. There was no total absence of reasons. Even if as respondent suggests the decision was not very well worded, the arbitrator's reasons are intelligible and it is possible to understand the basis for his decision. Such a wording is far from amounting to an infringement of the rules of natural justice. I would therefore dismiss this last argument.

For these reasons, I would allow the appeal, set aside the judgment of the Court of Appeal and restore that of the Superior Court denying the writ of evocation. Respondent will pay costs in all courts, except to the mis en cause arbitrator in this Court, as the latter filed no factum.

Appeal allowed.

Solicitors for the appellant: Canuel, Quidoz, Tremblay, Blier, Castonguay & Sylvain, Montréal.

Solicitors for the respondent: Vermette, Dunton & Associés, Montréal.

Il me semble que ce n'est pas le cas ici. Il n'y a pas absence totale de motifs. Même si, selon l'intimée, la formulation de la sentence n'est pas des plus heureuses, les motifs de l'arbitre sont intelligibles et permettent de comprendre les fondements de sa décision. Cette formulation est loin d'équivaloir à une violation des règles de justice naturelle. Je rejetterais donc ce dernier argument.

Pour ces motifs, j'accueillerais le pourvoi, casserais le jugement de la Cour d'appel et rétablirais celui de la Cour supérieure refusant l'émission du bref d'évocation. L'intimée payera les frais dans toutes les cours sauf dans cette Cour à l'arbitre mis en cause, celui-ci n'ayant pas produit de mémoire.

Pourvoi accueilli.

Procureurs de l'appelant: Canuel, Quidoz, Tremblay, Blier, Castonguay & Sylvain, Montréal.

Procureurs de l'intimée: Vermette, Dunton & Associés, Montréal.

Douglas Aircraft Company of Canada Ltd. *Appellant*;

and

Andrew McConnell, Ray Hopkinson, Archie P. Wilson and Al Benjamin, on their own behalf and on behalf of all the other members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1967 *Respondents.*

and

J. D. O'Shea, Q.C.

1978: November 7; 1979: June 28.

Present: Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour relations — Strike — "Sick-in" a strike — Grievance arbitration — Judicial review — Plant Chairman relieved of all production duties — Whether "employee".

The four grievors, now respondents, were members of the union bargaining committee at appellant's plant. The grievances were taken against the action of the appellant in discharging the grievors for their participation in a "sick-in". Some of the appellant's employees had been involved in a demonstration in support of the employees of the Artistic Woodworking Company, a dispute completely unrelated to Douglas Aircraft and Local 1967. Due to their involvement in the demonstration several Local 1967 members were late for work. One of them was Harbinson a member of the union bargaining committee and he during a meeting between management and that committee was called out to receive notice of his suspension for late arrival at work by reason of his participation in the Artistic dispute. During the meeting the respondent Wilson on hearing of Harbinson's suspension indicated to the management personnel present: "If you discipline people for this, you are going to have troubles," and thereupon he and the rest of the committee left the meeting. None of the other union committee members (who included the respondents Benjamin and McConnell) dissociated themselves from Wilson's statement. That afternoon a number of employees were seen to leave earlier than the scheduled

Douglas Aircraft Company of Canada Ltd. *Appelante*;

et

Andrew McConnell, Ray Hopkinson, Archie P. Wilson et Al Benjamin, en leur nom personnel et au nom de tous les autres membres du Syndicat international des travailleurs unis de l'automobile, de l'aéronautique et de l'astronautique et des instruments aratoires d'Amérique, local 1967 *Intimés.*

et

J. D. O'Shea, c.r.

1978: 7 novembre; 1979: 28 juin.

Présents: Les juges Ritchie, Spence, Pigeon, Dickson, Beetz, Estey et Pratte.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Relations de travail — Grève — «Sick-in» équivalant à une grève — Arbitrage de griefs — Contrôle judiciaire — Le Président du comité d'entreprise libéré de ses fonctions de production — S'agit-il d'un «employé»?

Les quatre réclamants, intimés devant cette Cour, étaient membres du comité syndical de négociation dans l'usine de l'appelante. Les griefs ont été présentés par les réclamants contre l'appelante qui les a congédiés en raison de leur participation à un «*sick-in*». Certains employés de l'appelante avaient participé à une manifestation d'appui aux employés d'Artistic Woodworking Company, dont le conflit était étranger à toute relation entre Douglas Aircraft et le local 1967. En raison de leur participation à la manifestation, plusieurs membres du local 1967 se sont présentés en retard au travail. L'un d'eux, un nommé Harbinson, membre du comité syndical de négociation, au cours d'une réunion entre la direction et le syndicat, a été appelé hors de la salle pour se voir remettre un avis de suspension pour son retard en raison de sa participation au conflit Artistic. Informé de la suspension de Harbinson, l'intimé Wilson a déclaré aux représentants de la direction présents à la réunion: «Si vous punissez les gens pour ça vous allez avoir des problèmes», sur quoi M. Wilson et le reste du comité ont quitté la réunion. Aucun autre membre du comité syndical (y compris les intimés Benjamin et McConnell) n'a exprimé son désaccord avec la déclaration de Wilson. Au cours de l'après-midi, on a vu certains employés

time. Wilson and Benjamin were seen speaking to employees after which the employees were seen to leave their work; Benjamin was heard to request some employees to stop work and leave. Subsequently Wilson was asked by a company officer if he was attempting to encourage a concerted illegal action and denied it. There were however rumours that union representatives were asking employees to book off sick the following day, October 2nd. The company called a meeting with the Union that day (October 2) and met with the bargaining committee on which Hopkinson had replaced the suspended Harbinson. On October 2 there was abnormal absenteeism at the plant with the heaviest concentration in the areas where the bargaining committee men worked. With the exception of Wilson, who by reason of his position had no production duties, all the bargaining committee were absent. The appellant responded by convening another meeting with union representatives and sending a notice of termination of employment to the respondent grievors because of the role played by them in the work interruption of October 2, 1973. The first grievance, that of Hill was heard by another arbitrator who reduced the penalty of discharge to four weeks suspension and ordered reinstatement. An application for judicial review was dismissed in Weekly Court (1974), 4 O.R. (2d) 521. The other four grievances were heard by J. D. O'Shea who dismissed them and an application to quash these four awards was granted in the Divisional Court (1976), 14 O.R. (2d) 1, 72 D.L.R. (3d) 453 whose decision was affirmed by the Ontario Court of Appeal (1977), 19 L.A.C. (2d) 237.

Held (Estey J. dissenting in part): The appeal should be allowed with respect to all the respondents.

Per Ritchie, Spence, Pigeon, Dickson, Beetz and Pratte JJ.: As stated by Estey J. there was no error in the disposition by the arbitrator in relation to McConnell, Hopkinson and Benjamin whose discharge was a consequence of their participation in an illegal strike when they were members of the union bargaining committee appointed under the collective agreement. The appeal should also be dismissed with respect to the respondent Archie Wilson. The arbitrator correctly held that a distinction in wording between Article 8 of the agreement (dealing with the Plant Chairman) and Article 51 (dealing with the Union President) indicated on intention not to give the respective incumbents the same status. The latter is given "Leave of Absence" and becomes an employee of the Union, the former is only

quitter l'usine avant l'heure prévue. On a vu Wilson et Benjamin parler à des employés après quoi ces employés ont quitté le travail. On a entendu Benjamin demander à certains employés d'arrêter de travailler et de partir. Un dirigeant de la compagnie a par après demandé à Wilson s'il essayait d'encourager une action illégale concertée. M. Wilson a répondu non. Il courait cependant de nombreuses rumeurs selon lesquelles des représentants syndicaux demandaient aux employés de se déclarer malades le jour suivant, le 2 octobre. La compagnie a le 1er octobre convoqué une réunion avec le syndicat, et a rencontré le comité de négociation dont faisait partie M. Hopkinson qui remplaçait M. Harbinson pendant la suspension de ce dernier. Le 2 octobre, l'usine a connu un niveau d'absentéisme inhabituel particulièrement élevé dans les endroits où travaillaient les membres du comité de négociation. A l'exception de M. Wilson qui ne participait pas à la production en raison de son poste, tout le comité de négociation était absent du travail. L'appelante a réagi aux événements en convoquant une autre réunion avec les représentants du syndicat et en envoyant à chaque réclamant intimé un avis de cessation d'emploi en raison du rôle joué par chacun d'eux dans l'arrêt de travail du 2 octobre 1973. Le premier grief, celui de M. Hill, a été entendu par un autre arbitre qui a réduit le congédiement à une suspension de quatre semaines et ordonné sa réintégration. La Cour des sessions hebdomadaires a rejeté une demande de contrôle judiciaire (1974), 4 O.R. (2d) 521. Les quatre autres griefs ont été entendus par J. D. O'Shea qui les a rejetés. La Cour divisionnaire a accueilli une demande visant à annuler la décision de ce dernier (1976), 14 O.R. (2d) 1, 72 D.L.R. (3d) 453. La décision de la Cour divisionnaire a été confirmée par la Cour d'appel de l'Ontario (1977), 19 L.A.C. (2d) 237.

Arrêt (le juge Estey étant dissident en partie): Le pourvoi doit être accueilli à l'égard de tous les intimés.

Les juges Ritchie, Spence, Pigeon, Dickson, Beetz et Pratte: Comme l'a affirmé le juge Estey, l'arbitre n'a pas fait d'erreur dans ses décisions relatives à McConnell, Hopkinson et Benjamin qui ont été congédiés en raison de leur participation à une grève illégale, alors qu'ils étaient membres du comité syndical de négociation formé en vertu de la convention collective. Le pourvoi doit également être rejeté à l'égard de l'intimé Archie Wilson. L'arbitre a eu raison de conclure que la distinction entre la rédaction de l'article 8 de la convention (qui traite du Président du comité d'entreprise) et l'article 51 (qui traite du Président du syndicat) indique une intention de ne pas donner à chacun de ces titulaires le même statut. Le dernier reçoit un «congé autorisé» et devient employé du syndicat; le premier est seulement

relieved of production duties for time spent on union duties albeit that in this case he was allowed full time for such union activities. Although Wilson's activities were not a breach of duty to the Company because no such duty existed, they were misconduct which is another possible cause for which an employee may be dismissed and this in effect was what the arbitrator found. He mentioned "unlawfulness" and in light of ss. 63(1)(3), 67(1) of *The Labour Relations Act*, R.S.O. 1970, c. 232, Wilson could not claim to have been improperly disciplined for activities as Plant Chairman for which he was answerable only to the Union. By engaging in unlawful activity he did something for which he could claim no immunity.

Per Estey J. *dissenting in part*: The case raised the difficult and fundamental question as to the scope for judicial review of a labour arbitration board's decision. The board is not by the terms of *The Labour Relations Act*, R.S.O. 1970, c. 232 as amended protected from judicial review by *certiorari* or otherwise as is the Ontario Labour Relations Board established under that Act. The law of judicial review of inferior tribunals generally is applicable. The question was what limits to such judicial review are embodied by law. Adopting the reasoning of the Ontario Court of Appeal in *R. v. Barber*, [1968] 2 O.R. 245. The Court could proceed to determine the scope in the present case unhindered by any issue as to whether or not a specific question of law was referred to the statutory arbitrator. On a review of the authorities it is clear that all boards, are subject to the jurisdictional supervision of the Superior Court. A *certiorari* review of a statutory board free of a privative cloak brings with it the added ground of review for error on the face of the record. Such reviewable error exceeds a difference of opinion by the reviewing tribunal on an interpretative issue and falls short of an error resulting in an excess of its jurisdiction on the part of the board. Where the error in the award relates to the statute whose interpretation is required of the board in the course of determining the dispute the test is the same save that an error in law in statutory interpretation is not subject to the qualification that the assigned interpretation must be one which the words will not reasonably bear to permit review. Questions of admission and interpretation of evidence and procedure are all matters exclusively for the board as are all questions of fact. Unfairness, procedures contrary to natural justice, arbitrary conduct, refusal to discharge their function, fraud and bias in law are all matters that transcend the classification of error of law on the face of the record. They are jurisdictional and reviewable by *certiorari* or

libéré de ses fonctions de production pendant le temps consacré aux affaires syndicales bien qu'en l'espèce il se soit occupé de ces activités à plein temps. Même si, par ses activités, Wilson ne s'est pas rendu coupable d'inexécution d'une obligation puisqu'il n'en avait aucune, il a toutefois commis une faute grave, autre motif possible de renvoi d'un employé. C'est effectivement ce à quoi a conclu l'arbitre. Ce dernier a parlé d'«illégalité» et, compte tenu des par. 63(1)(3) et 67(1) de *The Labour Relations Act*, R.S.O. 1970, chap. 232, Wilson ne pouvait prétendre avoir été injustement congédié en raison de ses activités de Président du comité d'entreprise dont il ne devait répondre qu'au syndicat. Par cet acte illégal, Wilson faisait quelque chose pour quoi il ne pouvait se prévaloir d'aucune immunité.

Le juge Estey *dissident en partie*: L'affaire soulève la question difficile et fondamentale de l'étendue du pouvoir judiciaire de réviser la décision d'un conseil d'arbitrage en matière de relations de travail. En vertu de *The Labour Relations Act*, R.S.O. 1970, chap. 232 et modifications, le conseil n'est pas à l'abri du contrôle judiciaire par voie de *certiorari* ou autrement comme l'est la Commission des relations de travail de l'Ontario constituée en vertu de cette loi. Les principes généraux du contrôle judiciaire des tribunaux d'instance inférieure sont applicables. La question consiste à déterminer les limites que la loi impose à ce contrôle judiciaire. Adoptant le raisonnement de la Cour d'appel de l'Ontario dans *R. v. Barber*, [1968] 2 O.R. 245, la Cour peut entreprendre de préciser la portée du contrôle judiciaire dans l'affaire dont elle est saisie sans se demander si une question de droit précise a été soumise à l'arbitre nommé en vertu de la loi. Il ressort clairement d'après une étude de la jurisprudence que tous les conseils sont en matière de compétence soumis à la surveillance d'une cour supérieure. Un recours en *certiorari* contre un conseil que ne protège aucune clause privative permet en outre d'utiliser comme motif de révision l'erreur apparente à la lecture du dossier. Une erreur semblable susceptible de révision va plus loin qu'une simple divergence d'opinions du tribunal supérieur quant à un problème d'interprétation et il ne s'agit pas d'une erreur qui amène le conseil à outrepasser sa compétence. Lorsque l'erreur dans la sentence porte sur la loi que le conseil doit interpréter pour trancher le différend, le critère de révision est le même sauf qu'une erreur de droit sur l'interprétation d'un texte de loi n'est pas soumise à la réserve que le texte ne doit pas pouvoir raisonnablement justifier l'interprétation donnée. Les questions relatives à la réception et à l'interprétation de la preuve et à la procédure relèvent exclusivement du conseil puisque ce sont des questions de fait. L'injustice, l'adoption de procédures

its equivalent with or without a privative clause.

In the present appeal as to the respondent Wilson, the company's obligation to pay him salary, as Plant Chairman, is analogous to a fringe benefit to the members of the bargaining unit to be provided by the Company under the agreement. Wilson was not an employee of the Company in that he was chosen by the Union in accordance with the terms of the Agreement. The Company could not discharge him from that office.

To hold that Wilson had any duty toward the Company for which he was accountable in law would create a fundamental conflict of interest in his position. Such a concept is hostile to the basic principle of the rights of labour. The arbitrator's decision is susceptible to attack on two grounds. First, there was in the award an indication of a possible grievance or action at law against the Union rather than grounds for a grievance discharge against Wilson personally. There was also some confusion as to the nature of Wilson's duty to the members of the bargaining unit, owing to the terminology of Article 8. In interpreting Article 8, the learned arbitrator assigned to its terms a meaning which the words would not reasonably bear. Hence on the above principles the award is quashed.

As to the respondents Benjamin, McConnell and Hopkinson there were no errors of law or reviewable questions justifying a judicial review. A court in judicial review is not however a court sitting on an appeal and a court in the latter position might well have responded differently to the awards.

[*Re Federation of Telephone Workers of British Columbia and British Columbia Telephone Co.* (1971), 23 D.L.R. (3d) 18; *Kent v. Elstob*, [1802] 3 East 18; *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited*, [1912] A.C. 673; *Howe Sound Company v. International Union of Mine, Mill & Smelter Workers (Canada), Local 663*, [1962] S.C.R. 318; *Port Arthur Shipbuilding Company v. Arthurs et al.*, [1969] S.C.R. 85; *Hodgkinson v. Fernie and Another* (1857), 3 C.B. (N.S.) 189; *In the Matter of an Arbitration Between King and Duveen and Others*, [1913] 2 K.B. 32; *R. v. Barber et al.*, [1968] 2 O.R. 245; *Government of Kelantan v. Duff Development Company Limited*, [1923] A.C. 395; *Re International Nickel Co.*

contraires à la justice naturelle, une conduite arbitraire, le refus d'exercer ses fonctions, la fraude et la partialité constituent des motifs juridiques qui transcendent l'erreur de droit apparente à la lecture du dossier. Il s'agit là d'excès de compétence et ces erreurs sont susceptibles de révision par voie de *certiorari* ou de recours semblables, qu'il y ait ou non une clause privative.

Quant à l'intimé Wilson, l'obligation de la compagnie de lui payer un salaire à titre de président du comité d'entreprise est analogue aux avantages sociaux que la compagnie doit fournir aux membres de l'unité de négociation en vertu de la convention collective. Wilson n'est pas un employé de la compagnie en ce qu'il a été choisi par le syndicat conformément aux termes de la convention. La compagnie ne pouvait le congédier de ce poste.

Le fait de conclure que Wilson avait certaines obligations légales envers la compagnie aurait pour effet de le placer dans une position de conflit d'intérêts. Une telle idée s'oppose à la conception fondamentale des droits des travailleurs. La décision de l'arbitre peut être attaquée sur deux moyens. Premièrement, la sentence peut fonder un grief ou une poursuite judiciaire contre le syndicat plutôt que le congédiement de Wilson. Il existe également une certaine confusion quant à la nature des obligations de Wilson envers les membres de l'unité de négociation, vu le texte de l'article 8. En interprétant l'article 8, le savant arbitre a donné à ses dispositions un sens qu'elles ne peuvent raisonnablement avoir. Par conséquent, vu les principes précités, la sentence devrait être annulée.

En ce qui concerne les intimés Benjamin, McConnell et Hopkinson, il n'y a pas eu d'erreur de droit ou de question susceptible de révision qui puisse donner lieu à un contrôle judiciaire. Le rôle d'une cour en matière de contrôle judiciaire n'est pas le même que celui d'une cour qui siège en appel. Cette dernière aurait fort bien pu adopter une attitude différente à l'égard de ces sentences.

[Jurisprudence: *Re Federation of Telephone Workers of British Columbia and British Columbia Telephone Co.* (1971), 23 D.L.R. (3d) 18; *Kent v. Elstob*, [1802] 3 East 18; *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited*, [1912] A.C. 673; *Howe Sound Company c. International Union of Mine, Mill & Smelter Workers (Canada), Local 663*, [1962] R.C.S. 318; *Port Arthur Shipbuilding Company c. Arthurs et al.*, [1969] R.C.S. 85; *Hodgkinson v. Fernie and Another* (1857), 3 C.B. (N.S.) 189; *In the Matter of an Arbitration Between King and Duveen and Others*, [1913] 2 K.B. 32; *R. v. Barber et al.*, [1968] 2 O.R. 245; *Government of Kelantan v. Duff Development Company Limited*, [1923] A.C. 395; *Re International Nickel Co.*

of Canada Ltd. and Rivando, [1956] O.R. 379; *F.R. Absalom, Limited v. Great Western (London) Garden Village Society Limited*, [1933] A.C. 592; *Rex v. Nat. Bell Liquors Ltd.*, [1922] 2 A.C. 128; *Rex v. Northumberland Compensation Tribunal*, [1952] 1 K.B. 338; *Re The Ontario Labour Relations Board et al.*, [1957] O.R. 316 referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario affirming without reasons, a judgment of the Divisional Court[1] setting aside the the arbitrator's award[2] in the matter of employee grievances alleging unjust discharge.

G. Finlayson, Q.C., and *T. Heintzman*, for the appellant.

L. A. MacLean, Q.C., for the respondents.

The judgment of Ritchie, Spence, Pigeon, Dickson, Beetz and Pratte JJ. was delivered by

PIGEON J.—I have had the privilege of reading the reasons for judgment prepared for delivery by my brother Estey and I agree with him that there was no error in the dispositions made by the arbitrator in relation to respondents McConnell, Hopkinson and Benjamin whose discharge was a consequence of their participation in an illegal strike when they were members of the Union Bargaining Committee appointed under the collective agreement between the appellant Company and the Union.

With respect to respondent Archie Wilson I find myself unable to agree with Mr. Justice Estey's view that the arbitrator was in error and, in the circumstances, I find it necessary to quote the essential part of the award on Wilson's grievance in which the arbitrator sets forth his findings and reasons for dismissing it. This is as follows:*

Having considered all the evidence and the very able representations of the parties I have no hesitation in finding that a great number of employees acted in concert on October 2nd and engaged in a work interruption known as a "sick-in" as a means of protesting the company's action in disciplining employees who reported late for work because they were engaged in picketing

*(1975), 8 L.A.C. (2d) 118, at pp. 130-133.
[1] (1976), 14 O.R. (2d) 1.
[2] (1977), 15 L.A.C. (2d) 102.

of Canada Ltd. and Rivando, [1956] O.R. 379; *F.R. Absalom, Limited v. Great Western (London) Garden Village Society Limited*, [1933] A.C. 592; *Rex v. Nat. Bell Liquors Ltd.*, [1922] 2 A.C. 128; *Rex v. Northumberland Compensation Tribunal*, [1952] 1 K.B. 338; *Re The Ontario Labour Relations Board et al.*, [1957] O.R. 316.]

POURVOI contre un arrêt de la Cour d'appel de l'Ontario confirmant sans motifs un jugement de la Cour divisionnaire[1] qui a écarté la sentence de l'arbitre[2] rendue par suite de griefs présentés par des employés qui alléguaient un congédiement injustifié.

G. Finlayson, c.r., et *T. Heintzman*, pour l'appelante.

L. A. MacLean, c.r., pour les intimés.

Version française du jugement des juges Ritchie, Spence, Pigeon, Dickson, Beetz et Pratte rendu par

LE JUGE PIGEON—J'ai eu l'avantage de lire les motifs de mon collègue le juge Estey et conviens avec lui que l'arbitre n'a pas fait d'erreur dans ses décisions relatives aux intimés McConnell, Hopkinson et Benjamin qui ont été congédiés en raison de leur participation à une grève illégale, alors qu'ils étaient membres du comité syndical de négociation formé en vertu de la convention collective conclue entre la compagnie appelante et le syndicat.

Je ne peux cependant être d'accord avec le juge Estey lorsqu'il dit que l'arbitre a erré au sujet de l'intimé Wilson et j'estime dans les circonstances qu'il me faut citer la partie essentielle de la sentence sur le grief de Wilson, où l'arbitre expose les motifs et conclusions qui l'amènent à le rejeter. Cela se lit comme suit:*

[TRADUCTION] Après avoir étudié toute la preuve et l'argumentation habile des parties, je n'hésite pas à conclure que de nombreux employés ont agi de concert le 2 octobre et ont participé à un arrêt de travail connu sous le nom de «*sick-in*», afin de protester contre les mesures disciplinaires que la compagnie avait prises contre des employés arrivés en retard au travail parce

*(1975), 8 L.A.C. (2d) 118, aux pp. 130-133.
[1] (1976), 14 O.R. (2d) 1.
[2] (1977), 15 L.A.C. (2d) 102.

Artistic Woodwork Company in support of the strike at that plant. This penalty had been announced on Friday, September 28th and I find that the absences on October 2nd did not result from a spontaneous reaction by employees but rather was a planned response to the company's actions.

When assessing the grievor's statements which were made on September 28th and October 1st and 2nd it would be improper to attempt to interpret them in isolation. The true meaning of what the grievor said must be determined in light of all the surrounding events of which the grievor had knowledge. For these reasons I am unable to find that his statements were as innocuous as counsel for the union suggested. In this regard I am unable to agree with the findings of Mr. Gorsky in the Hill grievance award. Although the grievor's failure to testify cannot be construed as an admission of guilt in view of the fact that the onus rests on the company to establish just cause however in the absence of any explanation from the grievor, I must attach meaning to the words used by Mr. Wilson which would make his statements consistent with the events that took place. The statements made by the grievor are not only consistent with the unlawfulness of the acts complained of but to treat his statements as innocent remarks in light of all the surrounding circumstances would be naive to the extreme. Mr. Wilson was acknowledged to be a "hard nosed" union leader who was not adverse to the use of tough and at times abusive language. By repeating, without explanation, that there would be trouble if the company disciplined the Artistic Woodwork picketers who were late for work on September 26th and also by criticising the employees who reported for work on October 2nd the grievor clearly demonstrated, not only his support for the sick-in but his leadership in causing the unlawful activities. His participation was not merely passive. I find that the evidence clearly demonstrates his leadership in causing employees to contravene the collective agreement. In this regard the evidence in this case is distinguishable from the evidence in the Sunar Industries Case referred to above.

Although nothing can be inferred from the fact that the grievor did not testify, when considered in isolation, the failure of the grievor to testify permits me to draw inferences from the evidence before me, if that evidence is unexplained or qualified by evidence adduced through union witnesses. In the instant case I find that the company's evidence was sufficiently strong and substantial so as to cast a duty of explanation on the grievor to rebut the conclusions and inferences which the company has suggested should be drawn from that evidence.

qu'ils faisaient du piquetage devant la Artistic Woodwork Company en guise d'appui à la grève touchant cette usine. Ces mesures avaient été annoncées le vendredi 28 septembre et je conclus que les absences du 2 octobre ne constituaient pas une réaction spontanée des employés mais étaient plutôt une action concertée en réponse aux mesures prises par la compagnie.

Il ne conviendrait pas d'interpréter hors contexte les propos tenus par le réclamant le 28 septembre et les 1er et 2 octobre. Il faut en déterminer la véritable signification compte tenu de tous les événements connexes dont était informé le réclamant. Pour ces motifs, je ne puis conclure que ses déclarations étaient aussi anodines que l'a suggéré l'avocat du syndicat. Je ne puis être d'accord à cet égard avec les conclusions de M. Gorsky dans la sentence sur le grief Hill. Bien que l'omission de témoigner du réclamant ne puisse être considérée comme un aveu de culpabilité étant donné que la compagnie a le fardeau de prouver la juste cause du congédiement, je dois cependant, le réclamant n'ayant offert aucune explication, donner aux mots employés par M. Wilson un sens compatible avec les incidents qui ont eu lieu. Ses déclarations ne sont pas seulement compatibles avec l'illégalité des actes dont on se plaint, mais il faudrait être extrêmement naïf pour considérer ses remarques anodines compte tenu de toutes les circonstances. M. Wilson avait une réputation de dirigeant syndical «dur» qui ne se privait pas d'user d'un langage acerbe et parfois grossier. En répétant sans explications qu'il y aurait des problèmes si la compagnie imposait des mesures disciplinaires aux piqueteurs d'Artistic Woodwork qui étaient arrivés en retard le 26 septembre, et en critiquant les employés présents au travail le 2 octobre, le réclamant a montré sans équivoque non seulement son appui au «*sick-in*», mais aussi son rôle de meneur des agissements illégaux. Sa participation n'était pas purement passive. La preuve démontre clairement qu'il a comme leur chef poussé les employés à violer la convention collective. Sous ce rapport, la preuve en l'espèce est différente de celle qui a été apportée dans l'affaire Sunar Industries mentionnée ci-haut.

Bien qu'on ne puisse tirer aucune conclusion de la simple omission de témoigner du réclamant, ce silence me permet de tirer certaines déductions de la preuve soumise, alors qu'elle n'est pas expliquée ou nuancée par des témoins du syndicat. Dans la présente affaire, je conclus que la preuve de la compagnie était suffisamment forte et substantielle pour imposer au réclamant l'obligation de fournir des explications à l'encontre des conclusions et déductions que, selon la compagnie, on peut en tirer.

I further find that the evidence established that the grievor played a role in the work interruption as alleged in the company's reply to the grievance. That role, as established by the evidence, was more than a passive role. Usually a union official, by reason of his office, does not owe a higher duty to the employer than any other employee. Accordingly, if a union official is merely a passive participant in a work stoppage that is led by others, he normally should bear no greater responsibility than other employees who are merely passive participants. Again there is usually no responsibility on a union official to act as an arm of management. Such are not the facts in the instant case however. Rather than being a passive participant, I am satisfied that the grievor's role was one of active leadership. As a union leader, his position of leadership within the bargaining unit made his actions in leading the sick-in more authoritative and therefore more culpable. Although it is obvious from Mr. Wilson's remarks to the general foreman on October 2nd concerning certain employees who had reported for work that day that the sick-in was not as successful as he had wished it to be, it was apparently not the fault of any efforts the grievor had made to cause the sick-in to occur. In addition, the collective agreement in this matter is distinguishable from the collective agreement with which the Court was concerned in the British Columbia Telephone Company case cited above. In that case the Court found that there was no implied obligation on an employee who holds union office which is greater than on a rank and file employee. In the instant case, the parties have addressed themselves to the functions and responsibilities of the plant chairman. The plant chairman has no production functions to perform in common with other bargaining unit employees. His full time duties are directed to the administering of the collective agreement and in this he is responsible to the manager, labour relations, pursuant to the provisions of Article 8 of the collective agreement. Since he is paid by the company solely for administering the collective agreement as plant chairman, he must assume more responsibility for its proper and lawful administration than if he were not paid for this function. The company is entitled to look to the bargaining committee and particularly its chairman to deal with matters arising under the collective agreement. The bargaining committee as a whole and its chairman in particular frustrated the company's efforts to enforce the provisions of the collective agreement on October 2nd and indeed the bargaining committee appeared to support the threat of trouble made by Mr. Wilson on February 28th* since no member of the bargaining committee disassociated himself from Mr. Wilson's remarks but on

* (read September 28th.)

Je conclus en outre que la preuve a établi que le réclamant a joué un rôle dans l'arrêt de travail, comme le prétend la compagnie dans sa réponse au grief. La preuve a démontré qu'il s'agissait de plus qu'un rôle passif. Un responsable syndical n'a généralement pas, du fait de ses fonctions, de plus grandes obligations envers l'employeur que tout autre employé. Par conséquent, si un responsable syndical ne participe que passivement à un arrêt de travail provoqué par d'autres employés, il ne doit pas encourir de plus grandes responsabilités que les autres simples participants. Là encore, le responsable syndical n'a généralement aucune obligation d'agir à titre d'agent de la direction. Ce n'est toutefois pas le cas ici. Je suis convaincu que le réclamant a joué le rôle actif de meneur plutôt que celui de simple participant. Ses fonctions de direction à titre de chef syndical conféraient plus d'autorité à ses actes durant le «*sick-in*», et le rendaient donc plus coupable. Bien qu'il soit évident—d'après les remarques faites le 2 octobre par Wilson au contremaître général au sujet de certains employés qui s'étaient présentés au travail ce jour-là—que le «*sick-in*» n'a pas eu le succès escompté, cela n'était apparemment pas dû au manque d'efforts déployés par le réclamant pour le provoquer. De plus, en l'espèce, la convention collective se distingue de celle dont la Cour était saisie dans l'affaire British Columbia Telephone Company, précitée, et où la Cour a décidé qu'un représentant syndical n'avait pas d'obligations implicites plus étendues que celles d'un employé ordinaire. Ici, les parties ont défini les fonctions et responsabilités du président du comité d'entreprise. Ce dernier ne participe d'aucune façon à la production comme les autres employés de l'unité de négociation. Il doit s'occuper à plein temps de l'application de la convention collective et, à ce titre, il relève du gérant des relations de travail, conformément à l'article 8 de la convention collective. Vu que la compagnie le paie seulement pour voir à l'application de la convention collective à titre de président du comité d'entreprise, il doit assumer pour sa bonne application suivant la loi une plus grande responsabilité que s'il n'était pas payé pour ces fonctions. La compagnie est en droit de s'attendre à ce que le comité de négociation dans son ensemble, et son président en particulier, s'occupent des questions relatives à la convention collective. Le comité de négociation dans son ensemble, et son président en particulier, ont frustré les efforts de la compagnie pour faire respecter la convention collective le 2 octobre. Les membres du comité de négociation ont d'ailleurs semblé appuyer les remarques faites par Wilson le 28 février* puisqu'aucun d'entre eux ne s'en est dissocié; au contraire, ils ont tous participé au «*sick-in*» mettant ainsi à exécution les menaces profé-

* (lire le 28 septembre)

the contrary participated in the sick-in thereby enforcing the threat of trouble made by Mr. Wilson.

In view of the provisions of Article 8, even if Mr. Wilson's participation in a work stoppage were merely passive his culpability would be greater than other employees. The extent of the benefits provided by the collective agreement for the position of any union office is usually a reliable guide to the degree of responsibility which flows to that position under the collective agreement. For this reason, if for no other, Mr. Wilson must bear the greatest responsibility for what occurred on October 2nd since he failed to demonstrate that he had actively attempted to enforce the provisions of the collective agreement at the direction of the manager of labour relations and to cause the members of the bargaining unit to do likewise. In this respect Mr. Kirkby was in a different position than Mr. Wilson. Mr. Kirkby was on a full time leave of absence from the bargaining unit for the duration of his term of office as president of the local union. He was not paid by the company. During his leave of absence he owed no duty to the company as an employee. His only duty was to the union. In this regard Mr. Kirkby's duty to the company was similar to that of Mr. Fairchild, the international representative. If Mr. Kirkby was guilty of unlawful conduct the remedy would be within the jurisdiction of the Courts or by way of an application for leave to prosecute under the Ontario Labour Relations Act., in my view.

The first question I will consider arises out of the latter part of the last quoted paragraph. Was the arbitrator correct in holding that, although appointed by the Union as full time Plant Chairman of the Union Bargaining Committee and thereby relieved of any production duties, Wilson nevertheless remained an employee of the Company subject to dismissal for cause? In this respect consideration is to be given to the following provisions of the Collective Agreement which, among others, were quoted by the arbitrator at the beginning of the award.

UNION REPRESENTATION

Bargaining Committee

8. The Company acknowledges the right of the Union to select a Bargaining Committee of five (5) members of whom one (1) shall be the Chairman and one (1) the Skilled Trades Committeeman. The Company will recognize and bargain with the said committee on any matter properly arising from time to time during the

rées par M. Wilson.

Compte tenu des dispositions de l'article 8, même si la participation de M. Wilson à un arrêt de travail était purement passive, il serait plus coupable que d'autres employés. Les avantages conférés par la convention collective en considération d'un poste syndical constituent d'habitude une bonne mesure du degré de responsabilité qui en découle. Pour cette raison, à tout le moins, M. Wilson doit porter la plus grande part de la responsabilité des incidents du 2 octobre puisqu'il n'a pas démontré qu'il avait essayé concrètement de faire respecter les dispositions de la convention collective selon les directives du gérant des relations de travail, et d'inciter les membres de l'unité de négociation à en faire autant. M. Kirkby n'avait pas à cet égard le même statut que M. Wilson. M. Kirkby bénéficiait d'un congé autorisé de l'unité de négociation à plein temps pour la durée de son mandat de président du syndical local. Il n'était pas payé par la compagnie. Il n'avait aucune obligation à l'égard de la compagnie durant son congé. Il n'avait d'obligations qu'envers le syndicat. Les obligations de M. Kirkby envers la compagnie étaient à cet égard semblables à celles de M. Fairchild, le représentant international. A mon avis, si M. Kirkby était coupable de conduite illégale, l'affaire serait du ressort des tribunaux ou une requête pour permission de poursuivre pourrait être présentée en vertu de *The Ontario Labour Relations Act*.

La première question dont je traiterai ressort de la fin du dernier alinéa cité. L'arbitre avait-il raison de statuer que Wilson continuait d'être un employé de la compagnie passible de congédiement pour cause, malgré que le syndicat l'ait nommé Président à plein temps du comité d'entreprise et qu'il n'ait pas de fonctions de production? Il faut prendre en considération les dispositions suivantes de la convention collective que l'arbitre a citées, entre autres, au début de sa sentence:

[TRADUCTION] REPRÉSENTATION SYNDICALE

Comité de négociation

8. La compagnie reconnaît le droit du syndicat de choisir un comité de négociation de cinq (5) membres dont un (1) président et un (1) représentant des métiers spécialisés. La compagnie reconnaît ce comité et doit négocier avec lui toute question survenant pendant la durée de la convention. Le Président du syndicat local,

continuance of the Agreement. The President, or in his absence the Vice-President, of the Local, will be ex officio members of the Committee if not elected thereto.

The Plant Chairman of the Union Bargaining Committee shall be known as the full time Plant Chairman. He shall be on a full time basis for the purpose of administering the Agreement in co-operation with the regular Stewards and Committeemen. He shall be allowed free access to the Company's operations in the performance of his duties. He will be provided with an office and office facilities including desk, chair, telephone and filing cabinet, and he will be supplied with copies of Company forms concerning starts, lay-offs, discharges, releases, re-calls and changes in job classification. The Company will continue the present practice of providing Company forms involving transfers of employees.

The Vice-Chairman of the Union Bargaining Committee, or because of his unavailability, another designated representative of the Union Plant Committee shall substitute for the full time Plant Chairman should he be absent from the Plant.

The full time Plant Chairman or his substitute shall receive the rate of pay equal to the highest rate in the Bargaining Unit, and will be limited to forty (40) hours per week at straight time. He shall be responsible to the Manager, Labour Relations or his nominee.

When the Plant Chairman ceases to hold office, he shall be returned, consistent with his seniority, to the classification and to the department in which he was employed at the time of his selection as Plant Chairman, or to a job classification embracing comparable job duties to that which he held prior to his selection.

Zone Committeemen

9. The Company agrees that Union representation in each of the thirteen (13) geographical zones of the Bargaining Unit shall consist of one Zone Committeeman and two Shop Stewards. Zone Committeemen and Shop Stewards shall be elected or otherwise appointed from the employees in the geographical zone they are to represent. In addition, there will be one Skilled Trade Zone in the Bargaining Unit, represented by one Zone Committeeman and two Shop Stewards . . . .

Stewards

10. If the number of employees in a geographical zone exceeds two hundred (200) in number, then the Union may add one (1) Shop Steward, and one (1) additional Shop Steward for each additional one hundred (100) employees added to the Zone. One of the said Stewards shall be known as the Chief Steward. The Chief Stew-

ou en son absence le Vice-Président, est membre *ex officio* du Comité s'il n'y est pas élu.

Le Président du comité syndical de négociation porte le nom de Président à plein temps du comité d'entreprise. Il exerce ses fonctions à plein temps afin d'appliquer la convention en coopération avec les délégués réguliers et les membres du comité. Il a libre accès aux opérations de la compagnie dans l'exécution de ses fonctions. On lui fournit un bureau avec le mobilier, dont un pupitre, une chaise, un téléphone et un classeur, ainsi que des exemplaires des formulaires qu'utilise la compagnie pour l'embauche, les mises à pied, les congédiements, les renvois, les rappels au travail et les changements de classification d'emploi. La compagnie doit continuer à fournir les formulaires relatifs aux mutations d'emploi.

Le Vice-Président du comité syndical de négociation, ou s'il n'est pas disponible, un autre représentant désigné du comité syndical d'entreprise remplace le Président du comité d'entreprise en son absence.

Le Président à plein temps du comité d'entreprise, ou son remplaçant, est payé au taux le plus élevé de l'unité de négociation, et il travaille un maximum de quarante (40) heures à temps simple. Il relève du gérant des relations de travail ou de son représentant.

Lorsque le Président du comité d'entreprise quitte son poste, il retourne, compte tenu de son ancienneté, au département où il était employé avec la classification qu'il avait au moment où il a été choisi comme Président du comité d'entreprise, ou à un poste comportant des fonctions comparables à celles qu'il exerçait avant d'être choisi.

Représentants de secteur

9. La compagnie convient que la représentation syndicale sera assurée dans chacun des treize (13) secteurs géographiques de l'unité de négociation par un représentant de secteur et deux délégués d'atelier. Les représentants de secteur et les délégués d'atelier sont élus ou autrement nommés parmi les employés du secteur géographique à représenter. De plus, l'unité de négociation comprend un secteur des métiers spécialisés, à être représenté par un représentant de secteur et deux délégués d'atelier . . .

Délégués

10. S'il y a plus de deux cents (200) employés dans un secteur géographique, le syndicat peut ajouter un (1) délégué d'atelier et un (1) délégué d'atelier supplémentaire pour chaque centaine (100) d'employés ajoutés dans ce secteur. L'un desdits délégués est le délégué en chef. Le délégué en chef a droit à quatre heures aux

ard shall be allowed four hours each Friday afternoon, on Company time, in order to consult with his fellow Stewards on matters related to the administration of the Agreement ....

Performance of Regular Duties—Union Business

12. The Union recognizes and agrees that Stewards, Zone Committeemen and Members of the Bargaining Committee have regular duties to perform in connection with their employment and that only such time as is reasonably necessary will be consumed by such persons during working hours in order to attend to the business of administering the Agreement ....

Union Business

13. Before leaving his regular duties on behalf of the Company to investigate or process a grievance or otherwise attend to the business of administering the Agreement, the Steward or Zone Committeeman must obtain the permission of his Foreman to do so, and before permission is granted, may be required to complete a form supplied by the Foreman indicating the nature of his business and the time anticipated to transact such business, it being understood that, if permission is granted and the Foreman's permission will not be unreasonably withheld, the time in excess of such may, at the Company's discretion, and after notice to the Union, be disallowed.

In accordance with this understanding, except as provided in Clause 23, the Company will compensate such employees for the time spent during their working hours in dealing with employee grievances at their regular rate of pay. The Company reserves the right to withhold payment if the Steward or Zone Committeeman does not conform to the accepted practice when dealing with grievances or if an unreasonable or abnormal amount of time is consumed in dealing with grievances. Any dispute arising from the above may be the subject of the Grievance Procedure.

I must also quote the provisions of the Collective Agreement under which, as the arbitrator noted, the local union president had been granted "Leave of Absence". This is Article 51 as follows:

Union Leave of Absence

51. (a) An employee who is elected or appointed to a full time office with the International Union or Local 1967, will be granted Leave of Absence upon written application of the International Union or the senior officer of Local 1967 as the case may be. Such Leave of Absence shall be, upon request, extended and it is understood that the Company will receive written notice

frais de la compagnie, tous les vendredis après-midi, afin de s'entretenir avec les délégués sur des sujets relatifs à l'application de la convention ...

Exécution du travail régulier—Affaires syndicales

12. Le syndicat reconnaît et convient que les délégués, les représentants de secteur et les membres du comité de négociation doivent accomplir un travail régulier en rapport avec leur emploi, et qu'ils ne doivent prendre que le temps raisonnablement requis pour s'occuper de l'application de la convention durant les heures de travail ...

Affaires syndicales

13. Avant de quitter le travail qu'il exécute normalement pour la compagnie, afin d'enquêter sur un grief ou le préparer, ou pour autrement s'occuper de l'application de la convention, le délégué ou le représentant de secteur doit obtenir la permission de son contremaître qui, avant d'accorder cette permission, peut lui demander de remplir un formulaire qu'il lui fournira, indiquant la nature des affaires et le temps prévu pour s'en acquitter; il est entendu que si la permission est accordée, et elle ne sera pas refusée de façon déraisonnable, le temps pris en trop pourra être déduit, à la discrétion de la compagnie, après avis au syndicat.

Conformément à cette entente, sous réserve de l'article 23, la compagnie doit payer ces employés au taux régulier, pour le temps consacré aux griefs des employés durant les heures de travail. La compagnie se réserve le droit de retenir le paiement si le délégué ou le représentant de secteur ne se conforme pas à la pratique acceptée pour s'occuper des griefs, ou s'il y consacre un temps déraisonnable ou anormal. Tout différend concernant les dispositions ci-dessus peut faire l'objet d'un grief.

Je dois également citer les dispositions de la convention collective en vertu desquelles, comme l'a remarqué l'arbitre, le président du syndicat local a eu droit à un «congé autorisé». Il s'agit de l'article 51 qui se lit comme suit:

Congé syndical autorisé

51. (a) Un employé qui est élu ou nommé à un poste à plein temps du Syndicat international ou du Local 1967, a droit à un congé autorisé, sur demande écrite du Syndicat international ou de l'agent principal du Local 1967, selon le cas. Ce congé est prolongé sur demande, et il est entendu que le Syndicat international ou le Local 1967 doivent aviser respectivement par écrit la

from the International Union or Local 1967 respectively to this effect.

(b) The International Union or Local 1967 agrees also to advise the Company in writing once annually of the names of those Douglas employees who are engaged in full time duties with the Union.

(c) Upon similar application, leave will be granted for periods up to ten (10) days to permit members of the Bargaining Unit to attend conventions, educational seminars or conferences called by the International Union or other Labour Councils. It is understood that not more than fifteen (15) members will be absent at one time under this clause and that applications for leave will be presented in writing as soon as possible—in any case not less than five (5) working days—in order that the Company may provide replacements, if necessary.

(d) It is understood that requests which exceed the numbers quoted above may be granted providing the individuals can be spared from production.

(e) If an employee returns to the Bargaining Unit from a full time office with the International Union, the return shall be to the former Job Classification or a Job Classification embracing comparable job duties to that which he held prior to leave of absence, providing such return does not result in a lay-off or bumping of an employee holding greater seniority.

(f) When an employee returns to the Bargaining Unit from a full time office with Local 1967, he shall be returned consistent with his seniority, to the classification and to the department in which he was employed at the time of his selection to such office, or to a Job Classification embracing comparable job duties to that which he held prior to his selection.

It appears to me that the arbitrator correctly held that the difference in wording between Article 8 and Article 51 indicated an intention not to give the Plant Chairman the same status as the Union President. The latter is given "Leave of Absence" and becomes an employee of the Union. The Plant Chairman is only relieved of production duties just as other committee members and stewards are for the time they are allowed to spend on "Union business" in "administering the Agreement" on "Company time" (See Art. 10, 12, 13). It is clear that stewards and committee members do not cease to be employees for the time devoted to such activities and it does not appear to me that

compagnie en ce sens.

(b) Le Syndicat international ou le Local 1967 conviennent également d'aviser par écrit la compagnie, une fois par an, des noms des employés de Douglas s'occupant à plein temps d'activités syndicales.

(c) Sur semblable demande, il sera accordé aux membres de l'unité de négociation jusqu'à dix (10) jours de congé afin de leur permettre d'assister à des congrès, des séminaires de formation ou des conférences organisées par le Syndicat international ou d'autres Conseils du travail. Il est entendu qu'en vertu de cette clause, au plus quinze (15) membres seront absents en même temps, et que les demandes de congé seront présentées par écrit dès que possible—au moins cinq (5) jours ouvrables à l'avance—afin que la compagnie puisse prévoir les remplacements, si nécessaire.

(d) Il est entendu qu'un plus grand nombre de demandes peuvent être accordées si la production n'exige pas la présence de ces personnes.

(e) Si un employé réintègre l'unité de négociation après avoir occupé un poste à plein temps auprès du Syndicat international, il retourne à un poste de sa classification antérieure ou à un poste comportant des fonctions comparables à celles qu'il exerçait avant son congé autorisé, dans la mesure où cette réintégration ne cause pas la mise à pied ou la rétrogradation d'un employé qui a plus d'ancienneté.

(f) Lorsqu'un employé réintègre l'unité de négociation après avoir occupé un poste à plein temps auprès du Local 1967, il retourne, compte tenu de son ancienneté, au département où il était employé avec la classification qu'il avait au moment où il a été choisi pour ce poste, ou à un poste comportant des fonctions comparables à celles qu'il exerçait avant d'être choisi.

Il me paraît que l'arbitre a eu raison de décider que la rédaction différente des articles 8 et 51 indique une intention de ne pas donner au Président du comité d'entreprise le même statut qu'au Président du syndicat. Ce dernier reçoit un «congé autorisé» et devient employé du syndicat. Le Président du comité d'entreprise est seulement libéré de ses fonctions de production, tout comme le sont les autres membres du comité et les délégués, pendant le temps qu'il leur est permis de consacrer aux «affaires syndicales», à «l'application de la convention», «aux frais de la compagnie» (Voir art. 10, 12 et 13). Il est clair que les délégués et les membres du comité ne cessent pas d'être employés durant le

it is otherwise for the Plant Chairman just because he is allowed full time for such activities rather than part time only. Where it was intended that union officials should cease to be "on Company time" it was clearly provided for "leave of absence". This was not done for the Plant Chairman and, in this connection I would draw attention to the following provision in Appendix III, Letters of Intent, No 34. "*Re: Union Business Practice*".

(13) In the event the Plant Chairman requires the presence of a zone committeeman and/or a Steward in his office, he will contact the Manager of Labour Relations or his designee, who will make the necessary arrangements as soon as possible.

The Chairman will have the responsibility to ensure that persons will not congregate nor spend excessive time in his office when they are given permission to be there.

It is argued that the duties of the Plant Chairman are to the Union, not to the Company and reference is made to the judgment in *Re Federation of Telephone Workers of British Columbia and British Columbia Telephone Co.*[3] on which the Divisional Court relied. I do not disagree with that proposition and I accept that the Company could not complain of a breach of duty to it by Wilson because none existed. However, breach of duty, is not the only possible cause for which an employee may be dismissed, there is also misconduct. Although he did not use the word, this is clearly what the arbitrator found when he said:

The statements made by the grievor are not only consistent with the unlawfulness of the acts complained of but to treat his statements as innocent remarks in light of all the surrounding circumstances would be naive to the extreme ... His participation was not merely passive. I find that the evidence clearly demonstrates his leadership in causing employees to contravene the collective agreement.

Concerning the "unlawfulness" mentioned by the arbitrator the following provisions of *The*

[3] (1971), 23 D.L.R. (3d) 18.

temps consacré à ces activités, et je ne crois pas qu'il en aille autrement du Président du comité d'entreprise simplement parce qu'on lui permet de s'occuper de ces tâches à plein temps plutôt qu'à temps partiel. Lorsqu'on a voulu que des représentants syndicaux cessent d'être rémunérés «aux frais de la compagnie», on a clairement prévu un «congé autorisé». Cela n'est pas le cas du Président du comité d'entreprise et je signale à cet égard la disposition suivante de l'Annexe III, Lettres d'intention, n° 34. «*Objet: Pratique relative aux affaires syndicales*».

[TRADUCTION] (13) Si le Président du comité d'entreprise requiert la présence d'un représentant de secteur et/ou d'un délégué dans son bureau, il doit entrer en contact avec le gérant des relations de travail ou la personne que celui-ci a désignée, qui prendra dès que possible les dispositions nécessaires.

Le Président aura la responsabilité de s'assurer que ces personnes ne se réunissent, ni ne passent un temps excessif dans son bureau lorsqu'elles ont la permission d'y être.

On allègue que le Président du comité d'entreprise a des obligations envers le syndicat, pas envers la compagnie, et on réfère au jugement rendu dans l'affaire *Re Federation of Telephone Workers of British Columbia and British Columbia Telephone Co.*[3], sur lequel s'est fondée la Cour divisionnaire. Je n'en disconviens pas et admets que la compagnie ne pouvait se plaindre de l'inexécution d'une obligation de la part de Wilson puisqu'il n'en avait aucune. Cependant, l'inexécution d'une obligation n'est pas le seul motif possible de renvoi d'un employé: il y a aussi toute faute grave. Bien qu'il n'ait pas utilisé cette expression, c'est clairement ce à quoi conclut l'arbitre lorsqu'il dit:

[TRADUCTION] Ses déclarations ne sont pas seulement compatibles avec l'illégalité des actes dont on se plaint, mais il faudrait être extrêmement naïf pour considérer ses remarques anodines, compte tenu de toutes les circonstances ... Sa participation n'était pas purement passive. La preuve démontre clairement qu'il a comme leur chef poussé les employés à violer la convention collective.

En ce qui concerne «l'illégalité» mentionnée par l'arbitre, il faut remarquer les dispositions suivan-

[3] (1971), 23 D.L.R. (3d) 18.

Labour Relations Act (R.S.O. 1970, c. 232) should be noted.

63. (1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

. . .

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

. . .

67. (1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

In the light of these provisions, Wilson could not claim to have been improperly disciplined for activities as Plant Chairman for which he was answerable only to the Union. Those activities properly embraced only the "administering of the Agreement". The instigation of a strike contrary to the provisions of the Agreement was completely outside the range of activities which could be considered as within the scope of the duties of the Plant Chairman. By engaging in this unlawful activity Wilson did something for which he could claim no immunity just as would be the case for any public official committing an illegal act while on public duty.

I do not find it necessary to comment on what the arbitrator said he would hold "if Mr. Wilson's participation in a work stoppage were merely passive". There is a clear finding of "active leadership" which cannot be challenged and, in my view, fully supports the conclusion reached by the arbitrator both as respects the cause of the disciplinary discharge and the severity of the penalty. What the situation would be otherwise is immaterial. I wish to make it clear that I am purposely refraining from any reference to decisions respecting the situation of labour union officials with respect to injunctions or cease and desist orders, what I am presently saying is intended to be limited to a consideration of the situation disclosed in the present case.

tes de *The Labour Relations Act* (R.S.O. 1970, chap. 232):

[TRADUCTION] 63. (1) Lorsqu'une convention collective est en vigueur, un employé lié par la convention ne doit pas faire la grève et un employeur lié par la convention ne doit pas décréter le lock-out à l'égard d'un tel employé.

. . .

(3) Un employé ne doit pas menacer de faire une grève illégale et un employeur ne doit pas menacer de décréter le lock-out illégal à l'égard d'un employé.

. . .

67. (1) Nul ne doit poser un acte quelconque s'il sait ou doit savoir que cet acte aura pour conséquence probable et raisonnable d'entraîner une personne ou des personnes à une grève illégale ou un lock-out illégal.

Compte tenu de ces dispositions, Wilson ne pouvait prétendre avoir été injustement congédié en raison de ses activités de Président du comité d'entreprise, dont il ne devait répondre qu'au syndicat. Ces activités se limitaient exclusivement à «l'application de la convention». L'incitation à une grève, en violation des dispositions de la convention, débordait complètement le cadre des activités qui pouvaient faire partie des fonctions du Président du comité d'entreprise. Par cet acte illégal, Wilson faisait quelque chose pour quoi il ne pouvait se prévaloir d'aucune immunité, tout comme n'importe quel fonctionnaire public qui commet un acte illégal au cours de ses fonctions officielles.

Je n'estime pas nécessaire de commenter les propos de l'arbitre au sujet de ce qu'il déciderait [TRADUCTION] «si la participation de M. Wilson à un arrêt de travail était purement passive»? Il a clairement conclu que le réclamant a joué «le rôle actif de meneur». Cette conclusion est incontestable et à mon avis, justifie pleinement la décision de l'arbitre quant à la juste cause de congédiement disciplinaire et à la sévérité de la sanction. Il n'y a pas lieu de rechercher quel serait le résultat dans une autre situation. Je tiens à souligner que je m'abstiens intentionnellement de toute référence à des décisions sur le statut des responsables syndicaux à l'égard d'injonctions et d'ordonnances de ne pas faire; mes propos se limitent à l'étude de la situation dans la présente affaire.

In the result, I would allow the appeal with respect to all the respondents, set aside the judgments of the Courts below and restore the awards of the arbitrator. The appellant is entitled to its costs throughout against the respondent grievors.

The following reasons were delivered by

ESTEY J. (*dissenting in part*)—An arbitration resulting from an illegal work stoppage at the appellant's plant in Malton comes to us by way of the Divisional Court of the High Court of Ontario whose judgment setting aside the arbitrator's award was confirmed without reasons by the Ontario Court of Appeal. The arbitrator by agreement amongst counsel heard four grievance arbitrations consecutively and issued four separate awards although cross-references, particularly with reference to the facts, appear in these awards.

The four grievors, now respondents, were four of five members of the union bargaining committee at the appellant's plant. The fifth member of that committee, one William Hill, was the subject of another arbitration and I will refer to this later. In each case, the grievance is taken against the action of the appellant in discharging the grievors by reason of their participation in a "sick-in." The facts can be briefly stated. On Wednesday, September 26, 1973 some of the appellant's employees were involved in a demonstration in support of the employees of the Artistic Woodworking Company, which dispute was completely unrelated to any dealing between Douglas Aircraft and Local 1967. Due to their involvement in the Artistic dispute, five members of Local 1967, including one Harbinson, a member of the bargaining committee for Local 1967, reported late for work. On September 28, 1973, management representatives met with the union bargaining committee to deal with a grievance not connected with the issues now arising. In the course of the meeting, Harbinson was called out to meet his supervisor for the purpose of receiving notice of his suspension for late arrival at work by reason of participation in the Artistic dispute. During this meeting, the respondent Wilson, on hearing of Harbinson's suspension, stated to the management personnel present: "If

En conséquence, je suis d'avis d'accueillir le pourvoi à l'égard de tous les intimés, d'infirmer le jugement des cours d'instance inférieure et de rétablir les sentences de l'arbitre. L'appelante a droit à ses dépens dans toutes les cours contre les réclamants intimés.

Version française des motifs rendu par

LE JUGE ESTEY (*dissident en partie*)—Le pourvoi vise une sentence arbitrale rendue à la suite d'un arrêt de travail illégal dans l'usine de l'appelante à Malton. La Cour d'appel de l'Ontario a confirmé sans publier de motifs le jugement de la Cour divisionnaire de la Haute Cour de l'Ontario qui a écarté la sentence de l'arbitre. Avec le consentement des avocats, l'arbitre a entendu les quatre griefs consécutivement et a rendu quatre sentences distinctes bien qu'on y retrouve des éléments communs, particulièrement en ce qui concerne les faits.

Les quatre réclamants, intimés devant cette Cour, étaient quatre des cinq membres du comité syndical de négociation dans l'usine de l'appelante. Il y a eu un autre arbitrage à l'égard du cinquième membre de ce comité, un nommé William Hill; j'y reviendrai plus tard. Tous ces griefs ont été présentés par les réclamants contre l'appelante qui les a congédiés en raison de leur participation à un «*sick-in*». On peut brièvement résumer les faits. Le mercredi 26 septembre 1973, certains employés de l'appelante ont participé à une manifestation d'appui aux employés d'Artistic Woodworking Company, dont le conflit était étranger à toute relation entre Douglas Aircraft et le local 1967. En raison de leur participation au conflit Artistic, cinq membres du local 1967, y compris un nommé Harbinson, membre du comité de négociation du local 1967, se sont présentés en retard au travail. Le 28 septembre 1973, des représentants de la direction ont rencontré le comité syndical de négociation afin d'examiner un grief étranger aux questions ici en litige. Pendant la réunion, Harbinson a été appelé hors de la salle afin de rencontrer son supérieur qui lui a remis un avis de suspension pour son retard en raison de sa participation au conflit Artistic. Informé de la suspension de Harbinson, l'intimé Wilson a déclaré aux représentants de la direction présents à la réunion: [TRADUC-

any given day, on October 2nd 66 officers or officials of the union were absent from work.

At about 8:20 a.m. on October 2nd the general foreman met Mr. Wilson in the plant. The general foreman expressed surprise at seeing Mr. Wilson in the plant at that time. Mr. Wilson replied that he was only there to see what was going on. Mr. Wilson then pointed to a couple of drivematic machine operators and said, "Look at the bastards, they can't even look me straight in the face". He then pointed to another employee and said, "That little Portuguese bastard was saying yesterday that we should all be out in the street, but he comes in to work today". Mr. Wilson then made inquiries as to the number of operators and maintenance men who were to work.

At about 8:50 a.m. on October 2nd, Mr. Wilson telephoned the company and advised that the regular step 3 grievance meeting which was scheduled that day would have to be cancelled since all the bargaining committee and all the executive board were absent from work. Only one out of fourteen zone committeemen and two out of some forty-nine stewards were at work on October 2nd.

An employee also testified that Mr. Benjamin had approached him on October 1st and asked him and two other employees not to come into work the following day but to phone in and report that they were sick. The employee further testified that Mr. Benjamin had approached him and two other employees around 2:30 p.m. on Friday, September 28th and asked them "to get the hell out otherwise it would be rough on the guys already out". The witness further testified that he had seen a number of employees punching out between 2:00 p.m. and 2:30 p.m. on Friday. After this time no work was accomplished because a lot of employees were standing around in small groups discussing the matter. The witness testified that he did not punch out as requested because he did not want to lose wages.

The appellant responded to these actions on the 2nd of October by convening a meeting with union representatives and sending a notice to each of the respondent grievors which stated in part as follows:

Further to our discussion of Tuesday, October 2nd, 1973 this will confirm that your employment has been terminated for the role you played in the work interruption of October 2nd, 1973.

pouvaient être absents le même jour, mais que le 2 octobre, 66 représentants ou agents syndicaux étaient absents du travail.

Vers 8h20 le 2 octobre, le contremaître général a rencontré M. Wilson dans l'usine, et s'est dit étonné de l'y voir à cette heure. M. Wilson a répondu qu'il était là seulement pour voir ce qui se passait. M. Wilson a ensuite désigné quelques opérateurs de machine automatiques et dit, «Regarde ces bâtards, ils ne peuvent même pas me regarder droit dans les yeux». Il a ensuite désigné un autre employé et dit, «Ce petit bâtard de Portugais disait hier que nous devrions tous sortir dans la rue, mais il est au travail aujourd'hui». M. Wilson s'est ensuite enquis du nombre d'opérateurs et d'employés d'entretien qui étaient au travail.

Vers 8h50 le 2 octobre, M. Wilson a téléphoné à la compagnie pour annoncer que la réunion régulière de la troisième étape de griefs qui était prévue ce jour-là devrait être annulée puisque tous les membres du comité de négociation et du conseil de direction étaient absents du travail. Seulement un des quatroze représentants de secteur et deux des quelque quarante-neuf délégués syndicaux étaient au travail le 2 octobre.

Un employé a également témoigné que M. Benjamin l'avait abordé le 1er octobre pour lui demander, ainsi qu'à deux autres employés, de ne pas se présenter au travail le jour suivant, mais de téléphoner et de se déclarer malade. Cet employé a en outre déclaré que M. Benjamin l'avait abordé, lui et deux autres employés, vers 14h30 le vendredi 28 septembre, et leur avait demandé «de sortir au plus vite, sinon cela serait difficile pour les employés déjà sortis». Le témoin dit également avoir vu un certain nombre d'employés poinçonner leurs cartes de sortie entre 14h00 et 14h30 le vendredi. Il ne s'est fait aucun travail après cette heure-là parce que beaucoup d'employés s'étaient réunis en petits groupes pour discuter de l'affaire. Le témoin a déclaré qu'il n'avait pas poinçonné sa carte de sortie comme on le lui avait demandé parce qu'il ne voulait pas perdre de salaire.

L'appelante a réagi aux événements du 2 octobre en convoquant une réunion avec les représentants du syndicat et en envoyant à chaque réclamant intimé un avis qui se lit en partie comme suit:

[TRADUCTION] Suite à notre conversation du mardi 2 octobre 1973, la présente confirme qu'il a été mis fin à votre emploi en raison de votre rôle dans l'arrêt de travail du 2 octobre 1973.

The Company response included other actions such as the suspension of the six-man executive committee of the union for varying periods from 5 to 23 days; the suspension of zone committeemen for 3 days; and the issuance to 47 union stewards of a final warning and to the rank and file employees, a warning.

Apparently the "sick-in" was the continuation or repetition of earlier episodes which had culminated in the incorporation into the collective agreement current in 1973 of an exchange of correspondence between the appellant and the international union to which the local, the bargaining agent of the grievors, belonged. These letters included one from the Staff Vice-President - Personnel of the Appellant's parent company, McDonnell Douglas Corporation, to the Vice-President and Director, Aerospace Department, United Automobile Workers, dated November 12, 1971 which, after reciting (a) that the author of the letter regarded work-to-rule, slowdowns, etc. as violations of the law and (b) that, due to the competitive nature of the business in which the appellant is engaged, namely aircraft manufacturing, concerted work stoppages operated to the detriment of the Company and the job security of the employees, stated:

The Company, therefore, is prepared to take appropriate action against any individual or groups of individuals who lead, direct, participate or engage in such concerted activities either as a violation of the no-strike provisions of our agreement or under the applicable provisions of the Labour Relations Act, or both.

The letter continued:

This letter is directed to the attention of those appropriate personnel in your organization and represented by your organization, so all concerned will be aware that such violations will be infractions, on which the management intends to invoke immediate discipline.

The International Union replied and its letter is incorporated into the collective agreement as well. It reads in part:

... we will not condone any slowdowns, work stoppages or illegal strikes ... [and] the International Union will not support any such action morally or financially if such action should occur.

La compagnie a également pris d'autres mesures comme la suspension des six membres du comité de direction du syndicat pour des périodes de 5 à 23 jours, la suspension des représentants de secteur pour 3 jours, un avertissement final aux 47 délégués syndicaux, et un avertissement aux simples employés.

Le «*sick-in*» constituait apparemment le prolongement ou la répétition d'événements antérieurs qui avaient abouti à l'incorporation à la convention collective en vigueur en 1973 d'un échange de correspondance entre l'appelante et le syndicat international auquel adhérait le local, agent négociateur des réclamants. Parmi ces lettres, il en est une que le vice-président du personnel de la compagnie-mère de l'appelante, McDonnell Douglas Corporation, avait envoyée le 12 novembre 1971 au vice-président et directeur des Travailleurs unis de l'automobile, Division de l'aéronautique; après avoir déclaré a) que l'auteur de la lettre considérait la grève du zèle, les ralentissements de travail, etc ... comme des violations des règles applicables et b) que, vu la nature concurrentielle des affaires de l'appelante, soit la construction aéronautique, les arrêts de travail concertés nuisaient à la compagnie et à la sécurité d'emploi des employés, la lettre disait:

[TRADUCTION] La compagnie est donc prête à prendre les mesures appropriées contre toute personne ou tout groupe de personnes qui conduisent ou ordonnent ce genre d'activités concertées ou y participent, que ce soit en violation des dispositions qui interdisent la grève dans notre convention ou des dispositions pertinentes de *The Labour Relations Act*, ou les deux.

La lettre poursuit:

[TRADUCTION] Nous attirons l'attention des membres de votre organisation et des personnes qu'elle représente sur cette lettre, afin que toutes les personnes concernées sachent que des violations de ce genre constituent des infractions contre lesquelles la direction a l'intention de sévir immédiatement.

La réponse du syndicat international fait également partie de la convention collective. En voici un extrait:

[TRADUCTION] ... nous n'excuserons aucun ralentissement de travail, arrêt de travail ou grève illégale ... [et] le syndicat international n'appuiera aucun mouvement de ce genre, moralement ou financièrement, s'il devait se produire.

A similar exchange of letters between the appellant and the Vice-President and Director, U.A.W., Canada was likewise incorporated into the collective agreement. The letter from the appellant to D. McDermott, Vice-President and Director of U.A.W., Canada reads in part as follows:

We wish to reiterate however, the position also taken in negotiations that we intend to enforce the terms of the new Collective Agreement and prevent any repetition of the type of conduct set forth in the grievance. This enforcement may involve the discipline of employees including discharge and will of necessity result in more severe discipline being applied to any Union representatives involved. In as much as the Company should not suffer any damage as a result of any future breach of the Collective Agreement for which the Union has been responsible we will again look to the Union for recovery of any loss suffered through the filing of a Policy Grievance under the arbitration procedure provided by the Ontario Labour Relations Act.

It is our honest desire to improve Union/Management relations, but we wish to impress upon you our intention to ensure future compliance with the Collective Agreement.

Article 8 establishing the bargaining committee under the collective agreement is of considerable significance in these proceedings and I set it out in full.

8. The Company acknowledges the right of the Union to select a Bargaining Committee of five (5) members of whom one (1) shall be the Chairman and one (1) the Skilled Trades Committeeman. The Company will recognize and bargain with the said committee on any matter properly arising from time to time during the continuance of the Agreement. The President, or in his absence the Vice-President, of the Local, will be ex officio members of the Committee if not elected thereto.

The Plant Chairman of the Union Bargaining Committee shall be known as the full time Plant Chairman. He shall be on a full time basis for the purpose of administering the Agreement in co-operation with the regular Stewards and Committeemen. He shall be allowed free access to the Company's operations in the performance of his duties. He will be provided with an office and office facilities including desk, chair, telephone and filing cabinet, and he will be supplied with copies of Company forms concerning starts, lay-offs, discharges, releases, re-calls and changes in job classification. The Company will continue the present practice

La convention collective contient également un échange semblable de correspondance entre l'appelante et le vice-président et directeur des T.U.A. du Canada. La lettre de l'appelante à D. McDermott, vice-président et directeur des T.U.A. du Canada se lit en partie comme suit:

[TRADUCTION] Nous voulons toutefois rappeler la position que nous avons aussi adoptée lors des négociations, savoir qu'il entre dans nos intentions de faire respecter les conditions de la nouvelle convention collective et d'empêcher toute répétition du genre de conduite décrite dans le grief. Cela peut signifier à l'égard d'employés des mesures disciplinaires, y compris le renvoi, et entraînera forcément des mesures plus sévères si des représentants syndicaux sont concernés. Étant donné que la compagnie ne devrait subir aucun dommage par suite de toute violation future de la convention collective dont le syndicat serait responsable, nous réclamerons encore le dédommagement de toute perte subie en présentant un grief collectif en vertu de la procédure d'arbitrage prévue par *The Ontario Labour Relations Act*.

Nous désirons sincèrement améliorer les relations patronales-syndicales, mais nous tenons à vous faire bien comprendre que nous avons la ferme intention d'assurer le respect de la convention collective.

L'article 8 qui crée le comité de négociation en vertu de la convention collective présente une importance considérable en l'espèce; je le reproduis intégralement.

[TRADUCTION] 8. La compagnie reconnaît le droit du syndicat de choisir un comité de négociation de cinq (5) membres dont un (1) président et un (1) représentant des métiers spécialisés. La compagnie reconnaît ce comité et doit négocier avec lui toute question survenant pendant la durée de la convention. Le Président du syndicat local, ou en son absence le Vice-Président, est membre *ex officio* du Comité s'il n'y est pas élu.

Le Président du comité syndical de négociation porte le nom de Président à plein temps du comité d'entreprise. Il exerce ses fonctions à plein temps afin d'appliquer la convention en coopération avec les délégués réguliers et les membres du comité. Il a libre accès aux opérations de la compagnie dans l'exécution de ses fonctions. On lui fournit un bureau avec le mobilier, dont un pupitre, une chaise, un téléphone et un classeur, ainsi que des exemplaires des formulaires qu'utilise la compagnie pour l'embauche, les mises à pied, les congédiements, les renvois, les rappels au travail et les changements de classification d'emploi. La compagnie doit

of providing Company forms involving transfers of employees.

The Vice-Chairman of the Union Bargaining Committee, or because of his unavailability, another designated representative of the Union Plant Committee shall substitute for the full time Plant Chairman should he be absent from the Plant.

The full time Plant Chairman or his substitute shall receive the rate of pay equal to the highest rate in the Bargaining Unit, and will be limited to forty (40) hours per week at straight time. He shall be responsible to the Manager, Labour Relations or his nominee.

When the Plant Chairman ceases to hold office, he shall be returned, consistent with his seniority, to the classification and to the department in which he was employed at the time of his selection as Plant Chairman, or to a job classification embracing comparable job duties to that which he held prior to his selection.

The first grievance, that of Mr. William Hill, was heard by another arbitrator who reduced the penalty of discharge imposed by the appellant employer to a suspension of four weeks together with an order for reinstatement. An application for judicial review was dismissed in Weekly Court[4].

The four respondents fall into two categories so far as their activities during the events in question are concerned. Wilson and Benjamin took an active part in the sense that the evidence includes several references, some of which are noted above, where these respondents ordered, persuaded, directed or somehow attempted to cause employees either the cease work or to join the "sick-in". The respondent Benjamin also absented himself from work on October 2, 1973. Wilson, of course, had no production duties to perform in the plant. The other group, being Messrs. Hopkinson and McConnell, are not the subject of any such evidence, their attachment to the events being as members of the union bargaining committee and their absence from work on October 2, 1973. They had full knowledge of the collective agreement and of the announced policy of the appellant as to its response in the event of work stoppages contrary to the agreement. They did not report for work on the 2nd of October. In the case of McConnell, he was present on the 28th of September when the

[4] (1974), 4 O.R. (2d) 521.

continuer à fournir les formulaires relatifs aux mutations d'emploi.

Le Vice-Président du comité syndical de négociation, ou s'il n'est pas disponible, un autre représentant désigné du comité syndical d'entreprise remplace le Président du comité d'entreprise en son absence.

Le Président à plein temps du comité d'entreprise, ou son remplaçant, est payé au taux le plus élevé de l'unité de négociation, et il travaille un maximum de quarante (40) heures à temps simple. Il relève du gérant des relations de travail ou de son représentant.

Lorsque le Président du comité d'entreprise quitte son poste, il retourne, compte tenu de son ancienneté, au département où il était employé avec la classification qu'il avait au moment où il a été choisi comme Président du comité d'entreprise, ou à un poste comportant des fonctions comparables à celles qu'il exerçait avant d'être choisi.

Le premier grief, celui de M. William Hill, a été entendu par un autre arbitre qui a réduit le congédiement imposé par l'employeur appelant à une suspension de quatre semaines et ordonné sa réintégration. La Cour des sessions hebdomadaires a rejeté une demande de contrôle judiciaire[4].

Les quatres intimés appartiennent à deux catégories distinctes en ce qui concerne leurs activités au cours des événements en question. Wilson et Benjamin ont joué un rôle actif en ce sens que plusieurs parties des témoignages, j'en ai déjà signalé quelques-unes, mentionnent que ces intimés ont ordonné à des employés soit de cesser le travail soit de se joindre au «*sick-in*», ou les y ont entraînés ou ont autrement essayé de les inciter à le faire. De plus, l'intimé Benjamin s'est lui-même absenté du travail le 2 octobre 1973. Wilson n'avait bien sûr aucun travail à effectuer dans l'usine. Il n'existe pas de preuve semblable à l'égard de l'autre groupe, soit MM. Hopkinson et McConnell, leur participation aux événements se limite à leur qualité de membres du comité syndical de négociation et à leur absence du travail le 2 octobre 1973. Ils connaissaient parfaitement la convention collective et la politique déclarée de l'appelante en cas d'arrêt de travail en violation de la convention. Ils ne se sont pas présentés au travail le 2 octobre. McConnell était présent le 28

[4] (1974), 4 O.R. (2d) 521.

respondent Wilson made his statement, quoted above, relating to the discipline of employees for participation in a demonstration at a plant in no way connected with that of the appellant. Hopkinson did not join the committee until after the meeting of the 28th of September.

The learned arbitrator dismissed all four grievances. The Divisional Court quashed the arbitrator's decision. Osler J. for the court stated:

> It may well be thought that in each case the conduct found by the arbitrator was sufficient to justify the penalty of discharge, even if it went no further than has been indicated above. The difficulty arises, however, because the arbitrator applied the provisions of the agreement and in particular the provisions of article 8 thereof, and concluded that there was a positive obligation resting upon members of the bargaining committee, (a) to disassociate themselves from the remarks made by other members indicating instigation or support of the sick-in, and (b) to attempt to bring the sick-in to a conclusion.
>
> We are all of the view that no such interpretation can reasonably be placed upon the language of the agreement and in particular the language of the article mentioned.

This case raises the difficult and fundamental question as to the scope for judicial review of a labour arbitration board's decision. Such an arbitration board is not, by the terms of *The Labour Relations Act*, R.S.O. 1970, c. 232 as amended, protected from judicial review by *certiorari* or otherwise as is the Ontario Labour Relations Board established under that Act, because the section in question, generally referred to as a privative clause, is limited to the Ontario Labour Relations Board. *Vide* s. 97, *The Labour Relations Act*. Thus we are here examining the award of a statutory tribunal through the eyes of a court sitting in judicial review which, by *The Judicial Review Procedure Act*, 1971 (Ont.), c. 48, s. 2, includes all the powers and judicial authority formerly exercised in an application for a writ of *certiorari*, and which judicial review is not reduced in scope by any applicable privative clause. That the tribunal in question is a labour arbitration board established under a collective agreement

septembre lorsque l'intimé Wilson a fait sa déclaration, citée précédemment, au sujet des mesures disciplinaires contre des employés pour participation à une manifestation chez une entreprise tout à fait étrangère à celle de l'appelante. Hopkinson ne s'est joint au comité qu'après la réunion du 28 septembre.

Le savant arbitre a rejeté les quatre griefs. La Cour divisionnaire a annulé la décision de l'arbitre. Le juge Osler a dit au nom de la Cour:

> [TRADUCTION] Il est permis de penser que les conclusions que l'arbitre a tirées dans chaque cas quant à la conduite pouvaient justifier le congédiement, même si cette conduite s'est limitée à ce que l'on a indiqué précédemment. Toutefois, la difficulté vient de ce que l'arbitre a appliqué les dispositions de la convention, en particulier les dispositions de l'article 8, et a conclu que les membres du comité de négociation avaient l'obligation ferme a) de se dissocier des remarques faites par d'autres membres pour inciter et appuyer le «*sick-in*», et b) d'essayer de mettre fin au «*sick-in*».
>
> Nous sommes d'avis qu'on ne peut raisonnablement donner cette interprétation à la convention et en particulier à l'article mentionné.

La présente affaire soulève la question difficile et fondamentale de l'étendue du pouvoir judiciaire de réviser la décision d'un conseil d'arbitrage en matière de relations de travail. En vertu de *The Labour Relations Act*, R.S.O. 1970, chap. 232 et modifications, un tel conseil n'est pas à l'abri du contrôle judiciaire par voie de *certiorari* ou autrement comme l'est la Commission des relations de travail de l'Ontario constituée en vertu de cette loi, parce que l'article en question, généralement qualifié de clause privative, s'applique seulement à la Commission des relations de travail de l'Ontario. Voir l'art. 97, *The Labour Relations Act*. Dans l'exercice du contrôle judiciaire, cette Cour étudie donc ici la sentence d'un tribunal établi en vertu d'une loi, ce qui, aux termes de *The Judicial Review Procedure Act*, 1971 (Ont.), chap. 48, art. 2, inclut tous les pouvoirs et l'autorité judiciaire autrefois exercés à l'occasion d'une demande de bref de *certiorari*, l'étendue de ce contrôle judiciaire n'étant limitée par aucune clause privative.

between private contracting parties is, in law, of no significance. The law of judicial review of inferior tribunals generally is applicable. The question is what limits to such judicial review are embodied by law.

The law in this field has developed over the centuries in a manner which reflects the growth of the forms of government and commerce. From our earliest judicial history, the courts of superior jurisdiction, such as the Divisional Court of Ontario, have exercised a supervisory power over inferior tribunals by means of the prerogative writs, including the writ of *certiorari* or the successor remedy established by the rules of the Supreme Court of Ontario. Such courts have for the past two centuries also exercised some supervisory control over non-statutory tribunals, sometimes referred to as consensual boards, by a motion to set aside the award of the board, originally made in the proceedings taken to enforce the award in a court, but in modern times, by an application to the court to set aside the award. *Kent v. Elstob*[5]; *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited*[6]. The law relating to private arbitrations has greatly influenced the parallel development in the case of statutory tribunals whose awards were not protected by a privative clause especially in the area of labour relations arbitrations. In some provinces such tribunals are consensual, for example British Columbia (*vide Howe Sound Company v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663*[7] and in other provinces such as Ontario, such tribunals are statutory (*vide Port Arthur Shipbuilding Company v. Arthurs et al.*[8]). By 1857 it was well settled that a consensual board's decision could be set aside for fraud and by reason of an error of law appearing on the face of the record of the board. *Hodgkinson v. Fernie*

[5] (1802), 3 East 18.
[6] [1912] A.C. 673.
[7] [1962] S.C.R. 318.
[8] [1969] S.C.R. 85.

Du point de vue juridique, il importe peu que le tribunal en question soit un conseil d'arbitrage constitué en vertu d'une convention collective intervenue entre des parties privées. Les principes généraux du contrôle judiciaire des tribunaux d'instance inférieure sont applicables. La question consiste à déterminer les limites que la loi impose à ce contrôle judiciaire.

Dans ce domaine, le droit a évolué au cours des siècles d'une façon qui reflète la croissance des formes de gouvernement et de commerce. Dès le début de notre histoire judiciaire, les cours de juridiction supérieure, comme la Cour divisionnaire de l'Ontario, ont exercé un pouvoir de surveillance sur les tribunaux d'instance inférieure au moyen des brefs de prérogative, y compris le bref de *certiorari* ou la procédure qui l'a remplacé dans les règles de la Cour suprême de l'Ontario. Durant les deux derniers siècles, ces cours ont également exercé une certaine surveillance sur les tribunaux non établis en vertu de lois, parfois appelés conseils choisis par les parties, au moyen d'une requête qui visait à faire infirmer la sentence du conseil et qui était présentée à l'origine au cours des procédures d'exécution de la sentence. Plus récemment, cette surveillance a été exercée sur demande à la cour d'écarter la sentence. *Kent v. Elstob*[5]; *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited*[6]. Le droit relatif à l'arbitrage privé a exercé une profonde influence sur l'évolution parallèle dans le cas des tribunaux constitués par des lois et dont les sentences n'étaient pas protégées par une clause privative, spécialement dans le domaine des arbitrages en matière de relations de travail. Dans certaines provinces, ces tribunaux sont choisis par les parties, par exemple la Colombie-Britannique (voir *Howe Sound Company c. International Union of Mine, Mill and Smelter Workers (Canada), Local 663*[7], mais ils sont constitués par des lois dans d'autres provinces comme l'Ontario, (voir *Port Arthur Shipbuilding Company c. Arthurs et al.*[8]).

[5] (1802), 3 East 18.
[6] [1912] A.C. 673.
[7] [1962] R.C.S. 318.
[8] [1969] R.C.S. 85.

and Another[9]. It is also clear that in such a proceeding, a court would set aside an award where the arbitrator determined matters outside the area of his authority as described in the constituting contract. See Halsbury's *Laws of England*, 4th ed., Vol. 2, p. 330, para. 622. Finally, there evolved the sub-rule, or at least a clarification of the old rule, in the judgment of Channell J. in *In the Matter of an Arbitration Between King and Duveen and Others*[10], at pp. 35-6:

It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside . . . but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator.

In the case of *R. v. Barber et al., Ex parte Warehousemen and Miscellaneous Drivers' Union Local 419*[11], the Ontario Court of Appeal found that the rule applicable to the review of awards of consensual tribunals denying the courts authority to review the correctness in law of a decision on the very question of law specifically referred to the board, but at the same time permitting the court to review an error of law made by the consensual board with reference to material matters 'arising but not specifically referred,' does not apply to the review of a decision by a statutory board. This was so according to Jessup J. A. speaking on behalf of the court" . . . because in such cases the resort to arbitration is compulsory." (at p. 248).

[9] (1857), 3 C. B. (N.S.) 189.
[10] [1913] 2 K.B. 32.
[11] [1968] 2 O.R. 245.

Dès 1857, il était bien établi que la décision d'un conseil choisi par les parties peut être écartée pour fraude et en raison d'une erreur de droit apparente à la lecture du dossier. *Hodgkinson v. Fernie and Another*[9]. Dans ce genre de procédures, il est également clair qu'une cour écartera la sentence d'un arbitre qui tranche des questions qui ne relèvent pas des pouvoirs conférés par le contrat constitutif. Voir Halsbury's *Laws of England*, 4e éd., vol. 2, p. 330, par. 622. Enfin, il y a la règle secondaire, ou au moins une clarification de l'ancienne règle, exposée dans les motifs du juge Channell dans *In the Matter of an Arbitration Between King and Duveen and Others*[10], aux pp. 35 et 36:

[TRADUCTION] C'est sans aucun doute un principe de droit bien établi que si une erreur de droit apparaît à la lecture de la sentence arbitrale, cela rend la sentence irrégulière, et elle peut être écartée . . . mais il est également clair que si une question de droit précise est soumise à la décision d'un arbitre et qu'il rend effectivement une décision, le fait que la décision soit erronée ne rend pas la sentence irrégulière à sa lecture de sorte qu'il soit permis de la rejeter. Autrement, soumettre une question de droit à un arbitre serait toujours futile.

Dans *R. v. Barber et al, Ex parte Warehousemen and Miscellaneous Drivers' Union Local 419*[11], la Cour d'appel de l'Ontario a conclu qu'il ne faut pas appliquer aux décisions d'un conseil établi en vertu d'une loi, la règle applicable en matière de révision des sentences de tribunaux choisis par les parties suivant laquelle les cours n'ont pas le pouvoir de réviser le bien-fondé d'une décision sur le point de droit spécifiquement soumis au tribunal, mais suivant laquelle elles peuvent cependant réviser une erreur de droit commise par ce tribunal sur des points importants [TRADUCTION] «qui sont soulevés sans être spécifiquement soumis». Rendant le jugement au nom de la Cour d'appel, le juge Jessup a dit qu'il en va ainsi [TRADUCTION] « . . . parce que dans ces cas le recours à l'arbitrage est obligatoire.» (à la p. 248).

[9] (1857), 3 C.B. (N.S.) 189.
[10] [1913] 2 K.B. 32.
[11] [1968] 2 O.R. 245.

This Court in *Port Arthur* (*supra*) adopted the ratio of the Ontario Court of Appeal in *Re International Nickel Co. of Canada Ltd. and Rivando*[12], and held that an arbitration pursuant to *The Labour Relations Act* (Ontario) is a statutory arbitration. However, this Court has not explicitly stated that the rule limiting judicial review in the situation where a specific question of law has been submitted to an arbitrator does not apply in the case of a statutory arbitrator. Such a decision may be implicit from the absence in decisions of this Court involving statutory tribunals, of any discussion with respect to whether or not a specific question of law had been referred to the arbitrator.

I make these comments in an attempt to bring some clarity to a very confusing area of law. I adopt the reasoning of the Ontario Court of Appeal with respect to this issue in *Barber* (*supra*), and proceed to determine the scope for judicial review in the case before me unhindered by any issue as to whether or not a specific question of law was referred to the statutory arbitrator. Through *Rivando*, *supra*, and *Port Arthur* in this Court, *supra*, this statutory route leads back to review by *certiorari*, which in our judicial history was never extended to consensual arbitrators, and likewise has never been limited or circumscribed by the rule as enunciated in *Government of Kelantan v. Duff Development Company Limited*[13], or as it may have been modified in its restatement in *F. R. Absalom, Limited v. Great Western (London) Garden Village Society, Limited*[14].

The supervisory power of the court over proceedings in inferior statutory tribunals, in the words of Lord Sumner, "goes to two points: one is the area of inferior jurisdiction and the qualifications and conditions of its exercises; the other is the observance of the law in the course of its exercise." *R. v. Nat. Bell Liquors Ltd.*[15] at p. 156. It must be noted as Lord Denning points out in *R.*

[12] [1956] O.R. 379.
[13] [1923] A.C. 395.
[14] [1933] A.C. 592.
[15] [1922] 2 A.C. 128.

Dans l'arrêt *Port Arthur* (précité), cette Cour à adopté le raisonnement de la Cour d'appel de l'Ontario dans *Re International Nickel Co. of Canada Ltd. and Rivando*[12], et a conclu qu'un arbitrage tenu en vertu de *The Labour Relations Act* (Ontario) constitue un arbitrage par un tribunal établi en vertu d'une loi. Cette Cour n'a cependant pas explicitement déclaré que la règle qui exclut le contrôle judiciaire au cas où une question de droit précise a été soumise à un arbitre ne s'applique pas à un arbitre nommé en vertu d'une loi. On pourrait tirer une conclusion en ce sens à partir du fait que, dans aucun arrêt portant sur des tribunaux établis en vertu de lois, cette Cour ne s'est demandé si on avait soumis une question de droit précise à l'arbitre.

Je fais ces commentaires afin d'essayer de clarifier quelque peu un aspect fort embrouillé du droit. J'adopte le raisonnement de la Cour d'appel de l'Ontario dans l'arrêt *Barber* (précité) sur cette question, et j'entreprends maintenant de préciser la portée du contrôle judiciaire dans l'affaire dont je suis saisi, sans me demander si une question de droit précise a été soumise à l'arbitre nommé en vertu de la loi. Le cheminement législatif, jalonné par *Rivando*, précité, et l'arrêt *Port Arthur* de cette Cour, précité, remonte jusqu'à la révision par *certiorari* qui, dans notre histoire judiciaire, ne s'est jamais appliquée aux arbitres choisis par les parties et qui, de la même façon, n'a jamais été limitée ou circonscrite par la règle élaborée dans *Government of Kelantan v. Duff Development Company Limited*[13], telle quelle ou avec les modifications qu'elle a pu subir lorsqu'elle a été reformulée dans *F. R. Absalom, Limited v. Great Western (London) Garden Village Society, Limited*[14].

Selon l'expression de lord Sumner, le pouvoir de surveillance de la cour sur les procédures des tribunaux d'instance inférieure établis en vertu de lois [TRADUCTION] «porte sur deux points: d'une part l'étendue, la nature et les conditions d'exercice de la compétence du tribunal inférieur, d'autre part, le respect de la loi dans l'exercice de cette compétence.» *R. v. Nat. Bell Liquors Ltd.*[15], à la p.

[12] [1956] O.R. 379.
[13] [1923] A.C. 395.
[14] [1933] A.C. 592.
[15] [1922] 2 A.C. 128.

v. Northumberland Compensation Tribunal[16], at p. 351 that *certiorari* is available only to quash an arbitration award for an error of law if that error appears on the face of the record. The use of *certiorari* to review decisions of statutory tribunals fell into disuse for about a century commencing in 1848 (presumably because of the advent of statutory rights of appeal from inferior tribunals and, in criminal law the incidence of *certiorari* fell off following the *Summary Jurisdiction Act 1857* which reduced the practical effectiveness by limiting the scope of the reviewable record. As Lord Sumner stated: "The fact of the record 'spoke' no longer: it was the inscrutable face of a sphinx." (*R. v. Nat. Bell Liquors Ltd.*, *supra*, at p. 159)), but with the birth and rapid growth of the administrative body in the post-World War II era in the United Kingdom, the review of the determinations of statutory tribunals by *certiorari* revived on a large scale. (See Wade *Administrative Law*, 4 ed., pp. 262 and 273, and S.A. de Smith, *Judicial Review of Administrative Action*, 3 ed., p. 354.)

For many years there was a thinly disguised sense of rivalry between the traditional courts and the statutory tribunals, now generally referred to as administrative boards. Lord Hewart, then Chief Justice of England, reflected the view initially prevalent in some parts of the legal world when he wrote:

> Between the "rule of law" and what is called "administrative law" (happily there is no English name for it) there is the sharpest possible contrast. One is substantially the opposite of the other .... It is a system which is fundamentally opposed to the English conception of the "rule of law" especially as regards exemption from the jurisdiction of the ordinary legal tribunals, in the case of public officials acting in performance or purported performance of their official duties.
>
> (The New Despotism, p. 37)

[16] [1952] 1 K.B. 338.

156. Il faut noter, comme l'a fait remarquer lord Denning dans *R. v. Northumberland Compensation Tribunal*[16], à la p. 351, qu'on ne peut avoir recours au *certiorari* pour faire annuler une sentence arbitrale pour une erreur de droit que si cette erreur apparaît à la lecture du dossier. A partir de 1848, l'usage du *certiorari* aux fins de réviser des décisions de tribunaux établis en vertu de lois a été abandonné pendant environ un siècle (sans doute à cause de l'introduction par des lois du droit d'appel des décisions de tribunaux d'instance inférieure, et en droit criminel le *certiorari* est tombé en désuétude suite à l'adoption de la *Summary Jurisdiction Act 1857* qui en réduisait l'efficacité pratique en limitant le contenu du dossier susceptible d'examen. Comme l'a dit lord Sumner: [TRADUCTION] «le dossier était devenu «muet»: il était aussi insondable qu'un sphinx.» (*R. v. Nat. Bell Liquors Ltd.*, précité, à la p. 159)), cependant, parallèlement à l'avènement et à la croissance rapide du corps administratif au Royaume-Uni durant la période qui a suivi la Seconde Guerre mondiale, le *certiorari* fut de nouveau largement utilisé pour attaquer les décisions des tribunaux établis en vertu de lois. (Voir Wade *Administrative Law*, 4 éd., pp. 262 et 273, et S.A. de Smith, *Judicial Review of Administrative Action*, 3 éd., p. 354.)

Pendant de nombreuses années, il y a eu une rivalité à peine déguisée entre les cours traditionnelles et les tribunaux établis en vertu de lois qu'on appelle aujourd'hui généralement conseils administratifs. Lord Hewart, alors juge en chef de l'Angleterre, exprimait l'opinion partagée initialement par certains éléments du milieu juridique, lorsqu'il a écrit:

> [TRADUCTION] Il y a la plus grande différence possible entre la «règle de droit» et ce qu'on appelle «le droit administratif» (il n'existe heureusement pas de nom anglais pour le désigner). Ils sont essentiellement à l'opposé l'un de l'autre ... Il s'agit d'un système qui s'oppose fondamentalement à la conception anglaise de la «règle de droit», particulièrement en ce qui a trait aux fonctionnaires publics qui exercent ou prétendent exercer leurs fonctions officielles et qui ne sont pas soumis à la juridiction des tribunaux ordinaires.
>
> (The New Despotism, p. 37)

[16] [1952] 1 K.B. 338.

The first comprehensive examination of the relationship between court and board in labour law in our country was undertaken by Roach J.A. in *Re The Ontario Labour Relations Board, Bradley et al. and Canadian General Electric Co. Ltd.*[17], where the court was concerned with the decision of a statutory tribunal, the Labour Relations Board established under a statute containing a privative clause. The court started with a recital of the basic authority of a court acting through *certiorari* to review and to quash the decision of such a board:

> In absence of a privative clause, the Court in *certiorari* proceedings, has power to examine the record returned to it by the inferior tribunal and if that record discloses error on the part of that tribunal, to quash its decision as having been made in error. Also, if it appears to the Court that the inferior tribunal acted beyond its jurisdiction then the Court has the power in *certiorari* proceedings to quash the decision of that tribunal as having been made without jurisdiction. However, where there is a privative clause, the Court is restricted to determining whether or not the inferior Court acted within the limits of its jurisdiction:
>
> (at p. 333)

The court then proceeded to determine whether a decision that certain employees were properly included by the board in the bargaining unit as certified, was a decision in a collateral manner only and thus reviewable, or was a decision on the merits of the application and thus not reviewable; the former going to jurisdiction of the board and the latter to its exercise of jurisdiction. His Lordship phrased the test:

> Where the matter is not collateral but constitutes part or the whole of the main issue which the inferior tribunal had to decide, the Court is limited to examining the record to determine whether there was any evidence before the inferior tribunal. I hasten to add, however, that the Court can do that only in the absence of a privative clause. If there is a privative clause in the Act creating the tribunal, the Court cannot do that.
>
> (p. 335)

[17] [1957] O.R. 316.

C'est le juge Roach de la Cour d'appel qui, le premier, a étudié en détail la relation entre les cours et les conseils d'arbitrage en droit du travail dans notre pays, dans *Re The Ontario Labour Relations Board, Bradley et al. and Canadian General Electric Co. Ltd.*[17], où la Cour était saisie d'une décision d'un tribunal, la Commission des relations de travail, créé en vertu d'une loi qui contient une clause privative. La Cour commence par un rappel des pouvoirs fondamentaux d'une cour qui agit par voie de *certiorari* pour réviser et annuler la décision d'un tribunal de ce genre:

> [TRADUCTION] Dans les procédures de *certiorari*, la Cour, en l'absence de clause privative, a le pouvoir d'étudier le dossier qui lui est transmis par le tribunal d'instance inférieure et, si elle y décèle une erreur commise par ce tribunal, elle peut en annuler la décision pour cause d'erreur. En outre, s'il apparaît à la Cour que le tribunal d'instance inférieure a outrepassé sa compétence, elle a également le pouvoir d'annuler la décision de ce tribunal pour absence de compétence. Cependant, s'il existe une clause privative, le pouvoir de la Cour se limite à déterminer si le tribunal d'instance inférieure a excédé sa compétence.
>
> (à la p. 333)

La Cour a ensuite entrepris de déterminer si une décision relative à l'inclusion de certains employés dans l'unité de négociation accréditée ne constituait qu'une décision accessoire, et donc susceptible de révision, ou constituait plutôt une décision sur le fond de la demande, auquel cas elle ne pouvait être révisée; la première question concernait la compétence de la Commission et la deuxième l'exercice de cette compétence. Le juge a formulé le critère suivant:

> [TRADUCTION] Lorsque le point n'est pas accessoire mais forme plutôt une partie ou l'ensemble de la question principale dont a été saisi le tribunal d'instance inférieure, la Cour peut seulement étudier le dossier afin de déterminer si ce tribunal était saisi d'une preuve quelconque. Je m'empresse d'ajouter toutefois, que la Cour ne peut agir ainsi qu'en l'absence d'une clause privative. La Cour ne peut le faire si la loi qui crée le tribunal contient une clause privative.
>
> (p. 335)

[17] [1957] O.R. 316.

The same court later addressed the problem of judicial review of an arbitration board constituted as in these proceedings and likewise without the presence of a privative clause restricting the ambit of review. The principle guiding a court in such a circumstance was stated on behalf of the court by Aylesworth J.A.:

> I content myself by stating at once that upon a perusal and consideration of the agreement I find it impossible to say that it may not upon its very terms reasonably receive the interpretation and application given to it by a majority of the Board of Arbitration. It is immaterial whether or not the Court from whom an order of *certiorari* is sought agrees with the interpretation given to the agreement by an arbitrator; it is sufficient to defeat the application if it can be said that the interpretation given to the agreement by the arbitrator is one which the language of the agreement reasonably will bear. The Court has no appellate function to discharge with respect to the interpretation of the agreement except to decide whether or not the interpretation applied by the arbitrator is one which, as I have said, the language of the agreement reasonably will bear.

Re Canadian Westinghouse Co. Ltd. and Local 164 Draftsmen's Association of Ontario [1962] O.R. 17 at pp. 19-20.

The development of the rules of review in the Ontario Court of Appeal was brought to its present state by its judgment in *R. v. Barber et al., Ex parte Warehousemen and Miscellaneous Drivers' Union Local 419, supra*, where the court was concerned with an application to quash an award of a labour arbitration board. Jessup J.A. stated the law as follows:

> ... where a matter of law referred to an arbitration board for determination is one of construction, error of law will not be found simply because the Court considers some other interpretation more apt if the interpretation of the language is one it will reasonably bear.

(p. 250)

Jessup J.A. concluded on the facts of the case that the errors of law led the board to act "without or in excess of jurisdiction by in effect amending the agreement." (p. 254).

Boards of the type here involved have been the subject of appeals to this Court in *Port Arthur*

La même cour a étudié par la suite le problème du contrôle judiciaire de la sentence d'un tribunal d'arbitrage constitué comme c'est le cas en l'espèce, lorsqu'aucune clause privative ne vient limiter les pouvoirs de révision. S'exprimant au nom de la Cour, le juge Aylesworth a énoncé le principe directeur dans de telles circonstances:

> [TRADUCTION] Je dois déclarer tout de suite qu'après avoir étudié la convention, il m'est impossible de dire qu'elle ne peut pas raisonnablement être interprétée comme l'a fait la majorité du conseil d'arbitrage. Il importe peu que la cour à laquelle on s'adresse pour obtenir un ordre de *certiorari* soit d'accord avec l'interprétation que l'arbitre a donnée à la convention; il suffit, pour rejeter la demande, que le sens donné par l'arbitre à la convention soit une interprétation raisonnable des termes de la convention. La cour ne siège pas en appel de l'interprétation de la convention sauf pour décider si, comme je l'ai dit, l'arbitre a donné une interprétation raisonnable des termes de la convention.

Re Canadian Westinghouse Co. Ltd. and Local 164 Draftmen's Association of Ontario [1962] O.R. 17, aux pp. 19 et 20.

Les règles actuelles de révision de la Cour d'appel de l'Ontario résultent de l'arrêt qu'elle a rendu dans l'affaire *R. v. Barber et al., Ex parte Warehousemen and Miscellaneous Drivers' Union Local 419*, précité, où on lui demandait d'annuler la sentence d'un conseil d'arbitrage en matière de travail. Le juge Jessup a énoncé le droit comme suit:

> [TRADUCTION] ... lorsqu'une question de droit soumise à un conseil d'arbitrage en est une d'interprétation, la Cour ne conclura pas à une erreur de droit simplement parce qu'elle préfère une autre interprétation, si les dispositions de la convention ont été raisonnablement interprétées.

(p. 250)

Le juge Jessup a conclu sur les faits de l'espèce que les erreurs de droit avaient amené le conseil à agir [TRADUCTION] «sans compétence ou à outrepasser sa compétence en modifiant à toutes fins pratiques la convention.» (p. 254).

Cette Cour a entendu des pourvois concernant des conseils de ce genre dans *Port Arthur Ship-*

Shipbuilding Company v. Harry W. Arthurs et al., (supra); *Union Carbide Canada Limited v. Weiler et al.*[18]; *General Truck Drivers Union, Local 938, et al. v. Hoar Transport Company Limited*[19]; *Air-Care Ltd. v. United Steel Workers of America et al.*[20]; *McLeod et al. v. Egan et al.*[21]; and *The Board of Industrial Relations of the Province of Alberta and Sheet Metal Auto Body, Motor Mechanics, and Allied Production Workers, Local 414, Edmonton, Alberta v. Stedelbauer Chevrolet Oldsmobile Ltd.*[22] The basis for quashing an order of such a board has been variously stated as being a lack "of inherent power(s) to amend, modify or ignore the collective agreement" (*Port Arthur, supra*, at p. 96, *per* Judson J.; *Hoar Transport, supra*, at p. 637), a lack of jurisdiction or power to hear a grievance after an improper preliminary finding contrary to the terms of the collective agreement (*Union Carbide, supra*, at p. 970), and an excess of jurisdiction by doing that which is expressly forbidden in the agreement (*Air-Care Ltd., supra*, at p. 7).

The standard of review established in this Court in the case of the statutory board sitting in the absence of a privative clause in the constituting statute, is that expressed in *Stedelbauer, supra*, wherein Martland J. stated:

> In my opinion, such a review can be made, not only on a question of jurisdiction, but in respect of an error of law on the face of the record. That *certiorari* would issue to quash the decision of a statutory administrative tribunal for an error of law on the face of the record, although the error did not go to jurisdiction, was clearly stated in *R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw*. That case was referred to by Kerwin J. (as he then was) in *Toronto Newspaper Guild v. Globe Printing Company*.
>
> (p. 143)

In *McLeod v. Egan, supra*, the majority, speaking through Martland J., quashed an award made

[18] [1968] S.C.R. 966.
[19] [1969] S.C.R. 634.
[20] [1976] 1 S.C.R. 2.
[21] [1975] 1 S.C.R. 517.
[22] [1969] S.C.R. 137.

building Company c. Harry W. Arthurs et al. (précité); *Union Carbide Canada Limited c. Weiler et al.*[18]; *General Truck Drivers Union, Local 938, et al. c. Hoar Transport Company Limited*[19]; *Air-Care Ltd. c. United Steel Workers of America et al.*[20]; *McLeod et al. c. Egan et al.*[21]; et *The Board of Industrial Relations of the Province of Alberta and Sheet Metal Auto Body, Motor Mechanics, and Allied Production Workers, Local 414, Edmonton, Alberta c. Stedelbauer Chevrolet Oldsmobile Ltd.*[22] Les motifs d'annulation des décisions de ces conseils ont été tour à tour décrits comme l'absence [TRADUCTION] «de pouvoir inhérent d'amender, de modifier ou de méconnaître la convention collective» (*Port Arthur*, précité, à la p. 96, le juge Judson; *Hoar Transport*, précité, à la p. 637), l'absence de compétence ou de pouvoir d'entendre un grief, après une décision préliminaire contraire aux dispositions de la convention collective (*Union Carbide*, précité, à la p. 970), et un excès de compétence si le conseil fait ce que la convention interdit expressément (*Air-Care Ltd.*, précité, à la p. 7).

Le critère de révision élaboré par cette Cour dans le cas d'un conseil dont la loi constitutive ne contient pas de clause privative, a été énoncé dans l'arrêt *Stedelbauer*, précité, où le juge Martland a dit:

> [TRADUCTION] A mon avis, on peut exercer ce pouvoir de révision, non seulement sur une question de compétence, mais aussi à l'égard d'une erreur de droit qui apparaît à la lecture du dossier. L'arrêt *R. c. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, dit clairement qu'on peut annuler par *certiorari* la décision d'un tribunal administratif établi en vertu d'une loi dans le cas d'une erreur apparente à la lecture du dossier, même si cette erreur ne touche pas à sa compétence. Le juge Kerwin (plus tard juge en chef) a mentionné cet arrêt dans *Toronto Newspaper Guild c. Globe Printing Company*.
>
> (p. 143)

Dans *McLeod c. Egan*, précité, le juge Martland, au nom de la majorité, a annulé une sentence

[18] [1968] R.C.S. 966.
[19] [1969] R.C.S. 634.
[20] [1976] 1 R.C.S. 2.
[21] [1975] 1 R.C.S. 517.
[22] [1969] R.C.S. 137.

specific question of law, but rather was a reference to the board for the decision of a grievance arising under a collective agreement but which involved the determination by the arbitrator of a preliminary jurisdictional question and the arbitrator exceeded his jurisdiction by in effect amending the agreement (pp. 340-1). This Court, by a majority decision in the *Toronto Police Association* case, *supra*, determined at p. 656, *per* Martland J., that:

> ... there was no submission of a question of law to the arbitrator on the basis that his decision would be binding upon the parties and not subject to any review.

and later at pp. 657-8:

> The question of law which arose in the arbitration came up in the course of the consideration of a grievance in the ordinary way under the provisions of the collective agreement ....The arbitrator, in making a decision on the grievance put before him, was obligated to make a decision consistent with the agreement. Whether or not such a decision was or was not inconsistent with the agreement is clearly a question which could not be determined by the arbitrator himself.
>
> Consequently, in my opinion, the form of submission made to the arbitrator, considered in the light of the defined restrictions on the arbitrator's powers as contained in the agreement, cannot be considered as a reference of a specific question of law which the parties have agreed to accept as binding and which, in consequence, is not subject to review by reason of an error or law on the face of the award.

In the result, the award was quashed for an error in law on the face of the record. In a more recent contact with this issue, this Court in *Zeller's (Western) Limited*, *supra*, declined to quash the award of a consensual board stating through Dickson J.:

> If the board, upon entering the inquiry, is free of jurisdictional error and, in the course of the inquiry, acts in reasonable consonance with the powers which it may properly exercise under the statute or agreement from which its powers flow, the Court will respect both the autonomy and the conclusions of the board: *International Association of Machinists and Aerospace Workers, Flin Flon Lodge No. 1848 et al. v. Hudson Bay Mining and Smelting Co. Ltd.*, [supra]
>
> (at pp. 380-1)

de la Cour, le Juge en chef étant dissident, a conclu que la sentence pouvait être annulée parce qu'il ne s'agissait pas d'un compromis sur une question de droit précise, mais plutôt d'un renvoi au conseil pour qu'il décide d'un grief résultant d'une convention collective; l'arbitre devait cependant prendre une décision préliminaire quant à sa compétence, et il l'avait outrepassée en modifiant à toutes fins pratiques la convention (pp. 340 et 341). Dans l'arrêt *Toronto Police Association*, précité, cette Cour a décidé, le juge Martland parlant au nom de la majorité, à la p. 656:

> ... il n'y a pas eu de présentation d'une question de droit à l'arbitre à partir du principe que sa décision lierait les parties et ne serait pas susceptible de révision.

et plus loin aux pp. 657 et 658:

> ... La question de droit qui a été soulevée lors de l'arbitrage l'a été dans le cours ordinaire de l'audition d'un grief sous le régime des dispositions de la convention collective. ... L'arbitre, en rendant une décision sur le grief dont il était saisi, était obligé de rendre une décision compatible avec la convention. La question de savoir si cette décision est incompatible ou non avec la convention n'est certainement pas une question que l'arbitre lui-même peut trancher.
>
> Par conséquent, à mon avis, la forme de compromis soumise à l'arbitre, considérée à la lumière des restrictions définies énoncées dans la convention quant aux pouvoirs de l'arbitre, ne peut être considérée comme un renvoi d'une question de droit précise que les parties ont convenu d'accepter comme liant les parties et qui, par conséquent, n'est pas sujet à révision pour erreur de droit à la lecture de la sentence.

La sentence fut donc annulée pour erreur de droit apparente à la lecture du dossier. Plus récemment, cette Cour a fait face à ce problème dans *Zeller's (Western) Limited*, précité, et a refusé d'annuler la sentence d'un conseil choisi par les parties; le juge Dickson a dit au nom de la Cour:

> ... Si, en procédant à l'enquête, le conseil n'est pas marqué d'une erreur d'ordre juridictionnel et si, au cours de l'enquête, il agit en conformité raisonnable avec les pouvoirs qu'il peut régulièrement exercer en vertu de la loi ou de la convention d'où il tire ses pouvoirs, la Cour respectera à la fois l'autonomie et les conclusions du conseil: *International Association of Machinists and Aerospace Workers, Flin Flon Lodge No. 1848 et al. v. Hudson Bay Mining and Smelting Co. Ltd.* [précité]
>
> (aux pp. 380 et 381)

This terminology would indicate an inclination to move in the direction of the pronouncements in *Westinghouse, supra*, and the *Barber* case, *supra*.

The spectrum of judicial review is completed by a bare reference to the restricted supervisory role of a court when faced with a privative clause (see *Mrs. Barbara Jarvis v. Associated Medical Services, Incorporated*[27]; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*[28]; and *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*[29]). The only test in this category of judicial review is one of jurisdiction of the administrative tribunal. The structural jurisdiction of a board may not be enhanced by an error of law in the interpretation of the parent statute. *Per* Cartwright J. in *Jarvis, supra*, p. 502. The functional jurisdiction of the board may be destroyed in the course of the proceeding by a failure to meet the standards of natural justice and fairness. (*Hoogendoorn v. Greening Metal Products and Screening Equipment Company and The United Steel Workers of America, Local 6266*[30]). This is not the complete catalogue of the grounds for such review as we are not here concerned with this category of arbitration.

What then are the applicable standards of review by a court of an award by a statutory tribunal in the absence of a privative clause. Omnipresent is the duty of the court to enforce the law. The administrative tribunal must perform its mandate from the legislature, no more no less. Beyond that statement, the scope of review is more elusive of description; within that statement, all operations of the administrative tribunal are reviewable. I see no need nor indeed basis in the law for the importation into the legislated world of dispute settlement by compulsory arbitration of the ancient rules which grew up around the contractual dispute and its resolution by private arbitration. There is no real or fictional abandonment of the right of access to the courts by the parties to

[27] [1964] S.C.R. 497.
[28] [1975] 1 S.C.R. 382.
[29] [1979] 2 S.C.R. 227.
[30] [1968] S.C.R. 30.

Cette terminologie semble indiquer une tendance à se rapprocher des arrêts *Westinghouse* et *Barber*, précités.

Une simple mention du rôle limité de surveillance d'une cour en présence d'une clause privative complète le tableau du contrôle judiciaire (voir *Dame Barbara Jarvis c. Associated Medical Services, Incorporated*[27]; *Union internationale des employés des services, local no. 333 c. Nipawin District Staff Nurses Association*[28] et *Syndicat canadien de la Fonction publique, section locale 963 c. La Société des alcools du Nouveau-Brunswick*[29]). Le seul critère applicable à ce type de contrôle judiciaire est celui de la compétence du tribunal administratif. Une erreur de droit dans l'interprétation de la loi constitutive ne peut étendre la compétence structurelle d'un conseil d'arbitrage (le juge Cartwright dans *Jarvis*, précité, p. 502). Le conseil peut aussi voir disparaître sa compétence fonctionnelle en cours de procédure s'il ne respecte pas les critères de justice naturelle et d'équité. (*Hoogendoorn c. Greening Metal Products and Screening Equipment Company and The United Steel Workers of America, Local 6266*[30]). Cela ne constitue pas l'éventail complet des moyens donnant ouverture à ce genre de contrôle judiciaire, mais ce type d'arbitrage n'entre pas dans notre propos.

Quels sont donc les critères de révision qu'une cour peut appliquer aux sentences d'un tribunal dont la loi constitutive ne contient aucune clause privative? La cour a le devoir premier de faire respecter la loi. Le tribunal administratif doit s'acquitter du mandat que lui a confié la législature, ni plus ni moins. Si l'on s'en tient à cet énoncé, tous les actes des tribunaux administratifs sont susceptibles de révision. Au delà de ce critère, il devient périlleux de chercher à délimiter la portée du pouvoir de révision. Je ne vois pas le besoin, ni même de fondement dans la loi, de transposer dans le régime législatif de règlement des conflits de travail par arbitrage obligatoire, les anciennes règles qui se sont élaborées dans le cadre des conflits contractuels et de leur règlement par arbi-

[27] [1964] R.C.S. 497.
[28] [1975] 1 R.C.S. 382.
[29] [1979] 2 R.C.S. 227.
[30] [1968] R.C.S. 30.

the labour dispute and so the law relating to statutory entities and the review of their decisions by *certiorari* applies. It has been the law for centuries that such supervision includes review of all inferior statutory tribunals for error of law on the face of the record. What constitutes an error of law is the core of the problem. Within its assigned field, the board must remain supreme. Its decisions on issues of fact are beyond the judicial reach. Questions of procedure and evidence are likewise the exclusive province of the board save only where the conduct of the tribunal in relation to these and many other matters becomes unfair to a party in the sense of the traditions of natural justice which form such a vital part of our law. All the categories of review by *certiorari* and motion to set aside mentioned above bear some jurisdictional hue. Even the assignment of unreasonable meaning, in the words of the Ontario Court of Appeal, reflects this hue because the giving of an unreasonable meaning to words in a collective agreement would be to thereby alter the charter under which the parties agreed to work. The charter expressly denies the right of an arbitrator to amend the agreement by his award and so it comes back again to a jurisdictional issue in the broadest sense of that term. It is undoubtedly the trend in the application of judicial review, be it *certiorari* or a procedural or statutory equivalent, to limit the scope of review to matters of jurisdiction in the narrow sense and to those errors of law which approximate jurisdictional issues in the broadest sense. Historically, it has been said by the courts on occasion that the parties to an arbitration, however it might have been constituted, would not have contemplated that the arbitrator would, in the making of his award, fail to uphold the applicable general law of the community. While this is so, it is equally, and here more vitally true that the law of review has evolved, even in the absence of a privative clause, to a point of recognition of the purpose of contractually-rooted statutory arbitration: namely, the speedy, inexpensive and certain settlement of differences without interruption of the work of the parties. The scope of review only mirrors this purpose if it concerns itself only with matters of law which assume jurisdictional proportions and this I conclude to be the present state of

trage privé. Les parties au conflit de travail n'ont pas abandonné leur droit de recours aux tribunaux de droit commun et elles ne sont d'ailleurs pas présumées l'avoir fait; par conséquent, il faut appliquer le droit relatif aux organismes établis en vertu de lois ainsi que la révision de leurs décisions par voie de *certiorari*. Il a été de droit constant pendant des siècles que cette surveillance comprend la révision des décisions de tous les tribunaux d'instance inférieure établis en vertu de lois quand une erreur de droit apparaît à la lecture du dossier. Le cœur du problème consiste à définir ce qu'est une erreur de droit. Le conseil doit conserver toute autorité sur le domaine qui lui est attribué. Ses décisions sur des questions de fait échappent au contrôle judiciaire. De même, les questions de preuve et de procédure sont du ressort exclusif du conseil, sauf si, à l'égard de ces questions et de beaucoup d'autres, le conseil agit de façon injuste envers une partie, compte tenu des traditions de justice naturelle qui constituent une partie si importante de notre droit. Une certaine coloration juridictionnelle touche tous les modes de révision par voie de *certiorari* et de requête en annulation mentionnés précédemment. Selon la Cour d'appel de l'Ontario, cela est vrai même dans les cas d'interprétation déraisonnable des dispositions d'une convention collective puisque cela équivaut à modifier le pacte que les parties se sont engagées à respecter. Ce pacte interdit expressément à l'arbitre de modifier la convention par sa sentence, et on en revient encore à un problème de compétence dans le sens le plus vaste de ce terme. Que ce soit par voie de *certiorari* ou de recours procédural ou légal du même genre, il existe en matière de contrôle judiciaire une nette tendance à limiter la portée du contrôle aux questions de compétence au sens restreint et aux erreurs de droit qui se rapprochent des questions de compétence au sens le plus large. Historiquement, les cours ont à l'occasion exprimé l'avis que les parties à un arbitrage, peu importe la façon dont celui-ci est prévu, n'ont pas envisagé que l'arbitre puisse, en rendant sa décision, transgresser le droit généralement applicable dans la collectivité. Bien que ce soit exact, il est tout aussi vrai que le droit relatif au contrôle judiciaire a évolué, même en l'absence de clause privative, au point où l'on reconnaît l'objectif de

the law of judicial review of such statutory tribunals.

The origin of the board here is consensual but, in its final form, statutory. It falls within the historic reach of *certiorari*. All boards, indeed all people and legal entities, are subject to the jurisdictional supervision of the Superior Court. A *certiorari* review of a statutory board free of a privative cloak, brings with it the added ground of review for error on the face of the record. Such error exceeds a difference of opinion by the reviewing tribunal on an interpretative issue and falls short of an error resulting in an excess of its jurisdiction on the part of the board. In the modern era of administrative law, such reviewable error as regards a contract must amount to an error relating to the construction of the constituting contract of such magnitude that the interpretation so adopted by the board may not be reasonably borne by the wording of the document in question, and hence such determination is beyond the contemplation of amount to an amendment of the constituting agreement. Such an error is beyond the authority given to the board in the charter or collective agreement. The arbitrator has indeed the right to be wrong, but not where the wrong amounts to an amendment of the charter itself. Hence the earlier observation that even in this element of error of law on the face of the record, the error must take on a jurisdictional aspect; thus something the parties did not bind themselves by contract not to challenge; something which expands or contracts the relationship between the parties beyond their reasonable contemplation.

Where the error in the award relates to the statute whose interpretation is required of the board in the course of determining the dispute, the test of reviewable error is of the same scope and

l'arbitrage prévu par la loi mais d'origine contractuelle, soit le règlement rapide, sûr et peu coûteux des différends sans interruption du travail des parties. L'étendue du pouvoir de révision ne fait que refléter cet objectif s'il ne s'intéresse qu'aux questions de droit à incidences juridictionnelles, et je conclus qu'il s'agit là de l'état actuel du droit en matière de contrôle judiciaire de ces tribunaux établis en vertu de lois.

Dans la présente affaire, le conseil a été à l'origine choisi par les parties; toutefois, dans sa forme finale, il tombe dans la catégorie des conseils établis en vertu d'une loi. Il entre donc dans le cadre historique du *certiorari*. Tous les conseils, et d'ailleurs toutes les personnes et entités juridiques, sont en matière de compétence, soumis à la surveillance d'une cour supérieure. Un recours en *certiorari* contre un conseil que ne protège aucune clause privative permet en outre d'utiliser comme motif de révision l'erreur apparente à la lecture du dossier. Pareille erreur va plus loin qu'une simple divergence d'opinion du tribunal supérieur quant à un problème d'interprétation, il ne s'agit pas d'une erreur qui amène le conseil à outrepasser sa compétence. En droit administratif moderne, une erreur susceptible de révision en matière de contrat doit être une erreur d'interprétation d'une gravité telle que le texte du document en question ne peut pas raisonnablement justifier l'interprétation adoptée par le conseil et que cette interprétation équivaut à une modification ou à une transgression de la convention. En faisant une erreur de cette nature, un conseil outrepasse les pouvoirs que lui confère le pacte ou la convention collective. L'arbitre a bien sûr le privilège de se tromper, mais pas au point de modifier le pacte lui-même. D'où la remarque précédente que, même dans les cas d'erreur de droit apparente à la lecture du dossier, l'erreur doit avoir une incidence juridictionnelle; il s'agit donc d'une erreur que les parties ne se sont pas engagées par contrat à ne pas contester; une erreur qui étend ou restreint la relation entre les parties plus que celles-ci ne l'ont voulu.

Lorsque l'erreur dans la sentence porte sur la loi que le conseil doit interpréter pour trancher le différend, le critère de révision est de même nature et de même portée, à une importante exception

type, with one important exception. The test is objective and an error in law in statutory interpretation is unsoftened by the qualification that the assigned interpretation must be one which the words will not reasonably bear. This is so because the parties are not in law deemed to have authorized the board to settle their differences contrary to the statutes of the community. A primary jurisdictional error arising on a misinterpretation of the parent or constituting statute is reviewable as a jurisdictional error as no error in the interpretation of such a statute may increase or diminish the jurisdiction of the board. On the other hand, questions of admission and interpretation of evidence and procedure are all matters assigned exclusively to the board as are all questions of fact. The parties are seeking and must be permitted to achieve a quick, effective and economical yet above all a fair method for the settlement of their grievances without interruption of work. Unfairness, the adoption of procedures contrary to natural justice, arbitrary conduct, refusal to discharge their function, fraud and bias in law, are all matters that transcend the classification of error in law on the face of the record. They are all jurisdictional in the fundamental sense of that term, and hence are reviewable through *certiorari* or its equivalent, with or without a privative clause. Such errors of law are not the same as but are equatable to the jurisdictional error which may arise from wrongful conclusions in statutory interpretation as in the *Jarvis* case, *supra*. Similarly, a decision without any evidence whatever in support is reviewable as being arbitrary; but on the other hand, insufficiency of evidence in the sense of appellate review is not jurisdictional, and while it may at one time have amounted to an error reviewable on the face of the record, in present day law and practice such error falls within the operational area of the statutory board, is included in the cryptic statement that the board has the right to be wrong within its jurisdiction, and hence is free from judicial review.

près. Il s'agit d'un critère objectif, et une erreur de droit sur l'interprétation d'un texte de loi n'est pas soumise à la réserve que le texte ne doit pas pouvoir raisonnablement justifier l'interprétation donnée. Il en est ainsi parce que les parties ne sont pas réputées en droit avoir autorisé le conseil à trancher leurs différends contrairement aux lois de la collectivité. Un excès de compétence fondamental résultant d'une mauvaise interprétation de la loi constitutive est susceptible de révision en tant qu'excès de compétence puisqu'on ne peut étendre ou restreindre la compétence du conseil par une erreur dans l'interprétation de cette loi. Par ailleurs, toutes les questions relatives à la réception et à l'interprétation de la preuve et à la procédure relèvent exclusivement du conseil puisque ce sont des questions de fait. Les parties recherchent avec raison un mécanisme rapide, efficace, économique et surtout équitable de règlement de leurs griefs sans interruption du travail. L'injustice, l'adoption de procédures contraires à la justice naturelle, une conduite arbitraire, le refus d'exercer ses fonctions, la fraude et la partialité constituent des motifs juridiques qui transcendent l'erreur de droit apparente à la lecture du dossier. Il s'agit là d'excès de compétence dans le sens fondamental du terme et ces erreurs sont susceptibles de révision par voie de *certiorari* ou de recours semblable, qu'il y ait ou non une clause privative. Ces erreurs de droit ne sont pas identiques aux excès de compétence qui découlent de l'interprétation erronée d'une loi, comme dans l'affaire *Jarvis*, précitée, mais on peut les y assimiler. De la même façon, une décision qui ne serait étayée par aucune preuve pourrait être révisée parce qu'elle est arbitraire; cependant, l'insuffisance de la preuve au sens donné à cette expression en matière d'appel ne comporte pas un excès de compétence et, bien qu'à une certaine époque elle ait pu équivaloir à une erreur de droit apparente à la lecture du dossier, le droit et la pratique actuels considèrent qu'une telle erreur fait partie du domaine opérationnel d'un conseil établi en vertu d'une loi, ce que traduit l'énoncé sibyllin suivant lequel le conseil a le privilège de se tromper dans les limites de sa compétence, et son erreur n'est donc pas soumise au contrôle judiciaire.

This discussion but points in outline the map of jurisdictional review, its scope and nature, but this is and must remain a remedy with adaptable flexibility. The administrative juridical mechanism itself is still growing and evolving. With it will grow and evolve the concomitant interrelationship between the administrative tribunal and the superior court, for whatever form the administrative board or agency takes on, the interest of the community will always require the supervision which will ensure to the community the first rule of an organized community, and that is that all inhabitants, legal and natural, must participate in the workings of the community within their assigned role or region. As Professor Wade has said in "*Administrative Law*", *supra*, at p. 255:

> If administrative tribunals and authorities could trespass uncontrollably outside their proper fields, there would no longer be order in the legal system. Order can be preserved only if jurisdictional demarcation disputes can always be carried to the regular courts of law, and so brought within a unified hierarchy of authority.

For at least a half a century the courts on the one hand and administrative tribunals on the other have sought to produce an interface or interrelationship which will promote the foregoing object of judicial review and at the same time promote and facilitate the response through administrative law to the community need for just yet speedy disposition of the great volume of industrial and commercial disputes arising in the field of labour relations. Hence the search for terminology with a clear and constant meaning, for procedures which will promote the interests of both court and board and through them the community in this rather complex field of political, social and legal relations.

The Award Re the Respondent Wilson

What then is the result on the application of this law to these arbitrations? The four grievors must, in my view, be treated in two different groups, the first group consisting only of the grievor Wilson, and the second group of the other three. I turn first to the grievor-respondent Wilson. Wilson is

Ces commentaires ne donnent qu'une esquisse du pouvoir de révision pour défaut de compétence, de sa portée et de sa nature, mais il s'agit d'un recours souple, et qui doit le rester. Le système juridique administratif lui-même continue à croître et à évoluer. L'interrelation entre les tribunaux administratifs et les cours supérieures croîtra et évoluera parallèlement puisque, quelle que soit la forme des tribunaux ou organismes administratifs, l'intérêt de la collectivité exigera toujours une surveillance qui assure le respect de la règle première de toute collectivité organisée, soit que toutes les personnes qui la composent, morales et physiques, doivent participer aux activités de la collectivité dans les limites de leur rôle et de leur compétence. Comme le dit le professeur Wade dans «*Administrative Law*», précité, à la p. 255:

> [TRADUCTION] Si les tribunaux et les organismes administratifs pouvaient déborder sans aucun contrôle du domaine qui leur est assigné, il n'y aurait plus aucun ordre dans le système juridique. On ne peut préserver cet ordre que si les différends sur la délimitation de la compétence peuvent être référés aux tribunaux de droit commun et soumis ainsi à une autorité hiérarchique unique.

Pendant au moins un demi-siècle, les cours d'une part et les tribunaux administratifs d'autre part ont tenté de créer un rapport ou une interrelation pour promouvoir les objectifs du contrôle judiciaire décrits précédemment, tout en apportant, grâce au droit administratif, une réponse aux aspirations de la collectivité vers un règlement rapide mais juste du nombre important de différends industriels et commerciaux dans le domaine des relations de travail. D'où la recherche d'une terminologie claire et uniforme, de procédures qui respecteront les intérêts des cours et des tribunaux administratifs et, par leur intermédiaire, ceux de la collectivité dans ce domaine plutôt complexe de relations politiques, sociales et juridiques.

La sentence à l'égard de l'intimé Wilson

Quelle est alors la conséquence de ces principes de droit sur ces cas d'arbitrage? A mon avis, il faut séparer les quatres réclamants en deux groupes distincts, le premier qui ne comprend que Wilson, et le deuxième les trois autres. Je traiterai d'abord du réclamant intimé Wilson. Wilson est le

the "Plant Chairman" to use the words of Article 8, and as such he is the Chairman of the Union Bargaining Committee. By reason of Article 8 of the contract, the company is obligated to, and did in fact pay, Wilson according to the highest rate of pay in the bargaining unit calculated on the basis of a straight 40-hour work week. According to the agreement, when the Plant Chairman ceases to hold such office, he shall be reinstated consistent with his seniority to the classification in which he was employed when selected as Plant Chairman. By other terms of the collective agreement, the company is bound to provide the Plant Chairman with an office and certain specified office equipment, as well as information concerning "starts, lay-offs, discharges, releases, re-calls and changes in job classification", as well as providing "Company forms involving transfers of employees".

«président du comité d'entreprise», pour reprendre les termes de l'article 8, et à ce titre il est président du comité syndical de négociation. En vertu de l'article 8 de la convention, la compagnie doit payer Wilson, ce qu'elle a effectivement fait, au taux le plus élevé dans l'unité de négociation, sur une base hebdomadaire de 40 heures de travail au taux régulier. Selon la convention, lorsque le président du comité d'entreprise quitte son poste, il retourne, compte tenu de son ancienneté, au département où il était employé avec la classification qu'il avait avant d'être choisi président du comité d'entreprise. En vertu d'autres dispositions de la convention collective, la compagnie doit lui fournir un bureau et certains accessoires, des renseignements sur «l'embauche, les mises à pied, les congédiements, les renvois, les rappels au travail et les changements de classification d'emploi», ainsi que «les formulaires (de la compagnie) relatifs aux mutations d'emploi».

It is agreed that by reason of the terms of the collective agreement, Wilson, on being elected Chairman of the Union Bargaining Committee, was not required to perform any service to the Company in the plant or elsewhere. No doubt he had considerable duties and responsibilities to the union membership in the discharge of his duty as Plant Chairman, but neither Article 8, nor indeed any other part of the collective agreement, creates in Wilson any duty to perform any services for the Company. The agreement stipulates that the Plant Chairman shall receive "the rate of pay" specified in the agreement, and by implication obligates the Company to pay such moneys to Wilson. Neither by express term nor by any implication is this payment made by the Company to Wilson as Plant Chairman in compensation for any services rendered or to be rendered by Wilson to the Company as an employee; or indeed as Committee Chairman. If indeed such office involved a duty being owed by the Chairman to the Company, it would place the Chairman in a hopeless position of conflict, and even if such duties were hinted at in the agreement, a court would be loath to imply their presence. We are not troubled with any such consideration in this instance because the agreement clearly gives rise to no duty in Wilson to the Company to perform any services as an employee.

Il est admis qu'en vertu des dispositions de la convention collective, après son élection à titre de président du comité syndical de négociation, Wilson n'avait aucune tâche à accomplir pour la compagnie dans l'usine ou ailleurs. Ses fonctions de président du comité d'entreprise lui imposaient sans aucun doute d'importantes responsabilités envers les membres du syndicat, mais ni l'article 8 ni aucun autre article de la convention ne lui imposaient l'obligation d'accomplir quelque travail que ce soit pour la compagnie. La convention prévoit que le président du comité d'entreprise doit être payé au «taux» prévu par la convention, et oblige par conséquent la compagnie à payer cette somme à Wilson. Wilson ne reçoit pas cette rémunération à titre de président du comité d'entreprise, en considération de services rendus ou à rendre en tant qu'employé—ou encore en tant que président du comité de négociation—que ce soit expressément ou implicitement. Si ces fonctions obligeaient le président envers la compagnie, il serait placé dans une situation de conflit intenable, et même si la convention faisait allusion à ce genre d'obligations, une cour hésiterait à conclure à leur existence. Ce problème ne nous concerne pas ici puisque la convention n'impose à Wilson aucune obligation de travailler pour la compagnie à titre d'employé.

Arbitration cases in the field of labour relations in the Province of Ontario have in the past indeed found that "special duties" arise in an employee over and above his duties as an employee where that employee holds a responsible office in the trade union or in the trade union structure recognized in the collective agreement. More recently, the flow is in the other direction, that is to say, a recognition that no duty arises in an employee to the employer by reason of union office over and above his duty arising in law as an employee. A helpful discussion of these cases is found in *Canadian Labour Arbitration*, Brown and Beatty, 1977, p. 375, which states in part as follows:

> An issue which has arisen with some frequency, particularly in the context of an unlawful strike, is whether the officers of a union owe a higher duty to their employer than other members of the workforce and, accordingly, whether they may be liable to more severe disciplinary sanctions for engaging in similar acts of misconduct. Until recently, the vast majority of arbitrators had expressed the view without reservation that an employer could properly consider the fact that an employee was an officer of the union, had assumed certain unique responsibilities as a result of his office, and could therefore invoke more severe disciplinary sanctions against such a person for his misbehaviour. A minority of arbitrators, however, has argued that, while such persons may, by virtue of their position in the union, expose the union to certain liabilities as a result of their behaviour, it should not follow that they owe any additional or special personal obligations to the company over and above their normal responsibilities as employees.

In reviewing the arbitration of the related grievances by Hill concerning these same events at the appellant plant, Weatherston J., sitting in Weekly Court, in discussing this same problem, stated:

> Union office creates a higher degree of responsibility, but does not create a new duty to the employer.

Re Douglas Aircraft Co. of Canada Ltd. and *International Union, United Automobile Aerospace and Agricultural Implement Workers of America* (1974), 48 D.L.R. (3d) 481 at p. 487.

In the case of *Re Federation of Telephone Workers of British Columbia and British Columbia*

Les sentences arbitrales en matière de relations de travail en Ontario ont dans le passé conclu qu'un employé a des «obligations particulières» en plus de ses responsabilités d'employé lorsqu'il détient un poste dans le syndicat ou dans la structure syndicale reconnue dans la convention collective. La tendance récente est à l'inverse, c'est-à-dire qu'on admet qu'un employé n'a pas d'obligation envers l'employeur en raison de son poste syndical, en plus des obligations que la loi lui impose à titre d'employé. On trouve dans *Canadian Labour Arbitration*, Brown et Beatty, 1977, p. 375, une analyse intéressante de ces décisions qui se lit en partie comme suit:

> [TRADUCTION] Une question qui s'est posée assez souvent, surtout dans le cadre d'une grève illégale, est de savoir si les responsables syndicaux ont de plus grandes obligations que les autres employés à l'égard de leur employeur et, donc, s'ils sont passibles de sanctions disciplinaires plus sévères pour des fautes semblables. Jusqu'à ces derniers temps, la plupart des arbitres avaient émis sans réserve l'opinion qu'un employeur était justifié de tenir compte du fait qu'un employé était un responsable syndical, ce qui imposait à ce dernier certaines obligations particulières, et qu'il pouvait ainsi lui imposer des sanctions disciplinaires plus sévères s'il commettait une faute. Toutefois, une minorité d'arbitres soutenait que, bien que ces personnes puissent faire encourir certaines responsabilités au syndicat en raison de leur poste et de leur conduite, on ne devrait pas en déduire qu'elles ont des obligations personnelles particulières envers la compagnie, en plus de leurs responsabilités normales d'employés.

Le juge Weatherston de la Cour des sessions hebdomadaires disait ce qui suit lors de la révision de l'arbitrage des griefs connexes présentés par Hill à l'égard des mêmes incidents survenus dans l'usine de l'appelante:

> [TRADUCTION] Un poste syndical impose de plus grandes responsabilités, sans toutefois créer d'obligations nouvelles envers l'employeur.

Re Douglas Aircraft Co. of Canada Ltd. and *International Union, United Automobile Aerospace and Agricultural Implement Workers of America* (1974), 48 D.L.R. (3d) 481, à la p. 487.

Dans *Re Federation of Telephone Workers of British Columbia and British Columbia Tele-*

Telephone Co.[31], Dohm J. in discussing a relationship or status similar to that of the respondent Wilson said:

It may be that this employee wronged his employer by not being loyal to his employer. It could also be said that he wronged his union by not advising the picketers that they were on an unlawful course which could have resulted in damages to the union. It may be that he did not act as a responsible trade union officer should act in the interests of his fellow workers. He could have been disciplined as an ordinary rank-and-file member and received a penalty commensurate with the degree of responsibility. These factors, however, are no basis for implying into the contract of service a special duty by reason of his being a union officer. In my view, there was no error in law on the face of the award and I accordingly dismiss the application. Although it was not urged before me, I would apply the same test above mentioned to the suggestion that this special duty could be implied by law into the collective agreement. I am of the opinion that union officers personally do not owe any special duty to the employer unless specific terms are arrived at in the collective agreement. Responsible union leadership, however, would seem to require, apart from any legal duty, that in the interests of the employer and the union, the leaders should see that the terms of the collective agreement are carried out and should give proper leadership to their fellow employees when the terms of the collective agreement are wrongly broken.

(pp. 20-1)

In my respectful view, the use of the words "duty" and "responsibility" tends to becloud the true relationship between the parties. The law has never recognized that a bargaining representative of a group of employees owed a duty in such a role to the employer. He may owe a duty to the community (but that we do not need to decide here), and he clearly owes a duty to his constituents, but the total fabric and structure of labour relations is predicated upon the integrity in law and in fact of the representatives of both sides to the bargaining process. That integrity is not promoted, and in fact would be defeated, if the law were to place in the representative of the employees a duty enforceable by the company, or indeed a duty, the failure to exercise which would expose the employee repre-

[31] (1971), 23 D.L.R. (3d) 18.

phone Co.[31], le juge Dohm faisait des commentaires sur un employé dont la situation était semblable à celle de l'intimé Wilson:

[TRADUCTION] Il est possible que cet employé ait causé un préjudice à son employeur par manque de loyauté. On pourrait également dire qu'il a causé un préjudice au syndicat en n'avertissant pas les piqueteurs qu'ils agissaient illégalement, ce qui aurait pu entraîner la responsabilité du syndicat. Il se peut qu'il n'ait pas agi comme un agent syndical responsable le devrait dans l'intérêt de ses collègues de travail. Il aurait pu être puni comme un employé ordinaire et recevoir une sanction proportionnelle à son degré de responsabilité. Cependant, ces facteurs ne permettent pas de conclure que le contrat de travail lui impose une obligation particulière en raison de son poste syndical. A mon avis, la sentence ne contenait pas d'erreur apparente à sa lecture, et je rejette donc la demande. Bien que cela n'ait pas été plaidé devant moi, j'appliquerais le même critère si l'on soutenait que ces obligations particulières sont réputées faire partie de la convention collective par l'effet de la loi. Je suis d'avis que les responsables syndicaux n'ont pas d'obligations personnelles particulières envers leur employeur, à moins de dispositions expresses à cet effet dans la convention collective. Mise à part toute obligation légale, il semblerait toutefois que des dirigeants syndicaux responsables devraient s'assurer, dans l'intérêt de l'employeur et du syndicat, que les dispositions de la convention collective sont respectées et devraient également assumer correctement leurs fonctions de direction à l'égard de leurs collègues employés, si la convention collective n'est pas respectée.

(pp. 20 et 21)

A mon humble avis, l'emploi des mots «obligation» et «responsabilité» tend à obscurcir la vraie nature des relations entre les parties. Le droit n'a jamais reconnu qu'un représentant qui négocie pour un groupe d'employés a en cette qualité des obligations envers l'employeur. Il peut avoir des obligations envers la collectivité (mais il n'est pas nécessaire d'en décider ici) et il a certainement des obligations envers ceux qu'il représente, mais la structure et la nature même des relations de travail reposent sur l'autonomie en droit et en fait des représentants des parties dans le processus de négociation. Cette autonomie ne serait pas favorisée, et serait en fait détruite, si la loi imposait aux représentants des employés une obligation que la compagnie pourrait faire exécuter, ou encore une

[31] (1971), 23 D.L.R. (3d) 18.

sentative to punitive action of any kind by the company against the employee in his status as employee.

The obligation by the Company to provide a salary to the Plant Chairman under Article 8 is analogous to a fringe benefit to the members of the bargaining unit to be provided by the Company under the collective agreement. If the members of the bargaining unit wished to have a full-time spokesman or administrator acting in their interests in the administration of the agreement, such members would be obligated to provide the necessary income to enable their elected or selected representative to so serve them. Here the obligation to make such payment has been transferred by Article 8 from the union members to the Company, and hence the analogy to the payment by the Company of a fringe benefit to members of the bargaining unit. Gilbert E. Dwyer, in an article entitled 'Employer-Paid "Union Time" Under the Federal Labor Laws' (1961) 12 *Labor Law Journal* 236, at p. 242, stated as follows:

> Is a union official or representative *who performs no work* for the employer an employee merely because he is carried on the payroll?
>
> May employer payments to such an individual be reasonably regarded as compensation for service as an employee?
>
> May employer payments to such an individual be reasonably regarded as made "by reason of" his service as an employee?
>
> As to the latter two questions, it is difficult to conceive of adequate union representation being equated with service to the employer.

The matter, however, does not end there. Since Wilson is not an employee of the Company in that he is chosen by the Union and put in office by selection by Union members in the manner prescribed by Article 8, the Company cannot discharge him from that office. He holds no other office. He is not an employee except in the sense that he has a residual right upon ceasing to hold such office to be returned to the classification from whence he came. This right cannot be the subject of unilateral destruction by the Company by

obligation dont l'inexécution exposerait le représentant des employés à une quelconque mesure disciplinaire de la part de la compagnie, en sa qualité d'employé.

L'obligation qu'a la compagnie de payer un salaire au président du comité d'entreprise en vertu de l'article 8 est analogue aux avantages sociaux que la compagnie doit fournir aux membres de l'unité de négociation en vertu de la convention collective. Si les membres de l'unité de négociation voulaient qu'un porte-parole ou un administrateur veille à plein temps à leurs intérêts dans l'application de la convention collective, ils devraient verser une rémunération qui permette à ce représentant élu ou choisi de s'acquitter de ces fonctions. En vertu de l'article 8, l'obligation d'effectuer ce paiement a été transférée des membres du syndicat à la compagnie, d'où l'analogie avec les avantages sociaux payés par la compagnie aux membres de l'unité de négociation. Dans un article intitulé «Employer-Paid «Union Time» Under the Federal Labor Laws» (1961) 12 *Labor Law Journal* 236, Gilbert E. Dwyer écrit à la p. 242:

> [TRADUCTION] Un agent ou représentant syndical *qui n'accomplit aucun travail* pour l'employeur est-il un employé, simplement parce qu'il figure sur la liste de paie?
>
> Peut-on raisonnablement considérer que les paiements faits par un employeur à cette personne sont une compensation pour services rendus à titre d'employé?
>
> Peut-on raisonnablement considérer que les paiements faits par l'employeur à cette personne le sont «en raison de» ses services à titre d'employé?
>
> En ce qui concerne les deux dernières questions, on peut difficilement assimiler une représentation syndicale convenable à un service rendu à l'employeur.

Il y a plus toutefois. Étant donné que Wilson n'est pas un employé de la compagnie en ce qu'il est choisi par le syndicat et nommé à son poste par les membres du syndicat conformément à l'article 8, la compagnie ne peut le congédier de ce poste. Il ne détient pas d'autre poste. Il n'est pas un employé sauf dans le sens où il possède un droit résiduel de reprendre sa classification antérieure s'il cesse d'occuper ce poste. Ce droit ne peut être enlevé unilatéralement par la compagnie par suite d'une prétendue faute de la part du président du

reason of alleged misconduct by the Plant Chairman in the discharge of his office. In any case, it is abundantly clear that his status as an "employee" may not be the subject of disciplinary action by the Company, whatever other rights or consequences may flow from the alleged misconduct, and therefore the action taken by the Company on October 3rd, 1973 terminating his employment is a nullity. That notice stated in part:

Further to our telegram of Tuesday, October 2nd 1973 this will confirm that your employment has been terminated for the role you played in the work interruption of October 2nd, 1973.

Since this alleged termination is a nullity and thus has no effect on the status of Wilson under the collective agreement as Plant Chairman, and since he has no other status within reach of the Company's disciplinary action, there is nothing which may serve as the ultimate basis for an award in response to the grievance filed by Wilson, and consequently, the award of the arbitrator in this circumstance should have reflected this nullity.

I must, however, deal with one sentence found in Article 8 which states as follows: "He [the Plant Chairman] shall be responsible to the Manager, Labour Relations, or his nominee". It might be arguable that this sentence in isolation places some duty flowing from Wilson to the Manager, Labour Relations of the appellant-employee. As in the interpretation of contracts and statutes generally, however, sentences can rarely be construed in isolation, and almost always must be construed in the context and circumstances in which they are found in the entire document. If the Plant Chairman does indeed owe some duty to the employer for which he is accountable in law, he has, as I have already stated, a fundamental conflict of interest. In the field of labour relations, it is difficult to contemplate a situation where somehow, by implication, direct or indirect, an officer or representative of members of the bargaining unit may be rejected, discharged or interrupted in the course of performing his duties as a union representative within the four corners of the collective agreement. To construe the agreement otherwise would be to reduce the Bargaining Committee to a managerial

comité d'entreprise dans l'exécution de ses fonctions. Quoi qu'il en soit, il est évident que son statut d'«employé» ne peut faire l'objet de sanctions disciplinaires par la compagnie, quels que soient par ailleurs les autres droits ou effets qui peuvent résulter de la prétendue faute, et par conséquent la mesure prise par la compagnie le 3 octobre 1973 pour mettre fin à son emploi est nulle. Cet avis énonçait en partie ce qui suit:

[TRADUCTION] Suite à notre télégramme du mardi 2 octobre 1973, la présente confirme qu'il a été mis fin à votre emploi en raison de votre rôle dans l'arrêt de travail du 2 octobre 1973.

Puisque ce prétendu congédiement est nul et n'a ainsi aucun effet sur le statut de Wilson à titre de président du comité d'entreprise en vertu de la convention collective, et puisqu'il ne possède aucun autre statut qui le soumette au pouvoir disciplinaire de la compagnie, il n'existe aucun motif qui puisse justifier une sentence en réponse au grief présenté par Wilson, et la sentence de l'arbitre aurait donc dû en l'espèce tenir compte de cette nullité.

Il me faut cependant traiter de la phrase qu'on retrouve à l'article 8: «Il (le président du comité d'entreprise) relève du gérant des relations de travail ou de son représentant». On pourrait soutenir que cette phrase, prise hors contexte, impose à Wilson certaines responsabilités envers le gérant des relations de travail de l'employeur appelante. Tout comme en matière d'interprétation des contrats et des lois cependant, les phrases peuvent rarement être interprétées isolément et doivent presque toujours l'être par rapport au contexte et aux dispositions du document en son entier. Si le président du comité d'entreprise a effectivement certaines obligations légales envers l'employeur, il est alors fondamentalement placé—comme je l'ai déjà dit—dans une position de conflit d'intérêts. En matière de relations de travail, il est difficile d'imaginer une situation où, directement ou indirectement, un agent ou un représentant des membres de l'unité de négociation puisse être renvoyé, congédié ou suspendu alors qu'il s'acquitte de ses fonctions syndicales conformément à la convention collective. Interpréter différemment la convention équivaudrait à réduire les travaux du comité de

puppet show because, in the fullness of time, their individual economic well-being will come to depend upon the maintenance of some relationship with management. This is, of course, fundamentally hostile to the basic concept of the rights of labour and indeed of the rights of management in the long term. Therefore, I have no difficulty in interpreting the above-quoted sentence to refer to an attachment of the Plant Chairman to the office of the Manager, Labour Relations for such administrative details as picking up the monthly or weekly remuneration prescribed by the agreement as his entitlement, arranging his return to plant duty when that time comes, etc. and I read no other significance into the sentence.

The Divisional Court, for the reasons set out above in the excerpt from the reasons of Osler J., quashed the award by reason of the adoption by the arbitrator of a construction of s. 8 of the collective agreement which its words would not reasonably bear. The arbitrator in doing so found Wilson under a duty to the company with reference to the administration of the collective agreement. If I had not concluded, as already stated, that Wilson was not subject to discharge by the company either for wrongfully withholding his services, which he did not do, or by reason of a breach of duty owed by Wilson to the company under the collective agreement, I would reach the same substantive conclusion as the Divisional Court. I would do so because of the attribution of the learned arbitrator to the grievor Wilson of a duty to the company in his labour relations role under the collective agreement. Because the award uses the words "responsibility" and "culpability" interchangeably with reference to the grievor's liability or exposure to discharge as a penalty for breach of duty, it is not entirely clear as to what the "special relationship" between the company and Wilson is, nor the nature of the duty which thereby results. What is clear, however, is that the award includes the following statements with reference to the grievor Wilson:

His full time duties are directed to the administering of the collective agreement and in this he is responsible to

négociation à un spectacle de marionnettes manipulées par la direction puisque le bien-être économique individuel dépendrait, avec le temps, du maintien de certains rapports avec la direction. Il s'agit bien sûr d'une idée essentiellement opposée, à long terme, à la conception fondamentale des droits des travailleurs, ainsi qu'à ceux de la direction. Je n'éprouve donc aucune difficulté à interpréter la phrase citée précédemment de manière que le président du comité d'entreprise relève du bureau du gérant des relations de travail pour des détails administratifs comme recevoir la rémunération mensuelle ou hebdomadaire prévue par la convention collective, voir à son retour à l'usine le temps venu, etc., et je n'y trouve aucun autre sens.

Pour les raisons mentionnées dans l'extrait précité des motifs du juge Osler, la Cour divisionnaire a annulé la sentence parce que l'arbitre avait donné aux dispositions de l'article 8 de la convention collective une signification qu'elles ne peuvent raisonnablement avoir. Ce faisant, l'arbitre a considéré que Wilson avait des obligations envers la compagnie au sujet de l'application de la convention collective. Si je n'avais pas conclu, comme je l'ai déjà dit, que Wilson ne pouvait être congédié par la compagnie soit pour avoir illégalement cessé de travailler—ce qu'il n'a pas fait—soit pour inexécution d'une obligation qu'il aurait eue envers la compagnie en vertu de la convention collective, j'en viendrais sur le fond à la même conclusion que la Cour divisionnaire. Je le ferais parce que le savant arbitre a considéré qu'en vertu de la convention collective, le réclamant Wilson avait une obligation envers la compagnie vu le rôle que lui confie la convention collective dans les relations de travail. Étant donné qu'on utilise indistinctement les mots [TRADUCTION] «responsabilité» et [TRADUCTION] «culpabilité» dans la sentence pour exprimer que le réclamant risquait ou encourait un congédiement pour inexécution de ses obligations, les «rapports spéciaux» entre la compagnie et Wilson ne sont pas tout à fait clairs, pas plus que la nature des obligations qui en découlent. Ce qui est clair cependant, c'est qu'on trouve dans la sentence les remarques suivantes à l'égard du réclamant Wilson:

[TRADUCTION] Il doit s'occuper à plein temps de l'application de la convention collective et, à ce titre, il relève

the manager, labour relations, pursuant to the provisions of Article 8 of the collective agreement. Since he is paid by the company solely for administering the collective agreement as plant chairman, he must assume more responsibility for its proper and lawful administration than if he were not paid for this function.

and later in the award:

For this reason, if for no other, Mr. Wilson must bear the greatest responsibility for what occurred on October 2nd since he failed to demonstrate that he had actively attempted to enforce the provisions of the collective agreement at the direction of the manager of labour relations and to cause the members of the bargaining unit to do likewise.

The union President, Mr. Kirkby (who is not involved in these proceedings because he was not discharged by the company) was on leave of absence and was paid by the union and not by the company. The arbitrator, in pointing out the difference between Kirkby on the one hand and Wilson on the other in their relationship with the company, stated:

In this respect Mr. Kirkby was in a different position than Mr. Wilson. Mr. Kirkby was on a full time leave of absence from the bargaining unit for the duration of his term of office as president of the local union. He was not paid by the company. During his leave of absence he owed no duty to the company as an employee. His only duty was to the union.

After making the foregoing comments successively, though at different stages of the award, the disposition by the arbitrator concludes:

The grievor's leadership position within the bargaining unit made his unlawful actions more culpable than employees who hold lesser positions of leadership within the bargaining unit. It is not the position within the union per se which causes responsibility to the company to attach to the grievor. It was his position as a leader of the bargaining unit members, which was recognized by the parties in the manner described above in the collective agreement that created the greater responsibility for his active role. Indeed, since Article 8 requires the company to deal with the bargaining committee when matters arise under the collective agreement, the company is entitled to rely on the members of the bargaining committee to share the responsibility to inform the

du gérant des relations de travail, conformément à l'article 8 de la convention collective. Vu que la compagnie le paie seulement pour voir à l'application de la convention collective à titre de président du comité d'entreprise, il doit assumer pour sa bonne application suivant la loi une plus grande responsabilité que s'il n'était pas payé pour ces fonctions.

Et on lit plus loin dans la sentence:

[TRADUCTION] Pour cette raison, à tout le moins, M. Wilson doit porter la plus grande part de responsabilité des incidents du 2 octobre puisqu'il n'a pas démontré qu'il avait essayé concrètement de faire respecter les dispositions de la convention collective selon les directives du gérant des relations de travail, et d'inciter les membres de l'unité de négociation à en faire autant.

Le président du syndicat, M. Kirkby, (qui n'est pas partie à ces procédures puisqu'il n'a pas été congédié par la compagnie) était en congé autorisé, payé par le syndicat et non par la compagnie. En soulignant la différence entre Kirkby et Wilson dans leurs rapports avec la compagnie, l'arbitre a dit:

[TRADUCTION] M. Kirkby n'avait pas à cet égard le même statut que M. Wilson. M. Kirkby bénéficiait d'un congé autorisé de l'unité de négociation à plein temps pour la durée de son mandat de président du syndicat local. Il n'était pas payé par la compagnie. Il n'avait aucune obligation à l'égard de la compagnie durant son congé. Il n'avait d'obligations qu'envers le syndicat.

Après avoir successivement fait ces commentaires dans différents passages de sa sentence, l'arbitre a conclu:

[TRADUCTION] Le poste de direction qu'occupait le réclamant dans l'unité de négociation rend ses actions illégales plus graves que celles des employés qui détenaient des postes moins importants au sein de cette unité. Ce n'est pas la fonction syndicale en soi qui entraîne la responsabilité du réclamant envers la compagnie. C'est son poste de dirigeant des membres de l'unité de négociation, reconnu par les parties dans la convention collective de la façon ci-haut décrite, qui entraîne une plus grande responsabilité en raison de son rôle actif. D'ailleurs, puisque l'article 8 oblige la compagnie à traiter avec le comité de négociation lorsque surgissent des problèmes reliés à la convention collective, elle est justifiée de partager avec les membres du comité de

members of the bargaining unit of the company's position when such matters occur. This they failed to do.

Some of the above-quoted remarks by the arbitrator in fact indicate a possible basis for a grievance or an action at law against the union rather than grounds for a grievance discharge against Wilson personally. There also appears to be some confusion between a duty owed to the members of the bargaining unit by Wilson by reason of the chairmanship of the bargaining committee, with a possible duty to the company because of the terminology of s. 8. It is apparent in my view that in assessing the propriety of the company action and the penalty imposed by the company, the learned arbitrator has misinterpreted s. 8, and in so doing has assigned to the terms thereof a meaning which those words will not reasonably bear. Hence the award with respect to the grievor Wilson is subject to judicial review and should be quashed.

Second Group of Grievors

The grievances of the second group, namely the respondents Benjamin, McConnell and Hopkinson, were filed jointly with that of the respondent Wilson, and stated in part:

We protest the action of the Company for unjustly discharging us as members of Local 1967 U.A.W. Bargaining Committee and further protest the Company's action in unjustly discharging us as employees. We request immediate re-instatement and full redress for all losses.

It is necessary to determine the arbitrator's response to each of these three grievances in order to determine whether the awards, or any of them, are amenable to intervention on judicial review according to the principles discussed above. In all three awards the arbitrator found a withholding of services had occurred by personal participation in the sick-in. The issue before the arbitrator therefore reduced itself to a determination in each case whether, on the facts and circumstances, the penalty of discharge was appropriate in the sense of s. 19 of the collective agreement which provides in part:

The Arbitrator, however, in respect of a grievance involving a penalty, shall be entitled to modify such

négociation la responsabilité d'informer les membres de l'unité de négociation de sa position, lorsque les problèmes surviennent. Or, ils ne l'ont pas fait.

Certaines remarques de l'arbitre que je viens de mentionner pourraient peut-être fonder un grief ou une poursuite judiciaire contre le syndicat plutôt que le congédiement de Wilson. Il existe également une certaine confusion entre les obligations de Wilson envers les membres de l'unité de négociation, en sa qualité de président du comité de négociation, et les obligations possibles envers la compagnie, vu le texte de l'article 8. A mon avis, il est clair qu'en évaluant le bien-fondé de la mesure prise par la compagnie et de la sanction qu'elle a imposée, le savant arbitre a mal interprété l'article 8 et, ce faisant, a donné à ses dispositions un sens qu'elles ne peuvent raisonnablement avoir. La sentence à l'égard du réclamant Wilson est donc susceptible de révision et devrait être annulée.

Deuxième groupe de réclamants

Les griefs du second groupe, soit les intimés Benjamin, McConnell et Hopkinson, ont été présentés avec celui de l'intimé Wilson et se lisent en partie comme suit:

[TRADUCTION] Nous protestons contre les mesures prises par la compagnie qui nous a injustement congédiés à titre de membres du comité de négociation des T.U.A., Local 1967, et nous protestons en outre contre notre congédiement injuste à titre d'employés. Nous demandons une réintégration immédiate et le remboursement complet des pertes subies.

Il faut déterminer la réponse qu'a apportée l'arbitre à chacun de ces trois griefs afin de décider si les sentences, ou l'une d'entre elles, donnent ouverture au contrôle judiciaire conformément aux principes étudiés plus haut. Dans les trois sentences, l'arbitre a conclu que les réclamants n'avaient pas exécuté leur prestation de travail en participant personnellement au «*sick-in*». La question dont était saisi l'arbitre se résumait donc à déterminer dans chaque cas si, compte tenu des faits et des circonstances, le congédiement était une sanction appropriée au sens de l'article 19 de la convention collective qui stipule en partie:

[TRADUCTION] En ce qui concerne un grief relatif à une sanction, l'arbitre aura cependant le droit de modifier la

penalty as in the opinion of the Arbitrator is just and equitable.

It will be convenient to deal with each of these three awards separately for this purpose.

The Award Re the Respondent Benjamin

It should be noted that there is a limited cross-reference to the aforementioned Wilson award in these words:

In addition to the evidence concerning the general background of the dispute which is set out in the award in the Archie Wilson grievance . . ."

In discussing the position of the respondent Benjamin as a member of the Bargaining Committee, the arbitrator clearly had the terms of s. 8 of the collective agreement in mind although it is not the subject in this award of any specific reference. After finding that Benjamin had attempted during working hours to cause employees to violate the collective agreement, the award continued:

I do not intend to imply that Mr. Benjamin's duties as a member of the bargaining committee are to be exercised as if he were an arm of management. This is clearly not the purpose or function of a member of a union bargaining committee. However, since the company pays the members of the bargaining committee while performing bargaining committee functions during working hours, the company is entitled to expect that such members will not take advantage of their position of leadership under the collective agreement by deliberately trying to cause employees to violate the collective agreement as was done by Mr. Benjamin. His duties as a member of the union bargaining committee in administering the collective agreement are to enforce and uphold the provisions of the collective agreement rather than to violate these provisions.

This excerpt must be read in the light of the balance of the award where the grievor's "culpability" is compared to that of Wilson who held a "greater position of leadership under the collective agreement" and though "slightly less culpable than Wilson, the grievor must share a major portion of the responsibility for the work interruption . . ." The arbitrator concluded:

In my view his responsibility was such that his work record could not outweigh the seriousness of his offence, especially in light of the history of the relationship

sanction selon ce qu'il estime juste et équitable.

A ce propos, il convient d'examiner séparément les trois sentences:

La sentence à l'égard de l'intimé Benjamin

Il faut remarquer une brève référence à la sentence Wilson:

[TRADUCTION] En plus de la preuve relative au contexte général du différend, qui est décrite dans la sentence rendue sur le grief d'Archie Wilson . . .

En étudiant la situation de l'intimé Benjamin à titre de membre du comité de négociation, il est clair que l'arbitre avait à l'esprit les dispositions de l'article 8 bien qu'il n'en soit pas expressément fait mention dans la sentence. Après avoir conclu que Benjamin avait essayé durant les heures de travail d'inciter des employés à violer la convention collective, l'arbitre poursuit en ces termes:

[TRADUCTION] Je ne veux pas dire par là que M. Benjamin devait exercer ses fonctions de membre du comité de négociation comme s'il était un représentant de la direction. Ce n'est évidemment pas l'objectif ni la fonction d'un membre d'un comité syndical de négociation. Cependant, étant donné que la compagnie paie les membres du comité de négociation pendant qu'ils exécutent des fonctions de négociation durant les heures de travail, elle est en droit de s'attendre à ce que ces membres ne profitent pas de leur poste de direction en vertu de la convention collective pour essayer délibérément d'inciter les employés à violer la convention collective comme l'a fait M. Benjamin. A titre de membre du comité syndical de négociation, ses obligations dans l'application de la convention collective consistent à en faire respecter les dispositions et non à les transgresser.

Il faut lire ce passage dans le contexte du reste de la sentence où la «culpabilité» du réclamant est comparée à celle de Wilson qui détenait [TRADUCTION] «de plus grandes responsabilités de direction en vertu de la convention collective» et bien que «légèrement moins coupable que Wilson, le réclamant doit supporter une large part de responsabilité dans l'arrêt de travail . . .». L'arbitre a conclu:

[TRADUCTION] A mon avis, sa responsabilité était telle que son rendement au travail ne pouvait compenser la gravité de l'infraction, compte tenu surtout des relations

between the parties and the importance attached by the company to maintaining its production schedules.

I find no error in law in the construction of the applicable collective agreement provisions nor any other error in law, and certainly no attribution to the agreement which the words thereof would not reasonably bear. It might be that happier expressions could be employed to more sharply etch the distinction between "responsibility" for the grievor's action or his "culpability" therefor on the one hand, and his duty to the company as an employee on the other hand. Such a differentiation between the grievor's duty to the trade union as a member of the committee and his duty to the company as a production employee would have clarified the award but, in my view, this lack of clarity does not amount to a reviewable error of law. Neither is there any apparent reliance upon extraneous material which might involve a consideration of the fairness of the adjudication process as it applied to this grievance. In reviewing matters relevant to penalty, for example, the arbitrator observed:

> . . . the company is entitled to search out the ringleaders and to impose reasonable discipline which is directed to avoiding future concerted activities of this kind.

Applying the rigours of the principles of judicial review to this award, I find no error in law which would support judicial intervention.

The Award Re the Respondent McConnell

Again there is but a limited cross-reference to the awards respecting the Wilson and Benjamin grievances relating to the terms of the agreement and the facts. This grievor was not the subject of any evidence of direct promotion of the 'sick-in' other than his own absence from work on the 2nd of October and his membership in the bargaining committee. The award reveals the arbitrator's reasoning with respect to this respondent:

> Although there was no direct evidence of the activities of the grievor, he must accept responsibility for the results that flowed from the concerted efforts made by Mr. Wilson and Mr. Benjamin and is deemed, in the

passées entre les parties et de l'importance qu'attachait la compagnie au maintien de ses échéanciers de production.

Je ne vois aucune erreur de droit dans l'interprétation des dispositions pertinentes de la convention collective ni aucune autre erreur de droit, et certainement aucune interprétation qu'on ne pourrait raisonnablement donner aux termes de la convention. On aurait peut-être pu employer des expressions plus appropriées pour souligner plus nettement la distinction entre la «responsabilité» du réclamant pour ses actes ou sa «culpabilité» à cet égard d'une part, et ses obligations envers la compagnie à titre d'employé d'autre part. Cette distinction entre les obligations du réclamant envers le syndicat à titre de membre du comité et ses obligations envers la compagnie à titre d'employé aurait clarifié la sentence, mais ce manque de clarté n'équivaut pas à mon avis à une erreur de droit susceptible de révision. L'arbitre ne paraît pas non plus s'être fondé sur des preuves extrinsèques, ce qui pourrait remettre en question le caractère équitable du processus d'arbitrage suivi pour ce grief. En passant en revue les éléments pertinents à la sanction, l'arbitre a par exemple fait remarquer:

> [TRADUCTION] . . . la compagnie a le droit de chercher les agitateurs et d'imposer des mesures disciplinaires raisonnables en vue d'éviter à l'avenir des activités concertées de cette nature.

En appliquant les principes de contrôle judiciaire à cette sentence, je n'y trouve aucune erreur en droit qui puisse justifier une telle intervention.

La sentence à l'égard de l'intimé McConnell

On ne trouve ici encore qu'une brève référence aux sentences rendues sur les griefs Benjamin et Wilson en ce qui concerne les dispositions de la convention collective et les faits. Aucune preuve ne démontre que ce réclamant a directement encouragé le «*sick-in*», si ce n'est par sa propre absence le 2 octobre et sa qualité de membre du comité de négociation. On trouve dans la sentence le raisonnement suivant à l'égard de cet intimé:

> [TRADUCTION] Bien que l'on n'ait présenté aucune preuve directe des activités du réclamant, il doit porter la responsabilité du résultat des efforts concertés de MM. Benjamin et Wilson et, en l'absence de preuve

absence of evidence to the contrary and in the circumstances of this case, to have acted in concert with the bargaining committee as a whole. Had the grievor disassociated himself from Mr. Wilson's comments and actions on September 28th and had evidence been adduced to indicate that he was merely a passive participant, I might have been prepared to infer that his role in the work interruption was substantially different than was proved against both Mr. Wilson and Mr. Benjamin. Where members of a union bargaining committee are proved to have the necessary knowledge and act in concert to achieve an unlawful result, it is not unreasonable to find that the culpability of individual members of the committee flows to all members of the committee. This is especially true where it is difficult, if not impossible, to obtain detailed evidence of the activities of each and every member of such a committee. If I were to apply the criminal onus of proof I would be compelled to find that there was insufficient evidence to support the discharge of the grievor. However, I must apply the civil onus in this case.

As in the case of the award with reference to the respondent Benjamin, the arbitrator speaks in terms of "responsibility" and "culpability" which are, of course, common expressions in the assessment of penalty, civil and criminal. The award concludes:

> The evidence in this case was sufficiently strong to impose an onus of explanation on the grievor. In view of this failure to testify I am of the view that it is not unreasonable to infer that he acted in concert with other members of the union bargaining committee to precipitate the sick-in which took place on October 2nd.
>
> The grievor's support of a work stoppage for this reason is one of the most serious offences that can be committed by an employee.

Apart from one paragraph in the McConnell award which is common to the Hopkinson award, no reviewable question of law arises in the award, and it is convenient to discuss that paragraph as it arises in the Hopkinson award.

The Award Re the Respondent Hopkinson

This award is likewise linked to that of the awards in respect of the respondents Wilson and Benjamin by a cross-reference regarding the "relevant provisions of the collective agreement and the facts of this case ...." The arbitrator then estab-

contraire dans les circonstances, il est réputé avoir agi de concert avec l'ensemble du comité de négociation. Si le réclamant s'était dissocié des commentaires et des actes de M. Wilson le 28 septembre et si une preuve avait indiqué qu'il était simplement un participant passif, j'aurais pu en déduire que son rôle dans l'arrêt de travail était substantiellement différent de celui de MM. Wilson et Benjamin. Lorsqu'il est prouvé que les membres d'un comité syndical de négociation sont suffisamment informés et agissent ensemble dans un but illégal, il n'est pas déraisonnable de conclure que la culpabilité de membres du comité pris individuellement éclabousse tous les membres de ce comité. Ceci est d'autant plus vrai dans les cas où il est difficile, voire impossible, d'obtenir une preuve détaillée des activités de chaque membre d'un tel comité. Si je devais appliquer le critère du fardeau de la preuve en matière criminelle, je serais obligé de conclure que la preuve n'est pas suffisante pour justifier le congédiement du réclamant. Dans cette affaire, je dois cependant appliquer le fardeau de la preuve en matière civile.

Comme dans la sentence à l'égard de l'intimé Benjamin, l'arbitre emploie les expressions «responsabilité» et «culpabilité» qui sont courantes, bien sûr, dans l'évaluation des sanctions civiles et criminelles. La sentence conclut:

> [TRADUCTION] Dans cette affaire, la preuve était suffisamment forte pour imposer au réclamant le fardeau de fournir certaines explications. Vu qu'il n'a pas témoigné, j'estime qu'il n'est pas déraisonnable d'en déduire qu'il a agi de concert avec les autres membres du comité de négociation afin de provoquer le «*sick-in*» du 2 octobre.
>
> Pour cette raison, l'appui qu'a apporté le réclamant à l'arrêt de travail constitue l'une des plus graves infractions que puisse commettre un employé.

Mis à part un alinéa de la sentence McConnell qu'on retrouve dans la sentence Hopkinson, il n'y a ici aucune question de droit susceptible de révision, et il est plus commode d'analyser cet alinéa dans le cadre de la sentence Hopkinson.

La sentence à l'égard de l'intimé Hopkinson

On trouve également dans cette sentence une référence aux sentences relatives aux intimés Wilson et Benjamin, en ce qui concerne [TRADUCTION] «les dispositions pertinentes de la convention collective et les faits de cette affaire ...» L'arbitre

lished a more specific linkage between these grievors:

The role played by the grievor assumed greater importance because of his membership in the union bargaining committee, for the reasons referred to in the Wilson and Benjamin awards.

In considering this award it is necessary to remember that the respondent-grievor was not a member of the Union Bargaining Committee on the 28th of September but only joined it thereafter in replacement of the suspended member Harbinson.

The arbitrator found in essence that the committee acted in concert to induce breaches of the master and servant relationship between the company and its employees in the bargaining unit as that relationship is established under the collective agreement. The penalties awarded by the company the arbitrator found matched the grounds for discharge. He considered but did not accept the submission that the individual employment records of these grievors should have dictated a different penalty. The only question to be asked on the judicial review of such an award is whether the arbitrator has, in reaching his conclusion, committed an error of law apparent on the face of the record. (We are here not concerned with an allegation of lack of statutory or contractual jurisdiction to enter into the arbitration proceedings or any technical breach of jurisdictional structures during the conduct of the arbitration.)

I return to the paragraph common to the McConnell and Hopkinson awards to determine whether its content amounts to a reviewable error. The paragraph reads as follows:

In view of his responsibilities to the company under the collective agreement and his failure to properly explain his absence or otherwise adduce evidence to qualify or explain the part he played in the work stoppage, I am prepared to infer from the evidence before me that his role in the work interruption on October 2nd, was not merely passive.

As can be seen from the excerpts from the other awards, the arbitrator in scaling the penalties to the wrong, that is the cause for each discharge, sought out each grievor's "responsibility" or "culpability" as a member of the bargaining committee. The arbitrator has not found cause for discharge

fait ensuite un lien plus direct entre ces réclamants:

[TRADUCTION] Le rôle joué par le réclamant était plus important à cause de sa qualité de membre du comité syndical de négociation, pour les motifs mentionnnés dans les sentences Wilson et Benjamin.

Dans ce cas, il faut se souvenir que le réclamant intimé n'était pas membre du comité syndical de négociation le 28 septembre mais qu'il ne s'y est joint que plus tard, pour remplacer le membre suspendu, Harbinson.

L'arbitre a conclu en substance que les membres du comité avaient agi de concert pour inciter les employés à violer la relation employeur-employé qui unissait la compagnie et ses employés membres de l'unité de négociation selon les conditions prévues dans la convention collective. L'arbitre a décidé que les sanctions de congédiement imposées par la compagnie étaient appropriées. Il a examiné l'argument sans toutefois le retenir, que les dossiers individuels des employés auraient commandé une sanction différente. La seule question à se poser lors de la révision d'une telle sentence est de savoir si, en prenant sa décision, l'arbitre a commis une erreur de droit qui apparaît à la lecture du dossier. (En l'espèce, il n'y a aucune allégation d'absence de compétence de l'arbitre fondée sur une disposition de la convention ou d'une loi, ou de violation technique des structures juridictionnelles durant l'arbitrage.)

Je reviens maintenant à l'alinéa commun aux sentences McConnell et Hopkinson afin de déterminer s'il équivaut à une erreur susceptible de révision. Cet alinéa se lit ainsi:

[TRADUCTION] Étant donné ses responsabilités envers la compagnie en vertu de la convention collective, et l'omission d'expliquer son absence de façon satisfaisante ou de soumettre une preuve qui aurait nuancé ou expliqué le rôle qu'il a joué dans l'arrêt de travail, je déduis de la preuve que son rôle dans l'arrêt de travail du 2 octobre n'était pas purement passif.

Comme on l'a vu dans les extraits des autres sentences, en appréciant les sanctions en fonction de la gravité des fautes, c'est-à-dire le motif de chaque congédiement, l'arbitre a évalué la «responsabilité» ou la «culpabilité» de chaque réclamant en tant que membre du comité de négociation. L'arbi-

because the grievor did something in addition to the withholding of services on the 2nd of October. He has stated, however, that the scale of penalty for such a wrong is influenced by such considerations as the prominent position the grievor enjoyed amongst members of the bargaining unit as a member of the plant bargaining committee. In short, the arbitrator considered the impact on the rank and file of the concerted withholding of services by members of the bargaining unit in a position of leadership.

The arbitrator has, however, said at one point in each of the McConnell and Hopkinson awards in the excerpt quoted above that the grievors had "responsibilities to the company." This paragraph in these two awards is the only place where the preposition "to" has been associated with the "responsibilities" of the grievors; all other references refer to responsibilities "of" the grievors for their conduct, or culpability "for" individual actions. For example, the arbitrator concluded in the Hopkinson award:

> I find on the evidence before me that the company had good reason to believe that the grievor acted in concert with the other members of the union bargaining committee and he must therefore accept his proper share of the responsibility for the work stoppage of October 2nd, 1973.

For the reasons stated with reference to the award in the respondent Wilson's grievance, a collective agreement does not ordinarily establish bargaining duties in union representatives which are owed to the company over and above duties owed by them in common with the other members of the bargaining unit and which are distinct from duties owed by such representatives to the union and its membership. Any award, be it a finding of proper grounds for discharge or an award of penalty based on the finding of such a super-added duty of an employee, would be founded on an error of law arising out of a wrongful interpretation of the collective agreement unless that contract clearly so provided. Here s. 8 of the agreement does not so provide, and any such interpretation would, in my view, be unreasonable and would be beyond any meaning which the wording of s. 8 could reasontre n'a pas décidé que le congédiement était justifié pour le motif que le réclamant ne s'était pas borné à ne pas prêter ses services le 2 octobre. Il a cependant dit que l'éventail des sanctions pour ce genre de faute peut varier en fonction de considérations comme le poste important du réclamant au sein de l'unité de négociation en sa qualité de membre du comité de négociation de l'entreprise. Bref, l'arbitre a tenu compte de l'effet sur les employés ordinaires du retrait concerté des prestations de services des membres dirigeants de l'unité de négociation.

L'arbitre a cependant dit dans l'extrait précité des sentences McConnell et Hopkinson que les réclamants avaient des «responsabilités envers la compagnie». Dans ces deux sentences, cet alinéa est le seul endroit où la préposition «envers» est accolée aux «responsabilités» des réclamants; toutes les autres mentions parlent des responsabilités «des» réclamants pour leur conduite, ou de culpabilité «pour» leurs gestes individuels. Par exemple, l'arbitre a conclu dans la sentence Hopkinson:

> [TRADUCTION] La preuve produite me permet de conclure que la compagnie était justifiée de croire que le réclamant a agi de concert avec les autres membres du comité syndical de négociation et il doit donc porter sa juste part de responsabilité pour l'arrêt de travail du 2 octobre 1973.

Pour les motifs énoncés relativement à la sentence rendue dans le grief de l'intimé Wilson, en règle générale une convention collective n'impose pas aux représentants syndicaux plus d'obligations envers la compagnie qu'aux autres membres de l'unité de négociation et leurs obligations ne sont pas différentes de celles qu'ils ont envers le syndicat et ses membres. Toute sentence, qu'elle conclue à l'existence de motifs suffisants de congédiement ou qu'elle impose une sanction en se fondant sur une pareille obligation supplémentaire d'un employé, serait entachée d'une erreur de droit résultant d'une mauvaise interprétation de la convention collective, à moins que celle-ci ne le prévoie clairement. En l'espèce, l'article 8 de la convention ne le prévoit pas et, à mon avis, une interprétation en ce sens ne serait pas raisonnable et irait au-delà de toute interprétation raisonnable

ably bear. Such an interpretation would therefore be a reviewable error of law.

I do not find on considering the terminology employed by the arbitrator in the whole of each of these two awards that he has misinterpreted, and applied such a meaning to, s. 8 so as to thereby, in effect, apply a penalty appropriate to two wrongs instead of one, namely the wrongful withholding of services. Courts must, in examining awards of arbitrators, particularly in the field of labour relations, do so in the awareness of the role of the arbitrator. Usually he is a technician of considerable expertise in a highly specialized field. His terminology will not always or perhaps ever be that of the traditional courts, nor should it be. Precision of conclusion is of course required, and the relationship between the conclusion and the contractual or statutory provisions will be closely scrutinized by the courts. Expressional latitude must, however, be accorded the arbitrator as he applies the law of the contract or the statute to the facts as he finds them. The parties have selected him specifically for this task. The state speaking through the statute requires that his decision be final and binding. The whole atmosphere of the industrial-commercial arena requires that such differences be quickly and fairly settled by this summary procedure, designed as it is to be economical of time and expense. Here the arbitrator has, on the silence of the grievors who neither called nor gave evidence, drawn inferences of fact and concluded that more than a passive role was played by these two grievors. From a technical, legal viewpoint, the expression "responsibility to the company" is no doubt unfortunate, but when read in the context of the whole of the two awards and the history of the relationship between the parties as revealed in the whole of the collective agreement and in all the circumstances of these proceedings, I cannot conclude that the arbitrator has thereby revealed an erroneous construction of s. 8 or any other term of the collective agreement of the magnitude of a reviewable error of law. It therefore cannot be said that he exercised his discretion as to the penalty assigned to these two grievors on any wrong basis in law and thus there is no error of law on the record authorizing judicial review.

des termes de l'article 8. Pareille interprétation constituerait donc une erreur de droit susceptible de révision.

L'examen des termes employés par l'arbitre dans ces deux sentences ne me permet pas de conclure qu'il a mal interprété l'article 8 ou qu'il lui a donné un sens qui aurait pour effet d'imposer une sanction qui s'attaque à deux fautes au lieu d'une seule, savoir le retrait de la prestation de services. Dans la révision des sentences arbitrales, spécialement en matière de relations de travail, les cours doivent tenir compte du rôle de l'arbitre. Celui-ci est habituellement un expert qui possède de grandes connaissances dans un domaine très spécialisé. Les expressions qu'il emploie ne sont pas toujours et ne seront peut-être jamais celles des tribunaux traditionnels; il ne devrait d'ailleurs pas en être ainsi. Il faut bien sûr des conclusions précises et les cours étudieront attentivement la relation entre les conclusions et les dispositions contractuelles ou législatives. L'arbitre doit cependant jouir d'une certaine latitude dans l'application de la convention ou de la loi aux faits qui lui sont présentés. Les parties l'ont précisément choisi pour cela. Le législateur exige que sa décision soit finale et lie les parties. Le caractère même du milieu industriel et commercial requiert que ces différends soient réglés rapidement et équitablement au moyen d'une procédure sommaire, qui permette une économie de temps et d'argent. Dans la présente affaire, vu le silence des réclamants qui n'ont ni cité de témoins ni témoigné eux-mêmes, l'arbitre a déduit que ces deux réclamants ont joué plus qu'un rôle passif. D'un point de vue technique et juridique, l'expression «responsabilité envers la compagnie» est certainement malheureuse, mais lorsqu'on la replace dans le contexte de l'ensemble des deux sentences, de l'historique des relations des parties que révèlent la convention collective et toutes les circonstances de l'espèce, je ne peux pas conclure que l'arbitre a donné une mauvaise interprétation de l'article 8 ou d'aucune autre disposition de la convention collective qui équivaut à une erreur de droit susceptible de révision. On ne peut donc dire que l'exercice de son pouvoir discrétionnaire quant à la sanction imposée à ces deux réclamants soit mal fondée en droit, et il n'y a donc pas d'erreur de droit qui puisse donner lieu à contrôle judiciaire.

In the result therefore the award is quashed in respect of the principal union representative but the awards of the lesser members of the Committee are left intact. Let it therefore be said again for emphasis that the role of the court in judicial review is not that of a court sitting on an appeal. A court in the latter position might well respond differently to these awards. But the parties and the legislature selected the arbitrator and not the court to hear and dispose of these grievances, and the arbitrator must be left free to do so save only in those circumstances and according to the limiting rules of judicial review I have already discussed. I would therefore allow the appeal with respect to the respondent grievors Benjamin, McConnell and Hopkinson, and dismiss the appeal with respect to the respondent grievor Wilson, and accordingly the judgment of the courts below are set aside except with respect to the respondent Wilson and the award of the arbitrator restored in respect of all respondents other than the respondent Wilson.

By reason of the substantial success of the appellant, I would award to the appellant costs here and in the courts below against all respondents other than the respondents O'Shea and Wilson.

Appeal allowed as against all respondents, ESTEY J. *dissenting in part.*

Solicitors for the appellant: McCarthy & McCarthy, Toronto.

Solicitors for the respondents: Maclean & Chercover, Toronto.

En définitive, la sentence qui concerne le principal représentant syndical devrait être annulée, mais les sentences qui concernent les autres membres du comité devaient être maintenues. Signalons encore ici que le rôle d'une cour en matière de contrôle judiciaire n'est pas le même que celui d'une cour qui siège en appel. Cette dernière pourrait fort bien adopter une attitude différente à l'égard de ces sentences. Mais les parties et la législature ont choisi un arbitre, et non la cour, pour entendre et trancher ces griefs; il faut laisser l'arbitre libre de jouer son rôle, sauf dans les circonstances et le cadre limitatif des règles du contrôle judiciaire dont j'ai déjà parlé. En conséquence, je suis d'avis d'accueillir le pourvoi en ce qui concerne les réclamants intimés Benjamin, McConnell et Hopkinson et de le rejeter en ce qui concerne le réclamant intimé Wilson; les jugements des cours d'instance inférieure sont en conséquence infirmés sauf en ce qui concerne l'intimé Wilson, et la sentence de l'arbitre est rétablie à l'égard de tous les intimés sauf Wilson.

Vu que l'appelante a eu gain de cause sur la majorité des points, je suis d'avis de lui adjuger les dépens en cette Cour et dans toutes les cours d'instance inférieure contre tous les intimés, à l'exception des intimés O'Shea et Wilson.

Pourvoi accueilli, sentences de l'arbitre rétablis avec dépens, le juge ESTEY *étant dissident en partie.*

Procureurs de l'appelante: McCarthy & McCarthy, Toronto.

Procureurs des intimés: Maclean & Chercover, Toronto.

IN THE MATTER OF THE PENSION ACT, R.S.C. 1970, c. P-7;

AND IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE PENSION REVIEW BOARD CANADA, DATED THE 23RD DAY OF FEBRUARY, 1984, CONCERNING AN APPLICATION UNDER SECTION 12 OF THE PENSION ACT;

AND IN THE MATTER OF A DECISION OF THE ENTITLEMENT BOARD, DATED THE 13TH DAY OF JANUARY, 1983, CONCERNING AN APPLICATION UNDER SECTION 12 OF THE PENSION ACT.

BJARNIE H. PAULSON (applicant) v. CANADIAN PENSION COMMISSION (respondent)

INDEXED AS: PAULSON v. CANADIAN PENSION COMM.
(A-367-84)

Federal Court of Appeal
Urie, Marceau and Stone, JJ.
March 27, 1985.

Administrative Law - Topic 9104
Boards and tribunals - Judicial review, grounds - The Federal Court of Appeal set aside a decision of the Pension Review Board and referred the matter back for reconsideration where the board made inconsistent findings resulting in a misapplication of a statutory burden of proof.

Statutes Noticed:
Pension Act, R.S.C. 1970, c. P-7, s. 85 [para. 4 and Footnote 1].

Counsel:
D.K.L. Starkman, for the applicant; J.M. Aubry, for the respondent.

This application was heard by Urie, Marceau and Stone, JJ., of the Federal Court of Appeal at Toronto, Ontario on March 27, 1985.

The decision of the Federal Court of Appeal was delivered by Urie, J., on March 27, 1985.

[1] Urie, J.: We are all of the opinion that this section 28 application must succeed. We have formed this opinion on the basis that the Pension Review Board in its reasons for judgment made the following findings:-

> "What the evidence does support are two propositions:
> (a) that the appellant's condition could have resulted from radioactive contamination, and
> (b) that if it did the radiation at the clean-up site could reasonably have provided that contamination. The board does not quarrel with these two propositions." (emphasis added)

[2] In our view, having accepted these propositions it necessarily follows that a doubt must exist in the collective mind of the board as to the applicant's exposure to radiation being a possible source of his carcinomas. There was certainly evidence to support a finding that it was. The board, however, went further and stated:

> "The trouble is that they [the two propositions] are not sufficient to allow the board to get around the only real evidence before it, which is that on the one occasion that there appears to have been contamination, the steps taken to remove it were successful. And if the appellant was not contaminated then the whole structure so ably raised by counsel must fall." (emphasis added)

[3] It seems to us that this statement was made without regard to the evidence as a whole. Indeed, unfortunately, it ignores, inter alia, the uncontradicted evidence that (a) the monitoring systems then utilized were insufficient to necessarily disclose the presence of contamination in small quantities on or in the human body; (b) there was no monitoring capable of detecting alpha particles when they were not combined with beta and gamma contamination; the system could not detect them when the particles emitting alpha radiation were not so combined; (c) radioactive particles emitting alpha radiation, when lodged in the skin, would be undetectable using the monitoring systems then in use and might be sufficient to cause cancer of

the skin some years after the exposure.

[4] From the foregoing, we conclude that while it is true that the board appears to have found that there did not exist, in their appreciation of the evidence, reasonable doubt as to why the applicant developed skin cancer, on the basis of their findings earlier referred to herein and, as well, the uncontradicted evidence which they appear to have ignored, or to which they gave little or no weight, the board ought to have had such a doubt. That being so, they could not correctly apply section 85 [see Footnote 1] of the **Pension Act** without resolving that reasonable doubt in favour of the applicant.

[5] It is, of course, also true that while this court, on a section 28 application, is not entitled to substitute its view of the evidence for that of a lower tribunal (particularly where it is a tribunal which has been constituted because of its expertise in a given area) this does not mean that where a board makes findings which are inconsistent, or are not supported by the evidence, or result from a misapprehension of the meaning of a statute, that this court cannot require the tribunal to reconsider its opinion in order to correct its appreciation of the evidence and properly apply the law thereto. As we see them, the findings to which we earlier referred are inconsistent which, in turn, led the board to a misapplication of a very unusual provision, namely, section 85 of the **Pension Act**. That being so, we have no doubt that the impugned decision cannot stand either on the facts as found or on the application of the law to these facts.

[6] Accordingly, the section 28 application will be granted, the decision of the Pension Review Board will be set aside and the matter will be referred back to the board for reconsideration on the basis that all of the evidence must be weighed in reaching a decision thereon and section 85 of the **Pension Act** be properly applied in respect thereto.

[7] Before leaving this matter we should emphasize that which may be obvious, i.e. that in reaching our conclusion we have done so on the facts as found by the Pension Review Board in this case which are, apparently, concurrent with the findings of the Entitlement Board. Therefore, we think that is neither necessary nor desirable to express any concluded view as to the nature and extent of the burden of proof imposed by section 85 of the **Pension Act**. The court may be required to interpret the section in another factual situation but, in our view, in the circumstances of this case it is unnecessary.

Appeal allowed.

Editor: Eric B. Appleby
jmm

FOOTNOTES:

1. 85. The Commission, an Entitlement Board and the Pension Review Board shall, in determining the entitlement of an applicant to an award and in assessing the extent of the disability of a member of the forces to or in respect of whom entitlement to a pension has been established

   (a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of that applicant or member, and

   (b) accept as proof of any fact that the applicant or member is required to prove, any credible evidence submitted by him that is not contradicted

   and where, in weighing any evidence submitted to it, any doubt exists as to whether the applicant or member has established his case, the Commission, an Entitlement Board or Pension Review Board, as the case may be, shall resolve such doubt in favour of the applicant.

SECURICOR INVESTIGATIONS & SECURITY LTD. v. ONTARIO LABOUR RELATIONS BOARD

Ontario Supreme Court [Divisional Court],
Henry, J. Holland and Boland JJ.

Heard - April 2 and 3, 1985.
Judgment - April 17, 1985.

Procedural fairness - Audi alteram partem - Evidence - Party to judicial review application introducing affidavit to demonstrate that board had not taken a proper view of the evidence before it - Affidavit admissible for limited purpose of demonstrating complete absence of evidence on essential point - Improper assessment of evidence not constituting breach of rules of natural justice or jurisdictional error.

The OLRB determined that SIS Ltd. had breached a provision of the Ontario Labour Relations Act and SIS Ltd. applied for judicial review of that decision. On the application it was sought to have the Court consider an affidavit filed by counsel who had represented SIS Ltd. at the hearing before the OLRB. This affidavit was to the effect that the OLRB had made findings unsupported by the evidence and had weighed the evidence improperly or wrongly interpreted the evidence. The OLRB argued that the material in the affidavit was only admissible insofar as it attempted to demonstrate that there was an entire absence of evidence for the finding of the board on an essential point; it was not permissible to introduce affidavit evidence to show that the board had failed to take proper view of the evidence before it, thereby allegedly breaching the rules of natural justice and committing jurisdictional error. An application was brought for a preliminary ruling on the admissibility of the affidavit.

Held - Affidavit partially inadmissible.

In proceedings under the Ontario Judicial Review Procedure Act, an affidavit as to the evidence before a statutory body was admissible only for the purpose of demonstrating a complete absence of evidence on an essential point. Indeed, extreme caution should be exercised in admitting it for even that limited purpose. Failure to assess or evaluate evidence properly could not be classified as a breach of the rules of natural justice and/or a jurisdictional error for the purposes of avoiding this limitation. Natural

justice involved observation of the audi alteram partem rule and performing statutory functions in an unbiased manner, not a failure to deal with facts and evidence property.

Cases considered

Douglas Aircraft Co. of Can. Ltd. v. McConnell, [1980] 1 S.C.R. 245, 79 C.L.L.C. 14,221, 99 D.L.R. (3d) 385 (sub nom. Douglas Aircraft Co. v. U.A.W., Loc. 1967), 23 L.A.C. (2d) 143n, 29 N.R. 109 (S.C.C.) - considered.

Keeprite Wkrs. Independent Union and Keeprite Prods. Ltd., Re (1980), 29 O.R. (2d) 513, 114 D.L.R. (3d) 162 (Ont. C.A.). Leave to appeal to the Supreme Court of Canada refused 35 N.R. 85n - followed.

O.P.S.E.U. and Ontario, Re (1984), 45 O.R. (2d) 70 (Ont. Div. Ct.) - not followed.

S.E.I.U., Loc. 333 v. Nipawin Dist. Staff Nurses Assn., [1975] 1 S.C.R. 382, [1974] 1 W.W.R. 653, 41 D.L.R. (3d) 6 (S.C.C.) - considered.

Statutes considered

Judicial Review Procedure Act, R.S.O. 1980, c. 224, s. 2(3).

Labour Relations Act, R.S.O. 1980, c. 228, ss. 37(7)(c), 64.

Canadian Abridgment (2nd) Classification

Administrative Law IV. 1. d; IV. 3.

APPLICATION for preliminary ruling as to admissibility of affidavit in support of application for judicial review.

D. Peroff and R. Amsterdam, for applicant.

S.T. Goudge, Q.C., and L.R. Rothstein, for Ontario Labour Relations Board.

J Sack, Q.C., and J.K. McDonald, for United Steelworkers of America.

P. Jacobsen, for Attorney General of Ontario.

April 17, 1985. HENRY J. (orally): - This is an application for judicial review of the decision of the Ontario Labour Relations Board in which it found that Securicor Investigations and Security Ltd., the applicant, had violated s. 64 of the Labour Relations Act, R.S.O. 1980, c. 228, and ordered it to cease and desist from infiltrating trade unions on behalf of employers during or in anticipation of any strike or lockout; the board also ordered Securicor to pay certain compensation to the respondent union. I emphasize that the application before us is one for judicial review; this is not an appeal.

Part of the challenge to the board's decision is based upon its review and disposition of the evidence before it, which in his factum Mr. Peroff sets out briefly as follows as matters in which the board erred and so exceeded its jurisdiction:

"(b) By finding that Securicor:

(i) violated section 64 of the Act;

(ii) prolonged the strike by five weeks when there was no evidence to support these findings;

(c) By failing to weigh and consider all the evidence adduced before it;

(d) By failing to report and make reference in its written decisions to all the evidence, thereby prejudicing this application and the right of Securicor to seek relief by way of judicial review."

In support of the applicant's submissions is filed a lengthy and detailed affidavit of Robin Cumine, who appeared as counsel for Securicor before the board; it contains material directed to instances in which the deponent says that the board made findings without evidence to support them and findings that reflected a failure to weigh the evidence properly or wrongly interpreted the evidence. At the outset of the application before us it emerged that counsel opposite were objecting the use of this affidavit except for the limited purpose of demonstrating that there was an entire absence of evidence on which the board could base a finding of fact on an essential point. This issue was fully argued by all counsel, at the conclusion of which we ruled that the affidavit is admissible for that limited purpose only.

Mr. Peroff submitted that, in addition to the scope of its admissibility as we have defined it, the affidavit is admissible to show that the board, in failing to take a proper view of the evidence in the manner set out by him as I have described it, breached the rules of natural justice and so committed a jurisdictional error. He was frank to say that he urged us to develop here what he expressed as an emerging trend to open up on judicial review an inquiry into matters of fact and evidence which have hitherto been judicially regarded as within the sole province of the tribunal of fact. I say at once that while, within clearly expressed limits, this may be a function of a Court on appeal, it borders on the revolutionary to apply that principle to the process of judicial review which is essentially concerned with matters of jurisdiction.

Mr. Peroff relies principally upon the decision of this Court in Re O.P.S.E.U. and Ontario (1984), 45 O.R. (2d) 70 (Ont. Div. Ct.), wherein the Court found that the Ontario Grievance Settlement Board failed to decide an essential issue and in so doing erred in law, so that the decision was quashed. The Court also admitted affidavit evidence on the following basis saying that "the applicants must be allowed to file their affidavit evidence and transcript in order to make out their case of a denial of natural justice. A trier of fact cannot ignore nor fail to evaluate a relevant portion of the evidence, and if it does so there is a denial of natural justice. Because there was a fundamental conflict between the evidence of the inmate and the officers, the board had a duty to decide what was to be believed and what rejected. Its failure to weigh relevant and cogent evidence on the crucial issue of credibility was a denial of natural justice."

The finding in the context of their decision may be obiter but assuming that it was not we are not prepared to follow it in view of the decision of the Court of Appeal in Re Keeprite Wkrs.' Independent Union and Keeprite Prods. Ltd. (1980), 29 O.R. (2d) 513, 114 D.L.R. (3d) 162 (Ont. C.A.) (leave to appeal to the Supreme Court of Canada refused 35 N.R. 85n).

While that decision, which was before the Divisional Court in Re O.P.S.E.U., decided that affidavit evidence is admissible, the principle to be extracted in the Court of Appeal's decision, which canvassed the authorities, is that affidavit evidence as to what evidence was given before an arbitrator is admissible to augment the record on an application for judicial review of an arbitration award. Section 2(3) of the Judicial Review Procedure Act, R.S.O. 1980, c. 224, provides a statutory ground for judicial review when "the findings of fact of a tribunal made in the exercise of a statutory power of decision are required to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support its findings". According to s. 37(7)(c) of the Labour Relations Act, an arbitrator must base findings of fact on evidence admissible before him. Alternatively, absence of evidence may be characterized as jurisdictional error in a judicial tribunal. Such affidavit evidence can only be used to demonstrate complete absence of evidence on an essential point.

In the course of delivering the judgment of the Court of Appeal, Mr. Justice Morden said the following by way of instruction and warning at p. 521:

> "Having just completed the exercise of examining, in this fashion, the evidence that was before the arbitrator I

> would express the view, which is in agreement with that of Pennell, J., that the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare."

In the decision relied on by Mr. Peroff in Re O.P.S.E.U. and Ontario to which I have referred, reference was made to a decision of the Supreme Court of Canada in S.E.I.U. Loc. 333 v. Nipawin Dist. Staff Nurses Assn., [1975] 1 S.C.R. 382, [1974] 1 W.W.R. 653, 41 D.L.R. (3d) 6, where Dickson J. for the Court said in part [pp. 388-89]:

> "There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest. 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.
>
> A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. If, on the other hand, a proper question is submitted to the tribunal, that is to say, one within its jurisdiction, and if it answers that question without any errors of the nature of those to which I have alluded, then it is entitled to answer the question rightly or wrongly and that decision will not be subject to review by the Courts."

That decision in 1975 was before the Ontario Court of Appeal when it decided the Keeprite case in 1980 and it obviously had it in mind. It appears to me that when Dickson J. in the earlier decision referred to breaching the provisons of natural justice he was referring to the ordinarily well-established and recognized rules of natural justice which are two in number, audi alteram partem and that the tribunal not be biased. It is our opinion that he was not intending to place a new or extended construction upon those well recognized principles nor did the Court of Appeal in Keeprite appear to take that view.

I also refer to the decision of the Supreme Court of Canada in Douglas Aircraft Co. of Can. Ltd. v. McConnell, [1979] 1 S.C.R. 245, 79 C.L.L.C. 14,221, 99 D.L.R. (3d) 385 (sub nom. Douglas Aircraft Co. v. U.A.W., Loc. 1967), 23 L.A.C. 143n, 29 N.R. 109 (S.C.C.). In that case, the Court was considering judicial review from an arbitration board and in the course of his judgment, which was dissenting in part but not on this point, Mr. Justice Estey expresses the principle that we believe in both sound and well-established in administrative law. He says at pp. 405-06 [D.L.R.] as follows:

> "Within its assigned field, the board must remain supreme. Its decisions on issues of fact are beyond the judicial reach. Questions of procedure and evidence are likewise the exclusive province of the board save only where the conduct of the tribunal in relation to these and many other matters becomes unfair to a party in the sense of the traditions of natural justice which form such a vital part of our law. All the categories of review by certiorari and motion to set aside mentioned above bear some jurisdictional hue. Even the assignment of unreasonable meaning, in the words of the Ontario Court of Appeal, reflects this hue because the giving of an unreasonable meaning to words in a collective agreement would be to thereby alter the charter under which the parties agreed to work . . . "

and at p. 407:

> "Unfairness, the adoption of procedures contrary to natural justice, arbitrary conduct, refusal to discharge their function, fraud and bias in law, are all matters that transcend the classification of error in law on the face of the record. They are all jurisdictional in the fundamental sense of that term, and hence are reviewable through certiorari or its equivalent, with or without a privative

> clause. Such errors of law are not the same as but are equatable to the jurisdictional error which may arise from wrongful conclusions in statutory interpretation as in the Jarvis case, supra. Similarly, a decision without any evidence whatever in support is reviewable as being arbitrary; but on the other hand, insufficiency of evidence in the sense of appellate review is not jurisdictional, and while it may at one time have amounted to an error reviewable on the fact of the record, in present-day law and practice such error falls within the operational area of the statutory board, is included in the cryptic statement that the board has the right to be wrong within its jurisdiction, and hence is free from judicial review."

We think that that statement of the principles involved is apt to guide us in this case and with respect we adopt it.

In the result, we are bound by the Court of Appeal's decision in Keeprite and we decline to do as was done in Re O.P.S.E.U. and Ontario. As a final comment to indicate our awareness of the caution expressed by the Court of Appeal that such affidavit evidence should be admitted only in the most exceptional cases, we wish to record that we were here persuaded to admit it because of the position taken by counsel opposing that they did not object to its admissibility for the limited purpose stated; we therefore are not to be taken as deciding that this was an exceptional case.

Affidavit ruled to be partially inadmissible.

[COURT OF APPEAL]

Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd.

HOULDEN, MORDEN AND GOODMAN, JJ.A. — 19TH AUGUST 1980.

Labour relations — Arbitration — Judicial review — Admissibility of affidavit evidence in support of application for judicial review of an arbitration award — Judicial Review Procedure Act, 1971 (Ont.), c. 48, ss. 1(f), 2 — Labour Relations Act, R.S.O. 1970, c. 232, s. 37(7)(c).

Administrative law — Judicial review — Arbitration — Admissibility of affidavit evidence in support of application for judicial review of arbitration award — Judicial Review Procedure Act, 1971 (Ont.), c. 48, ss. 1(f), 2 — Labour Relations Act, R.S.O. 1970, c. 232, s. 37(7)(c).

Affidavit evidence as to what evidence was given before an arbitrator is admissible to augment the record on an application for judicial review of an arbitration award. Section 2(3) of the *Judicial Review Procedure Act*, 1971 (Ont.), c. 48, provides a statutory ground of judicial review when the findings of fact of a tribunal, made in the exercise of a statutory power of decision, are required to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support its findings. According to s. 37(7)(c) of the *Labour Relations Act*, R.S.O. 1970, c. 232, an arbitrator must base findings of fact on evidence admissible before him. Alternatively, absence of evidence may be characterized as jurisdictional error in a judicial tribunal. Such affidavit evidence can only be used to demonstrate complete absence of evidence on an essential point.

[*Re Int'l Nickel Co. of Canada Ltd. and Rivando*, [1956] O.R. 379, 2 D.L.R. (2d) 700, folld; *R. v. Nat Bell Liquors, Ltd.* (1922), 65 D.L.R. 1, 37 C.C.C. 129, [1922] 2 A.C. 128; *R. v. Barber et al., Ex p. Warehousemen & Miscellaneous Drivers' Union Local 419*, [1968] 2 O.R. 245, 68 D.L.R. (2d) 682, 68 C.L.L.C. 431; *Re United Glass & Ceramic Workers of North America et al. and Pilkington Brothers (Canada) Ltd. et al.* (1978), 21 O.R. (2d) 241, 89 D.L.R. (3d) 737; *Port Arthur Shipbuilding Co. v. Arthurs et al.*, [1969] S.C.R. 85, 70 D.L.R. (2d) 693, 68 C.L.L.C. 586; *R. v. Ontario Racing Com'n, Ex p. Taylor*, [1971] 1 O.R. 400, 15 D.L.R. (3d) 430; *Re Martin, Simard and Desjardins and The Queen* (1977), 20 O.R. (2d) 455, 87 D.L.R. (3d) 634, 41 C.C.C. (2d) 308; affd [1978] 2 S.C.R. 511, 87 D.L.R. (3d) 704, 41 C.C.C. (2d) 342; *Douglas Aircraft Co. of Canada Ltd. v. McConnell et al.*, [1980] 1 S.C.R. 245, 99 D.L.R. (3d) 385, 29 N.R. 109, refd to]

APPEAL from a judgment of the Divisional Court granting an application for judicial review of an arbitration award and quashing the award.

J. C. Murray, for appellant.
R. W. Cosman, for respondents.

The judgment of the Court was delivered by

MORDEN, J.A.:—The main issues in this appeal are the admissi-

bility of affidavit evidence filed in support of an application for judicial review to quash, on the ground of absence of evidence, an arbitration award made under a collective agreement subject to the *Labour Relations Act*, R.S.O. 1970, c. 232, and whether, if such evidence is admissible, it showed that there was no evidence to support the award. As Mr. Justice Pennell, speaking for the Divisional Court, indicated, while this may appear to be a "small case" it is important to the law of judicial review and, of course, to the parties.

The following is a brief outline of the basic facts and of the proceedings which have brought the matter before this Court. The collective agreement contained an article which, in its essential terms, provided that:

> [a] violation of the following rules will result in discharge: . . . Fighting — On Company premises — and/or unprovoked physical intimidation towards supervisory personnel.

The employer (the appellant in this Court) alleged that one of its employees, E. M. Judson (one of the respondents, the other being the union) on May 31, 1979, was involved in an incident with another employee, T. Vinnai, which amounted to fighting and discharged both of them. Mr. Judson filed a grievance which did not result in the matter being settled and it was, accordingly, submitted to arbitration. The hearing before the single arbitrator took place on August 27, 1979, and his award dismissing the grievance was rendered on August 29, 1979.

In his reasons for the award the arbitrator reviewed the evidence and the competing contentions of the parties. The company contended that during the incident between Mr. Judson and Mr. Vinnai, which had taken place in a test booth on the company premises shortly before the 7:00 a.m. shift, Mr. Vinnai pushed Mr. Judson who responded by throwing the contents of his coffee cup at Mr. Vinnai's face. Mr. Vinnai responded in turn by striking Mr. Judson in the face. This, it was submitted, amounted to "fighting" within the meaning of this word in the collective agreement. The union contended that the evidence showed only that the initial jostling resulted in the spilling of some coffee on Mr. Vinnai's pants and that the weight of the evidence showed only the subsequent throwing of a small amount of coffee — once again on Mr. Vinnai's pants. This, it submitted, did not amount to "fighting".

The arbitrator accepted the employer's contentions. At the conclusion of his reasons he said:

> Having considered the above, on the factual matter, it would appear to me

> that clearly a fight occurred in these circumstances. Thus, it seems that initially the grievor was responding in a manner which was disproportionate to any provocation when he threw coffee at Mr. Vinnai after he was jostled. In this regard, two facts stand out. Thus, first, he was aware that Mr. Vinnai had asked to move in and he had not responded because his mouth was full. Consequently, he would be aware that Mr. Vinnai had some reason to be perturbed. Secondly, although this is denied by the grievor, the weight of the evidence suggests that he did, in fact, throw the coffee in his face. *There is really no dispute that he said this at the meeting where the incident was considered* [with one D. Macaulay, the personnel supervisor, and others] and Mr. Vinnai has indicated this is the fact. Thus, the reasonable conclusion to draw from the foregoing is that he did so. Put another way, the throwing of hot coffee in a person's face after he has jostled a worker aside at the beginning of the shift when time is short, is not a normal and responsive action. Again, such an act clearly constitutes an assault. In my opinion, the following response of Mr. Vinnai, although not to be condoned in any way, clearly made the matter into a mutual "fight". In my opinion, no other description of these events would be appropriate.

(Emphasis added.)

The union and Mr. Judson moved before the Divisional Court for judicial review of the award on several grounds, the main one being that the arbitrator had "exceeded his jurisdiction by making findings of fact unsupported by or contrary to the evidence given". The particular finding which was challenged is that contained in the words which I have emphasized in the preceding paragraph.

The Divisional Court rejected all the grounds except the one to which I have specifically referred. The affidavits and the transcripts of the cross-examination thereon filed on the application before the Divisional Court showed, it is agreed between the parties, that there was no evidence before the arbitrator to support the conclusion that Mr. Judson admitted at the meeting where the incident was considered that he threw coffee in the face of Mr. Vinnai.

In his reasons Pennell, J., concluded:

> We regard a decision unsupported by evidence in an important particular as an error of law which is analogous to a denial of natural justice and which goes to jurisdiction. What decision the arbitrator would have reached had he not erred is unknown and unknowable. True it is that the record, which has been sent to the Court, does not disclose the error. We think that the relevant affidavit[s] should be made part of the record. We, therefore, order accordingly.
>
> We have said enough to indicate our conclusion that the award ought to be quashed and the grievance remitted for a further hearing.

The employer obtained leave to appeal to this Court from the order of the Divisional Court. Mr. Murray's submissions are that:

(1) the Divisional Court erred in receiving the affidavits and the transcripts of the cross-examination on them; and

(2) if this material was properly admitted, it showed that there was some evidence to support the arbitrator's finding that Mr. Judson was "fighting".

I now turn to these issues.

I. *Was the affidavit material admissible before the Divisional Court?*

I should make it clear at this point that the material filed with the Divisional Court was directed to showing what the evidence was that was given before the arbitrator and was not fresh evidence of what happened on May 31, 1979. As is usual, no verbatim record was made of what transpired before the arbitrator.

The appellant's submission is that absence of evidence can give rise to an error of law but not one of jurisdiction and, accordingly, unless the error appears "on the face of the record", *i.e.*, the evidence is properly part of the record of the inferior tribunal, an application for judicial review based on the grounds for *certiorari* (the *Judicial Review Procedure Act*, 1971 (Ont.), c. 48, s. 2(1), para. 1) will not properly lie. Unless the alleged error is of a jurisdictional nature the record returned to the Court cannot be augmented by affidavit evidence. He relies principally upon *R. v. Nat Bell Liquors, Ltd.* (1922), 65 D.L.R. 1, 37 C.C.C. 129, [1922] 2 A.C. 128. In my view, there are two, alternative, answers to this submission.

(a) *Section 2(3) of the Judicial Review Procedure Act, 1971.* The first answer is based on s. 2(3) of the *Judicial Review Procedure Act, 1971*. It reads:

> 2(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review.

Mr. Murray submits that this provision does not apply because (1) it merely codifies the existing law with the result that the error (absence of evidence) still has to appear on the face of the record, and (2) the arbitrator's findings of fact are not required by any statute or law to be based exclusively upon evidence admissible before him and on facts of which he may take notice. He concedes that the arbitrator was exercising "a statutory power of decision".

I see no reason to characterize the kind of error referred to in s. 2(3) as either jurisdictional or non-jurisdictional. It is a statutory ground of judicial review, probably designed to overcome perceived defects in the common law (see Report of the Royal Commission — *Inquiry into Civil Rights* (1968), vol. 1, at pp. 261-3 and 310-3), and should not be encumbered with common law limitations on the admissibility of evidence which relate to the ground of error of law on the face of the record. Further, by virtue of s. 2(1), para. 1 of the *Judicial Review Procedure Act, 1971* an applicant for judicial review is entitled to the relief he could have obtained on an application for *certiorari*, which would include the right to relief based on error of law (including absence of evidence) appearing on the face of the record. It is reasonable, therefore, to regard s. 2(3) as accomplishing something more than this. Accordingly, if affidavit evidence is necessary to show that s. 2(3) is applicable it should be admissible.

Mr. Murray's second point is that s. 2(3) does not apply because the arbitrator's findings of fact are not required by any statute or law to be based exclusively on evidence admissible before him and on facts of which he may take notice. He refers to s. 37(7)(*c*) of the *Labour Relations Act* which empowers the arbitrator:

> (*c*) . . . to accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not;

In my view, it is implicit in the obviously judicial function of the arbitrator that he is required by law to base his findings of fact exclusively on evidence that is admissible before him. The law, of course, does not contemplate that arbitrators' decisions as to the existence of facts may be based on speculation and, with respect to the particular determination which the arbitrator in this case was required to make, there was no power to go outside the evidence and to base the decision in whole or in part on policy grounds: see, generally, Brown and Beatty, *Canadian Labour Arbitration* (1977), at pp. 24-8, 115 and 120-1.

Section 37(7)(*c*) of the *Labour Relations Act* enlarges the range of the evidence which may be accepted by an arbitrator over that which is admissible in Court of law but it clearly does not empower the arbitrator to act upon information and material not contained in the evidence before him. Indeed, s. 37(7)(*c*) appears to assume that the arbitrator is required to act on evidence accepted by him at a hearing. In *R. v. Barber et al., Ex p. Warehousemen & Miscellaneous Drivers' Union Local 419*, [1968] 2 O.R. 245 at p. 252, 68 D.L.R. (2d) 682 at p. 689, 68 C.L.L.C.

431, Jessup, J.A., said of this provision (then s. 34(7)(c) of R.S.O. 1960, c. 202): "However, that provision does not relieve a board from acting only on evidence having cogency in law." See also *Re United Glass & Ceramic Workers of North America et al. and Pilkington Brothers (Canada) Ltd. et al.* (1978), 21 O.R. (2d) 241, 89 D.L.R. (3d) 737.

Mr. Murray stressed that part of s. 2(3) which reads: "required to be based exclusively . . . and on facts of which it may take notice", and submitted that this did not apply to the arbitrator and, hence, the subsection was inapplicable. This particular part of s. 2(3), in my view, does apply to arbitrators of the kind with which we are concerned. It recognizes, in the administrative process, a legitimate way in which some facts may be found without evidence and which is, generally, but with some allowance being made for the expertise and experience of the tribunal, equivalent to the power of a Court to take judicial notice of facts which are common knowledge. However, even if this part of s. 2(3), for some reason, did not apply to arbitrators, in the sense that they are not *empowered* to take judicial or official notice of facts, I think that s. 2(3) would still be applicable by reason of the requirement that their findings be based exclusively on evidence admissible before them. The notice of facts limb of the requirement is really an extension, where applicable, of the preceding evidentiary requirement. The situation would be otherwise, of course, if a tribunal were not *bound* by the limitations of the judicial or official notice doctrine respecting the finding of facts. In such a case it would seem that the tribunal would also not be bound to act on evidence admissible before it — and so s. 2(3) clearly would not be applicable.

I accept Mr. Murray's concession that the arbitrator exercises a "statutory power of decision" within the meaning of this term in s. 2(3). The term is defined in s. 1(*f*), the relevant part of which reads:

> 1. In this Act,
>
> . . . . .
>
> (*f*) "statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,
>
> (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party . . .

It appears to me that the reasoning in *Re Int'l Nickel Co. of Canada Ltd. and Rivando*, [1956] O.R. 379, 2 D.L.R. (2d) 700 (adopted by the Supreme Court of Canada in *Port Arthur Shipbuilding Co. v. Arthurs et al.*, [1969] S.C.R. 85 at p. 94, 70

D.L.R. (2d) 693 at p. 701, 68 C.L.L.C. 586), to the effect that an arbitrator appointed under a collective agreement which is subject to the *Labour Relations Act* (Ontario) is a statutory arbitrator, is applicable by analogy to support the conclusion that the arbitrator is empowered *under* a statute to decide legal rights and duties.

(b) ***Affidavits receivable on the basis of common law jurisdictional error.*** The alternative answer to Mr. Murray's submission that the affidavit material is not admissible is that, quite apart from s. 2(3) of the *Judicial Review Procedure Act, 1971*, I think that it now can be said, at least in this jurisdiction, that entire absence of evidence may properly be characterized as jurisdictional error in a judicial tribunal. No doubt the cases have gone both ways on the issue and *Nat Bell* has had a checkered history. None the less there are valid logical and policy grounds for regarding absence of evidence as jurisdictional error in a judicial tribunal: see D.W. Elliott, "'No Evidence': A Ground of Judicial Review in Canadian Administrative Law", 37 Sask. L. Rev. 48 (1972), particularly at pp. 59-65; Wade, *Administrative Law*, 4th ed. (1977), at pp. 274-8; and Reid and David, *Administrative Law and Practice*, 2nd ed. (1978), at pp. 357-60, where the decisions going both ways are collected. A clear statement by this Court that it amounts to jurisdictional error is that of Gale, C.J.O., in *R. v. Ontario Racing Com'n, Ex p. Taylor*, [1971] 1 O.R. 400 at p. 402, 15 D.L.R. (3d) 430 at p. 432:

> This being our view as to the proper interpretation of rule 128, there was therefore no evidence in this case on which the Commission could find that there was a failure to protect the horse from the administration of the drug, and, accordingly, the order was made without jurisdiction on the part of the Commission.

I see no value in canvassing contrary decisions because this Court, in the recent decision of *Re Martin, Simard and Desjardins and The Queen* (1977), 20 O.R. (2d) 455, 87 D.L.R. (3d) 634, 41 C.C.C. (2d) 308; affirmed [1978] 2 S.C.R. 511, 87 D.L.R. (3d) 704, 41 C.C.C. (2d) 342 (which was concerned with the availability of *certiorari* to quash a committal for trial), held, *per* Estey, C.J.O., at pp. 486-7 O.R., p. 666 D.L.R.:

> [W]e conclude that the learned Provincial Court Judge here acted within his jurisdiction, unless it can be said that he committed these respondents on the counts specified without any evidence at all, in the sense of an entire absence of proper material as a basis for the formation of a judicial opinion that the evidence was sufficient to put the accused on trial. That is quite a different question from the question "whether in the opinion of the reviewing tribunal there was evidence upon which a properly instructed jury acting judicially

could convict". It remained, therefore, to examine the excerpts of evidence, as placed before this Court from the lengthy transcript taken at the preliminary hearing, in order to determine whether there was any evidence at all on which the committing tribunal was able to base its opinion to commit, as required by the terms of the *Code* already cited.

I refer also to the recent dictum, to the same effect, of the same learned Judge in *Douglas Aircraft Co. of Canada Ltd. v. McConnell et al.*, [1980] 1 S.C.R. 245 at p. 277, 99 D.L.R. (3d) 385 at p. 407, 29 N.R. 109, a case concerned with Ontario labour arbitral jurisdiction.

Accordingly, I think that the Divisional Court, on this alternative ground, was right in receiving the evidence which, it was submitted by the respondents, showed that the arbitrator acted without jurisdiction.

II. *Was there any evidence to support the arbitrator's finding?*

As I have said, it is now common ground that there was no evidence to support the conclusion of the arbitrator respecting a statement made by Mr. Judson at the meeting with Mr. Macaulay, following the incident between himself and Mr. Vinnai. However, in my view, it cannot be said that there is no evidence supporting the arbitrator's finding that Mr. Judson threw coffee in Mr. Vinnai's face. From the cross-examination of John Clarke, who had been the union representative at the hearing before the arbitrator, it appears that there was evidence at the hearing that Mr. Judson had thrown coffee at Mr. Vinnai. There was a dispute as to whether the evidence was that the coffee had been thrown in his face. Mr. Clarke denied that Mr. Vinnai gave evidence that the coffee was thrown in his face but said that Mr. Vinnai did testify before the arbitrator that when the remainder of the coffee was thrown towards him it got on his beard and shirt. Mr. Judson, on his cross-examination, said that he had admitted before the arbitrator that he had thrown coffee at Mr. Vinnai — but "to the extent that it was not intentional". As far as the evidence before the arbitrator of what was stated before Mr. Macaulay is concerned, Mr. Judson said the evidence was that he admitted throwing coffee at Mr. Vinnai — but not intentionally.

The affidavit sworn by Janice Baker who appeared as counsel on behalf of the employer before the arbitrator deposed that "Mr. Vinnai testified that the coffee thrown by the grievor hit him on his face and clothing". The notes which she made of Mr. Vinnai's evidence at the hearing include: "coffee hit me on face and clothing — was thrown at me". She was not cross-examined on this part of her evidence.

There being evidence before the arbitrator capable of supporting his finding as to what, in fact, happened between Mr. Judson and Mr. Vinnai on May 31, 1979, the absence of evidence ground of attack is not, in my view, open to the appellant on either the application of s. 2(3) of the *Judicial Review Procedure Act, 1971* or common law jurisdictional grounds. To treat the complete lack of evidence on the finding respecting what was admitted to Mr. Macaulay as a ground for quashing the award would be to go beyond the Court's limited supervisory function and to exercise one of an appellate nature. In this regard the following description by Lord Sumner in *Nat Bell* at p. 18 D.L.R., pp. 149-50 A.C., of that kind of absence of evidence which may amount to an error of law is instructive: ". . . complete absence of any testimony on a definite and essential point . . .".

Having just completed the exercise of examining, in this fashion, the evidence that was before the arbitrator I would express the view, which is in agreement with that of Pennell, J., that the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare.

The foregoing indicates my disposition of the appellant's grounds of appeal. The respondents sought to support the Divisional Court's order on three additional grounds. Briefly, they are:

(1) The arbitrator asked himself the wrong question. The Divisional Court, reading the arbitrator's reasons as a whole, dealt with this point adversely to the respondents and I agree with its reasons on this point.

(2) The arbitrator wrongly interpreted "fighting". Again, I agree with the Divisional Court's reasons. It cannot be said that the arbitrator's interpretation is one that the word cannot reasonably bear.

(3) The arbitrator erred in rejecting the proposed evidence of one W. Robertson. This issue is not considered in the Divisional Court's reasons. At most, this error was one with respect to the admissibility of evidence only and cannot be characterized as jurisdictional in any sense — as showing either the failure of the arbitrator to inquire into the subject-matter committed to him or a denial of natural justice. Further, I do not see how

its admission could have had any bearing on the arbitrator's determination of the truth of what happened on May 31, 1979. To the extent that it could be said to be relevant to the employer's motive in discharging Mr. Judson its rejection could also be justified on the ground that no suggestion of improper motive was put to the employer's only witness during cross-examination by the union representative.

I would allow the appeal, with costs, set aside the order of the Divisional Court, and in its place make an order dismissing, without costs, the application for judicial review.

Appeal allowed; application for judicial review dismissed.

[COURT OF APPEAL]

Re Chapples Ltd. and City of Thunder Bay et al.

MACKINNON, A.C.J.O., WILSON AND THORSON, JJ.A. 4TH SEPTEMBER 1980.

Planning legislation — Redevelopment plan — City adopting downtown redevelopment plan — Store operator complaining about restaurant in proposed pedestrian mall in front of store — Request to Minister of Housing to defer approval pending review by Ontario Municipal Board — Whether permanent structures in pedestrian mall are amendment to redevelopment plan — Planning Act, R.S.O. 1970, c. 349, ss. 22, 44 — City of Thunder Bay Act, 1977 (Ont.), c. 108.

Applicant store operator objected to construction of a restaurant within a covered pedestrian mall in front of the store, which was built pursuant to a redevelopment plan adopted under s. 22 (am. 1973, c. 168, s. 5(1)) of the *Planning Act*, R.S.O. 1970, c. 349. Applicant requested the Minister of Housing to defer approval pending review by the Ontario Municipal Board. The Minister refused. On appeal from a judgment declaring the structure to be not in accordance with the redevelopment plan, *held*, the Ontario Downtown Revitalization Program and the *City of Thunder Bay Act*, 1977 (Ont.), c. 108, contemplate the construction of commercial outlets in pedestrian malls. Therefore, the construction of such structures is not such a departure from the general scheme of a redevelopment plan approved under s. 22 of the *Planning Act* as to require an amending by-law which would require a hearing before the Ontario Municipal Board and Board approval.

APPEAL from a judgment of Steele, J., 27 O.R. (2d) 444, 106 D.L.R. (3d) 707, granting an application for judicial review.

J. D. Crane, Q.C., and *A. G. McKitrick*, Q.C., for appellant.
A. M. Gans and *J. R. Sproat*, for respondent.
J. McNamee, for Ministry of Housing.

KEEPRITE WORKERS' INDEPENDENT UNION and JUDSON
v. KEEPRITE PRODUCTS LTD.

Supreme Court of Canada
Dickson, Chouinard and Lamer, JJ.
November 19, 1980.

R.W. COSMAN, for the motion;
WILLIAM J. HAYTER, contra.

A motion for leave to appeal to the Supreme Court of Canada was dismissed in the case of *Keeprite Workers' Independent Union and E.M. Judson v. Keeprite Products Ltd.*, a case from the Ontario courts - see *Bulletin of Proceedings taken in the Supreme Court of Canada* at page 15, November 21, 1980.

Motion dismissed.

R. v. BRISSON

Supreme Court of Canada
Dickson, Chouinard and Lamer, JJ.
November 19, 1980.

GABRIEL LASSONDE, for the Crown;
MICHEL F. DENIS, for the applicant, accused.

A motion for leave to appeal to the Supreme Court of Canada was granted in the case of *R. v. Roger Brisson*, a case from the Quebec courts - see *Bulletin of Proceedings taken in the Supreme Court of Canada* at page 16, November 21, 1980.

Motion granted.

A-16-77

Sarco Canada Limited (*Applicant*)

v.

Anti-dumping Tribunal (*Respondent*)

and

Sarco Company Inc. and Escodyne Limited (*Intervenants*)

Court of Appeal, Heald and Le Dain JJ. and MacKay D.J.—Toronto, May 16 and 17; Ottawa, June 9, 1978.

Judicial review — Decision of Anti-dumping Tribunal concerning injury to production in Canada of "like goods" — Material received and considered in manner not contemplated by Act — Applicant denied opportunity to test information received and relied on — Whether or not Tribunal construed term "like goods" correctly — Whether or not respondent failed to properly conduct inquiry in manner contemplated by Act — Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28 — Anti-dumping Act, R.S.C. 1970, c. A-15, ss. 2(1), 13(1), 14(1), 16(1).

This is a section 28 application to review and set aside a decision of the Anti-dumping Tribunal in which it found that the dumping into Canada of certain products had not caused, was not causing nor was likely to cause material injury to the production in Canada of like goods. The applicant alleges error in law and in jurisdiction in that respondent incorrectly construed the term "like goods" as used in the *Anti-dumping Act*. The applicant's second submission of error as to jurisdiction is that respondent failed to properly conduct the inquiry—a condition precedent to its finding. The Tribunal received and considered material obtained in a manner not contemplated by the Act, so that applicant was deprived both of the right to the kind of hearing afforded it under the Act and of the right to test the information received and relied on.

Held, the application is allowed. While it seems evident that the Tribunal ascribed more weight to the question of functional similarity than to the other characteristics in defining "like goods", the Court is unable to say that it did not consider those other characteristics. The Court will not interfere with a finding of fact of a statutorily created body with the legal authority and expertise to evaluate the evidence unless there was a complete absence of evidence to support it or a wrong principle was applied in making it. The Court is unable to say that either of these circumstances was present. It is clear that the Tribunal made use of confidential information, and that some of the information obtained and relied on was in error and not corrected. The applicant was prevented from correcting this error because the error was only evident upon a perusal of the confidential material that was not disclosed to applicant's counsel. This is a clear case of prejudice. The Tribunal did not

A-16-77

Sarco Canada Limited (*Requérante*)

c.

Le Tribunal antidumping (*Intimé*)

et

Sarco Company Inc. et Escodyne Limited (*Intervenantes*)

Cour d'appel, les juges Heald et Le Dain et le juge suppléant MacKay—Toronto, les 16 et 17 mai; Ottawa, le 9 juin 1978.

Examen judiciaire — Décision du Tribunal antidumping sur le préjudice causé à la production au Canada de «marchandises semblables» — Pièces reçues et prises en compte d'une manière non prévue par la Loi — Requérante incapable de vérifier les renseignements obtenus et invoqués — Le Tribunal a-t-il correctement interprété l'expression «marchandises semblables»? — L'intimé a-t-il conduit l'enquête d'une manière inappropriée, non prévue par la Loi? — Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), c. 10, art. 28 — Loi antidumping, S.R.C. 1970, c. A-15, art. 2(1), 13(1), 14(1) et 16(1).

Il s'agit d'une demande, introduite sur le fondement de l'article 28, d'examen et d'annulation d'une décision du Tribunal antidumping statuant que le dumping au Canada de certains produits n'avait pas causé, ne causait pas, ni n'était susceptible de causer, un préjudice sensible à la production au Canada de marchandises semblables. La requérante allègue que l'intimé a commis une erreur de droit et outrepassé sa compétence en interprétant incorrectement l'expression «marchandises semblables» de la *Loi antidumping*. En second lieu, selon la requérante, il y a eu erreur quant au pouvoir juridictionnel, l'intimé n'ayant pas conduit d'une manière appropriée l'enquête, condition préalablement requise pour lui permettre de statuer. Le Tribunal a reçu et étudié des pièces obtenues d'une manière que ne prévoit pas la Loi, privant ainsi la requérante à la fois du droit de se faire entendre comme le prévoit la Loi et de celui de vérifier les renseignements ainsi obtenus et invoqués.

Arrêt: il est fait droit à la demande. Bien que manifestement le Tribunal ait accordé plus de poids à la similitude fonctionnelle qu'aux autres caractéristiques lorsqu'il a défini l'expression «marchandises semblables», la Cour ne peut dire qu'il n'a pas tenu compte de ces autres caractéristiques. La Cour n'intervient pas pour modifier une conclusion de fait formulée par un organisme créé par la loi, doté des pouvoirs légaux et des connaissances spécialisées nécessaires pour évaluer les preuves dont il est saisi, à moins qu'aucune preuve n'appuie la conclusion ou qu'un principe erroné ne la fonde. La Cour ne peut dire qu'elle trouve ici l'une ou l'autre de ces circonstances. Il est clair que le Tribunal s'est servi de renseignements confidentiels et que certains des renseignements obtenus, et sur lesquels il s'est appuyé, étaient erronés et qu'ils n'ont pas été corrigés. La requérante n'a pu remédier à cette erreur qui apparaissait seulement à la lecture des pièces confidentielles non communi-

conduct the inquiry required by the statute since it acted on information not disclosed to the parties with the result that the applicant was given no opportunity to respond to that information. The Tribunal's refusal to grant the applicant the adjournment asked for was an improper exercise of the Tribunal's discretion.

Magnasonic Canada Limited v. Anti-dumping Tribunal [1972] F.C. 1239, applied.

APPLICATION for judicial review.

COUNSEL:

D. J. M. Brown and *D. L. Rogers* for applicant.
J. L. Shields for respondent.
M. Kaylor for intervenants.

SOLICITORS:

Blake, Cassels & Graydon, Toronto for applicant.
Soloway, Wright, Houston, Greenberg, O'Grady & Morin, Ottawa, for respondent.
Gottlieb, Agard, Reinblatt, Dupras & Kaylor, Montreal, for intervenants.

The following are the reasons for judgment rendered in English by

HEALD J.: This is a section 28 application to review and set aside a decision of the respondent dated December 31, 1976 in which it found that the dumping into Canada of steam traps, pipeline strainers, automatic drain traps for compressed air service, thermostatic air vents and air eliminators including parts, screens and repair kits pertaining thereto, produced by or on behalf of Sarco Company Inc., of Allentown, Pa. (one of the intervenants herein), had not caused, was not causing, nor was likely to cause material injury to the production in Canada of like goods.

The applicant's first allegation of error in law and in jurisdiction is that the respondent, in its determination of the question of "like goods" as used in the *Anti-dumping Act*, R.S.C. 1970, c.

quées à son procureur. Manifestement il s'agit là d'un déni de justice. Le Tribunal n'a pas tenu l'enquête requise par la loi vu qu'il a agi sur la foi de renseignements non révélés aux parties, d'où il suit que la requérante n'a pu y répondre. Le refus du Tribunal d'accorder à la requérante l'ajournement demandé a constitué un exercice inapproprié du pouvoir discrétionnaire à lui dévolu.

Arrêt appliqué: *Magnasonic Canada Ltd. c. Le Tribunal antidumping* [1972] C.F. 1239.

DEMANDE d'examen judiciaire.

AVOCATS:

D. J. M. Brown et *D. L. Rogers* pour la requérante.
J. L. Shields pour l'intimé.
M. Kaylor pour les intervenantes.

PROCUREURS:

Blake, Cassels & Graydon, Toronto, pour la requérante.
Soloway, Wright, Houston, Greenberg, O'Grady & Morin, Ottawa, pour l'intimé.
Gottlieb, Agard, Reinblatt, Dupras & Kaylor, Montréal, pour les intervenantes.

Ce qui suit est la version française des motifs du jugement rendus par

LE JUGE HEALD: Il s'agit en l'espèce d'une demande, introduite sur le fondement de l'article 28, d'examen et d'annulation de la décision rendue par l'intimé le 31 décembre 1976 et statuant que le dumping au Canada des purgeurs automatiques, filtres de pipeline, siphons automatiques pour le service d'air comprimé, aspiraux thermostatiques et appareils thermostatiques éliminateurs d'air, y compris leurs pièces, filtres et trousses de réparation, produit par Sarco Company Inc., Allentown, Pennsylvanie (l'une des intervenantes en l'espèce), ou pour le compte de cette entreprise, n'avait pas causé, ne causait pas ni n'était susceptible de causer un préjudice sensible à la production au Canada de marchandises semblables.

La requérante allègue en premier lieu que l'intimé a commis une erreur de droit et outrepassé sa compétence en interprétant incorrectement le terme «marchandises semblables» de la *Loi anti-*

A-15[1], incorrectly construed that term. The meaning to be ascribed to that term is central to the decision here because of its use in section 16(1) of the *Anti-dumping Act*, the section which authorizes and requires a decision of the respondent in the circumstances of this case[2]. The applicant points to a particular passage in the reasons of the respondent which reads as follows[3]:

[1] **2.** (1) In this Act,

. . .

"like goods" in relation to any goods means

(*a*) goods that are identical in all respects to the said goods, or

(*b*) in the absence of any goods described in paragraph (*a*), goods the characteristics of which closely resemble those of the said goods;

[2] **16.** (1) The Tribunal, forthwith upon receipt by the Secretary under subsection 14(2) of a notice of a preliminary determination of dumping, shall, in respect of the goods to which the preliminary determination of dumping applies, make inquiry as to whether

(*a*) the dumping of the goods that are the subject of the inquiry

(i) has caused, is causing or is likely to cause material injury to the production in Canada of like goods,

(ii) has materially retarded or is materially retarding the establishment of the production in Canada of like goods, or

(iii) would have caused material injury to the production in Canada of like goods except for the fact that provisional duty was applied in respect of the goods; or

(*b*) in the case of any goods to which the preliminary determination of dumping applies,

(i) either

(A) there has occurred a considerable importation of like goods that were dumped, which dumping has caused material injury to the production in Canada of like goods or would have caused material injury to such production except for the application of anti-dumping measures, or

(B) the importer of the goods was or should have been aware that the exporter was practising dumping and that such dumping would cause material injury to the production in Canada of like goods, and

(ii) material injury has been caused to the production in Canada of like goods by reason of the fact that the entered goods constitute a massive importation or form part of a series of importations into Canada of dumped goods that in the aggregate are massive and that have occurred within a relatively short period of time, and in order to prevent the recurrence of such material injury, it appears necessary to the Tribunal that duty be assessed on the entered goods.

[3] Case, Vol. 3A, p. 34.

dumping, S.R.C. 1970, c. A-15[1]. Le sens qu'il faut donner à cette expression est fondamental en l'espèce vu son utilisation à l'article 16(1) de la *Loi antidumping*, paragraphe qui, en l'espèce, permet et même impose à l'intimé de prendre une décision[2]. La requérante appelle l'attention sur le passage suivant des motifs de la décision de l'intimé[3]:

[1] **2.** (1) Dans la présente loi

. . .

«marchandises semblables», par rapport à toutes marchandises, désigne

a) des marchandises qui sont identiques à tous égards auxdites marchandises, ou

b) en l'absence de toutes marchandises décrites au sous-alinéa *a*), des marchandises dont les caractéristiques ressemblent étroitement à celles desdites marchandises;

[2] **16.** (1) Le Tribunal, dès réception par le secrétaire, en vertu du paragraphe 14(2), d'un avis d'une détermination préliminaire du dumping, doit, relativement aux marchandises auxquelles s'applique la détermination préliminaire du dumping, faire enquête pour savoir

a) si le dumping des marchandises qui font l'objet de l'enquête

(i) a causé, cause ou est susceptible de causer un préjudice sensible à la production au Canada de marchandises semblables,

(ii) a retardé ou retarde sensiblement la mise en production au Canada de marchandises semblables, ou

(iii) eût causé un préjudice sensible à la production au Canada de marchandises semblables n'eût été le fait qu'un droit temporaire a été appliqué aux marchandises; ou

b) dans le cas de marchandises auxquelles s'applique la détermination préliminaire du dumping,

(i) si

(A) il y a eu une importation considérable de marchandises semblables sous-évaluées, et si ce dumping a causé un préjudice sensible à la production au Canada de marchandises semblables, ou eût causé un préjudice sensible à cette production n'eût été l'application de mesures antidumping, ou

(B) l'importateur des marchandises était ou eût dû être au courant du fait que l'exportateur pratiquait le dumping et que ce dumping causerait un préjudice sensible à la production au Canada de marchandises semblables, et

(ii) si un préjudice sensible a été causé à la production au Canada de marchandises semblables du fait que les marchandises entrées constituent une importation massive ou font partie d'une série d'importations de marchandises sous-évaluées au Canada lorsque ces importations sont massives dans l'ensemble et se sont produites au cours d'une période relativement courte, et si, en vue d'empêcher qu'un tel préjudice sensible ne se répète, l'imposition d'un droit sur les marchandises entrées paraît nécessaire au Tribunal.

[3] Dossier conjoint, vol. 3A, page 34.

between the two companies, and their common use of the trade name "Sarco" which their goods carry to this day.

and again at pages 33 and 34:

The reality then is that the complaint of dumping was lodged by a Canadian producer who manufactures goods which closely resemble in physical appearance the goods produced by or on behalf of Sarco U.S.

In this context, are the like goods produced in Canada to be limited to those produced by Sarco Canada? The answer to this question is critical. If it is so limited, then, unquestionably, for the purposes of determining the question of whether material injury has been, is being or is likely to be caused to Canadian production of like goods, Sarco Canada is to be accepted as the "industry" without regard to the existence of other Canadian producers of the goods listed in the preliminary determination or to the presence in the Canadian market of undumped products from the United States of the same description.

Sarco Canada admitted throughout the proceedings that there are products produced by other Canadian producers and products imported from other American manufacturers that are functionally similar to the products of Sarco U.S. Thus, as to thermostatic steam traps, its principal witness stated: "Other manufacturers make thermostatic steam traps to their own design which compete in some of the same markets as do Sarco U.S. and Sarco Canada but they do not closely resemble "Sarco" thermostatic steam traps". With respect to inverted bucket steam traps: "The largest other inverted bucket steam trap is Armstrong. They have a number of bucket traps which are functionally similar to those produced by Sarco U.S. and a number which are not. The Armstrong bucket steam trap, however, does not closely resemble the Sarco U.S.-Sarco Canada bucket steam traps". And as to float and thermostatic steam traps: "Those produced by Trane (in Canada) and those produced in the U.S. by Hoffman, Dunham, Armstrong, etc., while functionally similar, do not closely resemble Sarco float thermostatic traps". And so on for item after item, except for strainers.

The position taken by counsel for Sarco Canada is that functional similarity is to be disregarded in circumstances such as those which prevail here, and the Tribunal should seek the narrowest class of goods which are "like", namely, those which most closely resemble the dumped imports, i.e., those goods which are produced by Sarco Canada.

The problem is not without difficulty, but on consideration the Tribunal has reached the conclusion that it must reject the narrow approach to the interpretation of the section of the Act under study. It appears to the Tribunal that the question of whether goods are "like" is to be determined by market considerations. Do they compete directly with one another? Are the same consumers being sought? Do they have the same

des deux sociétés et leur utilisation commune du nom commercial «Sarco», qui figure sur leurs marchandises jusqu'à ce jour.

et, à nouveau, aux pages 33 et 34:

Les faits sont donc les suivants: une plainte de dumping a été déposée par un fabricant canadien qui fabrique des marchandises ressemblant étroitement en apparence aux marchandises produites par ou pour le compte de Sarco E.-U.

Dans ce contexte, les marchandises semblables produites au Canada doivent-elles être limitées à celles que produit Sarco Canada? La réponse à cette question est décisive. Si tel est le cas, il faudra indubitablement, afin de déterminer si le préjudice sensible a été, est ou est susceptible d'être causé à la production de marchandises semblables, que l'on considère Sarco Canada comme l'entreprise représentant la «production», sans tenir compte ni de l'existence d'autres fabricants canadiens des marchandises qui figurent dans la détermination préliminaire ni de la présence, sur le marché canadien, de produits non sous-évalués provenant des Etats-Unis et correspondant à la même description.

Sarco Canada a reconnu tout au long des délibérations qu'il y a sur le marché d'autres produits provenant d'autres sources canadiennes, ainsi que des produits importés provenant d'autres fabricants américains, produits qui sont fonctionnellement semblables aux produits de Sarco E.-U. Ainsi, en ce qui concerne les purgeurs thermostatiques, le principal témoin de la société a déclaré: «D'autres fabricants fabriquent des purgeurs thermostatiques de leur propre conception, lesquels sont vendus sur certains des mêmes marchés à qui s'adressent Sarco E.-U. et Sarco Canada, mais ceux-ci ne ressemblent pas étroitement aux purgeurs thermostatiques «Sarco». En ce qui concerne les purgeurs à clapets à inversion, il a ajouté: «Le second plus important fabricant de purgeurs à clapet à inversion est Armstrong. Cette société fabrique une variété de purgeurs à clapet qui sont fonctionnellement semblables à ceux que produit Sarco E.-U., mais aussi un certain nombre de ces appareils qui ne le sont pas. Toutefois, le purgeur à clapet produit par Armstrong ne ressemble pas étroitement aux purgeurs à clapet fabriqués par Sarco E.-U. et Sarco Canada.» Et pour ce qui est des purgeurs à flotteur et des purgeurs thermostatiques, le témoin a fait la déclaration suivante: «Ces appareils produits par Trane (au Canada) et par Hoffman, Dunham, Armstrong, etc. aux Etats-Unis, bien que fonctionnellement semblables, ne ressemblent pas étroitement aux purgeurs thermostatiques à flotteur de Sarco.» Il a fait la même déclaration pour chaque article, sauf pour les filtres.

Le procureur de Sarco Canada a soutenu qu'il faut faire abstraction des ressemblances fonctionnelles dans le cas actuel et que le Tribunal doit chercher à déterminer quelle est la catégorie de marchandises qui présente les ressemblances les plus étroites, c'est-à-dire celles qui ressemblent le plus étroitement aux importations sous-évaluées, à savoir les marchandises produites par Sarco Canada.

Le problème n'est pas sans difficulté mais, après en avoir fait l'étude, le Tribunal en est venu à la conclusion qu'il doit rejeter la façon étroite d'interpréter l'article de la Loi à l'étude. Il lui semble que la question de savoir si des marchandises sont «semblables» doit être établie par des études de marché. Ces marchandises se font-elles directement concurrence? Visent-elles les mêmes consommateurs? Ont-elles, du point de vue

end-use functionally? Do they fulfill the same need? Can they be substituted one for the other? While in some cases, dissimilarity in the physical appearance of goods, which are functionally alike, can be such as to create entirely different markets; that is not the case here. It is also to be remembered that all these competitive products must conform to certain specified standards.

The Tribunal concludes that the "like goods" being produced in Canada (in relation to which material injury is to be examined) must encompass the collective production of all Canadian producers of the goods listed in the Deputy Minister's preliminary determination.

Pursuant to section 14(1) of the *Anti-dumping Act*, the Deputy Minister made a preliminary determination of dumping in respect of a class of goods which are described in a general way in the trade as "steam specialties" and sub-classes thereof such as, for example "steam traps". This Court has held that the Deputy Minister is entitled to formulate the class and what is included thereunder for investigation under section 13(1) of the Act[4] and for a preliminary determination of dumping under section 14(1) of the Act[5].

[4] Sections 13(1) and 14(1) of the *Anti-dumping Act* read as follows:

13. (1) The Deputy Minister shall forthwith cause an investigation to be initiated respecting the dumping of any goods, on his own initiative or on receipt of a complaint in writing by or on behalf of producers in Canada of like goods, if

(*a*) he is of the opinion that there is evidence that the goods have been or are being dumped; and

(*b*) either

(i) he is of the opinion that there is evidence, or

(ii) the Tribunal advises that it is of the opinion that there is evidence,

that the dumping referred to in paragraph (*a*) has caused, is causing or is likely to cause material injury to the production in Canada of like goods or has materially retarded or is materially retarding the establishment of the production in Canada of like goods.

14. (1) Where an investigation respecting the dumping of any goods has not been terminated under subsection 13(6) and the Deputy Minister, as a result of the investigation, is satisfied that

(*a*) the goods have been or are being dumped, and

(*b*) the margin of dumping of the dumped goods and the actual or potential volume thereof is not negligible,

he shall make a preliminary determination of dumping specifying the goods or description of goods to which such determination applies.

[5] *Compare: Mitsui and Co. Limited v. Buchanan* [1972] F.C. 944.

fonctionnel, le même usage final? Répondent-elles aux mêmes besoins? Peut-on les substituer l'une à l'autre? Il arrive que la dissemblance d'aspect physique des marchandises à fonction semblable est à ce point marquée qu'elle peut créer des marchés entièrement différents; toutefois, ce n'est pas le cas dans la présente enquête. Il faut également se rappeler que tous ces produits concurrentiels doivent être conformes à certaines normes précises.

Le Tribunal conclut que les «marchandises semblables», fabriquées au Canada (par rapport au préjudice sensible qui doit être étudié), doivent comprendre la production collective de tous les fabricants canadiens des marchandises énumérées dans la détermination préliminaire du sous-ministre.

Conformément à l'article 14(1) de la *Loi antidumping*, le sous-ministre a conclu au dumping présumé dans le cas d'une catégorie de produits connue dans le commerce sous le vocable «articles de production d'énergie thermique» dont les «purgeurs» forment l'une des sous-catégories. La présente cour a déjà statué que le sous-ministre est autorisé à créer des catégories (et à en préciser le contenu) aux fins d'enquêtes ouvertes sur le fondement de l'article 13(1) de la Loi[4], et à conclure, d'une manière préliminaire, au dumping en vertu de l'article 14(1) de la Loi[5].

[4] Les articles 13(1) et 14(1) de la *Loi antidumping* se lisent comme suit:

13. (1) Le sous-ministre fait ouvrir immédiatement une enquête concernant le dumping de marchandises, de sa propre initiative ou sur réception d'une plainte écrite portée par des producteurs de marchandises semblables au Canada ou en leur nom,

a) s'il est d'avis qu'il y a des éléments de preuve indiquant que les marchandises ont été ou sont sous-évaluées; et

b) si

(i) il est d'avis qu'il y a des éléments de preuve, ou

(ii) le Tribunal fait savoir qu'il est d'avis qu'il y a des éléments de preuve

indiquant que le dumping mentionné à l'alinéa *a*) a causé, cause ou est susceptible de causer un préjudice sensible à la production au Canada de marchandises semblables ou a retardé ou retarde sensiblement la mise en production au Canada de marchandises semblables.

14. (1) Lorsqu'on n'a pas, en vertu du paragraphe 13(6), mis fin à une enquête concernant le dumping de marchandises et que le sous-ministre, par suite de l'enquête, est convaincu,

a) que les marchandises ont été ou sont sous-évaluées, et

b) que la marge de dumping des marchandises sous-évaluées et le volume réel ou éventuel du dumping ne sont pas négligeables,

il fait une détermination préliminaire du dumping spécifiant les marchandises ou la sorte de marchandises auxquelles cette déclaration s'applique.

[5] *Comparer: Mitsui and Co. Limited c. Buchanan* [1972] C.F. 944.

Thus, when one considers section 16(1) in the light of sections 13 and 14 (*supra*), the reference in section 16(1) to "the goods in connection with which a preliminary determination has been made" and to "the production in Canada of like goods" makes it clear, in my view, that the respondent has jurisdiction to determine the relationship between all of the goods which have been preliminarily found to have been dumped, and material injury, if any, caused to producers in Canada of "like goods". Referring then to the definition of "like goods" as contained in section 2(1) of the Act, the respondent found as a fact that the applicant's goods were not "identical in all respects" to those of the exporter and this finding of fact is supported by the evidence and is not challenged by the applicant. Thus, since the requirements of section 2(1)(*a*) have not been met on the facts here present, it is necessary to refer to section 2(1)(*b*) and to consider the production in Canada of "goods the characteristics of which closely resemble" those found to have been dumped.

In my view, in defining "like goods" the respondent was required to consider all of the characteristics or qualities of the goods, and not restrict itself to a consideration of something less than the totality of those characteristics. Accordingly, if the record disclosed that the Tribunal had restricted itself to "market considerations" in defining "like goods", I would agree with counsel for the applicant that the Tribunal had erred in law. However, my perusal of the record does not impel me to such a conclusion. Initially, it should be noted that, on page 34 of its reasons (*supra*), the Tribunal does not state that the question of "like goods" is to be determined solely by market considerations. Additionally, it appears that there was evidence before the Tribunal as to physical similarity between the dumped goods and the goods of some Canadian manufacturers on the one hand (see Transcript of Public Hearing, Vol. 1, pp. 219, 229, 230, 200, 29) and further evidence as to some physical dissimilarities between the dumped goods and the goods of the applicant (see Transcript, Vol. 1, pp. 229, 199-200, 201) on the other hand. Furthermore, it appears particularly from page 33 of the Tribunal's reasons (*supra*), that it did give at least some consideration to the physical

Ainsi lorsqu'on lit l'article 16(1) à la lumière des articles 13 et 14 (*supra*), la référence qui y est faite «aux marchandises auxquelles s'applique la détermination préliminaire du dumping» et «à la production au Canada de marchandises semblables», montre clairement, à mon avis, que l'intimé était compétent pour décider de la nature de la relation existant entre les marchandises que, d'une manière préliminaire, on a jugé être sous-évaluées et le préjudice sensible causé le cas échéant aux producteurs au Canada de «marchandises semblables». Se référant alors à la définition de «marchandises semblables» figurant à l'article 2(1) de la Loi, l'intimé a conclu que les marchandises de la requérante n'étaient pas «identiques à tous égards» à celles de l'exportateur et cette conclusion de fait appuyée par les preuves produites n'est pas contestée par la requérante. Ainsi, vu qu'on ne trouve pas en l'espèce, dans les faits, les éléments prévus à l'article 2(1)*a*), est-il nécessaire de se reporter à l'article 2(1)*b*) pour voir si l'on produit au Canada des «marchandises dont les caractéristiques ressemblent étroitement» aux marchandises sous-évaluées.

A mon avis, pour définir l'expression «marchandises semblables», l'intimé devait considérer toutes les caractéristiques ou qualités des marchandises et non quelques-unes seulement. En conséquence, si le dossier révélait que le Tribunal s'en était tenu uniquement à des «considérations de marché» pour définir l'expression «marchandises semblables», je serais d'accord avec le procureur de la requérante pour dire que c'était juridiquement à tort de la part du Tribunal. Toutefois la lecture du dossier ne me mène pas à telle conclusion. Au départ il doit être noté qu'à la page 34 de ses motifs (*supra*), le Tribunal ne dit pas que la question des «marchandises semblables» doive être résolue uniquement en fonction de considérations de marché. En outre, il a été, semble-t-il, prouvé devant le Tribunal qu'il existait, d'une part, des ressemblances physiques entre les marchandises sous-évaluées et celles de certains fabricants canadiens (voir notes sténographiques de l'audience publique, vol. 1, pages 219, 229, 230, 200 et 29) et, d'autre part, des dissemblances physiques entre les marchandises sous-évaluées et celles de la requérante (voir notes sténographiques, vol. 1, pages 229, 199 et 200, 201). La page 33 des motifs précités montre bien que le Tribunal a prêté au moins quelque attention aux

dissimilarities between the dumped goods and the goods of Canadian producers. It also appears that the Tribunal did consider the physical characteristics of the goods. I say this because of the following passage appearing on page 32 of the reasons:

> There is no doubt that the goods manufactured by the complainant, Sarco Canada, most closely resemble in their physical appearance the goods produced by or on behalf of Sarco U.S. [Emphasis added.]

Thus, while it seems evident that the Tribunal ascribed more weight to the question of functional similarity than to the other characteristics in defining "like goods", I am not able to say that it did not consider those other characteristics.

A determination such as this is one of fact by a statutorily created body having the legal authority and expertise necessary to evaluate the evidence and to make such a finding. In these circumstances, the Court will not interfere with such a finding unless there was a complete absence of evidence to support it or a wrong principle was applied in making it[6]. In the case at bar, I am unable to say that either of these circumstances was present.

Accordingly, and for the foregoing reasons, I have concluded that the applicant has not established error in law and in jurisdiction in respect of its first allegation.

The applicant's second submission of error as to jurisdiction is to the effect that the respondent failed to properly conduct the inquiry which is a condition precedent to its finding and that it acted beyond its jurisdiction in that it received and considered material obtained by it in a manner not contemplated by the *Anti-dumping Act* which material was built into the record in such a manner that the applicant was deprived of the right to the kind of hearing afforded to it under the statute and was deprived of its right to test that information so received and relied on by the respondent through its refusal to grant the applicant's request for an adjournment for that purpose and says further, that by failing to disclose to the applicant a portion

[6] *Compare: In re Y.K.K. Zipper Co. of Canada Ltd.* [1975] F.C. 68 at 75 per Urie J.

dissemblances physiques existant entre les marchandises sous-évaluées et celles des fabricants canadiens. Il appert aussi que le Tribunal a tenu compte des caractéristiques physiques des marchandises. Je dis cela à cause du passage suivant des motifs à la page 32:

> Il ne fait aucun doute que les marchandises fabriquées par le plaignant, Sarco Canada, ressemblent très étroitement, en apparence, aux marchandises produites par ou pour le compte de Sarco E.-U. [C'est moi qui souligne.]

Ainsi, bien que manifestement le Tribunal ait accordé plus de poids à la similitude fonctionnelle qu'aux autres caractéristiques lorsqu'il a défini l'expression «marchandises semblables», je ne puis dire qu'il n'a pas tenu compte de ces autres caractéristiques.

Il s'agit ici d'une conclusion de fait formulée par un organisme créé par la loi, doté des pouvoirs légaux et des connaissances spécialisées nécessaires pour évaluer les preuves dont il est saisi et en arriver à cette conclusion. Dans un tel cas, la Cour n'intervient pas, à moins qu'aucune preuve n'appuie la conclusion ou qu'un principe erroné ne la fonde[6]. Je ne puis dire que nous trouvions ici l'une ou l'autre de ces circonstances.

Donc, sur la première allégation et pour les raisons qui précèdent, je conclus que la requérante n'a établi ni l'erreur de droit, ni l'incompétence.

En second lieu, selon la requérante, il y a eu erreur quant au pouvoir juridictionnel, l'intimé n'ayant pas conduit d'une manière appropriée l'enquête, condition préalable requise pour lui permettre de statuer. Il aurait aussi outrepassé sa compétence en recevant et en étudiant des pièces obtenues d'une manière que ne prévoit pas la *Loi antidumping*; ces pièces auraient été versées au dossier selon un procédé qui privait la requérante du droit de se faire entendre comme le prévoit la loi, ainsi que de son droit de vérifier les renseignements ainsi obtenus, et invoqués par l'intimé—et ce à cause du refus de celui-ci de faire droit à la demande d'ajournement présentée à cette fin par la requérante. Cette dernière fait valoir en outre

[6] *Comparer: In re Y.K.K. Zipper Co. of Canada Ltd.* [1975] C.F. 68, à la page 75, par le juge Urie.

of the material relied on by it, the respondent violated the *audi alteram partem* principle.

It is necessary, for a proper consideration of this submission, to refer to the facts surrounding the conduct of the inquiry. The Tribunal conducted its inquiry on November 15 to 19 inclusive, 1976. However, prior thereto, on November 10, 1976 it convened a hearing (referred to in the material as a preliminary sitting) at which the three members of the Tribunal were present along with counsel and other representatives of the interested parties. The purpose of this preliminary sitting, as stated by the Chairman, was as follows:

> ... to make available information to both parties, to decide on confidentiality, to outline some of the key issues and identify some problem areas and also to inform you on the procedures that we will follow at the public hearing[7].

Thereupon the Chairman called upon the Secretary of the Tribunal to file a number of exhibits. Twelve exhibits in all were filed, of which Exhibits ADT-2, ADT-4, ADT-6, ADT-8 and ADT-10 were designated as confidential exhibits, the remainder being designated as public exhibits. Confidential Exhibit ADT-2 contained certain attachments to a letter from the Deputy Minister to the Secretary of the Tribunal dated October 5, 1976. These attachments were a summary relating to the dumped goods. In respect of the other exhibits, the Chairman had this to say:

> Now, to date, the Tribunal has sent questionnaires to Canadian manufacturers, importers of the dumped goods, and importers of pipeline steam controls from other United States exporters. Mr. Mahli, of our research staff, visited a number of Canadian manufacturers and importers of pipeline steam controls in connection with the Tribunal's questionnaire. The Canadian manufacturers concerned were: Yarway Canada Limited, Guelph, Ontario; Sarco Canada Limited, Agincourt, Ontario; Atlas Engineering and Machine Company Limited, Toronto, Ontario; the Trane Company of Canada Limited, Toronto, Ontario; Dunham-Bush Canada Limited, Western, Ontario—Weston, Ontario; Braukmann Controls Company Ltd., Weston, Ontario. The Canadian importers concerned were: Mackinson Winchester Ltd., Montreal. In addition, the Tribunal became aware, after having sent out questionnaires to Canadian manufacturers and importers, that other firms were involved in either the manufacture of pipeline steam controls or sale of imported pipeline steam controls. The Tribunals research staff contacted a number of firms, as will be indicated

[7] Transcript of Public Hearing, Vol. 1, p. 1.

qu'en ne lui communiquant pas une partie des pièces sur lesquelles il s'est appuyé, l'intimé a violé le principe *audi alteram partem*.

Il est nécessaire, pour bien étudier ces allégations, de se reporter aux faits entourant la tenue de l'enquête que le Tribunal a mené du 15 au 19 novembre 1976 inclus. Auparavant, le 10 novembre 1976, il avait tenu une audience (qualifiée au dossier de séance préalable) où étaient présents les trois membres du Tribunal, de même que les procureurs et les autres représentants des parties intéressées. Les buts de cette séance préalable, selon le président, étaient les suivants:

> [TRADUCTION] ... mettre certaines informations à la disposition des parties, décider de la question du caractère confidentiel, circonscrire certains des points litigieux majeurs, identifier certaines des zones problèmes et aussi vous informer de la procédure qui sera suivie en audience publique[7].

Ensuite le président a demandé au secrétaire du Tribunal de verser au dossier un certain nombre de pièces, douze en tout, dont les pièces ADT-2, ADT-4, ADT-6, ADT-8 et ADT-10, qui ont été cotées confidentielles, les autres étant cotées pièces publiques. La pièce confidentielle ADT-2 contenait certaines annexes à une lettre du 5 octobre 1976 envoyée par le sous-ministre au secrétaire du Tribunal. Il s'agissait d'un résumé se rapportant aux marchandises sous-évaluées. Quant aux autres pièces, le président a déclaré ceci:

> [TRADUCTION] Maintenant, à ce jour, le Tribunal a envoyé des questionnaires aux fabricants canadiens, aux importateurs des marchandises sous-évaluées et à ceux de régulateurs de canalisations de vapeur provenant d'autres exportateurs américains. M. Mahli, de notre personnel de recherche, a rendu visite à un certain nombre de fabricants canadiens et d'importateurs de régulateurs de canalisations de vapeur à propos du questionnaire du Tribunal. Les fabricants canadiens concernés sont: Yarway Canada Limited de Guelph (Ontario), Sarco Canada Limited d'Agincourt (Ontario), Atlas Engineering and Machine Company Limited de Toronto (Ontario), Trane Company of Canada Limited de Toronto (Ontario), Dunham-Bush Canada Limited, Western, Ontario de Weston (Ontario) et Braukmann Controls Company Ltd., aussi de Weston (Ontario). La firme Mackinson Winchester Ltd. de Montréal est l'importatrice canadienne concernée. En sus, le Tribunal s'est aperçu, après avoir envoyé les questionnaires, que d'autres firmes étaient intervenues soit dans la fabrication des régulateurs de canalisations de vapeur, soit dans leur vente. Le

[7] Notes sténographiques de l'audience publique, vol. 1, page 1.

Canadian importers together with supporting material.

As a result of the undertakings of confidentiality by counsel, applicant's counsel had made available to him certain of the confidential exhibits. However, the remainder of the confidential exhibits were not made available. The Tribunal Chairman's ruling in this connection reads as follows:

Now, the remainder of the confidential information provided to the Tribunal will have to be confidential to the Tribunal only. It's replies from other companies . . . .[10]

The material which was not disclosed may be detailed as follows:

(a) Exhibit ADT-2;
(b) Exhibit ADT-4.2 and 4.4 and 4.5;
(c) Exhibit ADT-8 together with the attached documents and letters in support thereof; and
(d) Exhibit ADT-10 together with the supporting material.

The basis for such non-disclosure was said by the Tribunal to be section 29(3) of the *Anti-dumping Act* which reads as follows:

29. . . .

(3) Where evidence or information that is in its nature confidential, relating to the business or affairs of any person, firm or corporation, is given or elicited in the course of any inquiry under section 16, the evidence or information shall not be made public in such a manner as to be available for the use of any business competitor or rival of the person, firm or corporation.

The transcript of the preliminary sitting then reveals that counsel for Sarco Company Inc., one of the intervenants herein asked for disclosure of the questionnaires from other companies as well as disclosure in respect of Exhibit ADT-2. Then at this point, Mr. Brown, counsel for the applicant addressed the Tribunal as follows[11]:

MR. BROWN: Yes, Mr. Chairman, we had some questions relating to the public information and—and from our own intelligence had come to a conclusion that Canadian manu—other Canadian manufacturers weren't as significant as they appear to be from the public exhibit showing the the (*sic*) Canadian market. The imports don't—don't surprise us particularly, but the Canadian manufacturers do and we have some questions in our mind as to whether or not the products might properly—you know, the kind of numbers might properly have been included, and also whether the market, as it is

[10] Transcript, Vol. 1, pp. 6-7.
[11] Transcript, Vol. 1, pp. 8-12.

vingt et un importateurs canadiens; les pièces justificatives y sont annexées.

Le procureur s'étant engagé à respecter le caractère confidentiel, l'avocat de la requérante lui avait communiqué certaines des pièces confidentielles. Toutes n'ont cependant pas été divulguées. Voici la décision du président du Tribunal à ce propos:

[TRADUCTION] Maintenant, le reste des renseignements confidentiels fournis au Tribunal demeurera confidentiel et à la disposition du Tribunal seulement. Ce sont les réponses d'autres compagnies . . . .[10]

Voici les documents qui n'ont pas été rendus publics:

a) La pièce ADT-2;
b) Les pièces ADT-4.2, 4.4 et 4.5;
c) La pièce ADT-8 ainsi que les documents et lettres justificatifs y annexés; et
d) La pièce ADT-10 ainsi que ses pièces justificatives.

Pour refuser de rendre publiques ces pièces, le Tribunal s'est appuyé sur l'article 29(3) de la *Loi antidumping*, que voici:

29. . . .

(3) Lorsque des témoignages ou des renseignements qui sont d'une nature confidentielle, relativement aux travaux ou aux affaires d'une personne, d'une firme ou d'une corporation, sont fournis ou obtenus au cours d'une enquête tenue en vertu de l'article 16, les témoignages ou renseignements ne seront pas rendus publics de manière à pouvoir être utilisés par un concurrent ou par un rival commercial de la personne, de la firme ou de la corporation.

Les comptes rendus de la séance préalable révèlent qu'alors le procureur de Sarco Company Inc., l'une des intervenantes en cause, a demandé la communication des questionnaires envoyés aux autres compagnies, de même que de la pièce ADT-2. C'est à ce moment que Me Brown, procureur de la requérante, s'est adressé en ces termes au Tribunal[11]:

[TRADUCTION] Me BROWN: Oui, monsieur le président, nous avons certaines questions à poser portant sur les renseignements rendus publics et . . . et d'après nos propres renseignements nous en sommes venus à la conclusion que les fabricants cana . . . les autres fabricants canadiens n'avaient pas l'importance qu'ils paraissent avoir d'après la pièce publique schématisant le . . . le . . . marché canadien. Ce ne sont pas les importations qui . . . qui nous surprennent particulièrement, ce sont les fabricants canadiens et nous avons quelques questions en tête, comme par exemple, si certains produits auraient pu valable-

[10] Notes sténographiques, vol. 1, pages 6 et 7.
[11] Notes sténographiques, vol. 1, pages 8 à 12.

MR. CHAIRMAN: No.

MR. BROWN: No.

MR. CHAIRMAN: There's no time in early December. There—there's hardly any time from now until the end of the year. Mr. Secretary, do you think there's a—there is a possibility?

THE SECRETARY: No, Mr. Chairman. After next week—after next week, hearings are scheduled at this stage until mid-December.

MR. BROWN: So that the last—the only possible would be that third week in December?

MR. CHAIRMAN: Oh, and—and—and that is impossible. We could not render the decision before—in the prescribed period.

MR. BROWN: Well, ...

THE CHAIRMAN: Still—you still have two and a half days.

MR. BROWN: Well, ...

THE CHAIRMAN: I realize it's not very much and . . . .

MR. BROWN: . . . I also have another case on Friday, you know. You know, two and a half days really—I suppose everybody who's practicing law has the same problem. I get calendars that are filled as well.

MR. LAVIGNE: But why hasn't your client been inquiring of the Canadian manufacturers before this?

MR. BROWN: Well, we have. We have, There were a couple of manufacturers we hadn't heard of.

MR. LAVIGNE: Well, it's not unusual. We find that in every case both parties learn an awful lot about the market and other manufacturers. You know, but . . . .

MR. BROWN: Yes, ...

MR. LAVIGNE: . . . there's been ample time to make a—make contacts and seek support and all this sort of thing.

MR. BROWN: Well, that's true, although the information we were given from the manufacturers we contacted were—was: we're nothing, we're not really—you know, we're so insignificant that we don't care. And a couple of Quebec companies that have been revealed on the—on the face of the information, were new to us, a surprise to us, and I guess the first question to them would be, how significant are you and if you are significant would you participate as a witness? And it really—two days is just not adequate to be making those contacts.

THE CHAIRMAN: Well, it's unfortunate in this case, but we—we definitely cannot postpone this—this hearing.

Now, Mr. Brown, I'm informed by the Director of Research that we've tried to get a lot of these people to participate without any success. It was even difficult to get statistical information from them.

MR. BROWN: Well, I have—I suppose I have my—one slighter advantage that if they'll at least talk to me, I can subpoena (*sic*) them.

LE PRÉSIDENT: Non.

Me BROWN: Non.

LE PRÉSIDENT: Ce n'est pas possible au début de décembre; il y a . . . il ne reste plus de temps disponible d'ici la fin de l'année. Monsieur le secrétaire, pensez-vous qu'il y ait . . . qu'il y ait une possibilité?

LE SECRÉTAIRE: Non monsieur le président; après la semaine prochaine . . . après la semaine prochaine, des audiences sont prévues jusqu'à la mi-décembre.

Me BROWN: De sorte que la dernière . . . la seule possibilité, ce serait la troisième semaine de décembre?

LE PRÉSIDENT: Oh! et . . . et . . . et ce n'est pas possible. Nous ne pourrions rendre une décision avant . . . dans les délais prévus.

Me BROWN: Eh bien! . . .

LE PRÉSIDENT: Il reste . . . il vous reste deux jours et demi.

Me BROWN: Eh bien! . . .

LE PRÉSIDENT: Je comprends que ce n'est pas long, et . . . .

Me BROWN: . . . vous savez j'ai aussi une autre affaire vendredi. Vous comprenez: deux jours et demi en réalité . . . je suppose que tous ceux qui pratiquent le droit ont le même problème. Mon agenda est lui aussi comble.

M. LAVIGNE: Mais pourquoi votre client n'a-t-il pas enquêté chez les autres fabricants canadiens auparavant?

Me BROWN: Eh bien! nous l'avons fait. Nous l'avons fait; il y a un certain nombre de fabricants dont nous n'avions pas entendu parler.

M. LAVIGNE: Eh bien! ce n'est pas inhabituel. Nous nous apercevons que dans chaque affaire les deux parties en apprennent beaucoup sur le marché et sur les autres fabricants. Vous savez que . . . .

Me BROWN: Oui . . . .

M. LAVIGNE: . . . vous avez eu tout le temps de faire . . . d'établir des contrats, d'obtenir des appuis, etc.

Me BROWN: Eh bien! c'est vrai, quoique les propos qui nous ont été tenus par les fabricants que nous avons rejoints étaient: . . . Nous ne sommes rien, nous ne sommes pas réellement . . . vous comprenez ce que je veux dire! nous sommes si peu importants que nous nous désintéressons de la chose. Et deux ou trois compagnies québécoises révélées par les renseignements, nous en entendons parler pour la première fois, c'est une surprise et je devine que la première question que nous leur poserions serait: Quelle est votre importance et, si vous en avez une, est-ce que vous accepteriez de témoigner? Et vraiment . . . deux jours! ce n'est vraiment pas assez pour organiser ce genre de rencontre.

LE PRÉSIDENT: C'est malencontreux en l'espèce, mais nous, nous ne pouvons vraiment pas retarder cette . . . cette audience.

Maintenant, Me Brown, le Directeur de la recherche m'informe que nous avons essayé sans succès d'obtenir la participation d'un grand nombre de gens. Il a même été difficile d'obtenir d'eux des renseignements statistiques.

Me BROWN: Hum! j'ai . . . je suppose que j'ai un . . . un léger avantage c'est que s'ils refusent de me parler, je peux les assigner.

THE CHAIRMAN: Yes.

MR. BROWN: Even the mechanics of have subpoeonas (*sic*) served between—between now and Friday, for next Monday, is almost too much. You can appreciate that. I don't know that the Board—I guess, technically, you may well have the power to act . . . .

THE CHAIRMAN: We do.

MR. BROWN: . . . in your own initiative that way.

THE CHAIRMAN: We do.

MR. BROWN: By subpoeona, (*sic*) but it—by and large, you've left it to the parties in the past.

THE CHAIRMAN: As far as the Tribunal was concerned, we didn't feel that we needed that. We have information from them, which, of course is not available to you. That's—that's regrettable, but we will use that—that information and make our decision. [Emphasis added.]

Counsel for the applicant details in his memorandum the prejudice to his client by this refusal to provide him with the balance of the confidential material as follows[12]:

36. In the instant case the Tribunal received and relied upon confidential responses to questionnaires, confidential information from the Deputy Minister and data gathered by its research staff through personal attendances on and telephone communications with a number of firms identified as manufacturers or importers of goods said to be like to those to which the Preliminary Determination of Dumping applied. Counsel for the Applicant was not given an opportunity to examine all of the material considered by the Tribunal or the staff member who received information by telephone and submitted summaries thereof to the Tribunal.

37. It is submitted that the Tribunal erred in finding that there were, in addition to the Applicant, eight other Canadian producers of like goods as identified by the Tribunal in its Statement of Reasons. Material before the Tribunal disclosed that; John Wood Co. Limited did not manufacture goods of the type under consideration; Atlas Engineering and Machine Company Limited and Braukmann Controls Company Ltd. were unable to supply information; Dunham Bush Canada Limited had no significant production of the subject goods; and John W. Tucker Limited no longer produced any goods which were like goods to the goods produced by or on behalf of Sarco Co. Inc. to which the Preliminary Determination of Dumping applied.

Exhibit ADT-3—Record, Vol. 3A, p. 57
Transcript of Hearing—Record, Vol. 1, pp. 156-158

38. It is submitted that there was evidence before the Tribunal which indicated that the quantitative definition of the Canadian market represented by Exhibit ADT-12 was inaccurate and that, therefore, the decision of the Tribunal was based on an

[12] Applicant's memorandum of fact and law, pp. 14 and 15.

LE PRÉSIDENT: Oui.

Me BROWN: Le seul fait de procéder aux assignations d'ici . . . d'ici à vendredi, pour lundi prochain, c'est presque trop espérer. Vous comprendrez cela. Je ne crois pas que le Tribunal . . . je devine, techniquement, vous devriez avoir le pouvoir d'agir . . . .

LE PRÉSIDENT: Nous l'avons.

Me BROWN: . . . de votre propre initiative.

LE PRÉSIDENT: Nous le pouvons.

Me BROWN: Par voie d'assignation mais, . . . somme toute, vous avez laissé cela aux parties dans le passé.

LE PRÉSIDENT: En ce qui concerne le Tribunal, nous n'avons pas cru cela nécessaire. Nous avons obtenu d'eux des renseignements qui, bien entendu, ne sont pas à votre disposition. C'est . . . c'est regrettable mais nous allons nous en servir . . . de ces renseignements pour rendre notre décision. [C'est moi qui souligne.]

L'avocat de la requérante précise comme suit dans son mémoire le préjudice subi par sa cliente suite à ce refus de lui fournir les autres pièces confidentielles[12]:

[TRADUCTION] 36. En l'espèce, le Tribunal a reçu les données suivantes et s'est appuyé sur elles: certaines réponses confidentielles à certains questionnaires, certains renseignements confidentiels fournis par le sous-ministre et certaines données rassemblées par son personnel de recherche suite à des conversations, tenues par téléphone ou autrement, avec les représentants de firmes identifiées comme fabricants ou importateurs de marchandises soi-disant semblables à celles visées par la détermination préliminaire de dumping. On n'a pas donné à l'avocat de la requérante la possibilité d'examiner toutes les pièces étudiées par le Tribunal ou d'interroger le membre de son personnel qui a obtenu par téléphone certains renseignements puis en a présenté le résumé au Tribunal.

37. La requérante fait valoir que le Tribunal a conclu à tort qu'il y avait, outre elle-même, huit autres producteurs canadiens de marchandises semblables, au sens donné par le tribunal à cette expression dans ses motifs. Les pièces produites révèlent que John Wood Co. Limited ne fabriquait pas de marchandises du type en question, qu'Atlas Engineering and Machine Company Limited et Braukmann Controls Company Ltd. étaient incapables de fournir quelque renseignement que ce soit, que Dunham Bush Canada Limited ne produisait qu'une quantité négligeable des marchandises en question et que John W. Tucker Limited ne produisait plus de marchandises semblables à celles produites par la Sarco Co. Inc. ou pour son compte et visées par la détermination préliminaire de dumping.

Pièce ADT-3—Dossier, vol. 3A, page 57,
Notes sténographiques de l'audience—vol. 1, pages 156 à 158.

38. Elle fait valoir que certaines preuves soumises au Tribunal indiquaient que la définition quantitative du marché canadien schématisée par la pièce ADT-12 était inexacte et donc que la décision du Tribunal s'appuyait sur des faits erronés ou qui

[12] Mémoire de la requérante, pages 14 et 15.

be required would be, we should have thought, to exclude all competitors or rivals while the evidence is being taken and to provide such parties afterwards with the sort of report of the evidence taken in their absence that is contemplated for the parties with reference to confidential evidence taken under section 28.

In our view of the problem raised by this application, it is not a situation where it is necessary to consider whether a decision of a tribunal will so affect the rights or interests of a person that he is entitled to a fair hearing before that decision can be made. In our view, the question here is whether there has been a failure to comply with the statutory conditions precedent to the decision. Compare *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87, per Lord Thankerton at page 102.

The sole business entrusted to the Board is to conduct inquiries under section 16 in respect of goods to which preliminary determinations of dumping apply and then to make such orders or findings as the nature of the matters may require (section 16(3)).

For the conduct of such inquiries, the statute has made provision for the system of hearings to which I have referred and has conferred on the "parties" (who must, we should have thought, include the "importer" and other persons who have a statutory right to notice of the preliminary determination) a statutory right to appear at such hearings or to be represented there. In the absence of some thing in the statute clearly pointing to the contrary, we have no doubt that such a right implies a right of the party to be heard, which at a minimum includes a fair opportunity to answer anything contrary to the party's interest and a right to make submissions with regard to the material on which the Tribunal proposes to base its decision. A right of a party to "appear" at a "hearing" would be meaningless if the matter were not to be determined on the basis of the "hearing" or if the party did not have the basic right to be heard at the hearing.

Against this view, it is said that the object of the *Anti-dumping Act* is "to protect the Canadian public interest from dumped goods which may materially cause injury or retard production in Canada of like goods" and, therefore, the inquiry is "essentially an investigatory one and does not involve a contest between opposing parties".

We accept it that the object of the Act is to protect the Canadian public interest from dumped goods which may materially cause injury or retard production in Canada and that the inquiry is not, as such, a contest between opposing parties. It appears clear, however, that the reason for the existence of the Tribunal was that Parliament sought, not only a means whereby to keep out dumped goods when their importation would do injury or retard production, but also a means whereby dumped goods would not be kept out when their importation would not do injury or retard production (and would, therefore, presumably provide Canadian consumers with cheaper goods without doing any harm). Otherwise, that is, if Parliament was not concerned about the danger of keeping out

témoignages à huis-clos. Quant au reste de la procédure, elle peut varier selon les circonstances. A l'extrême, il pourrait être nécessaire, à notre avis, d'exclure tous les concurrents ou rivaux pendant la déposition des témoignages et, après coup, de fournir à ces parties le même genre de rapport de la preuve reçue en leur absence que celui prévu à l'article 28 pour ces parties lorsqu'il s'agit de preuve confidentielle.

Selon notre analyse du problème soulevé par cette demande, il ne s'agit pas d'un cas où il faut examiner si la décision d'un tribunal affectera les droits ou intérêts d'une personne de telle façon qu'elle aurait droit à une audition impartiale ou équitable avant que la décision ne puisse être prise. A notre avis, la question en l'espèce est de savoir si on a omis de se conformer aux conditions statutaires fixées pour prendre la décision. Comparer avec l'arrêt *Franklin c. Minister of Town and Country Planning* [1948] A.C. 87, rendu par Lord Thankerton à la page 102.

Le Tribunal a pour seule fonction de mener des enquêtes en vertu de l'article 16 relativement aux marchandises auxquelles s'appliquent des déterminations préliminaires du dumping et de rendre ensuite l'ordonnance ou de prendre les conclusions qui s'imposent (article 16(3)).

Quant à la conduite de ces enquêtes, la loi a prévu le système des audiences que j'ai mentionné et a conféré aux «parties» (qui, à notre avis, doivent inclure l'«importateur» et les autres personnes précisées dans la loi et qui ont droit à l'avis de détermination préliminaire) le droit de comparaître à ces audiences ou d'y être représentées. En l'absence de toute indication claire à l'effet contraire dans la loi, nous n'avons aucun doute qu'un tel droit implique que la partie a droit à une audition qui comprend à tout le moins une possibilité équitable de répondre à tout ce qui va à l'encontre de son intérêt et un droit de présenter ses prétentions relativement aux preuves sur lesquelles le Tribunal se propose de fonder sa décision. Le droit d'une partie de «comparaître» à une «audience» n'aurait pas de portée réelle si la décision ne devait pas être fondée sur ladite «audience» ou si la partie n'avait pas le droit fondamental d'y être entendue.

A l'encontre de ce point de vue, on a dit que le but de la *Loi antidumping* est [TRADUCTION] «de protéger l'intérêt du public canadien des marchandises sous-évaluées qui peuvent causer un préjudice sensible ou retarder sensiblement la mise en production de marchandises semblables au Canada» et, en conséquence, que l'enquête est [TRADUCTION] «essentiellement une recherche des faits et n'implique pas de confrontation entre des parties opposées».

Nous admettons que le but de la loi est de protéger l'intérêt du public canadien des marchandises sous-évaluées qui peuvent causer un préjudice sensible ou retarder sensiblement la production au Canada et que l'enquête n'est pas, en tant que telle, une confrontation entre des parties opposées. Toutefois, il semble manifeste que la raison d'être du Tribunal est que le Parlement a non seulement cherché un moyen de prémunir le pays contre les marchandises sous-évaluées lorsque leur importation risque de causer un préjudice à la production ou un retard dans celle-ci, mais aussi un moyen de ne pas empêcher l'importation des marchandises sous-évaluées lorsqu'elle ne risque pas de causer un tel préjudice ou retard (et, en conséquence apporterait probablement aux consommateurs cana-

dumped goods unnecessarily, the statute would have simply prohibited all importations of dumped goods.

One method that Parliament could have adopted to determine whether the dumping of any particular class of goods should be prohibited would have been to entrust the duty to an executive department of government with all necessary powers to gather information and to proclaim its findings. There would then have been no right in any "party" to be heard. Parliament chose instead to set up a court of record to make the inquiries in question and provided for such an inquiry being carried out by hearings where those whose economic interests are most vitally affected on both sides of the question would be entitled to appear. It seems obvious that it was thought that the most effective way of assuring that the right conclusion would be reached was to open the door to such opposing parties, whose economic interests were at stake, so that they could, by adducing evidence and by making submissions, make sure that all sides of the question were fully revealed to the Commission. We can think of no method more likely to ensure that the Commission would not go wrong for lack of information and for lack of proper exposition of the problem. Certainly, our experience in common law countries has shown that such method of inquiry has substantial advantages over the sort of result that can be obtained by individuals going out and gathering information by interviews and inspections.

In addition, one cannot overlook the fact that Parliament saw fit to cause the foreign government of the exporter country to be advised at the early stages of the matter. It may be, we do not know, that the international agreement referred to in section 16(4) of the *Anti-dumping Act* made it expedient to afford such a government an opportunity of taking part in such an inquiry at least as an observer.

It is also said against the view that we have taken as to the right of each of the parties to a fair opportunity to present his side of the matter that the statute makes it clear that the Tribunal is to pursue its own inquiries by its own staff and with the help of government departments and agencies. We fully accept it that the Tribunal may conduct a programme of amassing information relevant to a matter before it. What, as it appears to us, the statute contemplates is that such material, to the extent that it seems useful, be built into the record of the matter during the course of the hearings in such manner as the Tribunal chooses provided that it is consistent with giving the "parties" an opportunity to be heard. (One obvious way is to have commission counsel who submits evidence and makes submissions in the same way as counsel for a party.)

Another point that is taken against concluding that Parliament intended that the parties have the right to be heard in the ordinary way is that, if they have such a right, it will be impossible, it is said, for the Tribunal to implement the requirement in section 16(3) of the Act that it reach its decision within a period of 90 days. We do not recognize the inconsistency between the two requirements. Parliament has imposed a time-

diens des marchandises moins chères sans causer aucun préjudice). En d'autres termes, si le Parlement ne se préoccupait pas du danger qu'il y a à se prémunir sans nécessité contre les marchandises sous-évaluées, la loi aurait simplement interdit toute importation de telles marchandises.

L'une des méthodes que le Parlement aurait pu adopter pour déterminer si on devait interdire le dumping d'une catégorie précise de marchandises aurait pu être d'en charger un ministère, en lui accordant les pouvoirs nécessaires pour obtenir les renseignements requis et présenter ses conclusions. Aucune «partie» n'aurait alors eu droit à une audience. Au lieu de cela, le Parlement a choisi de créer une cour d'archives pour faire les enquêtes en question et a prévu qu'elles seraient menées au moyen d'audiences auxquelles ceux dont les intérêts économiques sont le plus nettement en cause des deux côtés auraient le droit de comparaître. Il est évident qu'on a pensé que le moyen le plus efficace d'atteindre une conclusion juste était de permettre aux parties opposées dont les intérêts économiques étaient en jeu d'exprimer leur point de vue, de sorte qu'ils puissent s'assurer, en apportant des éléments de preuve et en présentant leurs prétentions, que la Commission prenait connaissance de tous les aspects de la question. Nous ne trouvons pas de méthode garantissant plus sûrement que la Commission n'errerait pas par manque de renseignements ou défaut d'un exposé approprié du problème. Sans aucun doute, l'expérience des pays de *common law* prouve qu'une telle méthode d'enquête a des avantages substantiels par rapport au genre de résultats que l'on peut obtenir quand une personne désignée va recueillir des renseignements au moyen d'entrevues et d'inspections.

En outre, on ne peut omettre le fait que le Parlement a estimé approprié d'aviser le gouvernement du pays de l'exportateur dès le tout début de l'affaire. Bien que nous ne le sachions pas, il se peut qu'en vertu de la convention internationale mentionnée à l'article 16(4) de la *Loi antidumping*, il soit opportun d'accorder à un tel gouvernement la possibilité de prendre part à une enquête de ce genre, du moins en qualité d'observateur.

On a aussi ajouté à l'encontre du point de vue que nous avons adopté, à savoir le droit de chaque partie à la possibilité équitable de présenter son point de vue sur l'affaire, qu'il est manifeste dans la loi que le Tribunal doit poursuivre sa propre enquête avec son propre personnel et avec l'aide des ministères ou des organismes gouvernementaux. Nous sommes tout à fait d'accord avec le fait que le Tribunal peut par différents moyens rassembler les renseignements relatifs à l'affaire qui lui est soumise. Il nous semble que la loi prévoit inclure ces éléments de preuve dans le dossier de l'affaire, dans la mesure où ils semblent utiles. Ceci doit se faire au cours des auditions, de la façon que le Tribunal choisit, à condition que la procédure adoptée soit compatible avec le fait d'accorder aux «parties» la possibilité d'être entendues (l'une des façons évidentes consiste à inviter les avocats de la commission à soumettre leur preuve et à faire valoir leurs prétentions de la même façon que les avocats d'une partie).

Un autre argument avancé à l'encontre de la conclusion voulant que le Parlement ait donné aux parties le droit d'être entendues de la façon ordinaire est que, si elles avaient ce droit, il serait impossible, soutient-on, que le Tribunal se conforme aux exigences de l'article 16(3) de la loi selon lequel il doit statuer dans les 90 jours. Nous ne voyons pas d'incompatibilité entre ces deux exigences. Le Parlement a imposé une limite de

table on the Tribunal and the Tribunal must therefore operate on a timetable which implies a limit on the time that can be afforded to the parties to make out their respective cases. It does not, however, negative the requirement that they be given an opportunity to be heard that is necessarily implied by the other provisions of the statute.

Our conclusion is, therefore, that the Tribunal made the decision under attack without having conducted the inquiry required by the statute, in that it acted on information that was not put before it in the course of hearings by the Tribunal or a single member of the Tribunal such as were provided for by the statute, with the result that no opportunity was given to the parties to answer such information (either as obtained or, where based on confidential communications, as communicated to them in some way that complied with section 29(3)) and no opportunity was given to the parties to make submissions with regard thereto.

Likewise, in the case at bar, I have concluded that the Tribunal did not conduct the inquiry required by the statute since it acted on information not disclosed to the parties with the result that the applicant was given no opportunity to respond to that information. Likewise, I am of the opinion that in the circumstances of this case, the Tribunal's refusal to grant to the applicant the adjournment asked for was an improper exercise of the Tribunal's discretion.

I am not unmindful of the difficulties imposed on the Tribunal in a case such as this involving confidentiality in respect of at least a portion of the material before it on the one hand and the other requirements of the statute which necessitate a "hearing" either in camera or in public, in the presence of such of the interested parties as desire to be present, on the other hand. However, the fact that the role of the Tribunal is, because of the provisions of the statute, difficult in some circumstances, is not to say that the Tribunal is to be excused, in such cases, from balancing these two principles that is, the concepts of confidentiality and a fair and full hearing based on full disclosure of the case to be met. In the *Magnasonic* case (*supra*), the Chief Justice has given at least two examples of the way in which this seeming conflict could be resolved by the Tribunal. The one example probably represents a minimal safeguard of confidentiality. The other example seems to represent maximum safeguards in so far as confidentiality is concerned, with an absolute minimum so far as full disclosure and a fair hearing is concerned. The minimum "full disclosure and fair hearing" safeguard referred to by the Chief Justice and quoted *supra* suggests the exclusion of all competi-

temps au Tribunal ce qui implique une limite au temps qu'il peut accorder à chaque partie pour présenter son cas. Cela n'annule toutefois pas l'exigence selon laquelle elles doivent avoir la possibilité d'être entendues, exigence qui découle nécessairement des autres dispositions de la loi.

En conséquence, nous sommes d'avis que le Tribunal a pris la décision attaquée sans avoir mené l'enquête exigée par la loi, dans la mesure où il a agi sur des renseignements qui ne lui avaient pas été communiqués au cours des audiences du Tribunal ou par un seul membre du Tribunal ainsi que le prévoit la loi; il s'ensuit que les parties n'ont pas eu la possibilité de répondre à ces renseignements (soit tels qu'ils avaient été obtenus ou, lorsqu'ils étaient fondés sur des communications confidentielles, tels que communiqués conformément à l'article 29(3)) ni de faire valoir leurs prétentions à cet égard.

De même, en l'espèce, je conclus que le Tribunal n'a pas tenu l'enquête requise par la loi vu qu'il a agi sur la foi de renseignements non révélés aux parties, d'où il suit que la requérante n'a pu y répondre. De même je suis d'avis qu'en l'espèce, le refus du Tribunal d'accorder l'ajournement demandé par la requérante a constitué un exercice inapproprié du pouvoir discrétionnaire à lui dévolu.

Je n'oublie pas les difficultés imposées au Tribunal dans des affaires comme celle-ci où, d'une part, certaines des pièces produites sont confidentielles et où, d'autre part, la loi l'oblige à tenir une «audition» à huis clos ou en public, en présence des parties intéressées qui désirent y assister. Toutefois, le fait que le rôle du Tribunal soit rendu difficile en certains cas par la loi ne le dispense pas d'équilibrer dans ces affaires le principe du caractère confidentiel et celui d'instruction impartiale et complète fondé sur la révélation de toutes les preuves en cause. Dans l'affaire *Magnasonic* (*supra*), le juge en chef a fourni au moins deux exemples de moyens que le Tribunal pourrait prendre pour résoudre ce conflit apparent. Le premier donne probablement une garantie minimale du caractère confidentiel et l'autre une garantie maximale, avec un minimum absolu quant à la divulgation complète des preuves et une instruction impartiale. La garantie minimale de «divulgation complète des preuves et d'instruction impartiale» évoquée plus haut par le juge en chef implique l'exclusion de tous les concurrents au moment où la preuve confidentielle est reçue, mais oblige à remettre à toutes les parties un résumé ou un rapport portant sur cette preuve. Et pourtant, en

tors while the confidential evidence is being taken but would require the provision to all such parties of a summary or report of that evidence. Yet, in this case, even such a minimum safeguard was not provided by the Tribunal. The Tribunal used the confidential information not available to the applicant at least to some extent, as a basis for its decision without giving the applicant any report or summary of that evidence. Similarly, I am cognizant of the strictures placed upon the Tribunal by the requirement in section 16(3) of the Act that it reach its decision within 90 days. This requirement does not, however, nullify the other requirements of the statute which give the interested parties a full and fair opportunity to be heard. Likewise, it does not, by itself, represent a justification for refusing to grant an adjournment to one of the parties, in the presence of other circumstances which, but for the time limitation, would likely have resulted in the Tribunal granting the adjournment requested.

A perusal of this transcript satisfies me that this applicant's request for adjournment was entirely justified, given the substantial nature of the evidence first disclosed to it on November 10 and the fact that a substantial amount of other evidence was not going to be disclosed to it. I am also satisfied, from the transcript, that the Tribunal was sympathetic to the request, considered it reasonable in the circumstances, and but for the time constraints referred to, would have granted the adjournment.

Accordingly, it is my opinion that the applicant's second ground of attack on the Tribunal's decision is well-founded. I would therefore allow the section 28 application, set aside the decision of the respondent dated December 31, 1976 and refer the matter back to the Tribunal for a re-hearing in a manner not inconsistent with these reasons.

* * *

LE DAIN J.: I agree.

* * *

MACKAY D.J.: I agree.

l'espèce, un tel minimum n'a pas été assuré par le Tribunal. Ce dernier s'est fondé du moins dans une certaine mesure sur des renseignements confidentiels dont la requérante ne disposait pas, sans lui remettre quelque rapport ou résumé portant sur cette preuve. Je reconnais de même que l'article 16(3) de la Loi impose des inconvénients au Tribunal lorsqu'il l'oblige à statuer dans les 90 jours. Cette exigence toutefois n'annule pas les autres dispositions de la loi, laquelle accorde aux parties intéressées le droit plein et entier de se faire entendre. Elle ne justifie pas non plus le refus d'accorder à l'une des parties un ajournement en des circonstances qui, n'était le délai à lui imparti, auraient justifié l'octroi par le Tribunal de l'ajournement demandé.

Un coup d'œil aux notes sténographiques suffit à me convaincre que cette demande d'ajournement de la requérante était entièrement justifiée, compte tenu de la nature substantielle des preuves qui lui ont été divulguées pour la première fois le 10 novembre et compte tenu aussi du fait qu'un nombre important de preuves ne devait pas lui être divulgué. Je suis aussi convaincu, à la lecture des notes sténographiques, que le Tribunal a reçu la requête avec sympathie, la considérant raisonnable dans les circonstances et que, en l'absence des contraintes de temps signalées, il aurait accordé l'ajournement.

En conséquence je suis d'avis que le deuxième motif invoqué par la requérante pour contester la décision du Tribunal est bien fondé. Je ferais donc droit à la requête présentée sur le fondement de l'article 28, réformerais la décision rendue par l'intimé en date du 31 décembre 1976 et renverrais la cause au Tribunal pour qu'il procède à une nouvelle instruction compatible avec les présents motifs.

* * *

LE JUGE LE DAIN: J'y souscris.

* * *

LE JUGE SUPPLÉANT MACKAY: J'y souscris aussi.

sequently, the Board, having determined that the respondent is an employer, I think we are bound in this action to accept their conclusion.

Whether the Board has interpreted the Act correctly is, in my view, immaterial.

While this decision is not directly applicable to the facts of the case before us, I find that it is sufficiently relevant to be binding upon this Court.

In the present case, while the contract states that an operator is an independent contractor, the terms of it are so restrictive that they create doubt as to whether he is or is not. The Board having directed its attention to the specific question, it had to determine as part of its function and found that the operators of the stores were employees, I hold that this Court has no jurisdiction to interfere.

There is a remaining question of whether or not the employees of the store operator are employees of the operator or of Mac's Milk Limited. While it was submitted that even if the operator was found to be an employee of Mac's Milk Limited for the purposes of the Act, his employees were not necessarily employees of Mac's Milk Limited and should so be ruled. This is a difficult matter to determine and in this regard the Court was cited the case of *Short v. J.W. Henderson Ltd.*, a decision of the House of Lords. That case is not of particular help because, while the Court determined that modern working conditions and regulations were such that often the old common law rules of determination of employment had to be varied, I do not find that any such working regulations are applicable in the present case. However, it would be most unusual to have an operator of a store as an employee of the company and have it provided that his employees were not employees of the company. This is a question of determination of who is or who is not an employee, and I find that this was a matter within the jurisdiction of the Workmen's Compensation Board of Ontario and is therefore not open to review in this Court.

The application will therefore be dismissed with costs.

Application dismissed.

CAPE BRETON DEVELOPMENT CORP. v. PENNY (No. 2)

Nova Scotia Supreme Court, Appeal Division, MacKeigan, C.J.N.S., Cooper and Macdonald, JJ.A. May 13, 1977.

Workmen's compensation — Appeals — Statute providing for appeal with leave from final order of Workmen's Compensation Appeal Board on question of jurisdiction or law — Decision of Board alleged to be entirely contrary to preponderance of evidence — Question of law not raised by allegation — Only decision based on no evidence would involve question of law — Workmen's Compensation Act, 1968 (N.S.), c. 65, s. 159N.

[*Cape Breton Development Corp. et al. v. Penny et al.* (1977), 75 D.L.R.(3d) 571, 19 N.S.R. (2d) 474; *Edwards (Inspector of Taxes) v. Bairstow et al.*, [1956] A.C. 14; *Ashbridge Investments Ltd. v Minister of Housing and Local Government*, [1965] 1 W.L.R. 1320; *Re Lanteigne and Workmen's Compensation Board* (1973), 41 D.L.R. (3d) 764, 7 N.B.R. (2d) 36, refd to]

APPLICATION for leave to appeal and APPEAL from a decision of the Workmen's Compensation Appeal Board of Nova Scotia, granting certain benefits to an employee.

Daniel F. Gallivan, for appellant.
G. Wayne Beaton, for respondent.
John Dauvergne, watching counsel for the Workmen's Compensation Board.

The judgment of the Court was delivered by

MACKEIGAN, C.J.N.S.:—In this and two other applications by employers for leave to appeal from the Workmen's Compensation Appeal Board, this Court by a majority judgment of March 17, 1977 (*sub nom. Cape Breton Development Corp. et al. v. Penny et al.* (1977), 75 D.L.R.(3d), 571, 19 N.S.R.(2d) 474), held that an employer, as such, had no right to appeal to the Appeal Board from a decision of the Workmen's Compensation Board and had no right to appear or be heard before the Appeal Board. It held, however, that an employer such as the appellant could, subject to application for leave, appeal to this Court "from any final decision of the Appeal Board upon any question as to its jurisdiction or upon any question of law": s. 159N of the *Workmen's Compensation Act*, 1968 (N.S.), c. 65, as amended by 1975, c. 43, s. 13.

Now, having heard further argument on resumption of this application it falls to us to determine whether the appeal proposed by the appellant raises a fairly arguable question of law or of jurisdiction.

The facts are summarized by counsel for the appellant in his factum:

> Sometime prior to November 3rd, 1976, Mr. Headley Penny, an employee of Cape Breton Development Corporation, made a claim for compensation to the Workmen's Compensation Board of Nova Scotia alleging he was suffering from pneumonoconiosis and/or silicosis. Mr. Penny was then examined by Dr. J. R. Dill and his report and Mr. Penny's medical records were reviewed by Dr. Charles A. Gordon and the latter concurred with Dr. Dill that Mr. Penny's claim should be rejected. In view of the fact that a report from Dr. A. D. MacKeen, a radiologist, indicating a possibility of pneumonoconiosis or silicosis was before the Board, the medical reports of Dr. J. R. Dill and Dr. C. A. Gordon and the medical history of Mr. Penny were reviewed by Dr. J. C. McVittie and he concurred with the aforementioned Doctors that the claim should be rejected. It should be pointed out that **Drs. Dill, Gordon and McVittie are qualified experts in the field of pneumonoconiosis or silicosis.**
>
> Mr. Penny then appealed the decision of the Workmen's Compensation Board to the Workmen's Compensation Appeal Board. ... At the appeal hearing ... the testimony of Mr. Penny was heard and the medical reports of Dr. A. J. Gardner and Dr. K. Cadegan were admitted in evidence. ...

Dr. Gardner and Dr. Cadegan, general practitioners in the coal mining area, had expressed opinions that Mr. Penny had silicosis or pneumonoconiosis. Although they are not technically specialists, I do not think that we can disregard the great experience they must have had with "black lung" cases. The record thus does not permit us to assume, as the appellant contended, that their opinions were based on little knowledge and were of little or no value.

The appellant's counsel claimed that:

> ... it becomes apparent the decision reached by the Appeal Board is entirely contrary to the preponderance of evidence and is one that no reasonable men acting judicially could have reached ...

I must respectfully point out that at least the first part of counsel's objection which I have just quoted does not, in my view, express any question of law or jurisdiction which can be appealed. It is not enough that a Board decision be "entirely contrary to the *preponderance* of evidence". A decision may be against the "preponderance" of evidence where witnesses favouring the decision's result are slightly or even considerably outweighed in number or in amount of evidence, or, some of us might think, in the strength or probative value of their testimony, by the evidence of the opposing witnesses. In such a situation, even if we might ourselves have come to a different conclusion in assessing the evidence, the Board has committed no apparent error of law which would permit this Court to interfere, under the type of limited appeal available under this legislation. 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.

Thus, if, as is here the case, a material body of evidence reasonably supports the decision, this Court cannot touch it. It follows also that where the decision is so supported by material evidence one cannot say, to use the words used by counsel, that "it is one that no reasonable men acting judicially could have reached".

It is unnecessary to try to define precisely how far a Court can go in reviewing evidence under the guise of dealing with a question of law or jurisdiction. Indeed, *Reid on Administrative Law and Practice*, p. 306, suggests that the question is "one that is, in any general sense, unanswerable". For the purposes of this case, we need only say that we should not in this case go so far as the appellant asks us to go.

I would not, however, leave any impression that what to the layman might seem to be questions of fact and evidence cannot be reviewed as questions of law or jurisdiction where gross error is shown to have occurred. 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.

Here I am only trying to say what has been, of course, better said by Lord Radcliffe in *Edwards (Inspector of Taxes) v. Bairstow et al.*, [1956] A.C. 14 (H.L.) at p. 36, *viz.*:

> ... it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

Again, Lord Denning, M.R., in *Ashbridge Investments Ltd. v. Minister of Housing and Local Government*, [1965] 1 W.L.R. 1320 (C.A.) at p. 1326, said:

> Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law.

See S. A. de Smith; *Judicial Review of Administrative Action*, 3rd ed., pp. 111-20, esp. pp. 118-20; also p. 360.

Our brethren in New Brunswick, dealing with a case under similar legislation in that Province, adopted a similar test, although perhaps one slightly narrower than those suggested above, in *Re Lanteigne and Workmen's Compensation Board* (1973), 41 D.L.R. (3d) 764 at p. 767, 7 N.B.R. (2d) 36, *per* Hughes, C.J.N.B., namely, that it was an error of law for the Workmen's Compensation Board to have "... **proceeded to make its decision entirely contrary to the evidence, or upon no evidence at all, so that the decision is one that no reasonable man could have reached**".

In conclusion, I would grant leave to appeal but dismiss the appeal without costs.

Leave to appeal granted; appeal dismissed.

1964

CRANLEIGH PRECISION ENGINEERING LTD. v. BRYANT.

Roskill J.

that P 1, unlike the draft service agreement which Bryant refused to sign, contained no express obligation not to divulge confidential information, but this makes no difference, for, were it necessary, I would not hesitate to imply into the contract of employment between Bryant and the plaintiffs the relevant obligation. It is both reasonable and necessary so to do.

The plaintiffs relied on the decision of the Court of Appeal in *Swain* v. *West (Butchers) Ltd.*[43] in support of their argument that Bryant was under a duty to report to the plaintiffs' board that of which the plaintiffs' patent agents had informed him. I need only say that my conclusion on that part of the case is, I think, consistent with that decision. I reject the argument that it was a mere error of judgment on Bryant's part not to report this. It is difficult to think that as Bryant was able to buy the Bischoff specification in October–November, 1963, for a relatively trivial sum, the plaintiffs could not have done so at least as cheaply, had Bryant given them the opportunity of so doing.

In the result the plaintiffs are entitled to the relief claimed in the statement of claim in the second action. I will hear counsel as to the form of the injunction. The plaintiffs are, or may be, entitled to damages under this head. I will also hear counsel as to the form of any declaration of entitlement to damages which may be sought.

Judgment for the plaintiffs with costs.
Injunction granted.

Solicitors: *Gordon, Dadds & Co.; John Morris, Wilkes & Co.*

[43] [1936] 3 All E.R. 261, C.A.

[COURT OF APPEAL.]

C. A.

1965
July 1, 2.

Lord Denning M.R., Harman and Winn L.JJ.

* *In re* STALYBRIDGE (CASTLE HALL NO. 7) AND (ACRES LANE AND LAWTON STREET) COMPULSORY PURCHASE ORDER, 1963.

ASHBRIDGE INVESTMENTS LTD. *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT.

Compulsory Purchase—Compensation—"House"—Whether building is house "unfit for human habitation"—Power of court to interfere with Minister's decision — Whether fresh evidence admissible — Housing Act, 1957 (5 & 6 Eliz. 2, c. 56), s. 42 (1), Sch. 3, para. 4 (3), Sch. 4, para. 2.

Evidence—Fresh evidence—Minister's decision—Compulsory purchase—Clearance area—Whether house "unfit for human habitation"—Whether fresh evidence admissible—Housing Act, 1957, s. 42 (1), Sch. 3, para. 4 (3), Sch. 4, para. 2.

C. A.

1965

ASHBRIDGE INVESTMENTS LTD. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT.

Housing—"House"—Unfit for human habitation—What is a "house"?

Crown—Minister, determination by—Whether subject to review by courts—What is a "house"?

A local authority declared an area, which included two adjoining terrace houses of similar appearance, Nos. 17 and 19, Grosvenor Street, Stalybridge, to be a clearance area for the purposes of section 42 (1) of the Housing Act, 1957,[1] on the ground that the houses thereon were unfit for human habitation. Subsequently the local authority made a compulsory purchase order in respect of the land comprised in the clearance area, which was coloured pink on the map of the order, and certain adjoining land, which was coloured grey on the map. The basis of compensation for the houses unfit for human habitation in the clearance area, the pink area, was only their site value; whereas the fit houses and other buildings in the grey area got not only the value of the site but that of the house or building on it.

Following objections by the owners of Nos. 17 and 19, Grosvenor Street, the holding of an inquiry and a report by an inspector, the Minister confirmed with modification the compulsory purchase order; but he held, on the basis of the inspector's report, that though No. 17 was a house unfit for human habitation, No. 19 had ceased to be and

[1] Housing Act, 1957, s. 42: "(1) "Where a local authority . . . are "satisfied as respects any area in their "district—(*a*) that the houses in that "area are unfit for human habitation ". . . and (*b*) that the most satisfac- "tory method of dealing with the con- "ditions in the area is the demolition "of all the buildings in the area; the "authority shall cause that area to be "defined on a map in such manner as "to exclude from the area any build- "ing which is not unfit for human "habitation . . . and shall pass a "resolution declaring the area so "defined to be a clearance area . . ."

S. 43: "(1) So soon as may be "after a local authority have declared "any area to be a clearance area, "they shall, . . . proceed to secure "the clearance of the area in one or "other of the following ways . . . "that is to say . . . (*b*) by purchasing "the land comprised in the area . . . "(2) Where the local authority deter- "mine to purchase any land com- "prised in . . . a clearance area, they "may purchase also any . . . adjoin- "ing land . . . which is reasonably "necessary for the satisfactory "development or use of the cleared "area. (3) Where the local autho- "rity have determined to purchase ". . . land comprised in . . . a "clearance area they may purchase "that land . . . compulsorily by a "compulsory purchase order made "and submitted to the Minister and "confirmed by him in accordance "with the provisions of . . . the "Third Schedule to this Act. . . . "(5) The provisions of the Fourth "Schedule to this Act shall have "effect with respect to the validity ". . . of a compulsory purchase "order. . . ."

Sch. 3, para. 4. "(3) If the Minis- "ter is of opinion that any land "included by the local authority in a "clearance area should not have been "so included, he shall in confirming "an order made under section 43 of "this Act modify it so as to exclude "that land for all purposes from the "clearance area, but if in any such "case he is of opinion that the land "may properly be purchased by the "authority under subsection (2) of "that section, he shall further modify "the order so as to authorise the local "authority to purchase that land "under that subsection. . . ."

Sch. 4, para. 2: "If any person "aggrieved by such an order as afore- "said . . . desires to question the "validity thereof on the ground that "it is not within the powers of this "Act or that any requirement of this "Act has not been complied with, he "may . . . make an application for "the purpose to the High Court, and ". . . the court . . . (ii) if satisfied "upon the hearing of the application "that the order . . . is not within the "powers of this Act or that the "interests of the applicant have been "substantially prejudiced by any "requirement of this Act not having "been complied with, may quash the "order . . . either generally or in so "far as it affects any property of the "applicant."

C. A.

1965

ASHBRIDGE INVESTMENTS LTD. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT.

so was not a house. Accordingly, the Minister took No. 19 out of the pink area on the map, the clearance area, and put it into the grey area, thereby entitling the owners to greater compensation for it. The owners applied by notice of motion to the High Court to quash the compulsory purchase order in so far as it affected No. 17, Grosvenor Street, on the ground that it was not within the powers of the Housing Act, 1957, because No. 17 was not a house or, alternatively, was not unfit for habitation. Mocatta J. held that the question whether No. 17 was a "house" within the meaning of section 42 of the Housing Act, 1957, was a question going to the jurisdiction of the Minister to confirm a compulsory purchase order under section 43 (3) of the Act in respect of it and that the court could look into the matter afresh and receive fresh evidence.

On appeal by the Minister:—

Held, allowing the appeal, that under paragraph 4 (3) of Schedule 3 to the Housing Act, 1957, it was for the Minister to determine the question whether No. 17 was a "house" which was "unfit for habitation" within the meaning of section 42 (1) of the Act; and that the court, which should limit itself to the material available before the Minister, could only interfere on the ground that the Minister had gone outside the powers of the Act or that any requirement of the Act had not been complied with.

In re Butler, Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936 [1939] 1 K.B. 570; 55 T.L.R. 429; [1939] 1 All E.R. 590, C.A. and *In re Ripon (Highfield) Housing Confirmation Order, 1938; White and Collins* v. *Minister of Health* [1939] 2 K.B. 838; 55 T.L.R. 956; [1939] 3 All E.R. 548, C.A. distinguished.

Per Lord Denning M.R. A "house" in the Housing Act, 1957, means a building which is constructed or adapted for use as, or for the purposes of, a dwelling. The court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law. The court should look at the material which the inspector and the Minister had before them, just as it looks at the material before an inferior court, and see whether on that material, the Minister has gone wrong in law. Fresh evidence should not be admitted save in exceptional circumstances.

Appeal from Mocatta J. allowed.

APPEAL from Mocatta J.

By a resolution passed on October 7, 1963, Stalybridge Borough Council declared certain areas, which they duly caused to be defined by being coloured pink on maps, to be clearance areas under Part III of the Housing Act, 1957. Included in one of those areas coloured pink were the properties known as Nos. 17 and 19, Grosvenor Street, Stalybridge, the owners of which were Ashbridge Investments Ltd. The lands were included in the clearance areas on the grounds that the houses thereon were unfit for human habitation. By further resolutions on the same day the council determined to purchase the lands comprised in the clearance areas pursuant to their powers under section 43 (1) of the Act of 1957 and to purchase certain lands adjoining the clearance areas, which lands were coloured grey on the map, under the powers conferred on them by section 43 (2) of the Act.

On November 20, 1963, the council, pursuant to their powers under section 43 of the Act of 1957, made the Stalybridge (Castle Hall No. 7) and (Acres Lane and Lawton Street) Compulsory Purchase Order, 1963, comprising the areas coloured pink and grey. Following objections by the owners, an inquiry was held on March 3, 1964, by an inspector appointed by the Minister of Housing and Local Government. The inspector made a report to the Minister on April 6, 1964. On July 28, 1964, the Minister confirmed the compulsory purchase order subject to certain modifications made under paragraph 4 (3) of Schedule 3 to the Act of 1957. One of the modifications was that No. 19, Grosvenor Street was removed from the clearance area coloured pink and put into the grey area on the map on the ground that it had lost its identity as a dwelling and so should be excluded from the area.

By notice of motion dated September 17, 1964, the owners applied to the High Court for an order (under paragraph 4 (2) of Schedule 4 to the Act of 1957) that the compulsory purchase order should be quashed in so far as it affected No. 17, Grosvenor Street on the ground that in so far as it affected those premises it was not within the powers of the Housing Act, 1957, because No. 17 was not a house or, alternatively, was not unfit for habitation. On May 24, 1965, Mocatta J. determined as a preliminary point that the question whether No. 17 was a "house" within the meaning of the Act of 1957 was a question going to the jurisdiction of the Minister to confirm a compulsory purchase order under section 43 (3) of the Act and that the court should receive evidence of the facts and reach its own conclusion thereon and was not confined to the question whether the Minister, on the evidence before him, could properly conclude that No. 17 was a house.

The Minister appealed on the grounds that the judge erred in law; that the question whether any building was a house or other building within the meaning of section 42 of the Act was in the first instance within the jurisdiction of the local authority to determine; and that on an objection to the confirmation of a compulsory purchase order under section 43 (3) of the Act it was within the jurisdiction of the Minister to determine under the provisions of Schedule 3 to the Act whether any land was properly included in a clearance area and for the purpose of such determination to decide upon the facts within proper principles of law whether or not any building was a house.

The facts are more fully stated in the judgment of Lord Denning M.R.

Nigel Bridge for the Minister of Housing and Local Government.

John Drinkwater for the owners, Ashbridge Investments Ltd.

The following cases, not referred to in the judgments, were cited in argument: *In re Bowman, South Shields (Thames*

C. A.

1965

ASHBRIDGE INVESTMENTS LTD. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT.

Street) Clearance Order, 1931 [2]; *In re Bainbridge, South Shields (D'Arcy Street) Compulsory Purchase Order, 1937* [3]; *In re City of Plymouth (City Centre) Declaratory Order, 1946, Robinson* v. *Minister of Town and Country Planning* [4]; *British Launderers' Research Association* v. *Hendon Borough Rating Authority.* [5]

LORD DENNING M.R. In this case we are concerned with slum clearance. In particular with a terrace called Grosvenor Street, Stalybridge. Some of the houses in that terrace have been determined to be unfit for human habitation and are included in a clearance area coloured pink on the map. One or two of the houses in the terrace have been determined to be fit for human habitation and coloured grey on the map. In addition to these houses there are other buildings in the neighbourhood which are also coloured grey on the map. The local authority have made a compulsory purchase order which includes both the pink and the grey areas. But there is a great difference between them when it comes to compensation. The unfit houses in the clearance area (the pink area) only get site value: see *Davy* v. *Leeds Corporation.* [1] But the fit houses and the other buildings (all in the grey area) get not only the value of the site but of the house or building on it.

It is therefore a matter of considerable importance to determine whether any particular building is a house which is unfit, or a house which is fit, or another building. We have here an extraordinary situation. In this terrace Ashbridge Investments Ltd. own two houses. They are numbered Nos. 17 and 19, Grosvenor Street, Stalybridge. They look very alike from the outside. They are both unfit for human habitation: and the local authority put them both in the pink area. But the Minister, on considering the order, has held that No. 17 is a house and that No. 19 is not a house. So he has taken No. 19 out of the pink area and put it into the grey. The owners regarded this as a very strange decision and challenge the Minister's order.

The difficulty in this case arises because the Housing Act, 1957, does not define a house except by saying [section 189 (1)] that it includes "any yard, garden, outhouses, and appurtenances "belonging thereto or usually enjoyed therewith." That does not help us much to say when a house is not a house. But it is apparent that a "house" in the Act means a building which is constructed or adapted for use as, or for the purposes of, a dwelling. It need not actually be dwelt in, but it must be constructed or adapted for use as a dwelling, or for the purposes of a dwelling. The owners here say it is very illogical to hold that in the self-same terrace No. 17 has been held to be a house and

[2] [1932] 2 K.B. 621; 48 T.L.R. 351.

[3] [1939] 1 K.B. 500; sub nom. *South Shields (D'Arcy Street) Compulsory Purchase Order, 1937*, 55 T.L.R. 409; [1939] 1 All E.R. 419.

[4] [1947] K.B. 702; 63 T.L.R. 374; [1947] 1 All E.R. 851, C.A.

[5] [1949] 1 K.B. 462; 65 T.L.R. 103; [1949] 1 All E.R. 21, C.A.

[1] [1965] 1 W.L.R. 445; [1965] 1 All E.R. 753, H.L.(E.).

C. A.

1965

ASHBRIDGE INVESTMENTS LTD. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT.

Harman L.J.

included; that was not a matter for the opinion of the Minister or the satisfaction of the local authority, but was a statutory prohibition.

Therefore, it was necessary to see on what grounds the Minister had come to this conclusion, and as he had not been bound to give any reasons, nor to publish the report of his inspector, it was absolutely necessary to have some evidence to show what must have been the materials on which he so decided. Once they came out, it was seen that this was in fact part of a park and could not have been anything else. Therefore, there was no evidence on which the Minister could reach the conclusion which he did, and the order was quashed.

Now that does not seem to me to be an authority which involves anything here. It is true that the headnote states that the Court of Appeal held that a motion of this sort was a new and independent proceeding, and not a rehearing or a retrial. That, of course, we accept. But the fact that it is a new and independent proceeding does not mean that everything is necessarily open to the court. Some of the matters are left to the Minister, some are not. It is left to his opinion to decide whether a house is a house or another building, and it is left to his opinion also to decide whether it is or is not unfit for human habitation. In both those matters he relies on his inspector's view, and it is quite clear from the inspector's report in this case that he did take both those matters into his consideration, though, be it observed, the applicants here did not take the latter point but it was taken for them by the inspector. That being so, and it appearing from paragraph 4 (3) of Schedule 3 that those matters are for the Minister's opinion, it would not be right for this court to substitute its opinion for that of the Minister; and I do not think there is any case which involves us in doing so.

Mocatta J. thought that *In re Butler*[5] did so oblige him, but I think that is a mistaken view of that case. There, too, it was absolutely necessary to have some evidence, because otherwise one could not possibly tell what the materials were on which the Minister had concluded, as he had, that the structure was a house. It does not seem to me that anything which was said in that case about that being a mixed question of fact and law really constrains us to any conclusion other than that which I have stated. If those words "mixed question of fact and law" be legitimate at all, so far as it is a question of fact it is for the Minister's opinion. He has to get from his inspector what the primary facts are and form an opinion on them.

Thus far it is for the Minister. If he could not properly arrive at that opinion on his inspector's facts, that is law; and strictly speaking the two questions are not mixed at all, they follow one on the other. We can interfere if the decision of the Minister was perverse and could not have been properly arrived at on the facts

[5] [1939] 1 K.B. 570.

C. A.

1965

ASHBRIDGE INVESTMENTS LTD. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT.

Winn L.J.

meaning of section 42 (1)—to include No. 17 under (b) and not (a) of the confirmation, introducing in this, as well as in other, respects a modification of that order made by the council.

The importance of the position of No. 17, Grosvenor Street in the order as confirmed is purely a monetary importance arising from the distinction between the effects of section 59 (2) of the Housing Act, 1957, and section 59 (4) of the same Act. The Minister, when deciding to confirm such an order as this, is given expressly, by the provisions to which my Lords have referred, power to take properties which have been submitted to him as included under (a) of such an order out of that sub-paragraph and to put them into (b), and so cause them to attract higher compensation.

It seems to me that, unless it can be postulated that the Minister's only power in relation to No. 17, Grosvenor Street was so to transfer it, and that he had no power to confirm the compulsory purchase order save after transfer of No. 17, the owners' contention must fail: by the statute itself that decision is left to the Minister and not to the court, because it is left to the Minister to decide whether or not to transfer and, therefore, to decide not to transfer.

Appeal allowed.
Costs in the appeal to be the appellants' in any event.
Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor, Ministry of Housing and Local Government; Rooks & Co. for Thompson & Cooke, Stalybridge.*

A. H. B.

[PROBATE, ETC., DIVISION.]

1965
June 22.

Payne J.

*MORRISSEY v. MORRISSEY.

Husband and Wife — Divorce — Guardian ad litem — Infant — Women named infants—Service of petition on fathers—Absence of appearance—Whether registrar a discretion to appoint a guardian ad litem — Matrimonial Causes Rules, 1957 (*S.I.* 1957, *No.* 619), *r.* 66 (6).

Law Reform—Whether necessary—Divorce—Appointment of guardian ad litem—Preferable if change introduced by new rule announced in more precise and lucid terms—Matrimonial Causes Rules, 1957, *r.* 66 (6).

In an undefended suit for divorce in which two women named were infants, the petition was served on their respective fathers, who had apparently not taken legal advice. No appearance was

H. L. (E.)
1955
THE STONEDALE No. 1.

LORD SOMERVELL OF HARROW. My Lords, I agree. On the claim under section 9 of the Manchester Ship Canal Act, 1897, I am content to base my conclusion on the ground stated by my noble and learned friend, Lord Tucker, leaving open the question whether there was any "injury or damage" to the canal.

Appeal dismissed.

Applied in MALLALIEU v DRUMMOND [1983] 1 All ER 801

Solicitors: *Thomas Cooper & Co.* ; *Ell, Dickinson & Co.*

Followed in and dicta of LORD RADCLIFFE at 36 applied in JOHNSTON v HEATH [1970] 3 All ER 915

Dictum of LORD RADCLIFFE at 36 applied in PIONEER SHIPPING v BTP TIOXIDE [1981] 2 All ER 1030

Applied in INSTUMATIC, LTD. v. SUPABRASE, LTD. [1969] 2 All E.R. 131.

Dicta of VISCOUNT SIMONDS AND LORD RADCLIFFE, at pp. 31, 33, *followed in* THOMSON v. GURNEVILLE SECURITIES. [1969] 2 All E.R. 1195.

[HOUSE OF LORDS.]

Applied in SKINNER v BERRY HEAD LANDS [1971] 1 All ER 222

Applied in O'KELLY v TRUSTHOUSE FORTE [1983] 3 All ER 456

H. L. (E.)*
1955
June 20, 21, 22; *July* 25.

EDWARDS (INSPECTOR OF TAXES) . . APPELLANT;

AND

BAIRSTOW AND ANOTHER . . . . . RESPONDENTS.

Applied in WOOLWICH EQUITABLE BUILDING SOCIETY v INLAND REVENUE COMMISSIONERS [1992] 3 All ER 737

Revenue—Income tax—Profits of trade—Isolated transaction—Adventure in the nature of trade—Purchase and sale of spinning plant—Finding of General Commissioners—Review—Principles—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

Fact or law.

Followed in THOMSON v GURNEVILLE SECURITIES [1970] 1 All ER 601

Dictum of LORD RADCLIFFE at 36 applied in GLOBAL PLANT v SEC OF STATE [1971] 3 All ER 385

In 1946 the respondents, neither of whom had previously had any transactions in machinery, embarked on a joint venture to purchase for £12,000 a complete spinning plant, agreeing between themselves not to hold it but to make a quick resale. Potential purchasers were approached and there were divers negotiations, but it was not until February, 1948, that the whole plant had been sold in several lots at a profit of £18,225 11s. 3d. There had been no advertising, but expenses had been incurred for commissions for help in effecting the sales, for insurance, renovation of the plant, office work in connexion with the transaction, travelling and entertaining and rent for the housing of the plant. The General Commissioners found that there was not an adventure in the nature of trade to justify an assessment to income tax under Case I of Schedule D to the Income Tax Act, 1918:—

Held, that the facts found led inevitably to the conclusion that the transaction was an adventure in the nature of trade and that the commissioners' inference to the contrary should be set aside.

Per Viscount Simonds: The finding that the transaction was not an adventure in the nature of trade is an inference of fact but

Applied in GLANTREE ENGINEERING LTD v GOODHAND [1983] 1 All ER 542

* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD TUCKER and LORD SOMERVELL OF HARROW.

Dictum of LORD RADCLIFFE at 36 applied in TYRER v SMART [1979] 1 All ER 321

can be set aside because it appears that the commissioners have acted without any evidence or on a view of the facts which could not reasonably be entertained. In making that inference they are to be assumed to have been rightly directed in law as to the characteristics which distinguish such an adventure, and, so far as the Scottish courts have diverged from this approach to such problems, the other approach, adopted by the English courts, is to be preferred.

Per Lord Radcliffe: Without any misconception of law appearing on the face of the case stated, the facts found may be such that no person acting judicially and properly instructed as to the relevant law could have come to the determination reached; the court may then intervene, having no option but to assume that some misconception of law is responsible for the decision. There is no divergence between the approach of the English and Scottish courts on the principle that such a determination can only be upset if it is erroneous in point of law, but there may have been some divergence in the application of that principle.

Cooper v. *Stubbs* [1925] 2 K.B. 753; 41 T.L.R. 614; *Jones* v. *Leeming* [1930] A.C. 415; 46 T.L.R. 296 and *Inland Revenue Commissioners* v. *Fraser*, 1942 S.C. 493; 24 T.C. 498 considered.

Decision of the Court of Appeal (1954) 33 A.T.C. 131 reversed.

APPEAL from the Court of Appeal (Evershed M.R., Jenkins and Hodson L.JJ.).

This was an appeal from an order of the Court of Appeal dated May 10, 1954, dismissing an appeal by the appellant, Harold Lewis Edwards (Inspector of Taxes), from an order of the High Court (Wynn-Parry J.) dated February 17, 1954, whereby an appeal from a determination of the Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the County of York on a case stated by them was dismissed and their determination was affirmed. The question in the appeal arose on two assessments to income tax made on the respondents, Harold Bairstow and Fred Harrison, in respect of certain operations carried on by them as a joint venture in partnership in the years 1946–47 and 1947–48 whereby certain spinning plant was acquired by them and disposed of at a profit. The assessments for the years ending respectively April 5, 1947, and April 5, 1948, had originally been made on Bairstow only, but it became common ground that the operations out of which the profits arose were the joint venture of both respondents and the case was argued throughout on the footing of the assessments being made in their joint names. They were in the sum of £10,326 for the first year and £5,000 for the second year. The commissioners discharged the assessments and, the appellant having declared dissatisfaction, a case was stated.

H. L. (E.)
1955

EDWARDS (INSPECTOR OF TAXES) v. BAIRSTOW.

Paragraph 8 of the case stated was as follows: "The following "facts were admitted or proved:—(1) Mr. Harrison became "aware in 1946 that a complete spinning plant was for sale at "Messrs. Whitworths at Luddenden Foot and had reason to "believe that the plant could be purchased for a reasonable "figure. He communicated this information to Mr. Bairstow "as he himself was not in a position to finance any purchase. "Mr. Bairstow expressed himself to be interested but both he "and Harrison agreed that they had no intention of holding the "plant—what they desired was a quick purchase and re-sale. "Mr. Bairstow therefore arranged for a valuation to be made by "a professional valuer in order that he might be satisfied that the "price asked by Whitworths was one on which he could make a "quick profit. He also immediately and before purchasing the "plant made inquiries as to whether he could arrange to sell the "plant even before it had been purchased. Mr. Harrison was "in touch with an Indian by name Wattal who was very anxious "to purchase some of the plant, namely, the botany spinning "section; for this he was prepared to pay £17,000 but both "Harrison and Bairstow were quite decided that they had no "intention of selling the plant piece-meal; they wanted to sell it "as a complete unit. Then Mr. Bairstow began negotiations "with the International Export Co. They said they were pre-"pared to buy the whole of the plant. On November 14 the "International Export Co. wrote to Mr. Bairstow saying that "they were prepared to buy the plant which was on the fourth "floor which was the botany spinning plant for £15,000 this, of "course, being £2,000 less than the price offered for the same "section of the plant by the Indian Wattal. The reason why "the International Export Co. were prepared to pay £15,000 "immediately for that particular section of the plant was because "although they were willing to purchase the whole of the plant "it was their intention to export it and whilst they were con-"fident that an import licence into China would be forthcoming "for the asking in respect of the botany spinning section they "were not willing to complete the purchase of the remainder of "the plant until the import licences for such remainder were in "fact forthcoming. On November 20 Mr. Bairstow on behalf "of himself and Harrison having negotiated the purchase of the "spinning plant together with two small items of warping plant "completed the purchase by the payment to Whitworths of "£12,000. On November 27, one week later, the International "Export Co. paid Mr. Bairstow the sum of £15,000 for the

"botany spinning plant. Subsequently Messrs. Bairstow and "Harrison were informed by the International Export Co. that "unfortunately the import licences relating to the remainder of "the plant could not be obtained and therefore it was regretted "that they could not purchase the remainder of the plant. Thus "Mr. Bairstow and Mr. Harrison found themselves with the "remainder of the plant on their hands (which they had "endeavoured to avoid) and this left them no alternative but to "sell that remainder in whatever market they could. (2) The "rest of the plant was sold in two other principal and two "smaller lots by February, 1948, though owing to difficulties the "last plant was not removed until March, 1949. The two "smaller lots consisted of the two items of warping plant. "(3) Mr. Bairstow was a director of a company manufacturing "leather. Mr. Harrison was an employee of a spinning firm. "Neither of them had had any transactions in machinery or "any other commodity before. (4) The profits shown by the "accounts (which form part of this case and are annexed hereto, "marked 'A') was £18,225 11s. 3d. (5) The respondents' sole "purpose in the transaction was to sell the plant at a profit. "(6) With regard to the manner in which the sales were "effected:—(A) Some commissions were paid for assistance "received in effecting sales. (B) There was no advertising. "Customers principally learnt of the existence of the plant for "sale when they came to inspect the premises which were being "advertised by the original owners as becoming vacant. (C) "About 400 spindles out of the 220,000 which the plant repre-"sented were replaced because they were missing or damaged. "(D) Insurance risks were covered by the respondents while the "plant was in their hands. (E) Some costs for renovation were "incurred because of damage by floods during their ownership. "(F) When it was seen that the transaction would not be over "in a matter of weeks, wages were paid to Mr. Bairstow's "secretary who kept books and did other office jobs in con-"nexion with these transactions. (G) The respondents incurred "expense in travelling and entertainment in meeting both the "actual persons who would eventually buy the plant and others "who did not in fact become customers. A number of adver-"tisements asking for plant, which appeared in trade papers, "were answered by the respondents in an attempt to sell the "plant remaining after the first main sale. (H) Owing to the "delay in removing the plant, rent was paid to the landlords for "the last six months during which the plant was housed, and

H. L. (E.) 1955

EDWARDS (INSPECTOR OF TAXES) v. BAIRSTOW.

"it is thought that a further amount will have to be paid to "put the premises in order."

EXHIBIT "A" Case Stated

MR. HAROLD BAIRSTOW AND MR. FRED HARRISON

JOINT VENTURE—A SPINNING PLANT EX WHITWORTH MILL, LUDDENDEN FOOT

PERIOD FROM NOVEMBER 20, 1946, TO MARCH 31, 1949

	£ s. d.	£ s. d.
To Purchase of Plant		12,000 0 0
,, Repairs and Replacements...		110 18 10
,, Commissions:		
Cornelius Lane of Bradford	4,575 4 4	
Mr. and Mrs. Horace Shaw, Highthorn, Belmont Rise, Baildon ...	751 2 0	
W. Murgatroyd — address not known, but our clients believe he has gone abroad	250 0 0	
Cash Commission to a workman	10 0 0	
		5,584* 6 4
,, Insurance		71 15 6
,, Christmas Boxes		82 0 0
,, Flood Damage Costs:—		
Wages	800 5 11	
Renovations	42 16 9	
		843 2 8
,, Wages		117 5 0
,, Stationery		8 0 0
,, Travelling and Entertainment		866 13 11
,, Rent		130 0 0
,, Reserve for cost of dilapidations, legal and accountancy charges		785 0 0
,, Profit on the transaction ...		18,225 11 8
		£37,769 13 6

* Sic.

Profit divisible:—						
Harold Bairstow ...	£9,112	15	7			
Fred Harrison ...	£9,112	15	7			
	£	s.	d.	£	s.	d.
By Sale of Plant:—						
1946—Nov. 27 International Export Co. ...	15,439	13	6			
	£	s.	d.	£	s.	d.
Brought forward	15,439	13	6			
1947—Jan. 29 H. E. Crabtree & Co. ...	80	0	0			
June 26 Bailey, Verity and Raynor ...	12,000	0	0			
Oct. 22 Stalybridge Vigoyne Spinning Co.	250	0	0			
1948—Feb. 20 Joseph Cooper Jnr.	10,000	0	0			
				37,769	13	6
				£37,769	13	6

The respondents contended that this was a transaction the profits of which could not be liable to tax under Case I of Schedule D,[1] because, as they said, in the case of *Jones* v. *Leeming*,[2] "four conditions had been approved by the court, "one of which must be present to establish liability; (A) the "existence of an organization, or (B) activities which led to the "maturing of the asset to be sold, or (C) the existence of special "skill, opportunities, in connexion with the article dealt with, "or (D) the fact that the nature of the asset itself should lend "itself to commercial transactions." And they contended that none of these conditions was present in the transaction in question.

[1] By Sch. D to the Income Tax Act, 1918: "1. Tax under this Schedule "shall be charged in respect of—(a) "The annual profits or gains arising "or accruing . . . (ii) to any person "residing in the United Kingdom "from any trade, profession, employ- "ment or vocation . . . 2. Tax under "this Schedule shall be charged under "the following Cases respectively; "that is to say—Case I—Tax in "respect of any trade not contained "in any other Schedule . . ."
By s. 237: ". . . 'Trade' includes "every trade, manufacture, adventure "or concern in the nature of trade ". . ."

[2] [1930] A.C. 415; 46 T.L.R. 296.

H. L. (E.) 1955

EDWARDS (INSPECTOR OF TAXES) v. BAIRSTOW.

They distinguished certain cases upon which the appellant relied and urged that the profit was a capital one and that there was no concern in the nature of trade that could be taxed.

On behalf of the appellant it was contended "that the buying "and selling of the plant constituted a trade or adventure in "the nature of a trade and that the profits and gains arising "therefrom were assessable" accordingly.

The commissioners expressed their original determination in these terms: "We, the commissioners, having considered the "facts and evidence submitted to us, are of opinion that this "was an isolated case and not taxable and discharge the "assessments."

When the matter came before Upjohn J. on the case stated, he remitted it to the commissioners with the intimation that they were to consider and answer the question whether the transaction, being an isolated transaction, was nevertheless "an adventure in "the nature of trade" which was assessable to tax under Case I of Schedule D, and he further directed that they should be assisted in their finding by legal argument.

The commissioners accordingly met again and, having heard legal argument and further considered the matter, signed a supplemental case in which they stated their further decision as follows:—"We find that the transaction, the subject-matter of "this case, was not an adventure in the nature of trade."

The case thus supplemented came once more before the High Court, this time before Wynn-Parry J., who took the view that he was bound by authority to hold that the question before the court was purely one of fact and that the finding of the commissioners could not be upset unless it was so perverse that as a matter of law it could not stand, and, holding that it was not possible for him to take that view of their decision, dismissed the appellant's appeal with costs.

From the decision of Wynn-Parry J. the appellant appealed to the Court of Appeal, which unanimously dismissed the appeal for the reasons given by Wynn-Parry J. In the course of his judgment the Master of the Rolls made this observation, which gave rise to much discussion before the House of Lords[a]: "Although the Scottish courts (as, I think, is clear from a cita- "tion from the judgment of the latest of them in the judgment "of Upjohn J.) may have taken a road which diverges from that "followed by the English courts, the two jurisdictions, as it

[a] (1954) 33 A.T.C. 181, 183.

"seems to me, can only now be got together again by the House "of Lords. . . ."

Cyril King Q.C. and *Sir Reginald Hills* (*Sir Reginald Manningham-Buller Q.C.*, *A.-G.* with them) for the appellant. The relevant provisions of the Income Tax Act, 1918, are Schedule D, paragraphs 1 (*a*) (ii) and 2, Case I, the rule applicable to Case I, rule 10 of the rules applicable to Cases I and II (dealing with a trade carried on by two or more persons jointly) and section 237 defining "trade." See section 149 as to cases stated. See also Income Tax Act, 1842, s. 100, Sch. D, Cases I and II, r. 3.

A joint adventure may be carried on by two or more persons on joint account as well as in partnership. This was a joint adventure.

One should approach the finding of the commissioners by distinguishing between the primary facts found and the conclusions drawn from those facts. In cases under the Income Tax Act all the facts are before the court, which is entitled to form its own opinion. Looking at the conclusion reached by the commissioners on the stated facts, the court may find that their conclusion is such that no reasonable person could have reached it. Then the conclusion can be reversed. But if on a consideration of the facts stated a reasonable man can choose one of two conclusions, that is a middle field in which the commissioners are masters: see *Bracegirdle* v. *Oxley*.[4]

This was not a profit which should escape tax on the ground that it was an isolated case: see *Californian Copper Syndicate Ld.* v. *Harris*[5]; *Tebrau (Johore) Rubber Syndicate Ld.* v. *Farmer*[6]; *Thew* v. *South West Africa Co. Ld.*[7]; *Martin* v. *Lowry*[8]; *Inland Revenue Commissioners* v. *Livingston*[9]; *Pearn* v. *Miller*[10]; *Rutledge* v. *Inland Revenue Commissioners*[11]; *Cooper* v. *Stubbs*.[12] In the English cases matters of this sort have been treated as pure fact, whereas the question here is one of mixed law and fact and the approach to it should be rather that adopted by the Scottish courts. *Cooper* v. *Stubbs*[12] does not present the same problem as the case under appeal, which is not a pure question

[4] [1947] K.B. 849, 853, 856, 856–7, 858; 63 T.L.R. 98; [1947] 1 All E.R. 126.
[5] (1904) 6 F. 894; 5 T.C. 159.
[6] 1910 S.C. 906; 5 T.C. 658.
[7] (1924) 181 L.T. 248; 9 T.C. 141.
[8] [1926] 1 K.B. 550, 559; 42 T.L.R. 233; [1927] A.C. 312; 43 T.L.R. 116.
[9] 1927 S.C. 251; 11 T.C. 538.
[10] (1927) 11 T.C. 610.
[11] 1929 S.C. 879; 14 T.C. 490.
[12] [1925] 2 K.B. 753; 41 T.L.R. 614.

H. L. (E.)
1955
EDWARDS (INSPECTOR OF TAXES) v. BAIRSTOW.

of fact. *Leeming* v. *Jones*,[13] affirmed in the House of Lords sub nom. *Jones* v. *Leeming*,[14] does not lay down any general principle. It was really a battle on Case VI and it distinguished *Cooper* v. *Stubbs*.[15] The Scottish courts have laid down the right principles in dealing with questions of mixed law and fact in cases stated: *Inland Revenue Commissioners* v. *Fraser*[16]; *Inland Revenue Commissioners* v. *Toll Property Co. Ld.*,[17] and *Inland Revenue Commissioners* v. *Reinhold*.[18]

In the present case the facts found show clearly a trading adventure entered into in the course of a scheme of profit making: see *Californian Copper Syndicate Ld.* v. *Harris*[19]; *Thew* v. *South West Africa Co. Ld.*,[20] and *Inland Revenue Commissioners* v. *Livingston*.[21] The machinery was acquired by the two men on joint account in their capacity as traders in this adventure. The mere fact that there were two men is not unimportant, since they joined together for an express purpose. The quality of their operations in holding the machinery after purchase and doing repairs brings the matter within the class of cases represented by *Martin* v. *Lowry*[22] and *Rutledge* v. *Inland Revenue Commissioners*.[23]

If the matter in such a case as this be held to be one entirely of fact the principle must include both the General and the Special Commissioners. That would be an unsatisfactory position. If the matter is not one of pure fact the court is the judge of the fact and the law and can give the cases a sense of direction. In *Inland Revenue Commissioners* v. *Fraser*[24] the court looked at the meaning of the word "trade," on which so much depends in the present case, and held that there was in the case stated an error which it corrected. *Jones* v. *Leeming*[25] does not prevent that course being adopted. That was a different case in which the House of Lords was not laying down a ruling principle. On the Scottish view of the matter a question of law must arise on the meaning of "adventure . . . in the nature of trade" in the Act. The commissioners have either wrongly construed the words of the Act on this point or they have taken a view of the facts which no reasonable man could take: see *Bracegirdle* v. *Oxley*.[26] This view was accepted by Warrington and Atkin L.JJ. in *Cooper*

[13] [1930] 1 K.B. 279.
[14] [1930] A.C. 415; 46 T.L.R. 296.
[15] [1925] 2 K.B. 753.
[16] 1942 S.C. 493; 21 T.C. 498.
[17] 1952 S.C. 387; 34 T.C. 18.
[18] 1953 S.C. 49; 34 T.C. 389.
[19] 6 F. 894; 5 T.C. 159.
[20] 131 L.T. 248; 9 T.C. 141.
[21] 1927 S.C. 251; 11 T.C. 538.
[22] [1926] 1 K.B. 550.
[23] 1929 S.C. 379; 14 T.C. 490.
[24] 1942 S.C. 493; 21 T.C. 498.
[25] [1930] A.C. 415.
[26] [1947] K.B. 489.

v. *Stubbs*.[27] In *Inland Revenue Commissioners* v. *Fraser*[28] the effect of *Jones* v. *Leeming*[29] was correctly dealt with. Section 149 (1) (*d*) of the Income Tax Act, 1918, directs that in the case stated the facts and determination shall be set forth, and it is thus intended that the court shall be able to look at both the facts and the law in reaching a determination under section 149 (2) (*a*). The crux of the matter is the respondents' contention that it is not the function of the court to review the finding of the commissioners on a question of fact unless it is entitled to take the view that they have misunderstood the law or that their finding was perverse.

In summary, the respondents are chargeable to income tax under Case I of Schedule D in respect of the profits arising to them from the joint venture of acquiring and selling the plant. That venture was a "trade" within Case I as defined in section 237 and was an "adventure" within the meaning of that word in the definition. The joint venture, the operations of which extended over 17 months and consisted of numerous particular business activities, was an adventure within the charge of income tax in Case I. In deciding, after hearing legal argument, that the joint venture was not an "adventure" within the charge, the commissioners erred in law and misconstrued the meaning of the word in its statutory context. Alternatively, in so deciding they acted without any evidence or on a view of the facts which could not be reasonably entertained. On the admitted facts, no other view is possible than that the respondents, in carrying on their joint venture, carried on an "adventure" within Case I and were therefore chargeable to income tax in respect of the profits arising therefrom.

Sir Reginald Hills following. The only way in which an assessment can be challenged is by case stated. The case stated must set out the facts: see sections 137 and 149 of the Income Tax Act, 1918. *Jones* v. *Leeming*[30] on its special facts cannot be treated as an authority governing other cases with different special facts. Lord Thankerton[31] cites *Inland Revenue Commissioners* v. *Livingston*[32] and treats it as a valid decision. The word "adventure" cannot be ignored. It has a legal meaning and there is strong ground for thinking that the legislature was familiar with it in its legal context in connexion with trading activities in a commercial and profit-making atmosphere: see

[27] [1925] 2 K.B. 753.
[28] 1942 S.C. 498; 24 T.C. 498.
[29] [1930] A.C. 415.
[30] [1930] A.C. 415.
[31] Ibid. 428.
[32] 1927 S.C. 251; 11 T.C. 538.

H. L. (E.)
1955

EDWARDS (INSPECTOR OF TAXES) v. BAIRSTOW.

Californian Copper Syndicate Ld. v. *Harris*.[33] According to the Oxford English Dictionary one meaning of "adventure" is "a "pecuniary risk, a venture, a speculation, a commercial enter- "prise," and an "adventurer" is "one who undertakes, or "shares in, commercial adventures or enterprises; a speculator." Under section 82 (*b*) of the Partnership Act, 1890, a partnership may be entered on "for a single adventure or undertaking." In the Income Tax Act, 1918, "adventure" may mean a short-term profit-making operation. A boat for a particular purpose might be specially built and sold at a large profit. That would be an adventure, even though it was an isolated transaction. In several cases it is very relevant to look at the commodity dealt with, as the question arises in what capacity it is that a man buys a particular thing. *Martin* v. *Lowry*[34] was a clear case, and if the commissioners had held the other way the court would have held that they had come to an impossible conclusion. *Cooper* v. *Stubbs*[35] was far away from this case. The word "adventure" never came into it. It was a case of the continuous carrying on of a trade. The present is a case of buying and selling. In cases of industrial accidents the question whether due care has been taken may be considered by the court as one of degree, but the mere fact that it is a question of degree does not prevent the court from saying that the requisite degree has not been reached. The courts in income tax cases require the commissioners to set out the facts and they may say that those facts do not give rise to the commissioners' conclusions. Here the legislature meant something by using the word "adventure," which is different from a "concern." If the facts here set out do not disclose an "adventure," it is hard to say what can be one.

Senter Q.C. and *Roderick Watson* for the respondents. The Crown's proposition is not clear as to the difference alleged to exist between the practice in Scotland and in England. It was not asserted that the court was entitled to retry the case. The very strong judgments of Warrington and Atkin L.JJ. in *Cooper* v. *Stubbs*[36] were against that view. The respondents adopt the suggestion of Evershed M.R. in the present case[37] with regard to *Inland Revenue Commissioners* v. *Fraser*,[38] which, properly understood, is not really inconsistent with the reasoning in the English decisions. The finding of the commissioners in that case was not a clean finding of fact. The same is true of *Inland*

[33] 6 F. 894; 5 T.C. 159.
[34] [1926] 1 K.B. 550.
[35] [1925] 2 K.B. 753.
[36] Ibid.
[37] 88 A.T.C. 131, 133.
[38] 1942 S.C. 493; 21 T.C. 498.

Revenue Commissioners v. *Livingston* [39] and *Inland Revenue Commissioners* v. *Toll Property Co. Ld.* [40] In *Inland Revenue Commissioners* v. *Reinhold* [41] the finding of the commissioners was upheld as a finding of fact.

In the present case the views expressed by Evershed M.R. and Wynn-Parry J. show that it is impossible to say here that there has been perversity in the commissioners' finding in the sense of there being no evidence at all to support it. It is impossible to say that they misdirected themselves as to the meaning of the word "adventure" in the Act or on any other legal matter. The criteria adopted in the present case accord with those applied in *Inland Revenue Commissioners* v. *Fraser.* [42] Apart from *Jones* v. *Leeming* [43] it would be hard to find a case in which the attention of the commissioners had been so clearly directed to the proper matters for consideration. This appears on the face of the case stated. This is not a case of a commodity stamped with a trading character.

Counsel for the Crown are wrong in their construction of "adventure" in the Act. It is not to be distinguished from "concern." In section 237 "adventure or concern" amount to the same thing for the present purpose. The proper question is whether or not this was an adventure "in the nature of trade," and this is for the commissioners to decide as a question of fact.

The evidence set out in the case stated shows that this was not a trading adventure. The organization was on too trifling a scale. It was confined to Bairstow's secretary. The only work done on the plant was trifling. Nothing was done to mature the asset. There was no advertising. Neither of the respondents had any special skill which placed him in an advantageous position in carrying through the transactions. The purchase and sale of the plant lent itself to capital rather than commercial transactions. The commissioners weighed up all these matters and applied the proper tests and they were justified in arriving at their finding of fact. To upset them one would have to show that they misdirected themselves, misunderstanding the law, or else that there was no evidence at all to support their finding so that it was perverse. To allow this appeal would open the floodgates to innumerable appeals from the General Commissioners all over the country.

The basic submission for the respondents is that before such

[39] 1927 S.C. 251; 11 T.C. 538.
[40] 1952 S.C. 387; 34 T.C. 13.
[41] 1953 S.C. 49; 34 T.C. 389.
[42] 1942 S.C. 493; 24 T.C. 498.
[43] [1930] A.C. 415.

H. L. (E.)
1955
EDWARDS (INSPECTOR OF TAXES) v. BAIRSTOW.

sums as this are taxable there must be a source of income. In *Jones* v. *Leeming* [44] (*Leeming* v. *Jones* [45] below) it was argued for the Crown that the transaction itself was the source of income. But that will not do here, where the Crown is alleging that the source of income is a "trade" chargeable under Case I of Schedule D.

The question, then, is whether there is here a "trade" in an extended meaning giving rise to taxable income. There is not such a trade, and if the Crown is not satisfied with the position its remedy lies in legislation. Although the case was argued for the Crown on a narrow front as though an adventure in the nature of trade was something special, it is really only one aspect of trade in the charging section. The question may arise whether a person carries on a trade or more than one trade or has ceased to carry on a trade, or whether something is a trading sale. A company may be in a different position from an individual in this field. In *Inland Revenue Commissioners* v. *Toll Property Co. Ld.* [46] importance was attached to the function of the company. In *Balgownie Trust Ld.* v. *Inland Revenue Commissioners* [47] it was said that the company was doing what it was formed to do. See also *Inland Revenue Commissioners* v. *Hyndland Investment Co. Ld.* [48] As to the distinction between sources of income in different cases, see *Bennett* v. *Marshall.* [49] In the case of an individual trading the activity is the source of income. He will have performed a number of acts and it is for the commissioners to say what those acts add up to.

The Crown's basic proposition is that this was a profit-making scheme and as such gave rise to taxable profits, but the scheme must be considered fairly in its context. *Californian Copper Syndicate Ld.* v. *Harris* [50] was a case of a company with a profit-making object. That is a special fact and what is true of a company may not be true of an individual. This was admittedly not a case of partnership. In the case of a company there is continuity and a profit-making motive, but in the case of an individual the intention to make a profit is not the relevant test: *Jones* v. *Leeming* [51] and *Graham* v. *Green.* [52] A mere association between individuals does not take the case much further; the commissioners must take account of all other factors.

[44] [1930] A.C. 415.
[45] [1930] 1 K.B. 279, 288.
[46] 1952 S.C. 387; 34 T.C. 13.
[47] 1929 S.C. 790, 794–5, 796; 14 T.C. 684.
[48] (1929) 14 T.C. 694, 699.
[49] [1938] 1 K.B. 591; 54 T.L.R. 320; [1938] 1 All E.R. 93.
[50] 6 F. 894; 5 T.C. 159.
[51] [1930] A.C. 415.
[52] [1925] 2 K.B. 37; 41 T.L.R. 371.

On the question of the jurisdiction of the court in dealing with questions of fact in cases stated, *Cooper* v. *Stubbs* [53] and *Leeming* v. *Jones* [54] (*Jones* v. *Leeming* [55] in the House of Lords) are the sheet anchor of the respondents. *Calvert* v. *Wainwright* [56] is an example of the court saying that there had been a clear misunderstanding of the law. It is not wholly satisfactory to confine the authority of *Jones* v. *Leeming* [57] to the narrow question of what is an adventure or concern in the nature of trade. The broad question is concerned with the painfully familiar distinction between fact and law. See also *Levene* v. *Inland Revenue Commissioners* [58]; *Inland Revenue Commissioners* v. *Lysaght* [59]; *Rees Roturbo Development Syndicate Ld.* v. *Inland Revenue Commissioners* [60]; *Ducker* v. *Rees Roturbo Development Syndicate Ld.* [61]; *Currie* v. *Inland Revenue Commissioners* [62]; *Inland Revenue Commissioners* v. *Dean Property Co.*, [63] and *Inland Revenue Commissioners* v. *Scottish Automobile and General Insurance Co. Ld.* [64]

King Q.C. in reply. In a case such as this, where facts and inferences play such a great part, one cannot confidently turn to other cases for guidance unless they lay down some principle. An adventure is part of a trade only in the sense that both connote trading activities. One has to find that the adventure itself is the source of the profit which it is sought to tax. It is plain on the authorities that the point can arise out of a single transaction: see *Martin* v. *Lowry* [65]; *Rutledge* v. *Inland Revenue Commissioners*, [66] and *Californian Copper Syndicate Ld.* v. *Harris*. [67]

The question is whether on the facts found, which are not in dispute, there is a trading activity and a taxable profit arising from the purchase and sale of the machinery. It is important that the object of acquiring the machinery was to get a quick profit. In pursuance of this object the transaction was carried through on joint account. One of the respondents had knowledge of the machinery and the other had the capital; they combined the two. If one buys machinery it is unlikely that one does so otherwise than for the purposes of trading. Having regard to

[53] [1925] 2 K.B. 753.
[54] [1930] 1 K.B. 279, 283–4, 301.
[55] [1930] A.C. 415, 421–2, 426.
[56] [1947] K.B. 526; 63 T.L.R. 199; [1947] 1 All E.R. 282.
[57] [1930] A.C. 415.
[58] [1928] A.C. 217; 44 T.L.R. 874.
[59] [1928] A.C. 234, 246, 247; 44 T.L.R. 874.
[60] [1928] 1 K.B. 507, 515–6; 43 T.L.R. 796.
[61] [1928] A.C. 132; 44 T.L.R. 807.
[62] [1921] 2 K.B. 832; 37 T.L.R. 871.
[63] 1939 S.C. 545; 22 T.C. 706.
[64] 1932 S.C. 87; 16 T.C. 881.
[65] [1926] 1 K.B. 650.
[66] 1929 S.C. 379; 14 T.C. 490
[67] 6 F. 894; 5 T.C. 159.

H. L. (E.)
1955
EDWARDS (INSPECTOR OF TAXES) v. BAIRSTOW.

the general background, the machinery was bought as the subject-matter of a commercial transaction. As to the question what comes within trade, see *Ducker* v. *Rees Roturbo Development Syndicate Ld.*[68]

There is no relevant distinction between an adventure entered on by two men in joint account or by one individual and an adventure by a limited company when on the facts the object of the men or the individual is not different from that of the company.

When the commissioners set down the facts proved and come to their decision, they must look at the Act and consider the statutory words. If they took the right view of the word "adven-"ture" as construed in *Californian Copper Syndicate Ld.* v. *Harris*,[69] the question arises whether on the evidence they have gone wrong. Either they formed an erroneous view of the Act or they reached a wrong conclusion on the evidence, which was all one way. This is just the sort of case which should be reviewed by the court. *Inland Revenue Commissioners* v. *Fraser*[70] affords a signpost for the right approach. In *Jones* v. *Leeming*[71] the House of Lords never intended to say that such a case as this was a pure question of fact. Further, the meaning of "adventure" was not analysed there as here and in *Fraser's* case.[72]

Their Lordships took time for consideration.

VISCOUNT SIMONDS, having stated the facts, continued: My Lords, it is clear that the revenue authorities were anxious to bring this case to your Lordships' House largely because it was apprehended that the courts of England and Scotland had to some degree diverged in their treatment of this subject. That there is some ground for this apprehension will be clear from a comparison of (for example) the observations of Atkin and Warrington L.JJ. in *Cooper* v. *Stubbs*,[1] with those of Lord Russell in *Inland Revenue Commissioners* v. *Reinhold*[2]: "In the Scottish "courts, however, it is clear that such a question" (i.e., whether a transaction is an "adventure in the nature of trade") "is "regarded as a question of law, or at least of mixed fact and "law." It is not to be doubted that, particularly in a matter of taxation, any possible conflict, even if it be only an apparent

[68] [1928] A.C. 132, 140, 142.
[69] 6 F. 894; 5 T.C. 159.
[70] 1942 S.C. 493; 24 T.C. 498.
[71] [1938] A.C. 415.
[72] 1942 S.C. 493; 24 T.C. 498.
[1] [1925] 2 K.B. 753; 41 T.L.R. 614.
[2] 1953 S.C. 49, 56; 34 T.C. 389, 394.

conflict, should be resolved, and that is the task which now falls to your Lordships.

Before, however, examining the authorities in any detail, I would make it clear that in my opinion, whatever test is adopted, that is, whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as a pure finding of fact or as the determination of a question of law or of mixed law and fact, the same result is reached in this case. The determination cannot stand: this appeal must be allowed and the assessments must be confirmed. For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand. I venture to put the matter thus strongly because I do not find in the careful and, indeed, exhaustive statement of facts any item which points to the transaction not being an adventure in the nature of trade. Everything pointed the other way. When I asked learned counsel upon what, in his submission, the commissioners could have reasonably founded their decision, he could do no more than refer to the contentions which I have already mentioned. But these upon examination seemed to help him not at all. For, if it is a characteristic of an adventure in the nature of trade that there should be an "organization," I find that characteristic present here in the association of the two respondents and their subsequent operations. I find "activities which led to the maturing of the asset "to be sold" and the search for opportunities for its sale, and, conspicuously, I find that the nature of the asset lent itself to

H. L. (E.) 1955

EDWARDS (INSPECTOR OF TAXES) v. BAIRSTOW.

Viscount Simonds.

commercial transactions. And by that I mean, what I think Rowlatt J. meant in *Leeming* v. *Jones*,[3] that a complete spinning plant is an asset which, unlike stocks or shares, by itself produces no income and, unlike a picture, does not serve to adorn the drawing room of its owner. It is a commercial asset and nothing else.

Your Lordships have examined a large number of cases in some of which the commissioners have found an adventure or concern in the nature of trade and in others have not. And in each category will be found cases in which the court has upheld and others in which the court has reversed the commissioners' decision. I do not think it necessary to review them. It is inevitable that the boundary line should not be precisely drawn, but I think that there has been no case cited to us in which the question, however framed, whether the determination of the commissioners was maintainable, could be answered more clearly and decisively than in the present case.

I must turn now to the question of the apparent divergence between the English and Scottish Courts and venture to approach it by a brief consideration of the nature of a problem which has many aspects, e.g., the finding of a jury, the award of an arbitrator, or the determination of a tribunal which is by statute made the judge of fact. And the present case affords an exact illustration of the considerations which I would place before your Lordships.

When the commissioners, having found the so-called primary facts which are stated in paragraph 8 of their case, proceed to their finding in the supplemental case that "the transaction, "the subject-matter of this case, was not an adventure in the "nature of trade," this is a finding which is in truth no more than an inference from the facts previously found. It could aptly be preceded by the word "therefore." Is it, then, an inference of fact? My Lords, it appears to me that the authority is overwhelming for saying that it is. Such cases as *Cooper* v. *Stubbs*,[4] *Jones* v. *Leeming*[5] and *Inland Revenue Commissioners* v. *Lysaght*[6] (a case of residence) amongst many others are decisive. Yet it must be clear that to say that such an inference is one of fact postulates that the character of that which is inferred is a matter of fact. To say that a transaction is or is not an adventure in the nature of trade is to say that it has or

[3] [1930] 1 K.B. 279.
[4] [1925] 2 K.B. 753.
[5] [1930] A.C. 415.
[6] [1928] A.C. 234; 44 T.L.R. 874.

has not the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made. It is a question of law what is murder: a jury finding as a fact that murder has been committed has been directed on the law and acts under that direction. The commissioners making an inference of fact that a transaction is or is not an adventure in the nature of trade are assumed to be similarly directed, and their finding thus becomes an inference of fact.

If this is, as I hope it is, a just analysis of the position, the somewhat different approach to the question in some, but by no means all, of the Scottish cases is easily explicable. For as the Lord President (Lord Normand) put it in *Inland Revenue Commissioners* v. *Fraser*[1]: ". . . the commissioners here have "either misunderstood the statutory language (which I think is "the probable explanation of their error) or, having understood "it, have made a perverse finding without evidence to support "it." He might equally well have said that the assumption that they were rightly directed in law was displaced by a finding which was upon that assumption inexplicable. The misdirection may appear upon the face of the determination. It did so here, I think, in the case as originally stated: for in effect that determination was that the transaction was not an adventure in the nature of trade because it was an isolated transaction, which was clearly wrong in law. But sometimes, as in the case as it now comes before the court, where all the admitted or found facts point one way and the inference is the other way, it can only be a matter of conjecture why that inference has been made. In such a case it is easy either to say that the commissioners have made a wrong inference of fact because they have misdirected themselves in law or to take a short cut and say that they have made a wrong inference of law, and I venture to doubt whether there is more than this in the divergence between the two jurisdictions which has so much agitated the revenue authorities.

But, my Lords, having said so much, I think it right to add that in my opinion, if and so far as there is any divergence

[1] 1942 S.C. 493, 501; 24 T.C. 498, 504.

H. L. (E.)
1955

EDWARDS (INSPECTOR OF TAXES) v. BAIRSTOW.

Viscount Simonds.

between the English and Scottish approach, it is the former which is supported by the previous authority of this House to which reference has been made. It is true that the decision of the commissioners is only impeachable if it is erroneous in law, and it may appear paradoxical to say that it may be erroneous in law where no question of law appears on the face of the case stated. But it cannot be, and has not been, questioned, that an inference, though regarded as a mere inference of fact, yet can be challenged as a matter of law on the grounds that I have already mentioned, and this is I think the safest way to leave it. We were warned by learned counsel for the respondents that to allow this appeal would open the floodgates to appeals against the decisions of the General Commissioners up and down the country. That would cause me no alarm, if decisions such as that we have spent some time in reviewing were common up and down the country. But nothing, I think, will fall from your Lordships to suggest that there is not a large area in which the opinion of the commissioners is decisive. I would myself say nothing to detract from what was said by Lord Sterndale M.R. and Scrutton L.J. in *Currie* v. *Inland Revenue Commissioners*[a] upon the kindred question whether the taxpayer was carrying on a profession, for I do not think that any more precise guidance can be given in the infinitely complex and ever-changing conditions of commercial adventures.

In the result the appeal will be allowed, but effect will be given to the special arrangement as to costs which was a condition of leave to appeal being given.

LORD RADCLIFFE. My Lords, the Crown has sought to charge the respondents with income tax upon the profit arising from the purchase and sales of certain spinning plant acquired and sold during the period 1946–48. This profit, it is said, came from a "trade, manufacture, adventure or concern in the nature "of trade" and so is taxable under Case I of Schedule D of the Income Tax Act, 1918.

The Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the County of York, to whom the respondents appealed against the assessments, determined that the "transaction" which was their subject-matter was not an adventure in the nature of trade and discharged the assessments. In the High Court the Crown's appeal was

[a] [1921] 2 K.B. 332; 37 T.L.R. 871.

dismissed by the learned judge (Wynn-Parry J.) on the ground that the determination was "purely a question of fact" and that accordingly it was not open to the court to interfere with it. The matter was treated in exactly the same way in the Court of Appeal.

I should not myself have thought that the principles which govern a case of this sort offered much scope for controversy at this date, whether they are sought for in English or in Scottish legal decisions. The only difficulty that I see arises from the fact that in some cases judges have not been at pains to distinguish in their judgments what are the conditions which make the particular question before them no more than a question of fact.

My Lords, I think that it is a question of law what meaning is to be given to the words of the Income Tax Act "trade, "manufacture, adventure or concern in the nature of trade" and for that matter what constitute "profits or gains" arising from it. Here we have a statutory phrase involving a charge of tax, and it is for the courts to interpret its meaning, having regard to the context in which it occurs and to the principles which they bring to bear upon the meaning of income. But, that being said, the law does not supply a precise definition of the word "trade": much less does it prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances. In effect it lays down the limits within which it would be permissible to say that a "trade" as interpreted by section 237 of the Act does or does not exist.

But the field so marked out is a wide one and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the Commissioners, Special or General, to the effect that a trade does or does not exist is not "erroneous in "point of law"; and, if a determination cannot be shown to be erroneous in point of law, the statute does not admit of its being upset by the court on appeal. I except the occasions when the commissioners, although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the case that they have misunderstood the law in some relevant particular.

All these cases in which the facts warrant a determination either way can be described as questions of degree and therefore as questions of fact. In this, I am only saying what was said

any different principle. Warrington L.J. said [15] that intervention was proper only "in a very clear case, where either the Commissioners have come to their conclusion without evidence which should support it, that is to say, have come to a conclusion which on the evidence no reasonable person could arrive at, or have misdirected themselves in point of law." And Atkin L.J. recognized [16] that "there may be a state of facts which can only lead to one conclusion of law." Now, if I turn to the Scottish decisions I find that the judges are stating, though sometimes in somewhat different words, the same principle. Lord Normand's judgment in the First Division of the Court of Session in *Inland Revenue Commissioners* v. *Fraser* [17] has said almost everything that needs to be said on this branch of the subject. "In cases," he says, "where it is competent for a tribunal to make findings in fact which are excluded from review, the Appeal Court has always jurisdiction to intervene if it appears either that the tribunal has misunderstood the statutory language—because a proper construction of the statutory language is a matter of law—or that the tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it." And that, in its turn, appears to me to propound the same principle as that adopted by Lord Cooper in *Inland Revenue Commissioners* v. *Toll Property Co. Ld.*,[18] where he says: "Keeping in view the nature of the transaction, the purpose with which the company was floated and the objects which were prescribed in the memorandum of association, and the whole of the other circumstances which I have briefly summarized, it seems to me that the majority of the commissioners were not entitled to reach the conclusion which they did, that they must have misdirected themselves in law, and that the true and only reasonable conclusion on the facts found is the conclusion reached by the dissenting commissioner."

My Lords, I must apologise for taking so much time to repeat what I believe to be settled law. But it seemed to be desirable to say this much, having regard to what appears in the judgments in the courts below as to a possible divergence of principle between the English and Scottish courts. I think that the true position of the court in all these cases can be shortly stated. If a party to a

[15] [1925] 2 K.B. 758, 768.
[16] Ibid. 772.
[17] 1942 S.C. 493, 497–8; 24 T.C. 498, 501.
[18] 1952 S.C. 387, 393; 34 T.C. 13, 18–9.

H. L. (E.)
1955
EDWARDS (INSPECTOR OF TAXES) v. BAIRSTOW.
Lord Radcliffe.

hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

If I apply what I regard as the accepted test to the facts found in the present case, I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade.

What other word is apt to describe the operations? Here are two gentlemen who put their money, or the money of one of them, into buying a lot of machinery. They have no intention of using it as machinery, so they do not buy it to hold as an income-producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary, they have no intention

of holding their purchase at all. They are planning to sell the machinery even before they have bought it. And in due course they do sell it, in five separate lots, as events turned out. And, as they hoped and expected they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainment and incidentals, which do in fact represent the cost of organizing the venture and carrying it through.

This seems to be, inescapably, a commercial deal in second-hand plant. What detail does it lack that prevents it from being an adventure in the nature of trade, or what element is present in it that makes it capable of being aptly described as anything else? Well, to judge by the respondents' contentions as recited in the case, there were some circumstances lacking in this deal of which the presence has been regarded as of importance in other cases. I do not think that this line of argument is ever very conclusive; but, in any event, it breaks down completely on the facts that are found. It is said that there was no organization for the purposes of the transaction. But in fact there was organization, as much of it as the transaction required. It is true that the plant was not advertised for sale, though advertisements asking for plant were answered by the respondents. But why should they incur the cost of advertising if they judged that they could achieve the sale of the plant without it? It is said that no work had been done on the maturing of the asset to be sold. But such replacement and renovation as were needed were in fact carried out, and I can see no reason why a dealer should do more work in making his plant saleable than the purposes of sale require. It is said that neither of the respondents had any special skill from his normal activities which placed him in an advantageous position for the purposes of this transaction. It may be so, though one of them was the employee of a spinning firm. In any case the members of a commercial community do not need much instruction in the principles and possibility of dealing, and I think that, given the opportunity, the existence or non-existence of special skill is of no significance whatever. It is said, finally, that the purchase and sale of plant lent itself to capital, rather than commercial, transactions. I am not sure that I understand what this is intended to mean. If it means that at the relevant period there was no market for secondhand plant in which deals could take place, there is no finding to that effect and all the facts that are recited seem to be against the contention. If it means anything else, it is merely an attempt to describe the conclusion

H. L. (E.)
1955
EDWARDS (INSPECTOR OF TAXES) v. BAIRSTOW.
Lord Radcliffe.

which the respondents would wish to see arrived at on the whole case.

There remains the fact which was avowedly the original ground of the commissioners' decision—"this was an isolated case." But, as we know, that circumstance does not prevent a transaction which bears the badges of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery.

There is only one thing more that I wish to add. The appeal was presented to us as involving a question of great importance, since it offered an opportunity of reconciling what were thought to be divergences between the views of the English and Scottish courts as to their jurisdiction in dealing with cases stated which involve the existence or non-existence of a "trade" under Case I of Schedule D. As I have tried to show, I do not think that there has been any such divergence of principle. But I do not feel equally confident that there has not been some divergence in the understanding and application of the governing principles. I find it difficult to think that, had there not been, the Crown would have been appellant in the present case.

I think it possible that the English courts have been led to be rather over-ready to treat these questions as "pure questions of "fact" by some observations of Warrington and Atkin L.JJ. in *Cooper* v. *Stubbs*.[19] If so, I would say, with very great respect, that I think it a pity that such a tendency should persist. As I see it, the reason why the courts do not interfere with commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the commissioners are the first tribunal to try an appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners

[19] [1925] 2 K.B. 753.

deal with or to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.

I agree that the appeal should be allowed.

LORD TUCKER. My Lords, I agree, for the reasons which have been stated, that this appeal should be allowed.

LORD SOMERVELL OF HARROW. My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Radcliffe, in which I concur.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Iliffe, Sweet & Co. for Laycock, Dyson & Laycock, Huddersfield.*

[HOUSE OF LORDS.]

CAMILLE AND HENRY DREYFUS FOUNDATION INC. . . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

H. L. (E.)* 1955 *July* 5, 6, 28.

Revenue — Income tax — Charity — Foreign body — Corporation incorporated abroad for charitable purposes only—Whether entitled to exemption from income tax — "Any body of persons or trust "established for charitable purposes only"—Meaning—"Trust"—Application to Scotland—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 37 (1).
Trust—Scotland.

The exemption from income tax in section 37 (1) (*b*) of the Income Tax Act, 1918, is limited to a body of persons or trust established in the United Kingdom for charitable purposes only and excludes a body or trust established elsewhere.

Inland Revenue Commissioners v. *Gull* (1937) 54 T.L.R. 52; [1937] 4 All E.R. 290 considered.

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* *Present*: LORD MORTON OF HENRYTON, LORD PORTER, LORD NORMAND, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

COURT OF APPEAL.

22ND MAY 1957.

ONTARIO CENTRAL AIRLINES LTD. v. GUSTAFSON: GUSTAFSON v. ONTARIO CENTRAL AIRLINES AND KERN.

Practice — Evidence — Rejection by trial Judge of uncontradicted evidence without reasons given for rejection — General credibility of witness not attacked — Review by Court of Appeal.

Appeal by the defendant and a cross-appeal by the plaintiff from a judgment of Ferguson J.

The appeal was heard by **Roach, F. G. MacKay** and **Schroeder JJ.A.**

G. R. Hunter, for Gustafson.

A. S. Pattillo, Q.C. and J. J. Brett, for Ontario Central Airlines Ltd. and Kern.

The action arose out of a collision between a motor launch and a float-equipped aircraft, while the aircraft was taxiing on the surface of a lake. Ferguson J. stated in his judgment, "I do not accept the pilot's testimony that it was necessary to drive the airplane at 25 miles and if he had not been driving it at 25 miles an hour he would have seen or ought to have seen Gustafson's boat . . .". The pilot had given evidence that, by reason of the wind direction, he had had to apply power to the aircraft to maintain control while taxiing.

[The case is reported only in regard to whether the trial Judge ought so to have rejected the pilot's evidence. The following passage from the judgment of **F. G. MacKay J.A.** deals with this point.]

F. G. MacKay J.A.:—The learned trial Judge gave no reason or explanation for his rejection of the pilot's evidence on this point. The pilot was not cross-examined on his statement that because of the wind conditions it was necessary for him to taxi his plane at the speed he did in order to maintain control and keep his course, **nor was there any evidence adduced to throw any doubt upon or contradict this statement.** Part of the cross-examination was directed to eliciting the information that if the plane were taxied on what is known as "the step" of the floats, the pilot would have had good forward visibility but the pilot, who had many years of experience stated that to taxi on the step downwind on the day in question would require a speed on the water of from 60 to 70 miles per hour. It was not argued before us that such a speed in the narrow confines of the Bay would be either advisable or possible. While a trial Judge necessarily

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The right of a trial Judge
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this Court in *Clark v. McCrol*
p. 174, *per* Robertson C.J.O., [

There is no evidence in the
statements of the appellant whic
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the right to believe it or not. No
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discretion, and he should indicate
he does not accept. Here, the app
there was nothing in his appearance
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In *Regina v. Laffrade*, [19
157, *per* Aylesworth J.A., 105

In these circumstances the po
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did not see fit to give any reasons.

With respect, I do not think
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cases: *Rex v. Gun Ying*, 65 O.L.R.
Rex v. Tonelli (1951), 3 W.W.R.
McCrohan et al., [1948] O.W.N. 172,

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has the widest discretion as to what evidence he will accept or reject, I think that in this case the evidence being relevant to the issue and given by a person who was qualified and competent to give it, and (1) there was no contrary or conflicting evidence on the point; (2) the evidence is not in regard to a matter of common knowledge or experience of which the Judge would be entitled to take judicial notice; (3) it was given by a witness whose general credibility has not been successfully attacked, and (4) no reason or explanation for rejecting the evidence was given by the trial Judge, it should not be rejected. As I have already indicated the pilot was competent to give this evidence. It was in regard to a matter requiring technical knowledge or practical experience of a specialized nature and in regard to the third requirement there is no finding against his general credibility — indeed the trial Judge accepts his evidence as to the speed and manner in which he operated his aircraft.

The right of a trial Judge to reject uncontradicted evidence without giving reasons for the rejection, was considered by this Court in *Clark v. McCrohan et al.*, [1948] O.W.N. 172 at p. 174, *per* Robertson C.J.O., [1948] 2 D.L.R. 283.

> There is no evidence in the present record to challenge the sworn statements of the appellant which the plaintiff put in evidence. The learned trial judge said he did not believe this evidence and that he had the right to believe it or not. No doubt a wide discretion is given a trial judge as to the evidence he will accept. It is not, however, an absolute discretion, and he should indicate his reason for rejecting evidence that he does not accept. Here, the appellant gave no *viva voce* evidence, and there was nothing in his appearance or manner of giving evidence to assist the learned judge in determining his credibility. There is nothing inherently improbable in appellant's explanation to warrant its rejection.

In *Regina v. Laffrade*, [1953] O.W.N. 154, at pp. 156 and 157, *per* Aylesworth J.A., 105 C.C.C. 5,

> In these circumstances the positive and unshaken evidence proffered by the defence is of great importance. Obviously the learned magistrate gave it no credence because he convicted the appellant. In doing so he did not see fit to give any reasons.
>
> With respect, I do not think the learned magistrate is entitled to brush aside in this manner the evidence called for the defence. While admittedly he has a wide discretion as to what evidence he will accept or reject, he ought not to reject uncontradicted sworn testimony without stating some reason for doing so, particularly where, as here, the case for the Crown rests entirely upon a statutory rebuttable presumption. This principle has been affirmed more than once in civil as well as criminal cases: *Rex v. Gun Ying*, 65 O.L.R. 369, 53 C.C.C. 378, [1930] 3 D.L.R. 925; *Rex v. Tonelli* (1951), 3 W.W.R. (N.S.) 495, 99 C.C.C. 345; *Clark v. McCrohan et al.*, [1948] O.W.N. 172, [1948] 2 D.L.R. 283.

[His Lordship then dealt with other matters not reported and decided that the appeal by the defendant should be dismissed and the plaintiff's cross-appeal should be allowed.]

Appeal dismissed and cross-appeal by plaintiff allowed.

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"18. Our counsel, John C. Murray, advised the other counsel and the tribunal that although he had come prepared to make submissions in the event an argument was made that the objectors were the alter ego of management or perceived to represent management by other employees, that since no such argument was being advanced, he would not make such submissions. The tribunal did not ask Mr. Murray to deal with this point and no other counsel responded in any way to the statment."

[36] The Board's jurisprudence regarding special relationship employees applies where it may reasonably be perceived that such employees are conduits of management. It does not depend on evidence of actual perception. Mr. Murray is an experienced labour lawyer, and was, I am sure, entirely familiar with that jurisprudence. The Board did not refuse to hear Mr. Murray's argument. It simply failed to invite him to pursue the point, when he said he was not going to deal with it. In my judgment, there was no denial of natural justice in the circumstances described in Mr. Shapiro's affidavit.

[37] For the foregoing reasons, the application is dismissed. The applicants will pay to the Union its costs as of one motion. The Board does not ask for costs.

Applications dismissed.

Editor: Debra F. MacCausland
edp

LEE v. CORPORATION OF THE CITY OF NORTH YORK
(No. 511/85)

INDEXED AS: LEE v. NORTH YORK (CITY)

Ontario Divisional Court
Steele, J.
May 20, 1986.

Summary:

A city water main located on a public road in front of the plaintiff's home broke. Water seeped into the sewer mains and flooded the plaintiff's basement. The plaintiff commenced an action in nuisance against the city for damages. The trial judge allowed the plaintiff's action. The city appealed.

The Ontario Divisional Court allowed the appeal, set aside the trial judgment and dismissed the plaintiff's claim. The court held that the trial judge erred in making findings that were unsupported by the evidence and in speculating on certain matters.

Evidence - Topic 466

Functions of judge - Acceptance of evidence - The Ontario Divisional Court agreed that a trial judge has a "widest discretion" to accept or reject evidence, but where evidence is relevant, given by a qualified and competent witness, and (1) there is no contrary evidence, (2) the evidence is not such that the judge could take judicial notice of it, (3) the witness's credibility has not been successfully attacked, and (4) no reason for rejecting the evidence is given, such evidence should not be rejected - The court not only agreed but extended the principle to the proposition that "where there is no contrary evidence, not only should it not be rejected, it cannot be ignored" - See paragraphs 6, 7.

Evidence - Topic 470

Functions of judge - Fact findings by judge - Requirement of evidence to support finding - The Ontario Divisional Court stated that "a trial judge must make findings based on the evidence before him and not speculate

as to what the situation might be" - See paragraph 8.

Municipal Law - Topic 1869

Municipalities - Liability of - Nuisance - Water runoff - Broken main - A city water main broke, flooding the plaintiff's basement - The city had statutory authority to construct the water main and defended the plaintiff's nuisance action by arguing that the break was inevitable - The trial judge allowed the plaintiff's action, holding that the city could have prevented what was claimed to be inevitable by installing plastic pipes - On appeal the Ontario Divisional Court dismissed the plaintiff's action, holding that the trial judge erred in making findings that were unsupported by the evidence and speculating on the use of plastic pipe as being a factor to defeat the defence of inevitability.

Municipal Law - Topic 1875

Municipalities - Liability of - Nuisance - Defences - Statutory immunity or authority - Inevitable consequences - The Ontario Divisional Court agreed that where a municipality has statutory authority to construct a work which causes damage, to raise a defence to a nuisance action the municipality must prove that the event causing the damage was inevitable - The court also agreed that the criterion of inevitability is not what is theoretically possible, but what is possible according to the state of scientific knowledge at the time the work was constructed - See paragraphs 9 to 25.

Cases Noticed:

Bench v. North York (City) (1986), 15 O.A.C. 152, dist. [para. 5].

Ontario Central Airlines Limited v. Gustafson, [1957] O.W.N. 340, apprvd. [para. 6].

Spencer v. Rosati et al., 50 O.R.(2d) 661, refd to. [para. 8].

Buysse et al. v. Town of Shelburne, 45 O.R.(2d) 501, apprvd. [para. 16].

Schenck et al. v. Ontario (1981), 131 D.L.R.(3d) 310, dist. [para. 18].

Allen v. Gulf Oil Refining Ltd., [1981] 1 All E.R. 353 (H.L.), dist. [para. 19].

City of Manchester v. Farnworth, [1930] A.C. 171, appld. [para. 25].

Counsel:

J.J. Aikins, for the appellant;
P. Lenardon, for the respondent.

This appeal was heard on April 24, 1986, before Steele, J., of the Ontario Divisional Court, whose decision was released on May 20, 1986.

[1] Steele, J.: This is an appeal from the decision of Judge M.S. Fitzpatrick, in which he gave judgment against the defendant (City) for damages. The cross appeal has been abandoned because the amount of damages is no longer in dispute. The sole issue in the appeal is the liability of the City.

[2] A six-inch diameter cast iron water main located on the public road in front of the plaintiff's home broke. It was a clean break and the evidence was that the cause was unknown. Water from that break seeped into the sewer mains and subsequently flooded the basement of the plaintiff's home. The trial judge found no negligence on the part of the City, and the issue is whether or not it is liable in nuisance.

[3] The engineering evidence was that the cast iron main was properly constructed in accordance with the accepted state of the art at the time of installation, and that it is impossible to operate a water main at any time that is break-proof. The evidence also was that it is impossible today to install a water system that is break-proof whether installed with plastic pipe or cast iron or any other product. It was also stated to be impossible to inspect water mains unless they are dug up, and that they cannot be tested to anticipate whether breaks will occur. It was the opinion evidence of the engineers that the particular water pipe did not need to be replaced either before it broke or even today.

[4] It was conceded that the flow of water from the water main was a nuisance. It was also conceded that the defendant had available to it the

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defence of statutory authority for the construction of the work, and that the onus was upon the City to establish that the break was inevitable.

[5] The grounds of appeal are to the effect that the trial judge rejected uncontradicted engineering evidence in coming to his conclusion, and that he totally misunderstood that evidence and relied upon the decision in **Bench v. City of North York** (unreported, Rosenberg J., Divisional Court, March 27, 1985), [now reported 15 O.A.C. 152], in which the defence evidence was not as extensive.

[6] In **Ontario Central Airlines Limited v. Gustafson**, [1957] O.W.N. 340, it was stated as follows:

> "... While a trial judge necessarily has the widest discretion as to what evidence he will accept or reject, think that in this case the evidence being relevant to the issue and given by a person who was qualified and competent to give it, and (1) there was no contrary or conflicting evidence on the point; (2) the evidence is not in regard to a matter of common knowledge or experience of which the judge would be entitled to take judicial notice; (3) it was given by a witness whose general credibility has not been successfully attacked, and (4) no reason or explanation for rejecting the evidence was given by the trial judge, it should not be rejected. ..."

[7] I agree with the above statement and extend it to the proposition that, where there is no contradictory evidence, not only should it not be rejected, it cannot be ignored.

[8] A trial judge must make findings based on the evidence before him and not speculate as to what the situation might be (see **Spencer v. Rosati et al.**, 50 O.R.(2d) 661, at 664).

[9] The trial judge held that the City had statutory authority to construct the water main. He then stated as follows:

> "The defendant has failed to show that the flooding of the plaintiff's basement was the inevitable result of the operation of the system.
>
> "It is no defence to the nuisance claim that all possible skill had been employed to prevent the operation complained of from being a nuisance.
>
> "The defendant's statutory authority did not authorize the flooding of the plaintiff's basement; flooding is not the inevitable consequence of a water system.
>
> "In 15 years there had been 16 breaks on Byng Ave.; on the plaintiff's block there were 4 breaks in 15 years. The defendant did not produce any evidence as to the number of breaks before 1969 so there is no evidence before the court as to when the first breaks occurred or as to how many between the early 1950's and 1969. The defendant concluded that the number of breaks did not warrant action other than repair. The defendant is entitled to reach such a conclusion, but the court finds that it was open to them [sic] to have taken other action that could have prevented what is now claimed as inevitable. Cast iron pipes are now replaced by plastic pipes.
>
> "As stated by Mr. Justice Rosenberg in his decision on the appeal of **Phillip Bench v. Corporation of the City of North York**:
>
> 'The point at which water mains are replaced is one which has to be determined by economic considerations. It was established in this case, that the replacement of the complete North York Water System with plastic pipes was not economically feasible. However, in determining that a section should be replaced when a certain number of breaks occur within a given period, the defendant was electing to reject a more expensive program of replacing pipes when a lessor number of breaks occurred in the

same period. Part of the economics of the decision had to be compensating those owners whose premises were damaged as a result of the decision. An earlier replacement would have been more expensive but the expense of an earlier replacement policy did not create the defence of inevitable consequence.'

"The court finds that in the case before it that the expense of an earlier replacement policy does not create the defence of inevitable consequence."

[10] With respect, while there was no direct evidence as to the exact number of breaks in each year prior to 1969 there was evidence by the City's engineer as follows:

"I don't think there was any year we had more than two breaks on that particular."

Obviously, this reference was to breaks on that particular water line on Byng Avenue, and does not indicate any significant lesser number of breaks per year than subsequent to 1969.

[11] I cannot read the trial judge's reasons in any other way than to the effect that he was of the opinion that the City could have taken action to prevent what was claimed as inevitable by replacing the cast iron pipes by plastic pipes. If that was his conclusion it was in error because there was no evidence to support it. In addition, the evidence clearly showed that some flooding was the inevitable consequence of constructing a water system.

[12] The water main in question was constructed in the late nineteen forties or early nineteen fifties and was slightly older than the average age of water main in the municipality. There was nothing abnormal about it. The engineer of the City gave evidence with respect to the inevitability of breaks in a water main as follows:

Transcript p. 68:

"Q. Now, taking into account your engineering and practical knowledge, the City of North York and the operation of the water works system, and your professional qualifications, do you know of any scientific, technical, or engineering means whereby a water main system pipe can be constructed, manufactured, or installed to prevent failure, and to be failure proof at this time today?
A. Not to my knowledge.

Q. And what about the late 1940's or early 50's when this pipe was installed?
A. Definitely not."

and at p. 77:

"Q. Now, you said that since 1978, there had been a different type of pipe that's being installed. That's a plastic pipe. Now, was the reason for that that it's -- the plastic pipe is superior to the cast iron pipe? Is that why it is being used now?
A. Well, first off, you cannot buy a cast iron pipe today, very, very difficult to buy. It's practically impossible to get it. That alarm pipe we've had problems with, plastic pipe is the only alternative, and we don't know right at the present time whether or not the plastic pipe is going to be -- give us problems in the future."

and at p. 86:

"MR. AIKINS:
Q. And assuming you replaced it with plastic pipe, would that have guaranteed there would have been no breaks on that street?
A. No."

[13] In addition, the water works engineer of the City of Scarborough, another professional engineer, gave evidence as follows:

Transcript p. 90

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and at p. 91:

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upon your engineering knowledge and your experience with Scarborough whether it's possible either scientifically or technically, or by use of engineering methods to construct or manufacture, install a pipe so that it is 100 percent failure proof today?

A. No, I couldn't give a guarantee like that, no.

Q. I take it it was impossible in 1945?

A. No.

Q. Fifties even?

A. No.

Q. No, and given Mr. Skinner's evidence as to the number of breaks that occurred in this particular pipe in the 15 year period, would you consider that to be abnormal?

A. No, I checked against our own statistics, and it's pretty well in line with what we're finding, and what we do is we compare it to the number of breaks per mile or kilometer per year, and the figures here, I believe, work out to .8 breaks per mile per year, and that is pretty well in line with what we found.

Q. Given what occurred in this case -- the number of breaks, would you in Scarborough in the same circumstances have then replaced the pipe?

A. No."

and at p. 91:

"Q. Sir, as a pipe gets older, does it have more breaks in it usually?

A. It won't be necessarily true.

Q. It's not necessarily true?

A. I don't really have statistics where I can say it doesn't, but just trying to assemble something at the moment here I don't think would be necessary.

. . . . .

"Q. So, if the pipe in this particular case was younger than the approximately 34 years that it was, say it was a couple of years old, would you agree with me that the likelihood of a similar(ph) break occurring in that pipe would probably be less?

A. No, I couldn't make a general statement like that, referring to one particular installation, that wouldn't be fair."

[14] There is no other evidence respecting the quality of plastic pipe and therefore there is no evidence that indicates that plastic pipes would prevent inevitable escapes of water. To this extent the trial judge erred.

[15] While many of the facts recited in the decision of the trial judge in the **Bench** case are similar to the facts in this case, it is clear that there was not the extent of professional engineering evidence given as to the inevitability of breaking water mains. Each case must be determined upon its facts and, if the defendant in the **Bench** case did not put in a proper defence in that case, it should not be prejudiced in the present case where it has put in extensive defence evidence. Each case must be decided upon the facts presented to the court.

[16] I agree with the principle stated in **Buysse et al. v. Town of Shelburne**, 45 O.R.(2d) 501, at 509, as follows:

"Because of s. 30, prima facie Shelburne is entitled to assert the defence of statutory authority. However, that is not the end of the matter. The cases establish that to succeed on that defence the nuisance must be the inevitable consequence of the authorized undertaking, and the burden of proving inevitability lies on the municipality. In **City of Manchester v. Farnworth**, [1930] A.C. 171, at p. 183, the principle was stated by Viscount Dunedin as follows:

'When Parliament has authorized a certain thing to be made or done in

> a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.'"

[17] In the present case the defence of statutory authority is conceded to be available to the defendant.

[18] In **Schenck et al v. The Queen in Right of Ontario** (1981), 131 D.L.R.(3d) 310, the court dealt with a claim for damage to fruit lands as a result of salt being sprayed from the provincial highway adjacent thereto. The court found that it was not an inevitable consequence of damage to adjacent lands by reason of placing salt on the highway. There was no legislative requirement that salt be used but only that the highways be kept clear. The court found that the legislation did not specify the details by which legislative purpose of road maintenance was to be implemented. At p. 323 Robins, J., stated as follows:

> "... It is not incumbent on the plaintiffs to formulate alternative deicing procedures, it is for the Government to demonstrate that no practical alternatives to salt exist and no feasible procedures can be devised to eliminate the infringement of the plaintiffs' interests and, consequently, that it has no real choice but to treat the highways neighbouring the fruit farms in the identical manner highways generally are treated throughout the Province.
>
> "The inevitability argument here is essentially one of money. The costs that would be incurred in the limited use of other deicing compounds, including extra handling costs, are, it is true, greater than the cost of salt. But on the material before me it cannot be concluded that additional expenditures would be such as to render unfeasible the continuation of the deicing programme or to significantly reduce the Ministry's capacity to provide high standards of winter road care. In applying the common sense test of inevitability of **Manchester v. Farnworth**, supra, to this fact situation regard should be had, not only to expense, but to the gravity of the harm suffered and other factors relevant to the adjustment of conflicting interests in the law of nuisance. ..."

Further, at p. 324, he stated as follows:

> "... Further, it is to be observed (though I think it unnecessary to go this far here) that in the most recent House of Lords decision concerning the defence of legislative authority, **Allen v. Gulf Oil Refining Ltd.**, supra, Lord Edmund-Davies stated as his opinion at p. 359 that it is 'for the defendant to establish that any proved nuisance was wholly unavoidable, and this quite regardless of the expense that might necessarily be involved in its avoidance.'"

[19] In my opinion, the references to the damage being unavoidable regardless of expense was obiter both in the **Schenck** decision and in **Allen v. Gulf Oil Refining Ltd.**, [1981] 1 All E.R. 353 (H.L.), and is not binding upon me. In any event, the facts in the **Schenck** case are substantially different from the evidence that was presented to the court in the present case. They do not show inevitability of damage.

[20] There was evidence that municipalities do replace water mains at a period of time but at no fixed time. The evidence was that they are not replaced unless they have ceased to function in the way they were intended to function when they were installed. There was conflicting evidence as to

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whether that was because it was a question of expense or whether it was a question of good economics. There was no evidence as to when any particular pipe should be replaced or when the pipes were replaced as a general factor. This evidence would not have been of much significance on the issue of nuisance but it might have been on the issue of negligence, which was not found. In fact the evidence was that breaks in the percentage or numbers indicated on the facts in this case were not sufficient to warrant replacing the water mains.

[21] Counsel for the respondent, during argument, agreed there was no evidence to show there was any nuisance or lack of inevitability when the water main was first installed, and in effect acknowledged that if the water main had broken for unknown reasons in the first year after construction the defence of inevitability would be available. However, he submitted that, with evidence of breaks over the years, such defence of inevitability is lost. He argued that it was merely a question of when that defence is lost and when the municipality must replace all water mains or face absolute liability. I have difficulty in following that proposition because, in effect, it would mean that only after the loss of the defence would it become an economic balancing act between the cost of replacement to the municipality and the damage to individual property owners. I do not believe this is the case because in nuisance the economic factor is not a proper consideration. It may be a proper factor in considering negligence, but not nuisance.

[22] The respondent also submitted the critical time in determining whether the defence of inevitability was available was at the time the water escaped due to the break, and not at the time the water main was constructed some years before. The municipality has the statutory authority not only to construct but to maintain the water mains. He submitted that the water mains themselves do not create the nuisance but that it is the leakage from them that creates the nuisance and the defendant must show that at the time of leakage it was inevitable. If this were true then logically if a cast iron pipe broke one year after construction the defence of inevitability would have to be dealt with then. If it broke twenty years later the question would be dealt with then, and if it broke fifty years later the question would be then. At no time would the municipality be in any position to know whether or not it was inevitable because the inevitability is that it will break some time but not at any given time. This cannot be the answer to the question.

[23] In my opinion the relevant time to consider the defence of inevitability is when the work was constructed, and in the present case the defence is available.

[24] In the present case the evidence does not show more breaks per year as time passed. If the main broke so frequently that it was known that it would likely break again, it would be an issue of negligence, not nuisance.

[25] The respondent also submitted that plastic pipes had been used in the municipality in the last eight years and, by using them, the City could have avoided inevitable breaks. He submitted that the municipality should have replaced all its cast iron pipes or face liability for any breakage in the future. The evidence before the trial court does not support the proposition that plastic pipes would avoid inevitable breakage. Even if plastic pipes were infallible, because one builds a better mousetrap does not mean a municipality must immediately acquire that mousetrap or lose its defence of inevitability because it continues with the former suitable product. The critical time is when the work was constructed. In this regard I rely on the statement of Viscount Sumner in **City of Manchester v. Farnworth**, [1930] A.C. 171, at 199:

> "... It was further contended that the defendants were not obliged to keep their apparatus always up to the

latest improvements, or to become inventors themselves (for which **Vaughan v. Taff Vale Ry. Co.** [5 H.&N. 679] and **National Telephone Co. v. Baker** [[1893] 2 Ch.186, 203] were cited), nor were they prevented from abandoning tall chimneys with strong natural draught in favour of shorter chimneys with slower mechanical draught, if experience showed that higher efficiency would thus be obtained. I do not think that **Vaughan's** case is in point here. There the railway company had already in use an efficient spark arrester of an approved pattern and accordingly were not in default merely because there had come on the market another contrivance, newer and somewhat better. ..."

[26] For these reasons I am of the opinion that the learned trial judge erred in making findings that were unsupported by the evidence and speculating on the use of plastic pipe as being a factor to defeat the defence of inevitability. On the evidence properly before him the action should have been dismissed. I realize the result I reach is different than that reached by Rosenberg, J., in **Bench v. City of North York**, supra, but the evidence in this case was substantially different with respect to the defence of inevitability than the evidence that can be gleaned from the reasons of the trial judge in the **Bench** case.

[27] For these reasons the appeal is allowed and the judgment is set aside and the action is dismissed with costs, both here and below.

Appeal allowed;
Action dismissed.

Editor: Elizabeth M.A. Turgeon
edp

BENCH v. CORPORATION OF THE CITY OF NORTH YORK

INDEXED AS: BENCH v. NORTH YORK (CITY)

Ontario Divisional Court
Rosenberg, J.
March 27, 1985.

Summary:

The plaintiff's premises were damaged as a result of a leak in the defendant city's water main. The plaintiff commenced an action in nuisance against the city for damages. The trial judge allowed the plaintiff's action. The city appealed.

The Ontario Divisional Court dismissed the appeal.

(But see Lee v. North York (City), 15 O.A.C. 145, where the Divisional Court set aside judgment in favour of a city resident who also had water damage from a broken main).

Municipal Law - Topic 1869

Municipalities - Liability of - Nuisance - Water runoff - Broken main - The Ontario Divisional Court agreed that the flooding of a person's premises as a result of a municipal water main break is actionable nuisance - The court also stated that where the municipality was acting under statutory authority in constructing and maintaining the water main, the defence of inevitable consequence was available to it and the municipality had the onus of proving that any damage was the result of an inevitable consequence - See paragraph 7.

Municipal Law - Topic 1875

Municipalities - Liability of - Nuisance - Defences - Statutory immunity or authority - Inevitable consequences - A plaintiff's house was damaged by water from a city's broken water main - The Ontario Divisional Court held that the flooding was actionable nuisance and since the city was acting under statutory authority, the defence of inevitable consequence was available to it - The court affirmed that the city did not establish the defence of inevitable consequences and

DOWLUT v. COMMISSIONER OF SOCIAL SERVICES

Ontario Supreme Court
[Divisional Court],
Henry J.

Heard - March 22, 1985.
Judgment - March 28, 1985.

Appeals - Appeal from decision upholding suspension of welfare - Treatment of evidence in determining issue of fact not question of fact alone but raising appealable issues of law - Board improperly rejecting affidavit evidence, directing testimony without finding of credibility and attributing too much weight to evidence.

Mrs. D, a recipent of welfare under the Ontario General Welfare Assistance Act, had her assistance as a sole parent and head of a family suspended because she was allegedly no longer eligible. It was said that her husband was living in the family home. On review, the Social Assistance Review Board (before which Mrs. D had the onus) affirmed this decision of the commissioner. In so doing, it relied upon evidence that D and her husband had bought furniture together, information received by the Housing Authority, and the fact that Mr. D gave the family address on both his car registration form and at his place of employment. It discounted affidavit evidence to the contrary by friends and neighbours and other explanatory evidence by Mrs. D herself and others. Mrs. D then appealed to the Ontario Divisional Court. It was contended by the Commissioner that the issue of whether Mr. D was living in the family home was a question of fact alone not subject to appeal. On behalf of Mrs. D it was argued that the board's treatment of the evidence revealed an appealable error of law.

Held - Appeal allowed. Matter remitted to the commissioner to be dealt with on the basis that Mr. D was not living in the family home on the relevant date.

It was erroneous in law for the board to reject Mrs. D's testimony that her husband was not living with her and upon which she was not cross-examined without making a clear finding as to credibility. The board also erred in law in its summary and arbitrary rejection of the prima facie true affidavit evidence of friends and neighbours as well as the affidavit evidence of another friend with respect to the

purchase of the furniture. As for the use by Mr. D of the family address at his place of work and on his car registration, this was extremely frail and had been dealt with by affidavit. Moreover, the board was incorrect in law to reject the affidavits of Mrs. D and another because they could not state where Mr. D was living. While Mrs. D had to prove that Mr. D was not living with her, she did not have to prove where he was in fact living. In deciding the question of fact, the board had therefore erred in law. Moreover, in the circumstances the Court was in as good a position as the board to decide the issue of fact, the Court ruled that Mrs. D had discharged the onus of proof placed upon her to establish that Mr. D was not living with her.

While the board was not bound by the strict rules of evidence, it was an adjudicator in an adversary process deciding upon a matter of statutory entitlement, not an investigator seeking ways to uphold the first instance decision. In particular, it should not reject admissible affidavit evidence on the basis of credibility unless there was other evidence that controverted the affidavits which could be tested for credibility. Under the adversary system, it was for counsel and/or the parties to produce evidence calling into question the credibility of affidavit testimony.

Cases considered

Proc and Min. of Community & Social Services, Re (1974), 6 O.R. (2d) 624, 19 R.F.L. (2d) 82, 53 D.L.R. (3d) 512 - referred to.

Warwick and Min. of Community & Social Services, Re (1978), 21 O.R. (2d) 528, 5 R.F.L. (2d) 325, 91 D.L.R. (3d) 131 - referred to.

Willis v. Min. of Community & Social Services (1983), 40 O.R. (2d) 287 (Ont. Div. Ct.) - referred to.

Statutes considered

Family Benefits Act, R.S.O. 1980, c. 151, s. 15(4).

General Welfare Assistance Act, R.S.O. 1980, c. 188, ss. 7(1), 10, 11.

Statutory Powers Procedure Act, R.S.O. 1980, c. 484.

Regulations considered

General Welfare Assistance Act, R.S.O. 1980, c. 188 - R.R.O. 1980, Reg. 441, ss. 1(1)(f), 6(1).

Canadian Abridgment (2nd) Classification

Administrative Law IV. 9.

Public Health and Welfare IV.

APPEAL from decision of Social Assistance Review Board affirming suspension of welfare assistance.

J. McKean, for appellant.
K.F. Christie, for respondent.

(No. 717/83)

March 28, 1985. HENRY J. (orally): - Mrs. Dowlut, the appellant, was granted general welfare assistance on December 31, 1981, as a sole parent and head of a family by the commissioner of Social Services (Metropolitan Toronto) under the General Welfare Assistance Act, R.S.O. 1980, c. 188, and Regulations. He suspended the assistance on February 24, 1983, on the ground that she had ceased to be eligible (s. 10 of the Act). The reason assigned was that her husband was then living in her home. She requested a hearing and review of that decision by the Social Assistance Review Board under s. 11 of the Act which affirmed the commissioner's decision. She appeals to this Court.

The grant of welfare assistance is made under s. 7(1) of the Act which provides:

> "7(1) A municipality shall provide assistance in accordance with the Regulations to any person in need who resides in the municipality and who is eligible for such assistance."

The payments of assistance to a person in need are dependent on continuing eligilbity, the criteria for which are prescribed in Reg. 441 made under the Act. Section 6(1) of the Regulations prescribes that a "dependant" is not eligible for assistance as the head of a family. An adult dependant by definition (s. 1(1)(f)) expressly includes "the female spouse living with the male spouse". Parties who are legally married are spouses and no further test is required. If they are living together the wife is by definition a dependant and so is ineligible for assistance. The policy of this legislation is that where a family relationship exists, the application for assistance must be made by the head of the family - dependent members cannot do so as they are ineligible.

In such circumstances the only decision to be made in determining whether an applicant or a recipient is eligible for assistance or for continued assistance is one of fact, that is, whether the spouses are living together.

In the case of Mrs. Dowlut, the appellant, the Social

Assistance Review Board, from whose decision this appeal is brought therefore had to decide a simple issue of fact - whether her husband at or within a reasonable time before the suspension of welfare assistance on February 24, 1983, was living with her. The onus was on Mrs. Dowlut to satisfy the board that her husband was not living with her. That decision must be made on the evidence as a whole including the weight given to individual portions of it in the board's opinion.

In the final paragraph of its decision (infra) the board, by its language, indicates that it thought it should deal with the tests applicable to an informal spousal arrangement (as in Re Proc and Min. of Community & Social Services (1974), 6 O.R. (2d) 624, 19 R.F.L. 82, 53 D.L.R. (3d) 512 [affirmed without written reasons 6 O.R. (2d) 624n, 53 D.L.R. (3d) 512n (C.A.)] and Re Warwick and Min. of Community & Social Services (1978), 21 O.R. (2d) 528, 5 R.F.L. (2d) 325, 91 D.L.R. (3d) 131 (Ont. C.A.); that confusion does not vitiate what in my opinion was a finding of fact that Mrs. Dowlut's husband was living with her. The board need not have gone that far; it need only be satisfied on all the evidence that the appellant had not discharged the onus of showing that her husband was living elsewhere; clearly the board was not so satisfied. As to this there are two points as counsel for the commissioner submits:

(a) The issue is one of fact alone and is not appealable.

(b) In any event, the board reviewed all the evidence and weighed it; it reviewed the submissions of counsel; on the evidence it was open to the board to decide as it did and its decision should not be disturbed.

However, Mr. McKean, counsel for the appellant, also raises issues of law with respect to the board's view of the evidence before it; he says that the board applied arbitrary and unjust criteria in weighing and assessing the evidence.

The evidence before the board consisted principally of the following:

1. The commissioner's written submission of evidence in the manner permitted by the legislation that:

(a) On November 12, 1982, the department received information from Household Finance Corporation that the appellant and Mr. Dowlut, her husband had purchased furniture worth $2,800.

(b) On February 24 the Metropolitan Toronto Housing Authority received information that the appellant spouse was in her home and was driving a car; a check of the registration showed the same address as that of the appellant.

(c) Mr. Dowlut's employer verified his address as that of the appellant.

(I pause here to indicate that this was the case that Mrs. Dowlut had to meet before the board.)

2. The affidavit evidence of several friends and neighbours in the appellant's apartment building who in summary say that over the previous several months (which would extend back at least to January or February 1983) they had not seen Mr. Dowlut in the building and the spouses were separated.

3. It is common ground that Mr. Dowlut occasionally went to the apartment to visit the children as he was entitled to do.

4. The affidavit of Mr. Boros deposes that the furniture was to be purchased with a loan from him to Mrs. Dowlut who was a good friend but the furniture was too expensive and the money was returned. His evidence was that the spouses had been separated since about the end of 1981, and that Mr. Dowlut used Boros to pass messages to his wife, the appellant.

5. Brook Physick, a legal worker who interviewed the husband at the beginning of May 1983 at his place of employment at Agriculture Canada, in her affidavit deposed that the husband told her that he had separated the end of 1981 and went to Guyana for the period January to May 1982; on his return he became transient but would not give any of his addresses; because of his transient mode of living he had not changed his address on driver's licence or car insurance.

6. Mrs. Dowlut deposed in her affidavit evidence that her husband left her home at Christmas 1981 and went to Guyana. On his return in the summer of 1982 he visited the children several times a week. Violent arguments developed and at about Christmas 1982 he stopped coming to the apartment altogether. The failure of the husband to change his address for his employment records and other documentary purposes is not a matter within her control. Although she was present and testified briefly before the board she was not cross-examined on the vital question whether on or a reasonable time before February 24, 1983, her husband was living with her.

7. The board either rejected or gave little weight to the evidence led by the appellant. While it is the board's function

to consider and weigh the evidence, they must do so fairly and impartially and according to principle as judges. After analyzing all the evidence and submissions they said:

> "I note that in considering the statements of the appellant, that her memory of where he worked was less than credible. I am of the opinion that the Affidavits of neighbours and/or friends are not objective. I note that Exhibit F [Boros] would be irrelevant because it does not in fact state where Mr. Dowlut resides. I note that in her Form 1, Mrs. Dowlut failed to show where Mr. Dowlut lives but note on the Form 1 that she knew someone who could prove his residence. This then would make Exhibit F less than credible.
>
> Following careful consideration of the written submission made to the Board of all evidence presented to the Board for or at the Hearing, I find as a fact that there is a continuing economic relationship as shown in the agreement of the purchasing furniture, a sexual relationship agreement as he is the father of the two children, and a social relationship from time to time. I find as a fact on the preponderance of evidence, that Mrs. Dowlut is living as a spouse of Mr. Dowlut as defined in the Regulation made pursuant to the General Welfare Assistance Act."

As to this I have the following comments: First, Mrs. Dowlut appeared and testified briefly before the board. She was not cross-examined on her evidence that her husband was not living with her during the months immediately preceding the suspension of her welfare assistance on February 24, 1983. A representative appeared for the commissioner and counsel for Mrs. Dowlut; but the principal line of questioning was undertaken by the two members of the board, mostly on matters irrelevant to the issue before them. They appear to have rejected her evidence entirely. To do so required, in the case of this essential witness, a clear finding on credibility which they did not make. They say only that she did not seem clear about her husband's place of work and that a witness that she had stated could prove where her husband lived was not called. Her counsel frankly acknowledges that he interviewed this witness and that he could not prove the place of residence of the husband. But the board did not make an overall finding of credibility in rejecting her evidence on the vital point of her husband's whereabouts, upon which she was not cross-examined by her adversary. Indeed, the board as I view the transcript, usurped the role of counsel.

Stan F was cross X.

Steno cried on other points not rejected

of the matrimonial home on his driver's licence and with his employer, I refer simply to the remarks of Saunders J. in Willis v. Min. of Community & Social Services (1983), 40 O.R. (2d) 287 at 293 (Ont. Div. Ct.), to show the frailty of that type of evidence. The affidavit of Brook Physick reflects the husband's reason for not doing so (by reason of his transient lifestyle); the board rejected that affidavit as irrelevant because it did not state where the husband was residing; but that evidence was relevant in that it explained why Mr. Dowlut had not corrected his address with the Ministry of Transportation and Communications and his employer. The affidavit was clearly relevant and was not controverted and its rejection can only be viewed as error in law or as arbitrary.

Fourth, the board rejected not only the affidavit of Brook Physick but also that of Mrs. Dowlut on the ground that neither could state where the husband was living. It was of course not necessary for Mrs. Dowlut's case that she or her witnesses identify his whereabouts; it was necessary only to demonstrate that he was not living with her. The board therefore misapprehended the test that they were obliged to apply which is reversible error.

The issue raised in the appeal to which I have just referred is an issue of law upon which an appeal lies to this Court. I am persuaded that the board erred in law in its rejection of relevant evidence on the issue of fact and its decision should be set aside.

On this issue this Court is in as good a position as the board to decide the issue of fact. The board has not decided the issue of her credibility when she says that her husband was not living with her on or shortly before her welfare assistance was terminated. Accepting the affidavit evidence improperly rejected and her own evidence, I am of the opinion that Mrs. Dowlut has discharged the onus on the balance of probabilities of showing that at the relevant time her husband was not living with her.

The matter will therefore be referred back to the commissioner with instruction to dispose of this case on the basis that her husband was not living with her at the relevant time, that is on or for a reasonable period before February 24, 1983, when the welfare assistance was suspended.

I cannot leave this case without some general observations; I do not wish to be unduly critical of the board which is composed of lay members but if they accept the mandate it is incumbent upon them to learn the rules prescribed by law.

First, they are governed by the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, which gives them considerable latitude in accepting evidence and they are not

bound by the strict rules of procedure and evidence that govern a Court.

Second, they are sitting in judgment as judges in the context of the adversary process in which each side is expected to present its case; it is not their function to conduct the investigation.

Third, they must impartially weigh the evidence before them. Frequently the parties will not be represented by counsel but this does not alter the rule which is to listen fairly to both sides and to decide according to the evidence that they believe and accept. While it is obvious that in this class of case the board must be alert to detect abuses of the welfare assistance program it is not their function to seek ways to uphold the decision of the commissioner simply because his staff have discovered some evidence tending to show that the recipient is ineligible to receive the assistance. It is their duty to protect the public treasury and to prevent unauthorized payments; but at the same time they must be aware that an eligible recipient is entitled to receive welfare assistance as the Legislature has declared in s. 7 of the Act. It is for the commissioner tgo make a prima facie case that the recipient is not eligible; once that is done, the onus is on the recipient to prove her eligibility before the board whose duty it is (and no doubt it is a difficult one) to decide the issue impartially and according to establish principles relating to the weight and relevance of the evidence and the issue of credibility of the witnesses. The board has a particularly difficult task in rejecting affidavit evidence because it is virtually impossible to undermine the credibility of such evidence without seeing the witnesses in person and hearing them cross-examined (or at the very least seeing a transcript of their cross-examination). Without a testing of the credibility of affidavit evidence in one or another of these ways, it is dangerous for the board to decide the issue of credibility against such a witness unless there is other evidence that controverts the witness which can be tested for its credibility. The board should not undertake this function - under the adversary system it must be left to counsel for the parties or if that fails to the parties themselves.

here rejected and not cross-xed.

I have therefore endorsed the Appeal Book as follows "Appeal allowed. The decision of the board is rescinded; the matter is remitted to the commissioner under s. 15(4) of the Family Benefits Act with a direction that he dispose of it on the basis that Mrs. Dowlut's spouse was not living with her on or shortly before February 24, 1983. Costs of the appeal to be paid by the commissioner to Mrs. Dowlut forthwith after assessment."

Appeal allowed.

[HIGH COURT OF JUSTICE]
DIVISIONAL COURT

Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services

REID J. 20TH JUNE 1985.

Social welfare — Social assistance — Entitlement — Living as single person — Existence of familial economic or social relationship irrelevant unless cohabitation first established — Social Assistance Review Board failing to state grounds for credibility finding — Board acting on hearsay evidence — Order rescinding benefits set aside — Family Benefits Act, R.S.O. 1980, c. 151.

The appellant, a divorced mother of two children, received an allowance as a deserted mother under the *Family Benefits Act*, R.S.O. 1980, c. 151. Her allowance was cancelled by the Director of the Family Benefits Branch on the grounds that she was not living as a single person. The evidence at the hearing before the Social Assistance Review Board was that the appellant had a male friend with whom she spent a certain amount of time and with whom she had a social relationship. The board concluded that there was evidence of a "familial, social and economic relationship" between the appellant and her friend, that the appellant had not provided credible evidence to rescind the decision and that therefore the benefit should be cancelled. The appellant appealed to the Divisional Court.

Held, the appeal should be allowed. The first issue for the board to determine was whether or not the claimant was living with another person. The issue of whether there was a familial, social or economic relationship did not arise unless the claimant had not established that she was living singly. It is possible for a woman to have a relationship with a man like the one claimed by the appellant in the present case, and still be entitled to an allowance. The board stated that it had not received credible evidence to rescind the director's decision. Some reason for thinking the evidence not credible must be given if an appearance of arbitrariness is to be avoided. The Social Assistance Review Board owed the claimant a reasonable statement of why her claim failed, particularly when it failed because the claimant or her witnesses were not believed. Furthermore, the information upon which the decision was based, contained in the director's written submissions, was hearsay. The appellant was given no opportunity to cross-examine the persons who were the source of the director's information and she had presented direct evidence which contradicted it. In the circumstances, the appellant's direct evidence was entitled to acceptance subject to a finding against her credibility. If such a finding had been made, it was wholly unexplained and there was nothing in the record that would justify it. When dealing with the necessities of life for a mother and her two children, the board should not accept unchallengeable hearsay evidence over direct testimony without a proper finding and explanation why the direct testimony was found not to be credible. Mere suspicion is not a proper basis for rejecting a claim such as that made by the appellant.

Cases referred to

Re Ellis & Ministry of Community & Social Services (1980), 28 O.R. (2d) 385, 110 D.L.R. (3d) 414; *Dowlut v. Com'r of Social Services* (1985), 30 A.C.W.S. (2d) 299; *Re Warwick and Minister of Community & Social Services* (1978), 21 O.R. (2d) 528, 91 D.L.R. (3d) 131, 5 R.F.L. (2d) 325; *Re De Lima and Minister of*

Community & Social Services, [1973] 2 O.R. 821, 35 D.L.R. (3d) 481, 11 R.F.L. 365 *sub nom. Re De Lima; Willis v. Ministry of Community & Social Services* (1983), 40 O.R. (2d) 287

Statutes referred to

Canada Evidence Act, R.S.C. 1970, c. E-10
Family Benefits Act, R.S.O. 1980, c. 151, ss. 14(1), (5), 15(1), (4)
General Welfare Assistance Act, R.S.O. 1980, c. 188

Rules and regulations referred to

R.R.O. 1980, Reg. 318, ss. 1(1)(c), 5(b) (rep. & sub. O. Reg. 424/82; am. O. Reg. 709/84)

APPEAL from a decision of the Social Assistance Review Board pursuant to the *Family Benefits Act*, s. 15.

Carolyn D. Ateah, for appellant.
Leslie D. McIntosh, for respondent.

REID J.:—Susan Pitts is a 28-year-old divorced mother of two children, aged nine and ten. She began receiving an allowance as a deserted mother under the *Family Benefits Act*, R.S.O. 1980, c. 151, for her and her children's support in March, 1977. In February, 1984, the respondent director cancelled the allowance on the ground that she was not living as a single person. She appealed to the Social Assistance Review Board. The board affirmed the director's decision.

Ms. Pitts now appeals the board's decision. The basis for this court's jurisdiction is found in s. 15(1) of the Act:

> 15(1) Any party to the proceedings before the board of review under section 14 may appeal from the decision of the board to the Divisional Court on a question that is not a question of fact alone in accordance with the rules of court.

This court's powers on such an appeal are set out in s. 15(4). They are:

> 15(4) On an appeal under this section, the court may affirm the decision of the board of review or may rescind it and refer the matter back to the board or to the Director to be disposed of in accordance with such directions as the court considers proper under this Act and the regulations, and the board or the Director shall give effect to any direction given by the court under this section.

The hearing by the Social Assistance Review Board is in the nature of a review of the director's decision. Section 14(1) of the Act provides:

> 14(1) Where an applicant or recipient files a request for a hearing in accordance with section 13, the board of review shall fix a time for and hold a hearing to review the decision of the Director and the provisions of section 12 of the *Ministry of Community and Social Services Act* apply with necessary modifications to a hearing and review under this Act by the board of review.

At the hearing, the director need not appear but may make submissions in writing. Section 14(5) provides:

> 14(5) The Director may make his submissions at a hearing of the board of review in writing, but the applicant or recipient who is a party to the hearing shall be afforded an opportunity to examine before the hearing any such submission or any written or documentary evidence that the Director proposes will be produced or any report the contents of which the Director proposes will be given in evidence at the hearing.

Facts

The board convened a hearing to review the director's decision. It heard the following witnesses: Ms. Pitts, her "boyfriend" (her term) George Mitchell, and a C. Ladd, a friend of Ms. Pitts. The director's submissions were made in writing. They were to the effect that an anonymous complaint had been received that Ms. Pitts was living with George Mitchell. An "eligibility review" officer had visited her to inquire into that allegation. At that time, Ms. Pitts made a written solemn declaration under the *Canada Evidence Act*, R.S.C. 1970, c. E-10, that:

> My boyfriend, George Mitchell, is living at 94 Roslin Ave. and not residing with me at this time or at any other time. He coms [*sic*] over frequently and may stay once a week overnight.

That notwithstanding, the officer continued to investigate and concluded that George Mitchell lived in Ms. Pitts apartment; that George Mitchell had given Ms. Pitts' address as his to the Ministry of Transportation, the Toronto Credit Bureau, a "leading department store" and a bank; and that George Mitchell did not live with his parents.

On this information, the director cancelled the allowance. Ms. Pitts responded with a request for a hearing. On the request form she wrote:

> You have stated that I am not living as a single person. Without a monthly Mother's Allowance cheque, I have no way to support me and my two children or to pay March's rent.
>
> I have already signed a paper saying that I am living by myself (with 2 children) and do not know why you have cut me off my allowance cheque.
>
> In the meantime I have to report to Welfare for help and I don't know what I am to do if they refuse me.

No record of evidence was kept at the hearing. What transpired must be gleaned from the "Record of Hearing" prepared by the board member, Gaetano Manuele, who presided, and his subsequent "Notice of Decision". In the "Record of Hearing" he summarized the *viva voce* evidence in the following terms:

> The Appellant stated that she and her children are persons in need and she is not living in a common-law relationship with George Mitchell. George is her

boyfriend and she met him five years ago. She pays all her expenses and she does not receive any support at all. George, her boyfriend, comes to see her every day for a couple hours because his work is not too far from her premises. George stays in overnight from two to three times a week. They go out together for shopping and at times he buys groceries for her. They went to Niagara and stayed in overnight and usually in the summer they go to George's father's cottage every Sunday morning and stay until Monday morning. George bought presents for Christmas and for birthday occasions. George is living with his parents at 94 Roslin Avenue. With regard to George's mail at her address and all accusations from the eligibility review officer, some are true some are not. The reasons why George is using and used her address was because George did and does not like his parents to know his business. In conclusion, she stated that it is clear that she lived for the period in question and at the present time as a single person with her two dependent children.

GEORGE MITCHELL — WITNESS

Mr. Mitchell stated that he is living with his parents but he does not pay any accommodation. He is working full-time and has known Susan (the Appellant) for about six years. He is visiting her every day and stays in overnight about three times a week. His relation with her is just a friendship. He justified using Susan's address because he does not like his parents to know about his business. He admitted to go out for shopping, to the cottage on weekends, and to spend money at times for groceries and presents for special occasions.

C. LADD

Ms. Ladd, who lives at #402 and is the Appellant's friend, stated that Susan complained many times with her about George using Susan's address for many purposes, and she knows George does not live with Susan.

That summary is followed by the heading "Views of Board Members". Under it Mr. Manuele wrote:

Based on all evidence received from the Appellant, viva voce, and witness and considering all verifications from Family Benefits report, I feel that in this case I find that there is familial, social and economical relationship between the Appellant and George Mitchell. Therefore, I feel that I have not received credible evidence to rescind the Director's Family Benefits decision.

Under that entry is the heading, "Summary of Deciding Factors". Mr. Manuele wrote:

I find as a fact that the Appellant lived and is living with George as husband and wife within the meaning of the Family Benefits Act and Regulation.

Accordingly, I affirm.

Thereafter, a "Notice of Decision" was sent to Ms. Pitts over the hand of Mr. Manuele. It summarized the director's submissions and said:

It is, therefore, the Ministry's view that the Appellant was living with Mr. George Mitchell as husband and wife within the meaning of the Family Benefits Act and Regulations.

It then summarized the evidence of Ms. Pitts and her witnesses

in somewhat greater detail than what appeared in the "Record of Hearing". It said:

> At the hearing, the Appellant stated that she is 28 years old, divorced, has a Grade 10 education, and has not worked for the past three and a half years.
>
> She and her children are in need as she is not living in a common-law relationship with Mr. George Mitchell. Mr. Mitchell is her boyfriend and she met him five years ago. She pays all her expenses and she does not receive any support at all.
>
> Mr. Mitchell, her boyfriend, comes to see her every day for a couple of hours because his work is not too far from her premises. Mr. Mitchell stays overnight from two to three times a week. They go out together for shopping and at times, he buys groceries for her. They went to Niagara Falls together and stayed overnight, and usually in the summer they go to Mr. Mitchell's father's cottage every Sunday morning and stay until Monday morning. Mr. Mitchell bought presents for Christmas and birthday occasions, and he is living with his parents at 94 Roslin Avenue.
>
> With regard to Mr. Mitchell's mail and the Appellant's address and all accusations from the eligibility review officer, some are true and other accusations are not true. The reasons why Mr. Mitchell is using and used her address was because he did and does not like his parents to know his business.
>
> In conclusion, the Appellant stated that it is clear that she lived for the period in question and at the present time as a single person with her two dependent children.
>
> At the Hearing, Mr. George Mitchell stated that he is living with his parents, but he does not pay any accommodation. He is working full-time and has known the Appellant for about six years. He is visiting her every day and stays overnight about three times per week. His relationship with her is just a friendship. He justified using her address because he does not like his parents to know about his business. He admitted to going out for shopping and to the cottage on weekends and to spend money for groceries and presents for special occasions.
>
> At the Hearing, Ms. C. Ladd stated that she lives in Apartment #402 and is a friend of the Appellant. She stated that the Appellant at many times complained with her about Mr. Mitchell using her address for many purposes. She stated that she knows that Mr. Mitchell does not live with the Appellant.

Mr. Manuele then concluded:

> In considering this evidence I note that based on all evidence received from the Appellant and the *viva voce* evidence of the witnesses and considering all verifications from the Respondent's report, *I feel that in this case there is a familial, social, and economic relationship between the appellant and Mr. George Mitchell. Therefore, I feel that I have not received credible evidence to rescind the decision of the Respondent.*

(My emphasis.)

It will be noted that his reason for finding that a "familial, social and economic relationship" existed between Ms. Pitts and Mr. Mitchell was that he had "not received credible evidence to rescind the decision of the respondent" director.

He then concluded:

> Following careful consideration of the written submissions made to the Board and of all evidence presented to the Board for or at the Hearing, *I find as a fact that there is a familial, social, and economic relationship between the Appellant and Mr. Mitchell as he goes out with the Appellant to his father's cottage, he buys groceries and presents, and uses the Appellant's address.* Therefore, I find as a fact that the Appellant is not living in the circumstances of a single person within the meaning of the Family Benefits Act and Regulation made persuant [*sic*] thereto.
>
> Accordingly, I hereby affirm the decision of the Respondent.

(My emphasis.)

I have emphasized the passages in the foregoing that appear to be the *rationale* for the decision, a decision that is somewhat surprising given the outline of evidence. With respect, I think the decision is in error. It may be that the error stems from the method.

Not living as a single person

Clause 5(*b*) of R.R.O. 1980, Reg. 318, made under the *Family Benefits Act*, R.S.O. 1980, c. 151, states that "no person is eligible for an allowance . . . who is not living as a single person". At the hearing, the onus was on Ms. Pitts to prove that she was living as a single person: *Re Ellis and Ministry of Community & Social Services* (1980), 28 O.R. (2d) 385, 110 D.L.R. (3d) 414 (Div. Ct.).

Clause 1(1)(*c*) of the regulations defines "single person" to mean "an adult person . . . who is not living with another person as husband or wife". There are two elements to this definition:

(1) living with another person,

(2) as husband or wife.

Both elements must be present before it can be said that the recipient is not a single person.

The board must first consider whether or not the recipient is living with another person. If she is not, the inquiry ends there. It is not necessary for the board to inquire into the recipient's relationship with another person.

In its notice of decision, the board failed to make any finding as to whether Ms. Pitts was living with Mr. Mitchell. It considered only whether their relationship was that of husband and wife.

This case is similar in many respect to *Dowlut v. Com'r of Social Services* (March 29, 1985; Divisional Court, unreported [summarized 30 A.C.W.S. (2d) 299]) heard by my brother Henry. Much of what he said is applicable. He was dealing with a case to which the *General Welfare Assistance Act*, R.S.O. 1980, c. 188,

applied, but the issue before the board of review was the same as it is in the case before me. Mr. Justice Henry observed that under that legislation, if spouses were "living together, the wife is by definition a dependant and so is ineligible for assistance". He said further, at p. 3 of his reasons:

> In such circumstances the only decision to be made in determining whether an applicant or a recipient is eligible for assistance or for continued assistance is one of fact, that is, whether the spouses are living together.
>
> In the case of Mrs. Dowlut, the appellant, the Social Assistance Review Board, from whose decision this appeal is brought, therefore had to decide a simple issue of fact — whether her husband at or within a reasonable time before the suspension of welfare assistance on February 24, 1983, was living with her. The onus was on Mrs. Dowlut to satisfy the board that her husband was *not* living with her. That decision must be made on the evidence as a whole including the weight given to individual portions of it in the board's opinion.
>
> In the final paragraph of its decision (*infra*) the board, by its language, indicates that it thought it should deal with the tests applicable to an informal spousal arrangement (as in *Re Proc* [*Re Proc and Minister of Community & Social Services* (1974), 6 O.R. (2d) 624, 53 D.L.R. (3d) 512, 19 R.F.L. 82] and *Re Warwick* [*Re Warwick and Minister of Community & Social Services* (1978), 21 O.R. (2d) 528, 91 D.L.R. (3d) 131, 5 R.F.L. (2d) 325]); that confusion does not vitiate what in my opinion was a finding of fact that Mrs. Dowlut's husband was living with her. The board need not have gone that far; it need only be satisfied on all the evidence that the appellant had not discharged the onus of showing that her husband was living elsewhere.

I agree with that. The first inquiry to be made by the board in that case, as in this, was whether the claimant was living with another (in that case, a spouse). If the claimant could establish that she was not, the inquiry was at an end. The *Proc* and *Warwick*, *infra*, tests came into play only if the claimant had not established that she was living singly. To apply those tests before the initial question was answered was "confusion".

In argument, counsel for the director submitted that the testimony that Ms. Pitts and Mr. Mitchell did not live together should be rejected because there was no evidence from his parents that he lived with them. That was not a point mentioned by the board. Moreover, Ms. Pitts was not required to prove where Mr. Mitchell lived She had to prove only that he did not live with her.

In *Dowlut*, the board had rejected evidence that the husband was not living with the mother because the deponents were unable to state where he was living. Henry J. said at p. 10:

> It was of course not necessary for Mrs. Dowlut's case that she or her witnesses identify his whereabouts; it was necessary only to demonstrate that he was not living with her. The board therefore misapprehended the test that they were obliged to apply which is reversible error.

If a recipient is in fact living with another person, the next question which must be determined is, are they living as husband and wife? It is recognized that a woman may live with a man in a relationship other than husband and wife: landlord and tenant is one; housekeeper status is not unheard of, nor is simple friendship. The courts have provided guidelines to that second inquiry in a number of decisions commencing with *Re Warwick and Minister of Community & Social Services* (1978), 21 O.R. (2d) 528, 91 D.L.R. (3d) 131, 5 R.F.L. (2d) 325 (C.A.), particularly at p. 537. Having in mind that the primary purpose of the *Family Benefits Act* is to provide support for those in need (*Re De Lima and Minister of Community & Social Services*, [1973] 2 O.R. 821 at p. 822, 35 D.L.R. (3d) 481, 11 R.F.L. 365 *sub nom. Re De Lima*), one inquiry that must be made is where support is a feature of a live-in relationship. This was made clear in *Willis v. Ministry of Community & Social Services* (1983), 40 O.R. (2d) 287. As my brother Saunders said at p. 293:

> As the legislation is concerned with need, the understanding that support will be provided by the cohabitant is an essential but not the only element in the relationship.

As the *Willis* case itself illustrates, it is possible for a woman to have a relationship with a man not wholly unlike the one claimed by Ms. Pitts and still be entitled to an allowance. In *Willis*, the woman claimed that she was not, in fact, living with the father of her child, and that he did not support her, that she had had sexual intercourse with him once after their child was born, that he often came to visit the child and brought the occasional gift of cans of milk or diapers. The director's submission included assertions that the father had, on a number of occasions, given her address and telephone number as his, had listed their son as beneficiary on an insurance policy, and had referred to her in the records of two employers as his common law wife. The court held that there was no evidence before the board to support a finding that she was living with another person as his wife.

Without finding that Mr. Mitchell was living with Ms. Pitts, Mr. Manuele held:

> I find as a fact that there is a familial, social, and economic relationship between [Ms. Pitts] and Mr. Mitchell.

The words "familial, social, and economic relationship" have been extracted like a formula from *Re Warwick and Minister of Community & Social Services*, *supra*. The finding was based on admissions that Mr. Mitchell occasionally bought groceries and presents for Ms. Pitts and her children, took them to his parents'

losing party: see "Temptations of the Bench" [1978] XVI Alta. L. Rev., p. 406. In order that faith may be maintained in the legal system, it is necessary that losing parties be satisfied that they have been fairly dealt with, that their position has been understood by the judge, and that it has been properly weighed and considered. It is, therefore, important that the reasons for a decision be stated, and stated in language that the party who has been dealt the blow can comprehend.

I think that this applies with equal weight to the decisions of tribunals. Thus, in my opinion, members of the Social Assistance Review Board owe to claimants, in simple justice, a reasonable statement of why their claim failed, particularly when it failed because the claimant or witnesses were not believed. Mr. Manuele's rejection of Ms. Pitts' and her witnesses' evidence as not entitled to credence was neither preceded nor followed by one single word indicating why he did not find it credible. Judges customarily give to juries suggestions on how to go about the task of determining the credibility of witnesses. In accordance with a standard form of instruction, a judge of the Supreme Court of Ontario might say to a jury:

> In weighing the testimony of witnesses you are not obliged to decide an issue simply in conformity with the majority of the witnesses. You can, if you see fit, believe one witness against many. The test is not the relative number of witnesses, but in the relative force of their testimony. With respect to the testimony of any witness, you can believe all that that witness has said, part of it, or you may reject it entirely.
>
> Discrepancies in a witness' testimony, or between his testimony and that of others, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience and innocent misrecollection is not uncommon. It is a fact also that two persons witnessing an incident or transaction often will see or hear it differently. Discrepancies on trivial detail may be unimportant, but a falsehood is always serious.
>
> In determining the credit to be given to the evidence of a witness, you should use your good commonsense and your knowledge of human nature. You might, in assessing credibility, consider the following:
>
> > The appearance and demeanour of the witness, and the manner in which he testified. Did the witness appear and conduct himself as an honest and trustworthy person? It may be that he is nervous or confused in circumstances in which he finds himself in the witness box. Is he a man who has a poor or faulty memory, and may that have some effect on his demeanour on the witness stand, or on the other hand, does he impress you as a witness who is shifty, evasive and unreliable?
> >
> > The extent of his opportunity to observe the matter about which he testified. What opportunities of observation did he in fact have? What are his powers of perception? You know that some people are very observant while others are not very observant.

> Has the witness any interest in the outcome of the litigation? We all know that humanity is prone to help itself, and the fact that a witness is interested in the results of the litigation, either as a plaintiff or defendant, may, and often does, quite unconsciously tend to colour or tinge or shade his evidence in order to lend support to his cause.
>
> Does the witness exhibit any partisanship, any undue leanings towards the side which called him as a witness? Is he a relative, friend, an associate of any of the parties in this case, and if so, has this created a bias or prejudice in his mind and consequently affected the value of his testimony?
>
> It is always well to bear in mind the probability or improbability of a witness' story and to weigh it accordingly. That is a sound commonsense test. Did his evidence make sense? Was it reasonable? Was it probable? Does the witness show a tendency to exaggerate in his testimony?
>
> Was the testimony of the witness contradicted by the evidence of another witness, or witnesses whom you considered more worthy?
>
> Does the fact that the witness has previously given a statement that is inconsistent with part of his testimony at trial affect the reliability of his evidence?
>
> After weighing these matters and any other matters that you believe are relevant, you will decide the credibility or truthfulness of the witness and the weight to be given to the evidence of that witness.

It might not be untoward to suggest that board members keep those suggestions in mind.

In this case, the information given in the director's written submission was hearsay. It is admissible by virtue of the legislation but its weight must be considered against contradictory evidence. Ms. Pitts, Mr. Mitchell and Ms. Ladd all testified that Mr. Mitchell did not live with Ms. Pitts but that he lived with his parents. It was admitted that Mr. Mitchell was dating Ms. Pitts, that he visited her daily on his way home from work and that he frequently stayed overnight. All of that would easily explain the director's submission that Mr. Mitchell was seen regularly at Ms. Pitts' apartment.

Ms. Pitts had no opportunity to cross-examine the persons who were the source of the director's information. They did not attend the hearing. She could challenge the director's hearsay evidence only by calling direct evidence to contradict or explain it. In such circumstances, her direct evidence was entitled to acceptance if it contradicted or explained the director's submissions, subject to a finding against her credibility.

Here there is such a finding, but it is wholly unexplained and there is nothing in the record that would appear to justify it. There is no discussion of credibility at all. The board has accepted the director's hearsay information as credible and simply waved

away the direct evidence of three witnesses as not credible. When dealing with the necessities of life for a mother and her two children, the board should not accept unchallengeable hearsay evidence over direct testimony without a proper finding and explanation why the direct testimony was found not to be credible.

The *Dowlut* case also involved an offhand finding that the applicant and her witnesses lacked credibility. As has been said, the onus was on the applicant to satisfy the board that her husband was not living with her. The director's written submission said, on the basis of hearsay, that the spouses had purchased furniture together, that she drove his car, and that he had given her address to his employer and to the Ministry of Transport. There was affidavit evidence from friends and neighbours that he did not live with her and from a friend of the husband explaining the purchase of the furniture. The claimant testified at the hearing and was not cross-examined on her statement that her husband did not live with her. Henry J. said, at p. 6:

> The board either rejected or gave little weight to the evidence led by the appellant. While it is the board's function to consider and weigh the evidence, they must do so fairly and impartially and according to principle as judges.

And at p. 7:

> They appear to have rejected her evidence entirely. To do so required, in the case of this essential witness, a clear finding on credibility which they did not make.

And at p. 8:

> Second, the affidavits of the friends and neighbours were virtually swept aside as being not objective. This, in my opinion, is not justifiable. That evidence is *prima facie* true because the deponents were put to their oath. The board did not see those witnesses and I find it difficult to understand how they could reject them as a class. The appellant has to prove a negative and it can be expected that she will have difficulty in finding witnesses who will be willing to come forward in person.

I accept that Henry J. was speaking of affidavit evidence, whereas here, the evidence on the claimant's behalf does not appear to have been sworn. Nevertheless, while unsworn evidence cannot claim credit on the same ground as sworn evidence, it is, none the less, entitled to at least the credit impliedly given by the legislation to the director's submission. It must not be dismissed arbitrarily as lacking in credence, or non-objective.

Mr. Manuele might have noted a discrepancy between the evidence Ms. Pitts and Mr. Mitchell gave at the hearing that he stayed overnight with her two or three nights a week and her

earlier solemn declaration that he lived with his parents and "may have stayed once a week overnight". That would have been a proper basis for doubting the credibility of her evidence. Yet, if Mr. Manuele thought it was, he did not say so, and it would be wrong to assume that it was a factor in his finding against credibility. A healthy scepticism may well be appropriate in those called upon to deal with claims for welfare and the like assistance, for no doubt there are many who would abuse our society's generous impulses and seek what they are not entitled to. Some such claims, and the claimants behind them, may be devious, even fraudulent. Some of the friends and neighbours who support such claims may be all too willing to pervert the truth. It is the function of the director, and the board, to winnow out such claims. It is, no doubt, no easy task. Yet, it must not be assumed that all claims are spurious. Each must be dealt with on its own merits. "Mere suspicion", as this court has observed, is not a proper basis for rejecting them, or the credibility of those who assert them.

I am moved to make these observations because of the disturbing frequency with which claims appear to be rejected on nothing more than "mere suspicion" and an undue scepticism. That, unhappily, is what appears to have occurred here.

A single mother shackled with the responsibility of raising two children on meagre government assistance no doubt lives under very trying circumstances. It would be a strong woman indeed who could manage this without daily emotional support from a close friend. To deprive her of her only source of income because her close friend happens to be a man is very harsh. When dealing with the necessities of life for a mother and her children, the mother should be given the benefit of the doubt, especially when there is direct evidence that she is not living with her male friend. As Saunders J. said for the Divisional Court in *Willis*, *supra*, "If there are to be errors, it is better if they be in favour of those in need". I think this is the way the board should approach its task.

Conclusion

The *Family Benefits Act* does not permit an appeal from a decision of the board on a question of fact alone. The board herein erred in law in several ways. First, its failure to make a finding on whether the applicant was living with another person was error. Second, without having found that the applicant was living with another person, the board sought to apply the *Warwick* test which is applicable only when that finding is made, and third, it made a finding against the credibility of the applicant and her witnesses

without stating the basis for it but, perhaps more importantly, without any justification for it visible on the record.

I do not think it is necessary to refer the case back to the board for a new hearing. Accepting the improperly rejected direct evidence, which was not contradicted by other direct evidence, I am of the opinion that Ms. Pitts established on a balance of probabilities that Mr. Mitchell was not living with her.

I, therefore, refer the matter back to the director to dispose of this case on the basis that Ms. Pitts was living as a single person and to restore her allowance from the point at which it was wrongly discontinued.

The appeal is allowed and the decision of the board is rescinded. Costs of the appeal to Ms. Pitts.

Appeal allowed.

[SUPREME COURT OF ONTARIO]

Thornton v. Tittley et al.

SCOTT D.C.J. (L.J.S.C.) 28TH JUNE 1985.

Judgments and orders — Res judicata — Merger and bar — Previous application for relief from forfeiture with respect to lease — Application dismissed — Tenant bringing subsequent action claiming damages and other related relief — Subsequent action barred by res judicata.

Courts — Abuse of process — Multiplicity of proceedings — Landlord and tenant dispute — Plaintiff commencing action for damages including exemplary damages — Several prior proceedings initiated by plaintiff with respect to lease in related matters — History of litigation not constituting harassment.

The defendant moved for an order striking out the plaintiff's action on the grounds that it was frivolous and vexatious or that it constituted an abuse of process. The action arose from a lease in which the plaintiff was the tenant and the defendant the landlord. The plaintiff claimed damages under several heads including exemplary damages. There was a history of prior proceedings by the plaintiff against the defendant including criminal charges. One proceeding was for relief from forfeiture and that application had been dismissed on the grounds that the tenant had improperly withheld payment of rent and that the landlord was entitled to re-enter.

Held, the history of proceedings between the parties was not such as to constitute harassment by the plaintiff of a nature so flagrant as to warrant depriving him of his right to litigate. However, the plaintiff's action was barred on the grounds of *res judicata* in that the motion for relief from forfeiture had been dismissed. Although damages were claimed in the present action, that judgment was conclusive as to the issue which was raised and as well as to all other issues which could have been raised at the time.

(5)

Released: 11-2-86

Action No. 409/84

SUPREME COURT OF ONTARIO

(DIVISIONAL COURT)

VAN CAMP, O'LEARY and SUTHERLAND JJ.

IN THE MATTER OF Section 11 of the General Welfare Assistance Act, R.S.O. 1980, Chapter 188, and section 15(1) of the Family Benefits Act, R.S.O. 1980, Chapter 151:

AND IN THE MATTER OF the decision of the Social Assistance Review Board pursuant to section 11(1) of the General Welfare Assistance Act delivered to the Applicant, MARGARET SZUTS, by a letter dated April 11, 1984.

B E T W E E N :

MARGARET SZUTS

Applicant (Appellant)

- and -

THE COMMISSIONER OF SOCIAL SERVICES

Respondent

J. McKean
for the applicant

K.F. Christie
for the respondent

Leslie M. McIntosh
for Minister of Community and Social Services

Heard: September 13, 1985.

VAN CAMP J.:

The appeal is from the decision of the Social Assistance Review Board, suspending assistance under the General Welfare Assistance Act, R.S.O. 1980, c. 188, on the

basis that the appellant was not eligible under the Act as she was living with one Frank Balint as if they were husband and wife. That question is not one of fact alone and, therefore, an appeal lies to this court. (Re Warwick and the Minister of Community and Social Services (1978), 21 O.R. (2d) 528.)

Mr. Justice Sutherland has made a carefully detailed review of the background to the decision, of the evidence, the facts and the applicable law. We differ only in that I do not think that the Board erred in the application of the law to the facts.

The Board had before it the submission of the appellant's counsel. From the reasons for decision, it seems to me that the Board placed more stress upon the oral evidence of the appellant than it did upon the submissions of counsel for the appellant before it. The appellant had sworn that all the facts, as set out therein to the extent that they represented matters within her knowledge, were true. The Board was so entitled.

The evidence showed that the appellant and Mr. Balint had resided together since 1957, with the exception of the two years 1973 to 1975, until the appearance before the Board and that the appellant wished to continue

to reside with Mr. Balint. In the history of that period, it seemed to me that all that was lacking was a marriage licence. The relationship between them varied during the years, but it continued. Whatever may have been the reasoning of the Commissioner, the Board, in its decision, reviewed that relationship for the whole period. It was not a situation where two people were living together for economic purposes only. These two had come together to Canada in 1957. The appellant was divorced and about 37 years of age and Mr. Balint was some seven years younger. They lived together in a sexual relationship until the separation in 1973. After that separation and the short-lived marriage of Mr. Balint, the couple went back to each other again. The sexual relationship did not resume; it did not seem important to either of them. What does emerge is that each of them found in the other an answer to a need. In spite of the difficulties that have arisen over money, this couple still were continuing that relationship when the matter came before the Board.

I recognize that a couple may live together for economic reasons. I recognize that two people who have lived together in a common-law relationship might subsequently enter into common residence for economic purposes only, but in that case it would seem to me that there would be some life apart from each other. What is

seen here is a continuing relationship, a stormy one, but a continuing relationship which has the essential elements of the husband and wife relationship. They do not perhaps follow the same pattern that many couples do. They live together in the pattern that suits them.

Any question as to her eligibility must arise only from the nature of the economic factor in their relationship. The Board found that from the time they came to Canada they both worked and, as a result, shared expenses half and half. The statement in the submission of counsel that after their separation "...costs were split fifty-fifty and each agreed that there was no obligation to provide support to the other" seems to me just another way of saying the same thing; namely, while they were working, there was no need for the other to give support other than the sharing of expenses.

They purchased a house for $61,000 to which each contributed $3,000 as a down payment. They owned the house for one and one-half years and sold it in 1981 for $100,000. With the proceeds of the sale of that house, they jointly purchased a condominium where they were residing at the time of the hearing. They also purchased jointly the furniture for the condominium and a car. In this way, each of them was contributing towards the support of the

other.

It seems to me too narrow an interpretation of the spousal relationship contemplated by the Act to hold that it cannot exist when a couple, who share a relationship that would otherwise be a spousal relationship, decide that they will make their contribution each to the other economically by a joint sharing of major expenses. Nor do I find that the statements in Re Willis and Ministry of Community and Social Services (1983), 40 O.R. (2d) 287 and some of the other cases are contradictory. Each of these two people have recognized and have accepted an obligation to contribute to the economic well-being of the other.

As I understood it, this was the submission of counsel for the Minister, namely that the obligation to provide economic assistance to the other spouse may be found in many different methods, depending upon the circumstances of the couple.

There remains the question of whether the cohabitant's refusal to provide other monies when the appellant lost her job and became ill in 1983 changed the spousal relationship so that the appellant became eligible for assistance. From then on, they both purchased their food separately; Mr. Balint seldom used the kitchen. They continue

to live together. The joint bank account for the payment of the house expenses continued. From the time of the loss of her job in 1982 until shortly before the application in 1983, the appellant had received unemployment insurance. In my opinion, the Board was entitled to find that the spousal relationship continued to the hearing. It was a difficult decision on the facts, but I cannot see that the Board erred in its application of the law to those facts.

I would dismiss the appeal.

Released: February //, 1986.

I agree

Dennis F. O'Leary J.

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

VAN CAMP, O'LEARY and SUTHERLAND JJ.

IN THE MATTER OF section 11 of the General Welfare Assistance Act, R.S.O. 1980, Chapter 188, and section 15(1) of the Family Benefits Act, R.S.O. 1980, Chapter 151:	
AND IN THE MATTER OF the decision of the Social Assistance Review Board pursuant to section 11(1) of the General Welfare Assistance Act delivered to the Applicant, MARGARET SZUTS, by a letter dated April 11, 1984.	J. McKean for the applicant (appellant) K.F. Christie for the respondent
B E T W E E N :	Leslie M. McIntosh for the Minister of Community and Social Services
MARGARET SZUTS Applicant (Appellant)	
- and -	
THE COMMISSIONER OF SOCIAL SERVICES Respondent	Heard: September 13, 1985

SUTHERLAND J. (Dissenting):

Margaret Szuts, then aged 63, applied to the respondent on or about August 8, 1983, for assistance under the General Welfare Assistance Act, R.S.O. 1980, c.188 (the

"Act"), on the ground that she was a "person in need", as defined by Regulation 441 under the Act (O.Reg. 1980, s.1(2) and (3).Her need and her ill health have at no time been disputed. The respondent granted her assistance pending investigation and, on August 12, 1983, cancelled the assistance on the ground that she was residing in a spousal relationship with Mr. Frank Balint and so was ineligible for assistance under the Act. When she appealed to the Board the respondent was ordered by the Board to pay interim assistance pending the decision of the Board.

On learning of the decision of the respondent the appellant invoked her right to request a hearing and review under s-s.11(2) of the Act.

The Act provides, in s-s.11(4), that, where an applicant has filed a notice requesting a hearing by the Board, the provisions of ss.14, 15, 16 and 18 of the Family Benefits Act, R.S.O. 1980, c.151, among others, apply, with necessary modifications, to the hearing and review by the Board and to an appeal from a decision of the Board.

It is provided by s-s.14(5) of the Family Benefits Act that, with respect to a hearing of the Board, the respondent welfare administrator may make his submissions in writing. In this case the respondent availed

himself of that provision, making no oral submissions but only a brief written submission.

After a hearing the Board affirmed the decision of the respondent and, after a delay requiring an extension of time (which was granted by the Board), the appellant invoked the provision of s-s.14(7) of the Family Benefits Act, providing as follows:

> (7) The board of review may, on application of any party, reconsider and vary any decision made by it after hearing the parties to the proceedings in which the original decision was made, and the provisions of this section apply with necessary modifications to the proceedings on such reconsideration.

A differently constituted panel of the Board held a hearing to reconsider the original decision of the Board. Again, the respondent's submissions were made in writing - and it is noted that they added nothing to the brief written submissions made by him for use at the original hearing. The appellant was represented by counsel, gave oral testimony and was examined by Board members and by a representative of the respondent. In addition, the Board received on the re-hearing extensive written submissions of counsel for the appellant as to matters of both fact and law, which submissions were accompanied by an affidavit of Mrs. Szuts

deposing that all the facts set out in those submissions were true "to the extent that they represent matters within my knowledge". Those written submissions form part of the record on the appeal to this Court and their inclusion was not objected to by any party.

After the re-hearing the Board did not vary the original decision, and thus decided that Mrs. Szuts was ineligible because she was living with Mr. Balint as if they were husband and wife.

The appeal to this Court is brought pursuant to s-s.15(1) of the Family Benefits Act, which states:

> 15.(1) Any party to the proceedings before the board of review under section 14 may appeal from the decision of the board to the Divisional Court on a question that is not a question of fact alone in accordance with the rules of court.

It has been authoritatively determined that an appeal on the complex question of whether or not a person is living as a single person is not a question of fact alone. In Re Warwick and the Minister of Community and Social Services (1978), 21 O.R. (2d) 528, at p.538, Blair J.A., speaking for the Court of Appeal, stated the following:

> ... In my opinion, the Social Assistance Review Board and the Divisional Court erred in law in deciding that the determination of her status as a wife was a question of fact alone. ...

It follows that nothing turns upon the Board's characterization of its decision on that issue as a finding of fact nor, a fortiori, upon its further statement that its resultant determination as to eligibility for assistance was also a finding of fact. The second of those statements reflects confusion on the part of the Board. This Court has jurisdiction to hear this appeal.

In the light of the above quotation from Warwick it was, to say the least, surprising to find that both in the respondent's factum and in oral submissions on behalf of the respondent it was asserted that this Court had no jurisdiction to hear this application because the question was one of fact alone.

As authorized by s-s.15(3) of the Family Benefits Act the Minister of Community and Social Services made written and oral submissions on this appeal.

There is no transcript of the re-hearing before the Board. It is clear from the record that the Board had expected that a reporter would be on hand to transcribe the proceedings but no reporter showed up. Such a transcript, while it would have been helpful, is not as needed in a case, such as this, where there were extensive written submissions by the applicant, and where the Board gave written reasons for its decision, and where a member of the Board made summary notes of what transpired at the hearing and those notes were included in the record. It is provided in s-s.11(4) of the Act that s.12 of the Ministry of Community and Social Services Act, R.S.O. 1980, c.273, applies to a hearing and review under the Act, and that section provides that one of the ways that oral evidence taken before the Board at a hearing may be recorded is by notes taken by or under the supervision of a member or members of the Board conducting the hearing. The record was thus both formally correct and in practice adequate for purposes of the appeal.

This appeal involves the question of the eligibility of the appellant for general assistance under the Act, and it is clear that the onus is upon the appellant to establish her eligibility before the Board and, by extension, upon this appeal. See in this regard the decision

of this Court in Re Ellis and Ministry of Community and Social Services (1980), 28 O.R. (2d) 385, where Reid J., at p.389, expressed the Court's view that, under comparable statutory provisions, the Board is entitled to consider the submissions of the Director (whose role is filled on this appeal by the respondent) as a prima facie case and that it is therefore up to the applicant to meet that case.

The case of the respondent Commissioner was simplicity itself. As stated in his August 30, 1983, written submission to the first Board hearing on Mrs. Szuts' application:

> Considering the appellant shares accommodation with Mr. Balint and has previously lived in a spousal relationship with him, this Department determined that the appellant is currently living in a spousal relationship.
>
> Consequently, this Department found the appellant ineligible for ongoing assistance as a dependent is not eligible for assistance as a head of a family, in accordance with Section 6(1) of Regulation 441 to the General Welfare Assistance Act, R.S.O. 1980, c.188, as amended.
>
> I note, Mrs. Szuts has a life insurance policy with Dobbs and Tang naming Mr. Balint as the beneficiary.

The first of the above-quoted paragraphs sets forth the essence of the Commissioner's position. The Commissioner's reference to s-s.6(1) of Regulation 441 is misleading in that, standing alone, that subsection does not provide that a dependent adult, as defined, is not eligible for any relief under the Act but only that a "dependent is not eligible for assistance as the head of a family". The missing link is found not where it should have been, in the section of the regulation appearing under the heading "Eligibility", but over in s.11 where it is provided, subject to provisions that need not concern us here, that "general assistance shall be paid to or on behalf of any single person or head of a family who is a person in need and who is not a resident in an institution other than a nursing home or hostel...". Under Regulation 441 if Mrs. Szuts was living with Mr. Balint at the material times as if she were his wife, she would not be a "single person" as defined. No other provision of the Act or of Regulation 441 creates any obligation on any municipality to pay assistance to a dependent adult as defined.

The Commissioner's written submission and the proceedings before the Board will be easier to follow if certain definitions found in Regulation 441 are set forth. As defined in s.1 of such regulation,

> (f) "dependent adult" ... includes the female spouse living with the male spouse and a person who although not legally married to the head of the family lives with him as if they were husband and wife;
>
> ...
>
> (i) "head of a family" means a person who has charge of a household and who has one or more dependents therein;
>
> ...
>
> (n) "single person" means an unmarried adult, a widow, a widower or a separated or divorced person, but does not include a person,
>
> (i) who is a head of a family;
>
> (iii) who is living with another person as husband or wife.
>
> ...
>
> (p) "spouse" includes a person, who although not legally married to another person, lives with that person as if they were husband and wife;

Although the drafting leaves much to be desired, it is apparent from the definition of "spouse" and the definition of "dependent adult" that where a woman is living with a man as if they were husband and wife, the woman is, by definition, a "dependent adult", whether or not the man

actually supports her. Under those definitions the same is not true of a male "spouse" even though he may in fact be supported by the female spouse. It is not certain whether such a male spouse would qualify as the "head of a family", because the definition of that term requires that such a person (i) have charge of a household and (ii) have one or more dependents. The second criterion is achieved by definition but there could be real trouble in establishing the first criterion, because it would be a question of fact and there is a real possibility that a female spouse who was providing the support, or most of it, would be able to establish that in fact she was in charge of the household. As the woman is a dependent by definition, that could mean that some families have no head for purposes of the regulation.

I digress to note that if under definition of "single person" the terms "husband" and "wife" refer to persons who have been and are formally married, it is possible for the same person to be, at one and the same time, a "single person", a "spouse" and, if a female, a "dependent adult", all as defined above. I also note that, given the definition of "spouse", all the words in the definition of "dependent adult" that follow the words "male spouse" are redundant.

But what about the equality provisions of the Canadian Charter of Rights and Freedoms (the "Charter")? Subsection 15(1) of the Charter states as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The effect of s-s.32(2) of the Charter is that s-s.15(1) did not have effect until April 17, 1985. The record discloses that Mrs. Szuts was 64 years old on January 16, 1984, and so she had attained age 65 by January, 1985. The significance of her age is that upon the attainment of age 65 she became eligible to receive the old age pension, under the Old Age Security Act, R.S.C. 1972, c.O-6, as amended. Under the Act general welfare assistance is not payable to a person who is a "recipient of a governmental benefit" which term is defined in cl.1(i) of the Act to include a person in receipt of the old age pension under the Old Age Security Act. In my opinion s-s.15(1) of the Charter would be relevant to this appeal only if Mrs. Szuts, who became eligible for the old age pension in or before January, 1985, had not in fact become a recipient of that pension by April 17, 1985. There

is no evidence as to whether she was or was not in receipt of such a pension by that date but, given the fact that from and after October, 1983 she was in receipt of a federal government disability allowance and given her application for general welfare and the good level of intelligence reflected in the notes of her answers at the Board hearing, it is most unlikely that she would have failed to become a recipient of that pension before April 17, 1985. In my opinion it is only if she failed to become such a recipient by that date that s-s.15(1) of the Charter would have any impact on her situation under the Act, and then only with respect to the period between April 17, 1985 and the date upon which she first became such a recipient. Although it was not argued and may be moot for the reason considered above, I will express an opinion as to the constitutionality of certain provisions of Regulation 441.

In my opinion the above-quoted provisions of Regulation 441, taken together as they must be, clearly contravene s-s.15(1) of the Charter. Nor, in my opinion, would these provisions, even in the absence of s.28 of the Charter, be saved by the proviso in s.1 of the Charter, for in a country where it is widely and generally recognized, to an extent permitting judicial notice of the fact, that women

comprise over forty per cent of the paid labour force, the differences in the treatment of men and women under those provisions of Regulation 441 do not constitute "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Since April 17, 1985, where persons are found to be living together as husband and wife or as if they were husband and wife, the female cannot be deemed to be a dependent adult solely because she is a female.

However, I make no formal declaration that the provisions in question are nullities, because the matter was not argued before us and because, for the reasons stated, s-s.15(1) of the Charter may have no bearing on the position of Mrs. Szuts on this appeal.

It may be that the discriminatory provisions referred to above contravene the Ontario Human Rights Code but, as that matter was not argued before us and as I believe the Code to be in quite a different category from the Charter, if only because the former can be amended by Ontario alone, I make no further comment on that question.

The main issue on the appeal is whether the Board erred in deciding that at the material times Mrs. Szuts was living with Mr. Balint in a spousal relationship, i.e. as if they were husband and wife. It is common ground that if at the material time there was a spousal relationship between them then, under the applicable regulations, Mrs. Szuts was, by definition, a "dependent adult" and so ineligible for assistance.

There is no dispute as to the fact of their common residence at the material times. In these proceedings it has been acknowledged by Mrs. Szuts since August, 1983 that she and Mr. Balint were and continued to be co-owners of a condominium apartment at 5 Shady Golfway in Don Mills and that she and Mr. Balint each lived there at the material times. There is no evidence that anyone else shared the condominium apartment at any time after it was purchased by them in the summer of 1981, or shared any other residence at any time owned or occupied by them together.

There is a wide range of agreement as to facts. Apart from the brief statements in the Commissioner's written submission (as to common residence, co-ownership, previous spousal relationship and an alleged insurance policy), all the evidence comes from Mrs. Szuts. Although the Board (by which term I mean, unless otherwise stated, the second panel of the Board to deal with the application of Mrs. Szuts) made a number of express findings of fact, both at the end of the formal Record of Proceedings (Record p.25) and in its written reasons for its decision (especially in the third paragraph of p.43 of the Record), its reasons suffer from the practice of following one or more sentences purporting to recite what the applicant said with sentences which may be findings of fact or may be further recitals of the appellant's evidence. This pattern runs through the Board's reasons for decision. Paragraph after paragraph begins with words such as "The Appellant stated" and continues with other sentences which appear to be statements of fact but more probably, given the context, are further recitals of the appellant's testimony or submissions. It is often impossible to tell whether any findings have been made on such items or if any weight is given to them. The presence of such paragraphs make it appear, at least on the surface, that the evidence referred to therein came to the attention of the Board. The record

discloses some questioning of Mrs. Szuts, by Board members and by a representative of the respondent, but nothing apparently seeking to discredit her evidence or credibility. The express findings of fact are welcome, however much relevant evidence appears to have had no effect thereon, and the interpretation of the record is made easier by the fact that almost all the evidence came from Mrs. Szuts and was uncontradicted. Counsel have also agreed as to a wide range of facts.

That there was no negative finding as to the credibility of Mrs. Szuts, is important with respect to at least one piece of evidence from Mrs. Szuts that was not discussed or referred to in the facts as found by the Board or in the reasons of the Board. That is the statement, verified as aforesaid by her affidavit, made in written submissions to the Board on her behalf (and set forth at p.29 of the Record) to the effect that, when Mr. Balint returned to live with her in 1975 each agreed that neither was under any obligation to provide support for the other. In the light of the judicial decisions, including Warwick, supra, and the decision of this Court in Re Willis and Ministry of Community and Social Services (1983), 40 O.R. (2d) 287, referred to by the Board, that was simply too important a piece of evidence to ignore.

The formal findings of fact made by the Board, as set forth at the end of its Record of Hearing, are as follows:

> **Findings of Fact** (Deciding Factors)
>
> I find as a fact that
>
> 1. They resided in a common-law situation from 1957 to 1973. He left the home, was married, and when it did not work, he returned to her home in 1975.
>
> 2. They jointly purchased a condominium, car and furniture after the date. They have a joint bank account to pay house costs.
>
> 3. They both always worked so were economically independent. It was not until she lost her job and became economically dependent that the situation between them deteriorated.
>
> 4. There was never a social relationship between them, so that has not changed.
>
> 5. She wishes to live in the same home with the man with whom she admittedly lived common-law for sixteen years because she did not wish to sell the condominium which was jointly owned as it was a good arrangement for her.
>
> 6. The spousal relationship continues as they are still residing under the same roof.

Those findings were repeated in almost the same words at p.4 of the Board's reasons for decision (Record p.43).

Those findings only indirectly acknowledge (in paragraph numbered 5 above) that there was no sexual element in the relationship after 1973.

There was no reference in those findings to a large amount of relevant and uncontradicted evidence of Mrs. Szuts, including evidence:

(i) that the economic relationship between Mrs. Szuts and Mr. Balint had always been a strict 50/50 proposition;

(ii) that Mr. Balint had never supported her;

(iii) that she and Balint had agreed, long before, that neither had any obligation to support the other;

(iv) that when she lost her job (owing to changes in the ownership of her employer) Mr. Balint made it clear to her that he would not support her;

(v) that she was on unemployment insurance for one year, from June 1982 until June 1983 after having been laid off her job, and before she applied for assistance under the Act; and

(vi) that, except for some food purchased in common before she lost her job in June, 1982, the only costs she shared with Mr. Balint were those relating to their condominium apartment.

With respect to the social aspect of the relationship, the Board's emphasis was on how little change there had been in the relationship, not on the nature of the relationship itself. In the Board's reasons (but in a 'recital' paragraph and not in the Board's findings) there was reference to a statement attributed to Mrs. Szuts to the effect that when Mr. Balint returned to her home in 1975 everything was as it had been before he left, except that there was no sexual relationship. Although the Board does make the important finding that the relationship deteriorated after Mrs. Szuts lost her job, the Board's emphasis is on how little difference that actually made, again because there was so little to discontinue. That sort of reasoning cuts both ways. Although it is a truism, I feel obligated because of some of the oral submissions on behalf of the respondent to observe that where there is almost nothing left after very little has been removed, it must follow that there was not much there in the first place. The Board is not primarily to be engaged in measuring or estimating units of change but in determining whether a

spousal relationship existed at the material times. There was uncontradicted evidence that Mrs. Szuts had never gone out socially with Mr. Balint, because, she said, he always got drunk. She stated that her unwillingness to go out with him socially had lasted for 26 years, that is, from the time when she first knew him. That casts a special light on the attenuated nature of the common law relationship that was acknowledged by Mrs. Szuts to have subsisted between 1957 and 1973. I appreciate that it was laid down in Warwick that it is wrong to adopt a rigid and overly conventional conception of a spousal relationship, but that cannot mean that the concept of a spousal relationship is wholly empty of objective meaning or devoid of normative or conventional content. Words like "cohabitation", "conjugal", "social", "familial" and "spousal" as used in decisions such as Warwick, Willis and Proc, among many, describe aspects of complex relationships in which there are large numbers of interactive transactions, some involving a degree of intimacy. Concepts of loyalty, mutuality, cherishing, affection, involvement, interaction, and even shame and patient endurance, are not foreign to the concept of the spousal. With the exception of the economic (in most if not all cases) not all of those elements have to be present, or perhaps not many of them, but something involving the economic and some of those elements has to be going on

between people before it can be said that they have a spousal relationship. I agree with the submission made by Ms. McIntosh on behalf of the Minister that there can be a spousal relationship without there being a continuation of sexual relations in the conventional sense of that term or at least I agree that that is true where there are present enough other elements of a spousal relationship. With the exception of common residence and, in the overwhelming majority of cases, an economic relationship, elements can be absent if enough other elements are present. It is complex. No simple formulae will suffice, and that is undoubtedly why the legislation provides for a Board to hear applications for review on a case by case basis.

To return to the evidence, it was the uncontradicted testimony of Mrs. Szuts that almost the only joint social activities she engaged in with Mr. Balint were fishing outings. Even with respect to those there was no evidence that any third parties were ever involved, that is, that Mrs. Szuts and Mr. Balint ever appeared socially as a couple. The uncontradicted evidence is that after Mrs. Szuts lost her job even the fishing stopped. There was also ample evidence that Mrs. Szuts later became ill, which suggests that, taken alone, the cessation of fishing if it stood alone, should be not over emphasized. The importance of the focus on a few fishing outings is that it tends to highlight how little else was going on between these two people.

The Board appears to consider that there were at most two periods in the relationship between the two after they came to Canada in 1957, i.e. the sixteen year period from 1957 to 1973 when, as Mrs. Szuts acknowledges, they lived in a common-law relationship, albeit with strict equal sharing of costs and almost no social life involving third parties, and the period after 1975, when everything was the same except for the absence of sexual relations and the fact that they bought as joint owners first a house and later a condominium each of which they occupied together. The appellant, without conceding that there was a spousal relationship after 1975, submits that the attenuated relationship which existed between 1975 and 1982 was significantly changed after Mrs. Szuts lost her job.

The Board accepted that the relationship deteriorated after Mrs. Szuts lost her job. That is part of the Board's formal findings, as set forth in paragraph numbered 3 above. That paragraph also speaks of Mrs. Szuts having become "economically dependent", an unfortunate phrase which could suggest, wrongly, that she had become in fact dependent upon Mr. Balint instead of just a "dependent adult" according to the highly formalistic and artificial definition in Regulation 441.

The attention paid to the cessation of fishing seems to have obscured a number of more important changes that, on uncontested evidence, took place after Mrs. Szuts lost her job. The most overlooked of these, in terms of its importance, is that Mrs. Szuts and Mr. Balint stopped buying any food in common. That is important from two points of view. Firstly, it is evidence that tends to make the relationship before the job loss appear more like a spousal relationship, and, secondly, because it reflects an important and down-to-earth change after June 1982, in a relationship where, because of the absence of so many other badges of consortium, the purchase and sharing of at least some food would have bulked large as evidence of sharing.

In support of her contention that there were significant changes in the relationship after she lost her job Mrs. Szuts presented uncontested evidence, ignored in the Board's findings of fact although some of it was mentioned, without comment thereon, in the document styled as Board's reasons for decision, to the effect that after she lost her job, in addition to the cessation of any common purchasing of food:

(a) She and Mr. Balint had lived as virtual strangers in the same house.

> The issue raised on this appeal to which I have just referred is an issue of law to which an appeal lies to this Court. I am persuaded that the Board erred in law in its rejection of relevant evidence on the issue of fact and its decision should be set aside.

See also in this regard the recent decision of Reid J. in this Court in Re Pitts and The Director of The Family Benefits Branch of the Ministry of Community and Social Services (1985), 51 O.R. (2d) 302, to the same effect, and with a valuable discussion of considerations pertinent to the determination of credibility.

The uncontested evidence before the Board as to the joint ownership of shared accommodation was to the effect that late in 1979 or early in 1980 Mrs. Szuts and Mr. Balint purchased a house costing $61,000. The $6,000 down payment was contributed equally. The mortgage payments of more than $800 a month were found to be too great a burden, and so in the summer of 1981 they sold the house, for approximately $100,000 which provided them, according to p.23 of the record, with $28,000, presumably in cash. At the same time they purchased the condominium apartment referred to above for a price of $45,000 of which some $22,000 was initially satisfied by the giving of a mortgage, and the balance presumably came from the proceeds of the house sale.

From those proceeds Mrs. Szuts and Mr. Balint also purchased furniture and an automobile, one can assume on a strictly 50/50 basis.

Under Regulation 441 the equity owned by Mrs. Szuts in the condominium does not disentitle her to assistance; it is provided in cl.3(1)(a) of that regulation that a welfare administrator, in determining need, shall take into account the applicant's budgetary requirements and his, or her, liquid assets and income. Nothing is said of fixed assets. The respondent Commissioner has not denied that Mrs. Szuts was in need. In his written submission he mentioned the co-ownership but his stress was on the common residence in combination with a prior spousal relationship. The significance of the co-ownership is that it is consistent with the expectation, when the house was purchased and again in mid-1981 when the house was sold and the condominium apartment purchased, that the co-owners would be sharing a residence for an indefinite period. Other things being equal, that is evidence tending to support the existence at those times of spousal relationship, since one of the factors, although not in my view an essential factor, of a spousal relationship is the expectation that it will endure or is of indefinite duration.

Other uncontradicted evidence that should not be overlooked is that of Mrs. Szuts to the effect that where she allowed Mr. Balint to move into her home in 1975 she was lonesome as she had no other friends in Canada. That is evidence of more than a mere partnership as to shared accommodation. Other things being equal, it could contribute to a finding of a spousal relationship, but of itself it is equally consistent with friendship.

On the subject of friendship, Mr. McKean, at one stage in his submissions on behalf of Mrs. Szuts, asked why, since it was conceded that there was no sexual relationship between Mrs. Szuts and Mr. Balint, their relationship should be regarded any differently from the relationship of two women who might live together in a residence which they own jointly and with respect to which they share household expenses. While the question retains a certain rhetorical value and impact, reminding us that there can be long term relationships with shared property that would by no stretch of the imagination be considered spousal, the short answer is that the Board operates under the Act and Regulation 441 and the latter clearly makes distinctions on the basis of sex and clearly does not contemplate a spousal relationship between persons of the same sex. The Board is not to be burdened or blamed because it accurately reflects the

regulatory provisions, nor is such rhetoric to distract the Court from the issue before it. That issue remains whether the relationship here in question was a spousal one at the material times.

Leaving aside the question of the insurance policy, which the respondent commissioner himself appears to have treated as a mere incidental, the position of the Commissioner as expressed in his written submission can, I believe, be fairly summarized by the following formula: 'Prior spousal relationship plus present common residence equals present spousal relationship - period'. In so far as that summary is taken to reflect an invariable rule it is, in my opinion, contrary to the decision of this Court in Proc, a decision in respect of which leave to appeal was refused by the Court of Appeal and a decision later discussed without material disapproval in the Court of Appeal decision in Warwick. In so far as such a formula were adopted by the Board as an invariable rule it would also in my opinion constitute reversible error as it would amount to the declining of jurisdiction by way of the fettering by the Board of its proper discretion. We are dealing with an appeal and accordingly the declining of jurisdiction question is of less importance than it would have been in a

matter of judicial review. However, the "finding of fact" expressed in para.6 of the Board's finding, to wit:

> The spousal relationship continues as they are still residing under the same roof.
>
> [Emphasis added]

appears to be as much a matter of a rigid formula as the conclusion expressed by the Commissioner. That Mrs. Szuts and Mr. Balint once lived together in a spousal relationship has not been denied. When the Board says the spousal relationship "continues" it must mean not only in the period from 1975 until Mrs. Szuts lost her job in June 1982 but from then down to the time of the Commissioner's decision on August 12, 1983. Given the uncontradicted evidence as to the agreement that neither Mrs. Szuts nor Mr. Balint was obligated to support the other, and given the profile of their relationship after she lost her job, that is disclosed in Mrs. Szuts' uncontradicted evidence summarized in cls.(a) through (m) above, the Board appears to be saying that there is no material distinction between the relationship before and after Mrs. Szuts lost her job. On the uncontradicted evidence of a person whose credibility has not even been called in question I cannot agree. I shall return to that question.

On behalf of the Minister, Ms. McIntosh submitted that the Board compared the acknowledged common law relationship with the "current" relationship between the two and concluded that "everything was the same except the sexual aspect". With respect, I cannot agree with that submission. The above quoted phrase first appears in the record (at p.22) in the notes taken at the hearing by Norma I. Brown, the presiding member at the hearing, in a part of the notes marginally noted as "Mrs. Szuts under questioning from me". It will be helpful to show the statement in its context by setting it forth with the four brief sentences that preceded it and the two brief sentences that followed it in those notes, as follows:

> They came from England as a common law couple in 1957. They both worked, so right from the beginning they shared half and half. This was a recognized common law by both of them until September, 1973. In 1973 they resided again together after his marriage broke up. They never had sexual relations from then on. Everything was the same as before from then on, except the sexual aspect. When she became unemployed he told her that he would not support her. From then on they bought their own food.

With respect, when the sentence is seen in its context, it most reasonably appears to be a statement as to the nature of the relationship when Mr. Balint returned in 1975. While

there is nothing to suggest that the 1975 relationship did not continue until June, 1982, augmented after 1979 by co-ownership of the common residence, the last sentence of the excerpt set out above clearly negatives any reasonable inference that such relationship was being stated to continue after Mrs. Szuts lost her job. In the factum filed on behalf of the Minister it is asserted that the Board concluded that "everything was the same as before except the sexual aspect ...". The quoted statement, as I said, first appears in the notes of hearing. It is not carried to the Board's formal findings of fact as set forth at p.25 of the record in the six numbered paragraphs quoted above, nor into the findings set forth on p.4 of the Board's reasons for decision (p.42 of the record). The quoted words do appear in the Board's reasons for decision but in a paragraph which, although not commenced with words like "the Appellant stated" is sandwiched between two paragraphs that do begin that way, making it highly probable that when the quoted words appear in the Board's reasons they are appearing as a recital of part of Mrs. Szuts' testimony (as summarized in the notes of Norma I. Brown) and not as a finding or conclusion by the Board. This likelihood is increased by the words on the page next following in the Board's reasons for decision, where the paragraph citing the formal findings is commenced with the words, "In considering the foregoing

evidence ...". Thus I reject the Minister's submission that the quoted words as to limited change reflect any conclusion by the Board, let alone a conclusion that there was no change in the relationship after Mrs. Szuts lost her job. Moreover, it is my opinion that, on all the evidence before it, if the Board had so found the finding would have been perverse.

I have referred in the foregoing to "the material time" in relation to determination of the question of whether or not there was a spousal relationship as defined in the Act. The decision of this Court in Ellis makes the point that as this Court hears appeals from decisions of the Board which, in turn, are in review of the decisions of the Director (in this case the respondent Commissioner fulfils the function of the Director), it is improper to consider any purported evidence as to anything that happened after the Director (or Commissioner, as the case may be) made his decision. The question of material time with which we are concerned here relates not to events arising after the respondent Commissioner made his decision but to how far backward in time it is proper to look, and for what purpose. I adopt the statement of Maloney J., speaking for this Court in Re Chartier and the Director of the Income Maintenance

Branch of the Ministry of Community and Social Services (unreported, released December 4, 1984), where at pp.1 and 2 he stated as follows:

> The evidence before the Social Assistance Review Board in many respects ranged over all or most of that eleven year period. In its reasons for decision the Board made many findings of fact without relating them precisely as to the state of affairs as of August 1st, 1982, [the date of the Director's decision to cancel an allowance] and/or for a reasonable period before that date. We therefore feel obliged to rescind the order of the Board and refer the matter back to the Board to be disposed of as indicated (that is, based on the status as of August 1st, 1982, and a reasonable period before that date). In doing so, we do not profess to restrict the Board in hearing relevant evidence which might range back over the years in so far as such evidence may be helpful in determining the propensities of the parties concerned and the actual state of affairs at the relevant time.
>
> [Words in square parentheses added]

The Board and this Court are therefore to have regard for these purposes primarily to the state of affairs at the time the Commissioner made his decision to cancel the assistance being paid to Mrs. Szuts, i.e. August 12, 1983, and to a "reasonable period" before that date. It is clear from the general finding of the Board and from much specific,

detailed and uncontradicted evidence of Mrs. Szuts, that the relationship here in question deteriorated when Mrs. Szuts lost her job, on June, 1982, i.e., more than a year before the respondent Commissioner's decision. In my view the "reasonable period" can be carried back to June, 1982 and evidence as to the relationship before June, 1982 should be considered only in so far as it casts light upon the state of affairs in the relevant period.

It is worth noting that, as there is no dispute that at all material times Mrs. Szuts and Mr. Balint occupied the same residence, there is no issue as to the first part of the two part test laid down by Reid J. in Pitts and applied by me in Re Burton and the Minister of Community and Social Services (1985), 52 O.R. (2d) 211. The sole question here is whether at the material times there was a spousal relationship between persons whose common residence was admitted.

The appellant, in a powerful argument, submits that in arriving at its conclusions on the evidence before it the Board: has disregarded the decision of the Court in Willis and the evidence especially relevant thereto; has materially misinterpreted the decision of the Court of

Appeal in Warwick; and has defied the decision of this Court in Proc. As stated above, Proc was a decision with respect to which leave to appeal was refused by the Court of Appeal and also a decision that was in its result and in material parts, approved by the Court of Appeal, although not without comment. In my view the disapproving statements made in connection with Proc by Blair J.A. in the decision in Warwick related not to the Proc decision itself but to the way in which it had been interpreted by the Social Assistance Review Board and the Divisional Court in the Warwick matter to give undue, indeed exclusive, prominence to economic matters in determining, where common residence was admitted, whether a spousal relationship existed.

Counsel for the respondent Commissioner, in addition to simple assertions of the Commissioner's conclusions and to citations of some of the relevant definitions and regulatory provisions set forth above, submitted, correctly, that Mrs. Szuts has the onus of establishing her entitlement and submitted, incorrectly in my view as stated above, that whether or not there was a spousal relationship was a question of fact alone and so this Court did not have jurisdiction. I have referred above to Mr. Christie's oral submissions focusing on what he submitted were the small number of changes in the relationship between Mrs. Szuts and Mr. Balint after Mrs. Szuts lost

her job, that "The appellant stated and the Board found that the relationship between her and Mr. Balint had not changed except for the sexual aspect". I have stated above with regard to a similar assertion on behalf of the Minister my reasons for being unable to accept that the Board made any such finding or came to any such conclusion, and my reasons for believing that it could not have properly done so on the evidence before it. In oral submissions aimed at distinguishing the facts in the case at bar from those in Proc, Mr. Christie made the interesting observation, to which I shall return, that in Proc this Court made no express finding that the man and woman there in question had ever lived together in a spousal relationship, as defined.

In the factum delivered on his behalf the position of the Minister, with respect to what are referred to as the issues raised by the appellant, is stated in two submissions, namely:

> (i) ... that in order for an economic relationship to be found, there need not be evidence that the alleged spouse in fact supports or recognizes an obligation to support the recipient of public assistance.
>
> (ii) ... that there need not be a sexual relationship between two persons, before they can be said to be living together as husband and wife.

In oral submissions on behalf of the Minister with regard to the second of those positions Ms. McIntosh stated that the Minister was more concerned with matters of principle and precedent than with this particular case and that the Minister particularly wished to avoid a decision which could be cited as supporting the proposition that where there is a cessation of the sexual element in a relationship previously coming within the extended definition of the spousal, that means that the relationship ceases to be spousal. Counsel for Mrs. Szuts made it clear at the hearing, if not before, that he was not arguing that the continuation of sexual relations is a sine qua non for a finding that relations, otherwise spousal, continue to be such for purposes of the Act.

Although I express no opinion as to relationships in which there never were sexual relations as commonly understood and although I would stress that I speak of relationships "otherwise spousal", I do not have any difficulty in agreeing with the Minister's proposition that the cessation of sexual relations in a relationship otherwise spousal, as defined, does not necessarily mean that the relationship ceases to be spousal. I believe my opinion in this regard is in accord with the following statements made and approved by Blair J.A. in Warwick, at pp.537 and 538:

... marriage is more than a matter of economics and involves elements broadly described by the words cohabitation and consortium.

The extent to which the different elements of the marriage relationship will be taken into account must vary with the circumstances of each case, as illustrated in Thomas v. Thomas, [1948] 2 K.B. 294. In that case a wife, living apart from her husband, had been awarded a weekly payment under the Summary Jurisdiction (Married Women) Act, 1895 (U.K.), c.39. Th wife then moved back, with her child, to her husband's home but led a completely separate life from him. Lord Goddard, C.J., held that there had been no resumption of cohabitation within the meaning of the statute and said, at p.297:

> Cohabitation does not necessarily depend upon whether there is sexual intercourse between husband and wife. "Cohabitation" means living together as husband and wife; and, as I endeavoured to point out in Evans v. Evans ([1948] 1 K.B. 175), cohabitation consists in the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering housewifely duties to the husband and the husband cherishing and supporting his wife as a husband should. Of course, sexual intercourse usually takes place between parties of moderate age if they are cohabiting, and if there is sexual intercourse it is very strong evidence - in fact it may be conclusive evidence - that they are cohabiting; but it does not follow that because they do not have sexual intercourse they are not cohabiting. "Cohabiting", as I have said, means the husband and wife living together as husband and wife.

From his comments at p.534 in Warwick one would deduce that Blair J.A., while agreeing with the main thrust of the above quotation from Thomas v. Thomas, would find the conventional and restricted view of wifely and husbandly roles and duties to be somewhat "nostalgic". If that were the case I would agree with him.

On behalf of the Minister reference was also made to the decision of this Court in Bernice Smith v. The Director, Family Benefits Branch, Ministry of Community and Social Services (unreported, released September 23, 1980). In that case a Mrs. Smith, aged 50, who had a 15 year old daughter and was in receipt of mother's allowance under the Family Benefits Act, had her allowance cancelled when the Director discovered that she and a Mr. Martin, aged 69, had bought a residential property as joint tenants. At all material times Mrs. Smith and Mr. Martin occupied the property. After the cancellation of her allowance Mrs. Smith transferred her interest in the property to Mr. Martin and continued to live there. She either appealed the Director's decision or reapplied and then appealed the Director's decision that she remained ineligible for mother's allowance. The Board upheld the Director and the Divisional Court upheld the Board saying the evidence before the Board was

sufficient to enable the Board to reach the conclusion it came to, i.e. that Mrs. Smith was ineligible for assistance because she was living with Mr. Martin in a spousal relationship. It is noted that Cromarty J., speaking for the Court, found that the evidence indicated the presence of a significant number of the indicia of cohabitation and conjugality. Thus it was accepted; that Mrs. Smith remained liable on the covenant on the house mortgage; that Mr. Martin had made a will leaving the property to Mrs. Smith; that Mr. Martin had his own bedroom but shared all the main rooms of the house with Mrs. Smith and her daughter; that they cooked and ate all their meals together as a family; that he took her in his car for shopping, for rides to church, to her doctor and whenever else she required transportation. Fuel bills and hydro costs were shared. She did his laundry. The furnishings in the house were hers but were insured under his fire insurance policy. He paid all realty taxes. On the subject of sexual relations the Court did <u>not</u> say that their absence did not make any difference. The Court's actual statement on the point, at p.3, covered much less ground, being as follows:

> This does not mean that direct evidence of a sexual relationship between the parties is essential to the finding which much be made by the Social Assistance Review Board.

I am at a loss to see how this decision advances the position of the Minister in the case at bar. As to the indicia of conjugality and cohabitation, the facts stand in stark contrast to the facts, at the material times, in the case at bar. On the question of sexuality it might be argued that the decision is contrary to the Minister's position. It says direct evidence of a sexual relationship is not required. Is indirect evidence required? Is inference permitted? Will sexual relations be assumed in the absence of evidence to the contrary? Or presumed even in the presence of evidence to the contrary? The decision is a long, long way from being a holding that the absence of sexual relations makes no difference.

No direct authority was cited, in factum or in oral argument, in support of the Minister's first issue or proposition set forth above, i.e. "that in order for an economic relationship to be found there need not be evidence that the alleged spouse in fact supports or recognizes an obligation to support the recipient of assistance". (Emphasis added). As phrased the proposition misses the mark by a wide margin. While economic ties, factors and relations are important elements in a spousal relationship, in the extended meaning of the term provided by the above-quoted definitions, no one is, or ought to be, seeking to determine

whether the provision of financial support, or the recognition of an obligation to provide such support, is a condition precedent to a finding that an economic relationship exists between two people. Obviously it is not. Vendors and purchasers have an economic relationship, as have debtors and creditors, employees and employers, lessors and lessees, and many others. The question under the Act is whether there is a spousal relationship, as defined. If a correction is made in the question and it is put as whether the fact of support or recognition of an obligation to provide support is an essential element of an (extended) spousal relationship, as defined, still no direct authority is cited in support of the negative answer sought by the Minister. That is hardly surprising, as the decision in Willis in this Court is clearly an authority to the opposite effect. In Willis, Saunders J., speaking for the Court and after considering, among others, the decisions in Proc and Warwick, stated the following, at p.293:

> The decisions appear to boil down to a finding that cohabitation and consortium are the badges of a spousal relationship. As the legislation is concerned with need, the understanding that support will be provided by the cohabitant is an essential but not the only element in the relationship. ...

And further down the same page, one finds the following:

> ... On the basis of the cases cited, there must be some evidence of cohabitation and consortium which includes the recognition of an obligation to provide support before it can be found that a woman is living with a man as his wife. ...

In Proc, to which Saunders J. referred, Henry J., speaking for this Court, at p.626 (O.R.), found it significant that:

> ... Mr. Moquin accepts no legal obligation to support her. ...

And in the same report, at p.630, Henry J., speaking of the economic relationship of a man and a woman who were cohabitants and relating that to the question of whether the man and woman were living together as if they were husband and wife, stated:

> ... The material considerations here are the responsibility taken by the "husband" for the support and maintenance of the "wife", their respective interests in the matrimonial home, the liability assumed by the "husband" for the debts of his "wife" and the like. ...

And on the same page:

> Adopting this approach to the application of the words "as if they were husband and wife", we think it a fair inference that Mr. Moquin and Mrs. Proc were not spouses within the meaning of the definition. Mr. Moquin acknowledged no conjugal responsibility for her economic support, but proceeded entirely from charitable and humanitarian motives. While he provided food and lodging without payment from her, he did not purport to be responsible for her financial obligations. The indicia of economic responsibility for her are not present. ...

In Warwick, Blair J.A. considered the decision in Proc and, basically, approved it, although he interpreted it as not putting an exclusive emphasis on economic factors and went on to deal with other factors, with the effect of broadening the indicia of the spousal that are to be considered. At p.536, Blair J.A. stated as follows:

> The Proc case is much stronger from the Department's standpoint than the present case. There, the woman's position had changed from that of a wife "in fact if not in law" to that of a mere lodger given free room and board on a compassionate basis. None of the usual indicia of marriage remained, including the usual ongoing commitment by a husband for economic support and maintenance of his wife.
>
> [Emphasis added]

I momentarily leave consideration of the Minister's issues to express the opinion that the preceding quotation is an authoritative pronouncement which makes the respondent Commissioner's simple position, i.e. that a spousal relationship at an earlier time plus resumed common residence equals a current spousal relationship, legally untenable. To the extent that the Board's decision has the same basis as the Commissioner's, and there is almost nothing in the record to suggest otherwise, it, too, is legally untenable.

Returning to the Minister's first issue, I note that the decision of this Court in Willis was considered in this Court in Re Manone and The Director of Family Benefits (unreported, released April 3, 1984). Southey J., speaking for the Court, quoted, at p.293, the dictum of Saunders J. that includes the following:

> ... As the legislation is concerned with need, the understanding that support will be provided by the cohabitant is an essential but not the only element in the relationship. ...

With respect to the contemplated undertaking to provide support, Southey J. noted that it would be highly unlikely that a case would arise where there had been an undertaking to provide support but support had not in fact been provided, and he expressed the view that it was therefore

most important to determine in each such case the extent, if any, to which the cohabitant has in fact provided support. Southey J. found it unnecessary to consider for purposes of Manone, the further statement of Saunders J. in Willis that, in the words of Southey J. "might be taken as suggesting that there must be a recognition of an obligation to provide support before it can be found that a woman is living with a man as his wife". The reason was that in Manone there was not only no evidence of any recognition of an obligation to support or of an understanding as to support, but there was evidence that in fact no support was provided.

In the case at bar the facts go considerably beyond the fact situation in Manone. Here, we have uncontradicted evidence not only that no support was in fact provided, not only that there was no understanding that support would be provided but, quite the contrary, that there was an understanding, well before Mrs. Szuts lost her job, that neither party had any obligation to support the other. There was also evidence that when Mrs. Szuts lost her job she was again told by Mr. Balint that he would not support her. There was no contradictory evidence on any of these points. If the extended question did not have to be answered in Manone why is it appropriate or proper that it

be answered here? Again, the Minister's so-called issue is not an open question in the law.

The above-quoted passages from Willis were quoted with approval in the decision of this Court in Chartier where the views of Saunders J. were referred to, at p.2, as "the guiding principles" on the point.

One cannot help wondering what the Minister and his advisers hoped to achieve by intervening in this matter. The second of the two issues raised by the Minister in his factum was authoritatively answered by the Court of Appeal decision in Warwick, and so need not have been raised in these proceedings. The first of the issues raised by the Minister was dealt with by this Court in Willis and the propositions there set out on the point in question were adopted by this Court in Chartier. The importance of support as a factor in a spousal relationship was not questioned in Manone. On the facts in that case it was held to be unnecessary to express an opinion on whether a recognition of an obligation to support was an essential factor in a spousal relationship. It is even less necessary to express an opinion on that point on the facts of this case. I am aware of no case that has questioned the decision in Willis

that support is an essential but not the only element in a spousal relationship, as defined. On that basis alone there are grounds for allowing the appeal of Mrs. Szuts, for on the evidence it is clear that no support was ever forthcoming from Mr. Balint. On uncontested evidence the facts here go considerably beyond that, negativing both undertaking and any sense of obligation and, indeed, showing that here there was an agreement or understanding that neither party had any obligation to support the other.

Clearly this is not an appropriate case for the Minister to seek to challenge either the decision or the dicta of Saunders J. in Willis on the questions of the importance of an undertaking to support or of the importance of a sense of obligation to provide support.

If the Minister is unhappy with the decision in Willis or the decision in Proc as interpreted in Warwick itself and wishes to do something to change the law as there laid down, is not the most appropriate remedy an amendment to the Act or the regulations? I acknowledge that an appropriate case may come along in which the questions on which the Minister obviously desires different answers come legitimately before the Board and then the courts in appeals

in which the Minister can exercise his statutory right to participate. Such a case, if the required leave to appeal were granted by the Court of Appeal or, as to some issues, by the Supreme Court of Canada, might result in the authoritative overruling of parts of the law as presently laid down or might result in clarifications more agreeable to the Minister. But in my opinion, unless and until the law is changed in one of those ways, it is the duty of the Minister to administer the law as laid down in the Act and the regulations and in authoritative interpretations thereof by courts of competent jurisdiction.

The primary aim of the Act is the relief of need. With regard to such a statute there is something distinctly unedifying about seeing the appeal of a person admitted to be in need burdened with an intervention and opposition by the Minister occasioned, as acknowledged, not so much by the merits of this application, but by the, in my view, inappropriate and unnecessary "issues" referred to above. Insensitivity to the situation of the individual applicant is further illustrated by the fact that the Minister in his factum did not ask that any order or decision of the Court be framed in such a way that a precedent not be created that would militate against his long run and over-all concerns as

administrator of the Act. Instead, without detailed argument or submissions on the merits of the appeal in question, the Minister asked that the appeal be dismissed.

On an appeal from a tribunal that has been repeatedly criticized for ignoring or brushing aside relevant evidence without explanation and without any, or any justified, findings as to the credibility of witnesses (see in this regard decisions of this Court in Dowlut, Pitts, Burton and Manone) and with a rather full record reflecting a large amount of relevant and uncontradicted evidence from a crucial witness whose credibility was not called in question, there were not on behalf of the Minister any written submissions or observations as to the absence of findings based upon such evidence, or as to why such evidence could be ignored, nor were there submissions as to the absence of such findings or as to credibility. On the matter of the Board's failure to deal with much relevant evidence before it the Minister proceeded as if the decisions in Dowlut and Pitts had not been handed down. On the issue of support the decision in Willis was similarly ignored. The Minister and the law officers of the Crown have no more right than any other party or counsel to ignore relevant decisions of this Court. In view of such omissions,

relating to matters clearly relevant to the decision of this appeal, I question not only the correctness of the submissions made on behalf of the Minister but also the propriety of the Minister's request that the appeal be dismissed. I have already referred to the state of the law on the two issues that were stated to be the Minister's reason for participation in this appeal.

When I reframed the Minister's submission as to support I stated, above, that no direct authority was cited on behalf of the Minister's contentions with regard to support. Indirect authority was cited, in the form of excerpts from, and propositions based upon parts of, the Court of Appeal decision in Warwick. There was reference by the Minister to the well-known dictum of Blair J.A., at p.537 (O.R.), that:

> Marriage involves a complex group of human interrelationships - conjugal, sexual, familial and social as well as economic. ...

The Minister also cited from the same page the above quoted excerpt which includes the above quotation from the reasons of Lord Goddard C.J. in Thomas v. Thomas, the selected statement from the reasons of Blair J.A. being in this instance, as follows:

> The extent to which different elements of the marriage relationship will be taken into account must vary with the circumstances of each case,...

I have no difficulty in agreeing with either of those propositions, or as I stated above, with the Minister's contention that the cessation of sexual relations in a relationship otherwise spousal, as defined, does not necessarily mean that the relationship ceases to be spousal. The written submissions of the Minister were not much directed to the support issue, and in oral submissions Ms. McIntosh focused mainly on the implications of the cessation or absence of sexual relations. However, part of the argument of Ms. McIntosh appeared to be that because marriage "involves a complex group of interrelationships" involving many elements, including the economic, and because the "extent to which different elements ... will be taken into account must vary with the circumstances of each case" it cannot be said that any of, (i) payment of support, (ii) an undertaking to pay support or, (iii) a recognition of an obligation to pay support, is an essential feature of a spousal relationship as defined. The argument appears to be that where there are, or can be, many elements in a, necessarily complex, spousal relationship, the absence of <u>any</u> one element, except common residence, cannot be said to

negative the existence or continuance of a spousal relationship, as defined. I have already stated my opinion that that position can be maintained only by ignoring the decision of this Court in Willis. There is, apparently unintentional, irony in the fact that the Minister seeks to extract a general rule, apparently to be applied without regard to the background facts, from quotations of authoritative pronouncements the burden of which is that the relationship is a complex one, involving many elements, where the extent to which the different elements "will be taken into account must vary with the circumstances of each case ...".

Much less amusing is the manifest tendency of the Crown law officers to ignore decisions not in accord with the Minister's position. An example is afforded by the submissions on behalf of the Minister that the Board had not in the case at bar misstated the law laid down in Warwick. In its reasons for decision the Board included the following paragraph:

> In my opinion, the Hon. Mr. Justice Blair considered the economic relationship to be only one of several criteria, he did not distinguish even to the extent of making it first among equals.

That statement, as shown by the excerpts from Warwick, included in these reasons in the above discussion of the question of support, is manifestly wrong. More importantly, the same statement appeared word for word, in the reasons of the Board dealt with by me in Burton. In Burton I characterized that statement as a "persistent" misinterpretation of Warwick, because essentially the same interpretation had been clearly held to be erroneous in the decision of this Court in Manone. On this appeal Ms. McIntosh, who was also a counsel on the Burton appeal, submitted that the Board was not in error in its view of the decision in Warwick. My reasons in Burton were released only on August 30, 1985. I understand that leave to appeal that decision was being sought, when this application was being heard but, of course, the appeal had not yet been heard, and so Burton, to the knowledge of counsel for the Minister, cannot have been reversed. Nor has the decision of this Court in Manone been reversed. Similarly, the decision of this Court in Pitts, which held, in effect, among other things, that the Social Assistance Review Board commits reversible error when it ignores the relevant evidence of crucial witnesses without making any findings, or any reasonably justifiable findings, as to the credibility of the witnesses has not been reversed. In the case at bar much of the evidence of Mrs. Szuts was dealt with in the manner

considered improper in Pitts - and yet the Minister, ignored crucial evidence in the case at bar, and ignored the fact that although the Board recited some of the evidence it treated most of it, when it came to make its decision, as though it did not exist. Leave to appeal was being sought in respect of the decision of this Court in Pitts. The Minister appeared to be operating in the belief that an application for leave to appeal therefrom operates as a stay of points of law determined in the decision of a court of competent jurisdiction, i.e. the decision of this Court hearing an appeal from the Social Services Review Board on a question that is not a question of fact alone. Without there even being an appeal pending, the submissions on behalf of the Minister, as explained above, virtually ignored the decision of this Court in Willis. Written and oral submissions were made as if that decision of a court of competent jurisdiction had never been released.

It may well be that the ever increasing integration of society (in part reflected in a vast increase in regulatory enactments and prescriptions), combined with increases in the number of judicial proceedings involving governmental authorities and viewed in the light of provisions of the Canadian Charter of Rights and Freedoms

which can result in statutory and regulatory provisions being held to be nullities, and other factors, all taken together, create situations in which some of those charged with the administration and enforcement statutes and regulations may need legislation that would provide for the hearing of specified classes of appeals on a highly expedited basis. It may even be that such authorities require statutory assistance in the form of provisions that might seek to avoid administrative chaos in the face of a court decision of wide ranging impact by providing a mechanism for deferring, upon application in a proper case, the general impact of the decision until conforming administrative changes can be made or amending regulations or legislation can be put in place. It is certainly not my place to advocate such developments, nor do I do so. I mention those possibilities only to highlight the fact that no such legislation is in place. In the absence of such provisions neither the Minister, nor any Ministry or any law officer of the Crown, has the right to knowingly ignore the decision of a court of competent jurisdiction, whether or not leave to appeal has been sought or an appeal is pending, or an appellate decision is awaited.

Given the amount of litigation in this area of the law and the frequency with which the same law officers of the Crown appear on interventions by the Minister on appeals of decisions of the Social Assistance Review Board on claims arising under the Act or under the Family Benefits Act, no one can reasonably take refuge in a belief that the Ministry is not, through its legal advisers, aware of the decisions in question. Simple unawareness of the judicial decisions in question is so highly improbable that the problem must lie elsewhere. It appears that the Ministry is operating on the basis of faulty legal advice, either as to the meaning and implications of the decisions apparently being ignored or, a more serious matter, as to the binding general effect of a prior interpretation by a court of competent jurisdiction of provisions of the statute or regulation under consideration. The former is by far the less serious, as it can be corrected with information, from the courts or elsewhere. The latter, in so far as it may reflect not simple error but an element of wilfulness, would cut to the quick of the concept of the rule of law and would raise questions of the abuse of the process of the court. Anyone with any doubts about the absolute centrality of the concept of the rule of law in the Canadian constitution and legal order of things need only consider the recent decision of the Supreme Court of Canada in the Reference by the

Governor-in-Council concerning certain language rights under Section 23 of the Manitoba Act, 1870, and Section 133 of the Constitution Act, 1867, etc. (unreported, rendered June 13, 1985). That decision was concerned with a vastly larger subject matter - viz. the prospect of there being no valid and enforceable statute law or regulations in the Province of Manitoba, but its reminder of the centrality of the rule of law is clear and unmistakable, and has fundamental implications for the relatively modest problem under consideration here. The rule of law is jeopardized and the process of this Court is abused when the Ministry proceeds as though relevant and clearly stated decisions of this Court, obviously within its jurisdiction, and obviously known to the Ministry through its legal advisers, are treated as though they had never been pronounced. Concern to prevent abuse of its process and concern to protect the rule of law impel me to point out the impropriety of such a practice.

The foregoing should not be taken as a criticism of counsel representing the Minister on the hearing of this application. Within the limitations of her brief Ms. McIntosh was, as usual, skilled and helpful. The mission appears to have been misconceived, not the manner in which it was carried out.

It is almost an anti-climax to return to the particulars of this appeal, which I perceive to be relatively simple and clear cut. In my opinion the time since Mrs. Szuts and Mr. Balint arrived in Canada in 1957 divides itself, so far as their relationship is concerned, into three main periods. Those are: first, the period between their arrival in Canada in 1957 until Mr. Balint's withdrawal from their common residence in 1973; second, the period between their resumption of common residence in 1975 and June, 1982 when Mrs. Szuts lost her job; and, third, the period from June 1982 until August 12, 1983 when the Commissioner found Mrs. Szuts disentitled to an allowance.

It has been acknowledged that there was a spousal relationship in the first period. From the evidence it appears, however, that even in the first period although there was strictly equal sharing of household costs and presumably some other costs, there was very little social life.

In the second period there was no sexual relationship. Household and related costs were shared half and half. There was no social life except some fishing outings. Some food was purchased in common, and the parties must have been reasonably friendly toward, or accepting of,

each other, because in 1979 they purchased a house as joint tenants and as late as the summer of 1981 sold it and purchased the condominium apartment referred to above. The evidence of Mrs. Szuts with respect to the application for an insurance policy, although it refers to the third period, does disclose that Mrs. Szuts had no relative or friend or person in her life, who might see to her funeral and burial, except Mr. Balint. Were it not for the question of support and the uncontradicted evidence of a long term agreement or understanding that neither had any obligation to support the other, I would not have believed that it would have been clearly wrong to hold that a spousal relationship, as defined, subsisted between Mrs. Szuts and Mr. Balint in the second period. In my view it would not have been clear that such a relationship did exist but, with the onus on the applicant, I would, assuming the Board had not ignored significant amounts of material evidence, probably not have found the Board to have committed reversible error in finding that a spousal relationship existed. However, even in the second period, the situation is quite different, in my view, when consideration is given, as it must be, to the uncontradicted evidence that in the second period, i.e. when both were still employed, there was an understanding that neither of them had or would have any obligation to support the other. There is no countervailing evidence, nothing to

suggest any understanding that support would be paid or that Mr. Balint had any sense of obligation in that regard. On the basis of all of the evidence it is my opinion that the decision of this Court in Willis is clear authority for my conclusion that the relationship was not a spousal one in the second period.

However, in my opinion the real test arises with respect to the third period. One looks at the situation on August 12, 1983 and in a reasonable period preceding that date. The Board has found that relations between Mrs. Szuts and Mr. Balint deteriorated after the former lost her job in June, 1982 and so that event constitutes an appropriate beginning for the "reasonable period" referred to in Chartier. At the beginning of that period, Mrs. Szuts apparently asked Mr. Balint if he would support her, for the evidence is that he said no. He did not in fact pay any support. Nor is there any evidence that he expressed any intention to provide support, or had any sense of obligation in that regard. It has been suggested that the very fact that Mr. Balint declared that he would not support her was consistent with a situation in which she felt free to ask for support, that is, with a situation where she had some basis for expecting that he might support her. Her request, if made, can equally be interpreted as a request that he

change his mind about support. There is no evidence to contradict the evidence of Mrs. Szuts that there was an earlier agreement between them that neither would have any support obligations with respect to the other.

Mrs. Szuts was employed steadily, or without significant gaps, from 1957 to June, 1982. Presumably she paid her taxes and was no burden to the community. When she lost her job she was entitled to be supported by unemployment insurance for a year, as in fact happened. She was not then seriously ill. She may then have had hopes of getting another job. The evidence is that it was when she lost her job that Mr. Balint said, or confirmed, that he would not support her. There is nothing to suggest that either of them knew then that she would end up applying for welfare assistance to tide her over until she began receiving the old age pension and Canada Pension Plan retirement benefits. There is nothing in the record to suggest that Mrs. Szuts and Mr. Balint collusively shaped or misrepresented their relationship in the third period, or earlier, in order to make Mrs. Szuts appear eligible for general welfare assistance. There were no findings against her credibility, nor even any real attack on it before, or by, the Board. There was, and is, an onus on Mrs. Szuts to establish that

she is eligible for assistance. Her uncontradicted evidence, of which there is an abundance, all, except that relating to co-ownership of the common residence, some furniture and a car, (all purchased in the second period) and a prior common-law relationship, tends to support her claim to be eligible. On the question of support and with reference to most indicia of a spousal relationship, there is no contrary evidence.

The Board did not ignore all of Mrs. Szuts' evidence, because it did find that there was deterioration in the relationship after Mrs. Szuts lost her job, but, without making an adverse finding as to credibility and without expressly rejecting any of that evidence, the Board appears from the record to have ignored all the evidence, except that as to the absence of sexual relations, going to the absence of indicia of a spousal relationship. To the extent that is the case the Board is left with suspicions or a formula approach such as that of the Commissioner, as discussed above. With regard to the Board's suspicions I adopt the dictum of Saunders J., at p.293 in Willis, as follows:

> ... Notwithstanding the onus, the Board must not act on mere suspicion to take away an allowance. ...

As stated above, the Commissioner's formula approach, under which the combination of a previous (even ten years previous) common law relationship plus current common residence equals a current spousal relationship as defined, must be rejected as contrary to the decision of this Court in Proc and, more importantly, to the law in Proc as approved by the Court of Appeal in Warwick where, at p.536 (O.R.), Blair J.A. stated as follows:

> ... The Proc case is much stronger from the Department's standpoint than the present case. There the woman's position had changed from that of a wife "in fact if not in law" to that of a mere lodger given free room and board on a compassionate basis. None of the usual indicia of marriage remained, including the usual ongoing commitment by a husband for economic support and maintenance of his wife.

The fact that a relationship has previously been a spousal one, as defined, does not mean that the relationship cannot cease to be spousal, even though the parties at the material time share a residence. Each situation must be looked at on its facts.

It is not only the element of support that is missing. Almost all of the indicia of a spousal relationship have been missing at least since June, 1982. If one considers the factors summarized in cls.(a) to (m) above Mrs. Szuts and Mr. Balint are seen to be sharing a jointly owned apartment, in the sense that both own it and both live there, but to be living otherwise quite separate lives. The situation is more extreme than that in Proc because in Proc there were continuing instances of kindness and consideration on the part of Mr. Moquin. There are no such instances here. The joint ownership and the occupation of the condominium apartment is continued by each for his, and her, own sake - for convenient low cost housing - and not for the sake of the other.

Welfare administrators in the course of carrying out their often difficult duties will doubtless encounter situations where couples whose relationships are properly within the definition of the spousal have deliberately arranged their affairs to make it appear that the relationship is not spousal as defined. There is no evidence that that has been done in this case; indeed the great weight of the evidence is clearly to the opposite effect.

In my opinion Mrs. Szuts was not at the material times living with Mr. Balint as if they were man and wife. Accordingly, Mrs. Szuts was not at the material times a dependent adult, as defined, and therefore, her need having always been acknowledged, she was eligible at the material times for general welfare assistance under the Act.

In the circumstances nothing would be gained by referring the matter back to the Social Assistance Review Board for a new hearing. I would allow the appeal and refer the matter back to the respondent Commissioner for disposition on the basis that the appellant was at the material times living as a single person, and for the payment to her of such allowances as are accordingly payable, having regard to the interim allowances and any other allowances she may have received under the Act, or with reference thereto in the period between August 12, 1983 and the date she ceased to be eligible for general welfare assistance under the Act.

Costs were not asked for by the applicant, probably due to the special nature of the retainer and funding of counsel for the applicant, but had costs been asked for I would have awarded the costs of this application to the applicant and, assuming but not deciding that there

is jurisdiction to do so, I would have held the Minister responsible for half of such costs.

Released: February 11, 1986

cc

IN THE MATTER OF an appeal from the decision of the Director, Income Maintenance Branch, under the Family Benefits Act, R.S.O. 1980, Chapter 151.

AND IN THE MATTER of an appeal from the decision of the Social Assistance Review Board, dated October 31, 1983, in respect of SHIRLEY KAY ROSE BURTON.

BURTON v. MINISTER OF COMMUNITY AND SOCIAL SERVICES

INDEXED AS: BURTON v. MINISTER OF COMMUNITY AND SOCIAL SERVICES
(No. 1159/83)

Ontario Divisional Court
Sutherland, J.
August 30, 1985.

Summary:

A 35 year old divorced mother for several years received an allowance for herself and her three dependant children as a deserted mother, pursuant to the Family Benefits Act. The Director of the Income Maintenance Branch of the Ministry of Community and Social Services cancelled the allowance on the ground that the mother was no longer living as a single person. The mother appealed.

The Social Assistance Review Board affirmed the Director's decision. The mother appealed under s. 15(1) of the Family Benefits Act.

The Ontario Divisional Court allowed the mother's appeal, held that she was a single person qualified for benefits and ordered that her benefits be restored.

Practice - Topic 8803

Appeals - Whether trial judge or tribunal must give reasons for rejecting evidence or findings of credibility of witnesses - The Ontario Divisional Court stated that where the Social Assistance Review Board disregarded an applicant's evidence and her witnesses' evidence without making any express findings as to credibility of the applicant or witnesses, there was a reviewable error giving the Divisional Court jurisdiction to review the Board's findings - See paragraph 4.

Social Assistance - Topic 852

Claims - Benefits - Entitlement - Bars - Cohabitation - Single person - What constitutes - Under Reg. 318, s. 5(b), of the Regulations under the Family Benefits Act, "no person is eligible for an allowance ... who is not living as a single person" - The Ontario Divisional Court adopted a two-part test to determine whether a person is "single", discussed how the test should be applied, and in applying the test determined that a woman was living as a single person such as to qualify for benefits.

Social Assistance - Topic 984

Claims - Appeals - Jurisdiction of Appeal Board - Warning by court respecting board practices and interpretations - The Ontario Divisional Court criticized the Social Assistance Review Board's practices and interpretations of the Family Benefits Act and stated that the Board should have regard to repeated declarations by the court on these matters - See paragraph 28.

Social Assistance - Topic 986

Claims - Appeals - Disclosure to applicant - Duty of Crown - The Family Benefits Act, s. 14(5), provided that at a hearing before the Social Assistance Review Board, the Director of the Income Maintenance Branch of the Ministry of Community and Social Services may make his submission to the Board in writing, but the applicant or recipient who is a party to the hearing shall be afforded an opportunity to examine the submission before the hearing - The Ontario Divisional Court commented on the meaning of s. 14(5) and the effect of non-compliance therewith - See paragraph 3.

Social Assistance - Topic 988

Claims - Appeals - Burden of proof - Under Regulation 318, s. 5(b) of the Regulations under the Family Benefits Act, "no person is eligible for an allowance ... who is not living as a

single person" - The Ontario Divisional Court stated that on a hearing to determine whether a person is "single" the onus is on the person seeking assistance to prove that she was living as a single person - See paragraphs 7, 16.

Social Assistance - Topic 1021

Claims - Appeals to courts - Attempt by board to oust jurisdiction of court - The Family Benefits Act, s. 15(1) allowed an appeal from a decision of the Social Assistance Review Board on a question that was not a question of fact alone - The Ontario Divisional Court stated that the question of whether a person is living as a single person within the meaning of the regulations under the Act is not a question of fact alone - Thus the court held that nothing was achieved by the Board stating that its decision on the issue of whether a party was single was a finding of fact - See paragraph 4.

Social Assistance - Topic 1026

Claims - Appeal to courts - Leave to appeal on question of law - The Ontario Divisional Court held that the question of whether a claimant was living as a single person such as to qualify for social assistance benefits was not a question of fact alone for the purposes of appeal - See paragraph 4.

Words and Phrases

SINGLE PERSON - Meaning of phrase "single person" as it appeared in Regulation 318, s. 5(b) of the Regulations under the Family Benefits Act, R.S.O. 1980, c. 151 - See paragraphs 19 to 31.

Cases Noticed:

Re Ellis and Ministry of Community and Social Services (1980), 28 O.R. (2d) 385, refd to. [para. 3].

Re Warwick and Minister of Community and Social Services (1978), 21 O.R. (2d) 528, refd to. [para. 4].

Pitts v. Ontario (1985), 9 O.A.C. 205, folld. [para. 4].

Dowlut v. Commissioner of Social Services (1985), 8 O.A.C. 136, folld. [para. 16].

Re Proc and Minister of Community and Social Services (1974), 6 O.R.(2d) 624; 53 D.L.R.(3d) 512, refd to. [para. 19].

Statutes Noticed:

Family Benefits Act, R.S.O. 1980, c. 151, ss. 14(5) [para. 3]; 15(1) [para. 2]; 15(4) [para. 5].

Family Benefits Act Regulations, R.R. O. 1980, Regulation 318, s. 5(b) [para. 7].

Counsel:

James Jordan, for the appellant;
Leslie M. McIntosh, for the respondent.

This appeal was heard on May 24, 1985, before Sutherland, J., of the Ontario Divisional Court, who released the following decision on August 30, 1985.

[1] Sutherland, J.: The appellant, Shirley Burton, is a 35-year old divorced mother of three children, aged 12, 16 and 18. In January, 1972 she began receiving an allowance for herself and her dependent children, as a deserted mother, pursuant to the **Family Benefits Act**, R.S.O. 1970, c. 157 (now R.S.O. 1980, c. 151), and hereinafter referred to as the "**Act**". The Director of the Income Maintenance Branch of the Ministry cancelled the allowance on the ground that the appellant was not living as a single person. The appellant appealed to the Social Assistance Review Board (the "Board"), which affirmed the Director's decision.

[2] Ms. Burton appeals the Board's decision pursuant to s. 15(1) of the **Act**, which section provides that any party may appeal from a decision of the Board to the Divisional Court on a question that is not a question of fact alone. By order of Evans, C.J.H.C., made on May 22, 1985 pursuant to s. 16(2)(c) of the **Courts of Justice Act**, 1984 (Ont.) c. 11 the appeal was directed to be heard by a single judge of the Divisional Court.

[3] The Director did not appear at the hearing before the Board, his submis-

sions being made, as allowed by s. 14(5) of the **Act**, by letter dated June 27, 1983. Section 14(5) provides:

> "The Director may make his submissions at a hearing of the board of review in writing, but the applicant or recipient who is a party to the hearing shall be afforded an opportunity to examine before the hearing any such submission or any written or documentary evidence that the Director proposes will be produced or any report the contents of which the Director proposes will be given in evidence at the hearing."
>
> (Emphasis added.)

Although no objection was taken on the point by counsel for Ms. Burton, either before the Board or before me, it is clear from the transcript of the Board hearing that none of the Director, the respondent or the Board had complied to the statutory obligation to make the written submissions of the Director available to Ms. Burton before the hearing. The Board member, Mrs. Holt, made it clear that the Director's written submissions had just been received by the Board and that she herself had not had an opportunity to get to the second page of the letter before the hearing commenced. In **Re Ellis and Ministry of Community and Social Services** (1980), 28 O.R.(2d) 385, a three-judge panel of this court stated that the effect of the wording of the above-quoted subsection was to make it obligatory for the Board to afford an opportunity for the examination of the Director's written submissions by the appellant before the hearing. In that case the whole matter was referred back to the Board for a number of reasons, and so it is not clear whether in the circumstances that omission would alone have been held sufficient to cause the panel to return the matter for a rehearing. What is clear is that the court stated plainly that the obligation was to deliver the written submissions before the hearing. No objection was taken on behalf of the applicant, and so in these proceedings nothing will turn on that failure of the Board. But failure it is and failure that has persisted after the court has specifically pointed out the error of the practice. In this regard, each of the Board and the Ministry seems to have its telescope to a blind eye.

[4] As to the jurisdiction of this court, it was held by the Court of Appeal in **Re Warwick and the Minister of Community and Social Services** (1978), 21 O.R.(2d) 528 that the question of whether a person is living as a single person within the meaning of the regulations under the **Act** is not a question of fact alone. It follows that the Board achieved nothing by expressly stating its decision on that issue to be a finding of fact. If that were not enough, jurisdiction is also afforded by the Board's application of its erroneous interpretation of the decision in **Warwick** on the main question before the Board. Furthermore, the Board has made reviewable errors by reciting but apparently otherwise disregarding the evidence of the applicant and of witnesses for the applicant on various points raised in the submissions of the Director, without making any express findings as to the credibility of the applicant or such witnesses. In its reasons the Board noted, and in my view greatly exaggerated, the significance of discrepancies in the testimony of the witness, Cannon. The Board noted that the appellant's son was by his own admission unaware of what financial arrangements there may have been between the appellant and Mr. Dupuis, the man who is alleged to have been living with her as man and wife. But for the most part evidence of the appellant and her witnesses, although mentioned as if in a mechanical summary of the transcript of the proceedings, was not weighed or discussed or apparently considered with reference to the several points or instances cited by the Director as constituting the basis for his decision to cancel the appellant's allowance. In this regard I have had the benefit of considering the reasons of my brother Reid in **Re Pitts and The Director of the Family Benefits Branch of the Ministry of Community and Social Services**, unreported, released June 20, 1985 [reported as **Pitts v. Ontario** (1985), 9

O.A.C. 205], a decision in which one of the grounds for reversing the decision of the Board was that the Board had made a finding, in effect, against the credibility of the applicant and her witnesses without stating the basis for it and without there being any justification for it visible in the record. I have examined the transcript of Ms. Burton's hearing before the Board and am of the opinion that the evidence of the applicant and her witnesses was similarly disregarded to an extent constituting reviewable error. In my view, no more need be said on the question of jurisdiction.

[5] The powers of the court on an appeal from the Board are set out in s. 15(4) of the **Act**, as follows:

> "15.-(4) On an appeal under this section, the court may affirm the decision of the board of review or may rescind it and refer the matter back to the board or to the Director to be disposed of in accordance with such directions as the court considers proper under this **Act** and the regulations, and the board or the Director shall give effect to any direction given by the court under this section."

Bd powers.

Issue

[6] The Board's hearing takes the form of a review of the decision of the Director. Where, as here, there is no real issue as to need or as to the desertion of the appellant by her husband or as to the dependent status of the appellant's children, the issue is whether the appellant was at the material times living as a single person.

[7] It is provided in clause 5(b) of Reg. 318, R.R.O. 1980, made under the **Act**, that "no person is eligible for an allowance ... who is not living as a single person". Clause 1(1)(c) of that regulation defines "single person" to mean "an adult person who is a widow, widower, unmarried, deserted, separated or divorced and who is not living with another person as husband and wife". As stated in the decision of this court in **Re Ellis and Ministry of Community and Social Services**, supra, the onus is on the appellant to prove that she was living as a single person, that is, that she was not living with another person as a wife.

Facts

[8] The submission of the Director, in the form of the said letter of June 27, 1983, sets forth the evidence upon which the Director had based his decision that the appellant was not living as a single person. The evidence comprises six elements, and possibly a seventh, as follows:

1. The records of a credit bureau showed Dupuis as living in a common-law relationship with the appellant and stated that his address had changed on two or three occasions matching changes in her address.

2. The records of a former employer of Dupuis showed the appellant as the next-of-kin of Dupuis and for some, but not all, of the period gave the appellant's residence as his address.

3. The landlord of a former dwelling of the appellant at R.R. #3, Peterborough, was reported to have stated that the appellant and Dupuis were tenants of his and shared expenses.

4. Grenada T.V. Rentals stated that Dupuis was renting a television set from them and it was located at the appellant's residence at 621 Watts Avenue in Peterborough and at previous residences of hers.

5. Records at Ontario Hydro show that the Hydro service at the appellant's former residence at R.R. #3, Peterborough, from September, 1979 to December 9, 1981, when the premises burned down, was in the name of Dupuis, and the forwarding addresses given to Ontario Hydro were subsequent residences of the appellant.

6. Dupuis received his mail at the appellant's residence at 621 Watts Avenue in Peterborough, including correspondence with respect to unemployment insurance, and had received his mail at former residences of the appellant.

7. At the time of a "confrontation" of the appellant, presumably by an employee of the Ministry, the appellant gave several addresses for Dupuis, stating that when unemployed he lived with a friend, F. Lindsay, but that his permanent address when unemployed was his brother's place at Aurora and that when he was employed he resided "at work site". The impression created by the Director's written submission was that the appellant had stated that when Dupuis was employed he invariably lived at his work site.

[9] Those were the factors upon which the Director based his decision. The Director also noted that for purposes of his motor vehicle driver's licence the address of Dupuis was his brother's address in Aurora.

[10] At the hearing the appellant testified and there was also supporting testimony from Dupuis, from the appellant's mother, from the appellant's eldest son, Richard F. Burton, and from Gordon Cannon, a casual acquaintance of Mr. Dupuis.

[11] There was uncontradicted and unchallenged evidence from the appellant and Dupuis as to a number of matters that tend to put the evidence of the Director into quite a different perspective. Thus, Dupuis, a divorced man, is the brother of the wife of one of the appellant's brothers and has long been a friend of the appellant's family. Dupuis works in construction as operator of heavy machinery and does not usually have employment for more than eight or nine months a year. His job sites are at various locations in central Ontario - Gooderham, Orillia and Orangeville - having been cited as examples. Dupuis is a functional illiterate and relies upon the appellant to vet and read his mail and to help him with documents, such as unemployment insurance forms and even with cheques, which he can sign but cannot make out by himself. During the period in question he has always filed income tax returns and paid tax as a single person.

[12] Both the appellant and Dupuis flatly deny that they are living together as husband and wife. Dupuis testified as to his separate addresses in the period in question, and provided rental receipts covering parts of the period. The witness Gord Cannon also testified, although with obvious (but insignificant) confusion as to dates within the period, that at relevant times he and Dupuis had each been roomers at a rooming house at 621 Water Street in Peterborough.

[13] The appellant had known Dupuis for the six or seven years prior to the hearing and had been dating him, in her phrase, as a boyfriend, which includes sexual relations, for a period of about four years. It is clear that Dupuis is a close friend of the appellant and a friend to her children and also to her mother.

[14] With respect to the elements noted by the Director I shall, in referring to the evidence of the appellant and her witnesses, use the same numbering scheme as used above.

1. With respect to the credit bureau's records showing them living in a common-law relationship, both the appellant and Dupuis denied that but could not say on what basis the credit bureau might have come to the conclusion. Dupuis thought that the credit bureau might have been consulted when he rented a television set for the appellant's children, and, of course, gave the appellant's successive addresses as the locations of the television set (and, presumably, also as the addresses to which notices were to be sent

about it).

2. With respect to Dupuis having told his employer to put the appellant down as his next-of-kin, Dupuis gave weak testimony saying that he had been "kidding". The appellant questioned whether he knew the implications of a statement as to next-of-kin, she thought he might have thought of her as the person to be notified if he had an accident. Dupuis said he had told his foreman, in answer to the foreman's question as to his next-of-kin, that the appellant should be shown. The employer, if asked, would have known whether Dupuis filed income tax returns as a single man. Dupuis was not covered by any accident insurance; the only benefits he was aware of that might have been affected were benefits under Workers' Compensation.

3. Neither the appellant nor Dupuis had an explanation for the alleged statement by a former landlord of the appellant that she and Dupuis shared expenses, in a common-law relationship. The appellant said she made the lease arrangements and got her monthly tenancy on her own credit. The appellant's position is that the landlord is wrong and had no legitimate basis for his alleged belief. She wondered if her estranged brother, who acted often as if he hated her, had maliciously misinformed the landlord. The testimony of the appellant's mother makes such an eventuality not at all improbable. Although it is not a requirement of the law that persons who have made statements relied on by the Director should be made available for cross-examination at the hearing before the Board, a statement of opinion by a lay witness not before the Board should be regarded with caution when contradicted by the testimony of witnesses subject to cross-examination.

4. As to the television set, it is the evidence of Dupuis and the appellant that another brother had rented one for the appellant's children but was unable to keep up payments. Dupuis took over and rented a set for the children and also provided them with a TV Guide, for a total monthly expenditure of approximately $19.

5. With respect to the Ontario Hydro contract for a previous address of the appellant being in the name of Dupuis, the appellant and Dupuis provide a simple, and to me convincing, explanation. Their testimony is that because of arrears run up with Hydro by her former husband, the appellant was unable to obtain electrical service in her own name and Dupuis signed for her. Both testified that Dupuis never paid any Hydro bills for any residence of the appellant. Later the appellant obtained Hydro service in her own name. The forwarding addresses were consistent with Dupuis' use of the appellant's address as his mailing address.

6. It is freely admitted that Dupuis uses the appellant's address as his mailing address. He is illiterate. She kept an eye on his mail and would get in touch with him through his employer or through his brother in Aurora if mail arrived that required prompt attention. There was evidence that Dupuis was embarrassed at not being literate and that the appellant helped him with all his correspondence and forms. The practice is entirely consistent with the mailing address being just that, a mailing address.

7. As to the fact that, upon being confronted by a Ministry field worker who said she was living in a common-law relationship with Dupuis and so no longer entitled to mother's allowance, the appellant gave several addresses for Dupuis, some of which were later shown to be wrong, the main answer of the appellant was that she was very upset. Before the Board there was

other evidence which, while inconsistent with parts of her story on that occasion, was also quite inconsistent with residence by Dupuis at the appellant's residences in the period in question. Nor was the answer given by the appellant during the confrontation wholly wrong.

[15] For the most part the factors relied upon by the Director were effectively explained by the appellant and by Dupuis. Quite apart from that, there was clear evidence from Dupuis as to his residences during the period in question and emphatic denials from both Dupuis and the appellant of the allegation that Dupuis resided at any time with the appellant. Those denials are supported by the evidence of the appellant's mother and also by her eldest son.

[16] It is appropriate to note at this juncture that the appellant has no obligation to prove where Dupuis was in fact living during any part of the period in question. The only onus upon her in that regard is to show that he was not living with her. In this regard see **Dowlut v. Commissioner of Social Services**, an unreported Divisional Court decision of Henry, J., released on March 29, 1985 and see also **Pitts**, supra. [now reported (1985), 8 O.A.C. 136.]

[17] It was testified by the appellant that Dupuis did not own and had not bought any of the furniture in her home and she alone paid the rent and paid for hydro and other utilities and groceries. When he visited he would often bring beer and sometimes a meal, like take-out fried chicken, but he did not even shop for or supply groceries generally or even when he came to visit. There was uncontradicted evidence that he did not leave or keep clothing at the appellant's home. The evidence of Dupuis and the appellant to that effect is actually strengthened by the testimony of the appellant's mother, a frequent visitor, to the effect that on one occasion she saw at 621 Watts Avenue a coat belonging to Dupuis.

[18] There is no question on the evidence that Dupuis is a close friend of the appellant and an important figure in the lives of her children. He is also a good friend to the appellant's mother. It is clear that he is a frequent visitor at the appellant's home and that he sometimes stays for the weekend. He remembers the birthdays in the family and he spends significant holidays, such as Christmas, with the appellant and her children. Somewhat irregularly he gives the children allowances, and he gears them to how much they help their mother. When he takes out the appellant and her mother for a meal or for a social evening at the Legion, he pays. He has also taken the family for picnics and for the occasional weekend holiday. His visits tend to occur every second weekend or so. When he is not with the appellant she often does not know where he is and would get in touch with him, as for example if important mail came in, through his employer or by leaving a message with his brother in Aurora with whom he keeps in touch.

Law

[19] In **Pitts**, supra, my brother Reid, in considering the above-quoted definition of "single person", stated that there are two elements to it:

"(1) living with another person;

(2) as husband or wife,"

and that both those elements must be present before it can be said that the recipient is not a single person. At page 209 O.A.C. Reid, J., stated with respect to a case quite close to this one on its facts:

"The Board must first consider whether or not the recipient is living with another person. If she is not the enquiry ends there. It is not necessary for the Board to inquire into the recipient's relationship with another person."

After quoting with approval from the above-mentioned decision of Henry, J.,

in **Dowlut**, Reid J., continued at p. 210 O.A.C. as follows:

> "The first enquiry to be made by the Board in that case, as in this, was whether the claimant was living with another (in that case, a spouse). If the claimant could establish that she was not, the enquiry was at an end. The **Proc** and **Warwick** tests came into play only if the claimant had not established that she was living singly. To apply those tests before the initial question was answered was 'confusion'."

Warwick has been referred to above and **Proc** referred to above is the decision of the Divisional Court in **Re Proc and Minister of Community and Social Services** (1974), 6 O.R.(2d) 624; 53 D.L.R. (3d) 512.

[20] I agree with and adopt the two-part test outlined in the foregoing quotations from the reasons of my brother Reid in **Pitts**.

[21] In this case, as in **Pitts**, the Board did not make a finding that the appellant was living with Dupuis before going on to consider the other elements of their relationship and to attempt to apply **Warwick**.

[22] Although there was no suggestion of prurience, there was revealed in the questioning of the appellant, especially by Mrs. Holt, an excessive interest in the question of whether or not there had been sexual relations between the appellant and Dupuis. Chastity or sexual continence is not the issue; nor is it conduct exacted as a condition of the receipt of mother's allowance. There are obviously situations where the presence or absence of sexual relations can be of prime importance, as in the "housekeeper" cases such as **Warwick**, but where residence in the same dwelling as the recipient or claimant is not admitted or established, a focus on the presence or absence of sexual relations is premature.

[23] Along with the excessive concern with sexual relations went a general tendency in the reasons of the Board for an overstatement of the evidence, making it appear more supportive of the Board's conclusion than the evidence itself, as disclosed by the Director's written submission and, particularly, by the transcript, actually was. Thus, it was stated by the Board that Dupuis supplied food to the appellant's household, raising the prospect that he might have been in the habit of purchasing groceries, an activity more consonant with living together as man and wife than what the evidence shows, which is that Dupuis when he came around would sometimes bring a take-out meal for the family. Similarly, the impression created as to the extent and frequency of outings or holidays together exceeded the frequency and extent of such events as shown by the evidence. Moreover, the role of Dupuis as disciplinarian and "father figure" for the appellant's children, which role was first suggested by a Board member on the cross-examination of Dupuis, found its way into the Board's reasons apparently without any modification in the light of the evidence of Dupuis as to the deference exhibited by him in that regard. Evidence that Dupuis used to try to have the children help their mother and that he keyed his gifts or "allowances" to the children to reports of their behaviour toward her, and evidence from the appellant that the children looked up to Dupuis is quite consistent with Dupuis being the appellant's friend and lover and a friend of the family, with a commendable attitude of concern about the appellant's otherwise effectively fatherless children. The characterization of the role of Dupuis as that of a disciplinarian or an authoritative father figure is not warranted by the evidence.

[24] It appears to me that the difficulties experienced by the Board stem from its persistent misinterpretation of the Court of Appeal decision in **Re Warwick and Minister of Community and Social Services**, supra. I say "persistent" misinterpretation because the interpretation given to that decision by the Board was essentially the same as the interpretation dealt with in **Manone v. Director of Family Benefits**, an

unreported decision of the Divisional Court, released April 3, 1984 where Southey, J., speaking for the Court, stated as follows:

> "In considering whether the appellant was living with Albert Deforest as husband and wife, the Board erroneously stated that the Court of Appeal had decided in **Re Warwick and Minister of Community and Social Services** (1978), 21 O.R.(2d) 528 that other courts had been wrong in holding that the economic factor was the primary consideration. What Mr. Justice Blair said in **Warwick** was that it was wrong to consider only economic criteria. Thus, the court held in that case that a man who provided the entire economic support for a woman living in the same house was not living with her as husband and wife, because their relationship did not involve any of the other elements broadly described by the words 'cohabitation' and 'consortium'."

In **Warwick**, a single parent father and a single parent mother lived in the same house with their respective families of dependent children. The man owned the house and paid for its upkeep. The woman provided housekeeping and child care for them all, including the man. The woman had other income, mother's allowance, from which she provided for the needs of herself and her children other than shelter. Where the fact of common residence was admitted it was inevitable that the court would be concerned about the other facts, that is, about the second branch of the two-part test outlined by Reid, J., in **Pitts**. Thus in **Warwick**, at p. 537, one finds the following much-quoted statement by Blair, J.A., speaking for the court:

> "Marriage involves a complex group of human interrelationships conjugal, sexual, familial and social as well as economic. In more than the romantic sense, cohabitation and consortium are regarded as basic elements of marriage. It would be wrong to say that these elements are not present when persons, not legally married, live together as husband and wife. Considering these elements as part of the marriage or quasi-marriage relationship does not employ a moral judgment on the conduct of the parties, but rather recognizes the reality that marriage is more than a matter of economics and involves elements broadly described by the words cohabitation and consortium."

The error of the Board was to seize upon the words "conjugal, sexual, familial and social as well as economic" and to conclude that they were all equal and that singly or even collectively they provided alternative criteria the use of which would permit the Board to de-emphasize or ignore the essential final question, that is, whether Dupuis was living with the appellant.

[25] The Board was doubly wrong in making the following statement regarding **Warwick** and in seeking to use it as the basis for its decision. The Board's reasons included the following statement:

> "In my opinion the Hon. Mr. Justice Blair considered the economic relationship to be only one of several criteria, he did not distinguish it even to the extent of making it first among equals."

With respect, that is not a proper assessment of the weight given to economic factors in **Warwick**. Secondly, it is error, where residence is not admitted or established, to attempt to use that passage to avoid the requirement of a finding on the first branch of the test in **Pitts**, i.e., a finding as to whether Dupuis was living with the appellant.

[26] On the facts the appellant has satisfied the onus of establishing that Dupuis has not at any time in the period in question lived with her. The evidence of the Director when considered in the light of the explanations provided by the appellant and Dupuis is almost entirely explained away. What is left is not nearly enough to counter

the denials and other testimony of the appellant and her witnesses. The appellant has clearly achieved the difficult feat of proving a negative.

[27] With respect, it is to be hoped that the Board will consider carefully the reasons for the decision of this court in **Dowlut v. The Commissioner of Social Services** and in **Re Pitts and The Director of the Family Benefits Branch of the Ministry of Community and Social Services**, and, with regard to family benefits cases, especially the latter not only for its statement of the proper tests but also for its advice with regard to dealing with evidence and the making of findings.

[28] With respect, there is a need for the Board to review both its practices and its interpretation of the **Act** to bring them into line with the repeated declarations of the court in this area. It is difficult to avoid the sense that, through error, too many similar cases involving decisions by the Director to cancel benefits upon inadequate evidence are upheld by the Board and find their way to the court. One cannot help wondering how many others, persons who in the nature of things are among the more helpless in the community, are thus deterred from asserting claims that would be upheld by the courts.

[29] I do not believe that it is necessary to refer this case back to the Board for a new hearing. The appellant has met the onus of establishing that Mr. Dupuis was not living with her.

[30] I, therefore, refer the matter back to the Director for disposition on the basis that the appellant was at the material times living as a single person and for the restoration of her allowance from the point at which it was wrongly discontinued.

[31] The appeal is allowed. The decision of the Board is rescinded, and Ms. Burton shall have her costs of the appeal.

Appeal allowed.

Editor: Elizabeth M.A. Turgeon
edp

IN THE MATTER OF AN APPLICATION UNDER The Assessment Act, R.S.O. 1980, c. 31, ss. 50 and 66.

LONDON HUMANE SOCIETY v. CORPORATION OF THE CITY OF LONDON and REGIONAL ASSESSMENT COMMISSIONER FOR REGION NO. 23 (respondents) and ONTARIO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (intervenor)

INDEXED AS: LONDON HUMANE SOCIETY v. LONDON, REGIONAL ASSESSMENT COMMISSIONER FOR REGION NO. 23 and SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (ONT.)

Ontario Divisional Court
Saunders, Sirois and Bowlby, JJ.
July 5, 1985.

Summary:

An order was made under the Assessment Act that the lands and buildings of the London Humane Society were exempt from municipal taxation. The City of London and the Regional Assessment Commissioner appealed.

The Ontario Divisional Court allowed the appeal and held that the Society's lands and buildings were not exempt from taxation.

Real Property Tax - Topic 6290

Exemptions - Particular organizations - S.P.C.A. - S. 9 of the Ontario Society for the Prevention of Cruelty to Animals Act exempted lands and buildings of "the Society" from taxation, when used for Society purposes - The Ontario Divisional Court held that affiliated societies were not included within the meaning of the words "the Society", thus property owned by the London Humane Society was not exempt from taxation.

Words and Phrases

THE SOCIETY - The Ontario Divisional Court held that the words "the Society" as found in s. 9 of the Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1980, c. 356, did not include affiliated societies of the Ontario S.P.C.A.

DE SMITH'S

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

By

the late
S. A. DE SMITH, F.B.A.
Sometime Downing Professor of the Laws of England in the University of Cambridge

FOURTH EDITION
BY

J. M. EVANS, B.A., B.C.L.
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"Let no man weakly conceive that just laws, and true policy, have any antipathy; for they are like the spirits and sinews, that one moves with the other."

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jurisdiction,[90] or constructively declined jurisdiction,[91] or even exceeded its jurisdiction.[92] Generally, however, they have been content to proceed on the tacit assumption that the tribunal's mistake has rendered its decision nugatory, so that it can properly be commanded to hear and determine the matter as if the prior determination had never taken place.[93] Mandamus for failure to hear and determine according to law has issued primarily for the purpose of controlling abuse of statutory discretionary powers,[94] but it has also issued to tribunals that have committed gross errors in applying the law to questions of fact, the assumption being that the tribunal must have been guided by irrelevant considerations.[95] By stretching this flexible concept to its limits, the courts may be able materially to extend their power to review findings of law and fact by inferior tribunals.

Scope of Review of Findings of Law and Findings of Fact

(1) Rights of appeal from statutory tribunals to the High Court and the Court of Appeal are nearly always limited to questions of law. For some years before 1958 appeals lay under various conditions on points of law from decisions of certain statutory tribunals such as the Commissioners of Income Tax, pensions appeal tribunals and agricultural land tribunals to the High Court. The Tribunals and Inquiries Act 1958 (now replaced by the Tribunals and Inquiries Act 1971) provided for parties dissatisfied in point of law with the decisions of a number of other statutory tribunals to appeal by way of case stated or otherwise to the High Court.[96] Subsequent Acts establishing new statutory tribunals have usually provided for a similar right of appeal; the appeal is generally heard by a single judge of the Queen's Bench Division. Appeals on points of law also lie to the High Court from certain determinations by the Secretaries of State

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[90] *R.* v. *Board of Education* [1910] 2 K.B. 165, 179.

[91] *Ex p. Hebburn Ltd.; re Kearsley Shire Council* (1947) 47 S.R.(N.S.W.) 416, 420.

[92] *R.* v. *Weymouth Licensing JJ., ex p. Sleep* [1942] 1 K.B. 465, 472, 480; *R.* v. *Licensing Commission, ex p. Nicolosi* [1962] Qd.R. 90. See also *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal* [1959] A.C. 663, 695 (dictum).

[93] As in *R.* v. *Flintshire C.C. County Licensing (Stage Plays) Committee* [1957] 1 Q.B. 350. See also *R.* v. *South Middlesex R.T., ex p. Beswick* (1976) 32 P. & C.R. 67; *Sinclair* v. *Maryborough Mining Warden* (1975) 132 C.L.R. 473. But see the analyses of the proper scope of mandamus in *R.* v. *Paddington Valuation Officer, ex p. Peachey Property Corpn. Ltd.* [1964] 1 W.L.R. 1186; [1966] 1 Q.B. 380.

[94] See Chap. 6, *post*.

[95] See *R.* v. *de Rutzen* (1876) 1 Q.B.D. 55; *R.* v. *Cotham* [1898] 1 Q.B. 802; *Re Bottaglia and Workmen's Compensation Board* (1960) 22 D.L.R. (2d) 446; *Yukich* v. *Sinclair* [1961] N.Z.L.R. 752; *R.* v. *Brisbane Corporation, ex p. Mackay* [1961] Qd.R. 241. See also pp. 544–545, *post*.

[96] 1958 Act, ss. 9, 10, Sched. 1; 1971 Act, s. 13, Sched. 1; R.S.C. Ord. 94, rr. 8–10. Since an appeal lies only when a party is dissatisfied in law with a decision of the tribunal, the court cannot determine a point of law on which the tribunal gave no decision: *Esso Petroleum Co.* v. *Ministry of Labour* [1969] 1 Q.B. 98.

for Social Services [97] and the Environment [98] and from many types of decision by magistrates' courts in the general field of administrative law.[99] Appeals on points of law lie from the Transport Tribunal, the Lands Tribunal, the Foreign Compensation Commission [1] and the Employment Appeal Tribunal [2] direct to the Court of Appeal. From decisions of county courts in administrative law matters, appeals on questions of law lie to the Court of Appeal.[3] The appeal on a point of law is now the most usual method of reviewing a decision of an inferior tribunal, and the meaning of a point of "law" has assumed great importance.

(2) Where a special tribunal has erred on a matter not going to its jurisdiction, but the error is apparent on the face of its order, certiorari will issue to quash the order if the error is one of law but not if it is one of fact. A court may, however, be prepared to characterise as a legal error apparent on the face of the record a finding of fact unsupported by adequate evidence if the record purports to include all the evidence upon which the tribunal relied. This method of review is practically confined to those tribunals (*e.g.* the national insurance commissioners, the Criminal Injuries Compensation Board, the Immigration Appeal Tribunal) from which no right of appeal is provided by statute.

(3) Where an authority exercising judicial functions has erred on a jurisdictional matter (*i.e.* one that is preliminary or collateral to the merits), the reviewability of its decision otherwise than on appeal, and also the availability of an action for damages against its members, may depend on whether its error was one of law or of fact.

It may assist consideration of the difficulties involved in distinguishing between questions of law and fact to bear in mind at the outset the purpose of the exercise. In administrative law the most common reason for drawing the distinction is to identify the matters upon which a reviewing court is empowered to substitute its view for that of the body that made the initial

[97] *e.g.* under the Social Security Act 1975, ss. 93, 94, on issues including whether contribution requirements have been met by the employee and whether he was relevantly employed; R.S.C. Ord. 111.

[98] Town and Country Planning Act 1971, ss. 246, 247; Ord. 94, r. 12. Appeals are heard by a Divisional Court of the Queen's Bench Division. The principal rules of the Supreme Court relating to appeals in administrative law are Ords. 56, 61, 90, 93, 94, 98, 101, 103 and 111.

[99] An appeal on the merits will lie to the Crown Court (replacing quarter sessions under the Courts Act 1971) and thence (or directly from the magistrates' court) to the Divisional Court on a point of law by case stated.

[1] Foreign Compensation Act 1969, s. 3 (enacted after the decision in the *Anisminic* case [1969] 2 A.C. 147).

[2] Employment Protection (Consolidation) Act 1978, s. 136 (4). The Employment Appeal Tribunal itself hears appeals from industrial tribunals (s. 136 (1)) which exercise a wide jurisdiction (*e.g.* in respect of redundancy payments, complaints of unfair dismissal and sexual and racial discrimination in the conditions and terms of employment).

[3] An allegation of error of law by a county court judge cannot be raised for the first time before the Court of Appeal unless it goes to the jurisdiction of the county court (*Oscroft* v. *Benabo* [1967] 1 W.L.R. 1087).

decision. It would seem a reasonable working hypothesis to assume that when a court has jurisdiction to review the decisions of an administrative tribunal on questions of law, its intervention should extend to those matters upon which its decisions are likely to be better than those of the tribunal under review. The principal justification for any review at all is that the second opinion is likely to be better than the first. Judicial intervention may be justified either by the nature of the matter upon which the tribunal has allegedly erred or by the gravity of the error. In approaching the problem of characterising a question as one of law (upon which the court will normally intervene if satisfied that it was decided wrongly) or as one of fact (upon which it may not, unless the finding was, broadly speaking, unreasonable), the following considerations may be pertinent: any review through the courts increases the cost of administration; expense may be more burdensome to some than others; litigation inevitably delays the tasks of administration; the views of the tribunal primarily charged with the duty of interpreting the legislation are entitled to respect on those matters falling within its expertise, an expertise that, at the least, will accrue from regularly applying the legislation in question to a wide range of situations; the courts, on the other hand, have the experience that comes from interpreting statutes of almost unlimited variety and the ability to locate a particular issue within the wider context of basic legal principles of general applicability: judicial intervention may be particularly valuable to resolve issues of recurring importance, especially when they have not been clearly settled by the competent authorities.

There is often no difficulty in distinguishing a question of law from one of fact. The erroneous refusal or admission of evidence by a tribunal obliged to observe the rules of evidence is an error of law. The meaning that a lawyer should attribute to the terms of a policy of insurance is a question of law; the question whether the holder of a policy has renewed the policy before its expiry is one of fact. A finding of fact may be defined as an assertion that a phenomenon exists, has existed or will exist, independently of any assertion as to its legal effect.[4] Perplexing problems may, however, arise in analysing the nature of the process by which a tribunal determines whether a factual situation falls within or without the limits of a category or standard prescribed by a statute or other legal instrument. Every finding by a tribunal postulates a process of abstraction and inference, which may be conditioned solely by the adjudicator's practical experience and knowledge of affairs, or partly or wholly by his knowledge of legal principle. He hears evidence and, by satisfying himself as to its reliability, finds what were the "true" facts; it may then be necessary for him to draw a series of

[4] Louis L. Jaffe, *Judicial Control of Administrative Action*, 548. For another analysis of the various distinctions drawn between questions of law and questions of fact, see *Salmond on Jurisprudence* (12th ed.), 65–75.

inferences from these primary findings in order to determine what were the material facts on which he has to base his decision; in order to draw certain of these inferences correctly he may need to apply his knowledge of legal rules. At what point does an inference drawn from facts become an inference of law? Is the application of a statutory norm to the material facts always to be classified as the determination of a question of law? [5]

The criteria adopted by the courts for distinguishing between questions of law and questions of fact have not been uniform. Policy considerations may influence the decisions of the courts: where an appellate court has power to review questions of law only, it is apt to hold that a finding or inference was one of law if satisfied that it was wrong but that it was one of fact if satisfied that it was right.[6] Moreover, criteria applied in one branch of the law may be largely irrelevant in another: it may be unwise to rely upon the fine distinctions drawn in income tax appeals [7] or workmen's compensation appeals [8] as authoritative guidance in appeals from other inferior tribunals or applications for certiorari to quash determinations of the national insurance commissioners or medical appeal tribunals for error of law on the face of the record.[9] Much may depend upon the view adopted by the court of the ability of the tribunal, the degree of technicality or detail of the legislation and the nature of the interests affected by the tribunal's determinations. Subject to these qualifications, it is possible to make some meaningful generalisations about the tests applied by the courts to discriminate between law and fact in administrative law. But we must first enter another linguistic maze.

Suppose the question is whether an object is a cube. Laymen and lawyers alike will probably say that this is purely a question of fact. One knows the

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[5] For a particularly searching analysis, see W. A. Wilson, "A Note on Fact and Law" (1963) 26 M.L.R. 609. And see K. J. Keith, "Appeals from Administrative Tribunals" (1969) 5 Victoria U. of Wellington L.Rev. 123; P. H. Clarke, "Law and Fact in the Assessment of Compensation" [1979] J.P.L. 277.

[6] See John Dickinson, *Administrative Justice and the Supremacy of the Law*, 55.

[7] See A. Farnsworth, *Income Tax Case Law*, Chap. 2, pointing out that the distinctions drawn in income tax appeals had been developed almost entirely without reliance upon other branches of the law. See, however, note 9, *post*.

[8] *i.e.* appeals to the Court of Appeal from the decisions of county court judges before the National Insurance (Industrial Injuries) Act 1946 came into force.

[9] Moreover, a tribunal may err in law by applying the same criteria to determine whether a single statutory standard has been satisfied in different factual contexts: *Hampton (Dick) (Earth Moving) Ltd.* v. *Lewis (Valuation Officer)* [1976] Q.B. 254. Nevertheless, the important decision of the House of Lords in *Edwards* v. *Bairstow* [1956] A.C. 14, a tax case in which the concept of a question of law was given a broad interpretation, has been influential in other contexts. It has been applied, *e.g.* in *R.* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 Q.B. 574, a case of certiorari to quash for patent error of law, and in rating (*Solihull Corporation* v. *Gas Council* [1961] 1 W.L.R. 619) and arbitration (*Tersons Ltd.* v. *Stevenage Development Corporation* [1965] 1 Q.B. 37) cases, and in a case involving the scope of the obligation to pay social security contributions (*Global Plant Ltd.* v. *Secretary of State for Social Services* [1972] 1 Q.B. 139), and in a case concerning the registration of common land (*C.E.G.B.* v. *Clwyd C.C.* [1976] 1 W.L.R. 151, 158–159, 160–161), and in unfair dismissal cases (*e.g. Palmer* v. *Vauxhall Motors Ltd.* [1977] I.C.R. 24). Similarly, the decision in *Brutus* v. *Cozens* [1973] A.C. 854, a criminal appeal in which the House of Lords held that the application of a statutory term that conformed to its ordinary linguistic usage was a question of fact, has been widely used in administrative law.

mathematical definition of a cube; one measures the object and finds out whether it conforms to the definition. This is, however, a particular application of a mathematical law; and if the term " cube " were defined in an Act of Parliament [10] a lawyer might possibly be heard to say that the application of the statutory definition was partly or wholly a matter of law. If the question is whether X is a " British subject "—a term which is defined by statute—a lawyer is likely to call it a question of law or mixed law and fact. The meaning of " British subject " is a question of law. Particular facts about X are ascertained. A correct answer to the question can only be given by a person with some legal knowledge. If the question is whether a particular transaction constitutes a breach of contract, only a person with legal knowledge and expertise can be relied upon to give a correct answer. The layman as well as the lawyer is likely to call this a question of law.

Suppose now that the question is whether an injury sustained by Y arose " out of or in the course of employment " for the purpose of his entitlement to industrial injury benefit. Here one is dealing with a concept less precise than " cube," " British subject " or " breach of contract." When a case comes before a national insurance commissioner it will not be profitable for him to begin by trying to formulate an exact definition of the phrase " course of employment "; the texture of the concept is too open, though under the old Workmen's Compensation Acts the courts did their best to close it. He may ask various questions in order to establish the facts that he thinks material in answering the ultimate question. Where was Y at the relevant time? What was he doing? What were his instructions about the time, place and method of work? Having made his primary findings the commissioner may then go on to draw inferences from them—*e.g.* so as to determine whether Y was deviating from his instructions and if so by how much. These inferences will normally be called inferences of fact. Finally, he will decide whether the circumstances in which Y sustained his injury fall within the legal concept of " course of employment." This ultimate finding or inference could as well be styled one of law as one of fact. No appeal lies to the courts from the commissioners' determination, but they may be quashed by certiorari for error of law on the face of the record. The courts, who have confidence in the commissioners and are reluctant to assert their supervisory jurisdiction, have tended to justify their disinclination to intervene by characterising the question of " course of employment " as one of " fact and degree " [11] or by relying upon the discretionary nature of the prerogative orders.[12] They are, however, prepared to intervene to correct clear errors

[10] The term " cubic yard " is so defined (Weights and Measures Act 1963, Sched. 1, Pt. III).

[11] See *R.* v. *Industrial Injuries Commissioner, ex p. A.E.U.* (*No.* 2) [1966] 2 Q.B. 31, 49, 50, 51 (*per* Davies L.J.), 52 (*per* Salmon L.J.). The court's attitude to rent assessment committees is, however, less easy to predict: see *Mason* v. *Skilling* [1974] 1 W.L.R. 1437; *Palmer* v. *Peabody Trust* [1975] Q.B. 604; but *cf. Metropolitan Property Holdings Ltd.* v. *Finegold* [1975] 1 W.L.R. 349.

[12] See *R.* v. *National Insurance Commissioner, ex p. Michael* [1977] 1 W.L.R. 109, 112 (*per* Lord Denning M.R.).

and where questions of general principle are raised that are likely to recur, especially if there are differences amongst the commissioners.[13]

A matter is usually held to be one of degree (and therefore of fact) if it is one on which reasonable men may arrive at discrepant conclusions on the evidence before them.[14] Examples of such questions are whether a house is " unfit for human habitation " or whether a " substantial part " of premises is to be reconstructed,[15] whether a house has changed its character because of structural alterations,[16] whether operations on land involve a " material change of use " constituting development for which planning permission is required.[17] Courts may nonetheless lay down guidelines within which the tribunal of fact must normally approach its task.[18] The vaguer the statutory standard, the more closely does a determination that the facts found conform or do not conform to that standard approximate to an exercise of discretion and choice rather than a finding of fact. What are to the judges

[13] *A.E.U.* case (*supra*) at 49–50, 51 (*per* Davies L.J.), 52 (*per* Salmon L.J.); see also *R.* v. *West London Supplementary Benefits Appeal Tribunal, ex p. Clarke* [1975] 1 W.L.R. 1396; *Michael's* case (*supra*) at 112, 115–116. In this case (at 112) and elsewhere, Lord Denning has tended to the view that the application of a statute to particular facts always involves the determination of a question of law, although courts should also guard against undue involvement with the merits of routine decisions that raise no wider issues, provided, of course, that the tribunal has not adopted an interpretation that the words of the statute cannot linguistically carry, and the tribunal's procedure is fair: see *e.g. R.* v. *Preston Supplementary Benefits Appeal Tribunal, ex p. Moore* [1975] 1 W.L.R. 624, 631; *R.* v. *Criminal Injuries Compensation Board, ex p. Ince* [1973] 1 W.L.R. 1334; *H.T.V. Ltd.* v. *Price Commission* [1976] I.C.R. 170, 185–186; and in the context of appeals, see *e.g. Hampton (Dick) (Earth Moving) Ltd.* v. *Lewis (Valuation Officer)* [1976] Q.B. 254; *Halfdan Greig & Co. A/S.* v. *Sterling Coal and Navigation Corporation* [1973] 1 Q.B. 843; *British Railways Board* v. *Customs and Excise Commissioners* [1977] 1 W.L.R. 588; *Pearlman* v. *Harrow School Keepers and Governors* [1979] Q.B. 56, 66–67. *Cf.*, however, *Dyson Holdings Ltd.* v. *Fox* [1976] Q.B. 503 (where his Lordship preferred to regard the question whether a mistress was a member of a tenant's " family," and so a statutory tenant under the Rent Acts, as one of law; but in order to avoid earlier decisions by the Court of Appeal that he wished not to follow, he was prepared to regard it as one of fact: he warned county court judges, however, that whilst they were final finders of fact, they should not in future disregard this ruling from the Court of Appeal! But *cf. Joram Developments Ltd.* v. *Sharratt* [1979] 1 W.L.R. 1; *Helby* v. *Rafferty*, *ibid.*, 13). See *R.* v. *Nat. Ins. Comm. ex p. Stratton* [1979] Q.B. 361, 369.

[14] For a fuller analysis, see W. A. Wilson, " Questions of Degree " (1969) 32 M.L.R. 361.

[15] *Re Bowman* [1932] 2 K.B. 621; *Daly* v. *Elstree R.D.C.* [1949] 2 All E.R. 13; *Hall* v. *Manchester Corporation* (1915) 84 L.J.Ch. 732; *Atkinson* v. *Bettinson* [1955] 1 W.L.R. 1127; *Bewlay (Tobacconists) Ltd.* v. *British Bata Shoe Co.* [1959] 1 W.L.R. 45. Similarly, whether a building is a " dwelling-house " is a question of fact: *Scurlock* v. *Secretary of State for Wales* (1977) 33 P. & C.R. 202.

[16] *Mitchell* v. *Barnes* [1950] 1 K.B. 448; *Solle* v. *Butcher* [1950] 1 K.B. 671; but *cf. Pearlman's case, supra.*

[17] *Guildford R.D.C.* v. *Fortescue* [1959] 2 Q.B. 112; *Marshall* v. *Nottingham Corporation* [1960] 1 W.L.R. 707; *East Barnet U.D.C.* v. *British Transport Commission* [1962] 2 Q.B. 484; *Bendles Motors Ltd.* v. *Bristol Corporation* [1963] 1 W.L.R. 247; *Snook* v. *Secretary of State for the Environment* (1975) 33 P. & C.R. 1. See also in other contexts, *Bean* v. *Doncaster Amalgamated Collieries Ltd.* [1944] 2 All E.R. 279, 284; *Bracegirdle* v. *Oxley* [1947] K.B. 349, 358. Yet the questions whether a trade unionist has been guilty of " unfair competition " within the meaning of the union's rules (*Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329) and whether a dentist or doctor has been guilty of " infamous conduct in a professional respect " (*Felix* v. *General Dental Council* [1960] A.C. 704; *Bhattacharya* v. *General Medical Council* [1967] 2 A.C. 259; *Faridian* v. *General Medical Council* [1971] A.C. 995) have been held to be questions of law although they might well have been labelled questions of fact and degree.

[18] See, *e.g. Burdle* v. *Secretary of State for the Environment* [1972] 1 W.L.R. 1207; *Johnston* v. *Secretary of State for the Environment* (1974) 28 P. & C.R. 424; *de Mulder* v. *Secretary of State for the Environment* [1974] Q.B. 792; *Brooks and Burton Ltd.* v. *Secretary of State for the Environment* [1977] 1 W.L.R. 1294 (planning cases); see also in another context, *Capper Pass Ltd.* v. *Lawton* [1977] Q.B. 852.

questions of fact and degree (as opposed to questions of law) are often to the layman matters of personal opinion.[19] It does not follow, however, that either the judge or the layman will regard every determination of such a question as unassailable. If, for example, a statute were to ascribe legal consequences to tallness, a body deciding that an Englishman of 5′ 6″ was tall or that one of 6′ 2″ was not tall would be clearly in error; and a court would doubtless find a verbal formula for characterising the error as one of law. But if the same body were to hold a man of 5′ 10″ to be tall (or not tall), the judge and the layman would agree that the application of the standard of tallness to the facts was not a legal question, though they might use different terminology to describe the decision.

One way of explaining the problem that enjoys considerable current popularity in the courts is as follows. The initial question of whether statutory words conform to their ordinary linguistic usage or are to be understood in some technical or artificial sense is always a question of law for the courts.[20] If they fall into the latter category and do not have the meaning that a layman would ascribe to them because, for example, they have acquired some wider or narrower meaning as a result of prior judicial interpretation or are given a statutory definition that deviates from normal usage, then their application in individual cases will more readily be reviewed by the courts.[21] If, however, they bear their " ordinary " meaning, then their application will normally be regarded as raising a question of fact,[22] because, presumably, judges are no better acquainted with the English language than the body entrusted with

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[19] But a Minister's opinion as to the best application of planning policy to the facts found by an inspector in a planning appeal has been held not to be a " finding of fact "; hence, although the Minister has rejected the inspector's recommendations on this point and dismissed the appeal, the appellant was not entitled to make further written representations on account of the Minister's disagreement with his inspector: *Luke of Pavenham* v. *Minister of Housing and Local Government* [1968] 1 Q.B. 172; *Vale Estates (Acton) Ltd.* v. *Secretary of State for the Environment* (1971) 69 L.G.R. 543, *French Kier Developments Ltd.* v. *Secretary of State for the Environment* [1977] 1 All E.R. 296; *Wholesale Mail Order Supplies Ltd.* v. *Secretary of State for the Environment* [1976] J.P.L. 163; *Pyrford Properties Ltd.* v. *Secretary of State for the Environment* (1977) 36 P. & C.R. 28; *Meravale Builders Ltd.* v. *Secretary of State for the Environment* (1978) 36 P. & C.R. 87. See also *Lithgow* v. *Secretary of State for Scotland*, 1973 S.L.T. 81; *cf. Fairmount Investments Ltd.* v. *Secretary of State for the Environment* [1976] 1 W.L.R. 1255. See also *Hambledon and Chiddingfold P.C.* v. *Secretary of State for the Environment* [1976] J.P.L. 502.

[20] *Brutus* v. *Cozens* [1973] A.C. 854; *Customs and Excise Commissioners* v. *Mechanical Services (Trailer Engineers) Ltd.* [1978] 1 W.L.R. 56.

[21] See, for example, *Taylor* v. *Provan* [1975] A.C. 194 (whether expenses have been "necessarily" incurred in the performance by a taxpayer of the duties of his office); *Munby* v. *Furlong* [1977] Ch. 359 (whether a barrister's law books are " plant " for the purpose of claiming an income tax deduction). *Cf.*, however, *R.* v. *General Commissioners for Income Tax, ex p. Rind Trustees* [1975] Q.B. 517. Whether a " profit " has arisen for tax purposes is generally regarded as a question of fact, subject to the legal principle that no tax is payable on a " profit " until it actually accrues: *Willingale* v. *International Commercial Bank Ltd.* [1978] A.C. 834.

[22] *e.g. Brutus* v. *Cozens* (*supra*); *W.* v. *L.* [1974] Q.B. 711, 719 (whether a person is suffering from " mental illness "; note that words may still be " ordinary " in this context, although their proper application may require in part an expertise of a non-legal kind); *Evans* v. *Godber* [1974] 1 W.L.R. 1317; *R.* v. *National Insurance Commissioner, ex p. Secretary of State for Social Services* [1974] 1 W.L.R. 1290; *Dyson Holdings Ltd.* v. *Fox* [1976] Q.B. 503; *LTSS Ltd.* v. *Hackney L.B.C.* [1976] Q.B. 663 (whether a building was used as a " warehouse "); *Simmons* v. *Pizzey* [1979] A.C. 37 (" household "). But see cases; *Pearlman* and *A.C.T. Construction Ltd.* (p. 134, n. 29).

the primary responsibility for decision-making. But a tribunal will err in law if it finds that a statutory term, albeit one to be understood in its " ordinary " sense, applies to a factual situation to which no reasonable person who understands English would think the words were capable of applying. The error of law might be described as a finding of fact wholly unsupported by the evidence; alternatively, the court might say that the tribunal must have asked itself the wrong question (*i.e.* it could only have reached the result that it did by assuming, erroneously, that the words bore some " special " meaning). There is, however, another way in which an application of " ordinary " language may raise a question of law. Even within their ordinary linguistic usage words can have different shades (or registers) of meaning: a proper appreciation of their statutory context may, however, indicate that as a matter of statutory interpretation they do not bear their full range of meaning.[23] For example, under the Social Security Act 1973 a disabled person is entitled to an attendance allowance, if he requires, *inter alia*, attention during the night. Now although " night " is being used in its " ordinary " meaning (so that its application to particular facts will generally raise no question of law), its statutory context indicates that it should be understood to mean that time during which households normally sleep (when rendering services to a disabled person would be more onerous), and not the hours of darkness or the latter part of the day, even though the word " night " in its ordinary sense could well describe these periods. Once the appropriate shade or " register " of meaning has been identified as a matter of law, its application remains a question of fact.

A tribunal which has made a finding of primary fact wholly unsupported by evidence, or which has drawn an inference wholly unsupported by any of the primary facts found by it, will be held to have erred in point of law.[24] Here again legal terminology is at variance with ordinary linguistic usage. But the " no evidence " rule is well established, and it has established itself because superior courts exercising appellate or supervisory jurisdiction in respect of errors of law need to have power to intervene wherever manifest and gross error is revealed. For the lawyer a question of special interest is in what circumstances the concept of error of law will be stretched beyond the " no evidence " principle to embrace the principle that findings or

[23] See *R.* v. *National Insurance Commissioners* (*supra*); *Price* v. *Civil Service Commission* [1977] 1 W.L.R. 1417 (whether women " *can* comply with " a job requirement refers, in the context of the Sex Discrimination Act 1975, s. 1 (1) (*b*), to practical, not theoretical, ability). See also the views expressed by Lord Simon of Glaisdale in *Ransom* v. *Higgs* [1974] 1 W.L.R. 1594, 1618–1620, and in *Maunsell* v. *Olins* [1975] A.C. 373, 390–395.

[24] See *e.g. Allinson* v. *General Council of Medical Education and Registration* [1894] 1 Q.B. 750, 760, 763; *American Thread Co.* v. *Joyce* (1913) 108 L.T. 353; *Bean's* case (*supra*); *Smith* v. *General Motor Cab Co.* [1911] A.C. 188; *Doggett* v. *Waterloo Taxi Cab Co.* [1910] 2 K.B. 336; *Jones* v. *Minister of Health* (1950) 84 Ll.L.R. 416; *Cababe* v. *Walton-on-Thames U.D.C.* [1914] A.C. 102, 114; *Rowell* v. *Minister of Pensions* [1946] 1 All E.R. 664, 666; *Davies* v. *Price* [1958] 1 W.L.R. 434, 441–442; *R.* v. *Birmingham Compensation Appeal Tribunal, ex p. Road Haulage Executive* [1952] 2 All E.R. 100; *Maradana Mosque Trustees* v. *Mahmud* [1967] 1 A.C. 13; *Global Plant Ltd.* v. *Secretary of State for Social Services* [1972] 1 Q.B. 139, 155.

inferences lacking any reasonable foundation are erroneous in point of law.[25]

Lawyers also speak of questions of " mixed law and fact." Thus, whether the facts in issue are capable of falling within a category prescribed by statute may be treated as a question of law, since it entails a determination of the legal ambit of that category; whether they do fall within that category may be treated as a question of fact.[26] But the latter question can also be treated as a question of law; the factual part of a question of " mixed law and fact " is then confined to the ascertainment of the primary facts and perhaps the drawing of certain inferences from the facts.[27] Another way of expressing the distinction that is sometimes obscured by these terminological ambiguities [28] is to say that whilst a question of statutory interpretation, normally raising an issue of significance that is not confined to the particular facts of the case is always one of law, the application of the statute, properly interpreted, to those facts may or may not be.[29] On a question of interpretation the court will intervene if satisfied that the original decision-maker was wrong, whereas on a question of application, the court may choose to intervene only if it regards the decision as unreasonable. The labels " law " and " fact " should be attached to denote the intensity of review that the court has decided is appropriate.

Some propositions can now be briefly stated:

(1) An appellate court may have power to review not only findings of law but also findings of fact. In such situations the appellate court is not, of course, restricted to the " no evidence " rule.[30] But it will be readier in practice to set aside the inferior tribunal's inferences than its findings of primary fact.[31] Great weight will be given to

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[25] See p. 137, *post*; Wade, *Administrative Law* (4th ed.), 274–282.

[26] See *e.g. White* v. *St. Marylebone B.C.* [1915] 3 K.B. 249; *Re Butler* [1939] 1 K.B. 570, 579; *R.* v. *Supplementary Benefits Commission, ex p. Singer* [1973] 1 W.L.R. 713; *Brooks and Burton Ltd.* v. *Secretary of State for the Environment* [1977] 1 W.L.R. 1294; *Clarks of Hove Ltd.* v. *Bakers' Union* [1978] 1 W.L.R. 1207, 1217. See also *Bocking* v. *Roberts* [1974] Q.B. 307. *Burton* v. *Field & Sons Ltd.* [1977] I.C.R. 106; *R.* v. *West London Supplementary Benefits Appeal Tribunal, ex p. Wyatt* [1978] 1 W.L.R. 240. See also *Willingale* v. *International Commercial Bank Ltd.* [1978] A.C. 834, where it was stated that whether something amounted to a " profit " for tax purposes was generally a matter of fact to be determined in accordance with the principles of commercial accounting, but as a matter of law no profit could arise for tax purposes until it was realised.

[27] See *e.g. Felix* v. *General Dental Council* [1960] A.C. 704, 717; *Bhattacharya* v. *General Medical Council* [1967] 2 A.C. 259, 265; *Faridian* v. *General Medical Council* [1971] A.C. 995.

[28] American courts have also experienced difficulty with this matter. For a " practical " approach to the problem, see K. C. Davis, *Administrative Law Treatise, iv*, paras. 30.00 *et seq.* (and Supplements). For an " analytical " solution to the distinction between law, fact and discretion, see Louis L. Jaffe, *Judicial Control of Administrative Action*, Chap. 14.

[29] *Cf. Pearlman* v. *Harrow School Keepers and Governors* [1979] Q.B. 56; *A.C.T. Construction Ltd.* v. *Commissioners of Customs and Excise* [1979] 1 W.L.R. 870. Note that the jurisdiction of the European Court of Justice on a reference under Art. 177 of the Treaty of Rome is confined to the interpretation of the Treaty and legislation made under it; the application of the relevant law is entrusted to the national courts of Member States.

[30] See *e.g. Re St. Edburga's, Abberton* [1962] P. 10. See also p. 137, *post*.

[31] *Benmax* v. *Austin Motor Co.* [1955] A.C. 310; A. L. Goodhart (1955) 71 L.Q.R. 402. But where the inference was one that the expertise of the tribunal particularly qualified it to draw, a court may be reluctant to intervene if it is not satisfied that the tribunal was clearly wrong:

the consideration that the inferior tribunal had the advantage of hearing the evidence and observing the demeanour of witnesses, and its findings of primary fact will not be disturbed unless they are manifestly wrong.[32] This is not to say, however, that a clear distinction is always drawn, or can always be drawn, between primary findings and inferences, between perception and evaluation.

(2) Inferences drawn from primary facts may be inferences of law or inferences of fact. If the powers of an appellate court are limited to points of law, a general authority conferred by Rules of Court to draw inferences of fact and to require further evidence on questions of fact [33] must not be so interpreted as to enlarge the appeal on points of law to an unrestricted appeal on questions of fact.[34]

(3) Questions that cannot be determined, or inferences that cannot be drawn, except by a trained lawyer (*e.g.* because they demand knowledge of the legal rules governing the construction of statutes, contracts or other documents or an understanding of technical legal concepts) will generally be treated as questions of law,[35] but they may also be commingled with questions of fact.[36] The interpretation of its own rules by a voluntary organisation will generally be treated as a question of law.[37]

(4) Although the courts may show deference to the findings of a tribunal with specialised knowledge on other highly technical matters, even if they characterise those findings as matters of law,[38] they will

Commission for Racial Equality v. *Associated Newspapers Group Ltd.* [1978] 1 W.L.R. 905, 909, 910.

[32] *Watt (or Thomas)* v. *Thomas* [1947] A.C. 484; *Youll* v. *Youll* [1945] P. 13; *Flannery* v. *Cohuna Sewerage Authority* (1977) 51 A.L.J.R. 135.

[33] Ords. 55, r. 7 (2), (3); 59, r. 10 (2), (3).

[34] *Green* v. *Minister of Housing and Local Government* [1967] 2 Q.B. 606 (dealing with appeals on point of law from the Minister's decisions on enforcement notices); see also *Chivers* v. *Cambridge County Council* [1957] 2 Q.B. 58; *Re D. (An Infant)* [1977] A.C. 602.

[35] *British Launderers Research Association* v. *Hendon Borough Rating Authority* [1949] 1 K.B. 462, 471–472, *per* Denning L.J. See also *Gould* v. *Minister of National Insurance* [1951] 1 All E.R. 368, 372; *Solihull Corporation* v. *Gas Council* [1959] 1 W.L.R. 619; *Tsakiroglu & Co.* v. *Noblee Thorl G.m.b.H.* [1962] A.C. 93; *Morren* v. *Swinton & Pendlebury B.C.* [1965] 1 W.L.R. 576; *R.* v. *Criminal Injuries Compensation Board, ex p. Ince* [1973] 1 W.L.R. 1334; *Hoveringham Gravels Ltd.* v. *Secretary of State for the Environment* [1975] Q.B. 754; *B.S.M. (1257) Ltd.* v. *Secretary of State for Social Services* [1978] I.C.R. 894.

[36] *Global Plant* case (note 9, *ante*), distinguishing *Morren's* case (*supra*). Whether a contract falls within a particular category of contracts of "supply" for the purposes of value added tax is generally regarded as a question of law, requiring an objective construction of the terms of the contract and the application to them of the relevant statutory provisions; apportioning the price paid between the different types of service supplied is, however, a question of fact: *British Railways Board* v. *Customs and Excise Commissioners* [1977] 1 W.L.R. 588; *British Airports Authority* v. *Customs and Excise Commissioners* [1977] 1 W.L.R. 302; *cf.*, however, *Customs and Excise Commissioners* v. *Automobile Association* [1974] 1 W.L.R. 1447, 1454–1455.

[37] Hence the courts may interfere if the organisation misinterprets them: *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329; *Baker* v. *Jones* [1954] 1 W.L.R. 1005; *Leigh* v. *National Union of Railwaymen* [1970] Ch. 326.

[38] *Maurice (C.) & Co.* v. *Secretary of State for Employment and Productivity* [1969] 2 A.C. 346; *Esso Petroleum Ltd.* v. *Ministry of Labour* [1969] 1 Q.B. 98; *Fisher-Bendix Ltd.* v. *Secretary of State for Employment and Productivity* [1970] 1 W.L.R. 856, 860; (standard industrial classification of a class of activity as interpreted by an industrial tribunal for the purpose of a claim to refund of selective employment tax) *Cf.* pp. 132–133, *ante*. But courts show no deference to the findings of a tribunal that lie outside its expertise: *Griffiths* v. *Secretary of State for Social Services* [1974] Q.B. 468.

not necessarily abdicate from the field of review. " Scientists and engineers are entitled to have their rights enforced and their wrongs redressed as well as anyone else." [39] If the court thinks that the tribunal might have erred in point of law it may consult dictionaries, call expert witnesses or appoint assessors so as to inform itself adequately on matters outside the normal range of judicial expertise.[40]

(5) The concept of error of law includes the giving of reasons that are bad in law [41] or (if there is a duty to give reasons) inconsistent, unintelligible [42] or, it would seem, substantially inadequate.[43] It includes also the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account,[44] exercising a discretion on the basis of any other incorrect legal principles,[45] misdirection as to

[39] *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal* [1959] A.C. 663, 601, *per* Lord Denning.

[40] *Baldwin & Francis* case (*supra*); *R.* v. *Patents Appeal Tribunal, ex p. Swift & Co.* [1962] 2 Q.B. 647. Contrast the earlier approach adopted in *R.* v. *Appeal Tribunal, ex p. Champion Fibre & Paper Co.* [1956] R.P.C. 223 and *Re Baldwin & Francis' Application* [1957] R.P.C. 465. Possibly the willingness of the superior courts to intervene in patent cases is a response to special factors—the existence of a patent bar and the fact that the Patents Appeal Tribunal (now the Patents Court) consists of High Court judges. Despite the technical expertise required to administer the Price Code the courts have not shrunk from intervening when they have detected errors of law committed by the Price Commission: *G.E.C. Ltd.* v. *Price Commission* [1975] I.C.R. 1; *H.T.V.Ltd.* v. *Price Commission* [1976] I.C.R. 170.

[41] *e.g. R.* v. *Minister of Housing and Local Government, ex p. Chichester R.D.C.* [1960] 1 W.L.R. 587; *Birmingham Corporation* v. *Habib Ullah* [1964] 1 Q.B. 178; but see *Re Shahid Iqbal* [1979] Q.B. 264 (erroneous ground given for detention: order valid). If two independent reasons are given, of which one is good in law and the other bad, the decision may be affirmed (*Paultons Square Properties Ltd.* v. *L.C.C.* (1965) 63 L.G.R. 158; *sed quaere*). *Cf. Malloch* v. *Aberdeen Corporation* (*No.* 2), 1974 S.L.T. 253 (two reasons voluntarily given of which one was bad in law): *cf.* p. 151, *post*. See also *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 (giving reasons that were bad in law constituted failure to hear and determine according to law).

[42] *Cf. Givaudan & Co.* v. *Minister of Housing and Local Government* [1967] 1 W.L.R. 250 (this being failure to comply with statutory requirements to give reasons); *Hope* v. *Secretary of State for the Environment* (1976) 31 P. & C.R. 120; *French Kier Developments Ltd.* v. *Secretary of State for the Environment* [1977] 1 All E.R. 296; *Accountancy Tuition Centre* v. *Secretary of State for the Environment* [1977] J.P.L. 792.

[43] *Re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467. This decision was distinguished however, in *Re Allen and Matthews' Arbitration* [1971] 2 Q.B. 518; and in *Mountview Court Properties Ltd.* v. *Devlin* (1970) 21 P. & C.R. 686 the Divisional Court held that a complete failure to comply with a statutory duty to give reasons was not in itself an error of law. But see *Nudds* v. *Eastwood (W. & J. B.) Ltd.* [1978] I.C.R. 171 and *U.K.A.P.E.* v. *ACAS* [1979] I.C.R. 303, *contra*. See further, pp. 148–151, *post*.

[44] These may also be excesses of jurisdiction: See pp. 113, 116, *ante*. For illustrations see *R.* v. *Home Secretary ex p. Mehta* [1975] 1 W.L.R. 1087; *Portec (U.K.) Ltd.* v. *Mogensen* [1976] I.C.R. 396 (but see now *Wilson* v. *Maynard Shipbuilding Consultants A.B.* [1978] Q.B. 665); *R.* v. *Criminal Injuries Compensation Board, ex p. Clowes* [1977] 1 W.L.R. 1353; *R.* v. *Barnsley Supplementary Benefits Appeals Tribunal, ex p. Atkinson* [1977] 1 W.L.R. 917; *Brassington* v. *Cauldon Wholesale Ltd.* [1978] I.C.R. 405. Note also that it may be permissible for a tribunal to adopt as a useful working rule some decisional criteria that are not identical to those contained in the statute. But the tribunal must always be prepared to consider an argument that the statutory language entitles an individual to a favourable decision, even though the application of the informal guideline would not. See, *e.g. Saggers* v. *British Railways Board* [1977] 1 W.L.R. 1090; *R.* v. *Barnsley Supplementary Benefits Appeal Tribunal, ex p. Atkinson* [1977] 1 W.L.R. 917. However, a court may defer to an expert tribunal's judgment about relevance: *Woods* v. *Cinematograph Films Licensing Authority* [1978] 1 N.Z.L.R. 851, 858.

[45] *Wootton* v. *Central Land Board* [1957] 1 W.L.R. 424; *Instrumatic Ltd.* v. *Supabrase Ltd.* [1969] 1 W.L.R. 519; *Pepys* v. *London Transport Executive* [1975] 1 W.L.R. 234, *R.* v. *A Wreck Commissioner, ex p. Knight* [1976] 3 All E.R. 8; *Melwood Units Pty. Ltd.* v. *Commissioner of Main Roads* [1978] 3 W.L.R. 520 (P.C.).

the burden of proof,[46] and wrongful admission or exclusion of evidence,[47] as well as arriving at a conclusion without any supporting evidence.

(6) If the drawing of an inference from the primary facts, or the application of a statutory term to the facts and inferences drawn therefrom, is held or assumed to be a matter of law, a court will set the decision aside if satisfied that it was wrong; the tribunal will be held or assumed to have misdirected itself in law, even though the tribunal's decision could not be characterised as unreasonable.

(7) If the drawing of an inference or the application of a statutory term is held or assumed to be a matter of fact (or fact and degree) for the "tribunal" of first instance, a court may still hold that the decision is erroneous in point of law if any of the defects listed in paragraph (5) is present or if the inference or conclusion is one that no reasonable body of persons properly instructed in the law could arrive at (as where the evidence, including the tribunal's own expert knowledge, and primary facts point unmistakably to a different conclusion).[48] If the formulation is slightly changed, and it is said that an error of law exists whenever the conclusion is one to which the competent authority cannot reasonably come on the evidence adduced,[49] the scope of judicial review is potentially extended; there can be a wide difference between power to set aside unreasonable decisions and power to set aside only those decisions which no reasonable person could make.[50] The adoption of the narrower test by the Divisional Court in relation to the concept of "material change of use" in enforcement notice appeals has aroused some criticism.[51] Certainly it is open to the courts to

[46] *R.* (*Hanna*) v. *Ministry of Health and Local Government* [1966] N.I. 52, 61.

[47] See *R.* v. *Industrial Injuries Commissioner, ex p. Ward* [1965] 2 Q.B. 112; *Devis* (*W.*) *& Sons Ltd.* v. *Atkins* [1977] A.C. 931; *Merseyside and North Wales Electricity Board* v. *Taylor* [1975] I.C.R. 185.

[48] See, *e.g. Bracegirdle* v. *Oxley* [1947] K.B. 349; *Afford* v. *Pettit* (1949) 113 J.P. 433; *Woodley* v. *Meason, Freer & Co.* [1963] 1 W.L.R. 1409; *Saunders* v. *Saunders* [1965] P. 499; *Brutus* v. *Cozens* [1973] A.C. 854 (decisions of magistrates; appeal by case stated); and see esp. the speeches of Lord Simonds and Lord Radcliffe in *Edwards* v. *Bairstow* [1956] A.C. 14 (erroneous inferences drawn by income tax commissioners). It ought to be enough for the court to say that the decision impugned was manifestly wrong, and unnecessary for it to be able to point to the uniquely "correct" decision. The sufficiency of the evidence may depend upon whether the tribunal erred in law in applying a presumption or imposing a burden of proof: *R* v. *City of London Coroner, ex p. Barber* [1975] 1 W.L.R. 1310.

[49] See esp. *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 1320, 1326, *per* Lord Denning M.R. and p. 118, *ante*. Dicta in *Saunders'* case (*supra*). 508, 513–514 and *Savoury* v. *Secretary of State for Wales* (1976) 31 P. & C.R. 344, 348, 352, also support this broader test for error of law. See also *Moberly* v. *Commonwealth Hall* (*University of London*) [1977] I.C.R. 791 (appeal).

[50] *Cf.* the formulations of the standard of appellate review of inferences of fact in *I.R.C.* v. *Goodwin* [1976] 1 W.L.R. 191, 193–194 (*per* Lord Morris of Borth-y-Gest), 200 (*per* Lord Edmund-Davies).

[51] Notably the decision in *Bendles Motors Ltd.* v. *Bristol Corporation* [1963] 1 W.L.R. 247 (local planning authority held that introduction of automatic egg-vending machine into forecourt

expand the scope of review for errors of law by adopting the broader test.

(8) Although it would be difficult to maintain as a proposition of general application that there is any substantial difference between appellate review for errors of law and supervisory review by means of certiorari to quash for error of law on the face of the record, it should be noted that (a) on appeal the court may alter the original decision (or in some cases remit it to the inferior tribunal with directions) whereas in certiorari proceedings the court can only quash it (save where the impugned order is severable), although it may now also remit the matter and require the tribunal to reconsider and to reach a decision in accordance with the findings of the court [52]; (b) on an application for certiorari the court can review only such errors of law as are disclosed by the " record," save where an error goes to jurisdiction; (c) the evidence is seldom disclosed by the record, so that in practice perverse findings of primary fact can seldom be disturbed on an application for certiorari,[53] or, indeed, on an appeal by way of case stated unless this ground of attack has been specifically included in the case stated [54]; (d) on an application for certiorari a court may have regard to the fact that Parliament has not followed the now usual practice of providing an appeal on points of law from an inferior tribunal, and may be less astute to detect errors of law than on an appeal [55]; (e) the prerogative orders (and their statutory analogues) are discretionary and may be withheld in cases

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of petrol filling station constituted a material change of use; court refused to hold that this decision was erroneous in law). But see *Snook* v. *Secretary of State for the Environment* (1975) 33 P. & C.R. 1, where the court could find " no material whatever " to support the Minister's decision. But if the competent authority misdirects itself (*e.g.* by addressing itself to the wrong question or applying a wrong legal test) there is an error of law: see, *e.g. Burdle* v. *Secretary of State for the Environment* [1972] 1 W.L.R. 1207. See further at p. 136, *ante*.

[52] R.S.C., Ord. 53, r. 9 (4). Where an inferior criminal court has imposed a sentence outside its jurisdiction the Divisional Court may impose a substituted sentence (Administration of Justice Act 1960, s. 16). See *R.* v. *Birmingham JJ., ex p. Wyatt* [1976] 1 W.L.R. 260.

[53] In the older cases on speaking orders where the evidence was set out, there is some authority for the proposition that the scope of review is wider than is indicated by the strict " no evidence " rule. See *Paley on Summary Convictions* (9th ed.), 329–337. On habeas corpus applications brought by alleged fugitive offenders it has certainly been wide; *R.* v. *Brixton Prison Governor, ex p. Armah* [1968] A.C. 192; but *cf. R.* v. *Pentonville Prison Governor, ex p. Sotiriadis* [1975] A.C. 1, 30.

[54] See *e.g. Ransom* v. *Higgs* [1973] 1 W.L.R. 1180, 1204–1205; *New Windsor Corporation* v. *Mellor* [1974] 1 W.L.R. 1504, 1507–1508; *Central Electricity Generating Board* v. *Clwyd C.C.* [1976] 1 W.L.R. 151; *Re Britford Common* [1977] 1 W.L.R. 39. *Cf. Trocette Property Ltd.* v. *G.L.C.* (1974) 28 P. & C.R. 408; *Zoar Independent Church Trustees* v. *Rochester Corporation* [1975] Q.B. 246. See also Practice Direction (Employment Appeal Tribunal: Appeal Procedure) [1978] 1 W.L.R. 573.

[55] See, *e.g.* the cases cited at p. 131, note 13, *ante*. Even on an appeal, there may be a reluctance to submit decisions to so close a scrutiny as would discourage tribunals from performing their functions expeditiously: *Fougère* v. *Phoenix Motors Ltd.* [1976] 1 W.L.R. 1281. But the absence of any provision for appeal has not deterred the courts from issuing certiorari to quash speaking orders of medical appeal tribunals for applying statutory definitions incorrectly to the facts found by them. See *R.* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 Q.B. 574; *R.* v. *Medical Appeal Tribunal, London, ex p. Burpitt* [1957] 2 Q.B. 584; *R.* v. *Medical Appeal Tribunal for South Wales District, ex p. Griffiths* [1958] 1 W.L.R. 517 (the " paired organs " cases). See also *R.* v. *Thames Magistrate, ex p. Brindle* [1975] 1 W.L.R. 1400.

where the court thinks intervention inappropriate. But the artificial distinction between patent and latent errors of law in proceedings for certiorari to quash for error of law on the face of the record is very unsatisfactory, and it is difficult to see what damage would be done by affording persons aggrieved by the determinations of inferior tribunals a common gateway and avenue to the courts. It would still be possible for the courts to vary the intensity of review of determinations by particular tribunals in the light of considerations such as the specialised expertise and aptitudes of the tribunal, the significance of the issues involved to the administration of the scheme and the nature of the individual interests at stake.

(9) The adoption of a general rule in English administrative law empowering the courts to set aside findings of fact by statutory tribunals and administrative authorities if "unsupported by substantial evidence"[56] would create difficulties. If such a rule were to become meaningful, it would require bodies which at present conduct their proceedings informally to have verbatim transcripts or to keep detailed notes of evidence.[57] If the administrative findings were made partly on the basis of inspections and views, a body of super-inspectors would be needed. Nevertheless, in some contexts such a rule has much to commend it; and, as we have noted, some judges have already asserted jurisdiction to set aside decisions based on clearly erroneous inferences of fact either by classifying this type of error as an error of law or merely by proceeding on the assumption that manifest error of fact makes a decision *ultra vires*.[58]

Law and Fact in Jurisdictional Questions

If a tribunal has erred on a point that is preliminary or collateral to the merits, certiorari or prohibition may issue to it if the error is one of law; but where the error is one of fact, the circumstances in which the courts will intervene are doubtful. As regards prohibition, the prevailing view may be expressed in the words of the Canadian Supreme Court[59]:

[56] As in the federal administrative law of the United States (Administrative Procedure Act of 1946, s. 10 (*e*)), and of Canada (Federal Court Act 1970, s. 28 (1) (*c*)).

[57] Thus the challenge to a clearance order failed in *Savoury* v. *Secretary of State for Wales* (1976) 31 P. & C.R. 344 because of the difficulty in establishing upon what evidence (if any) the local authority decided that there was "suitable accommodation available" for those displaced. *Cf. Sabey (H.) & Co. Ltd.* v. *Secretary of State for the Environment* [1978] 1 All E.R. 586 (affidavit evidence admissible to show that there was no evidence upon which the inspector or the Minister could base a finding of fact).

[58] See cases cited at p. 118, notes 46–47, *ante*. See also Wade, *op. cit.*, (4th ed.), 274–281; Scarman, *English Law—The New Dimension*, 48–50; D. W. Elliott (1972) 37 Sask.L.R. 48 (review for "no evidence" in Canada); R. J. Sharpe, *The Law of Habeas Corpus*, 69–80; App. 2, *post*.

[59] *Segal* v. *City of Montreal* [1931] S.C.R. 460, 473. See also *Brown* v. *Cocking* (1868) L.R. 3 Q.B. 672, 676; *Elston* v. *Rose* (1868) L.R. 4 Q.B. 4, 7, 8; *Joseph* v. *Henry* (1850) 19 L.J.Q.B. 369 (prohibition to county courts); *Caledonian Collieries Ltd.* v. *Australasian Coal & Shale Employees' Federation (No. 1)* (1930) 42 C.L.R. 527, 547–548.

delegated powers) in arriving at his decision? Probably not, except in so far as he has been expressly informed of such a restriction.[25]

We shall consider later in this chapter the problems arising where there is a duty to hear before deciding but where the persons making the decision have not heard oral evidence relevant to the decision.[26]

(c) Conduct of the Hearing

A party must have an adequate opportunity of knowing the case he has to meet, of answering it and of putting his own case.

Duty of Adequate Disclosure

If prejudicial allegations are to be made against him, he must normally, as we have seen, be given particulars of them before the hearing so that he can prepare his answers.[27] In order to protect his interests he must also be enabled to controvert, correct or comment on other evidence or information that may be relevant to the decision. If this material is available before the hearing, the right course will usually be to give him advance notification; but it cannot be said that there is a hard and fast rule on this matter, and sometimes natural justice will be held to be satisfied if the material is divulged at the hearing, which may have to be adjourned if he cannot fairly be expected to make his reply without time for consideration.[28]

If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie a breach of natural justice, irrespective of whether the material in question arose before, during or after the hearing. This proposition can be illustrated by a large number of modern cases involving the use of undisclosed reports by administrative tribunals and other adjudicating bodies.[29] If the deciding body is or has the trappings of a judicial tribunal and receives or appears to receive evidence *ex parte* which is not fully disclosed, or holds *ex parte* inspections during the course or after the conclusion of the hearing, the case for setting the decision aside is obviously very strong; the maxim that justice must be seen to be done can readily be

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[25] On the other hand, the main purpose of the written representations procedure is to expedite the determination of minor appeals and that purpose (which has been achieved) might be frustrated were the view stated above to be adopted by the courts.

[26] At pp. 219–221, *post*.

[27] See p. 196 *et seq.*, *ante*. See also *M'Donald* v. *Lanarkshire Fire Brigade Joint Committee*, 1959 S.C. 141 (particulars of disciplinary allegations communicated only after undue delay).

[28] See pp. 197–198, 200, *ante*, 212–213, *post*.

[29] See *e.g. R.* v. *Milk Marketing Board, ex p. North* (1934) 50 T.L.R. 559; *R.* v. *Westminster (City of) Assessment Committee* [1941] 1 K.B. 53; *R.* v. *Milk Board, ex p. Tomkins* [1944] V.L.R. 187; *R.* v. *Architects' Registration Tribunal, ex p. Jaggar* [1945] 2 All E.R. 131; *Re Estate of Roscrea Meat Products Ltd.* [1958] I.R. 47; *Low* v. *Earthquake Commission* [1959] N.Z.L.R. 1198; *R.* v. *Metropolitan Fair Rents Board, ex p. Canestra* [1961] V.R. 89; *Kanda* v. *Government of Malaya* [1962] A.C. 322; *R.* v. *Kent Police Authority, ex p. Godden* [1971] 2 Q.B. 662; *South Otago Hospital Board* v. *Nurses and Midwives Board* [1972] N.Z.L.R. 828. For the general rule, see *Board of Education* v. *Rice* [1911] A.C. 179, 182. And see *Shareef* v. *Commissioner for Registration of Indian and Pakistani Residents* [1966] A.C. 47 (inadequate disclosure of relevant reports). See also cases cited in next footnote.

invoked.[30] If an appellate tribunal has communications with a tribunal of first instance with a view to altering the original decision, the parties to the proceedings before that tribunal ought to be notified so that they can make further submissions.[31] *A fortiori*, it is a breach of natural justice for an appellate authority, or a body receiving the report of the appellate authority, to hold private interviews with witnesses.[32]

To the general rule there are various exceptions, some of which have already been indicated. There are cases where disclosure of evidential material might inflict serious harm on the person directly concerned (*e.g.* disclosure of a distressing medical report to a claimant for a social security benefit) [33] or other persons, or where disclosure would be a breach of confidence or might be injurious to the public interest (*e.g.* because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, and might make it impossible to obtain certain classes of essential information at all in the future). In such situations the person claiming to be aggrieved should nevertheless be adequately apprised of the case he has to answer, subject to the need for withholding details in order to protect other overriding interests.[34]

Judicial and Official Notice

Against this background one must consider the concept of judicial notice, which in administrative law shades off into what is known in the United States as " official notice." [35] Courts, which are required to decide cases on

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[30] See *e.g. R.* v. *Bodmin JJ., ex p. McEwen* [1947] K.B. 321; *Fowler* v. *Fowler* [1963] P. 311 (courts); *R.* v. *Birmingham City Magistrate, ex p. Chris Foreign Foods (Wholesalers) Ltd.* [1970] 1 W.L.R. 1428 (magistrate condemning food); *Eastcheap Dried Fruit Co.* v. *N.V. Gebroeders Catz' Vereeniging* [1962] 1 Lloyd's Rep. 283 (arbitrators); *R.* v. *Newmarket Assessment Committee* [1945] 2 All E.R. 371; *Barrs* v. *British Wool Marketing Board*, 1957 S.C. 72; *R.* v. *Deputy Industrial Injuries Commissioner, ex p. Jones* [1962] 2 Q.B. 677 (statutory tribunals); *Taylor* v. *National Union of Seamen* [1967] 1 W.L.R. 532 (trade unions). See also *Re Gregson and Armstrong* (1894) 70 L.T 106 and *Goold* v. *Evans* [1951] 2 T.L.R. 1189; *Errington* v. *Minister of Health* [1935] 1 K.B. 249; *Hibernian Property Co. Ltd.* v. *Secretary of State for the Environment* (1974) 27 P. & C.R. 197; *Clark* v. *Wellington Rent Appeal Board* [1975] 2 N.Z.L.R. 24, 28-30 on the impropriety of *ex parte* views; *cf. Salsbury* v. *Woodland* [1970] 1 Q.B. 324 on the circumstances in which an unaccompanied view is permissible; *R.* v. *Lilydale Magistrates' Court, ex p. Ciccone* [1973] V.R. 122 on the suspicions of bias that may arise from the travelling arrangements; *R.* v. *Green* [1950] 1 All E.R. 38 and *R.* v. *Furlong, ibid.* 636 on the impropriety of private communications between judge and jury: cases cited at p. 268, *post*, on the limits of propriety in communications between justices and their clerks; and *Fisher* v. *Keane* (1879) 11 Ch.D. 353 on *ex parte* hearings in club expulsion cases.

[31] *R.* v. *Huntingdon Confirming Authority* [1929] 1 K.B. 698. *Cf. The Corchester* [1957] P. 84.

[32] *Palmer* v. *Inverness Hospitals Committee*, 1963 S.C. 311; *Wilcox* v. *H.G.S.* [1976] I.C.R. 306.

[33] Social Security (Determination of Claims and Questions) Regulations 1975 (S.I. 1975 No. 558) r. 4. See also *R.* v. *Kent Police Authority, ex p Godden* [1971] 2 Q.B. 662 (undisclosed official psychiatric report on police officer; court ordered disclosure to officer's own medical adviser but not to the officer himself). *Cf. Re W.L.W.* [1972] 2 All E.R. 433 (report on condition of mental patient).

[34] See pp. 189–190, *ante*. See esp. *R.* v. *Gaming Board for Great Britain, ex p. Benaim and Khaida* [1970] 2 Q.B. 417, on how much information ought to be disclosed to applicants for consents to run gaming clubs; *R.* v. *Home Secretary, ex p. Hosenball* [1977] 1 W.L.R. 766 (intelligence information and deportation).

[35] For a critical survey of the American doctrine, see Davis, *Administrative Law Treatise*, Chap. 15. See also J. A. Smillie, " The Problem of ' Official Notice ' " [1975] *Public Law* 64.

the basis of the rules of evidence, are also allowed to take judicial notice of matters of common knowledge, and these need not be put to the parties before them. How far judicial notice can properly extend is not altogether clear. The general principle is " that a person exercising judicial functions is not justified in noticing directly or indirectly by statement or otherwise facts within his private knowledge. He ought to be sworn and state them as a witness." [36] Exceptionally (if, for example, magistrates propose to take into account their impressions of a party before them derived from earlier proceedings in which he was involved),[37] an adjudicator may be permitted to use his personal knowledge, provided that there is no real likelihood of bias and the matter to be taken into account is clearly disclosed to the party concerned.[38] In one recent case,[39] an appeal was lodged against an acquittal by lay magistrates, on the ground that one of them had used his medical expertise during their retirement to consider their verdict, to persuade them to reject the only evidence given on a particular issue. The appeal was dismissed; such expertise may properly be used to evaluate evidence given, but not to contradict evidence or introduce new evidence that should be made available to the parties.[40] The degree of latitude conceded to liquor licensing justices to make use of undisclosed private knowledge has gone much further and is quite uncharacteristic of any form of litigation.[41] More characteristic of the standards appropriate for administrative adjudication was the attitude adopted towards arbitrators deciding workmen's compensation cases, who were permitted to draw on their own accumulated knowledge of general and local labour conditions to supplement evidence, but were obliged to disclose their thoughts to the claimant if non-disclosure would unfairly deprive him of his right to lead evidence or tender submissions on specific facts in issue.[42]

Statutory tribunals are set up because they already have or can be expected to acquire specialised expertise. Clearly they are entitled to use their expertise to draw inferences from evidence. If a tribunal is under an obligation to

[36] *R.* (*Giant's Causeway, etc., Tramway Co.*) v. *Antrim JJ.* [1895] 2 I.R. 603, 649. See also *Re Frank Bros. Ltd. and Hamilton Board of Police Cmrs.* (1967) 63 D.L.R. (2d) 309.

[37] See *Thomas* v. *Thomas* [1961] 1 W.L.R. 1; *Brinkley* v. *Brinkley* [1965] P. 75; *cf. Munday* v. *Munday* [1954] 1 W.L.R. 1078.

[38] See pp. 262–263, 266 *post*.

[39] *Wetherall* v. *Harrison* [1976] Q.B. 773. The court did warn, however, against the expert's unduly pressing his opinion upon his non-expert colleagues.

[40] For a stricter approach to the problem, however, see, *R.* v. *Prosser* (1836) 7 C. & P. 648. See also, *R.* v. *Field, ex p. White* (1895) 64 L.J.M.C. 158. *Cf.* Minister's duty to disclose evidence upon which he relies when disagreeing with a finding of fact by an inspector in a planning or compulsory purchase appeal: see pp. 211–212, *post*.

[41] *Cf. R.* v. *Howard* [1902] 2 K.B. 363, 376; *Boyle* v. *Wilson* [1907] A.C. 45. In *Wetherall* (*supra*) it was stated that more latitude should always be given to lay adjudicators on the ground that, unlike professional judges, they could not be expected to approach the evidence without bringing to bear their own knowledge.

[42] See *e.g. Peart* v. *Bolckow, Vaughan & Co.* [1925] 1 K.B. 399; *Reynolds* v. *Llanelly Associated Tinplate Co.* [1948] 1 All E.R. 140; and, generally, *Learmonth Property Investment Co.* v. *Aitken*, 1971 S.L.T. 349, 356; on industrial tribunals, see *e.g. Dugdale* v. *Kraft Foods Ltd.* [1976] 1 W.L.R. 1288, 1294–1295; *Adda International Ltd.* v. *Curcio* [1976] I.C.R. 407; *Spurling* v. *Development Underwriting (Vic.) Pty. Ltd.* [1973] V.R. 1, 10; Peter Brett & Peter W. Hogg, *Cases and Materials on Administrative Law* (2nd ed.), 501.

observe the rules of evidence it cannot use its own expert opinion as a substitute for evidence,[43] though it may still be able to rely on an extended concept of judicial notice to supplement evidence. But a number of special tribunals are not bound by the strict rules of evidence. They are charged with the task of actively finding the material facts by any appropriate means; they may be permitted to adopt inquisitorial procedures,[44] undertake unaccompanied inspections,[45] consult experts [46] and use their own technical and local knowledge [47] and their past experience which may be based on evidence given in previous cases [48]; their final decision may, in some cases, be based on broad considerations of public policy. They are nevertheless obliged to act in accordance with natural justice. And this means that, in the absence of contrary intendment, they must not place a party at a disadvantage by depriving him of an adequate opportunity of commenting on material relevant to their decision if it is gleaned from an outside source [49] or in the course of their own investigations, [50] or from evidence given in earlier cases.[51] In other words, one may expect the doctrine of " official notice " to be more readily applicable where the information relied upon is drawn from the general, accumulated experience of the decision-maker, rather than from an identifiable source upon which he has relied, whether it be another person, particular documents or specific prior events. As yet the case-law gives no clear indication of the extent to which they will be permitted to abstain from disclosing during the hearing their own expert opinions, or information relevant to the exercise of their discretion in so far as they can take public

[43] *Moxon* v. *Minister of Pensions* [1945] K.B. 490.

[44] *Cf. R.* v. *Medical Appeal Tribunal (North Midland Region), ex p. Hubble* [1958] 2 Q.B. 228, 240–241.

[45] *Cf. R.* v. *Brighton & Area Rent Tribunal, ex p. Marine Parade Estates* (1936) *Ltd.* [1950] 2 K.B. 410. *Cf. Halsey* v. *Esso Petroleum Co.* [1961] 1 W.L.R. 683, 689; *Salsbury* v. *Woodland* [1970] 1 Q.B. 324 (unaccompanied view by judge). For recognition of the greater flexibility given in this respect to inspectors conducting public local inquiries, see *Fairmount Investments Ltd.* v. *Secretary of State for the Environment* [1976] 1 W.L.R. 1255, 1264. And see *Hickmott* v. *Dorset C.C.* (1977) 35 P. & C.R. 195.

[46] *Cf. R.* v. *Deputy Industrial Injuries Commissioner, ex p. Jones* [1962] 2 Q.B. 677. See also *Wislang* v. *Medical Practitioners Disciplinary Committee* [1974] 1 N.Z.L.R. 29 (no duty to disclose legal advice obtained from outside the tribunal on a point of law upon which the individual had addressed the tribunal).

[47] *Crofton Investment Trust Ltd.* v. *Greater London Rent Assessment Committee* [1967] 2 Q.B. 955. See also *R.* v. *Brighton Rent Officers, ex p. Elliott* (1975) 29 P. & C.R. 456 (rent officer not required to disclose before the statutory consultation with the parties, the properties with which he proposed to compare the premises in question). And see *Kalil* v. *Bray* [1977] 1 N.S.W.L.R. 256 (specialist tribunal may rely on its own expertise to reject otherwise uncontradicted lay evidence).

[48] *Cf. R.* v. *Deputy Industrial Injuries Commissioner, ex p. Moore* [1965] 1 Q.B. 456.

[49] As in *Jones'* case (*supra*); *Hibernian Property Co. Ltd.* v. *Secretary of State for the Environment* (1974) 27 P. & C.R. 197 (views of occupiers favouring demolition of unfit houses).

[50] *R.* v. *Paddington & St. Marylebone Rent Tribunal, ex p. Bell, London & Provincial Properties Ltd.* [1949] 1 K.B. 666, 682 (important evidential point commented on during inspection but not properly put to landlords); *Crofton Investment Trust Ltd.* v. *Greater London Rent Assessment Committee* [1967] 2 Q.B. 955, 968 (dictum); *Fairmount* (*supra*) at 1265 (inspection revealed evidence of an aspect of unfitness not relied upon at inquiry). See also *Hickmott* v. *Dorset C.C.* (note 45, *supra*).

[51] See *Moore's* case (*supra*) at 466–468, 489–490 (dicta). And see *Re Martin (John) & Co. Ltd.* (1974) 8 S.A.S.R. 237, where on the facts an opportunity to rebut the evidence was found to have been given.

policy considerations into account.[52] But it is thought that the courts will lean in favour of imposing judicial standards as far as practicable,[53] so that if a party is misled as to the basis on which the tribunal is likely to decide and is thus placed at a material disadvantage in putting his case, he may be held to have been denied natural justice.[54]

Institutional Decisions

When one passes from quasi-adjudication by tribunals to the sphere of quasi-judicialised administration, recognised deviations from the ordinary rules of natural justice become more apparent. The best-known "institutional decisions" affecting private interests are those made by the Secretary of State for the Environment in the confirmation of compulsory purchase orders and the determinations of planning appeals.[55] Despite its defects,[56] this form of procedure, the principal feature of which is, the public local inquiry, is used for many other types of decision.[57] But it may also be noted that some recent legislation has imposed some important limitations upon it.[58]

In these contexts the main object must be to achieve decisions which strike a reasonable balance between the interests of the individual immediately concerned, the interests of other persons and authorities in the area, and the national interest. This balance is likely to be struck most satisfactorily by departmental administrators, who ought to be in a position to be aware of all

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[52] *Cf.* K. C. Davis's general position (p. 182, note 92, *ante*) that matters of policy and material affecting the exercise of discretion should, as far as is practicable, be disclosed but be controvertible by argument rather than the adduction of evidence.

[53] See *e.g.* the *Learmonth* case, note 42, *supra* and the *Brighton Rent Officers'* case, note 47, *ante* (tribunal entitled to use local knowledge but not undisclosed knowledge of particular facts in issue). *Cf.* however, *Wetherall's* case, note 39, *supra*.

[54] *Shareef* v. *Commissioner for Registration of Indian and Pakistani Residents* [1966] A.C. 47 (apolicant's advocate misled as to importance attached by tribunal to specific item of evidence; decision quashed); contrast *Drewitt* v. *Price Tribunal* [1959] N.Z.L.R. 21 (parties inadequately aware of basis of decision, but no fault attributable); and see last two cases cited at p. 201 note 17, *supra*, on misleading interested parties as to procedure to be applied. See also *Société Franco-Tunisienne d'Armement-Tunis* v. *Government of Ceylon* [1959] 1 W.L.R. 787 (arbitration; giving the decision on basis of point of law not raised at the hearing is misconduct; *quaere* whether this would be regarded as a breach of natural justice in proceedings before an administrative tribunal); *Re Chien Sing-Shou* [1967] 1 W.L.R. 1155; *Re Simeon* [1935] 2 K.B. 183. See also *R.* v. *Criminal Injuries Compensation Board, ex p. Ince* [1973] 1 W.L.R. 1334, 1344–1345; *cf. British Oxygen Co. Ltd.* v. *Board of Trade* [1971] A.C. 610.

[55] The fullest published analyses are by R. E. Wraith & G. B. Lamb, *Public Inquiries as an Instrument of Government* (1971); Jean-Luc Boussard, *L'Enquete Publique en Angleterre* (1969), See also pp. 18, 166-171, *ante*. For the broader context, see J. P. W. B. McAuslan, "The Plan, the Planners and the Lawyers" [1971] *Public Law* 247, and "Planning Law and Urban Problems" (1974) 37 M.L.R. 134. For a discussion of public inquiries into the siting of power stations, see Dennis B. Drapkin [1974] *Public Law* 220.

[56] For an analysis, in particular of the attendant delays in planning decisions, see *Review of the Development Control System, Final Report* (1975). For the Government's reaction to its recommendations, see D. of E. Cir. 113/75; Cir. 9/76 (action to be taken by local authorities); also the comment by Jeffrey Jowell (1975) 38 M.L.R. 543.

[57] *e.g.* Town and Country Planning Act 1971, s. 55 (6), Sched. 11, Pt. I (listed building consent); Health and Safety at Work Act 1974, s. 44, S.I. 1974 No. 2040 (licensing); Control of Pollution Act 1974, Pt. III, S.I. 1975 No. 2116, Pt. III; Consumer Credit Act 1974, ss. 41, 150, S.I. 1976 No. 837 (licensing).

[58] See p. 167, note 96, *ante*.

the factors bearing upon an individual case. They must be free to consu other members of their own department and if necessary, members of oth departments and outside experts in the course of making a decision.[59] Th cannot conduct hearings and inquiries themselves; this function is performe by a departmental inspector, and the decision is made by an administrato (occasionally by the Secretary of State himself) [60] who has read the inspector report and recommendations but has not heard the oral evidence or sub missions. In the case of planning appeals, this procedure may be varie according as the policy content of a particular issue is very large or very small The Secretary of State may refer an appeal or application raising matters o national or regional importance or complex technical questions to a specially constituted Planning Inquiry Commission for investigation and report.[61] Appeals raising only local issues are determinable by inspectors under delegated powers.[62] Appeals relating to the design or external appearance of buildings may go to an independent tribunal.[63]

To the individual whose interests are adversely affected, a divorce between hearing and deciding—not to speak of the pseudonymity of the decision-maker (" the Secretary of State ")—may seem unfair. In order to minimise the grounds for complaint, procedural safeguards for individual interests have been introduced, to a small extent by judicial decision but mainly by recent legislation.

Legislation imposes obligations to give notice and other particulars of planning applications and compulsory purchase orders and of inquiries held in connection with appeals or objections.[64] Does natural justice impose additional common-law duties on the Minister to disclose other relevant information at or before the inquiry? In 1947 the Court of Appeal held that a Minister was under no implied obligation to divulge to objectors to a compulsory purchase order a letter sent to him by the acquiring authority

[59] It may also be desirable for them to be free to consult the acquiring authority or local planning authority at various stages, but their freedom of action in this matter was curbed by the partial judicialisation of procedure and the inhibitions engendered by the " post-Franks " atmosphere. See J. A. G. Griffith, *Central Departments and Local Authorities*, 265–266. There is now freedom to consult in the shaping of development plans: Town and Country Planning Act 1971, ss. 7–16; Town and Country Planning (Amendment) Act 1972, ss. 1–3.

[60] Cases raising major policy issues or giving rise to considerable public controversy (*e.g.* the *Saffron Walden Chalkpit* and *Packington Estate* cases, p. 63, note 77, note 78, *ante*), on the last of which, see R. H. S. Crossman, *Diaries of a Cabinet Minister*, Vol. I, 450–451, 454, 456–457. The most recent example is the *Windscale* case.

[61] Town and Country Planning Act 1971, ss. 47–49. It is possible that the first use of this procedure may be made in determining applications for planning permission for the siting of nuclear fast-breeder reactors on a commercial scale. Although not used for the *Windscale* inquiry into the proposal to build an oxide reprocessing plant, the inquiry was conducted by a High Court judge who heard a wide-ranging public debate of the issues.

[62] *Ibid.*, Sched. 9. This procedure was introduced in 1968 in order to expedite decision-making. Approximately 7 out of 10 appeals are determined by inspectors, mainly in accordance with the written representations procedure. For an extension of delegation to inspectors, see S.I. 1972 No. 1652 (as amended by S.I. 1977 No. 477); and for the simplified inquiry procedure, see S.I. 1974 No. 420. And see the *Thirkell* case, p. 202, note 24, *ante*.

[63] *Ibid.*, s. 50. Although statutory provision to this effect had appeared in planning legislation for many years, no such tribunal had been constituted by 1978.

[64] See pp. 166–167, 198, note 97, *ante*.

before objections had been lodged and containing derogatory remarks about the objectors. To impose such an obligation, it was held, would necessarily entail the imposition of further obligations to disclose information, reports and representations in departmental files having a possible bearing on the Minister's policy decision to confirm such an order. The " idea that a Minister can be compelled to disclose to anybody information of that kind, which he has obtained as a purely administrative person," was " alien to our whole conception of government in this country." [65]

To this extent the normal requirements of natural justice were excluded. The court rationalised its conclusion by holding that since the information had been received by the Minister before the " quasi-*lis* " had been joined, he was under no duty to act judicially. This approach is clearly open to criticism. It is arguable that there should be an obligation to disclose, at or before the inquiry, (i) a departmental statement of general policy, on which argument at the inquiry would be permissible, and (ii) any material purely affecting a party to the controversy, which he might wish to contest by evidence adduced at the inquiry. But the decision still seems to be good law, save in one respect. Where (as seems to have happened in that case) a department has expressed in writing a view in support of the order (or in opposition to the unconditional grant of a planning application), the local authority must now notify the objector or appellant before the inquiry if it proposes to rely on this expression of view, in which case the department must send a representative to the inquiry to explain the department's view. The representative can be cross-examined but cannot be asked to express an opinion on the merits of government policy.[66] If the acquiring authority is a Minister he must give reasons for proposing to make the order; these may include policy factors.[67]

Subject to these qualifications, and to the inspector's duty to reject any evidence the production or giving of which would be contrary to the public interest,[68] the rules of natural justice must be observed during the course of

[65] *Johnson (B.) & Co. (Builders) Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395, 401, *per* Lord Greene M.R. See also *Kent C.C.* v. *Secretary of State for the Environment* (1977) 75 L.G.R. 452.

[66] Compulsory Purchase by Public Authorities (Inquiries Procedure) Rules 1976 (S.I. 1976 No. 746), rr. 4 (5), 6. See also Highways (Inquiries Procedure) Rules 1976 (S.I. 1976 No. 721), rr. 10 (2), 11. *Cf. Bushell* v. *Secretary of State for the Environment* (1977) 76 L.G.R. 460 (no right to cross-examine official on statistics that he had not himself compiled). A recent White Paper (Cmnd. 7133 (1978)) has proposed a number of amendments to highway inquiries procedure, including the appointment of inspectors by the Lord Chancellor, prior release by the Minister of more information about the bases of the proposals and greater opportunities at inquiries for the consideration of alternative routes. *Cf.* Town and Country Planning (Inquiries Procedure) Rules 1974 (S.I. 1974 No. 419), rr. 6 (1), (3), 11 (applicant must request presence of local authority representative). Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967 (S.I. 1967 No. 720), rr. 5 (2), 7. And see *Re Innisfil (Township of) and Vespra (Township of)* (1979) 23 O.R. (2d) 147 (objectors entitled to be heard on viability of government policy, but not to cross-examine officials).

[67] 1967 Rules, r. 5 (1). Similar obligations attach to the acquiring authority under the 1976 Rules; these are less likely to include policy factors. In planning appeals guidance as to departmental policy can often be obtained from the *Developmental Policy Control Notes* issued by the Department of the Environment (H.M.S.O.).

[68] 1976 Rules, r. 7 (4); 1974 Rules, r. 10 (4); 1967 Rules, r. 9 (4).

the hearing or inquiry. The inspector may make an unaccompanied view of the site before, during or after the inquiry; and, unlike a judge, his conclusions need not be confined to the matters raised by the parties. Nonetheless, he must not conduct a view during or after the inquiry in the presence of one party without giving the others an opportunity of being present.[69]

After the inquiry has ended the Secretary of State continues to wear his judicial hat till he discards it by announcing his decision; and in certain circumstances he may be required to put it on again after the announcement. During the period of gestation, he must not consult *ex parte* with any of the parties on an evidential matter about the confirmation of the order or the determination of the appeal; this common-law prohibition [70] is interpreted widely in administrative practice and it appears that informal communication between the deciding officers and the inspectors also tends to be inhibited.[71] But there is still no duty to disclose the inspector's report till after the Secretary of State's decision is announced,[72] even though the parties might have wished to correct errors of fact.[73] In the days when inspectors' reports were not disclosed at all, this deviation from the principles of natural justice used to be defended by invoking the concept of ministerial responsibility and asserting the need for encouraging frankness in official reports [74]; now non-disclosure before the decision is defended more persuasively on the ground that disclosure would be likely to slow down a creaking machine. In order to allow public debate on the report of the *Windscale* inquiry before he made a final decision, the Secretary of State published the report and announced that he had refused permission, whilst at the same time making it clear that this was no more than a device to avoid the danger, inherent in publishing the report prior to the decision, that he might be said to have taken into account *ex parte* evidence. In the event, the Secretary of State adopted the inspector's principal findings and recommendations and granted planning permission by a Special Development Order. Whether natural justice required the Minister to disclose relevant communications with other departments while he was acting in a judicial capacity was never made clear

[69] 1976 Rules, r. 8; 1974 Rules, r. 11; 1967 Rules, r. 10. See also p. 204, note 30, *ante*. On the duty of the inspector to inform the parties of a view that he has formed during an unaccompanied site inspection after an inquiry, see *Fairmount Investments Ltd.* v. *Secretary of State for the Environment* [1976] 1 W.L.R.1255.For comments on post-inquiry procedure, see H. M. Purdue [1975] J.P.L. 445 and [1976] J.P.L. 146.

[70] See pp. 168–169, 203, *ante*.

[71] J. A. G. Griffith, *Central Departments and Local Authorities*, 265–266, 355–357.

[72] 1976 Rules, r. 10; 1974 Rules, r. 13; 1967 Rules, r. 12. If a copy of the report does not accompany notification of the reasoned decision, it can be obtained on application by anyone entitled to such notification (including anyone who has appeared at the inquiry and has asked to be notified). Under the procedure for delegating to inspectors power to decide certain types of planning appeals, inspectors have to give a reasoned decision but do not submit a separate report: S.I. 1974 No. 420, r. 16. The decisional letter must explain the grounds in sufficient detail to enable the parties to understand the basis of the decision: *Hope* v. *Secretary of State for the Environment* [1975] J.P.L. 731.

[73] Contrast the position in Scotland (*cf. Hamilton* v. *Secretary of State for Scotland*, 1972 S.L.T. 233), commended in the Franks Report (Cmnd. 218 (1957), 73–74).

[74] *Local Government Board* v. *Arlidge* [1915] A.C. 120; see other cases cited at p. 169, note 11, *ante*, and the summary of the departmental case against publication set out at p. 72 of the Franks Report (Cmnd. 218 (1957)).

by the courts,[75] though it was universally assumed that he was free not to divulge purely intradepartmental consultations and advice. The position has now been partly resolved by statutory regulations [76]; it will be for the courts to decide whether the procedural duties thus imposed are exhaustive.[77]

If the Minister has it in mind to disagree with the inspector's recommendations [78] he must notify the main parties of this fact and the reasons for this disagreement. If he differs from the inspector on " a finding of fact " (a phrase which does not include a conclusion drawn by the application of planning or housing policy to the proven or observed facts [79]) he must give the parties an opportunity of making further written representations. If the reason for his disagreement is that he has received " new evidence " or taken into consideration a " new issue of fact " which was not raised at the inquiry he must re-open the inquiry if any of the parties so requests. For this purpose " new evidence " includes expert opinion (which may emanate from the Minister's own department or elsewhere) on a question of fact, but a " new issue of fact " does not include a matter of government policy. Although the courts are reluctant to set aside decisions because of alleged inadequacy of the inspector's findings of fact,[80] the report must provide the Minister

[75] See p. 168, note 10, *ante*.

[76] S.I. 1976 No. 746, r. 9; S.I. 1974 No. 419, r. 12; S.I. 1967 No. 720, r. 11. The adoption of these rules followed the controversy surrounding Major Aubrey Buxton and the case of the *Saffron Walden Chalkpit*: see Griffith & Street, *Casebook of Administrative Law*, 142–174, 184–192.

[77] See *e.g. Lake District Special Planning Board* v. *Secretary of State for the Environment* [1975] J.P.L. 220 (rules not exhaustive, but heavy onus to establish breach of rules of natural justice. In *Kent C.C.* v. *Secretary of State for the Environment* (1977) 75 L.G.R. 452, the Minister, in a " called-in " planning application was able to adopt as his own a policy statement of another Department on the inadequate industrial capacity in the area, without affording an opportunity to the applicants to rebut it. See further pp. 187–188, *ante*.

[78] The Minister is not bound by the inspector's recommendations or findings: *Nelsovil Ltd.* v. *Minister of Housing and Local Government* [1962] 1 W.L.R. 404; *Wipperman* v. *Barking L.B.C.* (1966) 17 P. & C.R. 225, though *cf. Coleen Properties Ltd.* v. *Minister of Housing and Local Government* [1971] 1 W.L.R. 433 (Minister's decision invalid because no evidence to displace inspector's findings of fact; see further, p. 118, *ante*). In practice departments have become more reluctant to override inspectors since reports have been made available for publication (Griffith, *op. cit.*, 356, 538). All but a tiny percentage of planning appeals are decided in accordance with the inspectors' recommendations.

[79] *Luke of Pavenham* v. *Minister of Housing and Local Government* [1968] 1 Q.B. 172; see also *Vale Estates (Acton) Ltd.* v. *Secretary of State for the Environment* (1971) 69 L.G.R. 543 (difference of opinion on aesthetic taste). But see *Hambledon and Chiddingfold P.C.* v. *Secretary of State for the Environment* [1976] J.P.L. 502, where the Minister's decision was invalidated by his failure to disclose a local authority's change of policy on a matter germane to its application for permission to use land as a caravan site. For a more questionable characterisation of a matter as one of opinion, not fact, see *Sunley Homes Ltd.* v. *Secretary of State for the Environment* [1975] J.P.L. 151 (account taken of cost of similar projects in determining comparative cost of a project); and see *Lester and Butler* v. *Secretary of State for the Environment* [1978] J.P.L. 308 (existence of immediate " housing need " a question of policy: the factual and policy strands of this conclusion not separated). See also *J. Murphy & Sons Ltd.* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 560 (difference of opinion on suitability of land for housing); *Lithgow* v. *Secretary of State for Scotland*, 1973 S.L.T. 81. See also *Pyrford Properties Ltd.* v. *Secretary of State for the Environment* (1977) 36 P. & C.R. 28. Whether an inspector's finding of fact has in reality been accepted by the Minister is not to be determined conclusively by a statement in the letter of decision to that effect: *Meravale Builders Ltd.* v. *Secretary of State for the Environment* (1978) 36 P. & C.R. 87, 96.

[80] *Continental Sprays Ltd.* v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 147; *Boyer (William) & Sons Ltd.* v. *Minister of Housing and Local Government, ibid.*, 374. *Cf.* however, the curious decision in *French Kier Developments Ltd.* v. *Secretary of State for the*

with a fair statement of the appellant's case on issues of fact, opinion and law.[81]

In some respects these duties go beyond those imposed by the basic requirements of natural justice; and in others (*e.g.* the provision that the emergence of new issues of policy is not a ground for re-opening the case, and the absence of any provision for arguing or re-arguing material questions of law which were unargued or unresolved at the prior hearings) [82] they seem to fall short of those requirements.

Oral Hearings

One who is entitled to be heard orally, or who is given an oral hearing in pursuance of a discretion conferred by statutory or other formal rules,[83] must be allowed an adequate opportunity of putting his own case. If he has a right to appear, it will, of course, be a breach of natural justice for the tribunal to refuse, deliberately or through inadvertence, to hear him at all.[84] His right to be heard must not be stultified by constant interruptions. If his interests are materially in jeopardy, he must be allowed to call witnesses,[85] and it may be a breach of the rules of natural justice for a tribunal to refuse to allow a party to call his witnesses in the order that he thinks best, if there is a real possibility of prejudice to the effective presentation of the case.[86] If the tribunal is obliged to observe the rules of evidence, the rejection of relevant and admissible evidence is usually no more than an error of law, but in some situations this may constitute denial of a fair hearing according to natural justice.[87] Again, natural justice may be violated by a refusal to allow a party (or his legal representative) to address the tribunal on the law

Environment [1977] 1 All E.R. 296 (Minister's decision quashed on the " new evidence " ground because he had attached evidential value to a document that had been rejected by the inspector as worthless).

[81] *Gibbs (W. H.) Ltd.* v. *Secretary of State for the Environment* (1973) 229 E.G. 103; *North Surrey Water Co.* v. *Secretary of State for the Environment* (1977) 34 P. & C.R. 140. See also *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment* (1976) 32 P. & C.R. 1; *Preston B.C.* v. *Secretary of State for the Environment* [1978] J.P.L. 548; *East Hampshire D.C.* v. *Secretary of State for the Environment* (1978) 248 E.G. 43. Although inspectors are now expected to play a more active role in the conduct of inquiries (see D.o.E. Cir. 113/75), their legal obligation to assist parties to make their case is very limited: *Snow* v. *Secretary of State for the Environment* (1977) 33 P. & C.R. 81. *Cf.*, however, *Tidman* v. *Aveling Marshall Ltd.* [1977] I.C.R. 506, 508 (industrial tribunal).

[82] Though in the 1930s such a right was not, apparently, regarded as an ingredient of natural justice: *Re Simeon* [1935] 2 K.B. 183.

[83] For the position in " voluntary " hearings, see pp. 237–238, *post.*

[84] *R.* v. *Birkenhead JJ., ex p. Fisher* [1962] 1 W.L.R. 1410; *R.* v. *Gravesend JJ., ex p. Sheldon* [1968] 1 W.L.R. 1699; *R.* v. *Kingston-upon-Hull Rent Tribunal, ex p. Black* (1949) 65 T.L.R. 209; *Chettiar* v. *Chettiar* [1962] 1 W.L.R. 279; *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578; similarly where the tribunal will not hear a party on an essential issue: *Sheldon* v. *Bromfield JJ.* [1964] 2 Q.B. 573; *Hodgkins* v. *Hodgkins* [1965] 1 W.L.R. 1448; *R.* v. *Hendon JJ., ex p. Gorchein* [1973] 1 W.L.R. 1502 (*R.* v. *Woking JJ., ex p. Gossage* [1973] Q.B. 448 distinguished); and see *R.* v. *Hopkin, ex p. Haywood* [1973] 1 W.L.R. 965.

[85] *Vye* v. *Vye* [1969] 1 W.L.R. 588. Natural justice does not require that witnesses be excluded while other witnesses are giving evidence; *Moore* v. *Lambeth County Court Registrar* [1969] 1 W.L.R. 141.

[86] *Briscoe* v. *Briscoe* [1968] P. 501; *Barnes* v. *B.P.C. (Business Forms) Ltd.* [1975] 1 W.L.R. 1565.

[87] *General Medical Council* v. *Spackman* [1943] A.C. 627 (see now Medical Act 1978, s. 7 (1)); *Bond* v. *Bond* [1967] P. 39. See further pp. 344–345, *post.*

or the facts [88] or, after a finding of guilt, on the penalty to be imposed.[89] Wrongful refusal of an adjournment to a party unable to attend the hearing [90] or requiring time to produce a witness or other important evidence may also be tantamount to a denial of justice.[91] A party who is unable to understand the English language should be allowed to engage (and in serious cases ought to be provided with) an interpreter.[92]

There is some authority for the proposition that one who is entitled to appear in person before a statutory tribunal is also entitled, in the absence of express or implied provision to the contrary,[93] to be represented by a lawyer or by any other appropriate spokesman of his choice,[94] except in informal proceedings before a domestic tribunal.[95] No matter what the status or

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[88] *Disher* v. *Disher* [1965] P. 31; *Mayes* v. *Mayes* [1971] 1 W.L.R. 679.

[89] *Ex p. Kelly, re Teece* [1966] 2 N.S.W.R. 674; *Ex p. Kent, re Callaghan* [1969] 2 N.S.W.R. 184; see also *Fullbrook* v. *Berkshire Magistrates' Courts Committee* (1970) 69 L.G.R. 75 (clerk dismissed for misconduct, entitled to opportunity to be heard on question whether pension should be forfeited).

[90] *Re M. (an Infant)* [1968] 1 W.L.R. 1897; *Rose* v. *Humbles* [1972] 1 W.L.R. 33. See also *R.* v. *Llandrindod Wells JJ., ex p. Gibson* [1968] 1 W.L.R. 598; *Priddle* v. *Fisher & Sons, ibid.* 1478 where the tribunal should have granted adjournment though not expressly requested. See further pp. 200–201, *ante*.

[91] *R.* v. *Medical Appeal Tribunal (Midland Region), ex p. Carrarini* [1966] 1 W.L.R. 883; *R.* v. *Thames Magistrates' Court, ex p. Polemis* [1974] 1 W.L.R. 1371.

[92] *Cf. Re Fuld's Estate (No. 2)* [1965] 1 W.L.R. 1336; *R.* v. *Merthyr Tydfil JJ., ex p. Jenkins* [1967] 2 Q.B. 21, 23 (dictum) (see now Welsh Language Act 1967, s. 1). See also Canadian Bill of Rights 1960, s. 2 (*f*).

[93] *Maynard* v. *Osmond* [1977] Q.B. 240 (disciplinary proceedings against police officer). See Police (Discipline) Regulations 1977 (S.I. 1977 No. 580), r. 16 (6). Senior officers are, however, entitled to legal representation (S.I. 1977 No. 581, r. 12 (5)). Legal representation is allowed to all officers on an appeal to the Secretary of State (S.I. 1977 No. 759, r. 10 (1)).

[94] *R.* v. *St. Mary Abbotts Assessment Committee* [1891] 1 Q.B. 378; *R.* v. *Board of Appeal, ex p. Kay* (1916) 22 C.L.R. 183. See also Powers of Criminal Courts Act 1973, s. 21 (1); *R.* v. *Birmingham JJ., ex p. Wyatt* [1976] 1 W.L.R. 260. The scope of the rule is not, however, clear either in England or in some other jurisdictions. See *Fraser* v. *Mudge* [1975] 1 W.L.R. 1132 (disciplinary proceedings against a prison inmate); *Maynard* v. *Osmond, supra*, at 253 (dicta). In *Re Mackey* (N.I. 1971) Gibson J. held that internee was impliedly entitled to be represented by an *agent* (who might be a lawyer) in making representations to an advisory committee, but not by a lawyer as such unless his interests were otherwise liable to be seriously prejudiced. For comment see (1972) 23 N.I.L.Q. 321. *Cf. Dabner* v. *South African Railways and Harbours* [1920] A.D. 583; *R.* v. *Melbourne Corporation, ex p. Whyte* [1949] V.L.R. 257, 268; *Re Royal Commission on State Services in New Zealand* [1962] N.Z.L.R. 96. For an examination of Canadian authorities, see W. S. Tarnopolsky, *The Canadian Bill of Rights* (2nd ed.), 226–227, 244–252; Robert F. Reid and Hillel David, *Administrative Law and Practice* (2nd ed.), 99–103. And see *Golder* v. *U.K.* (1975), where the European Court of Human Rights upheld prisoner's right of access to his solicitor: see Graham Zellick (1975) 38 M.L.R. 683. In some cases the matter is put more narrowly as being a matter of discretion for an adjudicator to allow the individual to appear in person or through an agent: see *R.* v. *Visiting Justice at Her Majesty's Prison, Pentridge, ex p. Walker* [1975] V.R. 883, where the principal authorities are considered. *Cf. Maynard* v. *Osmond* [1977] Q.B. 240 (appearance " in person " does not include representation by a lawyer). See also Alder [1972] *Public Law* 278.

[95] *Re Macqueen and Nottingham Caledonian Society* (1861) 9 C.B.(N.S.) 793; *Enderby Town Football Club Ltd.* v. *Football Association Ltd.* [1971] Ch. 591 (C.A.); *Pett* v. *Greyhound Racing Association Ltd. (No. 2)* [1970] 1 Q.B. 46. See also *Ex p. Death* (1852) 18 Q.B. 647. There is some authority for the proposition that when a body has made no formal rule on the matter, it cannot refuse to exercise its discretion to consider allowing legal representation to a person whose ability to pursue his livelihood is in jeopardy: *Pett* v. *Greyhound Racing Association Ltd. (No. 1)* [1969] 1 Q.B. 125, as explained by Lord Denning M.R. in the *Enderby Town* case (*supra*) at 605–606. However, it would appear possible for legal representation to be excluded altogether, whether as of right or in the discretion of the tribunal, by the exercise of an express rule-making power: see *e.g.* Cairns L.J. in *Enderby Town* (*supra*) at 609; *Maynard* v. *Osmond* (*supra*) at 252, 256, where it was held that legal representation had effectively been excluded by a rule made under a statutory power.

functions of the tribunal, it would be contrary to natural justice to allow one side to be legally represented but to refuse the same right to the other. In considering whether natural justice implies a right to legal representation (if a party is able to obtain it), one must recall that natural justice demands only minimum standards of fair adjudication, and not ideal standards. Whether, and if so when, legal representation ought to be permitted before a tribunal can raise difficult questions of policy. The reasons for excluding legal representatives (or permitting them to appear only with the tribunal's consent) are various: they tend to introduce too much formality and an inappropriate adversarial element into the proceedings, which are apt to become unnecessarily prolonged[96]; they disturb witnesses and inexpert members of the tribunal by asking awkward questions and taking " technical " points; their presence increases the likelihood of subsequent proceedings in the courts to impugn the decision, and judicial review is a bad thing. This recital suggests that, in general, legal representation of the right quality before statutory tribunals is desirable, and that a person threatened with social or financial ruin by disciplinary proceedings in a purely domestic forum may be gravely prejudiced if he is denied legal representation. Since the Franks Report the right to legal representation before statutory tribunals has been extended[97]; and it has begun to find its way into disciplinary procedures in universities and national sporting organisations.[98] Development of the case-law on implied rights to legal representation in non-statutory environments should be guided by a realistic appraisal of the interests of the person claiming it, as well as of the interests of the organisation to which he belongs.

Refusal to permit cross-examination of witnesses at an administrative hearing will usually be a denial of natural justice.[99] Seldom can such a

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[96] An argument recently used in connection with the imposition of punishment on members of disciplined organisations: see, *e.g. Fraser* v. *Mudge* [1975] 1 W.L.R. 1132. It may of course also be argued that the appearance of unfairness in such proceedings may have an equally deleterious effect upon morale and rehabilitation. See Harry Whitmore (1970) 33 M.L.R. 481; Annual Report of the Council on Tribunals for 1970–71, para. 60.

[97] But see note 93, *ante*. On the desirability of legal representation and the expansion of legal aid beyond the provision of financially assisted legal advice prior to a hearing contained in the Legal Advice and Assistance Act 1972, see Sir Robert Micklethwait, *The National Insurance Commissioners*, 53–57; K. R. Whitesides and Geoffrey Hawker, *Industrial Tribunals*, 42–63; Anne Frost and Coral Howard, *Representation and Administrative Tribunals* (1977), Chap. 6. Despite the recommendations of the Lord Chancellor's Advisory Committee (H.C. 20, Session 1974–75), little progress has been made towards the extension of legal aid before tribunals. See Annual Report of the Council on Tribunals for 1974–75, p. 25. Financial support is given by the Government to a variety of organisations (*e.g.* United Kingdom Immigration Advisory Service, Town and Country Planning Association's Planning Aid Service) whose functions may include providing representation before tribunals and inquiries. Trade union officials often represent employees before industrial and national insurance tribunals. See now Legal Aid Act 1979, s. 1.

[98] In 1972 legal representation was permitted at certain disciplinary hearings before the Stewards of the Jockey Club and the Greyhound Racing Association, and before the Football Association authorities.

[99] *Re Fremington School* (1846) 10 Jur.(o.s.) 512; *Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636, 646, 660; *Marriott* v. *Minister of Health* (1936) 154 L.T. 47, 50; *R.* v. *Newmarket Assessment Committee* [1945] 2 All E.R. 371, 373; *Magistrates of Ayr* v. *Lord Advocate*, 1950 S.C. 102, 109.

refusal be justified if a witness has testified orally and a party requests leave to confront and cross-examine him—the fact that the proceedings may be inquisitorial and informal is inconclusive [1]—but there may exceptionally be valid grounds for disallowing questions to a witness on a particular matter.[2] If a party to proceedings claims that he has been denied natural justice because the non-appearance of a witness has made it impossible to cross-examine him, an attack on the validity of the proceedings may seem to have a still firmer foundation but may well prove to be abortive. A tribunal may be entitled to base its decision on hearsay, written depositions or medical reports.[3] In these circumstances a person aggrieved will normally be unable to insist on oral testimony by the original source of the information, provided that he has had a genuine opportunity to controvert that information.[4] Again, deprivation of the opportunity to test evidence by cross-examination is not a violation of natural justice if the tribunal can and does decide merely on the strength of an inspection or oral or written submissions supplemented by its own local or specialised knowledge [5]; or if the proceedings before an investigating body are only for the purpose of collecting information [6]; or if the evidence relates to questions of policy rather than to the facts in issue.

Three final points can be made. First, often a party cannot effectively exercise his right to cross-examine unless he is represented by a lawyer.

Refusal to permit cross-examination of a witness in proceedings in a court will be a denial of justice; see *R.* v. *Edmonton JJ., ex p. Brooks* [1960] 1 W.L.R. 697; *Blaise* v. *Blaise* [1969] P. 54; *cf.* though *R.* v. *Wells Street Stipendiary Magistrate, ex p. Seillon* [1978] 1 W.L.R. 1002 (refusal to permit cross-examination of witness in committal proceedings not reviewable by prerogative order prior to their termination). Procedural codes for statutory tribunals and inquiries normally give an express right of cross-examination, but even when they are silent, the right may be implied: *Nicholson* v. *Secretary of State for Energy* (1977) 76 L.G.R. 693.

[1] *R.* v. *Brighton & Area Rent Tribunal* [1950] 2 K.B. 410, 419; *Ceylon University* v. *Fernando* [1960] 1 W.L.R. 223, 235 (dicta). In the *Fernando* case (involving disciplinary charges) it was held that a fair hearing had been given although witnesses had been heard in Fernando's absence; he had been given a sufficient account of what they had said and he had not asked to confront or cross-examine them. But *quaere* whether it was reasonable in the circumstances to make Fernando's right to cross-examine contingent on his taking the initiative in making such a request; he was not legally represented. Nor, indeed, was he represented at the hearing of the appeal before the Privy Council.

[2] As where questions are put to a civil servant on the merits of government policy (see p. 209, *ante*). The immunity from cross-examination conceded to the civil servant witness in *Re Trunk Roads Act* 1936 [1939] 2 K.B. 515 seems to have been more extensive than this.

[3] See also, *R.* v. *Epping and Harlow JJ., ex p. Massaro* [1973] Q.B. 433 (prosecution not obliged to produce for cross-examination at committal proceedings witnesses who will be called at trial).

[4] *Wilson* v. *Esquimalt & Nanaimo Ry.* [1922] 1 A.C. 202; *R.* v. *War Pensions Entitlement Appeal Tribunal, ex p. Bott* (1933) 50 C.L.R. 228. See also *Miller (T. A.) Ltd.* v. *Minister of Housing and Local Government* [1968] 1 W.L.R. 992 (enforcement notice appeal); *Bushell* v. *Secretary of State for the Environment* (1977) 76 L.G.R. 460. In these cases the relevant evidential material was disclosed in writing. See also, *Kavanagh* v. *Chief Constable of Devon and Cornwall* [1974] Q.B. 624 (Crown Court, on an appeal from a refusal to register a person under the Firearms Act 1968, may, like the original decision-maker, rely upon hearsay evidence). See, however, *Re W. L. W.* [1972] Ch. 456, where production of the author of a report for cross-examination was held to be a requisite of natural justice in a proceeding in a court of law.

[5] See the *Brighton Rent Tribunal* case (*supra*); *Crofton Investment Trust Ltd.* v. *Greater London Assessment Committee* [1967] 2 Q.B. 955 (tenants not obliged to call any evidence).

[6] *St. John* v. *Fraser* [1935] S.C.R. 441. See also *Re Pergamon Press Ltd.* [1971] Ch. 388. It does not follow, however, that an investigating body which makes no final decision is exempt from any duty to observe natural justice. See pp. 233–237, *post*.

Secondly, in proceedings culminating in the imposition of a penalty, natural justice surely requires that after the case has been proved, or even if there is no dispute as to the law and facts in the first place,[7] there should be a right to address the tribunal in mitigation [8] unless the penalty is automatic. Thirdly, there may well be questions of law, policy or opinion on which a party cannot properly claim any right to lead evidence or to cross-examine witnesses but on which he can fairly claim an implied right to make submissions to the deciding body.

Special Situations

1. Enforcement Powers

Desirable though it may be to act judicially before deciding to interfere with private rights, summary action may be justifiable when an urgent need for protecting the interests of other persons arises.[9] The owners of the wrecked oil tanker, the *Torrey Canyon*, which was polluting the English coastline, were not allowed the benefits of the *audi alteram partem* rule before the British Government ordered the ship to be bombed.[10]

At a less dramatic level, the Post Office may detain and dispose of dangerous or obscene postal communications.[11] An authorised public officer may summarily suspend the licence of a public service vehicle or prohibit the driving of a goods vehicle which is dangerously defective; there is a statutory procedure for review of the suspension.[12] Customs officials may seize obscene works; they are forfeited after one month unless the owner lodges a notice of objection, in which case the question of forfeiture is determinable only in a judicial proceeding.[13] Food suspected of being unfit for human consumption may be seized by a council officer, but condemnation is a matter for a magistrate only; notice of the proceedings must be given and anyone liable to be prosecuted is entitled to be heard in these civil proceedings.[14] It is highly unlikely that an owner of a building is entitled to

[7] R. W. Rideout, *Right to Membership of a Trade Union*, 132–133; *Ridge* v. *Baldwin* [1964] A.C. 40, 68; *Burn* v. *National Amalgamated Labourers Union* [1920] 2 Ch. 364, 374; *Edgar* v. *Meade* (1917) 23 C.L.R. 29, 43; *cf. Weinberger* v. *Inglis* [1919] A.C. 606, 632.

[8] See p. 213, note 87, *ante*.

[9] See generally pp. 190–191, *ante*.

[10] See Cmnd. 3246 (1967). The owners were notified of the decision after it had been taken. See also Oil in Navigable Waters Act 1971.

[11] Post Office Act 1953, ss. 8, 11 (as amended).

[12] Road Traffic Act 1972, ss. 57, 58 (as amended).

[13] Customs Consolidation Act 1876, s. 42; Customs and Excise Act 1952, ss. 275–280, Sched. 7. But the owner is not informed of his right to object: Harry Street, *Freedom, the Individual and the Law* (3rd ed.), 140. See also, Obscene Publications Act 1959, s. 3 (3).

[14] Food and Drugs Act 1955, s. 9. No appeal lies to the Crown Court, because the magistrate is not acting as a court (*R.* v. *Cornwall Q.S., ex p. Kerley* [1956] 1 W.L.R. 906). The denial of a right of appeal is obviously sensible, but *quaere* whether, as was stated *obiter* in that case (at 910, 911), the justices are acting in a purely administrative capacity. If they are, and the food is in fact fit for consumption, they might be liable for trespass. But it is thought that if necessary, they would be held to be acting judicially (*cf. R.* v. *Birmingham City Justice, ex p. Chris Foreign Foods (Wholesalers) Ltd.* [1970] 1 W.L.R. 1428 (magistrate, though acting "administratively," bound to "act fairly"; decision as to condemnation quashed by certiorari)) and hence immune from civil liability in the absence of malice.

prior notice of an intention to list it as being of architectural or historic interest; should he wish to alter the building, however, he is entitled to a hearing against a refusal of listed building consent.[15]

Here we have illustrated a range of *ex post facto* safeguards provided by modern statute law where summary action needs to be taken without prior notice. There are in fact remarkably few situations in which the enforcement powers of public authorities and administrative officers are exercisable without notice. Some of the exceptional situations arise under the Public Health Acts. Thus, a local authority may be under a duty to remove a temporary building when the period during which it has been permitted to remain has expired.[16] A local authority is empowered to examine and test sewers, drains and sanitary conveniences that it believes to be defective; to remedy stopped-up drains; to order the cleansing or destruction of filthy or verminous articles; and to remove to hospital an inmate of a common lodging house who is suffering from a notifiable disease giving rise to a serious risk of infection. Public health officers may destroy or deinfest verminous articles offered for sale.[17]

There are other direct enforcement powers conferred by public health legislation which are exercisable only when notice has been served on the persons affected—*e.g.* powers to construct sewers on private land, to pull down structures erected in contravention of building regulations, to cleanse filthy and verminous premises, to require the vacation of those premises during deinfestation, to cleanse and disinfect premises and articles thereon in order to prevent the spread of infectious disease, and to destroy rodents which are overrunning premises.[18] A duty to give prior notice generally implies a duty to listen to representations by the persons affected unless the circumstances calling for the exercise of the power render it impracticable. In some cases (*e.g.* where direct action has to be taken to make a dangerous building safe) legislation permits prior notice to be dispensed with if it is impracticable to give it.[19]

Frequently a power of direct enforcement becomes exercisable only by virtue of an order made by a magistrate upon an application made by a competent authority. In some of these cases the magistrate is expressly empowered to act *ex parte* if he deems it necessary—*e.g.* on applications for the removal of dead bodies from buildings in the interests of public health, for the removal of inmates of infected houses, for requiring persons to submit

[15] Town and Country Planning Act 1971, ss. 54, 56 (3), (6), Sched. 11, Pt. I. See *Amalgamated Investment and Property Co. Ltd.* v. *John Walker and Sons Ltd.* [1977] 1 W.L.R. 164.

[16] Public Health Act 1936, s. 53 (5); see also s. 344 (2).

[17] Public Health Act 1936, ss. 48, 84, 244; Public Health Act 1961, ss. 17, 37.

[18] 1936 Act, ss. 15 (1) (i) (*b*), 83, 167; 1961 Act, ss. 11, 35, 36, Sched., Pt. 1; Prevention of Damage by Pests Act 1949, s. 6.

[19] 1961 Act, ss. 24, 25 (2). The question whether it would have been more reasonable to apply to a magistrates' court for an order to be made against the owners can be determined in proceedings in which the recovery of expenses for the work executed is claimed (*ibid.*, s. 25 (5); 1936 Act, s. 58 (1)).

to medical examination in specified circumstances and for the detention in hospital of persons suffering from infectious diseases.[20] If the magistrate is not expressly empowered to act *ex parte* but no opportunity to be heard is expressly granted to persons affected, it is a question of construction and common sense whether such an opportunity ought to be implied.[21]

Typical of modern English administrative procedure are those situations where detailed statutory provisions exist for prior notice and opportunity to be heard before any direct enforcement measures can be taken in relation to property. Thus, a magistrates' court cannot issue a distress warrant for unpaid rates unless the occupier has been given notice and opportunity to be heard.[22] Again, a local authority wishing to secure abatement of a statutory nuisance must normally serve an abatement notice on the person responsible. If the nuisance is not then abated, the local authority may lodge a complaint which will be heard before a magistrates' court; it acquires power to abate the nuisance itself if the court issues a nuisance order and the defendant has failed to comply with it.[23]

Persons affected by some types of administrative orders are given a right of appeal to a court within a prescribed period before the order can be directly executed. One who is served with a notice signifying the intention of a local authority to alter the drainage system of his premises may appeal to a magistrates' court.[24] Before a local authority makes a demolition order or closing order in respect of a house that is unfit for human habitation, it must give the owner, occupier and mortgagee prior notice and opportunity to be heard; a person aggrieved by the order may then appeal to a county court, which is entitled to exercise a wide discretion in reviewing the merits of the order.[25] Direct enforcement of a demolition order cannot take place for at least four weeks after it has become operative; no provision except the imposition of fines or the substitution of a demolition order is made for non-

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[20] 1936 Act, ss. 162, 168–170; 1961 Act, s. 38. *Cf.* dicta in *R.* v. *Davey* [1899] 2 Q.B. 301, 305–306 on the implied right to act *ex parte* for reasons of urgency under earlier public health legislation.

[21] For decisions on the implied common-law right to be heard before justices before forfeiture of property, see *Gill* v. *Bright* (1871) 41 L.J.M.C. 22; *Ex p. Francis* [1903] 1 K.B. 275; contrast *White* v. *Redfern* (1879) 5 Q.B.D. 15 (condemnation of food; but *cf.* note 14, *ante*), and *R.* v. *Davey* (*supra*). See also, *R.* v. *Havering JJ., ex p. Smith* [1974] 3 All E.R. 489 (service of notice upon occupiers of caravans required before justices made site clearance order, considerations of administrative inconvenience notwithstanding).

[22] General Rate Act 1967, s. 97.

[23] Public Health Act 1936, ss. 92–95. See also Public Health (Recurring Nuisances) Act 1969 (prohibition notice). An expedited procedure, still involving the service of a notice but obviating the need for a court order before direct action is taken if unreasonable delay would be caused by following the usual procedure, is provided by s. 26 of the 1961 Act. *Cf.* s. 34 of the 1961 Act (procedure for removal of accumulated rubbish on site); Refuse Disposal (Amenity) Act 1978, s. 7.

[24] Public Health Act 1936, s. 42; see also ss. 48, 50.

[25] Housing Act 1957, ss. 16, 20; *Fletcher* v. *Ilkeston Corporation* (1931) 96 J.P. 7; but *cf. Pocklington* v. *Melkshan U.D.C.* [1964] 2 Q.B. 673 (non-judicial exercise of discretion). Nor, it would seem, must notice be given before a repair notice is served under the Housing Act 1957, s. 9 (1A); but again, the notice may not be enforced whilst the right of appeal to a county court remains exercisable (s. 11 (1)); see *Hillbank Properties Ltd.* v. *Hackney L.B.C.* [1978] Q.B. 998.

compliance with a closing order.[26] If a local planning authority serves an enforcement notice requiring the discontinuance of development carried out in contravention of planning controls and the restoration of the land to its former condition, the persons immediately affected may appeal to the Secretary of State for the Environment; they are entitled to an oral hearing conducted by a departmental inspector, to whom the power of decision can often be delegated. From the Secretary of State's or inspector's decision an appeal lies on a point of law to a Divisional Court of the Queen's Bench Division. Non-compliance with a valid enforcement notice is punishable by a fine and the local authority may enter upon the land to execute work required by the notice; there will have been no lack of prior notice or opportunity to be heard.[27]

Police officers normally cannot insist on entering private premises except under the authority of a warrant issued by a magistrate.[28] Some administrative powers of entry for the purposes of carrying out inspections or tests without the occupier's consent also require a magistrate's warrant; and in the absence of special circumstances the occupier must be given prior notification.[29] But under a number of recent Acts of Parliament administrative entry may be effected by a duly authorised officer simply by giving notice (which may be brief) to the occupier.[30]

2. Deciding without Hearing

Must he who decides also hear? In general the answer is in the affirmative. It is a breach of natural justice for a member of a judicial tribunal [31] or an

[26] *Ibid.*, ss. 23, 27, 28. For the procedure to be followed in relation to the demolition of obstructive buildings, see ss. 72–74.

[27] Town and Country Planning Act 1971, ss. 87–95, 110–111, 246. For other enforcement powers under this Act, see ss. 51–62, 108–109, 276, 280. See also ss. 51, 108 (discontinuance orders), 90 (stop notices) as amended by Town and Country Planning (Amendment) Act 1977. See also Town and Country Planning (Amendment) Act 1972, s. 7 (service of urgent building preservation notice). See also Control of Pollution Act 1974, s. 58 (1); although s. 58 (3) confers a right of appeal to magistrates against the notice, the notice may remain in force pending the determination of the appeal (S.I. 1975 No. 2116, r. 10 (2) (b)) and compliance with the notice may meanwhile be secured by criminal prosecution or proceedings for an injunction. Nonetheless, once the local authority is satisfied that the notice is justified, it is under no obligation to hear the person allegedly responsible for the nuisance; *Hammersmith L.B.C.* v. *Magnum Automated Forecourts Ltd.* [1978] 1 W.L.R. 50, 53 (dictum).

[28] See L. H. Leigh, *Police Powers in England and Wales*, Chap. 9.

[29] See esp. Public Health 1936, s. 287 (2); Rights of Entry (Gas and Electricity Boards) Act 1954; Deposit of Poisonous Waste Act 1972, s. 5 (2); Fair Trading Act 1973, s. 29 (1).

[30] See *e.g.* Town and Country Planning Act 1971, ss. 280, 281 (entry for survey); Compulsory Purchase Act 1965, ss. 11–13, Sched. 3 (entry into possession, when compulsory purchase order already operative, after notice to treat served on owners). See further, Donovan Waters (1958) 11 *Current Legal Problems*, 132.

[31] *R.* v. *Huntingdon Confirming Authority* [1929] 1 K.B. 698, 714, 717. See also *Munday* v. *Munday* [1954] 1 W.L.R. 1078; *Tameshwar* v. *R.* [1957] A.C. 476; *The Forest Lake* [1968] P. 270. In *R.* v. *Manchester JJ., ex p. Burke* (1961) 125 J.P. 387, a decision was quashed because a member of the bench who had not heard the evidence *appeared* to participate in the decision; contrast *Underwater Gas Developers Ltd.* v. *Ontario Labour Relations Board* (1960) 24 D.L.R. (2d) 673, where the evidence pointed to non-participation. But see, *Re D* (*Minors*) [1973] Fam. 179 (participation by magistrate who had not heard all the evidence did not render the decision a nullity, although it could have been set aside on appeal). In *Olympia Press Ltd.* v. *Hollis* [1973] 1 W.L.R. 1520, a forfeiture order over obscene books was upheld although not every magistrate had read each book; *cf. Burke* v. *Copper* [1962] 1 W.L.R. 700. See also p. 273, *post*.

arbitrator [32] to participate in a decision if he has not heard all the oral evidence and the submissions. The same principle has been applied to members of administrative bodies who have taken part in decisions affecting individual rights made after oral hearings before those bodies at which they have not been present; " for bias and ignorance alike preclude fair judgment upon the merits of a case." [33]

However, there are many situations in administrative law where it is impracticable or inconvenient for the deciding body, or some members of the deciding body, to hear the evidence. If a Minister is constituted as an appellate or confirming authority he cannot conduct the pre-decision hearings himself, and indeed the courts are prepared to accept that (save in exceptional and undefined circumstances [34]) he need not address his own mind to the case at all; the decision may be taken by one of his officials in his name; and the deciding officer, although he must doubtless be properly apprised of all the relevant materials and evidence, does not have to conduct or be present at any antecedent hearing,[35] unless the power to decide is explicitly delegated to the hearing officer. But Ministers and government departments stand in a special position. As a general rule, where a function vested in another administrative body incorporates a judicial element, the decision must be made by that body [36] and not by one of its committees or officials unless there is express statutory authority to delegate power to decide.[37] This does not necessarily mean that every member of that administrative body must participate in hearings or other investigations to collect the material on which the decision will be based. Such a function may be entrusted, for example, by a local authority to a committee or sub-committee; natural justice is a flexible concept. Nevertheless, the committee's report must be full enough to enable all the members of the deciding body to discharge their duty to decide; otherwise there will not have been a fair hearing according to natural

[32] *Re Plews and Middleton* (1843) 6 Q.B. 645; *British Metal Corporation* v. *Ludlow Bros. Ltd.* [1938] 1 All E.R. 135.

[33] *R.* v. *Halifax City Council Committee of Works, ex p. Johnston* (1962) 34 D.L.R. (2d) 45, 57, *per* MacDonald J. (local authority decision to order demolition). See also *Re Rosenfeld and College of Physicians and Surgeons* (1970) 11 D.L.R. (3d) 148; *R.* v. *Broker-Dealers' Association of Ontario* (1971) 15 D.L.R. (3d) 385 (disciplinary hearings); *R.* v. *Boycott, ex p. Keasley* [1939] 2 K.B. 651 (certificate that child was educationally sub-normal signed by doctor who had not conducted medical examination).

[34] See pp. 307–309, *post.*

[35] *Local Government Board* v. *Arlidge* [1915] A.C. 120; *R.* (*Hanna*) v. *Ministry of Health and Local Government* [1966] N.I. 52, and pp. 207–209, *ante.* On the requirement that a full report be before the Minister, see p. 221, n. 40, *post.*

[36] Whether the decision-making body comprises all eligible members or only those participating in a particular decision is ultimately a question of statutory interpretation to which considerations of administrative practicability are not irrelevant: *Howard* v. *Borneman* (*No.* 2) [1976] A.C. 301. Moreover, a lawyer-chairman may have power to direct his lay colleagues on points of law: *R.* v. *Orpin* [1975] Q.B. 283; *cf. Re Schabas and Caput of University of Toronto* (1975) 52 D.L.R. (3d) 495. But the " judicial element " may have to be more pronounced than will be required to attract the less rigorous duty of fairness: *R.* v. *Race Relations Board, ex p. Selvarajan* [1975] 1 W.L.R. 1686.

[37] See *e.g. Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18; *Vine* v. *National Dock Labour Board* [1957] A.C. 488; *Morris* v. *Gestetner Ltd.* [1973] 1 W.L.R. 1378; p. 298, *post.* Wide powers of sub-delegation are now vested in local authorities: Local Government Act 1972, s. 101 (1), (2).

justice.[38] Judges will differ in their views on the adequacy of such reports.[39] In a Privy Council appeal the decision of a dairy board was quashed because the report of the investigating sub-committee on which the decision was founded had merely summarised the submissions made before it but had neither incorporated the text of the written submissions nor stated what evidence had been given, nor had it summarised the evidence. The board, therefore, was held not to have " heard " before deciding.[40] The case, until it is distinguished as " turning on its own particular facts," poses awkward problems for university disciplinary bodies (if a decision is taken by a large Senate acting on the report of a smaller investigating body, and is not taken by a specially constituted disciplinary tribunal [41]). If the administratively convenient way of doing things is liable to be held not to comply with natural justice, one of two courses may have to be followed: to hold hearings before the massed deciding body itself, or to make or seek legislative changes giving the power of decision to a smaller body which is capable of hearing the whole of the evidence itself. However, courts are likely to allow far more procedural latitude to bodies not empowered to make decisions of binding effect, even though their impact upon individuals may be such as to attract a duty to observe standards of procedural fairness.[42]

3. Aspects of Licensing

Powers to control or regulate activities by licensing are vested in Ministers, public corporations (including the Gaming Board), local authorities, special tribunals, magistrates and professional and vocational bodies. To thrust every licensing authority inside a standard procedural straitjacket would be absurd. Licensing procedures do in fact vary widely. Some have the appearance of judicial procedures; some are very informal. In so far as licensing authorities are required by the courts to observe the rules of natural justice,

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[38] *Cf. Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636 (removal of clerk, who was the holder of a freehold office, after council had referred complaints against him to a committee for investigation and report; *held*, council had adequate material before it in reaching its final decision; and in any event the clerk had been allowed to be heard before the council too).

[39] *Cf. R.* v. *Minister of Agriculture and Fisheries, ex p. Graham* [1955] 2 Q.B. 140, 165, 174–175—a difficult marginal case.

[40] *Jeffs* v. *New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551. The judgment of the Privy Council does not fully reveal the complexity of the legal and administrative problems involved: see [1965] N.Z.L.R. 522; [1966] N.Z.L.R. 73; K. J. Keith (1968) 31 M.L.R. 87. See also *Wislang* v. *Medical Practitioners Disciplinary Committee* [1974] 1 N.Z.L.R. 29, 39. Note, too, that reports made by inspectors in compulsory purchase and planning appeals must adequately apprise the Minister of the arguments presented at the inquiry: *Gibbs (W. H.) Ltd.* v. *Secretary of State for the Environment* (1973) 229 E.G. 103; *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment* (1976) 32 P. & C.R. 1; *North Surrey Water Co.* v. *Secretary of State for the Environment* (1977) 34 P. & C.R. 140; *Preston B.C.* v. *Secretary of State for the Environment* [1978] J.P.L. 548; *East Hampshire D.C.* v. *Secretary of State for the Environment* (1978) 248 E.G. 43.

[41] Though *cf. Ex p. Forster, re Sydney University* (1963) 63 S.R.(N.S.W.) 723, for judicial acknowledgment of the special problems of decision-making in universities.

[42] *R.* v. *Race Relations Board, ex p. Selvarajan* [1975] 1 W.L.R. 1686 (where *Jeffs* was also distinguished on the ground that the Board was empowered to delegate investigatory functions to its committees).

the application of those rules must be flexible. But are licensing authorities under any implied duty at all to act judicially?

Whilst English courts appear to have recovered from the bout of conceptual sterility that hindered constructive consideration of the procedural aspects of licensing,[43] it would be misguided to think that all licensing bodies must always comply with the *audi alteram partem* rule. Nor should it necessarily be assumed from the availability of certiorari to quash a decision of a local authority for a substantive jurisdictional defect,[44] that the rules of natural justice apply to their full extent.[45] The precise requirements of procedural fairness will depend very much on the particular context: future developments are likely to concern the content of the duty to hear, rather than the existence of any duty at all, or the availability of the remedies of certiorari or prohibition.[46]

If the licensing authority is constituted as a distinct tribunal, or is expressly required to entertain representations or objections or appeals, or to conduct hearings or inquiries, when deciding whether or not to grant a licence (particularly if its discretionary power is limited [47]) the presumption must be that it is to act in accordance with natural justice.[48]

At the other end of the spectrum there are executive licensing authorities free from express procedural duties and almost certainly under no implied duty to observe the rules of natural justice—*e.g.* the Secretary of State for the Environment who grants office development permits, and the Secretaries of State for Trade and Industry who grant industrial development certificates [49] and export and import licences. It may possibly be desirable for them to be obliged to conduct formal hearings—the same may be true of the award of government contracts, television and commercial radio programme contracts,[50] and financial grants to industry—but as a general principle a

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[43] See cases cited at pp. 171–172, 188–189, *ante*.

[44] See, *e.g. R.* v. *L.C.C., ex p. Entertainments Protection Association* [1931] 2 K.B. 215. And see *R.* v. *G.L.C., ex p. Blackburn* [1976] 1 W.L.R. 550, 559. After *R.* v. *Hillingdon L.B.C., ex p. Royco Homes Ltd.* [1974] Q.B. 720, it would be surprising if certiorari and prohibition were held to be inappropriate remedies for impugning licensing decisions, at least when made by local authorities. See pp. 392–395, *post*.

[45] *Cf.* in another context, *Hanily* v. *Minister of Local Government and Planning* [1952] 2 Q.B. 444, 452.

[46] See *R.* v. *Gaming Board for Great Britain, ex p. Benaim and Khaida* [1970] 2 Q.B. 417; *R.* v. *Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299; *R.* v. *Barnsley M.B.C., ex p. Hook* [1976] 1 W.L.R. 1052.

[47] See *e.g. R.* v. *Gaming Board* (*supra*), at 430; Criminal Injuries Compensation Scheme 1964 (rev. 1969).

[48] Though the obligation may be qualified by a right to refrain from disclosing the source and precise content of highly confidential information: *ibid.*, 431.

[49] Town and Country Planning Act 1971, ss. 66–86; Town and Country Planning (Amendment) Act 1972, s. 5.

[50] In allocating these contracts to programme companies (see now Independent Broadcasting Authority Act 1973, ss. 2 (3), 12–16) the Independent Television Authority (now the Independent Broadcasting Authority) did not conduct public or formal hearings (unlike the Federal Communications Commission in the United States) but interviewed the applicants informally. For arguments for and against the procedure adopted, see 749 H.C.Deb. 423–425, 441, 449–450, 466–467 (June 28, 1967). See also Norman Lewis, "I.B.A. Programme Contract Awards" [1975] *Public Law* 317.

licensee's detriment will prima facie attract the operation of the rule,[64] as may a decision to increase the number of licences, with the effect of diminishing the value of existing licences.[65] Whether suspension of a licence should be preceded by notice and opportunity to be heard may depend on various factors—*e.g.* the degree of urgency involved, the duration of the suspension, whether suspension involves a finding of guilt, whether it entails material financial loss and whether it is a purely temporary measure pending full review.[66]

4. Aspects of Discipline

As we have seen, the courts have sometimes held the exercise of disciplinary functions to be non-judicial and therefore not subject to the rules of natural justice.[67] But " discipline," like " privilege," is an unwieldy analytical concept. That the courts ought not to interfere in certain disciplinary situations is clear enough. A parent reduces his child's pocket-money, a schoolteacher gives a pupil a detention; the courts will have nothing to do with these matters for reasons of public policy and because the damage sustained is too trivial. It is equally clear that they should and will be prepared to set aside some disciplinary decisions for non-observance of procedural requirements. If procedural rules have been laid down (*e.g.*, for the hearing of disciplinary charges against police officers), those rules will be treated as mandatory except in so far as they are of minor importance [68]; and upon them there may be engrafted the implied requirements of natural justice.[69] In trade union cases they have often set aside disciplinary decisions made in

holding that an implied duty to give opportunity to be heard existed before revocation of a trading licence. For Australian decisions applying the rule, see esp. *Banks* v. *Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222 (taxi driver's licence); *Stollery* v. *Greyhound Racing Control Board* (1972) 128 C.L.R. 509 (revocation of greyhound owner's licence for misconduct). See also *James* v. *Pope* [1931] S.A.S.R. 441 (licence for dried fruit packing shed); *R.* v. *Melbourne Corporation, ex p. Whyte* [1949] V.L.R. 257 (taxi driver's licence); contrast *Election Importing Co.* v. *Courtice* (1949) 80 C.L.R. 657, 663 (import licence). See also *Hecht* v. *Monaghan*, 307 N.Y. 461 (1954), where, on facts almost identical to those in *Parker's* case, the court reached the opposite conclusion.

[64] *White* v. *British Transport Commission* (1955) 30 Traffic Cases 234; *Re North Coast Air Services Ltd.* [1972] F.C. 390, 404 (Can.).

[65] *Liverpool Taxi* case, (note 46, *ante*).

[66] See, *e.g. Hlookoff* v. *City of Vancouver* (1968) 67 D.L.R. (2d) 119 (summary suspension of licence of premises for publishing newspaper on account of gross misconduct; suspension invalid). Contrast note 60, *ante*.

[67] See p. 194, *ante*. Contrast *Capel* v. *Child* (1832) 2 Cr. & J. 558 (ecclesiastical discipline); *G.M.C.* v. *Spackman* [1943] A.C. 627 (medical discipline); and see *R.* v. *Hull Prison Board of Visitors, ex p. St. Germain*, note 72, *post*.

[68] *Cf. Kilduff* v. *Wilson* [1939] 1 All E.R. 429; *Noakes* v. *Smith* (1942) 107 J.P. 101 (provisions not complied with held to be directory only). See also, *Martineau and Butters* v. *Matsqui Institution Inmate Disciplinary Board* [1978] 1 S.C.R. 118.

[69] *Ridge* v. *Baldwin* [1964] A.C. 40; *Cooper* v. *Wilson* [1937] 2 K.B. 309. *Cf.* however, *Maynard* v. *Osmond* [1977] Q.B. 240. See also *Merricks* v. *Nott-Bower* [1965] 1 Q.B. 57, where the Court of Appeal held that there was an arguable case for claiming that the summary transfers of the plaintiff police officers were in substance disciplinary measures and were *therefore* contrary to natural justice. And see *Re Solicitors Act 1954* [1960] I.R. 239 (severity of disciplinary sanction an important factor in holding functions to be judicial); see, too, *Stevenson* v. *United Road Transport Union* [1977] I.C.R. 893, 903.

breach of the union rules or natural justice; their intervention has been readily elicited where the penalty and its possible consequences are severe.[70] Again, there are situations where the revocation of a licence can be viewed as a disciplinary measure [71]; but this does not (or should not) answer the question whether the rules of natural justice apply.

Despite the justiciable nature of the issues and the potentially serious nature of the sanction, it is very doubtful whether prison inmates are entitled in disciplinary proceedings to anything like the full protection of natural justice. Thus it has been held that a right to legal representation is not implied in the statutory provisions for notice and a full opportunity for the prisoner to present his case.[72] The importance to prison discipline of expeditious determinations may also enable the disciplinary authority to limit the number of witnesses that a prisoner may call. The fear of reprisals may justify curtailing the opportunity of the accused to face and cross-examine his accusers. In recognition of the state interest in the difficulties of prison administration, the Supreme Court of the United States has given only a limited content to the constitutional right to due process in this context.[73]

It is now clear that disciplinary proceedings in higher educational institutions [74] have to be conducted in conformity with natural justice, provided at least the penalty imposed or liable to be imposed is severe,[75] and, probably, that not only academic performance is being taken into account.[76] The courts

[70] See *e.g. Taylor* v. *National Union of Seamen* [1967] 1 W.L.R. 532. Natural justice must also be observed in disciplinary proceedings before sporting bodies which have power to suspend and fine for misconduct.

[71] See *e.g.* Report of the Committee on Carriers' Licensing (1965) at 46 on the punitive and deterrent effects of the revocation and suspension of goods vehicle licences. Although not a "pure" licence case, the approach in *Hook*, note 55, *ante*, is more authoritative than that in *Parker's* case [1953] 1 W.L.R. 1150, 1155.

[72] *Fraser* v. *Mudge* [1975] 1 W.L.R. 1132. See Prisons Act 1952, s. 47; S.I. 1964 No. 388 r. 49. See also *R.* v. *Hull Prison Board of Visitors, ex p. St. Germain* [1979] Q.B. 425, 451 (dicta), an important decision holding that disciplinary proceedings conducted by prison visitors pursuant to a statutory duty to afford a prisoner a full opportunity to know the case against him and to present his own case are reviewable by *certiorari* for breach of the rules of natural justice. There are, however, dicta to the effect that punishments awarded by prison officials are not subject to review by the courts.

[73] See *e.g. Wolff* v. *McDonnell*, 418 U.S. 539 (1973); *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

[74] *Quaere* whether natural justice applies to expulsion from a school: see *Anandarajan* v. *Muhedevar* [1971] 2 Malayan L.J. 8; *Glynn* v. *Keele University* [1971] 1 W.L.R. 487, 494, clearly suggesting a negative answer; and see *Seymour* v. *Swift* (1976) 10 A.C.T.R. 1 (headmistress of private school not required to afford a hearing before suspending a pupil); but see *Rich* v. *Christchurch Girls' High School Board of Governors* (*No.* 1) [1974] 1 N.Z.L.R. 1; *Goss* v. *Lopez*, 419 U.S. 565 (1975).

[75] *Glynn* v. *Keele University* (*supra*) (summary suspension from residence on the campus for disciplinary offence); see also *Ceylon University* v. *Fernando* [1960] 1 W.L.R. 223 (disqualification from degree for alleged cheating in examination), where the Privy Council proceeded on the assumption that the university authorities were obliged to conduct an inquiry in accordance with natural justice. *Cf. Ward* v. *Bradford Corporation* (1971) 70 L.G.R. 27 (expulsion of student teacher; p. 256, *post*), indicating that the requirements of procedural fairness can sometimes be easily satisfied. See further *Ex p. Bolchover, The Times*, October 7, 1970; J. R. Forbes (1970) 7 U. of Queensld.L.J. 85; David Christie in *Academic Freedom and the Law* (N.U.S. and N.C.C.L., 1970), Chap. 3, and see Appx. 1. *Ex p. Death* (1852) 18 Q.B. 647, where the court refused on grounds of public policy to review a university disciplinary decision, now seems to have lost its authority. See further Alec Samuels (1973) 12 J.S.P.T.L.(N.S.) 252; and see note 78, *post*.

[76] See *Herring* v. *Templeman* [1973] 3 All E.R. 569, 584 (academic board, which made, in effect, final decisions on academic standards and professional potential, obliged to make an

have yet to draw distinctions between situations where the student has a status based on membership of a corporation or contractual rights,[77] and situations where he has no such interest. The possibility of recourse to the visitor almost certainly excludes their supervisory jurisdiction where natural justice is in issue.[78] The application of the rules of natural justice has not been confined to such situations; they extend, in a modified form, to cases where a student is to be refused readmission to a university for academic failure and the university authorities have a discretion whether or not to readmit him, in which case they must be prepared to afford him an opportunity to make representations on his own behalf.[79]

5. Deprivation of Status and Dismissal from Service

In the course of his judgment in *Ridge* v. *Baldwin*, Lord Reid considered the application of the rules of natural justice to three categories of dismissal.[80] First, in " a pure case of master and servant " dismissal was legally effective although the servant had been given no prior opportunity to be heard, but the facts might show breach of contract entitling the servant to damages. Special considerations might arise where power to dismiss a servant was fettered in certain ways. Secondly, where the occupant of an office was removable at pleasure he had no right to a prior hearing and no remedy for dismissal. Thirdly, where the occupant of an office was removable only for cause (*e.g.* inability or misbehaviour) he had an implied right to prior notice and opportunity to be heard.

This analysis was broadly supported by authority; in particular there was historical continuity between the procedural protection accorded to the holder of a freehold office (which was equated with a proprietary right) and that accorded to an officer removable for cause assigned.[81] However, it

unbiased assessment, but not to hold a hearing). *Cf. R.* v. *Aston University Senate, ex p. Roffey* [1969] 2 Q.B. 538, where personal conduct and history were also considered. See S. A. de S. [1974] Camb.L.J. 26; David Christie (1974) 37 M.L.R. 324.

[77] *Quaere* whether less protection may be afforded to merely contractual rights: see *Herring* v. *Templeman* (*supra*) at 571—not that an analogous distinction has proved successful in the context of public employment; see p. 227 *et seq.*, *post*.

[78] Authorities are ably reviewed by J. W. Bridge (1970) 86 L.Q.R. 531. Visitatorial jurisdiction has been held to be exclusive in intra-university disputes not involving allegations of breach of natural justice: *Thomson* v. *University of London* (1864) 33 L.J.Ch. 625; *R.* v. *Dunsheath, ex p. Meredith* [1951] 1 K.B. 127; *Thorne* v. *University of London* [1966] 2 Q.B. 237. The question was considered and left open in *Bell* v. *University of Auckland* [1969] N.Z.L.R. 1029 and by the Court of Appeal in *Herring* v. *Templeman* [1973] 3 All E.R. 569, although at first instance Brightman J. ([1973] 2 All E.R. 581, 589–591) thought that decisions on academic and professional fitness, and the procedure by which they were made, were within the exclusive jurisdiction of the Visitor. And see *Patel* v. *Bradford University Senate* [1978] 1 W.L.R. 1488; affd. [1979] 1 W.L.R. 1066 (Visitor's jurisdiction over disputed claims to membership exclusive, but reviewable).

[79] *R.* v. *Aston University Senate, ex p. Roffey* [1969] 2 Q.B. 538. There was no suggestion, however, that confidential tutors' reports on the candidates concerned had to be disclosed to them. *Cf. Herring* v. *Templeman* (*supra*); *Ex p. Forster, re University of Sydney* (1963) 63 S.R.(N.S.W.) 723; and see *King* v. *University of Saskatchewan* [1969] S.C.R. 678. See also *Brighton Corporation* v. *Parry* (1972) 70 L.G.R. 576.

[80] [1964] A.C. 40, 65–68. On the paucity of common-law procedural protections against dismissal, see M. R. Freedland, *The Contract of Employment*, 219–224.

[81] See cases cited at p. 159, *ante*.

raised difficult problems of law and public policy. In the first place public policy does not dictate that tenure of an office held at pleasure should be terminable without allowing its occupant any right to make prior representations on his own behalf; indeed, the unreviewability of the substantive grounds for removal indicates that procedural protection may be all the more necessary.[82] Secondly, some of the distinctions drawn between public office or status, on the one hand, and service on the other, have been abstruse, and the legal consequences of drawing such distinctions were unclear. Police officers [83] and dock labourers [84] were held to be office-holders or endowed with a legal status; whereas university teachers,[85] consultant surgeons [86] and taxonomic ichthyologists at the British Museum [87] appeared to be merely servants. If a police officer were wrongfully dismissed he could obtain a declaration that his dismissal was invalid, and he also had a right to a hearing before dismissal [88]; a dock labourer could also obtain such a declaration but probably had no right to be heard apart from special statutory provisions to that effect [89]; a university teacher, so it seemed, unlike his students,[90] had no implied right to be heard [91] and could not obtain a declaration that a wrongful dismissal was invalid, even if he were removable only for statutory cause [92]; a hospital doctor under the National Health Service, although no better protected than an ordinary servant according to an English court (because his employment had an insufficient statutory flavour), was entitled to have a wrongful dismissal declared invalid according to a Scottish court if he were dismissed without an adequate hearing.[93] One could perhaps be forgiven for wondering whether the law was verging on the asinine.[94] Thirdly, even where an employee was classified as a mere

[82] A point conceded by Lord Wilberforce in *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578, 1597. See also G. Ganz (1967) 30 M.L.R. 288. And see *Re Nicholson and Haldimand-Norfolk Police Commissioners* (1979) 88 D.L.R. (3d) 671.

[83] *Cooper* v. *Wilson* [1937] 2 K.B. 309; *Ridge* v. *Baldwin* (*ante*).

[84] *Vine* v. *National Dock Labour Board* [1957] A.C. 488.

[85] *Vidyodaya University Council* v. *Silva* [1965] 1 W.L.R. 77. See also *Orr* v. *University of Tasmania* (1957) 100 C.L.R. 526.

[86] *Barber* v. *Manchester Regional Hospital Board* [1958] 1 W.L.R. 181.

[87] *Tucker* v. *British Museum Trustees*, *The Times*, April 22, 1967; December 8, 1967 (C.A.).

[88] A chief constable had an implied right under the Municipal Corporations Act 1882, s. 191 (4) (considered in *Ridge* v. *Baldwin* (*ante*); removability for neglect of duty or inability), now repd.; the rights of police officers to be heard before dismissal may now be exclusively derived from statute, but this is not entirely clear; *cf. Merricks* v. *Nott-Bower* [1965] 1 Q.B. 57. See also *Maynard* v. *Osmond* [1977] Q.B. 240.

[89] The national dock labour scheme included provision for summary dismissal. See also *Pillai* v. *Singapore City Council* [1968] 1 W.L.R. 1278 (labourers dismissible without compliance with natural justice); *Fullbrook* v. *Berkshire Magistrates' Courts Committee* (1970) 69 L.G.R. 75 (same applies to magistrates' clerks, but decision as to forfeiture of pension for misconduct must be preceded by opportunity to be heard).

[90] See pp. 226–227, *ante*.

[91] Though he might be given an express right.

[92] *Vidyodaya* case (*ante*) treated as an anomaly by Lord Wilberforce in *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578, 1596.

[93] *Palmer* v. *Inverness Hospitals Committee*, 1963 S.C. 311, in which the court did not find it necessary to classify the doctor as an office-holder.

[94] Or " bizarre " (*Malloch's* case at 1595).

servant, he could undoubtedly be given a contractual right to be heard before dismissal or to appeal against dismissal. In such cases it was perfectly reasonable to hold that he was entitled to the superimposed benefits of natural justice.[95] Fourthly, if an office-holder, or one endowed with legal status who was removable only for cause, were *impliedly* entitled to be heard on his own behalf before dismissal, what reason was there for denying a similar implied right to a mere servant who is dismissible on identical grounds? [96]

Recent decisions have significantly expanded the categories of persons whom the courts are prepared to regard as holding an office or having a status of which they may be lawfully deprived only after being given an opportunity to be heard. Moreover, the courts have been willing to quash or declare invalid dismissals that do not comply with the requirements of natural justice. In one case the House of Lords annulled the purported dismissal of a Scottish schoolteacher on this ground.[97] The relevant legislation empowered the local authority to dismiss at pleasure, but required that notice be served upon teachers before a resolution to dismiss was passed. The majority inferred from this provision that the normal presumption that those dismissible at pleasure are not entitled to a hearing had been rebutted. Reliance was placed upon an earlier version of the legislation which referred to teachers as holding office in order to meet the point that even servants dismissible for cause are normally restricted to an action for damages for breach of the terms of their contract.[98] However, there are observations contained in their Lordships' speeches indicating that the legal attributes of office or status may extend to a much wider range of employees of public authorities than was previously imagined.[99]

More recently the Court of Appeal has granted a declaration against a trade union that a paid official of that union had not been validly dismissed because he had not been afforded the fair hearing to which he was entitled on a proper interpretation of the union's rules.[1] The court implied a right to a prior hearing that complied with the rules of natural justice on the grounds that the appellant was dismissible only for cause, that the charges

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[95] *Taylor* v. *National Union of Seamen* [1967] 1 W.L.R. 532; *Palmer's* case (*ante*) in so far as the house surgeon was regarded as a servant.

[96] The idea was rejected in *Pillai's* case (*ante*).

[97] *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578, where the appellants sought the production and reduction of the pretended resolution; unlike certiorari, this Scottish remedy is not confined to public law matters. *Cf. R.* v. *Post Office, ex p. Byrne* [1975] I.C.R. 221, where certiorari was held not to be an appropriate remedy with which to attack for breach of the rules of natural justice the dismissal of the applicant, a public employee. For further episodes in the saga of the unregistered schoolteachers, see *Malloch* v. *Aberdeen Corporation* (*No.* 2), 1974 S.L.T. 253; *Scott* v. *Aberdeen Corporation*, 1976 S.L.T. 141.

[98] Public Schools (Scotland) Teachers Act 1882, s. 3; however, this term was omitted from the subsequent legislation that governed the instant case: Education (Scotland) Act 1962, s. 85 (1). Lords Morris of Borth-y-Gest and Guest dissented, primarily on the ground that there was no longer any statutory basis for concluding that the appellants were office-holders.

[99] Especially at 1595–1596 (*per* Lord Wilberforce), and at 1582 (*per* Lord Reid).

[1] *Stevenson* v. *United Road Transport Union* [1977] I.C.R. 893. Petition for leave to appeal to the House of Lords was denied: *ibid.* at 907.

against him were disciplinary in nature and that the union's rules provided for an appeal to the governing body of the union from the committee that was empowered to make the original decision to dismiss. It might at first sight seem that this decision erodes almost to vanishing point the distinction between contractual servants and office-holders dismissible for cause. Nor was the employer a statutory body and it is difficult to see why the fact that the employee was a union official should have been regarded as relevant. For he was not elected [2] and the judgment does not proceed on the basis that dismissal prejudiced his status as a member of the union.[3] However, the applicable scope of the decision may be reduced by the emphasis placed by the court upon the fact that whilst the committee had power under the union's rules to appoint and dismiss officials, the contract of employment was between the appellant and the union.[4] The relevant rules thus not only contained the terms of employment but also limited the power of the committee to dismiss, and without a formal amendment of the rules the union could not expand the power of the committee merely by accepting its decision.

The present state of the law remains unsatisfactory in a number of respects. First, the test for determining when a person will be characterised as an office-holder rather than a "mere contractual servant" remains elusive. Whilst the legal attributes of office may now be extended to those specifically protected from dismissal without cause by statute or contract, others, especially if dismissed for misconduct or incompetence from posts of some seniority, are not altogether without hope of judicial intervention.[5] Secondly, the contractual ramifications of dismissal without a hearing are not altogether clear, for to some degree at least there is an inconsistency between granting a declaration that an employee has not been validly dismissed and the normal basis upon which damages are awarded for breach of a contract of service.[6] To point out that the courts have generally declared that the plaintiff was invalidly dismissed rather than that he is still an employee does not necessarily

[2] *Cf.* for example, *Breen* v. *Amalgamated Engineering Union* [1971] 2 Q.B. 175, 191, where it was suggested that judicial intervention might be justified in a refusal to confirm the appointment of a union official in order to protect the interests of those members who had elected him. The union office in question, however, was not remunerative.

[3] *Cf. Taylor* v. *National Union of Seamen* [1967] 1 W.L.R. 532, 546, where counsel conceded that the rules of natural justice were applicable because the ground upon which the plaintiff had purportedly been dismissed from his employment by the union also affected his status as a member of the union by rendering him ineligible for future office in the union. The assertion in *Stevenson* at first instance ([1976] 3 All E.R. 29, 37–38) that this consideration was relevant only to the relief granted appears to be wrong.

[4] [1977] I.C.R. at 903–904.

[5] See especially the observations of Lord Wilberforce in *Malloch*, cited at note 99 (*supra*). See also the remark made at first instance in *Stevenson* (*supra*) at 36, that the rules of natural justice would not apply to the dismissal of "a mere employee such as a typist or clerical secretary." The justification for affording least protection to those whose limited job opportunities may make dismissal particularly serious is not obvious.

[6] See further, M.R. Freedland, *The Contract of Employment*, 278–292. *Cf.* the criticism made of the decision in *R.* v. *Aston University Senate, ex p. Roffey* [1969] 2 Q.B. 538 to extend the scope of the prerogative remedies to relationships governed by contract, in *Herring* v. *Templeman* [1973] 3 All E.R. 569, 584–585; see also *R.* v. *Post Office, ex p. Byrne* [1975] I.C.R. 221, 226. See too *R.* v. *Barnsley M.B.C., ex p. Hook* [1976] 1 W.L.R. 1052, when the non-contractual elements in the relationship between the respondent and the applicant were emphasised.

answer such questions as whether the plaintiff is able to recover wages for work not done, is under a duty to mitigate his loss or whether the amount of any damages is reduced by money earned in other employment.[7] There is also an incompatibility between awarding a declaration that a dismissal is null and void [8] and the general reluctance of the courts to give specific relief for breach of contracts of employment,[9] although perhaps not too much should be made of this point. For declaratory relief is within the discretion of the court [10]; nor is it a specifically enforceable order, although a public authority would surely be reluctant to disregard it. Moreover, the subsequent conduct of the parties may clearly indicate that their legal relationship has ended.[11] Lastly, it should not be assumed that because a person might be entitled to a declaration that his dismissal was void for lack of a hearing, he would also obtain similar relief if he alleged that his conduct did not amount to statutory cause for dismissal. Judicial intervention in this latter case would seem to call for much more careful consideration of the general policy of the law against granting specific relief for breaches of contracts of service.

Finally, the courts' piecemeal endeavours to extend the requirements of procedural fairness to situations beyond the traditional categories of office-holders have been overtaken by the enactment of statutory protection against unfair dismissal.[12] The legislation, administered by industrial tribunals and subject to a right of appeal to the Employment Appeal Tribunal, extends to

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[7] Some of these matters are referred to in *Stevenson* (*supra*) at 906–907.

[8] That this is the effect of a breach of the rules of natural justice would seem clear: *Ridge* v. *Baldwin* [1964] A.C. 40; *Anisminic* v. *Foreign Compensation Commission* [1969] 2 A.C. 147, 171, 181, 195, 207. And yet in *Stevenson* (*supra*) at pp. 905–906, the question was apparently regarded as open to doubt. See further p. 240 *et seq.*, *post*.

[9] For an unusual case, see *Hill* v. *C. A. Parsons & Co. Ltd.* [1972] Ch. 305 (specific relief granted to restrain dismissal of an employee in whom the employer retained full confidence but who acted under pressure from a trade union). See also *Francis* v. *Kuala Lumpur Municipal Councillors* [1962] 1 W.L.R. 1411, 1417–1419; *McClelland* v. *Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594. It may be noted that the general policy of the courts against granting specific relief has been extended to the statutory provisions against unfair dismissal.

[10] That relief will not be lightly withheld, however, is apparent from *Stevenson's* case (*supra*) at 906.

[11] *Loc. cit.* at 907. In *Ridge* v. *Baldwin* [1964] A.C. 40, the relevance of the validity of the Chief Constable's dismissal was limited to his eligibility for a pension. *Cf. Taylor* v. *National Union of Seamen* [1967] 1 W.L.R. 532. See also *Bonsor* v. *Musicians' Union* [1954] 1 Ch. 479, 513 (*per* Denning L.J.).

It remains open, of course, for a court to award damages for breach of an express or implied term in a contract of employment that the employee will not be dismissed without a hearing: see *Taylor's* case (*supra*), where the plaintiff was awarded damages for wrongful dismissal in breach of a contractual duty to hear and a declaration that he was not dismissed on grounds that adversely affected his status as a member of the union. Although it is thought that a duty to hear will not normally be implied at common law into an ordinary contract of employment, it may be that this possibility with a consequent award of damages, but not declaration, was what Lord Reid had in mind when he said in *Ridge* v. *Baldwin* (*supra*) at 65, that the termination of a contract of employment " can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them." See also *Glover* v. *B.L.N. Ltd.* [1973] I.R. 388.

[12] The principal statute in this complex and rapidly growing area of the law is now the Employment Protection (Consolidation) Act 1978, Pt. V.

all employees (subject to a few exceptions[13]) of both public and private employers. Dismissal may be unfair either because it lacked good cause or because it was procedurally arbitrary.[14] Thus, an employer is generally required to afford to an employee some opportunity to be heard before he is dismissed,[15] and in determining whether a dismissal was procedurally unfair, industrial tribunals are to have regard to the Code of Practice issued by the Advisory, Conciliation and Arbitration Service, as approved and brought into effect by the Secretary of State for Employment.[16] The legislation provides for compensation awards to be made in favour of unfairly dismissed employees, although the amount payable may be reduced if the tribunal is satisfied that the employer had good cause to dismiss the employee and that the procedural irregularities could have made no difference to the outcome.[17] Orders of reinstatement or re-engagement may also be made where appropriate, although it should be noted that Parliament appears to have approved the normal attitude of the courts in these matters by not providing for specific enforcement. An employer who fails to comply with such an order may be required to pay additional compensation.[18]

It may be suggested that the existence of these statutory provisions makes the recent extensions by the courts of the old office-holder cases unnecessary, and, in some respects, unfortunate. First, those within the scope of the judicial expansion of the notion of " office " may not be employees entitled to the protection of the legislation.[19] Secondly, the existence of a special statutory adjudicative machinery to be used by employees alleging unfair dismissal and the inherent jurisdiction of the High Court to award declarations for unlawful deprivation from office may produce quite undue complexity, especially since the definition of those within the protection of the common law remains so unclear.[20] Thirdly, surer guidance is more likely

[13] See especially, 1978 Act, ss. 64–66, 138, 142.

[14] See, for example, *Earl* v. *Slater and Wheeler (Airlyne) Ltd.* [1973] 1 W.L.R. 51 (a leading case decided under the previous legislation); *Jamieson* v. *Aberdeen C.C.*, 1976 S.L.T. 5; *Williamson* v. *Alcan (U.K.) Ltd.* [1978] I.C.R. 104; *Palmer (George A.) Ltd.* v. *Beeby* [1978] I.C.R. 196.

[15] That a dismissal may in some circumstances not be unfair, despite procedural irregularities has been recognised: *James* v. *Waltham Holy Cross U.D.C.* [1973] I.C.R. 398 (no possible explanation by employee); *Lowndes* v. *Specialist Heavy Engineering Ltd.* [1977] I.C.R. 1. There are recent indications that the view taken by an industrial tribunal of the fairness of the employer's procedure will only be disturbed on appeal if it is one that no reasonable tribunal could have taken: *Khanum* v. *Mid-Glamorgan Area Health Authority* [1979] I.C.R. 40, 46; *Bentley Engineering Co. Ltd.* v. *Mistry* [1979] I.C.R. 47, 51.

[16] 1974 Act, Sched. 1, para. 3; Employment Protection Act 1975, ss. 4 (1) (*g*), (*h*), 6. The current Code (Disciplinary Practice and Procedures in Employment) was issued in 1977 and brought into effect by S.I. 1977 No. 867. Failure to comply with the provisions of the Code does not, however, automatically render the dismissal unfair: Employment Protection Act 1975, s. 6 (11).

[17] See, for example, *Earl* v. *Slater and Wheeler (Airlyne) Ltd.* (*supra*). See now *Devis (W.) & Sons Ltd.* v. *Atkins* [1977] A.C. 931; *quaere* whether the fraudulent employee who has successfully concealed his wrongdoing is nonetheless entitled to the basic award of compensation.

[18] Employment Protection (Consolidation) Act 1978, ss. 69, 71.

[19] 102 *Social Club and Institute Ltd.* v. *Bickerton* [1977] I.C.R. 911 (club secretary: rules ambiguous on whether payments to be made to him were by way of salary or honorarium).

[20] For an analogous situation arising from the possible lack of jurisdiction in the industrial tribunals and Employment Appeal Tribunal to give effect to rights contained in Community law, see p. 115, note 26, *ante*.

(h) Error of law will not usually be disclosed unless the tribunal has given reasons for its decisions. But an error of law may sometimes be held to be apparent on the face of the record even though the tribunal has not set out, or has not fully set out, its process of legal reasoning. Thus, if a tribunal merely sets out its findings of primary fact and the inferences drawn from those findings together with its decision, it may be held to have erred in point of law if the inferences or decision are such as no reasonable body of persons properly instructed in the law applicable to the case could have made.[88] If the order purports to incorporate all the relevant evidence, error of law will be apparent if there is no evidence in support of a recorded finding of primary fact [89] or in support of any material fact,[90] or if the record shows that inadmissible evidence was admitted or admissible evidence rejected.[91] Similarly, an unreasonable exercise of discretion may be quashed for error of law, as where, for example, a penalty is imposed by a tribunal that the court regards as excessive in the circumstances.[92] As we have already observed, the concept of error of law is a flexible one and in practice the courts have considerable freedom to manipulate the categories of law, fact and discretion so as to justify a decision to intervene, or not. If, however, they conclude that the error disclosed is only one of fact and does not go to jurisdiction, certiorari will be refused.[93]

(i) It might be thought that the statutory formulae whereby various types of ministerial orders affecting interests in land may be challenged on the ground that the order is not within the powers conferred by the Act or that a statutory requirement has not been complied with, are not wide enough to

itself it is by no means clear that the compensation appeal tribunal's error of law in misconstruing the relevant regulations was apparent on the face of the record. The tribunal's error consisted in refusing to take into account the applicant's period of service as clerk to a local council. But it seems that this period of service was not directly referred to in the tribunal's award (see report in [1951] 1 All E.R. 268, 270). Before the Divisional Court, counsel for the tribunal conceded that an error was apparent on the face of the order, and the case was decided on that footing. In the Court of Appeal counsel for the tribunal abandoned this concession in so far as it had been admitted that the error (which was not disputed) was apparent on the face of the order. Singleton L.J. held ([1952] 1 K.B. at 344–345) that the error was apparent on the face of the order; Denning L.J. held that it was not, because the record was incomplete inasmuch as it did not disclose the applicant's original claim or the decision made by the tribunal of first instance or the applicant's notice of appeal, but that it was open to the court to intervene as the error had been admitted in the face of the court. Morris L.J. contented himself with holding that in view of the admission made on the tribunal's behalf in the Divisional Court it was no longer open to the tribunal to take the point.

[88] See *R.* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 Q.B. 574, 582. See also *R. (John Clarke & Co.)* v. *Northern Ireland General Health Services Board* [1955] N.I. 41, and pp. 135, 137, *ante*

[89] See pp. 134–135, *ante*. *Quaere* whether the court is obliged to confine itself to the question whether there was any evidence at all in support of a finding of fact. See p. 134, note 25, *ante*; *R. (Hanna)* v. *Ministry of Housing and Local Government* [1966] N.I. 52, 65–66 (must be shown that the order is logically incapable of being made on evidence set out).

[90] *R.* v. *Birmingham Compensation Appeal Tribunal, ex p. Road Haulage Executive* [1952] 2 All E.R. 100n.

[91] *R.* v. *Industrial Injuries Commissioner, ex p. Ward* [1965] 2 Q.B. 112, or that the tribunal mistook the burden of proof: *Hanna's* case (*supra*) at 61.

[92] *R.* v. *Barnsley M.B.C., ex p. Hook* [1976] 1 W.L.R. 1052, 1057–1058; *cf. R.* v. *Southampton JJ., ex p. Green* [1976] Q.B. 11, 22.

[93] *R.* v. *West Sussex Quarter Sessions, ex p. Johnson Trust Ltd.* [1974] Q.B. 24.

[COURT OF APPEAL]

Re Reddall and College of Nurses of Ontario

MACKINNON A.C.J.O., BLAIR AND THORSON JJ.A. 1ST JUNE 1983.

Professions — Nurses — Incompetence — Discipline committee finding nurse employed in intensive care unit incompetent without hearing evidence of gravity of conduct — Committee revoking certificate of competence — Whether committee authorized to rely on its own expertise without hearing evidence — Health Disciplines Act, R.S.O. 1980, c. 196, ss. 12(6), 83.

The discipline committee of the Ontario College of Nurses, made up of one registered nurse, two registered nursing assistants, and two lay-persons, found that the appellant "committed serious errors which endangered the life of the patients assigned to her care" while working in an intensive care unit, and thus found her guilty of incompetence pursuant to s. 83(4) of the *Health Disciplines Act*, R.S.O. 1980, c. 196. She was then prohibited from practising. There was no expert evidence on the record supporting the finding that she had endangered patients, although errors and omissions were admitted. An appeal to the Divisional Court was dismissed. On appeal to the Court of Appeal, **held**, the appeal should be allowed in part and the matter of penalty referred back to the discipline committee.

Section 12(6) of the Act states that "the findings of a discipline committee shall be based exclusively on evidence admitted before it", while s. 83(2)(*b*) requires the discipline committee, in a hearing into an allegation of incompetence, "to determine whether upon the evidence and the facts so ascertained the allegations have been proved". As there was no evidence on the record to support a finding as to the seriousness of the errors and omissions of the nurse, the penalty of revocation of her certificate of competence could not stand. Members of the discipline committee may use their own expertise in accepting evidence before it, but there must be evidence on the record for them to consider. As there was evidence to support a finding of incompetence, that finding should stand.

Statutes referred to

Health Disciplines Act, R.S.O. 1980, c. 196, ss. 12(6), 13, 83(2), (4), 88
Statutory Powers Procedure Act, R.S.O. 1980, c. 484, ss. 15, 16

APPEAL from a judgment of the Divisional Court, 33 O.R. (2d) 129, 123 D.L.R. (3d) 678, dismissing an appeal from a decision of the discipline committee of the Ontario College of Nurses.

Ian G. Scott, Q.C., for appellant.
Alan J. Lenczner, Q.C., for respondent.

The judgment of the court was delivered orally by

MACKINNON A.C.J.O.:—This appeal is from an order of the Divisional Court which dismissed an appeal from the decision of the Discipline Committee of the College of Nurses. The discipline committee had revoked the certificate of the appellant as a registered nurse on a finding of incompetence.

Before the discipline committee the appellant admitted some 19 errors or omissions made by her in the intensive care unit at St. Joseph's Hospital, Hamilton.

Section 83 of the *Health Disciplines Act*, R.S.O. 1980, c. 196, sets out the duties of the discipline committee and the sections of that Act relevant to this appeal are:

> 83(2) In the case of hearings into allegations of professional misconduct or incompetence, the Discipline Committee shall,
>
> (*a*) consider the allegations, hear the evidence and ascertain the facts of the case;
>
> (*b*) determine whether upon the evidence and the facts so ascertained the allegations have been proved;
>
> (*c*) determine whether in respect of the allegations so proved the member is guilty of professional misconduct or incompetence;
>
> (*d*) determine the penalty to be imposed as hereinafter provided in cases in which it finds the member guilty of professional misconduct or of incompetence.
>
> . . . . .
>
> (4) The Discipline Committee may find a member to be incompetent if in its opinion he has displayed in his professional care of a patient a lack of knowledge, skill or judgment or disregard for the welfare of the patient of a nature or to an extent that demonstrates he is unfit to continue in practice.

Section 88 details the penalties that may be imposed by the discipline committee on a finding of professional misconduct or incompetence.

One other section relevant to the procedure before the discipline committee and on this appeal is s. 12(6) which reads:

> 12(6) Notwithstanding the *Statutory Powers Procedure Act*, nothing is admissible in evidence before a discipline committee that would be inadmissible in a court in a civil case and the findings of a discipline committee shall be based exclusively on evidence admitted before it.

As pointed out by Mr. Justice Reid in his reasons for the Divisional Court, that court is given very wide powers under s. 13 of the *Health Disciplines Act*, in the hearing of an appeal from a discipline committee:

> 13(1) Any party to proceedings before a discipline committee may appeal from its decision or order to the Divisional Court in accordance with the rules of court.
>
> (2) An appeal under this section may be made on questions of law or fact or both and the court may affirm or may rescind the decision of the committee appealed from and may exercise all powers of the committee and may direct the committee or the College to take any action which the committee or the College may take and as the court considers proper, and for such purposes the court may substitute its opinion for that of the committee, or the court may refer the matter back to the committee for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

Divisional Court wide powers on appeal

By virtue of that section the Divisional Court clearly has all the powers of the discipline committee to assess and weigh the evidence and determine whether incompetence or professional misconduct has been established by that evidence, and if so established, the seriousness of the offences alleged in determining the penalty to be imposed.

The discipline committee, in the instant case, after detailing the errors or omissions, which the appellant had admitted, concluded as follows:

> Miss Reddall has demonstrated and admitted to a difficulty in organizing her work load and setting priorities, and showed a lack of insight in dealing with her own problems. Miss Reddall committed serious errors which endangered the life of the patients assigned to her care. (Reference Standards of Nursing Practice: Sections I, II, III B, and IV.)
>
> The Committee finds Miss Linda Reddall guilty of incompetence as per Section 84(4) [now s. 83(4)] of the Health Disciplines Act, 1974, Part IV Nursing, in that she has displayed in her professional care of her patients, a lack of knowledge, skill and judgment and disregard for the welfare of the patient of a nature and to an extent that demonstrates she is unfit to continue in practice.

The most serious finding against the appellant, which appears to be the nub of the decision, and the basis for the revocation of her licence, is contained in the sentence: "Miss Reddall committed serious errors which endangered the life of the patients assigned to her care." It is common ground, as noted by the Divisional Court, that there was no evidence to support this finding in the record. The discipline committee consisted of five members: a registered nurse as chairman, two registered nursing assistants and two laymen. The position of the college of nurses before the Divisional Court and before us is that the conclusion that the lives of patients were endangered is based on the committee's "expertise".

Mr. Justice Reid pointed out the difficulties facing the court in accepting this argument [33 O.R. (2d) 129 at pp. 132-3, 123 D.L.R. (3d) 678 at pp. 682-3]:

> The mandate so conferred is not an easy one to execute. For instance, we are told by counsel for the College that certain things should be left to the Committee's expertise. We should not expect to see evidence in the record to support certain of the Committee's findings. That submission arose in connection with the Committee's finding that "Miss Reddall committed serious errors which endangered the life of the patients assigned to her care". The gravity of that finding is obvious. When we asked to see the evidence supporting that finding we were told we would not find it in the record. The conclusion was not grounded in any expert opinion given in evidence before the Committee: it was grounded in the Committee's "expertise".
>
> The consequence is that the Committee's conclusion is unreviewable. We

> are not experts in medicine or nursing. We cannot, or speaking for myself, I cannot, read the 19 admitted errors and omissions and decide whether any one or all of them endangered life. I do not say it was not so: I say merely that I am without the capacity to decide it on my own.
>
> The difficulty we face is this. We are asked to review the Committee's decision that Miss Reddall was incompetent. We are asked, as well, to review the penalty imposed; revocation of her certificate, and therefore her right to practise nursing. Both of these issues raise the question: how serious were her 19 errors? If all were serious enough to endanger life could a finding of incompetence or the revocation of the right to practise seriously be questioned? Even if some were that serious would the decision not remain difficult to challenge? The Committee's decision does not make clear whether it was "some" or "all". It refers merely to "errors which endangered" lives.
>
> The seriousness of Miss Reddall's errors is thus central to the issue of the appropriateness of the Committee's decision both on incompetence and on penalty. Yet, if there is no framework of expert evidence against which the Committee's decision can be measured in this Court, how can this Court perform its function? We are asked, in effect, to accept the most fundamental conclusion reached by the Committee without proof. We are asked to review the unreviewable.

Later he said [at p. 137 O.R., pp. 686-7 D.L.R.]:

> In the case before us, if the Committee has properly found that the errors endangered the lives of patients and was justifiably of the view that the nature of the errors demonstrated a general propensity for incompetence that would, in my opinion, make the penalty unassailable. But, again, whether they have properly made those findings, notwithstanding that the first was expressed and the second only implied, is not something that on the record before us I have the means to judge.

However, his view was, that although the members of the committee might not all be peers of a registered nurse, nevertheless they were in a far better position to judge the seriousness or gravity of a nursing error than is the court. He concluded that the Legislature had committed the responsibility for disciplinary matters to the nursing profession and to reject its conclusion would be to deny to the committee any expertise.

His first reason for accepting the committee's conclusion that the appellant's errors had been life-threatening was that this position had not been directly challenged before the committee. However, we are advised by counsel for the appellant, and an affidavit which we accepted today, sworn by the appellant's counsel at trial, supports this, that it had been argued on behalf of the appellant that none of the errors or omissions caused any harm or was likely to cause harm to any patient.

Mr. Justice Reid's second ground for accepting the conclusion that the appellant "committed errors which endangered the life of the patients assigned to her care" was that the court "was not

shown anything in the record that would support a challenge". It should be noted that the notice of hearing served on the appellant setting out the counts or allegations of incompetence does not allege that her errors or omissions were such as to endanger the lives of patients. It is difficult to accept the proposition that an onus is placed on an individual charged to challenge an allegation that is not made in the charge and upon which no evidence is led which can be challenged by cross-examination or otherwise. The onus is surely on the college to establish its case on the admissible evidence.

We do not think that the Divisional Court was being asked "to review the unreviewable". It is only so if the mere *ipse dixit* of the discipline committee, without more, is enough in all cases to establish the seriousness of the incompetence. Such an approach, with deference, emasculates the broad right of appeal given by s. 13(2) quoted above. There were two laymen on the committee and it cannot be that they are to act outside the evidence given at the hearing. Indeed they are directed, as are all members of the committee, to base their finding on the evidence before them (s. 12(6) and s. 83(2)(*b*) — this in sharp contrast to ss. 15 and 16 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484). Are the laymen on the committee to take evidence and expert opinion from their professional colleagues on the committee in executive session without the person charged having an opportunity to challenge the evidence or opinion by cross-examination and rebuttal? It would appear to be a denial of the right to a fair hearing and of natural justice as well as a breach of the sections referred to, to allow this to be so. Further, the members of the Divisional Court are in the same position as the lay members of the discipline committee. Yet they are given the same powers as that committee to weigh and assess the evidence and indeed to exercise all of its powers. They, like the committee, can only act on the evidence which is in the record.

There was clearly evidence to support a finding of incompetence against the appellant but the seriousness of the errors and omissions leading to that finding has not been established on the record. It is obvious, we think, that the finding that she is unfit to continue in practice and the revocation of her certificate was based on the finding that her errors had endangered the lives of patients assigned to her care. The necessary evidence to support this conclusion is missing and the penalty cannot stand. This view of the record does not mean that the members of the committee cannot use their expertise in assessing all the evidence which is

before them. But the evidence has to be before them before they can assess it. On any appeal one would expect the Divisional Court to give considerable weight to the decisions of the tribunal which has weighed the admissible evidence in light of its expertise and we do not deny the value of that expertise.

In the result, the appeal against the finding of incompetence is dismissed and the appeal against the penalty imposed is allowed, and to that extent the order of the Divisional Court is set aside and the penalty imposed by the discipline committee is quashed. The matter of penalty is remitted to the discipline committee for a rehearing on evidence as the parties may be advised. The appellant shall have her costs of the appeal and application for leave to appeal. There will be no order as to costs in the Divisional Court.

Appeal allowed in part.

[HIGH COURT OF JUSTICE]

Polischuk et al. v. Hagarty

HENRY J. 27TH MAY 1983.

Barristers and solicitors — Breach of contract — Defences — General practice — Solicitor acting for purchaser of real property — On closing, contrary to terms of agreement of purchase and sale and without consulting purchaser, solicitor accepting undertaking from vendor's solicitors to discharge mortgage on property — Vendor's solicitors failing to discharge mortgage and purchaser suffering damage — Whether solicitor in breach of contract — Whether defence that he acted in accordance with general practice — Burden of proof of damages.

A solicitor acting for a purchaser of real property who, on closing, contrary to the terms of the agreement of purchase and sale and without consulting his client, accepts an undertaking from the vendor's solicitor to obtain and register a discharge of a mortgage, is in breach of the terms of his retainer and liable to his client for breach of contract when the vendor's solicitor fails to carry out his undertaking and the client suffers damage as a result. It is no defence to the solicitor that he acted in accordance with the general practice of ordinary competent solicitors. He was retained to carry out the terms of the client's agreement of purchase and sale and not to substitute other terms for it. There is no principle of law or professional dealing that justifies him in failing to enforce the contract, as written by his client, unless he receives instructions to do so, or the matter was clearly left to his discretion, after he had given advice on it. However, the client is only entitled to nominal damages where he fails to prove, the burden being on him to do so, that had the solicitor consulted him about the undertaking, and advised him about the alternatives, he probably would have refused to accept the undertaking.

Sykes et al. v. Midland Bank Executor & Trustee Co. Ltd. et al., [1969] 2 All E.R. 1238; vard as to damages [1970] 2 All E.R. 471, **apld**

DAVID v. MINISTER OF NATURAL RESOURCES

New Brunswick Supreme Court
Appeal Division, Hughes, C.J.N.B.
Bugold and Ryan, JJ.A.
June 25, 1976.

EXPROPRIATION - TOPIC 3016
COMPENSATION AWARD - SHORE PROPERTY - THE PROVINCE OF NEW BRUNSWICK TOOK 32 ACRES OF PARTIALLY WOODED SHORE PROPERTY FOR A NATIONAL PARK - THE NEW BRUNSWICK COURT OF APPEAL AWARDED THE CLAIMANT COMPENSATION OF $2,600.00.

EXPROPRIATION - TOPIC 1072
MEASURE OF COMPENSATION - EVIDENCE OF VALUE - DUTY OF BOARD OR TRIBUNAL IN CONSIDERING EVIDENCE OF VALUE - THE NEW BRUNSWICK COURT OF APPEAL SET ASIDE A COMPENSATION AWARD OF THE PROPERTY COMPENSATION BOARD WHERE THE PROPERTY COMPENSATION BOARD VIEWED THE LAND TAKEN AND SUBSTITUTED ITS OPINION OF VALUE FOR THE UNCONTRADICTED EXPERT OPINION EVIDENCE OF VALUE LED BY THE EXPROPRIATING AUTHORITY - SEE PARAGRAPH 16.

This case arose out of a claim for compensation for 32 acres of land taken by the Province of New Brunswick for a national park. The land was located near the Village of Richibucto in Kent County, New Brunswick. The land taken was a peninsula which was accessible only by water. The members of the Property Compensation Board viewed the property and awarded the claimant compensation of $5,340.00. The decision of the Property Compensation Board is reported at 12 N.B.R. (2d) 627.

On appeal to the New Brunswick Court of Appeal, the appeal was allowed and the compensation award of $5,340.00 was set aside. The New Brunswick Court of Appeal awarded the claimant $2,600.00. The New Brunswick Court of Appeal stated that the Property Compensation Board improperly substituted its opinion of value for the uncontradicted expert opinion of evidence of value led by the expropriating authority - see paragraph 16. In addition, the New Brunswick Court of Appeal stated that the Property Compensation Board acted on a wrong principle when it valued the claimant's shore frontage as if the area had been subdivided into camp lots when in fact no part of the shore frontage was subdivided into lots at the time of the expropriation - see paragraphs 17 to 20.

CASES JUDICIALLY NOTICED:
Canadian National Railway Company v. Harricana Gold Mine Inc. 1939, [1943] S.C.R. 382, folld. [para. 19].
R. v. Davis (1914), 18 Ex. C.R. 72, folld. [para. 20].
R. v. Northern Empire Theatres Limited, [1951] Ex. C.R. 321, folld. [para. 21].

P. A. MacNUTT, for the Crown, appellant,
C. CAMILLE VAUTOUR, for the claimant, respondent.

This appeal was heard by the New Brunswick Court of Appeal at Fredericton, N. B. on February 26, 1976. Judgment was delivered by the New Brunswick Court of Appeal on June 25, 1976.

The judgment of the New Brunswick Court of Appeal was delivered by BUGOLD, J.A.

1 BUGOLD, J.A.: This is an appeal from the decision of the Property Compensation Board ("the Board"), dated September 9, 1975, whereby the Board fixed the compensation payable to the claimant in respect of the expropriation of certain lands suitable for the land assembly of the Kouchibouquac National Park at $5,340 with interest at the rate of 5 per cent per annum from September 2, 1970, to date of payment.

2 The expropriation was carried out under the provisions of the National Parks Act, S.N.B. 1968, c. 9, s. 3 on September 2, 1970. The land taken comprises an area of 32 acres with a frontage on Aldouane Lake, Kent County, New Brunswick. The claimant acquired title to the land from his father some years prior to the expropriation. It is located on the westerly side of a peninsula which forms the south-easternmost section of the Kouchibouquac National Park. The lot has an average width of 450 feet fronting on Aldouane Lake and a depth of approximately 3,300 feet. Its westerly extremity, containing a marsh and a sand spit, juts into the waters of Aldouane Lake and is known locally as Pointe à Pierre Daigle. Some 1,650 feet across the water lies the public wharf of Pointe d'Eglise which is readily accessible by a paved road less than one mile from the limits of Richibucto Village and approximately three miles from the centre of the shiretown.

3 The only access to the land in question from the public wharf is by boat during the summer months and on the ice in winter. There are no improvements or ser-

vices on the land such as electricity, water, sewage and roads. The sand spit has a total area of one acre and comes to rest against a high bank about 10 feet above the beach level. Beyond the bank, the land is flat and well above sea level with firm ground for approximately 2,000 feet and the remainder consists of low lying and marshy land. The first 2,000 feet or so have thick brush and wood cover which have been cut over in a fairly consistent way some twenty years ago. The rear portion of the lot is mainly open with sponge moss, scattered bushes and a few isolated trees. The southerly boundary of the property runs along shallow water at the lakeshore for a large distance from west to east and consists of high, heavily wooded ground and overlooks the expanse where Aldouane Lake empties into the North West Arm of Richibucto Harbour.

4 Gordon Young, an expert in the field of forestry and appraisal of forest land, studied aerial photographs and maps of the property. On October 8, 1974, he went on the land, and collected and compiled field information. Based on his findings, he prepared a forest inventory and stumpage appraisal report which was led in evidence by the Appellant. The purpose of the forest inventory and stumpage appraisal was to determine the fair market value of the forest on the property with consideration of the value to the owner. All values were determined as of September 2, 1970, the registration date of the expropriation. Of the total area of 32 acres, wasteland accounted for 16 acres leaving 16 acres as stocked and productive forest land. The forest type map prepared by Mr. Young and attached as the first schedule to his report shows five classifications of the land referred to as "stands". The first three stands are shown on the map as forest land, the fourth represents 15 acres as barren land and the fifth shows approximately 1 acre classed as a sand bar.

5 According to Mr. Young the first of the three stands of forest land comprising 12 acres contained most of the wood. He described the various species of wood and the applicable stumpage rates and estimated the value of the wood on this stand at $1,486. The wood on the second one acre stand had been cut in the past and did not have any significant volume of wood. The third stand covered an area of three acres. The wood had also been cut on this stand but not as heavily as on the second stand. Mr. Young assumed that the wood on the second and third stands had been cut some twenty years ago. He fixed the value of the wood

on the third stand at $63 and the total value of the stumpage at $1,549.00. Because the forest inventory was done some four growing years after the expropriation, Mr. Young discounted his total value of the stumpage by 9% in order to arrive at a more realistic value of the forest land as of the date of the expropriation and fixed the total net value of the stumpage at the round figure of $1,400.00.

6 In preparing his inventory and classification of the forest land, Mr. Young relied upon the stand classification method used by the Department of Natural Resources of New Brunswick which, in his opinion, appeared feasible and workable. A complete schedule of the stand classifications is included at the end of his report. As to his field work, all living single-stemmed softwood trees 1" d.b.h. and larger were tallied. All hardwood trees 1" d.b.h. and larger, considered to be vigorous and thriving, were also tallied. No deduction for unseen defects were made in the field. Only trees four inches and larger in diameter were considered in the volume estimate.

7 Roy de Stecher, an expert in real estate appraisal, on August 20, 1973, went by boat to inspect the claimant's land. Having worked out the bearings in order to get in and out of the lot, he walked through the middle of the land approximately beyond where the trees stopped on the marshy, swampy area. He walked down to the shore on the west side of the land. He had previously analyzed sales of shore front properties, sales that had taken place prior to the date of the expropriation and a year later, 1971-72, and ascertained that if the number of feet of shore frontage were divided into the sale price, the average range of rates were between $1.00 and up to $5.00 a foot frontage at that time in that general area depending on the type of shore and height of the bank. This was, of course, on the mainland areas accessible by roads. He considered the situation with respect to the land in question, to wit, the fact that the property taken is, for all practical purposes, situated on an island with no means of access except by boat during the summer season and on the ice in winter. The sales he referred to had depths varying normally from 200 to 400 or 500 feet. The land taken has these peculiar characteristics of a sand spit with a small pond in the middle. In actual fact, the land is more than 450 feet in width. Mr. de Stecher scaled it off and it came to approximately 900 feet. This of course is not really the true frontage

width because the width of the property is only 450 feet and the shore continues around back into the side of the land.

8 Upon comparing the straight shore frontage of the land taken with the sales of properties on the mainland and bearing in mind the fact that no sales had taken place on the peninsula at all for many years, except transfers of ownership, Mr. de Stecher determined there was no great demand for land on the peninsula. He had experience in island property transactions and found that because of lack of access, the value of land on an island is always considerably less than the equivalent shore frontage on the mainland. People have to have a boat to get there. He concluded that $1.00 per foot frontage was the value of the shore. Bearing in mind the unusual frontage of the property, he virtually allowed $2.00 per foot frontage because the actual width of the land taken was only 450 feet. Mr. de Stecher in assessing the frontage including the sand spit allowed 900 feet at $1.00 per foot frontage. He had a copy of Mr. Young's report wherein the latter had fixed the value of the stumpage at approximately $88.00 per acre. Mr. de Stecher added $12.00 per acre for any future recreational value the land might have and fixed the value of the 16 acres of wooded land at $100.00 per acre. The remaining 15 acres at the rear of the property were, in Mr. de Stecher's opinion, wasteland and he could not imagine any use to which this part of the land could be put. However, he felt it had some value and fixed $8.00 per acre for this area.

9 Having regard to the terrain, location and all the other factors infra affecting value, Mr. de Stecher, on a comparative basis, determined the compensation to the claimant in respect of the property expropriated as follows:-

LAND WITH SHORE FRONTAGE

Shore

Effective frontage of 900 feet @ $1.00 per ft. fr. (including 1 acre of sand spit)	$ 900.00

Backland

Wooded

veyance over the ice in winter does not constitute a great deterrent to the ownership of a summer camp, or even an all-season camp, in a locality so close to a builtup area. Its very seclusion in spite of this proximity, may very well be considered an asset by many people. The 1970 value of these lots is conservatively estimated by the Board to have been at least $500.00 each. True it is that they were not then developed but the Board has become persuaded that they would have been purchased and improved in very short order so that their potential value to an owner holding them for future development could not have been less than $300.00 per lot at the time of taking.

After careful consideration of all the factors involved, the Board has calculated that an adequate award for the subject property would be:

a - For 10 half-acre camp lots along shore	$3,000.00
b - For the 1 acre sand spit and beach	1,000.00
c - For 12 acres forested	1,200.00
d - For 14 acres low-lying waste land	140.00
Total	$5,340.00

15 The Appellant has appealed the compensation fixed by the Board alleging the Board erred in:-

(a) failure to give proper weight to evidence of value submitted by the Appellant;

(b) substituting its own subjective considerations contrary to factual evidence;

(c) completely ignoring evidence with regard to the isolation of and lack of development on and in the vicinity of the subject land; and

(d) embarking upon a speculative consideration of the highest and best use to which the land could be used not supported by evidence.

16 In my view, the grounds of appeal are well taken

and the award of compensation fixed by the Board cannot stand. The findings of the Board are not based on the unchallenged expert evidence adduced by the Appellant, but upon the Board's complete disregard of such evidence, embarking upon a private inquiry of its own, substituting its own inspection of the land taken for the evidence adduced and assessing the value of the land upon a speculative consideration of the highest and best use to which the land could be put not supported by the evidence.

17 The ruling of the Board that there is space for ten half-acre camp lots along the lakeshore frontage of the property is not supported by the evidence led by the Appellant and clearly arises out of the Board's own visit to the area. No part of the lakeshore frontage was subdivided into camp lots at the time of expropriation. Moreover, there is no evidence suggesting that such was the intention of the claimant, prior to the expropriation, other than the claimant's own self-serving statement before the Board that *"I was saving that for later on"*.

18 In reality the Board fixed the value of 5 acres of the land along the lakeshore frontage at $3,000.00 as if the area had been subdivided into camp lots and, in my opinion, proceeded on a wrong principle. On this issue alone the Appellant ought to succeed.

19 Kerwin, J., in *Canadian National Railway Company v. Harricana Gold Mine Inc. 1939*, [1943] S.C.R. 382, at p. 393 states:-

> .....this Court will not interfere on a mere question of quantum unless it is satisfied that the amount allowed is clearly excessive or just as clearly too small ....What is more important, however, is that in fixing the value of the lands expropriated as if they had been subdivided into lots, the trial judge proceeded upon a wrong principle and that is always a ground upon which this Court will set aside an award.

20 With respect to the Board's concept of sub-dividing the area on the shore front into camp lots, I am satisfied there is neither certainty nor probability that such lots could be sold in the near future. The prospect of selling the land for camp lots, being so remote and the potential so uncertain, cannot be considered in arriving at the market value of the land at

the time of expropriation. *R. v. Davis* (1914), 18 Ex. C.R. 72.

21 The onus of proof of value in expropriation cases lies on the owner of the expropriated property. *R. v. Northern Empire Theatres Limited*, [1951] Ex. C.R. 321. In the present case the owner has adduced no proof of value.

22 In the result, I would allow the appeal with costs thereof. The award of $5,340.00 compensation fixed by the Board is set aside. The amount of compensation to be paid to the claimant is fixed at $2,600.00 as supported by the uncontradicted evidence together with interest thereon, or on any unpaid balance thereof, at the rate of 5 per centum per annum to be computed from September 2, 1970, to date of payment. The further sum of $100.00 will be paid to the claimant as costs and disbursements upon his appearance on his own behalf at the hearing of this matter before the Property Compensation Board.

Appeal allowed.

nting judgment Laskin,
, stated as follows:

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because no notice was given to the owner and, at the time that the lien was registered and notice given, the owner had properly paid all moneys under its contract to Bondfield and there was no sum justly owing by the owner to anyone. There was therefore no valid lien against the lands because the owner had done everything that it was required to do under the contract and the *Act*. King Air was aware that the work physically had long since been substantially completed but it did not know what the payment or legal status was under the general contract. If it was concerned about its claim for a lien, it need only have given notice to the owner without even registering its lien. It did not do so.

[29] For these reasons, I am of the opinion that the appeal should be dismissed with costs.

Appeal allowed.

Editor: Debra F. MacCausland
edp

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, THIBERT, JUNG and McGILL v. MINISTRY OF CORRECTIONAL SERVICES

Ontario Divisional Court
O'Driscoll, Gray and Sirois, JJ.
February 6, 1984.

Summary:

Three correctional officers were dismissed for allegedly using excessive force on an inmate. The officers grieved their dismissal. The Grievance Settlement Board heard the grievances. Before a decision was reached, the officers were charged, then acquitted, of assault causing bodily harm to the inmate. The Board subsequently dismissed each grievance. The officers and their union applied under the Judicial Review Procedure Act to quash the Board's decision.

The Ontario Divisional Court allowed the application.

ADMINISTRATIVE LAW - TOPIC 2145

Natural justice - Administrative decisions or findings - Failure to consider evidence - The Ontario Divisional Court held that where a trier of fact failed to consider all the evidence before making a decision, it resulted in a denial of natural justice - See paragraph 29 - The court quashed a decision of the Grievance Settlement Board, where the Board glossed over evidence, was selective in what it considered and failed to refer to, consider or evaluate evidence relevant to the credibility of the parties - See paragraphs 30 to 33.

ADMINISTRATIVE LAW - TOPIC 2613

Natural justice - Evidence and proof - Affidavit evidence - Grievors applied under the Judicial Review Procedure Act to quash a decision of the Grievance Settlement Board which dismissed their grievances - The application was grounded on the Board's alleged breach of natural justice by failing to consider essential evidence in making its

decision - The Board kept no verbatim record of its proceedings - The Ontario Divisional Court allowed the grievors to file with the court, affidavit evidence and cross-examination to show the extent of the alleged error because the grievors would otherwise be denied access to the court - See paragraphs 25 to 28.

LABOUR LAW - TOPIC 9356
Public service labour relations - Judicial review - Decisions of grievance appeal boards - Error of law - The Grievance Settlement Board dismissed grievances by three correctional officers who were dismissed for allegedly using excessive force on an inmate - The Board failed to determine how the subject incident started and thus failed to apply s. 7 of the Ministry of Correctional Services Act Regulations, which governed the use of force by correctional officers - The Ontario Divisional Court held that the Board erred in law and quashed the Board's award - See paragraphs 16 to 24.

PRISONS - TOPIC 1068
Administration - Prison officers - Dismissal - Grounds - Use of excessive force - The Ontario Divisional Court held that the trier of the issue of whether a correctional officer used excessive force on an inmate must first consider whether the officer acted in self defence, then consider s. 7 of the Ministry of Correctional Services Act Regulations, which governed the issue - The court held that how the subject incident started and the inmate's propensity for violence and previous acts of violence were all relevant to the question of whether excessive force was used - See paragraphs 19 to 23.

CASES NOTICED:
Sarabura v. Her Majesty the Queen in Right of Ontario as represented by the Attorney General (1981), 12 A.C. W.S.(2d) 241 (Div. Ct.), consd. [para. 15].
Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association and Nipawin Union Hospital and the Labour Relations Board of Saskatchewan, [1975] 1 S.C.R. 382, consd. [para. 18].
R. v. Scopelliti (1982), 63 C.C.C.(2d) 481, ref'd to. [para. 22].
R. v. Baxter (1976), 27 C.C.C.(2d) 96, ref'd to. [para. 23].
R. v. Bogue (1977), 30 C.C.C.(2d) 403, ref'd to. [para. 23].
Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd. (1980), 29 O.R.(2d) 513, consd. [para. 27].

STATUTES NOTICED:
Ministry of Correctional Services Act Regulations, O.R. 243/79, s. 7(1) [paras. 11, 17, 19].

COUNSEL:
Ian Scott, Q.C., for the applicants;
Leslie M. McIntosh, for the respondent.

This application was heard before O'Driscoll, Gray and Sirois, JJ., of the Ontario Divisional Court, on January 13, 1984. The decision of the Divisional Court was delivered by O'Driscoll, J., and released on February 6, 1984.

I. TYPE OF APPLICATION

[1] O'Driscoll, J.: Gary Thibert, Emil Jung and Raymond McGill were employed by the respondent Ministry as correctional officers at the Lindsay Jail. It is alleged that on May 27, 1981, they used excessive force on the inmate Gary Barnes.

[2] On September 4, 1981, the applicants-grievors were dismissed.

[3] The Ontario Public Service Employees Union (Union) grieved the dismissals; the Grievance Settlement Board (G.S.B.) heard the grievances on December 4, 7, 8, 16 and 17, 1981, and on January 26, 1982.

[4] The 3 applicants-grievors were

charged under the provis
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grievor was acquitted.

[5] On April 6, 1982, t
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[6] The applicants-grie
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charged under the provisions of the *Criminal Code of Canada* with assault causing bodily harm to Gary Barnes. At a trial by jury in February, 1982, each grievor was acquitted.

[5] On April 6, 1982, the majority decision of the G.S.B. dismissed each grievance.

[6] The applicants-grievors and the Union apply for judicial review of the award under the *Judicial Review Procedure Act*, R.S.O. 1970, c. 224.

[7] Counsel for the applicants-grievors asks that the award be quashed; because the livelihood of each correctional officer hangs in the balance, counsel for the applicants asks that the matter be sent back to the G.S.B. for a new hearing.

[8] The application succeeds.

II. THE FACTS WHICH GAVE RISE TO THE DISMISSALS AND THE GRIEVANCES

[9] The applicants' statement on pp. 3-5 states:

> 4. (i) The inmates Gary Barnes and Gary Brabent, together with a third person, were arrested on April 17, 1981, and brought to the jail;
>
> *Majority Award of the G.S.B., Record*, p. 22.
>
> (ii) While at the jail, the inmates Barnes and Brabent were constantly verbally aggressive and abusive towards the guards and on May 24, 1981, they beat up three correctional officers resulting in an order that:
>
> 'Brabent and Barnes to remain in cells in number one corridor. Meals (to be on) paper. No privelages. (Sic). At least 2 officers with riot (sticks) to be in corridor any time one of them is out of cell (when) washup, etc. No medication for either until further notice by order Supt. Initials N.T.'
>
> *Majority Award of the G.S.B., Record*, pp. 22-3.
>
> (iii) On May 26, Brabent was again involved in an altercation with Staff, he was injured and taken to hospital for treatment.
>
> *Majority Award of the G.S.B., Record*, p. 24.
>
> (iv) On May 27, at washup time, the three grievors, entered the corridor housing the inmates Barnes and Brabent to take Barnes from his cell to the washroom. The grievors McGill and Jung were carrying batons pursuant to the above order. The grievor Thibert was carrying a toothbrush and towel. Outside the washroom door a fight broke out between Barnes and Thibert causing both to fall to the floor. Thibert got up from the floor and ran past the other two grievors down the length of the corridor to the grill or gate at which the officer in charge of the shift, Sergeant McGinn, was stationed. He collected a baton and handcuffs from McGinn and returned to the scene of the incident. During the incident, the inmate suffered a cut to the back of his head and bruising to his body.
>
> (v) He was taken to the Lindsay Hospital by ambulance, treated and returned to the cell

that night.

Majority Award of the G.S.B., Record, p. 24 and p. 29.

(vi) The incident was investigated by the Lindsay Police, on the night of May 27, and subsequently by Inspector Leutz from the Ministry who took statements from each of the grievors, Sergeant McGinn who witnessed the incident from the grill, and from inmate Barnes. In addition, an investigation was conducted by Inspector Raybould of the Ontario Provincial Police.

Majority Award of the G.S.B., Record, pp. 24-5 and p. 40.

(vii) On May 29, Barnes was moved to the Millbrook Correctional Centre.

Majority Award of the G.S.B., Record, p. 41.

[10] The majority award deals with the matter in this way:

3. GENERAL OUTLINE OF EVENTS

On April 17, 1981, three prisoners with considerable Federal time, i.e., time served in Federal institutions, were arrested by the Lindsay Police. There was some apprehension on the part of the Police that these prisoners might be dangerous and this apprehension was conveyed to the personnel at the jail to which they were taken. As is common when prisoners with Federal experience arrive at a Provincial institution, these persons being Barnes, Brabant, and another, made it clear from the beginning that they were tough guys. It soon became clear that they were not impressed by being at a Provincial institution and wished to be moved to a Federal one. They made this clear by being constantly verbally aggressive and abusive towards guards, throwing their meals and pails of urine at guards, boasting about how tough they were, and generally making excessive demands for what they considered to be their rights.

On April 20, for example, Barnes was found digging a hole in the ceiling of a washroom, a pipe was pulled from a ceiling and fire alarms were set off.

On May 24, a serious incident involving the three inmates occurred in which three guards were beaten up by these prisoners. One of these guards, John Blackmore, was badly beaten up by Barnes and suffered severe lacerations to his head, a broken nose, and other injuries. He was still off work at the date of this hearing as a result of that incident. It appears that Barnes took advantage of catching him in a one-on-one situation and continued to inflict injuries on him, even though he was unconscious. A second officer, Officer Bryans, suffered a broken jaw and miscellaneous injuries in the incident and was off work until November, 1981. A third officer, G. Widdis, was badly beaten about the face and suffered numerous cuts. He was off duty for one week.

III. THE ACTIONS OF THE APPLICANTS-GRIEVORS ARE TO BE JUDGED AGAINST WHAT STANDARD?

[11] Ontario Regulation 243/79 made pursuant to the *Ministry of Correctional Services Act,* 1978, governs the use of force by a correctional officer:

Section 7(1)

No employee shall use force against an inmate unless force is required in order to (a) enforce discipline and maintain order within the institution, (b) defend the employee or another employee or inmate from assault, (c) control a rebellious or disturbed inmate, or (d) conduct a search, but

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V. QUESTIONS

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where force is used against an inmate, the amount of force used shall be reasonable and not excessive, having regard to the nature of the threat posed by the inmate and all other circumstances of the case.

IV. THE DECISION OF THE MAJORITY AWARD

[12] Professor P.G. Barton, Vice-Chairman, and Mr. D.B. Middleton signed the majority award.

[13] Under the heading: "*Decision*: . . . (c) Did Barnes attack Mr. Thibert?" the following appears:

> How the incident started, we are unable to decide. Did the guards, primed for trouble, misinterpret some gesture of Mr. Barnes? We will never know.

[14] Lower down on the same page of the award, the two members of the majority find:

> Thus, we are not prepared to say on this evidence that there was a conspiracy to beat up Barnes.

V. QUESTIONS TO BE DECIDED

A. *Question 1*: Does the majority award contain an error in law or a declining of jurisdiction because the majority award does not decide: "how the fight started"?

[15] Counsel for the respondent has reminded us that Southey, J., in concurring reasons for judgment in *Sarabura v. Her Majesty the Queen in Right of Ontario as represented by the Attorney General* (1981), 12 A.C.W.S.(2d) 241 (Div. Ct.: Osler, Southey and Gray, JJ.) said:

> . . . it is my view that the court has no jurisdiction to interfere with the decisions of a lower tribunal on pure questions of fact, regardless of how unreasonable the decision of the lower tribunal appears to the court. It is only where the court perceives the error to be one of law or mixed law and fact, such as the interpretation of a contract or a statute, that an error, if sufficiently serious, can deprive the lower tribunal of jurisdiction.

[16] Unless counsel for the applicants-grievors can point out an error of law "window" in the "wall" of facts, this court cannot interfere with the facts as found by the G.S.B.; we cannot substitute our view of the evidence for that of the G.S.B. even though we may disagree with the G.S.B. in its assessment of the evidence.

[17] In my view, counsel for the applicants-grievors has found an error of law "window". The majority award failed to make a finding as to "how it all started" and thereby misinterpreted and failed to apply the provisions of s. 7 of Ontario Regulation 243/79 (supra).

[18] [In] *Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association and Nipawin Union Hospital and the Labour Relations Board of Saskatchewan*, [1975] 1 S.C.R. 382, 388-389, Dickson, J. (for the court) [stated]:

> There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest. 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.
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> A tribunal may, on the one hand,

have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the *Act* so as to embark on an inquiry or answer a question not remitted to it. If, on the other hand, a proper question is submitted to the tribunal, that is to say, one within its jurisdiction, and if it answers that question without any errors of the nature of those to which I have alluded, then it is entitled to answer the question rightly or wrongly and that decision will not be subject to review by the courts: *Anisminic, Ltd. v. Foreign Compensation Commission et al.*, [1969] 1 All E.R. 208; *Noranda Mines Ltd. v. The Queen et al.*, supra; *Farrell et al. v. Workmen's Compensation Board*, supra; *R. v. Quebec Labour Relations Board, Ex p. Komo Construction Inc.* (1967), 1 D.L.R.(3d) 125.

[19] Section 7 of Ontario Regulation 243/79 (supra) required the G.S.B. to determine whether the amount of force used was reasonable or excessive "having regard to the nature of the threat posed by the inmate and all other circumstances of the case".

[20] Under the provisions of the *Criminal Code of Canada*, a trier of fact must first determine whether the accused was acting in self defence against: (1) an unprovoked assault (s. 34), or (2) was acting in self defence in a situation where he, the accused, assaulted or provoked the assault of another (s. 35). Depending upon that preliminary finding, the trier of fact subsequently proceeds to consider other matters in deciding the question of self defence.

[21] In my view, it was impossible for the majority of the G.S.B. to decide whether "the force used against the inmate was reasonable and not excessive having regard to the nature of the threat posed by the inmate and all other circumstances of the case" without deciding: "How did it all start?"

[22] In deciding whether the force used was reasonable and not excessive, the triers of fact (G.S.B.) would have to evaluate Barnes' propensity for violence and his previous acts of violence: *R. v. Scopelliti* (1982), 63 C.C.C.(2d) 481, at p. 492 per Martin, J.A.:

> It is well established that where self-defence is raised, evidence not only of previous assaults by the deceased on the accused, but also of previous acts of violence by the deceased, known to the accused, towards third persons, is admissible to show the accused's reasonable apprehension of violence from the deceased. Evidence of the deceased's reputation for violence, known to the accused, is admissible on the same principle: see *R. v. Drouin* (1909), 15 C.C.C. 205 and commentary at p. 207; *R. v. Scott* (1910), 15 C.C.C. 442; *Wigmore on Evidence* (3rd Ed.), vol. ii (1940), pp. 44-52; *Phipson on Evidence* (12th Ed. 1976), pp. 188, 228.
>
> Obviously, evidence of previous acts of violence by the deceased, not known to the accused, is not relevant to show the reasonableness of the accused's apprehension of an impending attack. However, there is impressive support for the proposition that, where self-defence is raised, evidence of the deceased's character (i.e., disposition) for violence is admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked by the deceased.

[23] Moreover, the triers of fact (G.S.B.) must, when considering the question

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C.C.C.(2d) 96, at p. 111
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> *Preston* (1953), 106 C.
> 140; 17 C.R. 20; 9 W.
> *R. v. Ogal* (1928), 50
> pp. 73-4; [1928] 3 D.
> *Antley*, [1964] 2 C.C.
> 147; [1964] 1 O.R. 54
> at p. 389.

(2) *R. v. Bogue* (1977),
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of reasonable or excessive force, remember that the test is not purely objective: (1) *R. v. Baxter* (1976), 27 C.C.C.(2d) 96, at p. 111 per Martin, J.A.:

> I think I should add that, contrary to the view expressed by the trial judge, s. 34(1) does not import a purely objective test. The doctrine of mistake of fact is applicable to s. 34(1) as well as s. 34(2). An accused's belief that he was in imminent danger from an attack may be reasonable, although he may be mistaken in his belief. Moreover, in deciding whether the force used by the accused was more than was necessary in self-defence under both s. 34(1) and (2) the jury must bear in mind that a person defending himself against an attack, reasonably apprehended, cannot be expected to weigh to a nicety, the exact measure of necessary defensive action: *Palmer v. The Queen* (1971), 55 Cr. App. R. 223, at p. 242; *R. v. Preston* (1953), 106 C.C.C. 135, at p. 140; 17 C.R. 20; 9 W.W.R. (N.S.) 57; *R. v. Ogal* (1928), 50 C.C.C. 71, at pp. 73-4; [1928] 3 D.L.R. 676; *R. v. Antley*, [1964] 2 C.C.C. 142, at p. 147; [1964] 1 O.R. 545; 42 C.R. 384, at p. 389.

(2) *R. v. Bogue* (1977), 30 C.C.C.(2d) 403, at pp. 407-408 per Howland, J.A. (now C.J.O.):

> In considering whether the degree of force used by the accused was justified, the difference between the criteria under s. 34(1) and (2) must be carefully borne in mind. In neither case is a person defending himself against a reasonably apprehended attack expected to weigh to a nicety the exact measure of necessary defensive action. *R. v. Baxter*, supra, at p. 24 [p. 111]; . . .

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. . . As Holmes, J., stated in *Brown v. United States* (1921), 256 U.S. 335, at 343: 'Detached reflection cannot be demanded in the presence of an uplifted knife.'

[24] In the result, because of this error of law, I would quash the majority award and refer the arbitration back to the G.S.B. for a new hearing.

B. *Question 2*: The applicants-grievors submit that the majority award fails to mention, evaluate and either accept or reject a plethora of relevant and important evidence; does this constitute a denial of *natural justice* as that term is defined in the *Nipawin* case (supra)?

[25] Counsel for the applicants-grievors filed for use on this review a 10-page affidavit of Gary Thibert setting out evidence that the G.S.B. had before it but, it is alleged, failed to consider; a 28-page transcript of cross examination accompanies the affidavit.

[26] A preliminary question arises: is the Divisional Court entitled to receive the affidavit and the transcript?

[27] In *Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd.* (1980), 29 O.R.(2d) 513, at p. 516 per Morden, J.A.:

> (a) Section 2(3) of the *Judicial Review Procedure Act, 1981*. The first answer is based on s. 2(3) of the *Judicial Review Procedure Act, 1971*. It reads:
>
> '2(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise

> of such power, the court may set aside the decision on an application for judicial review.'

at p. 517:

> Accordingly, if affidavit evidence is necessary to show that s. 2(3) is applicable it should be admissible.

at p. 521:

> Having just completed the exercise of examining, in this fashion, the evidence that was before the arbitrator I would express the view, which is in agreement with that of Pennell, J., that the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare.

[28] The applicants-grievors cannot "get their case" of denial of natural justice before the Divisional Court if they are refused the right to file affidavit evidence. If the applicants-grievors are denied the right to file affidavit evidence before the Divisional Court alleging a denial of natural justice by the G.S.B. (which keeps no verbatim record) in that it failed to advert to crucial and essential evidence in the process of deciding its award, then, the applicants-grievors are shut out and denied that ground of relief; without affidavits, there is no way to get the matter before the Divisional Court. I find, on the facts of this case, both the affidavit and the cross examination thereon to be properly before this court.

[29] A trier of fact may believe all or part or nothing of the evidence of any witness or any exhibit. However, a trier of fact cannot ignore, nor fail to evaluate, nor forget a relevant portion or portions of the evidence. The trier of fact must consider all the evidence before deciding what is believed and what is rejected. If the trier of fact fails to carry out that fundamental responsibility, it results in a denial of natural justice as defined for the Supreme Court of Canada by Dickson, J., in *Nipawin* (supra).

[30] The G.S.B. was faced with a fundamental conflict between the evidence of Barnes and the evidence of the applicants-grievors; it was a classic credibility case. In order to do natural justice to all concerned, it was the duty of the trier of fact (G.S.B.) to decide what was to be believed and what was to be rejected; in doing so, the trier of fact was required to consider, evaluate and weigh *all* the evidence.

[31] A reading of the majority award together with paras. 7-27 inclusive of Thibert's affidavit, persuades me that the majority award glossed over evidence, was selective in what evidence it considered, and failed to refer to, consider and evaluate a wealth of relevant, cogent evidence that should have weighed very heavily on the crucial question of credibility.

[32] In my view, the failure of the majority of the G.S.B. to perform a primary and fundamental duty as a trier of fact amounted to a denial of natural justice to these applicants-grievors.

[33] Because of this error of law, I would also quash the majority award and refer the arbitration back to the G.S.B.

VI. RESULT

[34] The majority award of the G.S.B. dated April 6, 1982, is quashed and the matter is referred back to the G.S.B. for a new hearing.

VII. COSTS

[35] The applicants are to have one set

of taxed party-party cost
respondent.

Applic

Editor: Debra F. MacCaus
edp

RON ROBINSON LT
CANADIAN INDEMNITY

Ontario Divisiona
Henry, J.
February 8, 1

Summary:

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of taxed party-party costs paid by the respondent.

Application allowed.

Editor: Debra F. MacCausland
edp

RON ROBINSON LTD. v.
CANADIAN INDEMNITY COMPANY

Ontario Divisional Court
Henry, J.
February 8, 1984.

Summary:

As the plaintiff's insurer, the defendant settled a number of claims made against the plaintiff and then successfully sued the plaintiff for the amount of the deductible portion of the settled claims. The plaintiff subsequently sued the defendant on the ground that it was negligent in settling the insurance claims. That defence was not raised in the original action. Before trial, the defendant insurer moved for judgment on the ground that the matter was res judicata. The Toronto Small Claims Court granted the motion. The plaintiff appealed.

The Ontario Divisional Court dismissed the appeal because it had no jurisdiction.

COURTS - TOPIC 7511
Provincial courts - Ontario - Supreme Court, Divisional Court - Jurisdiction, appeals from Small Claims Court - S. 108 of the Small Claims Courts Act provided a right of appeal to the Divisional Court from a judge's decision at or after trial - The Ontario Divisional Court held that s. 108 did not provide for an appeal from an order or judgment made before trial, notwithstanding that it may finally dispose of the issues between the parties - See paragraphs 9 to 14.

PRACTICE - TOPIC 8991
Appeals - When appeal available - Small claims - S. 108 of the Small Claims Courts Act provided a right of appeal to the Divisional Court from a judge's decision at or after trial - The Ontario Divisional Court held that s. 108 did not provide for an appeal from an order or judgment made before trial, notwithstanding that it may finally dispose of the issues between the parties - See paragraphs 9 to 14.

WORDS AND PHRASES
DECISION OF THE JUDGE AT OR AFTER THE TRIAL - The Ontario Divisional Court held that the phrase "decision of the judge at or after the trial" in s. 108 of the Small Claims Courts Act, R.S.O. 1980, c. 476, did not include a pre-trial order or judgment - See paragraphs 9 to 14.

CASES NOTICED:
Gelber et al. v. Allstate Insurance Co. of Canada (1983), 41 O.R.(2d) 318, appld. [para. 13].
Re Lachowski and Federated Mutual Insurance Co. (1980), 29 O.R.(2d) 273, consd. [para. 13].

STATUTES NOTICED:
Small Claims Courts Act, R.S.O. 1980, c. 476, ss. 57, 59 [para. 6]; 106 [paras. 8, 11]; 108 [paras. 9 to 14].

COUNSEL:
Karen McCullough, for the appellant;
J. Gross, for the respondent.

This appeal was heard before Henry, J., of the Ontario Divisional Court on January 27, 1984, whose decision was delivered orally and released on February 8, 1984.

[1] Henry, J. [*Orally*]: I am obliged to both counsel for their assistance in this matter and have reached the conclusion that this appeal must be quashed for want of jurisdiction.

[2] Canadian Indemnity Company was the

Oakwood Development Ltd. *Appellant*;

and

Rural Municipality of St. François Xavier *Respondent.*

File No.: 17017.

1984: November 16; 1985: September 19.

Present: McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Mandamus — Municipal planning — Decision of municipality necessary to planning process — Refusal by municipality to consider remedies to flooding problem on proposed subdivision — Plan of subdivision rejected — Whether or not solutions to flooding problem extraneous consideration — If not, whether or not municipality exercised discretion according to law.

Municipal law — Planning — Decision of municipality necessary to planning process — Refusal by municipality to consider remedies to flooding problem on proposed subdivision — Plan of subdivision rejected — Whether or not municipality required to consider solutions to flooding problem — Whether or not municipality exercised its discretion according to law — The Planning Act, 1975 (Man.), c. 29, ss. 1, 60(1), 62(1) — The Planning Act Regulation, 30/77, ss. 6(1), 7, 11.

Appellant's application to the Municipal Planning Branch of the provincial government for approval to subdivide part of its land was denied, notwithstanding its designation for subdivision and residential development, because it lacked the municipal consent required by the planning scheme. The municipal council did not entertain either the application (because it considered the land to be flood-prone) or the proposals to remedy that problem (because it had no intention of allowing development on such land). Appellant alleged this rejection to be arbitrary and without lawful authority and the Court of Queen's Bench granted mandamus requiring the Council to consider the application. Appellant now appeals from the Court of Appeal's decision reversing that order. At issue is whether or not the Council

Oakwood Development Ltd. *Appelante*;

et

Municipalité rurale de St. François Xavier *Intimée.*

N° du greffe: 17017.

1984: 16 novembre; 1985: 19 septembre.

Présents: Les juges McIntyre, Chouinard, Lamer, Wilson et Le Dain.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Mandamus — Urbanisme — Décision de la municipalité nécessaire au processus de planification — Refus de la municipalité de prendre en considération des solutions au problème du risque d'inondations sur le terrain visé par le projet de lotissement — Rejet du plan de lotissement — Les solutions au problème du risque d'inondations sont-elles des considérations extrinsèques? — Dans la négative, la municipalité a-t-elle exercé son pouvoir discrétionnaire d'une manière conforme à la loi?

Droit municipal — Planification — Décision de la municipalité nécessaire au processus de planification — Refus de la municipalité de prendre en considération des solutions au problème du risque d'inondations sur le terrain visé par le projet de lotissement — Rejet du plan de lotissement — La municipalité est-elle tenue de prendre en considération des solutions au problème du risque d'inondations? — La municipalité a-t-elle exercé son pouvoir discrétionnaire d'une manière conforme à la loi? — The Planning Act, 1975 (Man.), chap. 29, art. 1, 60(1), 62(1) — The Planning Act Regulation, 30/77, art. 6(1), 7, 11.

La demande de l'appelante adressée à la Direction de l'urbanisme du gouvernement provincial en vue d'obtenir l'autorisation de lotir une partie de son bien-fonds a été rejetée, même si ce bien-fonds était destiné au lotissement en vue de la construction de logements, pour le motif que la municipalité n'avait pas donné le consentement requis par le plan d'aménagement. Le conseil municipal n'a pas étudié la demande (parce qu'il considérait que les terres en question étaient inondables) ni les propositions quant à des solutions à ce problème (parce qu'il n'avait pas l'intention de permettre l'aménagement de telles terres). Alléguant qu'il s'agissait d'un rejet arbitraire, sans fondement en droit, l'appelante a obtenu en Cour du Banc de la Reine un *mandamus* enjoignant au conseil d'étudier la demande. L'appelante

exercised its discretion "according to law" and in accordance with the principles reflected in the Act.

Held: The appeal should be allowed.

The failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. The municipality, accordingly, had not only to keep within its statutory mandate but also to consider all factors relevant to its statutory decision-making function. While it quite properly took into consideration the potential flooding problem, it erred in failing to consider the scope of the problem and possible solutions to it. The mere mention of flooding as the decisive factor, accompanied by an obstinate refusal to consider whether or not it was remediable, did not satisfy the requirement that all highly relevant considerations be taken into account. The Council, therefore, did not take proper account of the factors relevant to its statutory mandate and so did not exercise its discretion in accordance with proper principles.

Cases Cited

City of Vancouver v. Simpson, [1977] 1 S.C.R. 71; *Re Municipal Act* (1959), 28 W.W.R. 428; *Westminster Corporation v. London and North Western Railway Co.*, [1905] A.C. 426; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663; *R. v. Paddington Valuation Officer, Ex parte Peachey Property Corp. Ltd.*, [1966] 1 Q.B. 380; *Smith & Rhuland Ltd. v. The Queen ex rel. Brice Andrews*, [1953] 2 S.C.R. 95, referred to.

Statutes and Regulations Cited

Planning Act, 1975 (Man.), c. 29, ss. 1, 60(1), 62(1), as amended; C.C.S.M., c. P80.
Planning Act Regulation, 30/77, ss. 6(1), 7, 11.

APPEAL from a judgment of the Manitoba Court of Appeal (1982), 132 D.L.R. (3d) 119, [1982] 2 W.W.R. 508, 17 Man. R. (2d) 241, 17 M.P.L.R. 80, allowing an appeal from a judgment of the Court of Queen's Bench granting an application for mandamus. Appeal allowed.

forme maintenant un pourvoi contre l'arrêt de la Cour d'appel portant annulation de cette ordonnance. La question en litige est de savoir si le conseil a exercé son pouvoir discrétionnaire «d'une manière conforme à la loi» et en conformité avec les principes énoncés dans celle-ci.

Arrêt: Le pourvoi est accueilli.

L'omission d'un organe de décision administrative de tenir compte d'un élément très important constitue une erreur au même titre que la prise en considération inappropriée d'un facteur extrinsèque. Il incombait donc à la municipalité non seulement de respecter les limites de son mandat légal, mais aussi de prendre en considération tous les facteurs dont elle doit tenir compte en exerçant la fonction de prise de décisions que lui attribue la loi. Même si c'est tout à fait à juste titre qu'elle a pris en considération le problème posé par le risque d'inondations, elle a commis une erreur en ne tenant compte ni de l'ampleur du problème ni de solutions possibles à celui-ci. Il ne suffit pas pour satisfaire à l'exigence que tous les éléments les plus importants soient pris en considération qu'on dise que le danger d'inondations est le facteur décisif tout en refusant obstinément d'examiner s'il est possible d'y remédier. Donc, le conseil n'a pas pris dûment en considération les facteurs dont il doit tenir compte dans l'exercice de son mandat légal et, ainsi, n'a pas exercé son pouvoir discrétionnaire d'une manière conforme aux principes établis.

Jurisprudence

Arrêts mentionnés: *Ville de Vancouver c. Simpson*, [1977] 1 R.C.S. 71; *Re Municipal Act* (1959), 28 W.W.R. 428; *Westminster Corporation v. London and North Western Railway Co.*, [1905] A.C. 426; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Roncarelli v. Duplessis*, [1959] R.C.S. 121; *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663; *R. v. Paddington Valuation Officer, Ex parte Peachey Property Corp. Ltd.*, [1966] 1 Q.B. 380; *Smith & Rhuland Ltd. v. The Queen ex rel. Brice Andrews*, [1953] 2 R.C.S. 95.

Lois et règlements cités

Planning Act, 1975 (Man.), chap. 29, art. 1, 60(1), 62(1) et modifications; C.C.S.M., chap. P80.
Planning Act Regulation, 30/77, art. 6(1), 7, 11.

POURVOI contre un arrêt de la Cour d'appel du Manitoba (1982), 132 D.L.R. (3d) 119, [1982] 2 W.W.R. 508, 17 Man. R. (2d) 241, 17 M.P.L.R. 80, qui a accueilli l'appel d'un jugement de la Cour du Banc de la Reine faisant droit à une demande de *mandamus*. Pourvoi accueilli.

Sidney Green, Q.C., for the appellant.

Richard Scott, Q.C., and *Robert Adkins*, for the respondent.

The judgment of the Court was delivered by

WILSON J.—

I. The Facts

The appellant is a development company which purchased approximately forty acres of land in the respondent municipality in 1973. At the time the lands were purchased they were designated under an existing Town Planning Scheme for subdivision and residential development. "Flood plain areas" were marked on the plan but the appellant's lands were not in a flood plain area. In 1975, after extensive negotiations, the appellant obtained approval from the municipal council for a plan of subdivision permitting it to have six one-acre lots on the northern portion of the forty acres but was denied approval for subdivision of the balance of the lands pending the respondent's giving further consideration to flooding and erosion problems.

On December 1, 1977 the appellant submitted an application for subdivision of the southerly portion of its lands to the Municipal Planning Branch of the provincial government. This application was sent on to the respondent's municipal council for consideration. On June 2, 1978 the solicitors for the municipality wrote to the solicitors for the appellant informing them that the Council was not prepared to entertain the appellant's application because it considered the lands in question to be in a flood prone area making the lands inappropriate for residential development. The appellant was also advised that any proposals aimed at remedying the drainage problems on its land would not be considered since the municipality had no intention of allowing any development on lands prone to periodic flooding. The key portion of the letter reads as follows:

This property is in a flood-prone area, said flooding being obvious to all Councillors concerned and for this

Sidney Green, c.r., pour l'appelante.

Richard Scott, c.r., et *Robert Adkins*, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE WILSON—

I. Les faits

L'appelante, une société de promotion immobilière, s'est portée acquéreur en 1973 d'un terrain d'une quarantaine d'acres situé dans la municipalité intimée. Le plan d'aménagement urbain en vigueur à l'époque prévoyait le lotissement du terrain en vue de la construction de logements. Le plan indiquait les [TRADUCTION] «terres inondables», mais le bien-fonds de l'appelante n'en faisait pas partie. En 1975, à la suite de longues négociations, l'appelante a obtenu du conseil municipal l'approbation d'un plan de lotissement qui créait six lots d'un acre à l'extrémité nord des quarante acres. Le conseil a toutefois refusé d'approuver le morcellement du reste du bien-fonds tant que l'intimée n'aurait pas examiné plus à fond les problèmes posés par les inondations et l'érosion.

Le 1er décembre 1977, l'appelante a présenté à la Direction de l'urbanisme du gouvernement provincial une demande d'autorisation de lotissement relative à la partie sud du bien-fonds en cause. La Direction de l'urbanisme a soumis cette demande à l'examen du conseil municipal de l'intimée. Le 2 juin 1978, les avocats de la municipalité ont adressé aux avocats de l'appelante une lettre portant que le conseil n'était pas prêt à étudier la demande de l'appelante parce que, selon lui, les terres en question étaient inondables et, partant, impropres à la construction d'habitations. On a en outre fait savoir à l'appelante qu'aucune proposition visant à résoudre les problèmes de drainage sur ses terres ne serait examinée puisque la municipalité n'avait pas l'intention de permettre l'aménagement de terres exposées au risque d'inondations périodiques. La partie essentielle de la lettre est ainsi conçue:

[TRADUCTION] La zone dans laquelle se trouve ce bien-fonds est sujette aux inondations. Le danger d'inonda-

reason, they are not prepared to entertain application for subdivision in respect to this property.

The fact that you may obtain engineer's reports in respect to such development will not affect the decision of the Council as the original Plan of Subdivision was granted clearly on the understanding that no further development would be allowed in the lower area.

This communication was followed nine months later, in March of 1979, by the passing of a formal resolution by Council denying approval of the subdivision application. The appellant was notified of this resolution by letter dated March 27, 1979 from the province's Municipal Planning Branch. It is this rejection, which the appellant alleges was arbitrary and without lawful authority, that has given rise to the present litigation.

II. The Courts Below

The appellant brought an action against the municipality in the Manitoba Court of Queen's Bench. In its statement of claim the appellant sought two distinct remedies for the abuse of discretion which it alleged against the Council: (a) a declaration that its lands are entitled to be developed; and (b) an order of mandamus requiring the Council to entertain an application for subdivision approval and to impose only those conditions which will facilitate development of the lands in accordance with the existing Town Planning Scheme. As the alternative remedies tend to indicate, the appellant challenged the Council's exercise of discretion on several different levels, including the factors which it took into account in reaching the decision as well as the way in which the decision was actually made.

At trial the appellant was successful in obtaining an order requiring the municipality to hear and determine the application for subdivision approval that was originally submitted by the appellant on December 1, 1977. Wright J. found that the Council's refusal to entertain the application had been based on its perception of potential flooding problems on the appellant's land and that the Council had thereby exceeded the statutory scope of its discretion. As counsel for the municipality could not point him to any reference to flooding problems in the relevant sections of *The Planning Act*,

tions est à ce point évident que les conseillers ne sont disposés à étudier aucune demande de lotissement relative audit bien-fonds.

Même si votre projet d'aménagement était appuyé du rapport d'un ingénieur-conseil, le conseil ne modifierait pas sa décision parce que le plan initial de lotissement a été approuvé à la condition expresse qu'aucun lotissement ne serait permis dans la partie basse.

Neuf mois plus tard, en mars 1979, le conseil municipal a adopté une résolution qui rejetait la demande d'autorisation de lotissement. Cette résolution a été notifiée à l'appelante dans une lettre datée du 27 mars 1979, émanant de la Direction de l'urbanisme de la province. L'appelante allègue qu'il s'agit d'un rejet arbitraire, sans fondement en droit; d'où le présent litige.

II. Les tribunaux d'instance inférieure

L'appelante a poursuivi la municipalité devant la Cour du Banc de la Reine du Manitoba. Elle affirme dans sa déclaration que le conseil municipal a abusé de son pouvoir discrétionnaire et demande en conséquence deux redressements distincts: a) une déclaration portant qu'elle a le droit d'aménager son bien-fonds; et b) une ordonnance de *mandamus* qui obligerait le conseil à étudier une demande d'autorisation de lotissement et à n'imposer que les conditions nécessaires pour que l'aménagement des terres respecte le plan d'aménagement urbain existant. Comme l'indiquent les redressements demandés, l'appelante conteste plusieurs aspects de l'exercice du pouvoir. Elle trouve notamment à redire aux facteurs sur lesquels le conseil a fondé sa décision et à la façon dont celle-ci a été prise.

En première instance, l'appelante a obtenu une ordonnance exigeant que la municipalité entende la demande d'autorisation de lotissement initialement présentée le 1er décembre 1977 et qu'elle rende une décision sur cette demande. Le juge Wright a conclu que le conseil avait fondé son refus d'étudier la demande sur son évaluation du risque d'inondations auquel était exposé le bien-fonds de l'appelante et qu'en cela il avait excédé le pouvoir discrétionnaire que lui conférait la loi. Puisque l'avocat de la municipalité n'a pu signaler d'articles pertinents de *The Planning Act*, 1975

1975 (Man.), c. 29, as amended, C.C.S.M., c. P80, he concluded that this was an improper consideration for the municipality to take into account. Accordingly, the mandatory order was issued although it was not accompanied by the declaratory relief sought by the appellant. The respondent was ordered to entertain the application and to premise its decision only on those considerations specified as appropriate by the governing legislation. The Council was still free to decline to grant its approval.

The Manitoba Court of Appeal allowed the municipality's appeal. Hall J.A. (with whom Freedman C.J.M. concurred) indicated that the pertinent sections of *The Planning Act* and regulations thereunder made it clear that, provided the municipality acted in good faith, concern over flooding could properly be a consideration on which disapproval of an application was premised. The decision of this Court in *City of Vancouver v. Simpson*, [1977] 1 S.C.R. 71, was cited for the proposition that there are a variety of reasons why municipalities should have control over the planning of local subdivisions and that the courts should not lightly interfere with decisions of the responsible city officials. Since the municipality was not seen by Hall J.A. as having exceeded or abused its jurisdiction or authority in taking the flooding problem into consideration and since there was no evidence that the resolution was passed in other than good faith, the trial judge's order was reversed.

O'Sullivan J.A. concurred in this result but wrote separate reasons in which he drew a distinction between the respondent's solicitors' initial letter to the appellant and its eventual resolution denying the application for subdivision. He reasoned that the respondent's initial refusal to entertain the application no matter what proposal or evidence such an application might contain might well have justified an order of mandamus. Although *The Planning Act* was seen as giving the Council a wide discretion in refusing subdivision approval, it probably made mandatory the con-

(Man.), chap. 29 et modifications, C.C.S.M., chap. P80, relatifs aux problèmes d'inondations, le juge Wright est arrivé à la conclusion qu'il s'agissait là d'un facteur dont la municipalité ne pouvait à bon droit tenir compte. Par conséquent, une ordonnance de *mandamus* a été rendue, bien qu'elle ne fût pas assortie de la déclaration sollicitée par l'appelante. Il a donc été ordonné à l'intimée d'étudier la demande et de ne fonder sa décision que sur les considérations données pour pertinentes dans la loi applicable. Bien sûr, le conseil conservait toute latitude pour ne pas accorder son approbation.

La Cour d'appel du Manitoba a accueilli l'appel interjeté par la municipalité. Le juge Hall (à l'avis duquel le juge en chef Freedman s'est rangé) a indiqué qu'il ressort nettement des articles pertinents de *The Planning Act* et de son règlement d'application qu'à condition qu'elle soit de bonne foi, une municipalité peut à bon droit invoquer le risque d'inondations pour rejeter une demande. On a cité l'arrêt de cette Cour *Ville de Vancouver c. Simpson*, [1977] 1 R.C.S. 71, à l'appui du point de vue selon lequel les municipalités doivent, pour plusieurs raisons, avoir la haute main sur la planification des lotissements locaux et selon lequel les tribunaux ne doivent pas, sans motifs sérieux, modifier les décisions des édiles municipaux. Puisque, de l'avis du juge Hall, la prise en considération du risque d'inondations ne constituait ni un excès ni un abus de compétence ou du pouvoir de la municipalité, et puisque la preuve n'établit pas que la municipalité a agi autrement que de bonne foi en adoptant la résolution, l'ordonnance du premier juge a été annulée.

Le juge O'Sullivan, d'accord quant au résultat, a rédigé des motifs distincts dans lesquels il fait une distinction entre la première lettre adressée à l'appelante par les avocats de l'intimée et la résolution ultérieure par laquelle l'intimée a rejeté la demande d'autorisation de lotissement. Selon le juge O'Sullivan, le refus initial de l'intimée d'étudier la demande, peu importe les propositions ou les éléments de preuve que celle-ci pouvait contenir, aurait très bien pu donner lieu à une ordonnance de *mandamus*. Bien que, de l'avis du juge, *The Planning Act* confère au conseil municipal un

sideration of each application. However, subsequent to this initial response the respondent had actually heard and considered the appellant's application and the resolution denying approval represented a determination of the application which was within the scope of the respondent's discretion. Accordingly, O'Sullivan J. A. joined in the court's reversal of the trial judge's order that the application be entertained by the municipality.

III. The Statutory Framework

In assessing the position of a landowner applying to local municipal authorities for subdivision approval one must be conscious of the fact that the requirement of subdivision approval arises only by virtue of statute. The position at common law was succinctly stated by Wilson J. of the Supreme Court of British Columbia to the effect that "the right to subdivide real property, to sell a part rather than the whole, is an ordinary incident of ownership": *Re Municipal Act* (1959), 28 W.W.R. 428. The subdivision approval process operates, therefore, as a curtailment of common law rights and must be specifically authorized under the governing legislation.

In Manitoba the common law right to subdivide is restricted by s. 60(1) of *The Planning Act* which stipulates that any subdivision of a parcel of real estate in order to be valid must be "approved by the approving authority". The authoritative body referred to in s. 60(1) is defined in s. 1 of the Act as follows:

> **1** In this Act,
>
> (a) "approving authority" means
>
> (i) the minister; or
>
> (ii) the board of a district that is authorized by an order of the minister to act as an approving authority within the area of jurisdiction of the board, or
>
> (iii) the council of a municipality that is authorized by an order of the minister to act as an approving authority for that municipality, or

large pouvoir discrétionnaire en matière de refus d'autorisation de lotissement, il rendait probablement obligatoire l'examen de chaque demande. Toutefois, à la suite de sa première décision, l'intimée a étudié la demande de l'appelante et la résolution la rejetant constituait une décision relevant du pouvoir discrétionnaire de l'intimée. En conséquence, le juge O'Sullivan s'est joint à ses collègues, qui ont annulé l'ordonnance du premier juge exigeant que la municipalité étudie la demande.

III. Le cadre légal

Dans toute analyse de la situation d'un propriétaire foncier qui adresse aux autorités municipales locales une demande d'autorisation de lotissement, on ne doit pas perdre de vue que l'exigence d'une autorisation est une condition purement légale. Or, la règle de la *common law*, succinctement formulée par le juge Wilson de la Cour suprême de la Colombie-Britannique, porte que [TRADUCTION] «le droit de propriété comporte normalement le droit de morceler un bien-fonds, d'en vendre une partie seulement»: *Re Municipal Act* (1959), 28 W.W.R. 428. Il y a donc, en matière d'autorisation de lotissement, une restriction des droits de *common law* qui doit être expressément prévue par la loi pertinente.

Au Manitoba, la portée du droit reconnu par la *common law* de lotir un terrain est restreinte par *The Planning Act* dont le par. 60(1) dispose que tout projet de lotissement doit être [TRADUCTION] «approuvé par les autorités compétentes». L'organe en question mentionné au par. 60(1) est défini à l'art. 1 de la loi:

> [TRADUCTION] **1** Dans la présente loi,
>
> a) «autorités compétentes» désigne
>
> (i) le ministre, ou
>
> (ii) tout conseil de district autorisé par un arrêté du ministre à exercer un pouvoir d'approbation dans la région relevant de sa juridiction, ou
>
> (iii) le conseil d'une municipalité autorisé par un arrêté du ministre à exercer un pouvoir d'approbation dans les limites de cette municipalité, ou

(q) "minister" means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act;

In the case of the respondent municipality the provincial government has not exercised its discretion to delegate the function of acting as the ultimate approving authority. Rather, it would appear that this function is carried out by the provincial Department of Municipal Affairs which receives all applications for subdivision and processes them in accordance with the provisions of *The Planning Act* and the regulations passed thereunder. The first step in this process entails consultation with an assortment of other provincial authorities in order to ensure that the proposed subdivision is in conformity with land use planning generally in the area. Section 6 of Regulation 30/77 under *The Planning Act* provides:

6. (1) Before approving an application an approving authority may refer it to and request the comments of

(a) the Department of Highways;

(b) the Department of Agriculture;

(c) the Environmental Management Division and the Water Resources Division of the Department of Mines, Resources and Environmental Management;

(d) the Department of Tourism and Recreation;

(e) the Manitoba Hydro-Electric Board;

(f) the Manitoba Telephone System;

(g) the appropriate School Division;

(h) Central Mortgage and Housing Corporation; or

(i) any other authority, agency, department, council, or board that in the opinion of the approving authority might be affected by the proposed subdivision.

The evidence discloses that after receiving the appellant's application on December 1, 1977, the Municipal Planning Branch of the Department of Municipal Affairs did in fact circulate the application among the various provincial departments as authorized by the regulation. Although most of the departments consulted appear to have either approved the subdivision or been disinclined to offer any comment one way or another, the most significant response was the negative assessment

q) «ministre» désigne le membre du conseil exécutif chargé par le lieutenant-gouverneur en conseil de l'application de la présente loi;

Dans le cas de la municipalité intimée, le gouvernement provincial n'a pas exercé son pouvoir discrétionnaire pour déléguer le pouvoir d'approbation en dernier ressort. Au contraire, il appert que cette fonction est remplie par le ministère provincial des Affaires municipales qui reçoit toutes les demandes d'autorisation de lotissement et qui les examine conformément aux dispositions de *The Planning Act* et de son règlement d'application. Ce processus comporte dans un premier temps la consultation d'une série d'autres autorités provinciales afin de s'assurer de la conformité du projet de lotissement avec les plans généraux d'aménagement foncier pour le secteur en question. L'article 6 du règlement 30/77, pris en vertu de *The Planning Act*, porte:

[TRADUCTION] 6. (1) Avant d'accorder l'autorisation, les autorités compétentes peuvent demander avis

a) au ministère de la Voirie;

b) au ministère de l'Agriculture;

c) à la Division de la gestion de l'environnement et à la Division des ressources en eau du ministère des Mines, des Ressources et de la Gestion de l'environnement;

d) au ministère du Tourisme et de la Récréation;

e) à la Commission hydro-électrique du Manitoba;

f) au Réseau téléphonique du Manitoba;

g) à la division scolaire appropriée;

h) à la Société centrale d'hypothèques et de logement; ou

i) à tous les autres autorités, organismes, ministères, conseils ou commissions qui, de l'avis des autorités compétentes, pourront être touchés par le projet de lotissement.

Il ressort de la preuve que, après avoir reçu la demande de l'appelante le 1er décembre 1977, la Direction de l'urbanisme municipal du ministère des Affaires municipales l'a fait circuler parmi les différents organismes provinciaux comme le prévoit le règlement. Bien que la majorité des organismes consultés paraissent soit avoir approuvé le projet de lotissement soit s'être abstenus de tout commentaire, la réaction la plus importante a été la réponse négative de la Division des ressources en

submitted by the province's Water Resources Division. By inter-departmental memo dated April 6, 1978, the Director of Planning of this Division indicated to the Municipal Planning Branch that the proposed subdivision site was subject to erosion problems and to potential flooding by the nearby Assiniboine River.

The next step in the application assessment and approval process is to forward the application to the Council of the municipality in which the lands are situated. Although the consultation process with the other provincial government departments is optional on the part of the approving authority, the referral of the application to the local municipal council for approval is mandatory under the legislation. Section 7 of the Regulation 30/77 stipulates:

> 7. (1) The approving authority shall refer the application, together with a summary of comments received under section 6, to the council of the municipality in which the proposed subdivision is situated.
>
> (2) The council may, by resolution, give its approval to the proposed subdivision, with or without conditions, or reject it.
>
> (3) The council shall forthwith submit a copy of such resolution to the approving authority.

The mandatory nature of the approving authority's submission of each application to the local municipal council is made even stronger by *The Planning Act* itself, which makes municipal approval a prerequisite for subdivision approval. Section 62(1) of the Act provides, *inter alia*:

> **62(1)** A subdivision of land shall not be approved unless
>
> . . .
>
> (b) the council of the municipality in which the land proposed for subdivision is located, has by resolution given its approval, with or without conditions;

Accordingly, it is clear that whether or not the province has in a given case delegated the role of ultimate approving authority to the municipal council, the approval by resolution of this Council to any application for subdivision of lands located

eau. Par une note interne en date du 6 avril 1978, le directeur de la planification de cette Division, a signalé à la Direction de l'urbanisme municipal que l'emplacement choisi pour le projet de lotissement était sujet à des problèmes d'érosion et à des risques d'inondations dues à la proximité de la rivière Assiniboine.

L'étape suivante du processus d'examen d'une demande d'autorisation consiste à la faire parvenir au conseil de la municipalité où sont situées les terres en question. Quoique la consultation des autres organismes gouvernementaux provinciaux soit facultative, les autorités compétentes sont tenues de soumettre la demande à l'approbation du conseil municipal local. L'article 7 du Règlement 30/77 est ainsi rédigé:

> [TRADUCTION]
>
> 7. (1) Les autorités compétentes doivent renvoyer la demande, ainsi qu'un résumé des observations obtenues en vertu de l'article 6, au conseil de la municipalité où le lotissement projeté est situé.
>
> (2) Le conseil peut, par voie de résolution, approuver, avec ou sans condition, le projet de lotissement ou le rejeter.
>
> (3) Le conseil doit immédiatement faire tenir aux autorités compétentes copie de cette résolution.

L'obligation qu'ont les autorités compétentes de soumettre chaque demande au conseil municipal local est renforcée par *The Planning Act* elle-même, qui fait de l'approbation de la municipalité une condition préalable de l'autorisation de lotissement. Le paragraphe 62(1) de la Loi porte notamment:

> [TRADUCTION] **62(1)** Un projet de lotissement ne doit pas être approuvé, à moins
>
> . . .
>
> b) que le conseil de la municipalité dans laquelle se trouvent les terres visées par le projet de lotissement n'ait pris de résolution l'approuvant, avec ou sans condition;

Il est donc clair que, dans un cas donné, indépendamment de toute délégation par la province au conseil municipal du pouvoir d'approuver un lotissement en dernier ressort, le conseil doit nécessairement donner son approbation, par voie de

within the municipal boundaries is required. In the case at bar, the provincial government department which received the application and consulted with other branches of the provincial government as to its merits, proceeded to refer the matter to the respondent for Council's approval. This procedure not only appears to have been appropriate but is precisely the decision-making route stipulated by the governing legislation.

As noted above, the learned trial judge found that the concern over flooding was an improper consideration for the Council to take into account. With respect, this conclusion does not appear to be defensible upon an examination of the Act and regulations under which approval is required. First, the very fact that the scheme provides for consultation with provincial departments such as the Water Resources Division, and that their views are then passed on to the municipal council, would seem to indicate that the concerns of such departments (*i.e.*, drainage and flooding in this case) are meant to be taken into consideration when an application is evaluated by the Council. Perhaps even more significant, however, is the fact that specific evaluation standards have been set out in Regulation 30/77 and that soil erosion, drainage, and flooding problems figure prominently in the detailed list of relevant factors. Section 11 of the Regulation reads:

11. All land proposed to be subdivided shall be suited or capable of being efficiently adapted to the purpose for which the subdivision is intended, having regard, inter alia, to

(a) topography;
(b) soil characteristics;
(c) surface and sub-surface drainage;
(d) potential flooding, subsidence, landslides and erosion;
(e) existing and prospective uses of land in the vicinity;
(f) layout of streets and lanes;
(g) provision of services;
(h) distinction between pedestrian and vehicular traffic;

résolution, à tout projet de lotissement de terres situées dans les limites de la municipalité. Dans la présente instance, l'organisme gouvernemental provincial, qui a reçu la demande et consulté d'autres organismes gouvernementaux provinciaux sur son bien-fondé, a soumis le projet à l'approbation du conseil de l'intimée. Non seulement cette mesure paraît-elle avoir été appropriée dans les circonstances, mais c'est exactement le processus décisionnel prévu par la législation pertinente.

Comme nous l'avons déjà signalé, le savant juge de première instance a conclu que le conseil ne pouvait à bon droit prendre en considéraion le risque d'inondations. Avec égards, cette conclusion paraît indéfendable compte tenu de la Loi et de son règlement d'application qui posent l'exigence de l'approbation. En premier lieu, le simple fait que la consultation d'organismes provinciaux tels que la Division des ressources en eau soit prévue, et que leurs avis soient ensuite transmis au conseil municipal, semble indiquer que les préoccupations de ces organismes (en l'occurrence, le drainage et les inondations) doivent être prises en considération par le conseil lorsqu'il examine une demande. Il y a toutefois un point encore plus important, savoir que le Règlement 30/77 établit des normes précises d'évaluation et que sur la liste détaillée de facteurs pertinents figurent en évidence les problèmes reliés à l'érosion du sol, au drainage et aux inondations. L'article 11 du règlement est ainsi conçu:

[TRADUCTION]

11. Tout bien-fonds visé par un projet de lotissement doit se prêter ou pouvoir être efficacement adapté au but du lotissement, compte tenu notamment

a) de la topographie;
b) des caractéristiques du sol;
c) du drainage de surface et du drainage souterrain;
d) de l'éventualité d'inondations, de tassements du sol, de glissements de terrain et d'érosion;
e) des utilisations actuelles et futures des terres avoisinantes;
f) de la disposition des rues et des voies d'accès;
g) de la viabilisation;
h) de la distinction entre la circulation piétonnière et la circulation automobile;

(i) segregation of traffic flow as between major thoroughfares and minor streets;

(j) convenience of access;

(k) dimensions, shape and orientation of each lot;

(l) view and aspect of each lot;

(m) protection against pollution; and

(n) anticipated need for school sites, recreational facilities and parks.

The first four standards relate directly to the type of flooding and drainage problems with which the Water Resources Division was concerned and which formed the basis of the Council's rejection of the appellant's application. Clearly, then, it cannot be said that taking flooding problems into account represented the importation of an improper consideration into the Council's decision.

IV. Grounds for Review

As the respondent points out, the general rule regarding interference with the discretionary decisions made by administrative bodies acting under statutory authority has been one of deference. Lord Halsbury stated in *Westminster Corporation v. London and North Western Railway Co.*, [1905] A.C. 426, at p. 427:

> Assuming the thing done to be within the discretion of the local authority, no Court has power to interfere with the mode in which it has exercised it. Where the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorized . . . .

More recently, and dealing specifically with applications for subdivision, the Supreme Court of Canada in *City of Vancouver v. Simpson*, *supra*, at p. 76, approved the following statement of Kirke Smith J. in the Court below:

> Where, as here, there is direct statutory foundation for the ground given for the decision to approve or disapprove, and where it is not shown that that decision, despite its impact on an individual, was made in bad faith, or with the intention of discriminating against that individual, or on a specious or totally inadequate factual basis, there should, in my opinion, be no interference by

i) du partage de la circulation entre les artères principales et les rues secondaires;

j) de la facilité d'accès;

k) des dimensions, de la configuration et de l'orientation de chaque lot;

l) de la situation et de l'exposition de chaque lot;

m) de la protection contre la pollution; et

n) du besoin éventuel d'emplacements pour des écoles, d'installations récréatives et de parcs.

Les quatre normes figurant en tête de liste se rapportent directement au type de risques d'inondations et de problèmes de drainage qui inquiétait la Division des ressources en eau et qui a motivé la décision du conseil de rejeter la demande de l'appelante. Il est donc clair qu'on ne peut pas dire que la prise en considération par le conseil du risque d'inondation a été de quelque façon inappropriée.

IV. Motifs d'examen

Comme le souligne l'intimée, les tribunaux se sont montrés en règle générale réticents à modifier les décisions prises par des corps administratifs dans l'exercice d'un pouvoir discrétionnaire qui leur a été conféré par la loi. Lord Halsbury affirme dans l'arrêt *Westminster Corporation v. London and North Western Railway Co.*, [1905] A.C. 426, à la p. 427:

> [TRADUCTION] À supposer que l'acte accompli relève du pouvoir discrétionnaire des autorités locales, nul tribunal ne peut modifier la façon dont il a été exercé. Lorsque le législateur confie le pouvoir à un organisme donné, avec une discrétion d'exercice, il n'appartient pas au tribunal de contester ce pouvoir discrétionnaire. Cela suppose évidemment que l'acte accompli a été bel et bien autorisé par le législateur . . .

Plus récemment, dans l'arrêt *Ville de Vancouver c. Simpson*, précité, à la p. 76, la Cour suprême du Canada, se prononçant sur la question précise des demandes d'autorisation de lotissement, a approuvé la déclaration suivante faite en première instance par le juge Kirke Smith:

> [TRADUCTION] Lorsque, comme en l'espèce, le motif invoqué dans l'approbation ou le rejet se fonde directement sur un texte législatif, et lorsqu'il n'est pas démontré que cette décision, malgré l'effet qu'elle peut avoir à l'égard d'un particulier, a été prise de mauvaise foi ou témoigne de partialité contre celui-ci, ou qu'elle repose sur des faits spécieux ou totalement insuffisants, la cour

the court with municipal officials honestly endeavouring to comply with the duties imposed on them by the Legislature in planning the coherent and logical development of their areas.

There are no allegations of bad faith or discrimination in this case. The question before the Court, in essence, is whether the Council exercised its discretion "according to law" and in accordance with proper principles reflected in the "policy and objects of the [governing] Act": *per* Lord Reid in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997, at pp. 1030, 1034. More specifically, was it entitled to consider the potential flooding problem and make it the ground of its decision to refuse approval of the subdivision? As Rand J. said in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, any discretionary administrative decision must "be based upon a weighing of considerations pertinent to the object of the administration". For the reasons already given I am of the view that the Council was entitled to take the flooding problem into consideration. The issue does not, however, end there. As Lord Denning pointed out in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, at p. 693, the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. In *R. v. Paddington Valuation Officer, Ex parte Peachey Property Corp. Ltd.*, [1966] 1 Q.B. 380 (C.A.), where a property owner applied for a quashing of what was alleged to have been an erroneous municipal tax assessment, Danckwerts L.J. noted at p. 414:

> In order to succeed in their application for an order of mandamus and certiorari, the appellants have to show that the valuation officer of the borough council has gone wrong in law in such a way as to render the valuation list invalid, because he has taken into consideration matters which were not proper to be regarded, or has omitted to consider matters which were of direct

ne doit pas, à mon avis, modifier les décisions des fonctionnaires municipaux qui essaient honnêtement de remplir les devoirs que la loi leur impose en planifiant l'aménagement de leur secteur de façon cohérente et logique.

Or, en l'espèce, on n'allègue ni mauvaise foi ni partialité. La question dont la Cour se trouve saisie est essentiellement de savoir si le conseil a exercé son pouvoir discrétionnaire [TRADUCTION] «légalement» et d'une manière conforme aux principes qui se dégagent de [TRADUCTION] «la politique et des objets énoncés dans la Loi» applicable: lord Reid dans l'arrêt *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997, aux pp. 1030 et 1034. Plus précisément, le conseil était-il autorisé à tenir compte de la possibilité d'inondations et à fonder sur cette possibilité sa décision de rejeter la demande d'autorisation de lotissement? Comme le fait remarquer le juge Rand dans l'arrêt *Roncarelli v. Duplessis*, [1959] R.C.S. 121, à la p. 140, toute décision administrative résultant de l'exercice d'un pouvoir discrétionnaire doit [TRADUCTION] «se fonder sur l'examen des considérations reliées à l'objet de cette administration». Pour les motifs que j'ai déjà exposés, j'estime que le conseil avait le droit de tenir compte du problème posé par la possibilité d'inondations. Cela ne règle toutefois pas le litige. Comme lord Denning l'a affirmé dans l'arrêt *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663, à la p. 693, l'omission d'un organe de décision administrative de tenir compte d'un élément très important constitue une erreur au même titre que la prise en considération inappropriée d'un facteur étranger à l'affaire. Dans l'arrêt *R. v. Paddington Valuation Officer, Ex parte Peachey Property Corp. Ltd.*, [1966] 1 Q.B. 380 (C.A.), un propriétaire foncier a demandé l'annulation d'une cotisation d'impôt municipal qui, selon lui, était entachée d'une erreur. Le lord juge Danckwerts a fait remarquer, à la p. 414:

> [TRADUCTION] Si elle veut que sa demande d'ordonnance de *mandamus* et de *certiorari* soit accueillie, l'appelante doit établir que l'estimateur du conseil municipal a erré en droit de façon à invalider le rôle d'évaluation parce qu'il a pris en considération ce dont il n'aurait pas dû tenir compte ou qu'il a omis des facteurs qui se rapportaient directement à la détermination de la valeur

importance in ascertaining the values to be put upon the hereditaments.

The respondent municipality, therefore, must be seen not only to have restricted its gaze to factors within its statutory mandate but must also be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.

In the Manitoba Court of Appeal, O'Sullivan J.A. highlighted what is really the central concern here when he indicated that the letter which the appellant received from the respondent's solicitors in June of 1978 reflected the failure of the municipal council to entertain the appellant's application on its merits. Although from a procedural point of view this defect was later remedied by the Council's passing of a formal resolution denying the appellant's application to subdivide his land, in substance the decision does not reflect any consideration of the factors relevant to the subdivision application. Indeed, the evidence would appear to indicate a conscious refusal on the part of the respondent to consider any factors relevant to the drainage and flooding problems perceived to be present on the appellant's lands. At trial, Wright J. found as a fact that the municipality gave no consideration whatsoever to the seriousness of the flooding problem or the extent to which it might be remediable and that it refused to entertain any pertinent information of this nature "due to its belief that the land should not be subdivided under any circumstances".

Once flooding became the crucial factor in the Council's evaluation of the appellant's application, it was, in my view incumbent upon it to evaluate the scope of the flooding problem and possible solutions to it. The mere mention of flooding as the decisive factor, accompanied by an obstinate refusal to consider whether or not it was remediable, cannot be said to satisfy the requirement that all highly relevant considerations be taken into account. More specifically, Wright J. found that the respondent "did not give consideration to ways and means by which problems that could arise from flooding could reasonably be dealt". The argument of the respondent that the engineering

des biens-fonds.

Il faut donc non seulement que la municipalité intimée ait tenu compte uniquement de facteurs qui relèvent de la compétence que lui a conférée la loi, mais aussi qu'elle ait pris en considération tous les facteurs dont elle doit tenir compte pour bien remplir la fonction de prise de décisions qu'elle a aux termes de la loi.

En Cour d'appel du Manitoba, le juge O'Sullivan a souligné ce qui est en réalité la question principale en l'espèce lorsqu'il a dit que la lettre que les avocats de l'intimée ont fait tenir à l'appelante en juin 1978 manifeste le refus du conseil municipal d'étudier le fond de la demande de l'appelante. Du point de vue de la procédure, le conseil a ultérieurement corrigé ce vice par voie de résolution rejetant la demande de lotissement des terrains de l'appelante. Sur le fond, toutefois, la décision ne traduit aucune prise en considération des facteurs qui se rapportent à ladite demande. En fait, il paraît se dégager de la preuve que l'intimée a refusé consciemment de tenir compte de tout facteur touchant les problèmes relatifs au drainage et aux inondations que présenterait le bien-fonds de l'appelante. En première instance, le juge Wright a conclu que la municipalité n'a pas du tout examiné la gravité du risque d'inondations ni dans quelle mesure on pourrait y remédier et qu'elle a refusé de recevoir des données relatives à ces points [TRADUCTION] «parce qu'elle était convaincue que le bien-fonds ne devait dans aucun cas être loti».

Selon moi, du moment que le Conseil a retenu le risque d'inondations comme facteur décisif dans son étude de la demande de l'appelante, il lui incombait d'évaluer l'ampleur du problème et les solutions possibles. Il ne suffit pas pour satisfaire à l'exigence que tous les éléments hautement importants soient pris en considération qu'on dise que le risque d'inondations est le facteur décisif tout en refusant obstinément d'examiner s'il est possible d'y remédier. Plus précisément, le juge Wright a conclu que l'intimée [TRADUCTION] «n'a pas tenu compte des moyens par lesquels on pouvait raisonnablement résoudre les problèmes que pourraient entraîner les inondations». Lorsque l'intimée fait

reports and proposed solutions which the appellant wanted to put forward were somehow inaccurate or ineffective to solve the flooding problem misses the point of the trial judge's finding. All the evidence supports the finding that the Council refused to hear any information whatsoever regarding the potential flooding problem and therefore failed to take proper account of factors relevant to its statutory mandate. This finding leads inevitably to the conclusion that the respondent failed to exercise its discretion in accordance with proper principles.

V. The Appellant's Remedy

It is, of course, not for this Court to address the merits of the appellant's application for subdivision or to substitute its own decision for that of the municipal council. As Cartwright J. pointed out in *Smith & Rhuland Ltd. v. The Queen ex rel. Brice Andrews*, [1953] 2 S.C.R. 95, at p. 107, the courts recognize that the Legislature has conferred the discretionary power of decision on the administrative body under review and not on the courts. In its review capacity, it is the Court's function merely to ensure that the decision is properly made within the statutory framework and on the basis of considerations relevant to the decision-making function with which the administrative body is charged.

The appropriate remedy in such a case, therefore, is for the matter to be sent back to the respondent for the Council to hear and determine the appellant's application on proper principles. Accordingly, although these reasons differ from those of the trial judge in that the improper exercise of discretion is based on the failure to take into account all relevant considerations rather than on the taking into account of an improper consideration, the result is the same as that reached by the trial judge. Whereas flooding is indeed a proper consideration for the municipal council to take into account in evaluating an application for subdivision, the factors relevant to the potential flooding problem including, for example, the extent to which it is remediable by the appellant must equally be taken into account.

valoir que les rapports d'ingénieur-conseil sont inexacts et que les solutions proposées par l'appelante ne régleront pas le problème posé par les inondations, elle passe à côté de la conclusion du premier juge. Tous les éléments de preuve appuient la conclusion que le conseil a refusé de recevoir quelque donnée que ce soit concernant le risque d'inondations et que, par conséquent, il a omis de prendre en considération des facteurs pertinents à l'exercice de son mandat légal. Cela conduit inévitablement à la conclusion que l'intimée n'a pas exercé son pouvoir discrétionnaire d'une manière conforme aux principes établis.

V. Le recours de l'appelante

Bien entendu, il n'appartient pas à cette Cour de se prononcer sur le fond de la demande d'autorisation de lotissement présentée par l'appelante, ni de substituer sa propre décision à celle du conseil municipal. Comme le dit le juge Cartwright dans l'arrêt *Smith & Rhuland Ltd. v. The Queen ex rel. Brice Andrews*, [1953] 2 R.C.S. 95, à la p. 107, les cours reconnaissent que ce n'est pas à elles mais au corps administratif en cause que le législateur a conféré le pouvoir discrétionnaire de prendre une décision. Lorsque la Cour procède à l'examen d'une décision, son rôle consiste simplement à s'assurer qu'il s'agit d'une décision prise conformément aux textes de loi et fondée sur des facteurs qui relèvent de la fonction décisionnelle dont le corps administratif est chargé.

En pareil cas, il convient donc de renvoyer l'affaire à l'intimée pour que le conseil municipal puisse entendre la demande de l'appelante et rendre une décision en suivant les principes appropriés. Par conséquent, bien que les présents motifs diffèrent de ceux du juge de première instance puisque l'exercice inapproprié du pouvoir discrétionnaire repose sur l'omission de prendre en considération tous les facteurs pertinents plutôt que sur la prise en considération d'un facteur inapproprié, le résultat est le même dans les deux cas. Certes, le risque d'inondations est un facteur dont le conseil municipal peut à bon droit tenir compte dans son évaluation d'une demande d'autorisation de lotissement, mais il doit aussi prendre en considération les facteurs qui se rapportent à ce risque, par exemple, la possibilité pour l'appelante de remédier au problème.

It may be noted that despite the substantial lapse of time since the appellant's application was initially submitted, no particular hardship is worked on the respondent by virtue of its being ordered at this date to reconsider the appellant's application. Indeed, the respondent concedes that it has been open all along to the appellant to submit a new application for subdivision which will be considered on its merits and it would appear that the appellant's reluctance to do so until now simply reflects a desire to ascertain those considerations which may be taken into account in the evaluation of any future application. Accordingly, the appeal should be allowed and the trial judge's order that "the Defendant (Respondent) hear and determine, according to law, an application for approval of subdivision submitted by the Plaintiff (Appellant)" should be restored. The appellant is entitled to its costs both here and in the courts below.

Appeal allowed with costs.

Solicitor for the appellant: Sidney Green, Winnipeg.

Solicitors for the respondent: Thompson, Dorfman, Sweatman, Winnipeg.

Notons que, malgré le laps de temps considérable qui s'est écoulé depuis que l'appelante a présenté sa demande, on ne porte aucun préjudice grave à l'intimée si on lui ordonne, à ce stade-ci, de réexaminer la demande de l'appelante. L'intimée reconnaît d'ailleurs que l'appelante a toujours eu la possibilité de présenter une nouvelle demande d'autorisation de lotissement qui sera examinée au fond et il semble que, si l'appelante s'est jusqu'à présent montrée réticente à le faire, cela tient simplement à son désir d'être fixée sur les facteurs dont on pourra tenir compte dans l'examen de toute demande future. Il s'ensuit que le pourvoi doit être accueilli et qu'il y a lieu de rétablir l'ordonnance du premier juge portant que «la défenderesse (intimée) doit, d'une manière conforme à la loi, entendre la demande d'autorisation de lotissement présentée par la demanderesse (appelante) et rendre une décision sur cette demande». L'appelante a droit à ses dépens en cette Cour et dans les cours d'instance inférieure.

Pourvoi accueilli avec dépens.

Procureur de l'appelante: Sidney Green, Winnipeg.

Procureurs de l'intimée: Thompson, Dorfman, Sweatman, Winnipeg.

Oakwood Development Ltd. *Appellant*;

and

Rural Municipality of St. François Xavier *Respondent.*

File No.: 17017.

1984: November 16; 1985: September 19.

Present: McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Mandamus — Municipal planning — Decision of municipality necessary to planning process — Refusal by municipality to consider remedies to flooding problem on proposed subdivision — Plan of subdivision rejected — Whether or not solutions to flooding problem extraneous consideration — If not, whether or not municipality exercised discretion according to law.

Municipal law — Planning — Decision of municipality necessary to planning process — Refusal by municipality to consider remedies to flooding problem on proposed subdivision — Plan of subdivision rejected — Whether or not municipality required to consider solutions to flooding problem — Whether or not municipality exercised its discretion according to law — The Planning Act, 1975 (Man.), c. 29, ss. 1, 60(1), 62(1) — The Planning Act Regulation, 30/77, ss. 6(1), 7, 11.

Appellant's application to the Municipal Planning Branch of the provincial government for approval to subdivide part of its land was denied, notwithstanding its designation for subdivision and residential development, because it lacked the municipal consent required by the planning scheme. The municipal council did not entertain either the application (because it considered the land to be flood-prone) or the proposals to remedy that problem (because it had no intention of allowing development on such land). Appellant alleged this rejection to be arbitrary and without lawful authority and the Court of Queen's Bench granted mandamus requiring the Council to consider the application. Appellant now appeals from the Court of Appeal's decision reversing that order. At issue is whether or not the Council

Oakwood Development Ltd. *Appelante*;

et

Municipalité rurale de St. François Xavier *Intimée.*

N° du greffe: 17017.

1984: 16 novembre; 1985: 19 septembre.

Présents: Les juges McIntyre, Chouinard, Lamer, Wilson et Le Dain.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Mandamus — Urbanisme — Décision de la municipalité nécessaire au processus de planification — Refus de la municipalité de prendre en considération des solutions au problème du risque d'inondations sur le terrain visé par le projet de lotissement — Rejet du plan de lotissement — Les solutions au problème du risque d'inondations sont-elles des considérations extrinsèques? — Dans la négative, la municipalité a-t-elle exercé son pouvoir discrétionnaire d'une manière conforme à la loi?

Droit municipal — Planification — Décision de la municipalité nécessaire au processus de planification — Refus de la municipalité de prendre en considération des solutions au problème du risque d'inondations sur le terrain visé par le projet de lotissement — Rejet du plan de lotissement — La municipalité est-elle tenue de prendre en considération des solutions au problème du risque d'inondations? — La municipalité a-t-elle exercé son pouvoir discrétionnaire d'une manière conforme à la loi? — The Planning Act, 1975 (Man.), chap. 29, art. 1, 60(1), 62(1) — The Planning Act Regulation, 30/77, art. 6(1), 7, 11.

La demande de l'appelante adressée à la Direction de l'urbanisme du gouvernement provincial en vue d'obtenir l'autorisation de lotir une partie de son bien-fonds a été rejetée, même si ce bien-fonds était destiné au lotissement en vue de la construction de logements, pour le motif que la municipalité n'avait pas donné le consentement requis par le plan d'aménagement. Le conseil municipal n'a pas étudié la demande (parce qu'il considérait que les terres en question étaient inondables) ni les propositions quant à des solutions à ce problème (parce qu'il n'avait pas l'intention de permettre l'aménagement de telles terres). Alléguant qu'il s'agissait d'un rejet arbitraire, sans fondement en droit, l'appelante a obtenu en Cour du Banc de la Reine un *mandamus* enjoignant au conseil d'étudier la demande. L'appelante

exercised its discretion "according to law" and in accordance with the principles reflected in the Act.

Held: The appeal should be allowed.

The failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. The municipality, accordingly, had not only to keep within its statutory mandate but also to consider all factors relevant to its statutory decision-making function. While it quite properly took into consideration the potential flooding problem, it erred in failing to consider the scope of the problem and possible solutions to it. The mere mention of flooding as the decisive factor, accompanied by an obstinate refusal to consider whether or not it was remediable, did not satisfy the requirement that all highly relevant considerations be taken into account. The Council, therefore, did not take proper account of the factors relevant to its statutory mandate and so did not exercise its discretion in accordance with proper principles.

Cases Cited

City of Vancouver v. Simpson, [1977] 1 S.C.R. 71; *Re Municipal Act* (1959), 28 W.W.R. 428; *Westminster Corporation v. London and North Western Railway Co.*, [1905] A.C. 426; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663; *R. v. Paddington Valuation Officer, Ex parte Peachey Property Corp. Ltd.*, [1966] 1 Q.B. 380; *Smith & Rhuland Ltd. v. The Queen ex rel. Brice Andrews*, [1953] 2 S.C.R. 95, referred to.

Statutes and Regulations Cited

Planning Act, 1975 (Man.), c. 29, ss. 1, 60(1), 62(1), as amended; C.C.S.M., c. P80.
Planning Act Regulation, 30/77, ss. 6(1), 7, 11.

APPEAL from a judgment of the Manitoba Court of Appeal (1982), 132 D.L.R. (3d) 119, [1982] 2 W.W.R. 508, 17 Man. R. (2d) 241, 17 M.P.L.R. 80, allowing an appeal from a judgment of the Court of Queen's Bench granting an application for mandamus. Appeal allowed.

forme maintenant un pourvoi contre l'arrêt de la Cour d'appel portant annulation de cette ordonnance. La question en litige est de savoir si le conseil a exercé son pouvoir discrétionnaire «d'une manière conforme à la loi» et en conformité avec les principes énoncés dans celle-ci.

Arrêt: Le pourvoi est accueilli.

L'omission d'un organe de décision administrative de tenir compte d'un élément très important constitue une erreur au même titre que la prise en considération inappropriée d'un facteur extrinsèque. Il incombait donc à la municipalité non seulement de respecter les limites de son mandat légal, mais aussi de prendre en considération tous les facteurs dont elle doit tenir compte en exerçant la fonction de prise de décisions que lui attribue la loi. Même si c'est tout à fait à juste titre qu'elle a pris en considération le problème posé par le risque d'inondations, elle a commis une erreur en ne tenant compte ni de l'ampleur du problème ni de solutions possibles à celui-ci. Il ne suffit pas pour satisfaire à l'exigence que tous les éléments les plus importants soient pris en considération qu'on dise que le danger d'inondations est le facteur décisif tout en refusant obstinément d'examiner s'il est possible d'y remédier. Donc, le conseil n'a pas pris dûment en considération les facteurs dont il doit tenir compte dans l'exercice de son mandat légal et, ainsi, n'a pas exercé son pouvoir discrétionnaire d'une manière conforme aux principes établis.

Jurisprudence

Arrêts mentionnés: *Ville de Vancouver c. Simpson*, [1977] 1 R.C.S. 71; *Re Municipal Act* (1959), 28 W.W.R. 428; *Westminster Corporation v. London and North Western Railway Co.*, [1905] A.C. 426; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Roncarelli v. Duplessis*, [1959] R.C.S. 121; *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] A.C. 663; *R. v. Paddington Valuation Officer, Ex parte Peachey Property Corp. Ltd.*, [1966] 1 Q.B. 380; *Smith & Rhuland Ltd. v. The Queen ex rel. Brice Andrews*, [1953] 2 R.C.S. 95.

Lois et règlements cités

Planning Act, 1975 (Man.), chap. 29, art. 1, 60(1), 62(1) et modifications; C.C.S.M., chap. P80.
Planning Act Regulation, 30/77, art. 6(1), 7, 11.

POURVOI contre un arrêt de la Cour d'appel du Manitoba (1982), 132 D.L.R. (3d) 119, [1982] 2 W.W.R. 508, 17 Man. R. (2d) 241, 17 M.P.L.R. 80, qui a accueilli l'appel d'un jugement de la Cour du Banc de la Reine faisant droit à une demande de *mandamus*. Pourvoi accueilli.

Sidney Green, Q.C., for the appellant.

Richard Scott, Q.C., and *Robert Adkins*, for the respondent.

The judgment of the Court was delivered by

WILSON J.—

I. The Facts

The appellant is a development company which purchased approximately forty acres of land in the respondent municipality in 1973. At the time the lands were purchased they were designated under an existing Town Planning Scheme for subdivision and residential development. "Flood plain areas" were marked on the plan but the appellant's lands were not in a flood plain area. In 1975, after extensive negotiations, the appellant obtained approval from the municipal council for a plan of subdivision permitting it to have six one-acre lots on the northern portion of the forty acres but was denied approval for subdivision of the balance of the lands pending the respondent's giving further consideration to flooding and erosion problems.

On December 1, 1977 the appellant submitted an application for subdivision of the southerly portion of its lands to the Municipal Planning Branch of the provincial government. This application was sent on to the respondent's municipal council for consideration. On June 2, 1978 the solicitors for the municipality wrote to the solicitors for the appellant informing them that the Council was not prepared to entertain the appellant's application because it considered the lands in question to be in a flood prone area making the lands inappropriate for residential development. The appellant was also advised that any proposals aimed at remedying the drainage problems on its land would not be considered since the municipality had no intention of allowing any development on lands prone to periodic flooding. The key portion of the letter reads as follows:

This property is in a flood-prone area, said flooding being obvious to all Councillors concerned and for this

Sidney Green, c.r., pour l'appelante.

Richard Scott, c.r., et *Robert Adkins*, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE WILSON—

I. Les faits

L'appelante, une société de promotion immobilière, s'est portée acquéreur en 1973 d'un terrain d'une quarantaine d'acres situé dans la municipalité intimée. Le plan d'aménagement urbain en vigueur à l'époque prévoyait le lotissement du terrain en vue de la construction de logements. Le plan indiquait les [TRADUCTION] «terres inondables», mais le bien-fonds de l'appelante n'en faisait pas partie. En 1975, à la suite de longues négociations, l'appelante a obtenu du conseil municipal l'approbation d'un plan de lotissement qui créait six lots d'un acre à l'extrémité nord des quarante acres. Le conseil a toutefois refusé d'approuver le morcellement du reste du bien-fonds tant que l'intimée n'aurait pas examiné plus à fond les problèmes posés par les inondations et l'érosion.

Le 1er décembre 1977, l'appelante a présenté à la Direction de l'urbanisme du gouvernement provincial une demande d'autorisation de lotissement relative à la partie sud du bien-fonds en cause. La Direction de l'urbanisme a soumis cette demande à l'examen du conseil municipal de l'intimée. Le 2 juin 1978, les avocats de la municipalité ont adressé aux avocats de l'appelante une lettre portant que le conseil n'était pas prêt à étudier la demande de l'appelante parce que, selon lui, les terres en question étaient inondables et, partant, impropres à la construction d'habitations. On a en outre fait savoir à l'appelante qu'aucune proposition visant à résoudre les problèmes de drainage sur ses terres ne serait examinée puisque la municipalité n'avait pas l'intention de permettre l'aménagement de terres exposées au risque d'inondations périodiques. La partie essentielle de la lettre est ainsi conçue:

[TRADUCTION] La zone dans laquelle se trouve ce bien-fonds est sujette aux inondations. Le danger d'inonda-

reason, they are not prepared to entertain application for subdivision in respect to this property.

The fact that you may obtain engineer's reports in respect to such development will not affect the decision of the Council as the original Plan of Subdivision was granted clearly on the understanding that no further development would be allowed in the lower area.

This communication was followed nine months later, in March of 1979, by the passing of a formal resolution by Council denying approval of the subdivision application. The appellant was notified of this resolution by letter dated March 27, 1979 from the province's Municipal Planning Branch. It is this rejection, which the appellant alleges was arbitrary and without lawful authority, that has given rise to the present litigation.

II. The Courts Below

The appellant brought an action against the municipality in the Manitoba Court of Queen's Bench. In its statement of claim the appellant sought two distinct remedies for the abuse of discretion which it alleged against the Council: (a) a declaration that its lands are entitled to be developed; and (b) an order of mandamus requiring the Council to entertain an application for subdivision approval and to impose only those conditions which will facilitate development of the lands in accordance with the existing Town Planning Scheme. As the alternative remedies tend to indicate, the appellant challenged the Council's exercise of discretion on several different levels, including the factors which it took into account in reaching the decision as well as the way in which the decision was actually made.

At trial the appellant was successful in obtaining an order requiring the municipality to hear and determine the application for subdivision approval that was originally submitted by the appellant on December 1, 1977. Wright J. found that the Council's refusal to entertain the application had been based on its perception of potential flooding problems on the appellant's land and that the Council had thereby exceeded the statutory scope of its discretion. As counsel for the municipality could not point him to any reference to flooding problems in the relevant sections of *The Planning Act*,

tions est à ce point évident que les conseillers ne sont disposés à étudier aucune demande de lotissement relative audit bien-fonds.

Même si votre projet d'aménagement était appuyé du rapport d'un ingénieur-conseil, le conseil ne modifierait pas sa décision parce que le plan initial de lotissement a été approuvé à la condition expresse qu'aucun lotissement ne serait permis dans la partie basse.

Neuf mois plus tard, en mars 1979, le conseil municipal a adopté une résolution qui rejetait la demande d'autorisation de lotissement. Cette résolution a été notifiée à l'appelante dans une lettre datée du 27 mars 1979, émanant de la Direction de l'urbanisme de la province. L'appelante allègue qu'il s'agit d'un rejet arbitraire, sans fondement en droit; d'où le présent litige.

II. Les tribunaux d'instance inférieure

L'appelante a poursuivi la municipalité devant la Cour du Banc de la Reine du Manitoba. Elle affirme dans sa déclaration que le conseil municipal a abusé de son pouvoir discrétionnaire et demande en conséquence deux redressements distincts: a) une déclaration portant qu'elle a le droit d'aménager son bien-fonds; et b) une ordonnance de *mandamus* qui obligerait le conseil à étudier une demande d'autorisation de lotissement et à n'imposer que les conditions nécessaires pour que l'aménagement des terres respecte le plan d'aménagement urbain existant. Comme l'indiquent les redressements demandés, l'appelante conteste plusieurs aspects de l'exercice du pouvoir. Elle trouve notamment à redire aux facteurs sur lesquels le conseil a fondé sa décision et à la façon dont celle-ci a été prise.

En première instance, l'appelante a obtenu une ordonnance exigeant que la municipalité entende la demande d'autorisation de lotissement initialement présentée le 1er décembre 1977 et qu'elle rende une décision sur cette demande. Le juge Wright a conclu que le conseil avait fondé son refus d'étudier la demande sur son évaluation du risque d'inondations auquel était exposé le bien-fonds de l'appelante et qu'en cela il avait excédé le pouvoir discrétionnaire que lui conférait la loi. Puisque l'avocat de la municipalité n'a pu signaler d'articles pertinents de *The Planning Act*, 1975

1975 (Man.), c. 29, as amended, C.C.S.M., c. P80, he concluded that this was an improper consideration for the municipality to take into account. Accordingly, the mandatory order was issued although it was not accompanied by the declaratory relief sought by the appellant. The respondent was ordered to entertain the application and to premise its decision only on those considerations specified as appropriate by the governing legislation. The Council was still free to decline to grant its approval.

The Manitoba Court of Appeal allowed the municipality's appeal. Hall J.A. (with whom Freedman C.J.M. concurred) indicated that the pertinent sections of *The Planning Act* and regulations thereunder made it clear that, provided the municipality acted in good faith, concern over flooding could properly be a consideration on which disapproval of an application was premised. The decision of this Court in *City of Vancouver v. Simpson*, [1977] 1 S.C.R. 71, was cited for the proposition that there are a variety of reasons why municipalities should have control over the planning of local subdivisions and that the courts should not lightly interfere with decisions of the responsible city officials. Since the municipality was not seen by Hall J.A. as having exceeded or abused its jurisdiction or authority in taking the flooding problem into consideration and since there was no evidence that the resolution was passed in other than good faith, the trial judge's order was reversed.

O'Sullivan J.A. concurred in this result but wrote separate reasons in which he drew a distinction between the respondent's solicitors' initial letter to the appellant and its eventual resolution denying the application for subdivision. He reasoned that the respondent's initial refusal to entertain the application no matter what proposal or evidence such an application might contain might well have justified an order of mandamus. Although *The Planning Act* was seen as giving the Council a wide discretion in refusing subdivision approval, it probably made mandatory the con-

(Man.), chap. 29 et modifications, C.C.S.M., chap. P80, relatifs aux problèmes d'inondations, le juge Wright est arrivé à la conclusion qu'il s'agissait là d'un facteur dont la municipalité ne pouvait à bon droit tenir compte. Par conséquent, une ordonnance de *mandamus* a été rendue, bien qu'elle ne fût pas assortie de la déclaration sollicitée par l'appelante. Il a donc été ordonné à l'intimée d'étudier la demande et de ne fonder sa décision que sur les considérations données pour pertinentes dans la loi applicable. Bien sûr, le conseil conservait toute latitude pour ne pas accorder son approbation.

La Cour d'appel du Manitoba a accueilli l'appel interjeté par la municipalité. Le juge Hall (à l'avis duquel le juge en chef Freedman s'est rangé) a indiqué qu'il ressort nettement des articles pertinents de *The Planning Act* et de son règlement d'application qu'à condition qu'elle soit de bonne foi, une municipalité peut à bon droit invoquer le risque d'inondations pour rejeter une demande. On a cité l'arrêt de cette Cour *Ville de Vancouver c. Simpson*, [1977] 1 R.C.S. 71, à l'appui du point de vue selon lequel les municipalités doivent, pour plusieurs raisons, avoir la haute main sur la planification des lotissements locaux et selon lequel les tribunaux ne doivent pas, sans motifs sérieux, modifier les décisions des édiles municipaux. Puisque, de l'avis du juge Hall, la prise en considération du risque d'inondations ne constituait ni un excès ni un abus de compétence ou du pouvoir de la municipalité, et puisque la preuve n'établit pas que la municipalité a agi autrement que de bonne foi en adoptant la résolution, l'ordonnance du premier juge a été annulée.

Le juge O'Sullivan, d'accord quant au résultat, a rédigé des motifs distincts dans lesquels il fait une distinction entre la première lettre adressée à l'appelante par les avocats de l'intimée et la résolution ultérieure par laquelle l'intimée a rejeté la demande d'autorisation de lotissement. Selon le juge O'Sullivan, le refus initial de l'intimée d'étudier la demande, peu importe les propositions ou les éléments de preuve que celle-ci pouvait contenir, aurait très bien pu donner lieu à une ordonnance de *mandamus*. Bien que, de l'avis du juge, *The Planning Act* confère au conseil municipal un

sideration of each application. However, subsequent to this initial response the respondent had actually heard and considered the appellant's application and the resolution denying approval represented a determination of the application which was within the scope of the respondent's discretion. Accordingly, O'Sullivan J. A. joined in the court's reversal of the trial judge's order that the application be entertained by the municipality.

III. The Statutory Framework

In assessing the position of a landowner applying to local municipal authorities for subdivision approval one must be conscious of the fact that the requirement of subdivision approval arises only by virtue of statute. The position at common law was succinctly stated by Wilson J. of the Supreme Court of British Columbia to the effect that "the right to subdivide real property, to sell a part rather than the whole, is an ordinary incident of ownership": *Re Municipal Act* (1959), 28 W.W.R. 428. The subdivision approval process operates, therefore, as a curtailment of common law rights and must be specifically authorized under the governing legislation.

In Manitoba the common law right to subdivide is restricted by s. 60(1) of *The Planning Act* which stipulates that any subdivision of a parcel of real estate in order to be valid must be "approved by the approving authority". The authoritative body referred to in s. 60(1) is defined in s. 1 of the Act as follows:

> **1** In this Act,
>
> (a) "approving authority" means
>
> (i) the minister; or
>
> (ii) the board of a district that is authorized by an order of the minister to act as an approving authority within the area of jurisdiction of the board, or
>
> (iii) the council of a municipality that is authorized by an order of the minister to act as an approving authority for that municipality, or

. . .

large pouvoir discrétionnaire en matière de refus d'autorisation de lotissement, il rendait probablement obligatoire l'examen de chaque demande. Toutefois, à la suite de sa première décision, l'intimée a étudié la demande de l'appelante et la résolution la rejetant constituait une décision relevant du pouvoir discrétionnaire de l'intimée. En conséquence, le juge O'Sullivan s'est joint à ses collègues, qui ont annulé l'ordonnance du premier juge exigeant que la municipalité étudie la demande.

III. Le cadre légal

Dans toute analyse de la situation d'un propriétaire foncier qui adresse aux autorités municipales locales une demande d'autorisation de lotissement, on ne doit pas perdre de vue que l'exigence d'une autorisation est une condition purement légale. Or, la règle de la *common law*, succinctement formulée par le juge Wilson de la Cour suprême de la Colombie-Britannique, porte que [TRADUCTION] «le droit de propriété comporte normalement le droit de morceler un bien-fonds, d'en vendre une partie seulement»: *Re Municipal Act* (1959), 28 W.W.R. 428. Il y a donc, en matière d'autorisation de lotissement, une restriction des droits de *common law* qui doit être expressément prévue par la loi pertinente.

Au Manitoba, la portée du droit reconnu par la *common law* de lotir un terrain est restreinte par *The Planning Act* dont le par. 60(1) dispose que tout projet de lotissement doit être [TRADUCTION] «approuvé par les autorités compétentes». L'organe en question mentionné au par. 60(1) est défini à l'art. 1 de la loi:

> [TRADUCTION] **1** Dans la présente loi,
>
> a) «autorités compétentes» désigne
>
> (i) le ministre, ou
>
> (ii) tout conseil de district autorisé par un arrêté du ministre à exercer un pouvoir d'approbation dans la région relevant de sa juridiction, ou
>
> (iii) le conseil d'une municipalité autorisé par un arrêté du ministre à exercer un pouvoir d'approbation dans les limites de cette municipalité, ou

. . .

(q) "minister" means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act;

In the case of the respondent municipality the provincial government has not exercised its discretion to delegate the function of acting as the ultimate approving authority. Rather, it would appear that this function is carried out by the provincial Department of Municipal Affairs which receives all applications for subdivision and processes them in accordance with the provisions of *The Planning Act* and the regulations passed thereunder. The first step in this process entails consultation with an assortment of other provincial authorities in order to ensure that the proposed subdivision is in conformity with land use planning generally in the area. Section 6 of Regulation 30/77 under *The Planning Act* provides:

6. (1) Before approving an application an approving authority may refer it to and request the comments of

(a) the Department of Highways;

(b) the Department of Agriculture;

(c) the Environmental Management Division and the Water Resources Division of the Department of Mines, Resources and Environmental Management;

(d) the Department of Tourism and Recreation;

(e) the Manitoba Hydro-Electric Board;

(f) the Manitoba Telephone System;

(g) the appropriate School Division;

(h) Central Mortgage and Housing Corporation; or

(i) any other authority, agency, department, council, or board that in the opinion of the approving authority might be affected by the proposed subdivision.

The evidence discloses that after receiving the appellant's application on December 1, 1977, the Municipal Planning Branch of the Department of Municipal Affairs did in fact circulate the application among the various provincial departments as authorized by the regulation. Although most of the departments consulted appear to have either approved the subdivision or been disinclined to offer any comment one way or another, the most significant response was the negative assessment

q) «ministre» désigne le membre du conseil exécutif chargé par le lieutenant-gouverneur en conseil de l'application de la présente loi;

Dans le cas de la municipalité intimée, le gouvernement provincial n'a pas exercé son pouvoir discrétionnaire pour déléguer le pouvoir d'approbation en dernier ressort. Au contraire, il appert que cette fonction est remplie par le ministère provincial des Affaires municipales qui reçoit toutes les demandes d'autorisation de lotissement et qui les examine conformément aux dispositions de *The Planning Act* et de son règlement d'application. Ce processus comporte dans un premier temps la consultation d'une série d'autres autorités provinciales afin de s'assurer de la conformité du projet de lotissement avec les plans généraux d'aménagement foncier pour le secteur en question. L'article 6 du règlement 30/77, pris en vertu de *The Planning Act*, porte:

[TRADUCTION] 6. (1) Avant d'accorder l'autorisation, les autorités compétentes peuvent demander avis

a) au ministère de la Voirie;

b) au ministère de l'Agriculture;

c) à la Division de la gestion de l'environnement et à la Division des ressources en eau du ministère des Mines, des Ressources et de la Gestion de l'environnement;

d) au ministère du Tourisme et de la Récréation;

e) à la Commission hydro-électrique du Manitoba;

f) au Réseau téléphonique du Manitoba;

g) à la division scolaire appropriée;

h) à la Société centrale d'hypothèques et de logement; ou

i) à tous les autres autorités, organismes, ministères, conseils ou commissions qui, de l'avis des autorités compétentes, pourront être touchés par le projet de lotissement.

Il ressort de la preuve que, après avoir reçu la demande de l'appelante le 1er décembre 1977, la Direction de l'urbanisme municipal du ministère des Affaires municipales l'a fait circuler parmi les différents organismes provinciaux comme le prévoit le règlement. Bien que la majorité des organismes consultés paraissent soit avoir approuvé le projet de lotissement soit s'être abstenus de tout commentaire, la réaction la plus importante a été la réponse négative de la Division des ressources en

submitted by the province's Water Resources Division. By inter-departmental memo dated April 6, 1978, the Director of Planning of this Division indicated to the Municipal Planning Branch that the proposed subdivision site was subject to erosion problems and to potential flooding by the nearby Assiniboine River.

The next step in the application assessment and approval process is to forward the application to the Council of the municipality in which the lands are situated. Although the consultation process with the other provincial government departments is optional on the part of the approving authority, the referral of the application to the local municipal council for approval is mandatory under the legislation. Section 7 of the Regulation 30/77 stipulates:

> 7. (1) The approving authority shall refer the application, together with a summary of comments received under section 6, to the council of the municipality in which the proposed subdivision is situated.
>
> (2) The council may, by resolution, give its approval to the proposed subdivision, with or without conditions, or reject it.
>
> (3) The council shall forthwith submit a copy of such resolution to the approving authority.

The mandatory nature of the approving authority's submission of each application to the local municipal council is made even stronger by *The Planning Act* itself, which makes municipal approval a prerequisite for subdivision approval. Section 62(1) of the Act provides, *inter alia*:

> **62(1) A subdivision of land shall not be approved unless**
>
> . . .
>
> (b) the council of the municipality in which the land proposed for subdivision is located, has by resolution given its approval, with or without conditions;

Accordingly, it is clear that whether or not the province has in a given case delegated the role of ultimate approving authority to the municipal council, the approval by resolution of this Council to any application for subdivision of lands located

eau. Par une note interne en date du 6 avril 1978, le directeur de la planification de cette Division, a signalé à la Direction de l'urbanisme municipal que l'emplacement choisi pour le projet de lotissement était sujet à des problèmes d'érosion et à des risques d'inondations dues à la proximité de la rivière Assiniboine.

L'étape suivante du processus d'examen d'une demande d'autorisation consiste à la faire parvenir au conseil de la municipalité où sont situées les terres en question. Quoique la consultation des autres organismes gouvernementaux provinciaux soit facultative, les autorités compétentes sont tenues de soumettre la demande à l'approbation du conseil municipal local. L'article 7 du Règlement 30/77 est ainsi rédigé:

> [TRADUCTION]
>
> 7. (1) Les autorités compétentes doivent renvoyer la demande, ainsi qu'un résumé des observations obtenues en vertu de l'article 6, au conseil de la municipalité où le lotissement projeté est situé.
>
> (2) Le conseil peut, par voie de résolution, approuver, avec ou sans condition, le projet de lotissement ou le rejeter.
>
> (3) Le conseil doit immédiatement faire tenir aux autorités compétentes copie de cette résolution.

L'obligation qu'ont les autorités compétentes de soumettre chaque demande au conseil municipal local est renforcée par *The Planning Act* elle-même, qui fait de l'approbation de la municipalité une condition préalable de l'autorisation de lotissement. Le paragraphe 62(1) de la Loi porte notamment:

> [TRADUCTION] **62(1) Un projet de lotissement ne doit pas être approuvé, à moins**
>
> . . .
>
> b) que le conseil de la municipalité dans laquelle se trouvent les terres visées par le projet de lotissement n'ait pris de résolution l'approuvant, avec ou sans condition;

Il est donc clair que, dans un cas donné, indépendamment de toute délégation par la province au conseil municipal du pouvoir d'approuver un lotissement en dernier ressort, le conseil doit nécessairement donner son approbation, par voie de

within the municipal boundaries is required. In the case at bar, the provincial government department which received the application and consulted with other branches of the provincial government as to its merits, proceeded to refer the matter to the respondent for Council's approval. This procedure not only appears to have been appropriate but is precisely the decision-making route stipulated by the governing legislation.

As noted above, the learned trial judge found that the concern over flooding was an improper consideration for the Council to take into account. With respect, this conclusion does not appear to be defensible upon an examination of the Act and regulations under which approval is required. First, the very fact that the scheme provides for consultation with provincial departments such as the Water Resources Division, and that their views are then passed on to the municipal council, would seem to indicate that the concerns of such departments (*i.e.*, drainage and flooding in this case) are meant to be taken into consideration when an application is evaluated by the Council. Perhaps even more significant, however, is the fact that specific evaluation standards have been set out in Regulation 30/77 and that soil erosion, drainage, and flooding problems figure prominently in the detailed list of relevant factors. Section 11 of the Regulation reads:

> 11. All land proposed to be subdivided shall be suited or capable of being efficiently adapted to the purpose for which the subdivision is intended, having regard, inter alia, to
>
> (a) topography;
>
> (b) soil characteristics;
>
> (c) surface and sub-surface drainage;
>
> (d) potential flooding, subsidence, landslides and erosion;
>
> (e) existing and prospective uses of land in the vicinity;
>
> (f) layout of streets and lanes;
>
> (g) provision of services;
>
> (h) distinction between pedestrian and vehicular traffic;

résolution, à tout projet de lotissement de terres situées dans les limites de la municipalité. Dans la présente instance, l'organisme gouvernemental provincial, qui a reçu la demande et consulté d'autres organismes gouvernementaux provinciaux sur son bien-fondé, a soumis le projet à l'approbation du conseil de l'intimée. Non seulement cette mesure paraît-elle avoir été appropriée dans les circonstances, mais c'est exactement le processus décisionnel prévu par la législation pertinente.

Comme nous l'avons déjà signalé, le savant juge de première instance a conclu que le conseil ne pouvait à bon droit prendre en considéraion le risque d'inondations. Avec égards, cette conclusion paraît indéfendable compte tenu de la Loi et de son règlement d'application qui posent l'exigence de l'approbation. En premier lieu, le simple fait que la consultation d'organismes provinciaux tels que la Division des ressources en eau soit prévue, et que leurs avis soient ensuite transmis au conseil municipal, semble indiquer que les préoccupations de ces organismes (en l'occurrence, le drainage et les inondations) doivent être prises en considération par le conseil lorsqu'il examine une demande. Il y a toutefois un point encore plus important, savoir que le Règlement 30/77 établit des normes précises d'évaluation et que sur la liste détaillée de facteurs pertinents figurent en évidence les problèmes reliés à l'érosion du sol, au drainage et aux inondations. L'article 11 du règlement est ainsi conçu:

> [TRADUCTION]
>
> 11. Tout bien-fonds visé par un projet de lotissement doit se prêter ou pouvoir être efficacement adapté au but du lotissement, compte tenu notamment
>
> a) de la topographie;
>
> b) des caractéristiques du sol;
>
> c) du drainage de surface et du drainage souterrain;
>
> d) de l'éventualité d'inondations, de tassements du sol, de glissements de terrain et d'érosion;
>
> e) des utilisations actuelles et futures des terres avoisinantes;
>
> f) de la disposition des rues et des voies d'accès;
>
> g) de la viabilisation;
>
> h) de la distinction entre la circulation piétonnière et la circulation automobile;

VILLARROEL v. MINISTER OF EMPLOYMENT AND IMMIGRATION
(A-573-78)

Federal Court of Appeal
Pratte, Urie, JJ., and Kelly, D.J.
March 23, 1979.

ALIENS - TOPIC 1334

Admission - Refugees - Appeals - Scope of review - Immigration Act, R.S.C., 1970, c. I-12, s. 71(1) - On the basis of the applicant's evidence and its own knowledge of Chile's political situation and emigration rules, the Immigration Appeal Board rejected the applicant's application for a redetermination of his claim that he was a convention refugee - The applicant appealed - The Federal Court of Appeal dismissed the appeal and held that the opinion of the Board formed pursuant to s. 71(1) could not be reviewed, where the Board did not err in law and did not act arbitrarily or in the light of irrelevant considerations.

STATUTES JUDICIALLY NOTICED:

Immigration Act, R.S.C. 1970, c. I-12, ss. 2 [para. 2]; 70 [para. 1]; 71(1) [para. 3].

COUNSEL:

R.J. GATHERCOLE, for applicant;
B. SEGAL, for respondent.

This case was heard on March 7, 1979, at Toronto, Ontario, before PRATTE, URIE, JJ., and KELLY, D.J., of the Federal Court of Appeal.

On March 23, 1979, PRATTE, J., delivered the following judgment for the Court of Appeal:

Imm'g Appeal Bd — found against applicant
FCA upheld Board

1 PRATTE, J.: This is a section 28 application to review and set aside a decision of the Immigration Appeal Board determining, under section 71(1) of the *Immigration Act*, 1976, that the applicant is not a Convention refugee.

2 The applicant is a citizen of Chile, who entered Canada on April 19, 1978, at Mirabel Airport. The immigration officer who interviewed him reported him pursuant to section 20 and that report ultimately led to an inquiry. During that inquiry, which was held on April 26, 1978, the applicant claimed to be a Convention refugee. [See Footnote

1.] As prescribed by section 45, the inquiry was then adjourned and the applicant examined under oath respecting his claim. That claim was subsequently referred to the Minister for determination. On October 11, 1978, the applicant was notified that the Minister had determined that he was not a Convention refugee. On October 18, 1978, the applicant applied to the Immigration Appeal Board for a redetermination of his claim. That application was made pursuant to section 70 of the *Act* [See Footnote 2.] and was accompanied by a transcript of the examination under oath and a declaration under oath of the applicant setting forth the principal facts on which he relied to establish his claim.

3 By the decision under attack, the Board rejected the applicant's application for a redetermination of his claim. That decision was made under section 71(1) which reads as follows:

> 71.(1) Where the Board receives an application referred to in subsection 70(2), it shall forthwith consider the application and if, on the basis of such consideration, it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established, it shall allow the application to proceed, and in any other case it shall refuse to allow the application to proceed and shall thereupon determine that the person is not a Convention refugee.

4 In its reasons, the Board quotes the declaration under oath filed by the applicant in support of his application and observes that it differs in many respects from the evidence given by the applicant at his examination under oath. The Board concludes as follows:

> Although the applicant was arrested, beaten and tortured with electric current during fifty-odd arrests, he did not leave Chile immediately upon obtaining his passport on November 29, 1977 but waited until January 15, 1978. The Board finds it incredible that the applicant would be subjected to such numerous arrests, detentions and requests to report, considering his minor position in the Socialist Party and his activities within the Party. If the applicant was indeed considered to be dangerous to the state, as he stated at page 7 of the examination under oath, how would the authorities issue him with a passport? The Board has

knowledge that to obtain a passport in Chile, one has to first obtain a Certificate of Good Conduct from the police, then he has to apply to the Passport Registration Office and finally sign the passport in front of an official. Therefore, the authorities cannot but be aware of the issuance of the document to the applicant.

The applicant knew the correct procedure to apply for landed immigrant status as he had applied to enter the United States in 1964 and again in 1971. He went to Spain because Chileans apparently do not encounter any difficulty in trying to enter that country. However, the Board finds it strange that during the time the applicant was in Spain and unable to obtain legal employment, he never troubled to apply to emigrate to Canada.

The Board is sympathetic to the applicant's problem in not being able to support his children, but after considering the evidence as a whole, it is of the opinion that there are not reasonable grounds to believe that the claim could be established with the hearing of the appeal. The Board, therefore, determines that the applicant is not a Convention refugee.

5 It is apparent that the Board's decision was founded on the view that the applicant's allegations of facts were not plausible and that his declaration under oath was not, for that reason, to be believed.

6 Counsel for the applicant first argued that the decision of the Board was bad because, in his view, the Board does not possess the jurisdiction under section 71(1) to render a decision based on an assessment of the applicant's credibility. According to him, the power of the Board under section 71(1) is limited to determining whether the facts alleged by the applicant in support of his claim, assuming them to be true, would afford reasonable grounds to believe that the claim could be established.

7 I do not think that there is any merit in that contention which cannot, in my view, be reconciled with the language used in section 71(1). Under that section, the Board must refuse to allow an application to proceed unless it be of opinion that there are reasonable grounds to believe that the claim could be established. [See Footnote 3.] In order to form this affirmative opinion that the claim could be es-

tablished, it is clearly not sufficient for the Board to form the view that the facts alleged by the applicant would, if proven, make him a refugee; it is also necessary for the Board to be of the opinion that those allegations of facts could be proven, an opinion that the Board cannot possibly entertain if it honestly believes those allegations to be untrue. In my view, section 71(1) not only permits but requires that the Board take into account all circumstances that may reveal the truthfulness or falsity of the allegations of facts made by the applicant. [See Footnote 4.] Contrary to what was submitted by counsel for the applicant, I do not see, in that interpretation of that section, anything that contravenes the *Canadian Bill of Rights*.

8 The applicant's second argument was that, in any event, there was no evidence supporting the finding of the Board that the applicant's allegations were not credible.

9 That argument must, also, in my view, be rejected. Section 71(1) does not require the Board to make any findings but merely to form an opinion in the light of its experience as well as of the material before it. From that expression of opinion, there is no appeal. As long as the Board has not erred in law [See Footnote 5.] in forming its opinion, and has not acted arbitrarily [See Footnote 6.] or in the light of irrelevant considerations, its decision, under section 71 (1), cannot, in my opinion, be reviewed by the Court. In the present case, the record does not disclose that the Board committed any of those faults.

10 For these reasons, I would dismiss the application.

Appeal dismissed.

Editor: David C.R. Olmstead
jeh

FOOTNOTES:

1. That expression is defined as follows in section 2 of the *Act:*

   "Convention refugee" means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in

FOOTNOTES (cont'd):

a particular social group or political opinion,

(a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or

(b) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country;

Pursuant to section 4 of the *Act*, a Convention refugee has, as a rule, the right to remain in Canada.

2. That provision reads as follows:

70.(1) A person who claims to be a Convention refugee and has been informed in writing by the Minister pursuant to subsection 45(5) that he is not a Convention refugee may, within such period of time as is prescribed, make an application to the Board for a redetermination of his claim that he is a Convention refugee.

(2) Where an application is made to the Board pursuant to subsection (1), the application shall be accompanied by a copy of the transcript of the examination under oath referred to in subsection 45(1) and shall contain or be accompanied by a declaration of the applicant under oath setting out

(a) the nature of the basis of the application;
(b) a statement in reasonable detail of the facts on which the application is based;
(c) a summary in reasonable detail of the information and evidence intended to be offered at the hearing; and
(d) such other representations as the applicant deems relevant to the application.

3. In my view, section 71(1) required the Board to refuse to allow the application to proceed not only when the Board is of opinion that there are no rea-

FOOTNOTES (cont'd):

sonable grounds to believe that the claim could be established but, also, when things are so evenly balanced that the Board cannot form an opinion on that point. In other words, under section 71(1), as I read it, the applicant does not have the benefit of the doubt; on the contrary, the doubt must be resolved against him.

4. The Board, however, should be aware of the danger and difficulty of assessing the credibility of a witness on the basis of written material particularly when that written evidence has been given through an interpreter.

5. For instance, by addressing its mind to the wrong question or by considering material other than the material it is entitled to consider or by ignoring part of the material before it.

6. The Board would act arbitrarily, in my view, if it chose, without valid reasons, to doubt the credibility of a witness. If an applicant swears to the truth of certain allegations, that, in my view, creates a presumption that those allegations are true unless there be reasons to doubt their truthfulness.

Service Employees' International Union, Local No. 333 *Appellant*;

and

Nipawin District Staff Nurses Association (*Applicant*) *Respondent*;

and

Nipawin Union Hospital and the Labour Relations Board of Saskatchewan *Respondents.*

1973: June 18; 1973: October 29.

Present: Abbott, Martland, Pigeon, Laskin and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Labour relations—Certification—Labour Relations Board concluding that applicant a "company dominated organization"—Finding that applicant dominated by Saskatchewan Registered Nurses Association—Failure to find S.R.N.A. an "employer" or "employer's agent"—Whether Board acted without jurisdiction—The Trade Union Act, 1972 (Sask.), c. 137.

The respondent association applied to the Saskatchewan Labour Relations Board for certification in respect of a unit which included all registered nurses and head nurses employed by the respondent hospital except the director of nursing. The appellant union opposed the application on the ground that the association was not a "trade union" because it was a "company dominated organization", organized, formed and influenced in its administration by the Saskatchewan Registered Nurses' Association ("S.R.N.A.").

The Board accepted the union's contention and dismissed the association's application. The association then applied to the Saskatchewan Court of Appeal for an order of *mandamus* directing the Board to exercise the jurisdiction conferred upon it under s. 5 of *The Trade Union Act*, 1972 (Sask.), c. 137, in respect of the application for certification and for *certiorari* to quash the dismissal order. The Court of Appeal quashed the Board's order and directed that a peremptory writ of *mandamus* issue as applied for by the association. The union then appealed to this Court.

Union internationale des employés des services, local no. 333 *Appelante*;

et

Nipawin District Staff Nurses Association (*Requérante*) *Intimée*;

et

Nipawin Union Hospital et la Commission des relations de travail de Saskatchewan *Intimés.*

1973: le 18 juin; 1973: le 29 octobre.

Présents: Les Juges Abbott, Martland, Pigeon, Laskin et Dickson

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Relations de travail—Accréditation—Commission des relations de travail décidant que la requérante est une «organisation dominée par l'employeur»—Conclusion que la requérante est dominée par la Saskatchewan Registered Nurses Association—Défaut de conclure que la S.R.N.A. est un «employeur» ou «représentant d'employeur»—La Commission a-t-elle agi dans les limites de sa compétence?—The Trade Union Act, 1972 (Sask.), c. 137.

L'association intimée a fait une demande d'accréditation auprès de la Commission des relations de travail de la Saskatchewan relativement à une unité qui comprenait toutes les infirmières inscrites et les infirmières chefs employées par l'hôpital intimé à l'exception de la directrice du nursing. L'Union appelante s'est opposée à la demande alléguant que l'association n'était pas un «syndicat» parce qu'elle était une «organisation dominée par l'employeur», mise sur pied, constituée et influencée sur le plan de son administration par la Saskatchewan Registered Nurses' Association («S.R.N.A.»).

La Commission a accepté la prétention de l'Union et rejeté la demande de l'association. L'association a ensuite demandé à la Cour d'appel de la Saskatchewan une ordonnance de *mandamus* enjoignant la Commission d'exercer les pouvoirs que lui confère l'art. 5 du *Trade Union Act*, 1972 (Sask.), c. 137, relativement à la demande d'accréditation, ainsi qu'une ordonnance de *certiorari* cassant l'ordonnance de rejet. La Cour d'appel a cassé l'ordonnance de la Commission et a ordonné qu'un bref péremptoire de *mandamus* soit délivré comme l'avait demandé l'asso-

Held: The appeal should be allowed and the Board's dismissal of the association's application confirmed.

The Board dealt with the question remitted to it, *viz.*, whether the association was a trade union, as defined. That question in turn required determination of the further question whether the association was a company dominated organization, as defined. The Board gave its answer to both of these questions. The contention that in doing so it failed to make a finding that S.R.N.A. was an employer or employer's agent or that the members of the council of S.R.N.A. were employers or employers' agents and the Board thereby acted without jurisdiction was not accepted. A tribunal was not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion. The Board made the specific finding that S.R.N.A. was not a "trade union" as defined by *The Trade Union Act*. The Court was prepared, on the record, to accept that the Board was aware of the statutory definition of "employer" and "employer's agent" found in the Act and that it neither overlooked nor wilfully disregarded such definitions in concluding that the association was a company dominated organization.

Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796, [1970] S.C.R. 425, distinguished.

APPEAL from a judgment of the Court of Appeal for Saskatchewan [1], quashing an order of the Labour Relations Board and directing that a peremptory writ of *mandamus* issue as applied for by the respondent association. Appeal allowed.

G. J. D. Taylor, Q.C., for the appellant.

J. E. Gebhard, for the Labour Relations Board of Saskatchewan.

D. K. MacPherson, Q.C., for the Nipawin District Staff Nurses Association.

[1] [1973] 4 W.W.R. 616, 36 D.L.R. (3d) 440.

ciation. L'Union a ensuite interjeté appel à cette Cour.

Arrêt: L'appel doit être accueilli et le rejet par la Commission de la demande de l'association confirmé.

La Commission a traité de la question dont elle était saisie, à savoir si l'association était un syndicat, au sens de la définition. Cette question à son tour exigeait que l'on statue sur une autre question, celle de savoir si l'association était une organisation dominée par l'employeur, au sens de la définition. La Commission a répondu à ces deux questions. La prétention selon laquelle, en ce faisant, elle n'a pas conclu que la S.R.N.A. était un employeur ou le représentant d'un employeur ou que les membres du Conseil de la S.R.N.A. étaient des employeurs ou des représentants d'employeurs, et selon laquelle la Commission aurait donc agi sans compétence, n'est pas acceptée. Un organisme n'est pas tenu de conclure explicitement par écrit sur chaque élément constitutif, si subordonné soit-il, qui mène à sa décision finale. La Commission a conclu spécifiquement que la S.R.N.A. n'était pas un «syndicat» selon la définition du *Trade Union Act*. La Cour est disposée, d'après le dossier, à reconnaître que la Commission était au courant de la définition légale des termes «employeur» et «représentant d'employeur» figurant dans le *Trade Union Act*, et que celle-ci n'a pas fait abstraction de ces définitions et n'a pas non plus volontairement omis d'en tenir compte lorsqu'elle a conclu que l'association était une organisation dominée par l'employeur.

Distinction faite avec l'arrêt: *Metropolitan Life Insurance Co. c. International Union of Operating Engineers, Local 796*, [1970] R.C.S. 425.

APPEL à l'encontre d'un arrêt de la Cour d'appel de la Saskatchewan [1], infirmant une ordonnance de la Commission des relations de travail et ordonnant qu'un bref péremptoire de *mandamus* soit délivré comme l'avait demandé l'association intimée. Appel accueilli.

G. J. D. Taylor, c.r., pour l'appelante.

J. E. Gebhard, pour la Commission des relations de travail de la Saskatchewan.

D. K. MacPherson, c.r., pour la Nipawin District Staff Nurses Association.

[1] [1973] 4 W.W.R. 616, 36 D.L.R. (3d) 440.

The judgment of the Court was delivered by

DICKSON J.—On September 14, 1972, respondent Nipawin District Staff Nurses Association (the "Association") applied to the Labour Relations Board of the Province of Saskatchewan (the "Board") for certification in respect of a unit which included all registered nurses and head nurses employed by the Nipawin Union Hospital except the director of nursing. The appellant, Service Employees' International Union , Local 333 (the "Union") opposed the application and filed a reply in which it was alleged that the Association was not a "trade union" because it was a "company dominated organization", organized, formed and influenced in its administration by the Saskatchewan Registered Nurses' Association ("S.R.N.A."). S.R.N.A. is a statutory body under the *The Registered Nurses' Act*, R.S.S. 1965, c. 315, being, as the name implies, an association of those nurses who become registered as members of the Association and thereafter are entitled to be known as registered nurses. The affairs of S.R.N.A. are under the management of a council composed of seven members elected annually. S.R.N.A. has over 6,000 members of whom approximately 4,500 are employed in hospitals or nursing homes in Saskatchewan.

The Association's application was heard by the Board and dismissed. The Association then applied to the Saskatchewan Court of Appeal for an order of *mandamus* directing the Board to exercise the jurisdiction conferred upon it under s. 5, cls. (*a*), (*b*) and (*c*) of *The Trade Union Act*, 1972 (Sask.), c. 137, in respect of the application for certification and for *certiorari* to quash the dismissal order. The Court of Appeal quashed the Board's order and directed that a peremptory writ of *mandamus* issue as applied for by the Association. The appellant Union has now appealed to this Court.

Le jugement de la Cour a été rendu par

LE JUGE DICKSON—Le 14 septembre 1972, l'intimée Nipawin District Staff Nurses Association (l'«Association»), syndicat d'infirmières attitrées, a fait une demande d'accréditation auprès de la Commission des Relations de travail de la province de Saskatchewan (la «Commission») relativement à une unité qui comprenait toutes les infirmières inscrites et les infirmières chefs employées par le Nipawin Union Hospital à l'exception de la directrice du nursing. L'appelante, l'Union internationale des employés des services (Service Employees' International Union), Local 333, (l'«Union»), s'est opposée à la demande et a présenté une réponse dans laquelle elle allègue que l'Association n'est pas un «syndicat» parce qu'il s'agit d'une «organisation dominée par l'employeur», mise sur pied, constituée et influencée sur le plan de son administration par la Saskatchewan Registered Nurses' Association («S.R.N.A.»), association des infirmières inscrites de la Saskatchewan. La S.R.N.A. est un organisme créé par la loi en vertu du *Registered Nurses' Act*, R.S.S. 1965, c. 315, et est, comme son nom l'indique, une association groupant les infirmières qui sont inscrites comme membres de cette association et qui ont ensuite le droit d'être appelées infirmières inscrites. Les activités de la S.R.N.A. sont régies par un conseil composé de sept membres élus annuellement. La S.R.N.A. groupe environ 6,000 membres dont environ 4,500 sont employés dans les hôpitaux ou les maisons de santé en Saskatchewan.

La demande de l'Association a été entendue par la Commission, qui l'a rejetée. L'Association a ensuite demandé à la Cour d'appel de la Saskatchewan une ordonnance de *mandamus* enjoignant la Commission d'exercer les pouvoirs que lui confèrent les clauses *a*), *b*) et *c*) de l'art. 5 du *Trade Union Act*, 1972 (Sask.), c. 137, relativement à la demande d'accréditation, ainsi qu'une ordonnance de *certiorari* cassant l'ordonnance de rejet. La Cour d'appel a cassé l'ordonnance de la Commission et a ordonné qu'un bref péremptoire de *mandamus* soit délivré comme l'avait demandé l'Association.

Section 5(*a*), (*b*) and (*c*), so far as applicable, provides as follows:

5. The board may make orders:

(*a*) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, or a subdivision thereof or some other unit . . .

(*b*) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(*c*) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

The following sections of *The Trade Union Act* are also relevant:

2. (*l*) "trade union" means a labour organization that is not a company dominated organization.

. . .

(*e*) "company dominated organization" means a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered with or to which an employer or employer's agent has contributed financial or other support, except as permitted by this Act;

. . .

(g) "employer" means:

(*i*) an employer who employs three or more employees;

(*ii*) an employer who employs less than three employees if at least one of the employees is a member of a trade union that includes among its membership employees of more than one employer;

(*iii*) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;

L'Union appelante interjette maintenant un appel à cette Cour.

Les clauses *a*), *b*) et *c*) de l'art. 5, dans la mesure où ils sont applicables, prévoient ce qui suit:

[TRADUCTION] 5. La Commission peut rendre des ordonnances:

a) déterminant si l'unité appropriée d'employés aux fins de négocier collectivement doit être une unité d'employeur, une unité professionnelle, une unité d'établissement, ou une subdivision de ces dernières ou quelque autre unité . . .

b) déterminant quel syndicat, s'il en est, représente la majorité des employés dans une unité d'employés appropriée;

c) enjoignant un employeur ou un syndicat représentant la majorité des employés dans une unité appropriée de négocier collectivement;

Les articles suivants du *Trade Union Act* sont aussi pertinents:

[TRADUCTION] 2. (*l*) «syndicat» signifie une organisation de travail qui n'est pas une organisation dominée par l'employeur.

. . .

e) l'expression «organisation dominée par l'employeur» signifie une organisation de travail dont la formation ou l'administration a été dominée par un employeur ou un représentant de l'employeur ou a subi l'ingérence de ces derniers ou à laquelle un employeur ou un représentant de l'employeur a contribué financièrement ou autrement, sauf comme le permet la présente loi;

. . .

g) «employeur» signifie:

i) un employeur qui emploie trois employés ou plus;

ii) un employeur qui emploie moins que trois employés si au moins un des employés est membre d'un syndicat qui comprend dans son effectif des employés de plus d'un employeur;

iii) en ce qui concerne les employés d'un entrepreneur qui fournit les services des employés pour et au nom d'un commettant en conformité d'un contrat passé par l'entrepreneur ou le commettant, l'entrepreneur ou le commettant selon que la Commission peut, à sa discrétion, décider aux fins de la présente loi;

and includes Her Majesty in the right of the Province of Saskatchewan;

(*h*) "employer's agent" means:

(*i*) a person or association acting on behalf of an employer.

(*ii*) any officer, official, foreman or other representative or employee of an employer acting in any way on behalf of an employer with respect to the hiring or discharging or any of the terms or conditions of employment of the employees of the employer;

. . .

5. The board may make orders:

. . .

(*h*) determining whether a labour organization is a company dominated organization;

. . .

21. There is no appeal from an order or decision of the board under this Act, the board may determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari*, *mandamus*, prohibition, injunction or other proceeding whatever.

et comprend Sa Majesté du chef de la province de Saskatchewan;

h) l'expression «représentant de l'employeur» signifie:

i) une personne ou une association agissant au nom d'un employeur;

ii) tout cadre supérieur, responsable, contremaître ou autre représentant ou employé d'un employeur qui agit d'une manière quelconque au nom d'un employeur relativement à l'embauchage ou au licenciement ou à toute condition d'emploi des employés de l'employeur;

. . .

5. La Commission peut rendre des ordonnances:

. . .

h) déterminant si une organisation de travail est une organisation dominée par l'employeur;

. . .

21. Aucun appel ne peut être interjeté à l'encontre d'une ordonnance ou d'une décision de la Commission en vertu de la présente loi, la Commission peut décider toute question de fait nécessaire à sa juridiction, et ses actes, ordonnances et décisions ne seront pas révisables par une cour de justice ou par voie de *certiorari*, *mandamus*, prohibition, injonction ou toute autre procédure.

In dismissing the Association's application, the Board found that the majority of the members of the council of S.R.N.A. over the years had been what the Board referred to as "management personnel" such as directors of nursing and superintendents of public health nursing employed by various hospitals, many of whom were persons whose primary responsibility in their employment was to exercise authority and perform functions of a managerial character and who regularly acted in a confidential capacity in respect of the industrial relations of their employers.

Evidence was placed before the Board that S.R.N.A. had devoted considerable energy, time and expense during the preceding several years promoting the organization of staff nursing associations throughout the Province of Saskatchewan. The Board accepted evidence placed before it that S.R.N.A. was attempting to dominate such associations with a view to ensuring that nurses would not become mem-

En rejetant la demande de l'Association, la Commission a conclu que la majorité des membres du conseil de la S.R.N.A. avaient été au cours des années ce que la Commission a appelé «des cadres de gestion», tels que les directrices du nursing et les surintendants des services infirmiers au public employés par divers hôpitaux, dont plusieurs avaient comme responsabilité première l'exercice de pouvoirs et l'exécution de fonctions propres à la gestion et accomplissaient régulièrement des actes à caractère confidentiel relativement aux relations industrielles de leurs employeurs.

On a produit devant la Commission des éléments de preuve selon lesquels la S.R.N.A. avait consacré beaucoup d'énergie, de temps et d'argent au cours des quelques années précédentes à promouvoir la mise sur pied d'associations d'infirmières attitrées partout dans la province de Saskatchewan. La Commission a retenu des témoignages selon lesquels la S.R.N.A. tentait de dominer ces associations

bers of "non-nurse unions". The organization meeting of the respondent Association was arranged by the employment relations officer of S.R.N.A. and held at the Nipawin Union Hospital. The employment relations officer had a draft agenda with him and a draft write-in constitution for the new organization; his expenses were paid by S.R.N.A. and the application for certification was filed with the Board under a covering letter from him. It was also conceded that counsel representing the Association at the hearing before the Board was engaged and paid by S.R.N.A. The substance of the Board's decision to dismiss the application is found in the following paragraph:

> The Board concurs, on the evidence presented to it in this application, with the view expressed by Miss Sutherland in the indicated article and feels that an organization under the domination, or control, of the SRNA Council would, or could, in effect be control of the bargaining process by management or management personnel.

The "view expressed by Miss Sutherland" is that contained in the April 1971 issue of the News Bulletin published by S.R.N.A. in which Miss Ann Sutherland, then S.R.N.A. employment relations officer, stated:

> The SRNA council is almost always made up of management nurses so that approval by the council would in effect be control of the bargaining process by management. However, a more formal relationship of the staff nurses' association within SRNA will need to be established.

The reasons for decision of the Board contain a quotation from Carrothers, *Collective Bargaining Law in Canada*, 1965, p. 207, reading: "statutory policy is clear that unions should be free of employer influence or domination" and conclude by holding that the applicant Association was a company dominated organization and accordingly not a trade union within the meaning of the Act.

dans le but de s'assurer que les infirmières ne deviendraient pas membres de «syndicats de non-infirmières». L'assemblée de fondation de l'Association intimée a été préparée par l'agent des relations de travail de la S.R.N.A. et elle a été tenue au Nipawin Union Hospital. L'agent des relations de travail avait apporté un projet d'ordre du jour ainsi qu'un projet sommaire de constitution pour la nouvelle organisation; ses dépenses ont été payées par la S.R.N.A. et la demande d'accréditation a été déposée auprès de la Commission avec une lettre d'accompagnement émanant de lui. Il a aussi été admis que les services de l'avocat représentant l'Association à l'audition tenue devant la Commission ont été retenus et payés par la S.R.N.A. L'essentiel de la décision de la Commission de rejeter la demande se trouve dans l'alinéa suivant:

> [TRADUCTION] Sur la preuve qui a été faite relativement à cette demande, la Commission partage l'avis exprimé par Miss Sutherland dans l'article précité et pense qu'une organisation dominée ou contrôlée par le conseil de la S.R.N.A. équivaudrait ou pourrait équivaloir en fait à un contrôle du processus de négociation par la gestion ou le personnel de gestion.

«L'avis exprimé par Mlle Sutherland» est celui contenu dans le numéro d'avril 1971 du News Bulletin publié par la S.R.N.A. dans lequel Mlle Sutherland, alors agent des relations de travail de la S.R.N.A. a déclaré:

> [TRADUCTION] Le conseil de la S.R.N.A. est presque toujours constitué d'infirmières cadres de sorte que l'approbation du conseil équivaudrait en fait à un contrôle du processus de négociation par la gestion. Cependant, il sera nécessaire de préciser plus fermement le statut de l'association d'infirmières attitrées au sein de la S.R.N.A.

Les motifs de la décision de la Commission contiennent une citation tirée de Carrothers, *Collective Bargaining Law in Canada*, 1965, p. 207, et qui se lit comme suit: [TRADUCTION] «Les lignes de conduite découlant de la loi indiquent clairement que les syndicats devraient être libres de l'influence ou de la domination de l'employeur», et la Commission conclut ses motifs en statuant que l'Association requérante est une organisation dominée par l'employeur et

The judgment of the Court of Appeal for Saskatchewan delivered by Culliton C.J.S. acknowledges the right of the Board to determine whether the association was a "company dominated organization" and affirms that if, in the determination of that question, the Board acted within its jurisdiction the decision could not be reviewed in *certiorari* or *mandamus* proceedings even if wrong in fact or law: *Farrell et al. v. Workmen's Compensation Board*[2]; and *Noranda Mines Ltd. v. The Queen et al.*[3] The Court of Appeal held that although the Board found that the Association was dominated by S.R.N.A. that finding would not render the Association a company dominated organization within s. 2(*e*) unless S.R.N.A. was either an employer or employer's agent. In the opinion of the Court the Board inquired into the personal and private employment of the individual members who constituted the council of S.R.N.A.; found that the members of the council from time to time were made up of persons who could not be classed as employees under *The Trade Union Act*; and, having reached that conclusion, the Board held that the applicant, being under the domination of an organization so constituted, would in effect be controlled by management and, therefore, a company dominated organization. The Court concluded that the inquiry made by the Board and the decision which it reached were not founded on the provisions of the legislation but upon the Board's view of what constituted a company dominated organization, and thus the Board acted in excess of its jurisdiction. With great respect, I do not agree. There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the

[2] [1962] S.C.R. 48.
[3] [1969] S.C.R. 898.

Le jugement de la Cour d'appel de la Saskatchewan prononcé par M. le Juge en chef Culliton reconnaît que la Commission a le droit de déterminer si l'Association était une «organisation dominée par l'employeur» et affirme que si, en décidant la question, la Commission a agi dans les limites de sa compétence, la décision ne peut être revisée par voie de *certiorari* ou de *mandamus* même si elle est erronée en fait ou en droit: *Farrell et al. v. Workmen's Compensation Board*[2]; et *Noranda Mines Ltd. c. The Queen et al.*[3]. La Cour d'appel a conclu que même si la Commission a décidé que l'Association était dominée par la S.R.N.A., cette décision ne fait pas de l'Association une organisation dominée par l'employeur au sens de l'art. 2, al. *e*) à moins que la S.R.N.A. soit un employeur ou le représentant d'un employeur. De l'avis de la Cour, la Commission a enquêté sur l'emploi personnel et individuel de chacun des membres qui formaient le Conseil de la S.R.N.A., conclu que le Conseil se composait de temps à autre de personnes ne pouvant être classées comme employés en vertu de la loi dite *Trade Union Act*, et, ayant tiré cette conclusion, décidé que la requérante, étant sous la domination d'une organisation ainsi constituée, serait effectivement sous le contrôle de la gestion et, par conséquent, serait une organisation dominée par l'employeur. La Cour a conclu que l'enquête faite par la Commission et la décision à laquelle elle est arrivée n'étaient pas fondées sur les dispositions législatives mais sur l'opinion qu'avait la Commission de ce qui constitue une organisation dominée par l'employeur, et que ce faisant la Commission a outrepassé ses pouvoirs. Bien respectueusement, je ne partage pas cet avis. Il ne peut y avoir de doute qu'un tribunal «statutaire» ne peut pas, impunément, faire abstraction des conditions requises par la loi qui l'a créé, et trancher les questions à sa guise. S'il le fait, il déborde le cadre de ses pouvoirs, manque de remplir son devoir envers

[2] [1962] R.C.S. 48.
[3] [1969] R.C.S. 898.

public interest. 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.

A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. If, on the other hand, a proper question is submitted to the tribunal, that is to say, one within its jurisdiction, and if it answers that question without any errors of the nature of those to which I have alluded, then it is entitled to answer the question rightly or wrongly and that decision will not be subject to review by the Courts: *Anisminic, Ltd. v. Foreign Compensation Commission et al.*[4]; *Noranda Mines Ltd. v. The Queen et al., supra; Farrell et al. v. Workmen's Compensation Board, supra; R. v. Quebec Labour Relations Board, Ex p. Komo Construction Inc.*[5]

Reference must be made to *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*[6]. In that case the Union sought certification as bargaining agent of all employees at Metropolitan Life Insurance

[4] [1969] 1 All E.R. 208.
[5] (1967), 1 D.L.R. (3d) 125.
[6] [1970] S.C.R. 425.

le public et s'écarte d'une façon d'agir légalement permise. Une intervention judiciaire est alors non seulement admissible, mais l'intérêt public l'exige. Mais si la Commission agit de bonne foi et si sa décision peut rationnellement s'appuyer sur une interprétation qu'on peut raisonnablement considérer comme étayée par la législation pertinente, alors la Cour n'interviendra pas.

Un tribunal peut, d'une part, avoir compétence dans le sens strict du pouvoir de procéder à une enquête mais, au cours de cette enquête, faire quelque chose qui retire l'exercice de ce pouvoir de la sauvegarde de la clause privative ou limitative de recours. Des exemples de ce genre d'erreur seraient le fait d'agir de mauvaise foi, de fonder la décision sur des données étrangères à la question, d'omettre de tenir compte de facteurs pertinents, d'enfreindre les règles de la justice naturelle ou d'interpréter erronément les dispositions du texte législatif de façon à entreprendre une enquête ou répondre à une question dont il n'est pas saisi. Si, d'autre part, une question appropriée est soumise à ce tribunal, c'est-à-dire, une question relevant de sa compétence, et s'il répond à cette question sans faire d'erreurs de la nature de celles dont j'ai parlé, il peut alors répondre à la question correctement ou incorrectement et sa décision ne sera pas sujette à révision par les cours: *Anisminic, Ltd. v. Foreign Compensation Commission et al.*[4]; *Noranda Mines Ltd. c. The Queen et al.*, précité; *Farrell et al. c. Workmen's Compensation Board*, précité; *R. c. La Commission des relations de travail du Québec, Ex p. Komo Construction Inc.*[5].

Il faut se reporter à l'affaire *Metropolitan Life Insurance Co. c. International Union of Operating Engineers, Local 796*.[6] Dans cette affaire-là, le syndicat a cherché à obtenir l'accréditation comme agent négociateur de tous les

[4] [1969] 1 All E.R. 208.
[5] (1967), 1 D.L.R. (3d) 125.
[6] [1970] R.C.S. 425.

Company in its building division at Ottawa, with certain exceptions. The company opposed the application on the ground that the constitution of the Union could only be interpreted as excluding from membership in the Union those persons claimed by the Union for certification. The Board rejected the company's submission and applied a policy of its own making in dealing with the question whether an employee was a member of a Union. That policy permitted a person to be so regarded upon mere application for membership and payment of at least $1 initiation fee or monthly dues. This Court held that it was a condition precedent to the Board having power to grant the Union's application for certification, that it be satisfied that more than 55 per cent of the employees in the bargaining unit were members of the Union; if the Board had addressed itself to that question its decision could not have been interfered with by the Court although it appeared that the Board, in reaching it, had erred in fact or in law or in both: instead of asking itself that question the Board embarked on an inquiry as to whether, in regard to the requisite number of employees, the conditions which the Board *ex proprio motu* applied, had been fulfilled; in proceeding in this manner the Board failed to deal with the question remitted to it and instead decided a question not remitted to it. The recent judgment of the House of Lords in the *Anisminic* case, *supra*, as well as the judgment of this Court in *Toronto Newspaper Guild, Local 87, American Newspaper Guild (C.I.O.) v. Globe Printing Co.*[7], were relied upon. It would seem to me that in the case at bar the circumstances are very different. In the instant case, the Board dealt with the question remitted to it, *viz.*, whether the Association was a trade union, as defined. That question in turn required determination of the further question whether the Association was a company dominated organization, as defined. The Board gave its answer to both of these questions. It is contended, however, that in doing so it failed to make a finding that

[7] [1953] 2 S.C.R. 18.

salariés de Metropolitan Life Insurance Company dans sa division des immeubles à Ottawa, avec certaines exceptions. La compagnie a fait opposition à cette demande en invoquant que la seule interprétation possible des statuts du syndicat requérant défendait d'admettre comme membres du syndicat les personnes dont se réclamait le syndicat en vue de l'accréditation. La Commission a rejeté la prétention de la compagnie et a appliqué une ligne de conduite traçée par elle-même en traitant de la question de savoir si un employé était membre d'un syndicat. Cette ligne de conduite permettait de considérer une personne comme membre sur la base d'une simple demande d'adhésion et du versement d'au moins $1 de droit d'entrée ou de cotisations mensuelles. Cette Cour a conclu qu'une condition préalable du pouvoir de la Commission de faire droit à la demande d'accréditation du syndicat était qu'elle soit convaincue que plus de 55 pour cent des employés qui composent l'unité de négociation sont membres du syndicat; si la Commission s'était attaquée à cette question-là, la Cour n'aurait pu intervenir dans sa décision, même s'il lui paraissait qu'en la rendant la Commission avait commis une erreur de fait ou une erreur de droit: au lieu de se poser cette question, la Commission avait entrepris de rechercher si, à l'égard du nombre requis d'employés, les conditions que la Commission appliquait de sa propre initiative avaient été remplies; en agissant ainsi, la Commission avait manqué de s'attaquer à la question qui lui avait été soumise et elle avait plutôt tranché une question dont elle n'était pas saisie. On s'appuya sur le récent jugement de la Chambre des Lords dans l'affaire *Anisminic* (précitée), de même que sur l'arrêt de cette Cour dans l'affaire *Toronto Newspaper Guild, Local 87, American Newspaper Guild (C.I.O.) c. Globe Printing Company*[7]. Il me semble que dans l'affaire qui nous occupe les circonstances sont très différentes. Dans le présent cas, la Commission a traité de la question dont elle était saisie, à savoir si l'Association était un syndicat, au sens de la définition.

[7] [1953] 2 R.C.S. 18.

S.R.N.A. was an employer or employer's agent or that the members of the council of S.R.N.A. were employers or employers' agents and the Board thereby acted without jurisdiction. I find it difficult to accept that contention. Section 2(*e*) of *The Trade Union Act* defines "company dominated organization" as a labour organization dominated by "an" employer. The proscribed domination need not be that of the employer whose employees are seeking to organize. A labour organization is a company dominated organization if *any* employer or employer's agent dominates it or interferes with it or contributes financial or other support to it, except as permitted by the Act. "Employer" means "an employer who employs three or more employees": s. 2(*g*)(*i*). The reasons for decision of the Board do not state the number of persons employed by S.R.N.A. and the Board did not expressly find that S.R.N.A. was an employer or employer's agent but I do not regard this as fatal to the Board's jurisdiction. A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion. The role of the Court in a case such as this is supervisory, not appellate: s. 21 of the Act. The Board made the specific finding that S.R.N.A. was not a "trade union" as defined by the Act. For myself, I am quite prepared, on the record, to accept that the Board was aware of the statutory definition of "employer" and "employer's agent" found in *The Trade Union Act* and that it neither overlooked nor wilfully disregarded such definitions in concluding that the association was a company dominated organization.

Cette question à son tour exigeait que l'on statue sur une autre question, celle de savoir si l'Association était une organisation dominée par l'employeur, au sens de la définition. La Commission a répondu à ces deux questions. On allègue cependant qu'en ce faisant elle n'a pas conclu que la S.R.N.A. était un employeur ou le représentant d'un employeur, ou que les membres du conseil de la S.R.N.A. étaient des employeurs ou des représentants d'employeurs, et que la Commission a ainsi agi sans compétence. Je trouve difficile d'accepter cette prétention. L'article 2, al. *e*), du *Trade Union Act* définit «organisation dominée par l'employeur» comme une organisation ouvrière dominée par «un» employeur. La domination proscrite ne doit pas nécessairement être celle de l'employeur chez qui les employés veulent se structurer. Une organisation de travail est une organisation dominée par l'employeur si *un quelconque* employeur ou représentant d'employeur la domine ou s'immisce dans ses affaires ou contribue financièrement ou autrement à son soutien, sauf dans la mesure permise par le *Trade Union Act*. Un «employeur» y est défini comme «un employeur qui emploie trois employés ou plus»: art. 2, al. *g*), par. (*i*). Les motifs de la décision de la Commission ne précisent pas le nombre de personnes employées par la S.R.N.A. et la Commission n'a pas expressément conclu que la S.R.N.A. était un employeur ou un représentant d'employeur, mais je ne considère pas que cela soit fatal à la compétence de la Commission. Un organisme n'est pas tenu de conclure explicitement par écrit sur chaque élément constitutif, si subordonné soit-il, qui mène à sa décision finale. Le rôle de la Cour dans un cas de ce genre est un rôle de surveillance, non d'appel: art. 21 de la loi. La Commission a conclu spécifiquement que la S.R.N.A. n'était pas un «syndicat ouvrier» selon la définition de la loi. Quant à moi, je suis tout disposé, d'après le dossier, à reconnaître que la Commission était au courant de la définition légale des termes «employeur» et «représentant d'employeur» figurant dans le *Trade Union Act* et qu'elle n'a pas fait abstraction de ces définitions et n'a pas non plus volontairement omis d'en

I would accordingly allow the appeal and confirm the Board's dismissal of the association's application, with costs in this Court and in the Court of Appeal. There should be no costs payable to or by the Board.

Appeal allowed with costs.

Solicitors for the appellant: Goldenberg, Taylor, Tallis & Goldenberg, Regina.

Solicitors for the applicant, respondent: MacPherson, Leslie & Tyerman, Regina.

Solicitor for the Labour Relations Board of Saskatchewan: J. E. Gebhard, Regina.

tenir compte lorsqu'elle a conclu que l'Association était une organisation dominée par l'employeur.

Je suis donc d'avis d'accueillir l'appel et de confirmer le rejet par la Commission de la demande de l'Association, avec dépens en cette Cour et en Cour d'appel. Il n'y aura pas d'adjudication de dépens en faveur de la Commission ou contre elle.

Appel accueilli avec dépens.

Procureurs de l'appelante: Goldenberg, Taylor, Tallis & Goldenberg, Regina.

Procureurs de l'intimée: MacPherson, Leslie & Tyerman, Regina.

Procureur de la Commission des relations de travail de Saskatchewan: J. E. Gebhard, Regina.

(3) The order incorporating the amendment shall not be taken out unless and until the defendant first submits to discovery, or the plaintiff waives further discovery in writing.

Order accordingly.

College of Physicians & Surgeons of Ontario v. Petrie

[Indexed as: College of Physicians and Surgeons of Ontario v. Petrie]

High Court of Justice, Divisional Court, Callaghan A.C.J.H.C., O'Brien and Campbell JJ. February 6, 1989.

Administrative law — Duty to act fairly — Extent of duty — Discipline committee finding appellant failed to maintain standards of profession — Counsel for college and appellant jointly recommending penalty — Committee imposing more severe penalty — Not hearing submissions on severity — Duty of fairness requiring hearing of submissions — Matter remitted for reconsideration of sentence.

The Discipline Committee of the College of Physicians and Surgeons (the "Committee") found that a physician had failed to maintain the standards of practice of the profession. A joint submission was made by counsel for the college and the physician that a penalty of an unpublished reprimand be imposed. The committee, after deliberating, ordered a published reprimand and a suspension. Counsel were not asked to make representations on the severity issue. The physician appealed.

Held, the appeal as to sentence should be allowed. The matter should be remitted for reconsideration of sentence.

The committee's decision as to conviction, made in good faith, was supported by the evidence and was consistent with a reasonable construction of the constituent statute.

The committee was within its jurisdiction in rejecting the joint submission. However, when it proposed to impose a more substantial penalty it should have afforded counsel an opportunity to make representations addressing that issue. The matter should therefore be remitted to the committee for a reconsideration of sentence after hearing submissions.

Shek v. Ontario College of Pharmacists, Ont. Div. Ct., April 26, 1988 (unreported), **consd**

Statutes referred to

Health Disciplines Act, R.S.O. 1980, c. 196, s. 64

Rules and regulations referred to

R.R.O. 1980, Reg. 448 (*Health Disciplines Act*), ss. 27(3) (am. O. Reg. 445/87, s. 1), (21)

APPEAL from conviction and sentence of the Discipline Committee of the College of Physicians and Surgeons.

Deborah Berlach, for appellant.
David A. Jarvis, for respondent.

The judgment of the court was delivered orally by

CALLAGHAN A.C.J.H.C.:—This is an appeal from a decision of the Discipline Committee of the College of Physicians and Surgeons of Ontario (Committee) dated March 25, 1988, wherein the Committee found the appellant had failed to maintain the standard of practice of the profession contrary to s. 27(3) and (21) of R.R.O. 1980, Reg. 448, made pursuant to the *Health Disciplines Act*, R.S.O. 1980, c. 196.

The Committee ordered the appellant be reprimanded, the reprimand published and recorded, and, that the appellant's licence to practise be suspended for a period of two months which suspension would be lifted if the appellant would agree to aid the Committee in an investigation under s. 64 of the Act.

Ms Berlach, in an admirable argument, has attempted to convince us that the findings of the Committee pursuant to which the appellant was convicted should be set aside. We are all of the view that in the circumstances of this case, the fundamental principles applicable militate against such a finding. It is not the function of this court to substitute its assessment of the balance of probabilities for the factual findings of the Committee. This is particularly so where, as here, the findings on credibility are challenged with reference to the appellant's evidence when contrasted with the evidence of other witnesses. In this case, the decision of the Committee, made in good faith, is supported by the evidence and is consistent with a reasonable construction of the constituent statute. In such circumstances, we decline to interfere with the findings of the Committee, with reference to conviction and we accordingly dismiss the appeal against conviction.

The issue of penalty however, raises another problem. At the conclusion of the hearing, a joint submission was made to the Committee by counsel on behalf of the college and on behalf of the appellant. On that occasion, both agreed that justice would be satisfied by a penalty of an unpublished reprimand. The Committee, after hearing the joint submission, took a short recess and, upon resuming, made its findings as to conviction and then imposed the reprimand *and* the suspension above-mentioned.

It is the imposition of the suspension that has caused us some concern. While it is within the jurisdiction of the Committee to reject a joint submission, we are of the view that when a Committee with disciplinary power rejects such a submission and

proposes to impose a sentence of a more severe character, then the rule of *audi alteram partem* should be invoked and the Committee should afford counsel the opportunity to make representations addressing the issue of the more severe penalty.

In an unreported decision of this court, *Shek v. Ontario College of Pharmacists* (April 26, 1988), it is stated:

> The Committee did not accept the recommendation as was its right, however the Committee gave no indication that it was considering the more serious penalty of suspension. We are of the view that in these circumstances, the appellant should have been given an opportunity to address the issue of suspension and absent such an opportunity . . . the order of suspension is vacated.

This is consonant with principle — see S.A. de Smith, *Judicial Review of Administration Action*, 4th ed. (1980), at pp.212-3:

> The more severe the penalty imposition, deprivation, encroachment or slur the more likely it is that the courts will apply the *audi alteram partem* rule. Again, natural justice may be violated by a refusal to allow a party (or his legal representative) to address the tribunal on the law or the facts or, after a finding of guilt, on the penalty to be imposed.

It is our view that a tribunal imposing a more substantial penalty than that which has been recommended on a joint submission should follow carefully that fundamental principle and indicate to those appearing before it that it is considering imposing such a penalty and request submissions thereon.

The failure to accept the recommendation that the reprimand be unpublished and the imposition of the suspension involve potential economic consequences of a significant nature for the appellant. His counsel should have been afforded an opportunity to comment and make submissions in reference thereto.

In result therefore, we are of the view that the appeal as to conviction must be dismissed, but the appeal as to sentence must be allowed. We have considered the question as to whether or not the matter should be dealt with by this court or referred back to the Committee. We are of the view that the matter should properly go before the original Committee for the imposition of penalty. While there may be some apprehension of bias in referring the matter to the original Committee, it is our view that such apprehension is outweighed by the great advantage that the Committee has from having heard the witnesses in this matter and its familiarity with the evidence relevant to these proceedings. In this case, the Committee heard the appellant and is particularly well-suited to impose the appropriate penalty.

In result therefore, the matter shall be remitted to the Committee to reconsider the sentence imposed after hearing

submissions from counsel on behalf of the college and counsel on behalf of the appellant.

Success being divided, there will be no order as to costs of this appeal.

Appeal allowed in part.

Bell Canada v. Olympia & York Developments Ltd. et al.; City of Ottawa et al., Third Parties

[Indexed as: Bell Canada v. Olympia & York Developments Ltd.]

High Court of Justice, Eberle J. February 7, 1989.

Civil procedure — Discovery — Examination and inspection — Plaintiffs supplying expert witness with documents — Calling expert to give evidence — Defendant seeking production of documents — Privilege between solicitor and expert continuing after expert on stand — Relevancy of documents not proven — Documents need not be produced.

At the trial of an action the solicitors for the plaintiff called an expert witness. They had supplied the expert with documentary evidence in advance which the second defendant sought to have produced. The plaintiff refused and the second defendant moved for an order for production.

Held, the motion should be dismissed.

The communications between the solicitors and other parties were privileged either as solicitor-client communications or as documents made for the purposes of litigation. The privilege is not that of the expert but of the client. To hold that the privilege ended once the expert became a witness might lead to the same loss of privilege as between solicitor and client if the client were to become a witness, a privilege which is necessary to uphold the public interest.

Moreover, the relevance of the materials sought had not been established.

Vancouver Community College v. Phillips (1987), 38 L.C.R. 30, 20 B.C.L.R. (2d) 289, 27 C.L.R. 11, **not folld**

Ocean Falls Corp. v. Worthington (Canada) Inc. (1985), 69 B.C.L.R. 124, **consd**

RULING on a motion for the production of documents during the course of a trial.

W.H.O. Mueller, Q.C., and *R.W. Carlton*, for plaintiff.

R.M. Loudon, Q.C., *R.M. Slattery* and *E.T. Henderson*, for defendant, Olympia & York Developments Limited.

G.E.H. Betts, Q.C., and *Janine Kovach*, for defendant, Jerry Jablonsky Limited.

D.J. Ross and *M.E. Girard*, for third party, City of Ottawa.

P.K. Boeckle, *G.R. Will* and *M.P. Keeble*, for third party, Regional Municipality of Ottawa-Carleton.

ment made by the Minister. The notices here in question clearly met that requirement. First, the fact that they bore the printed signature of a person who had ceased to be the Deputy Minister was of no consequence since nothing in the statute requires that notices of assessment be signed by anyone. Second, the fact that the words "Revenue Canada" were not the legal designation of the Department of National Revenue was also immaterial since, as was decided by the judge below, the use of that "publicly well known appellation" could in no way mislead the taxpayer "into thinking that these forms did not emanate from the Department of National Revenue."

[3] The appeal will, for these reasons, be dismissed with costs.

Appeal dismissed.

Editor: David C.R. Olmstead
clh

CORPORATION OF THE TOWN OF FLAMBOROUGH and REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH (appellants) v. NATIONAL ENERGY BOARD and INTER-PROVINCIAL PIPE LINE LIMITED (respondents)
(No. A-288-86)

INDEXED AS: FLAMBOROUGH (TOWN) et al. v. INTERPROVINCIAL PIPE LINE LTD.

Federal Court of Appeal
Heald, Mahoney and Marceau, JJ.
May 7, 1987.

Summary:

Interprovincial Pipe Line Ltd. applied for approval of the location of truck and rail delivery and loading facilities for propane within a municipality. After a hearing the National Energy Board approved the location of the facilities and imposed conditions. The municipality appealed on the ground that the parties were not heard respecting the conditions.

The Federal Court of Appeal allowed the appeal and held that the parties were entitled to be heard on the conditions.

Administrative Law - Topic 225

Hearing and decision - Right to be heard - What constitutes not being heard - After a hearing the National Energy Board approved the location of propane facilities and imposed conditions respecting the preparation of operations and emergency manuals and staff training and noise monitoring programs - The parties were not heard on the nature of the conditions imposed - The Federal Court of Appeal held that the parties were improperly denied a hearing on the conditions and directed that the Board hear the parties on them.

Administrative Law - Topic 283

Hearing and decision - Denial of right to hearing - Effect of - The Federal Court of Appeal adopted the Supreme Court of Canada's statement that "the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing" - See paragraph 7.

Cases Noticed:

Cardinal and Oswald v. Kent Institution, [1985] 2 S.C.R. 643; 63 N.R. 353, appld. [para. 7].

Counsel:

D. Estrin, for the appellant;
L. Keough, for the National Energy Board;

of natural justice, procedural fairness or fundamental justice in imposing the conditions contained in paragraphs 12, 13, 14 and 15 of its Order

a) Without providing the applicants with an opportunity to lead evidence or make submissions as to the precise content of such conditions prior to the making of the order, and

b) without providing the applicants with an opportunity to lead evidence and make submissions as to whether such conditions have been complied with prior to leave to open being granted."

[6] In my opinion, the hearing undertaken by the NEB was inherently a two-stage process entailing, firstly, the determination of whether the earlier approval of the locations should be confirmed and, secondly, a determination of the conditions under which the facilities ought to be permitted to be operated on those locations. The appellants had the same right to be heard on the second stage as on the first.

[7] Given the expertise available to the NEB, one may well question the value of the appellants' input into the preparation of the operations manual and the staff training program. The appellants' counsel conceded that the noise monitoring program, while important to them, was not something they felt strongly required their imput. That is all beside the point. As was said by LeDain, J., in **Cardinal and Oswald v. Kent Institution**, [1985] 2 S.C.R. 643; 63 N.R. 353, at 661 S.C.R.

"... I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing."

In any event, it is foreseeable that some emergencies arising in connection with the facilities could have effects requiring management outside their boundaries. The value of the appellants' input as well as their right to have input in this area is obvious. That the presence of the facilities may impose a financial burden on the municipalities for the provision of emergency services is, likewise, not to be ignored.

[8] I would allow this appeal, set aside paragraphs 12, 13, 14 and 15 of Order No. AO-2-XO-1-83 and refer the matter back to the NEB for reconsideration on a basis not inconsistent with these reasons. In referring the matter back I would make clear that the appellants and IPL are entitled to be heard as to what, within the contemplation of those paragraphs, IPL is to be required to deal with as a precondition of leave to open and also to be heard on those subjects before that material is approved. That said, the NEB is master of its own procedures. It may determine how it will afford the parties a fair hearing. This judgment is not to be construed as necessarily requiring a resumption of the public hearing.

Appeal allowed.

Editor: David C.R. Olmstead
clh

DANAKAS v. WAR VETERANS ALLOWANCE BOARD, CANADA

Federal Court of Canada [Court of Appeal],
Mahoney, Ryan and Hugessen JJ.

Heard - January 9, 1985.
Judgment - January 28, 1985.

Procedural fairness - Audi alteram partem - Board denying benefit to applicant on ground not dealt with at hearing of application - Judicial review granted - Applicant entitled to opportunity to know and meet case against him - Failure to permit him to do so constituting breach of natural justice.

Judicial review - Error of law - In deciding to deny benefit board relying on precedent - Application for judicial review granted - Board erring in treating earlier decision as binding - Board obliged to consider facts of each case.

D had been denied a war veterans allowance and this was affirmed on appeal by a majority of the board. It was held that he was not an "allied veteran" in terms of the Act and therefore did not qualify. At the hearing, the board principally concentrated on whether D had provided sufficient proof of service in the Second World War. No question was raised about whether the organization that he claimed to have served was a qualifying force. However, when the decision was rendered, the denial of a pension was based on a holding that the resistance force with which D served did not qualify. In this regard, reliance was placed on an earlier precedent of the board which had held that the particular resistance force was excluded. In D's case, the board did not consider a Greek law enacted after the earlier precedent and which recognized the resistance status of D's group. D applied under s. 28 of the Federal Court Act for an order reviewing and setting aside the board's decision.

Held - Application granted and matter remitted back to the board.

1. It was contrary to the principles of natural justice to dismiss D's claim without revealing the critical issue to him and providing an opportunity to deal with it.

2. The board erred in treating its earlier decision as a

conclusive or binding precedent. The board was obligated to consider the facts of each application. While a minority of the board did deal with the facts in holding D to be entitled to a pension, the majority had not dealt with the facts and there was no basis for presuming that the majority (had it not considered the precedent to be binding) would have applied the law to the facts in the same way as the minority. It was therefore appropriate to remit the matter to the board for reconsideration but taking into account s. 11 of the Interpretation Act (Canada) and its call for purposive interpretation of legislation of "a fair, large and liberal" variety. In particular, the board was to take account of the purpose of earlier extensions of the ambit of the benefits available under the Act.

Statutes considered

Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), ss. 28, 52(d).
Interpretation Act, R.S.C. 1970, c. I-23, s. 11.
War Veterans Allowance Act, S.C. 1952, c. 54.
War Veterans Allowance Act, S.C. 1960, c. 36.
War Veterans Allowance Act, R.S.C. 1970, c. W-5, ss. 2(1)(a), 31(4)(b)(i).

Canadian Abridgment (2nd) Classification

Administrative Law IV. 2. f. ii; IV. 2. 1.

APPLICATION under s. 28 of Federal Court Act (Canada) to review and set aside a decision of the War Veterans Allowance Board.

J. David Wake, for applicant.
Joseph A. Pethes, for respondent.

(No. A-649-84)

January 28, 1985. The judgment of the Court was delivered by

MAHONEY J.: - This s. 28 application seeks to set aside a decision of the War Veterans Allowance Board dismissing the applicant's appeal from the refusal of his application for war veterans allowance by a district authority. The applicant served in Greece with the National Popular Resistance Army (E.L.A.S.) during World War II. His entitlement to war veterans allowance depends, inter alia, on whether he is an "allied veteran" within the contemplation of subpara. 31(4)(b)(i) of the War Veterans Allowance Act, R.S.C. 1970, c. W-5.

That Act provides:

"2.(1) In this Act

'veteran' means . . . any of the following persons more particularly described in section 31, namely,

. . .

(c) an allied veteran,

. . .

31.(4) An allied veteran is

. . .

(b) any former member of His Majesty's forces, or of any of the forces of any of His Majesty's allies or powers associated with His Majesty in any war concluded or terminated on or before the 15th day of August 1945, who served during any such war, and has resided in Canada for a total period of at least ten years, and

(i) served in a theatre of actual war,"

The only point in issue is one of fact, namely, whether E.L.A.S. was "a force of any of His Majesty's allies or powers associated with His Majesty". That E.L.A.S. was a "force" appears not to be in issue.

At the hearing of this application, three grounds for setting aside the Board's decision were advanced. Firstly, a denial of natural justice is alleged in that the board is said to have dismissed the appeal without giving the appellant the opportunity to present evidence or argument on the ground upon which it was dismissed, namely that E.L.A.S. was not a force of an ally of, or power associated with, His Majesty. Secondly, what I should characterize as an error in law is alleged, in that the majority of the board considered itself bound to follow an earlier decision on a finding of fact, that being the finding that Greek national resistance forces, of which E.L.A.S. was one, were not forces of an ally of, or power associated with, His Majesty. Thirdly, the board is said to have erred in law in its conclusion.

As to the first point, the district authority declined the applicant's application on the basis that he had not established "service elegibility". Thereafter, evidence was obtained that the appellant had, in fact, been a member of E.L.A.S. The assistance extended to the applicant in this regard by the

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board's staff is worthy of commendation. It clearly approached its work with sympathy for, and a genuine interest in helping, the applicant. That said, no place in the record, prior to the board's decision, is there to be found a suggestion, much less one communicated to the applicant, that the wartime status of E.L.A.S. was in issue in his appeal. The term "service eligibility" is, to me, very broad and imprecise in its meaning. If it was intended to convey that E.L.A.S.'s status, rather than the applicant's membership in E.L.A.S., was in issue, it failed.

A memorandum from one board employee to another, appearing at p. 102 of the case, states in part:

> "This emotional veteran was clearly and repeatedly informed of the need to prove his service in the Greek National Resistance 1941-1944. He understands that unless this is proven on paper, War Veterans Allowance cannot be approved."

If he was not actually misled by the concentration on the issue of his service with the resistance, the applicant was certainly not informed that the status of the resistance as a qualifying force was in issue, much less that it was an issue the board considered critical. For the board to proceed to a decision without according the applicant the opportunity to know and deal with that issue was a denial of natural justice. For that reason alone, this application should succeed.

As to the second ground, the board relied on an earlier decision, in an appeal by Nicolas Farsarakis, rendered August 11, 1982. I would make two points concerning it.

By a law enacted on September 20, 1982, Greece recognized a number of wartime resistance groups as "national resistance organizations". E.L.A.S. was among them. In my opinion, the board was correct in holding that the status of E.L.A.S. during World War II, not its status since September 20, 1982, is material to the application of para. 31(4)(b) of the War Veterans Allowance Act. The new Greek law may, nevertheless, be evidence of the wartime status of the specified groups. The board ought to have considered it from that point of view.

A copy of the Farsarakis decision is on the record. The evidence tendered there is not, but I infer that the board received considerable evidence as to the wartime status of the Greek resistance. The board is, in my view, entitled to take account of previously acquired knowledge in disposing of a subsequent appeal. I do, however, consider that the majority erred in law in holding that the decision in Farsarakis was conclusive of the issue here.

The impression of the majority of the board as to the

doctrine of stare decisis is misconceived. Whether or not E.L.A.S. was a force of an ally of, or power associated with, His Majesty had not been conclusively determined as a matter of law by its earlier decision. It remained, rather, a question of fact to be determined by application of the law to the facts as found on the evidence in each case. If the facts as found are not to be distinguished in some material aspect from those in an earlier case, the result should be the same. However, before the facts are found, the evidence must be received and considered. For this reason, too, this application should succeed.

Presumably because of its misconception as to the application of stare decisis, the majority of the board did not deal with the evidence before it nor make findings of fact based on that evidence. The minority did make findings of fact, although it did not identify the source of the underlying evidence. Those findings follow. I have taken the liberty of correcting a number of typographical errors.

> "In 1942, the Allied GHQ-Middle East decided to send a British Military Mission to the Greek mountains. On 29 September 1942 British Officers and men under Brigadier E.C.W. Myers parachuted into Greece. Their assignment was to sabotage the German supply line that led through Greece to Africa. The British team established contact with E.L.A.S. and others, and in November 1942 a combined force attacked the Gorgapotamus Bridge in Central Greece, a key link in the German supply line. This was an eminently successful military operation. It was originally planned that the Myers group would return to the Middle East by submarine. Instead the unit was ordered to stay in Greece and establish a British Military Mission to concentrate on 'organizing, training and supplying guerilla forces as an auxilary military force'. The Myers team insisted that every possible assistance be given to E.L.A.S.
>
> E.L.A.S. had British Army officers and men cooperating with them at both the staff and field level. These officers and men had primary missions as advisors, communicators and trainers. The British group were in continual contact with Allied Headquarters - Middle East.
>
> E.L.A.S. was provided with arms, ammunition, equipment and training by the British Army.
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> Senior Officers of E.L.A.S. signed the surrender document for the Italian Forces in 1943 on behalf of Greece.
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> On 17 May 1944, a conference of all Greek political parties and organizations was held in Lebanon. At that time a new Government-in-exile, called 'The Government of National Liberation' was formed under George Papandreau. In September 1944 six members of E.L.A.S. and its political arm were sworn in as members of the government. This Government-in-exile was recognized by His Majesty.
>
> The Government of National Liberation placed certain Greek Forces - including E.L.A.S. - under the command of British General Sir Ronald Scobie. This situation lasted for a period of less than three months. On 5 November 1944, Sir Ronald Scobie issued an order that the 'E.L.A.S. Regiment' was to be demobilized effective 10 December 1944. The Civil War in Greece broke out on 5 December 1944.
>
> . . .
>
> There is no doubt that His Majesty had major problems in dealing with the Greek political situation during and after World War II. E.L.A.S. was politicized, and in addition to fighting the Germans and Italians, carried out military actions against other Greek organizations in order to achieve political goals. The fact remains that as an armed force, they carried out military operations against the enemies of His Majesty.
>
> It is not the mandate of the War Veterans Allowance Board to adjudicate with regard to the degree of effectiveness or efficiency of any of the forces of any of His Majesty's allies or powers associated with His Majesty. No such qualification or quantification is stated or implied in the Act. It is sufficient that an applicant satisfy the requirement of having served in such a force."

I agree with the last paragraph as a conclusion of law. The minority held that the applicant had served with E.L.A.S. and that E.L.A.S. was a force of one of His Majesty's allies or powers associated with His Majesty.

Since the record does not contain the evidence upon which the minority made its findings of fact and since those findings are not, by definition, the findings of the board, it is

not possible for this Court to say that the board either did or did not err in applying the law to the facts in holding that E.L.A.S. was not, at the relevant time, a force of an ally of, or power associated with, His Majesty. I would, therefor, allow this s. 28 application and, pursuant to s. 52(d) of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), refer this matter back to the board for reconsideration on a basis not inconsistent with these reasons.

I would enjoin the board, in its reconsideration, to recognize that Parliament must be assumed to have been aware of the realities of the war fought in occupied Europe when, in two stages, first to members of allied forces and later to members of associated forces, it extended the benefit of the War Veterans Allowance Act to allied veterans of World War II, S.C. 1952, c. 54, and S.C. 1960, c. 36. The board should also bear in mind that it, too, is bound by s. 11 of the Interpretation Act, R.S.C. 1970, c. I-23, which provides:

> "11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

It may be helpful to pose the question in concrete terms but in another national context. Did Parliament intend, in 1952 and 1960, to extend the benefit of the War Veterans Allowance Act to the chetniks, who had been led in the field by the War Minister in King Peter's Yugoslavian government in exile, Colonel Mihailovic, but to withhold that benefit from Tito's partisans? Is that a reasonable result in the context of Canadian policy toward allied veterans? Do the words Parliament has chosen to express its intention necessarily lead to that result?

Application granted. Decision set aside. Matter remitted to the board with directions.

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VANCE v. HARDIT CORP. et al.

Ontario Supreme Court [Divisional Court],
Reid, Southey and J. Holland JJ.

Judgment - December 23, 1985.

Procedural fairness - Audi alteram partem - Notice - Tribunal acting on information secured by own investigation - Practices contrary to rules of natural justice - Notice provision in Residential Tenancies Act, R.S.O. 1980, c. 452 breached - Practice not justified by judicial notice provisions of Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 16.

Procedural fairness - Bias - Disqualification of tribunal members - Members not disqualified simply because of adverse decision against party in earlier adjudication.

Appeals - Tribunal relying on earlier decision under appeal - Mere fact that decision under appeal not preventing reliance.

The Ontario Residential Tenancies Commission (O.R.T.C.) had disallowed appeals from the decisions of commissioners allowing three applications for rental increases for properties owned by HC and occupied by V. In the first of these decisions, the commissioner had stated that he was allowing HC's application on the strength of the evidence presented and the O.R.T.C.'s "own investigations". This aspect of the decision was also adopted by the commissioners adjudicating the other two applications. On appeal to an appeal panel of the O.R.T.C., V challenged this reliance on material generated by the O.R.T.C.'s own investigations, but this argument was rejected. Thereafter, in an appeal by way of case stated, the O.R.T.C. asked the Ontario Divisional Court whether it had erred in that ruling.

By virtue of s. 105 of the Residential Tenancies Act Ontario, the provisions of the Statutory Powers Procedure Act (Ontario) (the S.P.P.A.) were made applicable to O.R.T.C. proceedings. Section 16 of the S.P.P.A. provided that a tribunal could take notice of facts that could be judicially noticed and also "generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge". As well, s. 109 of the Residential Tenancies Act allowed the O.R.T.C. to take account of evidence obtained outside the hearing provided that it was first

revealed to the parties with an opportunity to refute or explain it.

In addition to this question, the O.R.T.C. also stated a number of other questions to the Court including:

(a) its right to rely in the second case upon its decision and the commissioner's decision in the first case when that case was already on appeal to the Divisional Court;

(b) the propriety of including a member of the panel in the first case as a member of the panel for the second case, and

(c) its insistence in the third case that an appeal should be allowed only if the commissioner had committed a "fundamental evidentiary error or misdirected herself".

Held - Appeals allowed. Three cases remitted back to the O.R.T.C.

1. There was no evidential basis for an argument that the additional evidence relied upon by the commissioner in the first case came within the judicial notice provisions of s. 16 of the S.P.P.A. Moreover, taking that material into account without notice to the parties was a breach of s. 109 of the Residential Tenancies Act. Furthermore, even without that provision, the actions of the commissioner would have amounted to breach of the rules of natural justice.

2. To the extent that the granting of the rent increases in the other two cases relied upon this aspect of the decision in the first case, the appeals in those cases also had to be allowed.

3. Despite the launching of an appeal in the first case, the decision in that case was still an effective order until upset or stayed. Accordingly, the O.R.T.C. was entitled to rely upon it in the second case.

4. Mere deciding a prior case against a litigant did not disqualify an adjudicator from sitting on a subsequent case involving that same litigant.

5. The O.R.T.C. had not erred in law in the third case in its statement of the standard to be met by appellants.

Statutes considered
Residential Tenancies Act, S.O. 1979, c. 78, s. 117(8).

Residential Tenancies Act, R.S.O. 1980, c. 452, ss. 105, 109, 118(2), 118(4)(c).
Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 16.

Canadian Abridgment (2nd) Classification
Administrative Law, II. 1. b. iv; II. 1. b. v; II. 2. a; II. 3; II. 4.

APPEALS by way of case stated from three decisions of the Ontario Residential Tenancies Commission dismissing appeals from the granting of applications for rent increases.

D.C. Moore, for appellant.
G.J. Pratte, for Hardit Corporation.
L. Kolyn, for Residential Tenancy Commission.

(Nos. 205/84; 445/84)

December 23, 1985. The judgment of the Court was delivered by

REID J.: - These proceedings involve appeals from three decisions of appeal panels of the Residential Tenancy Commission.

The first appeal is from the decision of an appeal panel composed of Commissioners H.F. Snyder, W.D. Biggar and N.L. Myrhorod, issued on October 29, 1982, affirming a decision of Commissioner G.E. Isaac, issued on January 18, 1982, granting the respondent Hardit Corporation the right to increase rents in residential premises at 5 and 15 Brookbanks Drive in Don Mills containing 269 rental units.

The second appeal is from the decision of an appeal panel composed of Commissioners W.D. Biggar, A.D. Sandeman and R.C. Yurkoski, dated April 25, 1984, affirming the decision of Commissioner E.T. Smith, dated September 15, 1983, granting Hardit the right to increase rents in the same premises.

The third appeal is from the decision of an appeal panel composed of Commissioners J.H. Thomson, D.B. Braund and R.S. Bentley, dated December 18, 1984, affirming a decision of Commissioner N.G. Stanwick, dated June 6, 1984, as corrected on June 11, 1984, granting Hardit the right to increased rents in units in the said premises.

The appeals were all by way of cases stated by the commission to this Court under s. 118(2) of the Residential Tenancies Act, R.S.O. 1980, c. 452. In our view, there is merit in the appellant's submissions as to only one of the questions contained in the three stated cases, and I shall deal

with that question first. It was question (b) in the stated case dated February 14, 1984, on the first appeal. The question reads as follows:

> "Whether the Residential Tenancies Commission erred in law in finding that the Commissioner made no finding outside the ambit of the Residential Tenancies Act or the Statutory Powers Procedure Act notwithstanding reliance on evidence resulting from the Commission's investigation."

The facts recited in that stated case may be briefly summarized. In June 1981 Hardit applied to the Residential Tenancy Commission for an increase in rents above that prescribed by the Residential Tenancies Act, S.O. 1979 c. 78. The appellant, Fred Vance (Vance) was one of the tenants whose rent might be increased. Vance appeared at the hearing of the application before Commissioner Isaac and opposed the application having filed extensive written material in support of his opposition. In January 1982 Commissioner Isaac gave his decision ordering an increase in the rent that Hardit could charge. This resulted in an increase of Vance's rent from $272.26 to $422 per month.

In his reasons for decision, Commissioner Isaac set out his findings of fact in detail. However, he prefaced those findings with the following statement:

> "I have made the following findings of fact based on the evidence that was presented by the parties for consideration on this application, together with evidence obtained as a result of the Commission's own investigations." (Emphasis added.)

Later he said:

> "Having made the above findings of fact, I must now determine the total rent increase that is justified for the Residential complex."

Nothing in the reasons given by Commissioner Isaac identified or explained what evidence was obtained as a result of "the Commission's own investigations".

Vance appealed that decision to an appeal panel of the commission. The appeal was rested on a number of grounds, one of them being the commissioner's act of resting his decision on "evidence" that was not adduced at the hearing and not described or elucidated. That was submitted to be a failure of fairness and natural justice.

The appeal panel disposed of that contention in the following terms:

> "In this regard we state that the Commission has authority under Section 16 of the Statutory Powers Procedure Act to take judicial notice of facts and also to take notice of generally recognized scientific or technical facts, information or opinion within its scientific or specialized body of opinion.
>
> We can see no finding made by Commissioner Isaac outside the ambit of the Residential Tenancies Act or the Statutory Powers Procedure Act."

It is this observation that is the subject of the question under consideration.

The jurisdiction of the appeal panel is set out in s. 117(8) of the Residential Tenancies Act 1979 (the Act) as follows:

> "(8) After the hearing of the appeal, the appeal panel may,
>
> (a) affirm the decision or order of the Commissioner; or
>
> (b) make any decision or order that a Commissioner is authorized to make under this Act, and for such purposes the appeal panel may substitute its opinion for that of the Commissioner."

The appeal panel dismissed the appeal and affirmed Commissioner Isaac's order.

Thereafter Vance appealed to this Court. The jurisdiction of this Court on such an appeal is set out in s. 118 of the Act. The appeal must be on a question of law and be by way of stated case. The commission is entitled to be heard, by counsel or otherwise, upon the argument of the appeal.

On such an appeal the Court is given broad powers to make any order "that it considers proper" and, in particular, to "remit the matter to the Commission with the opinion of the Divisional Court": s. 118(4)(c).

With respect, I am unable to find anything in s. 16 of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484 that supports Commissioner Isaac. Section 16 of the Act states:

> "16. A tribunal may, in making its decision in any proceedings,
>
> (a) take notice of facts that may be judicially noticed; and

(b) take notice of any generally recognized scientific or technical facts, information, or opinions within its scientific or specialized knowledge."

The Statutory Powers Procedure Act is unquestionably applicable. Section 105(1) of the Residential Tenancies Act states:

"105.(1) The Statutory Powers Procedure Act applies to proceedings by the Commission in the exercise of a statutory power of decision."

In my respectful opinion there was nothing in the reasons for decisions given by Commissioner Isaac to justify the appeal panel's conclusion that the evidence on which he relied consisted of "facts that may be judicially noticed" or "any generally recognized scientific or technical facts, information, or opinions within (his) scientific or specialized knowledge". That appears to be mere speculation.

Nor can I find any justification in the Residential Tenancies Act. Indeed, s. 109 of the Act is wholly to the contrary. Section 109 states:

"109. In making its determination, the Commission may consider any relevant information obtained by the Commission in addition to the evidence given at the hearing, provided that it first informs the parties of the additional information and gives them an opportunity to explain or refute it." (Emphasis added.)

The proviso is clear. Commissioner Isaac was not entitled to act upon any information that he obtained in addition to the evidence given at the hearing without having first informed Vance and any other interested party of the additional information and given him or them an opportunity to explain or refute it.

Apart from statute, it is well established that resting a finding of fact on undisclosed information or evidence can amount to a breach of the rules of natural justice and an error of jurisdiction.

In my opinion, the breach of s. 109 of the Act is clear and resort need not be had to the common law. Were s. 109 not applicable, my opinion would be that in the circumstances of this case the failure of the commissioner to disclose the evidence would amount to a breach of the rules of natural justice and a failure of jurisdiction.

It follows that question (b) in the stated case with

respect to the first appeal should be answered in the affirmative, and the matter should be remitted to the commission to be dealt with in accordance with these reasons.

The other two questions in the stated case on the first appeal asked whether the commission had erred in law in certain actions taken by it. Counsel for the appellant conceded that both of these questions should be answered in the negative.

The stated case with respect to the second order under appeal raised three questions. The first question (a) was withdrawn by counsel for the appellant during argument in this Court. The other two questions read as follows:

> "(b) Did the Residential Tenancy Commission err in law when it referred to, and relied upon, the findings made in the order of the Commissioner G.E. Isaac which order was affirmed by the first Appeal Panel of the RTC, as that order of the Appeal Panel was under appeal to the Divisional Court at the time of the second application to the Residential Tenancy Commission?
>
> (c) Did the Residential Tenancy Commission err in law by including in its second Appeal Panel a member of the Commission who had participated in the prior Appeal Panel decision with respect to the first order?"

As to question (b), the fact that an order has been appealed does not impair the effectiveness of the order and the reasons given for it, except to the extent that the rules or a statute provide for a stay. The commission was under no obligation to reconsider and decide afresh issues between the parties that had been disposed of by a valid and subsisting prior order, even though such order was under appeal. The question is answered in the negative.

As to question (c), a litigant has no right to refuse to proceed before a particular Judge simply because that Judge has decided a prior case against the litigant. The question is answered in the negative.

The stated case with respect to the third order under appeal contained four questions. Two of them were withdrawn. The remaining two read as follows:

> "(a) Did the Residential Tenancy Commission err in law in stating that the Appellant must persuade the Appeal Panel that the Commissioner at first instance committed any fundamental evidentiary error or misdirected herself in order to have his appeal allowed?

(b) Did the Residential Tenancy Commission err in law by determining that Hardit Corporation is a "landlord" within the meaning of Section 1(1)(d) of the Residential Tenancies Act and as such was entitled to make application for rent review?"

Both of these questions are answered in the negative.

As to (a), the relief sought by Vance before the appeal panel was the quashing of the order of Commissioner Stanwick and the dismissal of Hardit's application for increased rentals. Vance did not seek merely a variation in the order below, and an adjustment in the increase to be permitted. In these circumstances, I do not think the board erred in holding that such relief should be granted only on the basis of an evidentiary error by the commissioner that was fundamental, in the sense of essential, or that she had misdirected herself on an important point.

As to (d), the oral evidence that Hardit fell within the broad definition of "landlord" in s. 1(1)(d) of the Act was sufficient.

Although the answers to the questions in the stated cases in the second and third appeals contain no finding of error by the commission, those appeals must be allowed and the matters contained therein referred back to the commission along with the subject of the first appeal, because the second and third rent increases depend in part on the initial decision that was the subject of the first appeal.

The appeals are allowed with costs to the appellant, payable by the commission, with counsel fee as of one appeal.

Appeal allowed. Matters remitted to the Residential Tenancies Commission.

the proliferating divorce rate. In addition, there would hopefully result a uniformity in the approach taken by the Provincial Courts of this province.

It will be apparent that either the applicant or the respondent will have to go to the expense and trouble of making an application to vary the present maintenance order. That application will have to be made to the Quebec court which made the order in the first instance. It appears from what I have said that the order cannot be enforced in its present form when the older child no longer qualifies as a "child of the marriage".

In the result there will be an order that the arrears as of the date of the hearing be paid in full by 30th September 1977; in default of payment, 14 days imprisonment.

BRITISH COLUMBIA SUPREME COURT

Gould J.

McLean v. Weir, Goff and Royal Inland Hospital

Medicine and surgery — Res ipsa loquitur — Patient rendered a quadriplegic as a result of subclavian angiogram — Expert opinion evidence entered by defendant showing defendant not negligent — Plaintiff not tendering medical opinion evidence — Court not able to substitute own opinion to contradict expert testimony — Adequate warning given plaintiff by defendant as to risk — Defendants not liable.

The plaintiff was rendered a quadriplegic as a result of a subclavian angiogram performed in the defendant hospital by the defendant Dr. G. The plaintiff, because he was suffering from loss of circulation to his hands, had been referred to Dr. G. by Dr. W. for further diagnosis. Dr. G. performed a subclavian angiogram, which consisted of inserting a catheter into the plaintiff's arteries and injecting a contrast medium, which could be seen by fluoroscope, to test the arterial flow. The plaintiff was given no warning by Dr. W. as to possible risk, and Dr. G. outlined the procedure but did not warn him of the risk of paralysis. During the procedure some of the contrast medium entered the costocervical trunk, causing paralysis. The plaintiff claimed that each doctor had failed to warn him of the dangers of the procedure and, relying on res ipsa loquitur, claimed Dr. G. had negligently carried out the angiogram.

Held, the action was dismissed. Expert witnesses called by the defence all agreed that Dr. G.'s procedure was consistent with normal procedure carried out at the time, and showed that he had not acted negligently in injecting the quantity of contrast medium at the site he did. The doctrine of res ipsa loquitur did not apply as how the paralysis occurred was known from the evidence. As the plaintiff had not introduced any expert evidence to contradict the evidence of the defendants or to offer any theories consistent with negligence by Dr. G., the court had no status to come to a

"Q. Concerning what you diagnosed? A. Just to tell him that it was what I have described to you in lay terms.

"Q. Yes? A. And to show the extent of the problem we have to have an angiogram.

"Q. I see, did you say anything further to him? A. No.

"Q. Then did you discuss the angiogram at all with him? A. No.

"Q. Did you tell him who would be doing the angiogram? A. No, you have to understand that we have two radiologists that do the angiograms and you don't know which one you are getting for any particular occasion."

The plaintiff in his evidence said that Dr. Weir used the words "simple test" in describing to him what was to be done at the hospital. As to this Dr. Weir says "simple test" were not his words, and that he probably used the term "arteriogram" and explained to his patient how dye would have to be put into both arm arteries to show the problem in his hands and fingers. He said he gave no warning as to possible complications.

There are sizeable differences in the evidence of the plaintiff and that of Dr. Weir as to what was done and said in the latter's office. Dr. Weir's version is as plausible as the plaintiff's version is implausible. There are even wider differences between the evidence of the plaintiff and that of Dr. Goff as to what was said by Dr. Goff at the hospital before the procedure was started. Here again the doctor's evidence is, per se, plausible, whereas the plaintiff's is not. On entering the hospital plaintiff executed Ex. 3, a patient's agreement on admission. Before the procedure was started the plaintiff executed Ex. 2, which specifically names Dr. Goff and authorizes him to carry out an angiogram. The plaintiff sweeps these two documents aside, so to speak, by saying that he remembers signing them, but he did not have his glasses with him and so did not and could not read them.

Dr. Weir stated in evidence that as he himself was not going to carry out the procedure at the hospital — he would be in Boston at that time — he was not concerned with the patient's being warned of the nature of the procedure and consenting to it. Dr. Weir left that, he said, to the doctor who was going to carry out the procedure and to whom, therefore, the consent would be directed. To this court that seems an eminently sensible course of conduct on the part of Dr. Weir. As he was not going to carry out any procedure whatsoever on Mr. McLean,

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there was nothing that McLean had to consent to as far as Dr. Weir was concerned. The warning required by law to be given to a patient prior to elective surgery is to ensure that the patient may give an "informed consent", as the cases term it. Certainly the plaintiff, McLean, was entitled to a lawful warning before he underwent the angiogram, but Dr. Weir was not the person to give it, on 10th October 1973, in his office, for a procedure to be done by another doctor 13 days later at a hospital in Kamloops. Counsel for plaintiff was asked if his position was that the plaintiff was entitled to two warnings, the first from Dr. Weir on 10th October in the latter's office, and again from Dr. Goff or someone on his behalf on 23rd October at the hospital, immediately before signing the consent. Counsel said that was his submission, but could give no authority for the double-warning theory. I find no merit in it. There was no other case argued against Dr. Weir and thus the action against him is dismissed.

As to the warning given at the hospital on 23rd October by Dr. Goff, other than recording that I accept Dr. Goff's version of it, not the plaintiff's, it will be better dealt with later in this judgment after the facts have been considered. I do not think the plaintiff was sincerely mistaken in what I have found to be his inaccuracies in telling of his conversations with Drs. Weir and Goff, but I think the circumstances should be recorded. At the opening of his case in court he was present, in a wheelchair, substantially quadriplegic for life. Counsel announced agreement as to quantum for his injuries at $250,000. I assume that he knew that in his case it was all or nothing, and that the "all" was $250,000, collectible, if it could be won. With apologies to Mark Twain I simply say that there are no good untruths in court, but some are worse than others.

Plaintiff's counsel opened his case with excerpts from the discoveries of, respectively, Dr. Weir and Dr. Goff. The first witness called was plaintiff himself, Robert McLean. Other than on the matter of warning and consent his evidence was of little significance because it dealt with his life before and after the events of 23rd October 1973. The implications from this evidence are now superfluous as $250,000 has been agreed to as the proper quantum of damages. The second witness called was the plaintiff McLean's wife. The only evidence of any possible significance she gave was that McLean left his home on the morning of 23rd October with no overnight paraphernalia, such as tooth-brush or night clothes. This evidence was directed at his alleged belief that he would not have to stay overnight in the hospital for the tests. This touches upon

Mr. McEachern for the plaintiff objected to the question in the following terms:

"MR. MCEACHERN: I object to my friend asking this witness for an opinion; I was given a notice of the opinion evidence that this witness would be giving and I wasn't given any notice that he would give any opinion on the cause of the cord damage."

The notice referred to by counsel is the 14 days required as to opinion evidence by the British Columbia Evidence Act, R.S.B.C. 1960, c. 134, s. 13 [re-en. 1976, c. 33, s. 86]. The notice which Mr. McEachern had received is Ex. 6, which does not include specific notice that Dr. Goff would be asked his opinion as to what caused the paralysis. The same objection was made to similar questions as to what caused the plaintiff's paralysis asked of, respectively, Drs. Pitman and Robertson. Notices given as to their opinion evidence are, respectively, Exs. 16 and 19, and are similarly defective. Thus was precipitated by the objecton an interesting situation: plaintiff had mounted his case with intent to bring it within the res ipsa loquitur evidentiary doctrine and thus fasten on the defendants the onus to explain; but as soon as defendants attempted an explanation, plaintiff objected that defendants could not explain because they had not given the appropriate notice pursuant to the British Columbia Evidence Act. Had this situation been carried to its potential ultimate absurdity, this court would have had to decide this important and complicated case precluded by the British Columbia Evidence Act from ever being able to find out what the case was about — what caused the plaintiff's paralysis. One can hardly decide whether there was negligence unless one can inquire fully into the matter as to which negligence is alleged — in this instance, the causing of the plaintiff's paralysis.

Fortunately s. 13(1) of the British Columbia Evidence Act authorizes the trial judge to exercise a discretion as to waiver of the notice. I exercised such a discretion as to the three witnesses, Drs. Goff, Pitman and Robertson, and the respective notices, Exs. 6, 16 and 19. It is unthinkable that plaintiff was taken by surprise. The causation of the paralysis was the central factual question in the case.

During the argument on the objection this interchange took place.

"THE COURT: I think I will allow it under 13(1) under discretion —

"MR. MCEACHERN: I don't want to unduly press the point but I regard this as important and I want to state and state

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"MR. GREY: I have n
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"THE COURT: Any re

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619, 152 L.T. 56, [1934]
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High Court), and *Gent*
(2d) 160 (C.A.).

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The medical evidence
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1973 to explore possible causes of Raynaud's phenomenon in both the hands of the plaintiff McLean.

2. The equipment, the contrast medium (Hypaque 60) used, the pressure at which it was injected and the amount injected were all beyond criticism.

3. The head of the catheter (approximately 1 metre in length) at the moment of the damaging final injection had been passed by — in order on the right side — the vertebral, thyrocervical and costocervical trunks, and was approximately 1 centimetre beyond (distal to) the costocervical trunk.

4. There were four possible theories as to how the overcharge of contrast medium got into the costocervical trunk:

(a) Recoil of the head of the catheter upon injection, such as to point the flow directly into the costocervical trunk, or to inject such a quantity into its immediate area as to be carried up the costocervical into the spinal cord and damage it;

(b) Refluxion of the medium, i.e., a flowing back against the directional blood flow in the artery (from the heart towards the arm) to cause an undue concentration at the exit of the costocervical trunk from the subclavian;

(c) Jet effect causing an occlusion of the artery beyond the catheter point and consequent heavy refluxion; and

(d) Idiosyncratic reaction of the patient to Hypaque 60.

Theories (c) and (d) were most unlikely; (a) was the probable explanation, with (b) the second choice. Certainty as to exactly what happened was not possible.

5. If the catheter had been inserted further down the subclavian towards the axillary artery by, say, 1 inch (approximately 2½ centimetres) before the final injection, the complication would not have happened.

6. The state of the art (including the authoritative literature) in October 1973 did not recognize the danger of costocervical leakage in damaging quantity from the then standard subclavian arteriography, as this procedure was. At this time the danger area to be avoided "at all costs" so far as injection and leakage were concerned was the vertebral trunk.

7. The state of the art (including the authoritative literature) at the time of trial (February 1977) did recognize the danger described in (6.) above, namely, costocervical leakage into the spinal cord.

8. The distance between
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Ex. 13 (14 millimetres).
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injection in subclavian proc
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8. The distance between the thyrocervical and costocervical trunks leading off the subclavian varies: see Ex. 12 (11 millimetres); Ex. 11 (8 millimetres); Ex. 10 (15 millimetres), and Ex. 13 (14 millimetres). The standard arteriography practice for locating the position of a catheter head before final injection in subclavian procedure was and is to test inject and locate it by radiological illumination, including illumination of (a) the catheter head, (b) the vertebral, (c) the thyrocervical and (d) the costocervical trunks, and the relationship between the four, which was done in this case.

9. Dr. Goff's procedure was the standard accepted technique of October 1973, although not of February 1977. On the latter date special precautions would have had to be taken, by way of placing the catheter head more distal to the costocervical trunk, a danger area known to be such in 1977.

I find that the defence, from the above facts, has met the onus upon it if the doctrine of res ipsa loquitur applies, which I do not think it does, because how the disaster came about is known from the evidence, namely, an excessive amount of Hypaque 60 from the final, 21 cubic centimetre injection, reaching the spinal cord through the costocervical trunk system. The ultimate last detail of the mechanics of the entry into the costocervical trunk of the medium lies within the four possible explanations set out in (4.) above, as a probability. In any event, the defence took upon itself to try to prove, positively and precisely, what happened and that there was no negligence on the part of Dr. Goff, and in that endeavour I hold that it has succeeded.

The key to the successful defence was the state of the art in October 1973 compared to that in February 1977. Had Dr. Goff carried out the procedure he did with the same disasterous results for the same reason but in February 1977, I would have held him to have been negligent in failing to protect adequately against the potential danger of costocervical leakage in damaging quantities into the spinal cord, as that danger was known in February 1977.

The thrust of the plaintiff's case with relation to the facts was that Dr. Goff was mistaken when he said the head of the catheter was approximately 1 centimetre distal to the costocervical trunk when the damaging final injection was made. Dr. Goff's evidence to that effect was unequivocal. The plaintiff argued that the head of the catheter must have been closer, perhaps even proximal, to the costocervical trunk. I am asked by the plaintiff to deduce that from the disaster which ensued. The difficulty with that argument is that the plaintiff called no

medical evidence to contradict or offset the imposing bulk of expert medical opinion given to the court, none of it supporting the plaintiff's theory, but as a whole supporting the nine propositions catalogued above.

The plaintiff had adequate opportunity and was virtually invited to call medical evidence in rebuttal. For the plaintiff the most advantageous of all times in this trial for medical evidence was in rebuttal, after all the defence's experts had been heard. No rebuttal medical evidence was offered. Instead the court was invited, urged, to speculate against the unanimous evidence of exceptionally well qualified experts to bring in a finding contrary to their opinions. It is true that the court may accept in whole or in part or reject in whole or in part the evidence of any witness on the respective grounds of credibility or plausibility, or a combination of both. But in technical matters, unlike in lay matters within the traditional intellectual competence of the court, it cannot substitute its own medical opinion for that of qualified experts. The court has no status whatsoever to come to a medical conclusion contrary to unanimous medical evidence before it even if it wanted to, which is not the situation in this case. If the medical evidence is equivocal, the court may elect which of the theories advanced it accepts. If only two medical theories are advanced, the court may elect between the two or reject them both; it cannot adopt a third theory of its own, no matter how plausible such might be to the court. There is an evidentiary bar to opinion evidence on technical subjects from non-qualified witnesses, and an equally rigid bar against judges coming to conclusions on technical matters (other than domestic and constitutional law) founded on their own opinions rather than on evidence from qualified witnesses. The plaintiff's theory as to the surgical procedure here, a theory which connoted negligence on the part of the doctor who carried it out, was intelligently and eloquently argued. Unfortunately no witness, qualified or otherwise, was put forward to confirm it, nor was it confirmed by cross-examination. The same evidentiary situation obtained as to the state of the art in October 1973 compared to such in February 1977.

I direct myself now to the warning given the plaintiff patient by Dr. Goff before the angiogram was done. I accept the latter's evidence as to this. In effect the warning consisted of an outline of the somewhat complicated mechanics of the procedure and then this warning:

"Now, there are some hazards to this procedure. You are quite likely to get a bruise in the groin with blood leaking out

from the artery past the catheter. haps a 50 per cent chance. Th happen is much less likely, but w the hole in the artery seals over clot becomes too large and blocks That would mean that you would the afternoon to open up the arte artery up again to enable the blo

"MR. GREY: Now, then, that planation. What can you say as when doing a procedure such as It was and is my invariable prac an arteriogram and to use exac

No other warning as to haza no intimation of any risk of pa

Dr. Pitman described his pr before a subclavian angiogram. slightly less detail than that gave the following evidence:

"A. Yes, I consider that, closure of the nature of the p effects. I do not list the ra And especially — it is especia hensive patients not to upset the patient to come along t state of mind. One other thi patient he is going to have injection one hour before th the term I use. Just keep h will be shaved, I do not thi nique.

"MR. GREY: Now then, t A. That is as far as I go. on the horns of a dilemma so he can give him an info much that he will become nervous that he might be to go forward with a proc

"MR. GREY: Well, for dectomy, what would happ is fair. In the appendect might die from the anae that he might die if the a

tell the patient that the surgeon may perforate the secum. All these complications are known to have occurred, but they are rare and we do not tell the patient those things are possible because we do not expect them to happen."

The matter of warning the patient is extensively dealt with in the evidence of Dr. Robertson:

"Q. Now, then, before I turn to those procedures would you tell the court what your practice is with regard to any information or advice or warning you give a patient who has been referred to you for angiograms? A. Well, we have gone both ways on this issue of informed consent. Initially we would go into great detail and explain to the patients all possible risks and I must say I was only one of three [who] would do this and we now have a standard policy where the two of us do most of this work, and do not tell them the risks involved and we have come to this and I have worked on both sides of the issue now and I prefer not telling them what the risks are. What we do is go and see the patient before the examination is performed, usually on the patient's ward. Occasionally we may see them outside the X-ray room, and what I do is, I explain in detail to the patient how the study will be done. I start by telling him who I am and what we hope to accomplish. I then tell him that there will be freezing put into his groin, that a small hole will be put into the artery. I do not go into great lengths telling him about the cellular statistics. I tell him that a small tube would be positioned through the arm up to the vessels that go to supply their arm or their neck and I say at this stage when the vessel is properly positioned a mature —

"THE COURT: The tube is properly positioned? A. Yes. When the tube is properly positioned, a contrast, and I do not use the word 'dye' because it isn't a dye — a contrast agent will be injected and cerebral X-ray will be taken. I tell him that the procedure will be, will have moments of discomfort for him; the first when the freezing goes into the groin and the second as the catheter goes through the skin and I say the third one will be when the contrast is actually injected; they will get a sensation of discomfort, heat or pain, and this will last anywhere up to ten seconds, but it will disappear. I tell them there are anywhere between two to six types of this examination done per day — it is not an uncommon procedure in our hospital — and I tell them the examination will take anywhere from 45 minutes to an hour and a half. I tell them when they come in we will explain everything to them as we go along, and I say, 'If you have any questions, ask.' I give them the possibility of asking about complications. I do not

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tell them, as Dr. Goff said, the problems that their leg, they may have a clot in the leg, or as Dr. — I never tell them their artery may be blocked lower down or they may get a bruise there. I tell them those things at the end of the examination. I tell them of no pain or risk factors unless two groups — a patient specifically asks or indicates to me in some way, and usually a non-verbal way, he wants to know those risk factors. Then I go into it in great detail with him and I will give them what is known as, and you can put this in quotations, 'the death, blindness and paralysis' talk, and with this I will spell out in great detail how these catheters with the contrast, or a small piece of emboloid may be knocked off, may damage the vessels or the brain or spinal cord that it supplies — correction, not the spinal cord — I don't use the word 'spinal cord.' The second group I would tell are those patients that are the high-risk group, those patients that have a very, very high risk, those I will, or will tell the relatives of that patient.

"Q. I am sorry. When you say the high-risk group, you mean patients because of their condition? A. Yes.

"Q. There is a high risk of a complication? A. Yes. Their age, they may be in their '70's. They may have severe generalized atherosclerotic disease with poor pulse in the legs and weak blood vessels. We know that they are high-risk patients from clinical analysis. There may be a diabetic; they may have had previous stroke or they may have had a previous myocardial infarction.

"Q. I see. A. And this is the policy that is followed by the other chap who does the procedures along with myself. We have a standard policy on this. We have gone as far actually at one stage to draw up a consent form which listed all the possible complications. We had this drawn up and ready to supply the patient and we decided we would not distribute this to the patients. Initially when I came back to Vancouver I was speaking to patients and they were complaining about my conduct with the patients, both from the patients and from the attending staff, that I was scaring patients needlessly, that I was going into too much detail, and the majority of patients did not want me to discuss this with the patients, and also having gone through so much of this I think the majority of patients, this is the way they feel, and I would like to give another example. Present at Vancouver General, one of 25 hospitals in North America involved in a special mylographic trial with a new agent putting in the lumbar subarachnoid states [space]; this involves an informed consent and this informed consent is verbal in which we explain to the patient the pos-

sible differences between this agent and the old agent, and also how the examination will be done, and I go up to the patient and I explain this in great detail. It takes half an hour of my time, and I may do this twice or three times a day, and at the end of talking to patients, the patients look at me and say — 95 per cent of them will say — 'What would you do?' They don't want to hear this — they want me to tell them what they should have, without taking half an hour. 'Give me a capsule form.' The majority of the patients don't want to hear it and they can't understand what you are trying to tell them.

"THE COURT: This is a warning before a mylogram, a new agent? A. That is right.

"Q. What are some of the more horrible possibilities you hold out in the incident you are talking about? A. I tell them they are going to lie on the table, it is going to be hard, they are going to be there for an hour and may get a backache, and I tell them they may get a headache or a good chance that they will if I use the old oil, material, they have 25 per cent and if I use the new agent the chance is 23 per cent of them getting a headache or even if I stick in a needle into your back the chance of getting a headache is 25 per cent.

"Q. Those are not horrible possibilities. A. No. And I go on and tell them I will not use this new agent in patients who have had a history of seizures or who are alcoholic or who have been on the phenobarb type drugs because this new agent will potentiate seizures in this particular group of patients.

"THE COURT: Nothing worse than that — because there is nothing very scary in that? A. No.

"Q. For instance, you used the phrase and told the reporter to put it in quotations, 'death, paralysis'? A. Death, blindness and paralysis.

"Q. Death, blindness and paralysis talk? A. Yes.

"Q. Tell me something about the death, blindness and paralysis talk that you don't use anymore that you used to. Paralysis is mentioned? A. That's right. It's known as, first of all, injecting into the vertebral artery.

"Q. Which artery? A. Vertebral artery, the contrast can cause a reaction in the vertebral cortex that may lead to blindness and, in fact, this is relevant to the court, two weeks ago I injected a vertebral artery in a patient and the patient developed cortical blindness. This patient was completely blind for two days but at the end of this procedure the patient recovered

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her vision in the eye. Now, with the majority of things that we do, the risks we do, we have looked after our figures and gone through it, and your risk is around one per cent of a serious complication happening. One per cent. We document all our records as they go back.

"Q. Do you ever tell anyone that it is one per cent? A. If they ask. Yes. Of that one per cent you break it down and look, how many of those are going to be irreversible and how many are reversible? Now the majority of complications we get are completely reversible, so that when I look at this whole group I don't look at one patient, like Mr. McLean, I look at 100 patients or for that fact I have done over 1,000 patients and I look at them as a group and say to myself, 'Am I going to go out and scare the hell out of 100 patients so that the one patient who may have complications knows about that beforehand?' We have come to this conclusion, 'No, we will not do this because we are treating them as a group, not as a select individual and it's the best if you treat them as a group, you don't scare them because they come down, they are apprehensive, and at the end of the examination they say, "Jeez, it really wasn't that bad. Why did you tell me all those horrible things?" ' To get back to your point, you can produce blindness by this. You can produce a stroke in a patient by several means: one, you may knock a plaque or an atherosclerotic plaque into a major vessel and that goes to the brain, usually up in the carotid system and it goes into the distribution of the — and into the artery and this will affect a patient the same way as a patient having a stroke or a transient ischemic attack will have. It is also possible that you may have a death from angiography — this may occur, and I think the majority of these deaths have occurred because there is a fatal anaphalactic reaction on contrast and it may affect the respiratory status or the cardiac centre. I have never experienced this. I know of one person in the Vancouver area has had this complication well described. The persons who have been quoted, like Djian — both of the authors have described deaths but these are very, very uncommon. Again they are due to either anaphalactic reaction or due to patients who may have a heart attack during this type of examination that has been described. It is also possible that the stroke that may be induced may be so severe the patient may die from that."

He has followed both the practice of warning his patient of every remote, horrendous thing that could happen from an angiogram, and then the practice of a minimal warning. His present policy is not to warn (and probably frighten) the patient with all the awful, remote possibilities.

The risk on a subclavian angiogram, even in October 1973, of an accident such as happened here and its being irreversible, as is the case here, was a risk which, from the evidence, may be fairly described by the phrase "one in a thousand". The issue here is, does the surgeon, before embarking on a procedure of elective surgery, have to warn the patient of all the horrendous "one in a thousand" possibilities appurtenant to the procedure? A number of cases were cited on the matter of warning and patient consent, including *Thibodeau v. Simpson*, B.C., Prince George No. SC 333/71, Macfarlane J., 29th March 1974 (not yet reported). In this case a surgeon, in the course of what was to be only an exploratory operation, rendered sterile by removing without consent the fallopian tubes of a young Roman Catholic wife who specifically did not want to be sterile. He was held liable.

In *Halushka v. University of Sask.* (1965), 52 W.W.R. 608, 53 D.L.R. (2d) 436 (Sask. C.A.), surgeons were carrying out a research project in anaesthesia. By advance arrangement Halushka, for a fee, agreed to be the "guinea pig". The doctors knowingly deceived him, before the anaesthesia, as to its nature. He was injured and the surgeons were held liable.

In *Koehler v. Cook*, [1976] W.W.D. 71, 65 D.L.R. (3d) 766, Dryer J. of this court, held a surgeon liable who had reassured a patient before surgery by telling her that "if lasting complications of importance occurred . . . it would be a first time". The evidence showed that the doctor had already received many complaints of at least temporary and some of permanent (so far as he knew) loss of smell following similar operations. The plaintiff had permanently lost her sense of smell as a result of the operation.

In *Beausoleil v. La Communautes des Soeurs de la Charité de la Providence* (1964), 53 D.L.R. (2d) 65 (Que. C.A.), plaintiff had specifically stipulated she did not want a spinal anaesthetic, but a general one. She was given a spinal and injury ensued, for which the court awarded her damages.

In *Kenny v. Lockwood*, [1932] O.R. 141, [1932] 1 D.L.R. 507 (C.A.), Hodgins J.A. at p. 525 said:

"The relationship between the defendant Stoddart and the plaintiff was that of surgeon and patient, and as such the duty cast upon the surgeon was to deal honestly with the patient as to the necessity, character and importance of the operation and its probable consequences and whether success might reasonably be expected to ameliorate or remove the trouble, but that such duty does not extend to warning the patient of the dangers

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What is said to a patient by his doctor is not always mere communication; often it is part of the therapy or directly related to the treatment. The prime example is the psychiatrist by verbal communication alone treating his patient. Drs. Robertson and Pitman dealt with communication to a patient which undoubtedly would frighten him to the extent either that his treatment would suffer or he would refuse treatment altogether. How much to tell a patient has long been an ethical and sometimes a legal problem of the medical profession. Insofar as the communication goes beyond mere communication and touches directly upon health and treatment, the communication is part of the therapy of medicine. The less the courts try to tell doctors how to practise medicine the better. As held in *Kenny v. Lockwood*, supra, barring negligence in word or economy of truth, the bona fide opinion of a competent practitioner as to what his patient should be told should carry respect of the court to the degree of a sizeable reluctance on the part of the latter to substitute its opinion for that of the doctor. Was there "economy of truth", as used in *Kenny v. Lockwood*, in Dr. Goff's failure to warn the patient of a "one in a thousand" chance? No cases were cited to me to suggest any such concept, and I decline to interpret the "informed consent" theory as requiring such remote warnings. I think that a legal requirement for such a warning would deter the effective practice of progressive medicine. I hold that the warning given by Dr. Goff was in law adequate.

In result the action must be dismissed, notwithstanding the tragic paralysis which befell the plaintiff as a result of the angiogram. The defendants in law are entitled to one set of costs. When they consider what has befallen their patient, they may well have second thoughts about collecting costs.